THE FAILURE OF CONSENT

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THE FAILURE OF CONSENT:
RE-CONCEPTUALIZING RAPE AS SEXUAL ABUSE OF POWER

ABSTRACT

What is rape? What are the harms, risks and values that the criminal prohibition on rape attempts to promote? How should criminal law properly conceptualize the offense of rape? Does submission to sexual demands in light of threats to inflict non-physical harms, such as economic and professional harms including firing or demotion, constitute rape? Scholars have been grappling with these questions for several decades, attempting to better align society’s perceptions about the criminal regulation of sexual misconduct with the ever-evolving social perceptions about sexuality and gender norms.

This Article argues that while rape law reform has accomplished significant changes in the past decades, it has since stalled. What might account for this stagnation is the turn to consent. This move has proven erroneous both empirically, as well as normatively. On the empirical level, consent-based models have failed to take hold in the majority of jurisdictions, resulting in a failure to effect instrumental change both in the courts as well as in social norms. On the normative level, the turn to consent is also unable to foster legal and social change because consent-based models are conceptually flawed and normatively misguided. The result is that rape, as defined by our criminal justice system, bears little resemblance to the various forms of sexual abuses that are inflicted on victims.

To address these drawbacks, this Article advocates the adoption of an alternative conceptual framework for rape as an act of abuse of power and exploitation of dominance and control. This approach is not only more responsive to the complainants’ narratives and the harms inflicted upon them, but also better captures the wrongdoing in the perpetrator’s conduct. This Article’s innovation lies in suggesting not only that consent ought not to be an element of rape, but also that the theoretical understanding of what rape is ought to fundamentally change by adopting a conceptual overhaul that captures the offense based on an abuse of power construct.
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INTRODUCTION

Samuel B. Kent was a United States District Judge in the Southern District of Texas. Cathy McBroom served as a Deputy Clerk assigned to Kent’s courtroom. McBroom claimed that Kent started sexually abusing her in 2003, a year after she began working for him. According to her testimony, Kent would grab her, touch her groin, breast, inner thigh and buttocks, both directly and through her clothing. McBroom endured the abuse over a four year period for fear of losing her job, but Kent’s actions escalated over time, culminating in 2007, when he tried to force McBroom’s head towards his groin area, in an attempt to engage in oral contact. Following this escalation, McBroom filed a complaint with the Judicial Council. A special Investigative Committee looked into “McBroom’s sexual harassment complaint and other instances of alleged inappropriate behavior toward other employees of the federal judicial system” and recommended that Kent be reprimanded. The Judicial Council accepted the recommendations. At this point, the Department of Justice independently began investigating the complaint and obtained a grand jury indictment against Kent for three sexual abuse charges, in violation of federal law, related to McBroom’s allegations.¹ The indictment included two counts of abusive sexual contact² and one count of attempted aggravated sexual abuse³. Kent pleaded not guilty to these charges, but in the

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* Research Scholar to Professor Anne Coughlin, University of Virginia School of Law, S.J.D University of Virginia School of Law (2010). I am deeply grateful to Anne Coughlin, Kim Forde-Mazrui, George Rutherglen, and Clare Kaplan for their helpful advice and insightful comments on my doctoral dissertation entitled “Criminalizing Sexual Abuses of Power, Authority, Trust, Dependence and Influence” upon which this paper is based. Thanks also to Hadar Aviram for her valuable feedback. This paper is dedicated to the memory of Stieg Larsson whose Millennium trilogy inspired this paper more than any legal doctrine.

¹ See, U.S. V. Samuel B. Kent. Criminal No. 08-596, U.S District Court Southern District of Texas Houston Division (The indictment is on file with the author). See, also, Articles of Impeachment Against United States District Court Judge Samuel B. Kent, Introduced by Representative John Conyers on June 9, 2009, See, also, Department of Justice Press Release, January 6, 2009

² See, U.S.C Title 18 Section 2244 (b)

³ See, U.S.C Title 18, Section 2241 (a) (1)
meantime, Donna Wilkerson, who worked as Kent’s secretary, also claimed that Kent sexually abused her, and a Federal grand jury issued a superseding indictment stemming from her allegations. The indictment added three criminal charges against Kent: one count of aggravated sexual abuse, one count of abusive sexual contact and one count of obstruction of justice.\(^4\) The latter alleged that Kent obstructed justice when he falsely stated to the Investigative Committee that the extent of his unwanted sexual contact with Wilkerson was one kiss, and that when informed by Wilkerson that his advances were unwelcome, no further contact occurred. The indictment did not result in a judicial decision as it was resolved in a guilty plea in which federal prosecutors dropped five sex-crime charges, and Kent pleaded guilty only to the obstruction of justice charge. In the Factual Basis for the plea, Kent admitted that he engaged in nonconsensual sexual contact with McBroom and with Wilkerson. Kent was sentenced to 33 months in prison.

The indictment brings to the forefront of legal and public debate a contentious question: What is rape? What are the harms, risks and values that the criminal prohibition on rape attempts to promote? How should criminal law properly conceptualize the offense of rape? Does submission to sexual demands in light of threats to inflict non-physical harms, such as economic and professional harms including firing or demotion, constitute rape? Scholars have been grappling with these questions for several decades, attempting to better align society’s perceptions about the criminal regulation of sexual misconduct with the ever-evolving social perceptions about sexuality and gender norms.

While under common law rape was defined as intercourse accomplished through the use of force, and against a woman’s will, American jurisdictions today vary in their legislative schemes: some define the offense by focusing on the nonconsensual sex element, while others focus on the force element.\(^5\) Adopting the liberal premise\(^6\) that consent is the touchstone of the

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\(^4\) See, U.S.C. Title 18, section 1512

\(^5\) See, generally, Anne M. Coughlin, Interrogation Stories, 95 Va. L. Rev. 1599 (2009) (positing that rape laws today are not monolithic and different jurisdictions adopt various statutory schemes).

\(^6\) See, generally, Christine A. Littleton, Equality and Feminist Legal Theory, 48 U. Pitt. L. Rev. 1043, at 1045 (1987) (positing three theories to explain and resist women’s inequality), See, also, Garry Minda, The Jurisprudential Movements of the 1980s, 50 Ohio St. L. J. 599, at 626-29 (1989). In this paper I use the term “liberal” not in its political aspect, but rather to signify a theory that the state both protects citizens from interference with their fundamental rights, and that there are autonomous spheres of family, personal and sexual relations that the state cannot interfere with.
criminal regulation of sexuality, most scholars today agree that the essential characteristic of rape is non-consensual sex rather than an act of physical violence. Thus, scholars rely on the notion of consent to sex as the predicate for rape law reform. Many scholars believe that the key to successful reforms lies with adopting an affirmative consent standard. Accordingly, the prevailing view today is that conceptualizing rape as nonconsensual sex, without any reference to the force element is a normatively-warranted step that would eventually result in social and legal change. A sharply different picture, however, emerges in practice when examining the criminal prohibition on rape in the majority of jurisdictions: most jurisdictions today still refuse to criminalize sex without consent when the force element is lacking. Surprisingly, despite several decades of rape law reform, the criminal offense of rape in the majority of jurisdictions still resembles the traditional common law prohibition. A noticeable gap thus exists between the normative view, advocated by many legal scholars, that rape ought to be defined solely as nonconsensual sex, and the actual definition of rape in most jurisdictions, which requires both elements of force and nonconsensual sex.

This Article argues that while rape law reform has accomplished significant changes in the past decades, it has since stalled. What might account for this stagnation is the turn to consent. This move has both failed to effect instrumental change in the courts as well as in social norms, and is also conceptually flawed and normatively misguided. The practical result of these deficiencies is that rape, as defined by our criminal justice system, bears little resemblance to the various forms of sexual abuses that are inflicted on victims. While rape law typically criminalizes only the physically violent sexual attack, it refuses to criminalize an array of abuses, effectively disregarding prevalent forms of sexual violence and misconceiving the crime of rape. Statutory definitions of rape are inept and require an overhaul to better capture the harm and wrongdoing of sexual abuses that many victims still experience.

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8 See, e.g., Peter Westen, THE LOGIC OF CONSENT (Burlington Ashgate Publishing 2004)
9 See, Schulhofer, supra note 7
10 See, generally, Michelle Anderson, All American Rape, 79 St. John’s L. Rev. 625, at 627-628 (2005) (positing that the law misconceives the crime of rape by criminalizing only the classic rape narrative, namely, the extrinsic violent attack, while disregarding the rape itself).
The disconnect between rape as it is inflicted and sexual abuse as it is criminalized is most noticeable in the context of sexual abuse of power stemming from professional and institutional relationships. This Article uses the phrase “sexual abuse of power” to refer to cases in which a person in a supervisory position exploits his power, authority, dominance and influence to compel an employee’s or student’s submission to unwanted sex. The employees or students acquiesce to sexual demands for fear of economic or professional harm.

The Kent indictment offers an opportunity to examine the above theoretical questions in a particular context: sexual abuse of power in the workplace. Revisiting the above criminal charges begs the question: is the current legal treatment of sexual abuses of power problematic? This Article posits that it is, as this type of indictment is seldom brought. The Kent case is a rare example in which criminal charges were brought against a supervisor -- a Federal Judge--for abusing his power to obtain his subordinates’ submission to unwanted sexual demands. This type of abuse generally remains beyond the scope of criminal regulation.

Instead, these abuses are typically treated by courts and scholars merely as one form of employment or education discrimination, namely, a sexual harassment suit in violation of Title VII or Title IX of the Civil Rights Act of 1964. Revisiting these abuses requires that we challenge the legal boundary between civil sexual harassment and criminal sex offenses, and evaluate the limits of the sexual harassment framework. Indeed, sexual harassment takes different forms -- ranging from gender-based comments to actual sexual intercourse -- but when does supervisory misconduct rise to the level of criminal conduct? When does sexual harassment law become unfit as it is unable to account for sexual acts which are criminal in nature?

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11 See, generally, Michal Buchhandler-Raphael, Sexual Abuse of Power, University of Florida Journal of Law and Public Policy, (forthcoming Fall 2010). The phrase “sexual abuse of power” is broader than the term “sexual coercion” which is typically narrowly construed to include only cases in which explicit threats to harm a complainant are demonstrated. Sexual abuse of power aims to cover abusive conduct above and beyond threats to harm to include additional forms of placing complainants in fear of economic or professional harm.

Many scholars consider sexual harassment suits successful, but these alleged accomplishments are in fact exaggerated, often by the media. Examining whether the anti-discriminatory framework fits the harms inflicted on victims calls into question the actual extent of achievement. In fact, the problem of sexual abuses of power in professional and institutional settings is far from being cured, as the current framework fails to provide a suitable remedy to address these abuses. Law’s failure to define accurately the harms and wrongdoing of sexual abuses in these settings negates the actual experiences of victims.

Sexual harassment law cannot provide a comprehensive account of these abuses because they do not fit neatly into this legal rubric. Indeed, these abuses are more akin to other sex offenses and are better suited for the application of criminal law. This Article rejects sexual harassment law’s premise that unwelcome intercourse as well as gendered-based comments merely constitute different forms of sexual harassment. Instead, the Article posits that the law ought to clearly distinguish between sexist comments and actual sexual intercourse, by adopting a different legal framework for these fundamentally distinct conducts. Under this alternative account, sexual abuses of power in the workplace and in the academy ought to be viewed as crimes, namely, as one form of rape.

Turning to criminal law, however, poses further hurdles, as current definitions of sex offenses also prove inadequate. In most jurisdictions, a rape conviction requires the prosecution to establish both the force requirement—typically construed to include only physical violence—as well as nonconsensual sex. In the majority of sexual abuses of power, however, the force element is not established, as submission to unwanted sexual demands is obtained by placing victims in fear of non-physical harm. But more importantly, the non-consent element is also not established; typically the employee gives the superior permission to engage in sex with her in order to avoid harmful repercussions if she declines the sexual demands.

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13 See, generally, Deborah Zalesne, Sexual Harassment Law: Has It Gone Too Far, Or Has the Media? 8 Temple Pol’ & Civ. Rts. L. Rev. 351 (1999) (some suggest that they have gone too far, stifling any opportunity for welcome sex between people of unequal power. Zalesne discusses the backlash against sexual harassment suits and in particular, the media’s responses to these suits).

14 See, generally, Buchhandler-Raphael, supra note 12, (revisiting in more detail the sexual harassment framework for addressing these cases by arguing that sexual abuses of power resulting in submission to unwanted sexual demands should be criminalized)
The Kent indictment sharpens two key questions pertaining to the complex relationships between sexual harassment and rape law. The first addresses which legal framework is most appropriate to regulate sexual abuses of power in the workplace and in the academy, and whether these abuses justify criminalization. A second broader question suggests a two-pronged query: a normative part examining the conceptual underpinning of sex offenses in general (i.e. should rape be perceived as an act of nonconsensual sex, or should the law conceive it differently?); and a doctrinal part further exploring the practical implications of these theoretical questions (i.e. what should be the elements that define the sex offense?).

Given the theoretical questions concerning rape law reform in general and their application for sexual abuse of power in the workplace, what should be the agenda for future rape law reform? The contemporary focus on consent has clear strengths and its accomplishments cannot be ignored; Drawing on the notion of consent to demarcate the legal boundary between rape and sex enables criminalizing a wider array of conducts not previously recognized as criminal under the traditional definition of rape. However, in light of its drawbacks, it is time to consider additional steps. While this Article supports rape law reform efforts, it contends that the reform ought to explore new directions. To do that, it first evaluates the reasons behind the empirical failure of consent-based models and proceeds to offer an alternative conceptual framework. Conceptualizing rape as nonconsensual sex not only fails to provide an accurate account of the harms inflicted; it also fails to capture the wrongdoing embodied in rape. Defining the offense as sex without consent makes it harder to justify placing criminal liability on the perpetrator.

To address the above drawbacks, this Article advocates the adoption of an alternative conceptual framework for rape as an act of abuse of power and exploitation of dominance and control. This approach is not only more responsive to the complainants’ narratives and the harms inflicted upon them, but also better captures the wrongdoing in the perpetrator’s conduct. Several jurisdictions have already defined rape without any reference to the problematic notion of consent.15 This Article’s innovation, however, lies in suggesting not only that consent ought not to be an element of rape, but also that the theoretical understanding of what rape is ought to

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15 *See, e.g.* 18 Pa. Stat. section 3121 (Pennsylvania expands force to include moral, psychological intellectual force).
fundamentally change by adopting a conceptual overhaul that captures the offense based on an abuse of power construct articulating which conduct amounts to exploitation.

The Article proceeds as follows: Part I argues that the turn to consent has empirically failed to result in instrumental change in rape law as it is applied by courts. It does so by demonstrating that consent-based models failed to take hold in practice as they were rejected by most jurisdictions. Part II examines the reasons behind the empirical failure of consent-based models and explains why the turn to consent is conceptually flawed and normatively misguided. It argues that these models are inadequate as they fail to criminalize an array of sexual abuses. Part III offers an alternative theoretical framework for rape law and points to the links between this conceptual view and the elements that ought to define the offense. It also evaluates why previous reforms, which focused on expanding the definition of force to include non-physical coercion, have failed by overlooking what this Article argues to be the missing component in these reforms.

I. THE EMPIRICAL FAILURE OF CONSENT

Susan’s Estrich’s 1986 pathbreaking book “Real Rape” brought to the forefront of rape law reform the legal system’s disparate treatment of stranger rape--perceived as “real rape”-- and acquaintance rape, which is typically treated leniently by the criminal justice system. Revisiting rape law 24 years later demonstrates that this sharp divide still exists today. While “real-stranger” rapes -- the classic rape narrative of a stranger forcing himself on a chaste victim in a dark alley -- are treated by the criminal justice system very seriously, especially when the victims are minors, acquaintance rapes are still under-reported, under-enforced, and under-punished. In sharp contrast, these non-paradigmatic rapes in fact constitute the majority of sexual abuses in our society. Sexual abuse of power in professional and institutional settings-- particularly in the workplace and in an academic setting-- is one particular example of this problem.


17 See, generally, Anderson, All American Rape, supra note 10, at 627 (comparing and contrasting the classic rape narrative with a typical acquaintance rape).
What accounts for this disparate treatment? The answer rests with the legal notion of consent to sex, and particularly with the ways in which the judicial system, along with the public at large, defines what qualifies as consent. While our criminal justice system is essentially suspect of the possibility that a complainant would consent to sex with a stranger, courts are readily willing to assume that when some kind of previous relationships between the complainant and the defendant existed (such as dating or professional relations), the expressed consent to sex--or at least, the defendant’s belief that she had consented--was reasonable.\textsuperscript{18} The following section revisits the centrality of the concept of consent by questioning whether it has proved successful in accomplishing reform in rape law along with fostering social change through affecting prevailing norms.

A. The Refusal to Criminalize Non-Consensual Sex as Rape

Rape law reform’s turn to consent has empirically failed; to date, most jurisdictions refuse to criminalize nonconsensual sex as one form of rape, insisting that to convict a perpetrator of rape the prosecution needs to establish the defendant’s use of force or the threat of it, in addition to proving the complainant’s lack of consent.

The efforts of early rape law reformers focused on abandoning one of the two elements by defining the offense of rape either by focusing on the lack of consent element or by focusing on expanding the notion of force to include additional forms of seemingly nonviolent force above and beyond its physical aspect. Today, however, the focal point of reformers has clearly shifted in favor of statutory schemes that adopt consent-based models.\textsuperscript{19} Under contemporary criminal law, consent to sexual relationships is the touchstone of the criminal regulation of sexuality. Under \textit{Lawrence v. Texas}, consensual sex precludes harm to others.\textsuperscript{20} In our post-Lawrence era, only nonconsensual sex might justify criminal regulation. The current trend,

\textsuperscript{18} See, e.g., State v. Smith, 554 A. 2d 714 (Conn. 1989) (A defendant’s mistaken, but reasonable, belief that the complainant consented to engage in sex with him is recognized in most jurisdictions as a mistake of fact defense, the most common defense in acquaintance rapes.)

\textsuperscript{19} See, generally, SCHULHOFER, \textit{supra note} 7 at 82-98(1998) (criticizing reforms that focus on expanding the definition of force, and contending that they have practically failed).

\textsuperscript{20} See, Lawrence v. Texas, 539 U.S. 558, at 578 (holding that the case does not involve injured or coerced persons, but rather adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle).
placing heavy emphasis on identifying when and where consent to sex is absent, aligns with the liberal view regarding the significance of an individual’s right to exercise his/her sexual agency. It holds that because sexual autonomy can be undermined in ways which do not necessarily involve physical force or the threat of it, the offense of rape should be expanded to include additional violations, such as sex with an intoxicated or unconscious victim or sex induced through fraud or coercion.\(^{21}\)

Many scholars today concede that the offense of rape ought to be defined as nonconsensual sex, and that the use of force ought not be an element of the offense. In practice, however, despite the conceptual view that nonconsensual sex is the essence of rape, a different picture emerges. Surprisingly, after five decades of rape law reform and the ever-evolving social norms about sexuality, in the majority of jurisdictions the common law definition of rape has not changed. In 43 states and in the District of Columbia, to prove rape, the prosecution needs to establish concurrently two elements: the defendant’s use of force against the complainant and the complainant’s lack of consent to sex.\(^{22}\) In 36 states, the criminal prohibition explicitly requires both force and non-consent as elements of the offense. In the remaining 8 states, the offense of rape is ostensibly defined as nonconsensual sex, but the use of force element is incorporated into the definition of “non-consent”.\(^{23}\)

Only a minority of jurisdictions--16 states--currently criminalize nonconsensual sex without the additional requirement of forceful compulsion.\(^{24}\) However, even in these jurisdictions, non-consensual sex does not always amount to actual rape--the state’s highest non-aggravated form of sexual offense. Only in six states does nonconsensual sex constitute rape. The remaining states have amended their statutes to create a differentiated scheme for sex offenses: the offense of rape is reserved only for forceful violent nonconsensual sexual acts while

\(^{21}\) See, generally, Schulhofer, supra note 7 at 273-82 (arguing that the right to sexual autonomy is the missing entitlement that rape law reform must acknowledge).

\(^{22}\) See, generally, Anderson, supra note 10 at 631-32

\(^{23}\) Id

\(^{24}\) Id (Sixteen states and the District of Columbia do criminalize sexual penetration that is non-consensual and without force. These states, however, impose less punishment upon non-consensual penetration, with over than half of them categorizing these offenses as mere misdemeanors).
nonconsensual sex is criminalized as a lesser sexual offense, often merely a misdemeanor. But perhaps the most unsettling aspect of these empirical findings is that currently, nonconsensual sex is not criminalized at all in the majority of jurisdictions.\(^{25}\)

B. The Affirmative Consent Standard’s Empirical Failure

Another reason for the failure of consent is the limited practical applications of the affirmative consent standard even in those jurisdictions that do criminalize non-consensual sex without the additional force requirement. There is currently no consensus among scholars and legislatures about the legal standard to determine consent to sex. Even if all jurisdictions were to adopt consent-based models and abolish the force requirement, many forms of sexual abuse would still remain beyond the scope of potential criminal regulation as the affirmative consent standard has not taken hold in most jurisdictions.

While many scholars agree that the crux of rape is nonconsensual sex, there is no consensus on clear definitions of consent. Indeed, consent in general, and consent to sexual relations in particular, is too murky to provide a clear legal standard. Acknowledging that the concept of consent itself is highly contested, not only when viewed through a practical legal lens, but also from a theoretical-philosophical viewpoint, reformers have turned their endeavors to practical solutions. Rather than articulating what consent to sexual relations is, reformers have primarily focused on finding a workable legal standard to determine when and how consent is expressed. Contemporary reformers therefore attempt to define when and how consent to sex is expressed by identifying the circumstances in which consent is tainted and should be considered legally invalid.\(^{26}\) This calls for targeting the objective expressions of consent, based on the complainant’s verbal expressions or noticeable behavior.

Most jurisdictions have formally abandoned the requirement for physical resistance, acknowledging that this standard is ill-suited to measure lack of consent. Resistance, however, is still often read into rape statutes as part of the elements of either force or non-consent. Courts


\(^{26}\) See, e.g. ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS, at 165-7(2003) (contending that explicit and implicit threats should be criminalized due to their coerciveness).
continue to consider lack of resistance as highly probative to the question of whether the complainant consented to sex. While the physical resistance standard has officially been rejected, legislatures and scholars disagree on whether lack of consent ought to be expressed through verbal resistance (“no means no”) or through an affirmative expression, either verbal or through conduct (an explicit “yes”).

Susan Estrich advocates the verbal refusal standard as the legal standard for lack of consent. In the paradigmatic nonconsensual situation, the complainant explicitly declines the perpetrator’s sexual demands by expressing a verbal refusal. In contrast, Stephen Schulhofer argues that verbal refusal is an unfit standard, contending that this standard is unable to criminalize situations in which the complainant is passive and does not express refusal due to coercive pressures. Indeed, a complainant often is unable to verbally express refusal, a common response which psychologists refer to as “frozen fright.” To address the drawbacks in the verbal refusal standard, Schulhofer advocates the affirmative permission standard, under which obtaining a person’s permission to sex, prior to the sexual contact, is a prerequisite for the legitimacy of the contact. The justification behind this standard is that placing on the person who initiates sex the burden of obtaining affirmative permission prior to sexually proceeding would reduce the risk of engaging in nonconsensual sex. The most notable implication is that anything less than overt words or actions indicating permission—particularly the complainant’s silence—are considered lack of consent.

27 See, generally, Susan Estrich, REAL RAPE (Harvard University Press, 1987) at 41 and 98 (arguing that a complainant’s explicit verbal refusal should suffice to meet rape elements). See, also, Lynn Henderson, Rape and Responsibility, 11 Law and Philosophy 127 at 68 (1992) (arguing that verbal refusal to sexual relations suffices to objectively express lack of consent).

28 See, generally, SCHULHOFER, supra note 7 at 74 (arguing that the verbal refusal standard would not fill the gaps in existing rape laws).

29 See, e.g. People v. Barnes, 42 Cal. 3d 284, at 295-302, 721 p. 2D 117-120 (1986) (pointing out that recently, however, the entire concept of resistance to sexual assault has been called into question. It has been suggested that while the presence or resistance may well be probative on the issue of force or non-consent, its absence may not. For example, some studies have demonstrated that while some women respond to sexual assault with active resistance, others “freeze”. The “frozen fright” response resembles cooperative behavior. Indeed, as one psychologist notes, “the complainant may smile, even initiate acts, and may appear relaxed and calm”. Subjectively, however, she may be in a state of terror… These findings suggest that lack of physical resistance may reflect a “profound primal terror” rather than consent”).

30 Id at 96, 268-273 (arguing that “clear proof of unwillingness can no longer be essential to sustain a claim of abuse…for such intrusions actual permission-nothing less than positive willingness-should ever count as consent”).
Conventional wisdom suggests that developing a standard under which any sexual relations must be preceded by a non-equivalent affirmation would not only result in a significant change in rape law but would also establish the boundaries of permissible sex. Ultimately, the argument goes, this would lead to acknowledging that acquaintance rape is a serious crime to be redressed by criminal law. The view that nothing but an affirmative expression of assent is legally required to render sexual relationships legitimate has theoretically taken hold, as many scholars support it.\(^{31}\) In practice, however, a different picture emerges when the standard is applied in court decisions.

1. **MTS : The Swing of the Pendulum**

In New Jersey, affirmative consent has become the touchstone of criminal regulation of sex offenses. Sexual assault is defined under New Jersey law as an act of sexual penetration by using physical force or violence. New Jersey law eliminated any reference to the complainant’s consent, by focusing exclusively on the forcible character of the perpetrator’s conduct. In the landmark *MTS* case, however, the New Jersey Supreme Court re-read consent back into the statutory provision by holding that “the definition of physical force is satisfied… if the defendant applies any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely-given permission”.\(^{32}\)

Revisiting this decision reveals a surprising disconnect between the description of the legislative history as well as the legislative intent the court provides as a background, and the ultimate holding itself: The court begins with the legislative purposes behind the amendment of New Jersey law defining rape as an act of sexual assault. The first part of the decision suggests that the essence of the offense is an act of force and violence, similar to other forms of non-sexual battery. The court emphasizes that the purpose of defining the offense in terms of forceful compulsion, rather than nonconsensual sex, was to shift the focus from the complainant’s demeanor towards the perpetrator’s wrongful conduct. The second part of the decision, however, unexpectedly moves from defining the offense in terms of force and violence towards re-defining it in terms of sex without permission, although New Jersey law does not mention consent in its

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\(^{31}\) *See, generally, SCHULHOFER, supra note 7 at 271* (asserting that only clearly communicated permission should count as consent).

\(^{32}\) *See, In re M.T.S 609 A. 2d 1266 (N.J. 1992) at 1277*
definition of the offense, which defines wrongdoing strictly in terms of force. The court however, chose to re-define the sex offense by not only bringing consent back, but by making it the core component of the wrongful conduct.

The MTS decision, therefore, demonstrates the full swing of the pendulum: Given the elaborate description of the amendment’s purposes, New Jersey law was theoretically aimed at breaking away from consent-based models by targeting sexual violence that amounts to forceful compulsion. Practically, however, this amendment effectively places consent at the center of the inquiry, resulting in a decision that criminalizes sex obtained without affirmative permission. Rather than identifying the perpetrator’s culpable conduct, the decision leaves us with the need to determine when a complainant, either verbally or by conduct expresses permission.

The MTS decision has been characterized as embodying a rather radical reform in rape law, drawing sharply varied reactions.33 It has been praised by many scholars and condemned by others, depending upon different social, gender and political perceptions. Stephen Schullhofer generally welcomes an affirmative consent standard which takes into account the complainants’ wishes and right to sexual autonomy. However, he is wary that the standard was wrongly construed in MTS, as its application might be too broad for its failure to provide guidelines to determine when consent is freely given. Schullhofer posits that if broadly construed, the requirement of freely given consent would create criminal liability whenever submission to sex was influenced by emotional demands or social pressure. He concludes that the standard as applied in MTS fails to guide decision makers in drawing the line between legitimate and criminal pressures.34

Katharine Baker also favors an affirmative consent standard. While suggesting that requiring explicit verbal assent each and every time one engages in sexual activity (as in the commonly ridiculed Antioch College Policy) may go too far, forcing people to focus on what

33 See, e.g., Katie Roiphe, The Morning After: Sex, Fear & Feminism on Campus 62 (1993) (arguing that the affirmative consent standard “proposes that women, like children, have trouble communicating what they want”).

34 See, SCHULHOFER, supra note 7 at 96-97 (criticizing MTS’s application of the affirmative consent standard).
consent means is not only appropriate but essential, given the alarming frequency with which sex occurs on college campuses without a meeting of the minds on the question of consent”.  

The standard has also been extensively critiqued on contrasting grounds. Some scholars criticize it for being too narrow, contending that it relies heavily on the definition of consent, a concept that cannot practically do all the work in the context of rape law and is ill-equipped to capture the wrongs of rape which arise in a variety of contexts--coercion, drugging, threat, fraud, etc. Rejecting the continued reliance on the problematic notion of consent, Anderson recommends that the law focus on the communication aspect of obtaining affirmative consent by requiring the parties to engage in a negotiation process, in which they must agree, prior to engaging in sexual acts, on what they are going to do.

Other scholars criticize the standard for being too broad and thus unfair to defendants, arguing that the standard permits conviction not only in cases where the perpetrator knowingly engages in intercourse without affirmative permission, but also when the perpetrator did not know, but should have known, that the complainant had not consented. This latter aspect of the standard is viewed as particularly far reaching and potentially unfair to defendants as it explicitly adopts a negligence mens rea as a requirement for conviction in sexual assault rather than conscious wrongdoing. These critics further contend that popular opinion deems requiring a “yes” before intercourse inappropriate and unfair.

These theoretical controversies, however, mainly remain in the abstract. The practical implications of the standard are rather limited, both in the majority of jurisdictions that rejected it, as well as in those that adopted it, including New Jersey itself. In general, the affirmative consent standard is widely rejected by most jurisdictions, and is typically considered the oddball rather than the leading legal standard. In fact, only two states—Wisconsin and Washington—

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35 See, generally, Katharine Baker, Sex, Rape and Shame 79 B.U.L Rev. 663 at 688 (1999)
36 See, Michelle Anderson, Negotiating Sex, 78 Southern California L. Rev. 1401 at 1417-1420 (2005).
37 See, id.
38 See, e.g., Donald Dripps, After Rape Law: Will The Turn to Consent Normalize the Prosecution of Sexual Assault? 41 Akron L. Rev. 957 at 962 (2008) (positing that even with the mistake defense liability for rape turns on simple negligence).
39 See, Gruber, supra note 16 at 635
have legislatively adopted this standard. While these jurisdictions define consent as requiring either words or overt conduct that indicates affirmative permission, they remain in the minority. Moreover, in most jurisdictions today, rape laws still require overt verbal resistance in order to prove that the sex was nonconsensual. The practical implication of the verbal resistance standard is that any conduct falling short of unequivocal rejection, including passive submission, is viewed by the criminal justice system as consent.

Furthermore, in New York, for example, even the complainant's clear verbal refusal does not necessarily indicate non-consent. Lack of consent is established only if, in addition to the complainant's verbal refusal, a reasonable person in the defendant's situation would have understood the complainant's words and acts as an expression of lack of consent to the sexual act under all circumstances. New York rape law thus permits the defendant to interpret the complainant's verbal refusal as indicating consent. Despite years of rape law reform, clear verbal protestations are not necessarily sufficient to establish rape; the defendant's belief as to whether an express "no" really means "no" prevails when it is deemed a reasonable mistake as to the complainant's consent. Most jurisdictions today permit a mistake of fact defense provided that the defendant's error as to consent is both honest and reasonable. Only a few jurisdictions reject this defense by opting for a strict liability mens rea as to the element of consent.

But it is more surprising that even in states where the affirmative permission standard has been adopted, its impact has been modest. The New Jersey statute, for instance, permits a conviction for sexual assault not only when physical force is used to obtain sex, but also when

40 See, e.g., Wisconsin Statutes Annotated, section 940.225 sexual assault, subsection (4) (defining consent as “words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.” Wisconsin courts rejected any attempts to challenge this provision. For example, the court in Gates v. State, 283 N.W 2d 474, at 477 (Wis. App. 1979) rejected the argument that the provision was unconstitutional because it shifted the burden of proof to the defendant, holding that the “prosecutor is required to prove that the victim did not by either words or by overt actions freely agree to have sexual contact or intercourse with the defendant.” The court in State v. Lederer, 299 N.W. 2d 457, at 460 (Wis. Ct. App. 1980) rejected the argument that the provision was inappropriate and unfair to defendants, by holding that it knows of no other means of communicating consent other than manifesting freely given consent through words or overt conduct. Washington state also defines consent as requiring “actual words or conduct indicating freely given agreement to have sexual relations.” Moreover, following the decision in U.S. v. Camara, 781 P. 2d 483 at 486-487 (Wash. 1989), Washington courts typically instruct the jury that the burden rests with the defendant to prove by a preponderance of the evidence that the sexual intercourse was consensual. See, also. Washington v. Gregory, 147 P. 3d 1201, at 1258 (Wash. 2006).

coercion is employed to the same effect. The term “coercion” is defined in the statute to include threats of physical injury, threats to accuse someone of a crime, and other threats to cause substantial harm to someone’s reputation, financial condition, or career.\textsuperscript{42} This seemingly broad language also covers threats to inflict harm, such as firing or demotion in the workplace, wording that appears sufficiently expansive to include sexual abuses of power in the workplace, in which submission was obtained in order to avoid harming one’s career.

Despite the provision theoretically enabling the prosecution of threats to inflict professional and economic harm in the workplace, none of the jurisdictions that criminalize nonconsensual sex per se acknowledges that submission to unwanted sex resulting from being threatened or placed in fear of economic or professional harm in the workplace and in the academy justifies criminal regulation. Researching the case law in these jurisdictions reveals that there are no reported decisions in which prosecutors have attempted to invoke the theory of non-physical coercion as a basis for criminalizing coerced submission in the workplace or in an academic setting.

This finding is surprising in light of previous attempts to criminalize threats to inflict non-physical harm, without mentioning the victim’s consent. Such proposals start as early as the Model Penal Code’s Gross Sexual Imposition provision which prohibits “compelling a female to submit by any threat that would prevent resistance by a woman of ordinary resolution…”\textsuperscript{43} The MPC commentary sheds some light on reformers’ attempt to reach perpetrators who threaten to inflict various types of nonphysical harms, such as threats to a woman’s business or job\textsuperscript{44}. While the commentary specifically acknowledges threats to fire an employee as criminal conduct\textsuperscript{45}, this theory has failed to take hold in the majority of the jurisdictions which neither adopted the gross sexual imposition provision nor any other provision that criminalizes these types of threats.

\textsuperscript{42} See, New Jersey Stat. section 2C:14 – 1 (j), 2c: 13 – 5 ((a)

\textsuperscript{43} See, section 213.1 (2) to the Model Penal Code

\textsuperscript{44} Model Penal Code section 213.1 (2), and commentaries at 301-314 (Proposed Official Draft 1962) (the commentary provides in pertinent part: examples might include threat to cause her to lose her job or to deprive her of a valued possession). The commentary explains on page 314 that coercion is overwhelming the will of the victim, while bargaining is offering an “unattractive choice to avoid some unwanted alternative”).

\textsuperscript{45} Id, at 314 (referring to threats to cause a woman to lose her job).
Coercive pressures to induce submission in the workplace are viewed as one form of civil sexual harassment, rather than as a criminal sex offense.\footnote{See, generally, SCHULHOFER, supra note 7 at 186 (discussing civil liability for sexual harassment in the workplace).}

Revising the practical applications of the affirmative permission standard requires considering which types of sexual misconduct still fall short of criminal regulation, even in jurisdictions that adopted this standard. Indeed, criminal charges are rarely brought in “ambiguous” cases of sexual abuse of power that stem from disparities in power in the workplace and in the academy. The standard is unable to criminalize sexual abuses of power in these settings because these abuses are considered legally permissible; they are viewed as perfectly consensual sex between competent adults, thus falling outside the scope of criminal regulation. Social norms align with this view, as prevailing public perception views criminalization as unjustified. Courts and scholars draw a sharp divide between nonconsensual sex, which might justify criminalization, and unwelcome sex, which might amount to civil sexual harassment.\footnote{See, generally, Vinson v. Meritor Savings Bank, the doctrinal basis for Chief Justice Renquist’s holding in the landmark sexual harassment decision in Vinson v. Meritor Savings Bank was that while the sexual relations between the employee and her supervisor were consensual and voluntary, they were nonetheless unwelcome, and thus amounted to civil harassment under the hostile environment prong.} Given this dichotomy, the turn to criminal law proves unhelpful, as consensual, albeit unwelcome, sex in the workplace is not considered criminal wrongdoing. Thus, even in those jurisdictions which amended their laws to criminalize nonconsensual sex, the prohibitions fall short of covering sexual abuse in the workplace. Assuming that the affirmative permission standard is uniformly adopted, the criminal law remains unhelpful, as apparent permission to sex is often obtained, but does not necessarily indicate willingness.

Considering the above overview reveals that today, nearly 18 years after the affirmative permission standard was first applied in \textit{MTS}, a gap exists between the perceived consequences of the standard and its actual application by the criminal justice system. The standard which at first was believed to be revolutionary, predicting radical reform in the law of rape, turned out to be much less influential, as it failed to take hold in practice. The prediction that the standard would lead to a path-breaking reform in the law of rape proved not only wildly exaggerated but also practically wrong: Despite the turmoil it created, the standard has failed to foster a
significant change in rape laws. Furthermore, the standard negates the actual experiences of victims and cannot account for many sexual abuses of power that remain beyond the scope of criminal regulation, continuously shielding culpable perpetrators from criminal sanctions.

Moreover, in addition to failing to take hold legally, the standard has also failed to foster changes in social norms. While reformers hoped it would affect social attitudes about sex and rape, sending an educational message to the public that acquaintance rape is a real crime and shaping a new culture that values female sexual agency and respect in sexual relationships, these hopes remain utopian. Acknowledging this failure, Aya Gruber concludes: “Today, affirmative consent appears less popular than ever, as both men and women reject the notion of a linguistic prerequisite for sex.” Katharine Baker is wary of this alarming finding, cautioning that “the popular rejection of verbal communication in the sexual context not only perpetuates the alarming level of mis-communication, it robs the less physically powerful of the one tool at their disposal—language."

C. Affirmative Consent in Comparative Law: Canada

Considering the comparative law’s lens provides additional support for the assertion that the affirmative permission standard is unable to provide the basis for criminalizing many forms of sexual abuses of power. Canadian law has taken an important legislative step by fully adopting an affirmative consent standard. Under Canadian sexual assault law, non-consensual sex is the touchstone of the criminal offense. The basic premise of Canadian law is that the offense of rape is essentially an act of violence: an assault of a sexual nature. Consequently, the offense of sexual assault is defined in the Canadian Criminal Code as intentionally applying force on another person without that person’s consent. While the definition of sexual assault incorporates the force element, the notion of force itself is broadly construed. By defining force

48 See, generally, ESTRICH, supra note 25 at 104


50 See, Gruber, supra note 16 at 636

51 See, generally, Baker, supra note 33 at 689

52 See, Canadian Criminal Code section 265
as any intentional touching, Canadian law in fact abandoned the common law requirement of establishing severe physical force, as any contact of a sexual nature suffices to meet this definition. The actus reus of sexual assault thus is established by the proof of three elements: touching, the sexual nature of the contact, and the absence of consent.

The Code further adopts a clear definition of consent for the purposes of sexual assault law. Consent is defined as “the voluntary agreement of the complainant to engage in the sexual activity in question.”53 It further states that “no consent is obtained… where the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority.”54 The Code also limits the defendant’s ability to rely on mistaken belief in consent by stating that “it is not a defense… that the accused believed that the complainant consented to the activity that forms the subject matter of the charge where: (a) the accused’s belief in consent arose from the accused’s self-induced intoxication or recklessness or willful blindness, (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.”55

In the landmark 1999 Ewanchuk decision, the Canadian Supreme Court explicitly adopts the affirmative consent standard.56 In Ewanchuk, the seventeen-year-old complainant met the defendant in a mall’s parking lot. He told her that he was looking for staff for his woodworking business, and the complainant showed interest and gave him her phone number. The next day the defendant interviewed the complainant for the job in his van. At some point he suggested moving to his trailer, and upon entering, closed the door in such a way as to make the complainant believe he had locked it, which frightened her. When the defendant proceeded to fondle the complainant’s breast, she said no. He then moved to non-sexual massaging to which she also said no. Eventually, the defendant began massaging the complainant’s inner thighs and pelvic area, rubbing his pelvic area against hers. The complainant did not want the defendant to touch

53 See, Section 273.1 (1) of the Canadian Criminal Code
54 See, section 273.1 sub-section (2) (b) of the Canadian Criminal Code
55 See section 273.2 of the Canadian Criminal Code
her in this manner, but out of fear, did not say anything. Eventually the defendant took out his penis and the complainant asked him to stop; soon after she left the trailer.  

The trial judge acquitted the defendant based on the defense of implied consent; the court held that objectively the complainant’s conduct raised a reasonable doubt regarding her lack of consent. The Court of Appeals upheld the acquittal on the basis that there had been an honest but mistaken belief in consent. The Canadian Supreme Court reversed the decision, and found the defendant guilty of sexual assault.

The decision brings consent to the forefront both with respect to the actus resus and the mens rea of the offense of sexual assault. The Canadian Supreme Court held, regarding the actus reus for sexual assault, that the presence or absence of consent is a purely subjective inquiry. The Court further concluded that submission due to threats or fear of the application of force establishes the complainant’s lack of consent for the purposes of actus reus. The Court also held that the defendant could not suggest that there was implied consent to negate the actus reus of the offense. It stressed that in order to enjoy the defense of mistaken consent the defendant must establish evidence that the complainant communicated consent to engage in sexual activity, and a claim that the complainant wanted to engage in sexual acts, but did not express her desire, is not a defense. The Court thus placed significant limits on the defense of mistaken consent by clarifying that a belief that silence or passivity is indicative of consent provides no defense. Moreover, with respect to the mens rea, the Court held that the defendant cannot enjoy the

57 See, Ewanchuk at 2-12

58 See, Ewanchuk, id, at 15-17 (detailing the judicial history of the case, beginning with the decision of the trial court in the Court of Queen’s Bench)


60 See, Ewanchuk, at 26-27 (holding that the absence of consent is subjective and determined by reference to the complainant’s subjective internal state of mind towards the touching, at the same time it occurred).

61 See, Ewanchuk at 36 (positing that the Canadian Criminal Code defines a series of conditions under which the law will deem an absence of consent is cases where the complainant’s ostensible consent or participation was induced by reason of force, fear, threats, fraud or the exercise of authority).

62 See, Ewanchuk at 31 (stating that the doctrine of implied consent has been recognized in our common jurisprudence in a variety of contexts but does not include sexual assault. There is no defense of implied consent to sexual assault in Canadian law.)

63 See, Ewanchuk at 46
defense of mistaken consent in circumstances where he abused his position of trust or authority to obtain acquiescence.64

Applying these legal rules to the facts of the case, the Court held that the complainant unambiguously indicated her lack of consent to the defendant’s sexual advances through either words or conduct. The Court held that there was no subjective consent on the part of the complainant, and that the word “no” could not be misconstrued to suggest consent. As for the mens rea element, the Court held that where the complainant indicates her lack of consent through words or conduct, the onus is upon the defendant to show that there was conduct or words indicating her consent. The utterance of the word “no” suggests that the defendant cannot enjoy the defense of mistaken belief in consent.65

The judicial progressive construction of sexual assault in Canada does not end with Ewanchuk; Canadian courts acknowledge that the turn to affirmative consent alone cannot do all the work toward criminal regulation of sexual misconduct, and thus consent must sometimes be supplemented with an additional requirement, such as voluntariness. In the 2004 Stender decision, the Ontario Court of Appeals incorporated the notion of voluntariness into the definition of consent.66 In Stender the defendant had been in a romantic relationship with the complainant that ended prior to the sexual assault in question. Without her knowledge, the defendant had taken pictures of the complainant engaging in sexual activity with him. After their consensual relationships had ended, the defendant coerced the complainant to engage in sex with him by threatening to distribute the pictures to the complainant’s acquaintances. The trial Court acquitted the defendant on the grounds that the nature of the threat was not meant to be criminalized. The Ontario Court of Appeals found the defendant guilty on the grounds that

64 See, Ewanchuk at 50 (holding that “not all beliefs upon which an accused might rely will exculpate him. Consent in relation to the mens rea is limited by the provisions of sections 273.1 (2) of the code, which provide among others, that no consent is obtained where the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority”).

65 See, Ewanchuk at 53-60

consent requires an informed choice, and that no such choice exists if the complainant does not have the option to participate.67

The significance of the *Stender* decision lies with the fact that under Canadian sexual assault law a threat to harm need not necessarily relate to physical force in order to render consent involuntary. A complainant who does not want the sexual activity to take place, but who believes that she has no choice but to participate, is not consenting voluntarily. This nuanced construction of the notion of voluntariness thus complements the affirmative consent standard by adopting the theory that permission to engage in sex may not necessarily amount to consent.

At first glance, the Canadian law’s adoption of legal rules regarding affirmative consent and lack of free choices seems promising. In particular, the criminal code’s explicit provision stating that consent is not obtained when induced through abuse of power, authority, or trust seems also to encompass abuses of disparities in the workplace and in the academy to induce submission to unwanted sex. Indeed, these abuses are seemingly the paradigmatic examples for circumstances in which exploitation of a person in a subordinate position results in submission. Surprisingly, however, despite the explicit wording, this promising potential has not materialized in practice.

Considering Canadian case law reveals that similar to American jurisdictions, applying the affirmative consent standard has not resulted in expanding the reach of the offense of sexual assault to cover sexual abuses of power in the workplace and in the academy. There are no reported decisions in which coerced sex in these settings is criminalized based on the theory that consent is not obtained when mere permission is induced by abuse of power. The Canadian law’s refusal to criminalize these noticeable forms of abuse of power provides another example of the inadequacy of the affirmative consent standard to regulate these abuses. Even in a jurisdiction which maintains that consent is not obtained when induced by abuse of power, this construct has not been applied to criminalize sexual abuses of power in those settings.

Moreover, Canadian sexual assault law reveals another anomaly concerning the disparate treatment of abuses of power in different settings. Revisiting the *Stender* decision exposes an inexplicable legal gap between abuses of power in the workplace and in the academy and similar

67 *Id.*
abuses in private relationships. While threats to shame a complainant by distributing pictures of her engaging in sexual activity are considered extortionate threats that justify criminalization in private relations between two individuals, there are no reported cases that have reached the same result in the context of threats to inflict non-physical harm, such as firing or demotion, in sexual relationships that stem from professional relations in the workplace or in the academy. Furthermore, while in the context of sexual relations in a private setting Canadian law acknowledges that submission to unwanted sex due to the belief of lack of other choices taints consent as involuntary, the case law does not offer an example of similar legal treatment where lack of alternative choices is demonstrated in a professional setting.

This discrepancy begs the question: what accounts for the different legal treatment of sexual abuses of power in various settings, and are these different outcomes justified? Why should threats to inflict non-physical harm in a private setting justify criminalization on the grounds that submission is deemed involuntary, while similar threats in a workplace or an academic setting do not? Comparing these different scenarios further supports the assertion that consent-based models are misguided, as they are unable to provide an accurate account of the criminal wrongdoing that is embodied in sexual abuses of power in the workplace and in an academic setting.

II. FROM EMPIRICAL FAILURE TO NORMATIVE INADEQUACY

Acknowledging that rape law reform has stalled in recent years requires evaluating what accounts for the empirical failure of consent-based models to accomplish substantial reform in rape law, and particularly what accounts for the inadequacy of the affirmative permission standard to cover sexual abuses in the workplace and in the academy by recognizing them as criminal conduct justifying criminal regulation.

A. Reasons for the Empirical Failure

1. Failure to Align Social Norms with Legal Changes

While many scholars believe that the key to legal change lies with re-defining the offense of rape as sex without consent, a prevailing social perception views rape as a forceful act
involving either physical violence or the threat of it. Despite years of efforts to change rape law, perceptions of “real rape” have not fundamentally changed, as many individuals still believe that when the force element is lacking, no “real rape” has occurred. In practice, the old distinction between “stranger violent rape” and “acquaintance rape” is still intact today. Societal perceptions tend to adhere to the view that when a previous relationship existed between the complainant and defendant, and the complainant did not actively resist the sexual acts, the fact that they were not genuinely consensual does not, in itself, justify criminalizing the conduct as rape. While most jurisdictions have legally abolished the resistance requirement, the common perception is that the complainant’s resistance and the perpetrator’s use of physical force or the threat of it demarcate the boundary between rape and sex. The scholarly view that lack of consent is what demarcates the boundary between rape and sex has failed to take hold in the public eye. Nonconsensual sex qua nonconsensual sex is simply not perceived as justifying criminalization.

The problem, however, goes above and beyond the force obstacle: again, even if the belief that the crux of rape is nonconsensual sex is adopted by the majority of communities, a more controversial hurdle remains concerning the legal construction of the phrase “consent to sex”. The main explanation for the empirical failure of consent lies in a noticeable gap between the legal standard for expressing consent and social norms regarding the concept of consent and its absence. As scholars, as well as the public at large, disagree on what conduct qualifies as consent to sex, legal changes in statutory provisions, which adopt a consent-based model, fail to align with prevailing societal perceptions.

a. The Persistence of the “No Means No” debate

Rape law reform efforts have been confronted by a social debate concerning the interpretation of a complainant’s “no.” Several scholars believe that even today, social norms remain ambiguous about the different meanings of the verbal resistance standard.68 Dan Kahan’s recent paper discusses the intersection between prevailing social norms and legal change in the context of the appropriate legal standard to determine consent.69 Kahan’s project uses an

68 See, generally, Dripps, supra note 36 (discussing the gap between scholarly elite opinions and prevailing social perceptions about the ways to express consent).

experimental study to make the connection between the “no means no” debate, which Kahan deliberately chooses to dub “the no means…? debate”, and cultural predispositions to what conduct qualifies as consent to sex. Kahan’s study uses the infamous Berkowitz case to demonstrate his hypotheses. In Berkowitz the complainant unequivocally expressed verbal resistance to sex with the defendant. The defendant was acquitted, however, not because the sex was viewed as consensual, but because at the time of the offense Pennsylvania law defined rape as forceful compulsion, and the court held that the prosecution was unable to establish the force element. Kahan’s project uses the theory of Cultural Cognition to demonstrate that a hierarchical worldview, as opposed to an egalitarian one, encouraged the participants in the study to perceive the defendant as having reasonably understood the complainant as consenting to sex despite her repeated verbal objections. The study reveals that potential jurors, particularly hierarchical women, still tend to view verbal refusal as ambivalent. Under this account, those who subscribe to traditional gender norms conceive of saying “no” but meaning “yes” as a strategy that some women use to evade the stigma that these norms visit on women who engage in casual sex.

Kahan’s insights carry several implications for future rape law reform. The more obvious and less controversial one is that cultural dispositions and prevailing social norms have a much larger impact on outcome judgments than do legal definitions, as the influence of individuals’ hierarchical viewpoints is much stronger than the legal definition of rape. Kahan’s analysis demonstrates, yet again, that in regulating sexual misconduct, social norms and perceptions are stronger than legal provisions. In our criminal justice system, criminal cases are decided by a jury. Juries make decisions about culpability based on the social norms they hold regarding the boundaries between legitimate and illegitimate sexual conduct, and on how they define which conduct qualifies as expression of consent. Despite the legal instructions juries are given, the decisions they reach are largely influenced by their own personal perceptions and beliefs which are infused with gendered norms regarding sexuality and sexual conduct.

70 Id., at 763 (discussing his fourth hypothesis that hierarchical women would be disposed toward acquittal).

71 Id., at 756-760

72 Id., at 734

73 Id., at 733
These findings thus cast strong doubt on the extent to which the turn to consent may enable successful rape law reform. One implication of these findings is that if society still cannot reach a verdict about whether verbal refusal indeed indicates genuine lack of consent, then the turn to consent cannot effect any instrumental change in the criminal justice system. The problem is further exacerbated by submission cases in which verbal permission was granted. Here, the dichotomy between prevailing social norms and the affirmative consent standard becomes an even greater obstacle for rape law reform.

But the study also has further unsettling implications for rape law reform. In a significant way, Kahan’s paper takes us back twenty years, to a pre-affirmative permission standard era. Surprisingly, Kahan reminds us that the “no means…?” debate is still very much alive today, as if the introduction of the affirmative consent standard did not change anything in the criminal justice system’s discourse. The fact that scholars today still question whether verbal resistance demonstrates lack of consent is in itself an indication that the turn to consent has both failed to take hold in the criminal justice system and to accomplish any instrumental change in societal perceptions. Effectively allowing the public to define what qualifies as consent to sex is conceptually misdirected and makes it difficult, if not impossible, for rape law reforms to draw on the problematic notion of consent to sex.

b. Prosecutorial Discretion and Social Norms

The problem of sexual abuses of power in the workplace and in the academy goes beyond the lack of statutory provisions which criminalize these abuses, and the ongoing debate over which legal standard ought to be adopted to determine when consent is expressed. The problem goes deeper to implicate issues pertaining to prosecutorial policy choices about the scope of enforcement of sexual misconducts.74 While many scholars argue against over-enforcement of

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74 New Jersey law for example, theoretically enables prosecuting threats to inflicted economic and professional harm in the workplace. However, criminal charges of this type are not brought. Pennsylvania law also theoretically enables prosecution in these cases, as the definition of force is expanded to include also moral, psychological and intellectual force. This expanded construction however, is used only to prosecute sexual abuses concerning minors or incompetent victims such as in State of Pennsylvania v. Smolko 446 Pa. Super. 156, 666 A2d 672 (the victim was handicapped and unable to talk, we sexually abused by his caregiver, a male nurse. Due to his physical disability he was unable to communicate his unwillingness to engage in sex with the defendant).
criminal laws, when it comes to sexual abuses of power, particularly in the workplace and in the academy, the problem clearly becomes one of under-enforcement. Prosecutors are reluctant to pursue criminal charges in those cases that are viewed as highly contested, controversial and ambiguous. They are viewed as such precisely because of the current understanding of the concept of consent, and because of the fundamental gap between legal provisions and prevailing social norms, including those that prosecutors hold.

c. Criminal Law’s Role in Changing Social Norms

The relationships between law and social change are complex. One highly-contested aspect lies in debating whether the law should merely reflect social changes once they have already been embedded in community behavior, or take the lead in actively attempting to change social norms. Moreover, a growing body of literature challenges the value of legal tools in producing social change, suggesting that the law offers a deeply limited mechanism in successfully fostering social change.

Affecting instrumental change in public perceptions of the line between permissible and impermissible sexual conduct is a tricky business. Some scholars argue that changes in criminal law’s provisions, particularly in the contested area of sex offenses, cannot stray too far from prevailing social norms, and that any legal change must align with what communities believe to be criminal conduct. Dan Kahan argues that given the reality of “sticky norms,” criminal law should “gently nudge” rather than “shove through” new norms. Criminal prohibitions, posits Kahan, should only be slightly more progressive than prevailing social norms, and radical

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76 See, generally, Cass Sunstein, 96 Columbia L. Rev. 903, at 964 (1996) (discussing the general role of norms in effecting social change, and addressing the expressive function of law that is designed to influence behavior).

77 See, generally, Orly Lobel, 120 Harv. L. Rev. 937, at __ (2007) (describing the body of literature that discusses the limits of law in bringing about social change, and the literature that privileges extralegal activism as an alternative to the path of legal reform).

78 See, e.g., Dan Kahan, Gentle Nudges vs. Hard Shoves 67 U. Chi. L. REV 607 at 607 (2000) (articulating the sticky norms problem, namely: when social norms are prevalent, law enforcement is reluctant to enforce a law which intends to change them).
legislative reforms that stray too far from the status quo are bound to fail, and may even result in strengthening the old problematic norms.\textsuperscript{80} Donald Dripps agrees, contending that, as consent laws have failed to accomplish changes in the law of rape, it would be better to convict perpetrators of lighter offenses without a right to jury.\textsuperscript{81} David Bryden also favors this view, arguing that “when the law seeks to change social attitudes, lighter penalties increase the probability that juries would convict.”\textsuperscript{82}

This Article rejects this position by contending that criminal law can and should play a more active role in changing social norms concerning sexual misconduct. It argues that criminal law should go beyond merely reflecting social changes that have already occurred. In the context of rape law reform, the practical implication is that even assuming there are people who believe that no sometimes means yes, the law should actively engage in changing this norm by criminalizing sexual conduct.

Any attempt to use criminal law to change prevailing norms is controversial. But this fact should not result in abandoning cautious efforts to do so, once substantial harm and criminal wrongdoing have been identified. This position rests on the educative role of criminal law in promoting social change. Consider, for example, a society which is racist, sexist and chauvinistic. Should the criminal justice system simply reflect these prevailing norms and refrain from changing them? Or take sexual harassment, which over the last thirty years has evolved from a social phenomenon into an established cause of action.\textsuperscript{83} Sexist comments, gender-based remarks and unwanted sexual advances that were perceived as business as usual became banned in the workplace. The fact that sexual harassment suits have been wildly successful in our justice system demonstrates that shifts in social norms brought about through the use of law might to contribute to reducing gender inequality. The success of sexual harassment law thus casts doubt on the common belief that laws cannot change existing norms and promote social change.

\textsuperscript{80} Id, at 609

\textsuperscript{81} See, generally, Donald Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 Columbia L. Rev. 1780 at 1805 (1992)

\textsuperscript{82} See, generally, David Bryden, Redefining Rape, 3 Buff. Crim. L. Rev (2000)

2. Interpreting Consent as Permission

The turn to consent has also failed because of a fundamental problem stemming from the concept of consent itself. Generally speaking, the notion of consent to sex is murky and highly contested within both the criminal justice system and among scholars, and thus is unable to provide an agreed upon workable legal standard. The main practical problem with the concept of consent lies with the fact that it is currently construed in courts as permission. In the context of rape law, however, equating consent with permission-giving or technical authorization of the sexual act is fundamentally flawed because this construction neglects to account for the prerequisite that consent to sex ought to be an expression of willingness. The criminal justice system thus fails to capture that verbal permission to engage in sex is often merely apparent, and that consent to sex is not obtained when induced through abuse of power, authority, trust and dominance.

A recent Maryland case best demonstrates the problem of interpreting consent to sex merely as an act of permission-giving, rather than an expression of genuine willingness. In State v. Baby the complainant met the defendant and his friend at a restaurant and agreed to give them a ride home. After arriving at a secluded area, the perpetrators both attempted to have sex with the complainant, ignoring her verbal demand to stop. After being told she would not be able to leave until they had sex with her, she verbally gave permission to the defendant Baby. The jury accepted Baby’s account that initial consent to sex was given. However, they concluded that as intercourse proceeded, the complainant withdrew her consent by demanding that the defendant stop, which he ignored, and was therefore convicted of rape.

84 See, generally, WERTHEIMER, supra note 19.
85 See, In Re MTS (adopting an affirmative permission standard, rather than an affirmative consent standard, without pondering the potential difference between them). This view aligns with the Supreme Court’s construction of consent in the fourth amendment context: in Schenckloth v. Bustamonte, 412 U.S. 218 (1973) the court upheld consensual searches, requiring merely that they be voluntary).
86 See, generally, Buchhandler-Raphael, supra note 11.
87 See, 404 Md. 220, 946 a. 2D 463 at 466-468
88 Id
Despite the ultimate conviction, construing the initial technical permission given under clearly coercive circumstances as consensual sex is fundamentally erroneous. The Baby decision demonstrates that explicit verbal permission is often merely apparent consent. The missing element here is the need to incorporate the complainant’s voluntary and free will choices. When a complainant believes that she does not have any alternative choice but to submit to unwanted sexual demands, even a verbal “yes” does not necessarily indicate genuine consent. The jury in Baby ignored the underlying circumstances indicating the sexual acts were not consensual: the complainant ostensibly gave permission after being locked in a car at night, in a secluded area, with two male perpetrators who had already indicated their desire to physically force sexual acts on her if she refused to submit to their demands.

The result is that under consent-based models, viewing consent to sex merely as permission or authorization fails to criminalize an array of sexual abuses in which consent is merely apparent. Sexual abuses of power in the workplace and in the academy are the most prominent examples in which obtaining passive submission to unwanted sexual demands is not recognized as justifying criminal sanctions. Instead, these sexual relations are typically viewed as consensual sex. In other words, when competent adults acquiesce to unwanted sexual demands, and this submission is heavily affected by economic, professional and institutional inducements, the permission given under these coercive circumstances is viewed as valid consent. Conflating consent with permission thus accounts for the practical failure of consent-based models to cover many sexual abuses that stem from power disparities in professional and institutional settings.

B. Reasons for the Normative Inadequacy

Given the empirical failure of consent-based models, the article will now examine the normative inadequacy of the nonconsensual sex framework to demarcate criminal rape from legitimate sex. This analysis aims to explain why the current framework not only had failed to take hold in practice but it is also conceptually ill-suited to recognize various sexual abuses as criminal conduct.

1. Failure to Capture Harm and Injury

Conceptualizing rape as an act of sex without consent fails to provide an accurate account of the harms and injuries the offense inflicts on its victims. This account is simply inapt in
making a persuasive argument why the act of rape is experienced by its victims as such a harmful conduct that justifies imposing criminal sanctions on a culpable perpetrator.

While harm to others is the key justification for imposing criminal liability under liberal theory dating back to John Stuart Mill’s work “On Liberty,” it was judicially endorsed in the landmark Lawrence v. Texas decision. Lawrence made clear that any criminal regulation of sexual misconduct ought to rest on the premise that the sexual acts in question are harmful. A proposal to criminalize additional forms of sexual abuses, beyond those already recognized as criminal conduct, rests on adopting the premise that all forms of unwanted sex constitute harmful conduct.

To demonstrate the claim that viewing rape as nonconsensual sex fails to capture the true nature of harmful sexual misconduct, let us compare two cases: Lawrence v. Texas and People v. Onofre. In both cases, the courts examined the constitutionality of states’ criminal prohibitions against sodomy, ultimately striking them down. From a libertarian perspective, these decisions are generally viewed as victories to same sex couples as they ostensibly promote their rights to engage in consensual sex. But upon closer examination, a less optimistic picture emerges, casting doubts on the true nature of the sexual acts in the Onofre case.

The underlying circumstances in Onofre stand in sharp contrast to Lawrence’s facts: while Lawrence involved two adults who engaged in harmless sex, Onofre involved sex between an adult and an adolescent 17-year-old boy. More importantly, in Onofre, harmful conduct

89 See, Bonnie, Coughlin, Jefferis Jr. Low, CRIMINAL LAW, second edition, 2004, at 47 (suggesting that the harm principle is associated with John Stuart Mill and has been elaborated by many other legal theorists. For a more detailed explanation see, e.g. David Brink, Mill’s Moral and Political Philosophy, Stan. Encyclopedia Phil., Fall 2008, http://plato.stanford.edu/archives/fall2008/entries-mill-moral-political

90 See, Lawrence v. Texas, 539 U.S. 558 at 578 (holding that the case does not involve persons who might be injured or coerced, but rather adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle).

91 See, generally, Robin West, CARING FOR JUSTICE, (New York University Press, 1997) at 100-178 (discussing the various harms stemming from unwanted and unwelcome sexual relations). See, also, Wertheimer, supra note 19 at 89-118 (discussing the harms sustained by victims of unwanted sex in general and rape victims in particular).

92 See, Lawrence v. Texas, 539 U.S. 558

93 See, People v. Onofre 415 N.E. 2d 936 (N.Y. 1980)

94 See, People v. Onofre 415 N.E. 2d 936 (N.Y. 1980)
including, but not limited, to physical harm was clearly demonstrated. The victim in Onofre came to the police in an attempt to keep the defendant from similarly injuring other victims. The victim told the police that “my anus was bothering me and I even at one point went to a doctor… and got treatment because my rear end was tore up.”

While Onofre provides an example of sex that is injurious to the victim, the decision itself is premised on the uncontested assumption that the sexual relationship between an adult and a minor was consensual. But was it? By accepting this assumption, the court failed to take into account the underlying circumstances that characterized the sexual relations between the parties. In particular, the Onofre Court did not address the sexual abuse of power, which was demonstrated in this case. As Marc Spindelman correctly points out, failing to challenge the premise that the sex was consensual, the court ignored the stark inequalities of power between the parties--the significant age difference, different social position, and the victim’s emotional vulnerability--and by doing so, failed to acknowledge that apparent “consent” resulted from abuse of power, rather than from genuine willingness.

The Onofre court’s favoring of the defendant’s right to exercise his sexual autonomy requires that we consider at whose expense it was exercised and what cost. The sexual abuse in this case inflicted serious injuries on the victim and thus violated his own right to exercise sexual autonomy by avoiding harmful and unwanted sex. This insight casts doubt on whether the Onofre court struck the proper balance between these two conflicting rights. The decision reveals an unsettling failure to protect a subordinate person’s right to avoid sexual abuse of power. It further demonstrates that viewing sexual acts through the lens of a nonconsensual sex framework can often mask the actual harms that result from sexual abuses of power, obfuscating the injuries that are inflicted on the party in the disadvantageous position.

95 See, generally, Marc Spindelman, Surviving Lawrence v. Texas 102 Mich. L. Rev. 1615 at 1638-1642 and accompanying footnotes (discussing the harmful sexual relations in the Onofre case in which the sexual relations between an adolescent and an adult were viewed as consensual).

96 Id

97 Id

98 See, e.g. Spindelman, supra note 72 at 1638-1640 (describing the underlying circumstances in Onofre which indicate abuse of power).

99 Id
2. Failure to Capture Criminal Wrongdoing

Conceptualizing rape as nonconsensual sex fails to capture the wrongdoing embodied in the perpetrator's conduct, as it is unable to identify the particular wrong that justifies criminal regulation. Therefore, it cannot offer a persuasive account of why many forms of sexual abuses - sexual abuses of power, authority, trust and dependence--ought to be criminalized.

Contemporary theorists agree that a criminal theory must incorporate philosophical arguments concerning what conduct constitutes moral wrong, contending that the criminal sanction should be used solely to proscribe harmful conduct which incorporates wrongdoing. Joel Feinberg argues that harm in itself is insufficient to criminalize certain conduct, and that it should be further supplemented with identifying the perpetrator’s wrongful conduct. Feinberg espouses requiring a two-pronged account of what justifies criminalization; the first element, perpetrator oriented, consists of a wrongful act, a moral and legal determination that the perpetrator’s conduct is wrong and that personal guilt and sanctions should be placed on him. The second element, victim oriented, consists of a setback or violation of the victim’s interests and identifies the harms that the perpetrator’s wrongful conduct inflicts on victims.

Similar to other criminal prohibitions, the prohibition on rape must identify what precisely is the wrongdoing in the perpetrator's conduct in order to place personal liability on him and justify the criminal label with its social stigma of a “sex offender.” But what precisely is wrong in rape? While it is not disputed that rape is a harmful conduct that inflicts serious emotional and psychological injury on its victims, scholars do not agree on what precisely the wrongdoing in rape is. The conceptual underpinning of the offense of rape ought to incorporate


101 Id.

102 See, also, Douglas Husak, PHILOSOPHY OF CRIMINAL LAW (1987) at 224-244. Husak’s work provides another illustration for incorporating moral arguments as part of the understanding of the harm principle. Husak argues that, under a proper reading of Mill's harm principle, we see that he believed that the content of the principle is moral. A moral and political theory, argues Husak, is required to justify whether and under what circumstances criminal law should recognize harm, and that the harm principle should be invoked to prevent only those harms that are wrongs. Thus, Husak argues that only wrongful, blameworthy, immoral conduct should be criminalized, and that this principle should be placed at the core of criminal theory. See also, Hyman Gross, A THEORY OF CRIMINAL JUSTICE, (1979) in 415 (arguing that: “condemning one who is blameless is universally abhorred as an injustice and it is astonishing that those who advocate criminal liability regardless of culpability do not perceive this abhorrence as an insurmountable obstacle to the adoption of their program).
this feature, by clearly targeting unequivocal wrongdoing, namely, identifying the type of
contact that indeed justifies criminal regulation.

Conceptualizing rape as nonconsensual sex, however, fails to accomplish this goal as it is
unable to capture the wrongdoing embodied in the perpetrator's conduct. The source of the
problem rests with viewing rape as merely one form of sex, albeit nonconsensual. This view fails
to articulate the criminal wrong in rape. It fails to convince the criminal justice system, as well as
the public at large, that this type of conduct is a severe violation of a person’s right to remain free
from sexual violence, and as such, justifies criminal regulation. The sex without permission
construct does not convey the unequivocal message that rape is indeed a serious sex offense.
Moreover, conceptualizing the offense of rape around the notion of sex—a concept that generally
carries connotations of pleasure and enjoyment—further fails to acknowledge nonconsensual sex
as criminal wrongdoing.

A related concern is that conceptualizing rape as nonconsensual sex results in diluting the
severity of the offense. This happens mainly because while some states have amended their laws
to prohibit nonconsensual sex per se, they have also adopted lenient criminal sanctions for this
offense. In 8 of the 16 states that criminalize nonconsensual sex, the offense is reduced to a
mere misdemeanor. Defining the offense as a misdemeanor, along with imposing lenient
punishments, contributes to the prevailing belief that nonconsensual sex is not a serious offense
that justifies severe criminal punishment. Characterized that way, it is difficult to capture what is
the wrongdoing in rape, further trivializing the offense of rape.

Several scholars have begun to acknowledge that viewing the crux of rape as merely
nonconsensual sex fails to capture the wrongdoing embodied in the offense. Victor Tadros
argues that “the definition of criminal offenses ought also appropriately to describe the conduct
of the defendant who is convicted under them. Criminal offenses ought to be defined in a way
that reflects what makes the conduct of defendants who are convicted under them publicly

103 See, Anderson, supra note 10 at 631-2

104 Id
Tadros thus suggests that “definitions of rape which revolve around consent do not properly capture the wrong perpetrated by the defendant in any particular rape case.”

According to Katherine Baker, one of the main problems with securing date rape convictions stems from cultural ambivalence about how wrong date rape is and cultural confusion about what it is. Baker further contends that in declaring date rape wrong, criminal law has encountered the problem of trying to proscribe behavior that society has yet to condemn as wrongful. Baker posits that in the context of date rape, people believe that there is not much difference between consensual and nonconsensual sex: “Our collective understanding of what sex is does not distinguish between consensual and nonconsensual sex in a significant enough manner for people to see them as truly different.” Baker thus contends that a criminal proscription on nonconsensual sex cannot accomplish a meaningful change in societal perceptions. To alter the belief that nonconsensual sex is a substitute for consensual sex, we need to move beyond a sense that nonconsensual sex is wrong toward a recognition that it is truly the “other.”

This type of critique, however, remains under-developed, as society continues to adhere to the view that the essence of the offense of rape is nonconsensual sex. An alternative theoretical construct of what is the wrong in rape has not taken hold yet, which explains why no substantive changes in the law of rape had occurred in recent years. This leads to the conclusion that a criminal offense ought to be defined through negative terms, accounting for the perpetrator’s criminal wrongdoing.

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106 Id, at 519

107 See, generally, Baker, supra note 33 at 679

108 Id, at 679

109 Id, at 664

110 Id, at 664
3. Failure to Account for Complainants’ Narratives

An additional problem with consent-based models is that they fail to provide an accurate account of sexual abuse victims’ experiences, narratives and vantage points. Storytelling theory is an important theme in rape law reform. Robin West contends that dominant legal culture ignores the experiences of women, positing that “women suffer in ways in which men do not and…the gender-specific suffering that women endure is routinely ignored or trivialized in the larger (male) legal culture.”

Andrew Taslitz has incorporated storytelling theory as a method for better understanding the dynamics of a rape trial. Under the theory, “the story of the case must be told in a way to satisfy a jury’s needs for narrative coherence and fidelity”. Taslitz identifies four rape story narratives: bullying, black beasts, silenced voices and a little more persuading. Under the “silenced voices” narratives, rape victims’ voices are neutralized, and their stories lost in the process of the rape trial. The result is that complainants’ nuanced narratives are not heard by the jury. The “persuasion” narrative equates rape with successful seduction and effectively protects perpetrators’ freedom to exercise more pressure even in light of clear verbal resistance. It further puts the burden on the complainant to demonstrate that she took every action to avoid being raped. Anne Coughlin further expands storytelling theory from the substantive criminal law of rape to the criminal investigation context. Coughlin’s project offers an example of the


113 See, Taslitz, supra note 104 at 15

114 Id., at 19

115 Id.

116 Id., at 33-34

117 See, generally, Coughlin, supra note 5
role different narratives-- including the interrogator’s own--play in the criminal interrogation context, particularly in the context of investigating suspects in rape offenses.\textsuperscript{118}

The significance of narratives becomes even more crucial when it comes to sexual abuse of power in the workplace and in the academy. Recall the Kent indictment: the criminal charges against the judge beg the question: what really happened there? Was it merely a romance that went sour, or submission to unwanted sexual demands for fear of losing one’s job? Is there one objective truth or rather different accounts, Rashomon\textsuperscript{119} style, of the same event? Recall that initially, the defendant’s account was that he had a romance with the complainant which turned sticky. Kent’s lawyer’s stated that: “Judge Kent, who is married, and his secretary were involved in a longtime affair, and he didn’t reveal it to the judicial council because he was being a gentleman.”\textsuperscript{120} In sharp contrast, the complainant’s account of the same events was that she had reluctantly submitted to her employer’s unwanted sexual demands for fear of losing her job. In her own words: “Being molested and groped by a drunken giant is not my idea of an affair.”\textsuperscript{121} Kent’s secretary, with whom he was alleged to have had an affair, said that Kent “maliciously manipulated and controlled everyone around him.”

These conflicting accounts raise difficult questions about what types of sexual conduct should be viewed as criminal and renders the turn to consent a failure. The affirmative permission standard is unable to accurately account for sexual abuses of power as they are experienced through the complainants’ vantage points. In particular, it is unable to capture a complainant’s belief that no alternative choices were available to her. Unfortunately, for many complainants, the need to keep their job often proves stronger than exercising their right to avoid unwanted sexual relations.

\textsuperscript{118} Id.

\textsuperscript{119} See, generally, The Japanese director’s Akira Kurosawa’s landmark film Rashomon (examining the question whether a rape actually occurred by suggesting that there is no one objective truth. Rather, different accounts provide contrasting stories and vantage points. The film’s main themes focus on the subjectivity of “truth” and the uncertainty of factual accuracy).

\textsuperscript{120} See, Mr. DeGurin’s interview, concerning the Kent indictment, Associated Press

\textsuperscript{121} See, the complainant Cathy McBroom’s story, first appeared on Texas Lawyer, published by John Council, December 21, 2009.
4. Failure to Account for Conflicting Considerations

One of the main challenges of every rape law reform is striking a proper balance between two conflicting concerns: promoting sexual autonomy and protection from harm. On the one hand, the promotion of sexual autonomy and agency of women helps strengthen women. On the other hand, any rape law reform is essentially aimed at protecting victims from harm by placing limitations on perpetrators’ sexual freedoms.

A main agenda of rape law reform has been to expand the scope of harmful conduct by recognizing additional forms of harm above and beyond its physical aspects. Reformers have thus advocated the acknowledgement of emotional and psychological harm as fundamental injuries that are inflicted on victims. But considering the mental state of victims risks portraying them as weak and psychologically unstable. Moreover, reformers have focused on identifying which types of inducements invalidate consent. Doing this, however, ultimately results in weakening, rather than empowering victims. The practical implication of focusing on circumstances that negate consent often leads to adult women’s choices being viewed with suspicion. Moreover, this position implies that women are unable to make their own sexual choices, similar to incompetent victims such as those with mental disabilities.

What then should an appropriate balancing act between protecting victims from harm and promoting sexual autonomy look like? Michelle Anderson suggests that autonomy is not an absolute concept and that constraints on sexual autonomy are not always bad. Anderson

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122 See, generally, Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 41 (1988) (suggesting that “the fear of sexual invasion is the fear of being occupied from within, not annihilated from without; of having one’s self overcome, not ended”). See, also, West, CARING FOR JUSTICE, supra note 68 in 120-127 (addressing the non-physical invasive harm, which consists among other things the violation of privacy right).

123 See, generally, Anne M. Coughlin, Excusing Women, 82 Cal. L. Rev. 1, 7 (1994) (discussing the difficulties with self defense as a gender specific mental disability).

124 See, generally, Jeannie Suk, The Trajectory of Harm , 110 Columbia L. Rev. 1193, at 1199, 1251 (2010) (contending that focusing on the harm and trauma that women suffer has resulted in ultimately weakening them)

125 See, e.g., Vivian Berger, Rape Law Reform at the Millennium: Remarks on Professor Bryden’s Non-Millennium Approach, 3 Buff. Crim. L. Rev. 513 at 522(stating that: Women should not be overprotected. I feared…that a global portrayal, reflected in rape law, of females as weak, subordinate creatures, incapable of withstanding pressure of any sort, invites nullification and backlash, and on a philosophical level cheapens rather than celebrates “the rights to self-determination, sexual autonomy and self and societal respect of women).

126 See, Anderson, supra note 10 at 640.
concedes that rape constitutes an interference with one’s sexual autonomy, but argues that focusing on sexual autonomy as the main harm of rape fails to capture its full harm. Rape, contends Anderson, involves a dehumanization not reflected by a mere “lack of sexual choice.”

The current focus on consent and autonomy fails to meet these conflicting concerns, as a prohibition that defines rape as nonconsensual sex tries to satisfy both the goals of protection from harm and the promotion of sexual autonomy in contradictory ways. Moreover, the role that sexual autonomy plays in consensual sex, such as in the Lawrence v. Texas scenario, cannot be confused with its role in sexual abuse cases. The scope of protection which is granted to the positive aspect of the right to sexual autonomy -- the freedom to engage in sex with whomever one chooses without the criminal law’s interference-- should be limited whenever the negative aspect of sexual autonomy is implicated where the right to remain free of sexual violence and coercion ought to prevail.

III. An Alternative Underpinning of Rape Laws: Sexual Abuse of Power

Armed with the above insights, what does the future hold for rape law reform? What are the practical implications of the failure of consent for the criminal justice system? Should the law give up criminalization efforts as the turn to consent proves futile?

A. Abandoning Criminal Regulation?

Acknowledging the failures of consent-based models to accomplish significant changes both in the criminal justice system as well as in social norms have led several scholars with different underlying agendas to suggest creative solutions. Donald Dripps, who considers the turn to consent “lawless” and current rape law as unfair to defendants, contends that the difficulty in determining what counts as consent results in a broad prosecutorial discretion to bring rape charges against men in more cases than the criminal justice can manage. Dripps further describes a gap between “elite” and “popular” opinions regarding sexual mores and

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128 See, generally, Dripps supra note 36
gender roles, which results in different views of consent.\textsuperscript{129} Dripps proposes that the criminal justice system bypass the jury and make sexual abuse a misdemeanor with a maximum punishment of 6 months in jail.\textsuperscript{130}

In contrast, Aya Gruber, promoting a feminist agenda,\textsuperscript{131} contends that feminist reformers should abandon criminal law as a tool to accomplish legal reform. Gruber asserts that: “By adopting a prosecutorial attitude, which largely conceives of rape (and crime in general) as a product of individual criminality rather than social inequality, the feminist rape reform movement strayed far from its anti-subordination origins and undermined its own efforts to change attitudes about date rape.”\textsuperscript{132} Gruber argues that in light of the limited potential of rape laws to shape gender norms and the effects of criminal rape law on female victims, feminists should abandon the criminal law arena and shift their endeavors to counter sexual violence and gender inequality towards alternative strategies outside the criminal justice system.\textsuperscript{133}

This Article rejects the view that rape law reform has been exhausted by suggesting that the failure of previous reforms which focused on consent should not result in the abandonment of the criminal justice system altogether. Additional steps in rape law reform could be achieved by using criminal law as a tool to accomplish changes in social norms and behavior. The problem does not rest with the criminal justice system itself, but rather with the particular tool that rape law reform has chosen to use, namely, the turn to consent. Accordingly, the solution lies with shifting away from consent-based models and turning towards an alternative conceptual understanding of rape. The Article proposes that we redefine the theoretical framework of rape

\textsuperscript{129} \textit{Id}, at 971

\textsuperscript{130} \textit{Id}, at 976 (suggesting that where nonconsensual sex is a separate crime, the legislature should authorize trial by the court in specialized tribunals with no authority to impose more than six months in jail).

\textsuperscript{131} See, generally, Gruber, supra note 16 at 653 (suggesting that “woman should not “walk the halls of power in the criminal justice system but should rather begin the complicated process of disentangling feminism and its important anti-sexual coercion stance from a hierarchy reinforcing system that is unable to produce social justice”).

\textsuperscript{132} \textit{Id}, at 585

\textsuperscript{133} \textit{Id}, at 585-586 (asserting that feminists should be extremely wary of further entanglement with the penal system), also at 653 (Women should not “walk the halls of power” in the criminal justice system but should rather begin the complicated process of disentangling feminism and its important anti-sexual coercion stance from a hierarchy-reinforcing criminal system that is unable to produce social justice).
law and re-evaluate what rape is by considering some key features that characterize the wrongdoing in rape. The first step towards this alternative direction rests on the premise that since conceptualizing rape as nonconsensual sex has failed to accomplish social and legal change, the law ought to define the offense differently.

**B. The Misdirected Turn to Force**

Some skeptics might point to the failure of earlier reforms which attempted to define rape by expanding the notions of force and non-physical coercion, without any reference to consent. Before developing an alternative framework for the offense of rape, a critical evaluation of previous reforms is in order. The key question here is: might the turn to force-based models offer an alternative solution to the problems associated with consent-based ones?

Suggesting that in addition to the law not focusing on consent, the definition of force is too narrow, some scholars propose expanding the definition of force to include additional manifestations of non-physical coercion.\(^{134}\) The purpose behind these reforms was to shift the focus away from consent to whether the perpetrator’s actions were effectively coercive. Rather than scrutinizing the complainant’s behavior and clothing, the criminal justice system ought to exclusively focus on targeting a culpable perpetrator.

Indeed, previous reforms, starting in the 1970s, attempted to expand the notion of force in two ways: One type of expansion focused on broadening the notion of force itself to include additional forms of non-physical force, such as moral, psychological and intellectual.\(^{135}\) The second type of reform focused on including the broader notion of non-physical coercion, mainly economic coercion.\(^{136}\) Under jurisdictions which adopted these reforms rape is defined as forceful compulsion, without any reference to the problematic notion of consent.\(^{137}\)

\(^{134}\) See, *e.g.*, Catharine A. MacKinnon, *WOMEN’S LIVES, MEN’S LAWS*, at 247 (suggesting that many forms of coercive pressures should be recognized as one type of force. MacKinnon argues that rape should be defined as “a physical attack of a sexual nature under coercive conditions, and inequalities are coercive conditions”. MacKinnon further suggests that criminal law prohibit taking advantage of unequal social positions to coerce sex on a person who does not want it.)


\(^{136}\) See, *e.g.*, New Jersey, Rhode Island

\(^{137}\) See, *e.g.*, the definitions of rape in Pennsylvania, New Jersey, Michigan, Rhode Island.
While conceptualizing the offense of rape as an act of sexual coercion might be theoretically accurate, its practical implications prove more problematic. First, the term coercion has traditionally been narrowly construed to incorporate only explicit threats to inflict harm.\textsuperscript{138} The concept of coercion has never been expanded to incorporate additional forms of intimidating complainants and placing them in fear of non-physical harm, beyond actual threats to harm. The result is that even in jurisdictions that adopted a seemingly broad definition of force which also includes non-physical coercion, submission to unwanted sexual demands stemming from fear of nonphysical harm remains beyond the scope of criminal regulation.\textsuperscript{139}

Conceptually, sexual coercion is the flip side of lack of consent. Any attempt to define rape through the lens of sexual coercion necessarily implicates the problematic notion of consent. While in theory consent should have played no role under these reforms, in practice, it snuck back into the picture through the rear door, via the defense of mistaken consent. Despite the theoretical attempt to abandon consent, some courts have recognized it as an affirmative defense to a rape charge.\textsuperscript{140}

The most common critique against reforms that attempt to expand the notion of coercion argues that this concept is unable to demarcate the legal boundary between illegitimate pressures that amount to criminal wrongdoing and legitimate pressures that are an inevitable part of social interactions. Stephen Schulhofer criticizes the turn to the notion of force as being unable to mark the legal boundary between permissible and impermissible sexual conduct, contending that “focusing on ‘dominance,’ ‘force’ or degrees of pressure is simply not the way to get at the problem of drawing sexual boundaries and deterring sexual abuse. Although there are similarities between violent threats and other forms of coercion, the analogies do not clarify the underlying problems or help identify the specific features that make some sexual interactions abusive.”\textsuperscript{141} Schulhofer further argues that expanding the force definition to include more forms of coercive

\textsuperscript{138} See, the definition for coercion adopted by the Model Penal Code. See also the definition of coercion under New Jersey law.

\textsuperscript{139} See, e.g., New Jersey law: there are no reported decisions in N.J in which criminal charges were brought against a perpetrator such as a supervisor or an employer who coerced sex on their subordinates. Rode Island also adopted a definition that criminalizes coercion. However, the Rode Island Supreme Court recently rejected an attempt to criminalize coerced sex in the workplace: see, e.g., State v. DePetrillo, 922 A. 2d 124 (R.I, 2007)

\textsuperscript{140} See, e.g., People of the State of Michigan v. Khan, 264 N.W. 2d 360 at 366-7 (1978)

\textsuperscript{141} See, SCHULHOFER, supra note 7 at 98
power negates women’s sexual autonomy, and is “neither practically workable nor politically realistic, and thus it is bound to fail…” 142

The casebook example used by scholars to demonstrate the failure to recognize additional violations that fall short of physical force is the infamous Berkowitz case. In this case the court acquitted the defendant of rape on the grounds that while the complainant’s offered an explicit verbal lack of consent, no physical force was used throughout the sexual encounter. Despite the expansion by Pennsylvania law of the definition of force to include moral, psychological and intellectual force, rape law failed to account for a clear and explicit case of nonconsensual sex.

The common critique of any proposal to expand criminalization is: why should we return to legal terrains that have proved futile? This Article recommends a critical evaluation of previous failures before articulating a new course of action. It suggests, as well, that the turn to the notion of force is misguided, as previous reforms have failed to articulate the crux of the perpetrator’s culpable conduct by developing a clear understanding of the abusive conduct. Rather than articulating what conduct amounts to force or coercion, we should focus on identifying circumstances that demonstrate exploitation of power.

C. Rejecting Both Consent and Force

Acknowledging the fundamental problems associated with consent and force-based models has led several scholars to criticize the continuing reliance on the traditional elements of rape law: force and non-consent. Michelle Anderson argues that not only must rape law abolish the force and resistance requirements, it must also abolish the non-consent requirement.143 Anderson suggests a new model for rape law reform, the negotiation model, under which individuals would be required to consult with their partners before sexual penetration occurs.144 This model has some noticeable strengths; it acknowledges that consent-based models have failed, and thus should be replaced with an alternative conceptual model. Drawing on such ideas as communication and mutuality as inherent components in any sexual relationships offers a

142 Id., at 88

143 See, Anderson, supra note 34 at 1407

144 Id, at 1420-1422
significant step towards acknowledging that sexual relations must incorporate a genuine willingness on the part of both parties to engage in sex.

The negotiation model, however, does not offer a thorough reform in the conceptual framework of sex offenses. Rather than viewing the sex offense as non-consensual sex, it conceptualizes it as non-negotiated sex. This view, however, fails to capture the wrongdoing inherent in the offense of rape. Theorizing rape as a failure to negotiate intercourse before it occurs trivializes the severity of the sex offense by portraying it in neutral terms. Using the phrase “failure to negotiate” is unable to capture what rape is by providing an accurate account of the harms it inflicts on victims. The negotiation model is thus bound to fail in fostering an instrumental change in public perceptions of the wrongdoing in sex offenses.

Stephen Schulhofer’s model also rejects the continuing reliance on the traditional force and consent elements by suggesting that the essence of the sexual offense is the violation of sexual autonomy: the impermissible interference with our sexual choices. Examining Schulhofer’s proposal for an offense of non-violent sexual abuse, however, reveals that the sexual autonomy model is in fact not different from any other consent-based model. Alan Wertheimer contends that there is no difference between a consent-based model and Schulhofer’s sexual autonomy model, asserting that “although Schulhofer uses the language of autonomy rather than consent, there is nothing philosophical at stake between the consent model and the autonomy model. In effect, autonomy refers to the value that is protected, whereas consent refers to the means for protecting and promoting that value: we protect a person’s autonomy by prohibiting actions to which she does not consent and empowering her to engage in actions to which she does consent. If an individual violates a woman’s autonomy when he engages in sexual conduct without ensuring that he has her valid consent, then the models are not just functionally or extensionally equivalent. They are identical.”

This Article favors the view that contemporary rape law reform should distance itself from the traditional elements of rape. Both consent and forced-based models have practically failed, as have reforms which attempt to draw on expanding the notion of force to include non-

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145 See, WERTHEIMER, supra note 19 at 31-32 (explaining that the sexual autonomy model is essentially a consent-based model and does not offer a distinct construct).
physical forms of coercion.\textsuperscript{146} While on the theoretical level the offense of rape may be viewed as an act of sexual coercion, this Article favors an alternative understanding of the offense that builds neither on the notion of consent nor on the derivatives of the notion of force beyond its physical aspects, such as non-physical coercion, moral, intellectual or psychological force.

The Article further posits that the difficulty in drawing a workable legal boundary between permissible and impermissible pressures is overrated. It contends that the legal boundary between legitimate sex and sexual abuse can and should be effectively drawn. This may be done by focusing on the particular wrongdoing in rape: the exploitation element, as well as by defining the types of sexual relationships in which submission is induced through abuse of power. Under this construct, line drawing becomes more feasible and practically workable.

D. Re-Conceptualizing Rape As Sexual Abuse of Power

The following section argues that rather than conceptualizing rape based on lack of consent and force, the law should adopt an alternative framework for rape laws. It calls for re-conceptualizing the offense of rape by suggesting that the essence of rape is sexual abuse of power, namely, a wrongdoer’s culpable exploitation of dominance, influence and control over a person in a subordinate position. Under this construct, the offense of rape would be far more accurately described. Under this alternative construct, rape would be theorized differently and its elements re-defined to better capture the wrongdoing and harms inflicted by this offense. Accordingly, rather than defining the rape as engaging in nonconsensual sex, it would be defined as engaging in an act of sexual abuse of power, dominance and control.

1. What Is Rape? Revisiting the “Violence or Sex” Debate

During the 1970s the prevalent view among reformers was that rape is not about sex or sexual desire but an act of violence.\textsuperscript{147} The shift towards the de-sexualization of rape-- mainly associated with Susan’s Brownmiller’s influential book, Against Our Wills—seeks to counter the notion that rape is a sexual act by positing that it is fundamentally an aggressive conduct

\textsuperscript{146} See, SCHULHOFER, supra note 7 at 82-98 (criticizing reforms that focus on expanding the concept of coercion).

\textsuperscript{147} See, generally, Mary Ann Largen, The Anti-Rape Movement: Past and Present, in Rape and Sexual Assault: A Research Handbook 1, 5 (Ann Wolbert Burgess ed. 1985) (positing that in the second wave of feminism in the 1970s, it was popular to proclaim that “rape is violence, not sex”).
grounded in a political motivation to dominate women. The French philosopher Michel Foucault also contended that the crime of rape should be punished as a form of violence and “nothing but that,” describing the decriminalization of rape as a sexual crime. In a provocative statement Foucault posited that “sexuality can in no circumstances be the object of punishment…there is no difference, in principle, between sticking one’s fist into someone’s face or one’s penis into their genitalia …” The Model Penal Code adhered to this position, by defining the offense of rape as forcible compulsion, without any reference to the complainant’s lack of consent.

Given this tendency to de-sexualize the act of rape, more contemporary reformers have sought to reintroduce the notion that “rape is sex” back into an apt account of rape. After two decades of rape law reform, two main alternative theories have emerged to counter the position that rape is an act of violence: the first is Catharine MacKinnon’s view on rape in a society characterized by male dominance and female submission. Arguing that “rape is not less sexual simply by virtue of being violent,” MacKinnon believes that violence against women within a sexist society is always sexual and places rape within the confines of “normal” (but imposed) sexuality. She posits that heterosexuality is marked by a dominance/submission model of desire in which women come to be defined by inequality. Criminal law, contends MacKinnon,

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148 See, generally, Susan Brownmiller, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975) at 14 (stating that “rape, became not only a male prerogative, but man’s basic weapon of force against women), See, also, at 256 (arguing that “all rape is about power”).

149 See, generally, Vikki Bell, Beyond the Thorny Question: Feminism, Foucault and the De-sexualization of Rape, 19 Int’l J. Soc. Law 83 (1991)

150 See, Michel Foucault, Politics, Philosophy, Culture: Interviews and Other Writings 1977-1984 at 200. The French original uses the word “sexe” instead of “genitalia”.(Lawrence Kritzman ed. 1988 (reprint of La Folie Encerlee, a series of debates on repression and sexuality, one of them including a roundtable where Foucault asked these provocative questions (Change Collective 1977).


153 Id, at 173 (suggesting that: “Rape is not less sexual for being violent. To the extent that coercion has become integral to male sexuality, rape may even be sexual to the degree that, and because, it is violent).
maintains a legal definition of rape that fails to capture those events that many women experience as rape.\textsuperscript{154}

MacKinnon offers invaluable insights about rape, dominance and power. Her theories accurately capture current rape laws’ failure to account for rape victims’ narratives and for the actual harm inflicted on them by pointing at the practical gap between rape as it is narrowly defined by the criminal justice system and rape as it is experienced by its victims. The main drawback in MacKinnon’s views, however, is that they largely remain polemics, failing to provide the criminal justice system with practical legal tools to discern the line between criminal and non-criminal conduct. While MacKinnon’s theories leave a landmark blueprint in the context of sexual harassment law, her theories on the criminal law of rape leave us neither with further practical guidelines nor with legislative schemes to adequately address this problem.

While MacKinnon’s theories have been widely criticized,\textsuperscript{155} a second theory on rape and its harms has received far more acceptance by scholars.\textsuperscript{156} This theory is premised on the libertarian idea of sexual agency by positing that rape ought to be viewed as a violation of the right to exercise sexual autonomy.\textsuperscript{157} Traditional rape law’s main goal was not to protect women’s interests in controlling their own bodies and sexuality. Historically, rape law has primarily regulated competing male interests in controlling sexual access to females along with

\begin{flushleft}\textsuperscript{154} Id, at 172-178
\footnote{Id, at 172-178}

\textsuperscript{155} See, e.g., Robin West, Desperately Seeking a Moralist, 29 Harv. J. L & Gender (2006), 1 at 19-21(criticizing MacKinnon’s theories for conflating the harms of unwanted and nonconsensual sex).

\textsuperscript{156} See, e.g., Wayne LaFave, 2 Substantive Criminal Law, section 17.3, subsection (d) coercion (referring to this theory as “what has been aptly characterized as the broadest, most-well-developed categorization of coercive pressures… without resort to concepts that are hopelessly open-ended”, citing Patricia Falk, Rape by Fraud and Rape by Coercion, 64 Brook. L. Rev. 39 (1998) at 176

\textsuperscript{157} See, generally, SCHULHOFER, supra note 7 at 102 (stating that: “sexual autonomy… is an independent interest, indeed one of the most important interests for any free person”).

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constraining women’s sexuality. In a direct attempt to counter these views, Susan Estrich has suggested that the aim of contemporary rape law ought to be “a celebration of our autonomy.”

Estrich’s theory that rape law should shift its focus to protecting women’s sexual autonomy signaled the first step in a conceptual overhaul of the values that rape law reform aims to promote. The position that rape is about sexual desire rather than violence took hold in the 1990s, when reformers, most notably Stephen Schulhofer, proposed the distinction between violent rape and non-violent sexual abuse. Donald Dripps also distinguishes between a violent sexual assault and sexual expropriation, which he defines as engaging in intercourse with a person “known by the actor to have expressed the refusal to engage in that act, without subsequently expressly revoking that refusal.” The view that the offense of rape is mainly about the seemingly non-violent aspects of the violation of sexual autonomy has become a recurrent theme in contemporary rape law reform.

A few scholars have begun to question the characterization of sexual abuse as non-violent sexual misconduct. Dorothy Roberts suggests that “disconnecting all seemingly nonviolent sexual coercion from sex accompanied by physical violence will obscure the common nature of both, and is not as simple as Schulhofer and Dripps suggest.” Roberts concludes that “before we can move beyond violence, we must see all the violence that still escapes the law.” Michelle Anderson further criticizes the position that sexual abuse is non-violent by arguing that Schulhofer’s and Dripps’ characterization of sexual abuse as nonviolent “comprehends no intrinsic violence in the all-American rape itself and thereby greatly minimizes the harm of the offense.”

158 See, generally, Dorothy Roberts, Rape, Violence and Women’s Autonomy, 69 Chi-Kent L. Rev. 359 at 363-364 (1993) (contending that “Categories of entitlement that reflect relationships of power in our society determine the meaning of rape. By entitlement I mean the man’s entitlement to sexual control and the woman’s entitlement to the law’s protection of her sexual autonomy”).

159 See, generally, ESTRICH, supra note 25 at 102 (1987)

160 See, Dripps, supra note 101 (developing the commodity theory of sexuality under which individuals have a property right to the use of their bodies).

161 See, e.g. Roberts, supra note 153.

162 Id

163 See, generally, Anderson, supra note 10 at 640
This type of critique, however, has resulted neither in alternative conceptual models for rape laws nor in redefining the elements of the offense.\footnote{But Cf. Anderson, Negotiating Sex, supra note 34 (while Anderson did offer an alternative underpinning of rape law based on the negotiation model, the failure to negotiate basis fails to provide a practical change in rape laws, mainly because similarly to conceptualizing rape as nonconsensual sex, it fails to target the perpetrators wrongdoing which accounts for the legal justification for criminalization.)} Little attention has been paid to the additional ramifications of distancing the offense of rape from the broader concept of violence. Moreover, scholars have not thoroughly explored the implications of adopting the position that “nonviolent” sexual abuse is a lesser form of violent rape. They have thus failed to capture that these views result in the dilution of the severity of sex offenses: while the violent sexual assault is viewed as a serious wrongdoing, the seemingly non-violent sexual abuse is typically reduced to a mere misdemeanor.\footnote{See, Anderson, All American Rape, supra note 10 at 632 (positing that more than half of the states that criminalize nonconsensual sex categorize the offense as mere misdemeanors).} This lenient view fails to consider most types of acquaintance rapes as criminal sex offenses. Given the ramifications of placing the right to exercise sexual autonomy at the center of the rape inquiry, the time is ripe to propose an alternative framework of rape law that incorporates the idea of sexual abuse of power as another form of sexual violence.

The boundaries of the concept of violence are still under-defined and ambiguous under current rape law. Viewing sexual abuse as nonviolent sexual misconduct narrowly construes violence to necessarily mean physical force. It further fails to appreciate the ongoing effects of power, authority, dominance, influence and control of those in positions of power towards victims in subordinate positions. Nothing in the term itself, however, prevents the law from rethinking the legal meaning of violence and re-defining it in the context of sexual offenses. This view is based on the understanding that sexual violence is different and broader from mere physical non-sexual violence.

Rather than viewing rape solely as either an act of violence or as a sexual act, this Article favors a hybrid view which places sexual violence and sexual abuse of power in a unique category of violence. It contends that the mere act of sexual compulsion is, under certain circumstances, an act of violence, and that sexual violence is a distinct form of violence. It further suggests that the law ought to develop an alternative understanding of sexual violence that involves more than the exploitation of power disparities. If the legal meaning of violence is
redefined to encompass additional forms of sexual abuses, this would acknowledge that sexual exploitation of power is an additional form of sexual violence, and that perpetrators use it in ways which go beyond the physical aspect of non-sexual violence. Exerting physical violence becomes practically redundant, with abuse of power as its effective substitute, where submission results from placing victims in fear of professional and economic harm.

E. The Proposed Model’s Normative Strengths

The Article will now examine the normative advantages of a sexual abuse of power model that draws on the above ideas.

1. Capturing Wrongdoing

The abuse of power model better accounts for the fundamental wrongdoing in rape. Generally speaking, criminal law aims to target a perpetrator’s culpable conduct, in order to place personal liability and criminal sanctions on him. Characterizing the sexual offense through the lens of an abuse of power construct successfully achieves this goal, articulating the wrong in the sexual misconduct, which the nonconsensual sex paradigm fails to capture. Recall that defining rape under the “nonconsensual sex” account has failed to persuade public opinion that sex without consent is a serious offense because it has not been able to situate this conduct as conceptually distinct from legitimate sex.166 This account has thus failed to foster instrumental change in social norms concerning the proper demarcation between legitimate sex and sexual abuse. In contrast, the sexual abuse of power model, which focuses on articulating the features of abusive conduct, is better able to capture the wrongdoing in rape and to frame abuse of power as distinctively different from sex. The model thus holds future promise for instrumental change in social norms.

What, then, is the essence of the wrongdoing under the sexual abuse of power model? The answer lies in articulating the notions of abuse and exploitation. The proposed model aims to refine MacKinnon’s insights concerning imbalances of power by offering the practical implications of her theories in the context of the criminal law of rape. This attempt rests on the premise that MacKinnon’s theories do not successfully identify the wrongdoing in rape, as they

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166 See, generally, Baker, supra note 33 (suggesting that sex and nonconsensual sex are not perceived as conceptually distinct, thus date rape is not understood as “the other” which justifies criminal sanctions).
fail to distinguish among notions of power, dominance and subordination and their actual abuse and exploitation in particular cases.

While MacKinnon contends that all imbalances in power in a society characterized by male dominance and female submission are inherently coercive, this Article seeks to distinguish criminal from non-criminal conduct by stressing the centrality of the abuse and exploitation concepts, independent of the notion of power. While the concept of power has been thoroughly conceptualized by theorists, the concepts of abuse and exploitation in the context of sexual misconduct remain theoretically under-developed, and doctrinally narrowly construed. Drawing on the above insights, the offense of rape ought to be viewed as an act of exploitation of a person in a subordinate position. Focusing on the notions of abuse and exploitation is crucial because these are precisely the elements that account for the wrongdoing embodied in rape. Articulating these concepts is therefore best able to capture the wrong in rape.

Targeting the perpetrator’s wrongdoing by identifying those features that indicate culpable conduct also offers a response to potential critique to the proposed model. Several scholars are wary of expanding the scope of criminal regulation to criminalize additional forms of sexual abuses that fall short of physical force, raising the risk of unfairness to defendants as the main concern. They stress that because current laws adhere to prevailing societal norms about the legal boundary between permissible and illegitimate sexual conduct, adopting criminal provisions based on social norms not shared by the majority of the community would result in defendants who were both unaware of the complainant’s lack of consent and not expected to have been aware of this lack of consent, thus ultimately leading to wrongful convictions.

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167 See, generally, Michel Foucault, Truth and Power, in Power/Knowledge: Selected Interviews and Other Writings 1972-1977, at 109, (Colin Gordon. ed. 1980) at 119-122 (Foucault is considered to be the most influential theorist of power. Foucault contended that an appropriate analysis of power must extend beyond the limits of the state power. Rather, Foucault posited, power is everywhere; it is a productive social network defined by organized, hierarchical cluster of relationships).


169 See, e.g. Dripps, supra note 36 at 959.

170 Id.
Criminalizing sexual abuses of power under the proposed model comports with fundamental criminal law considerations and in particular the requirement that fair warning is provided. The abuse of power construct is best equipped to capture an individual’s wrongdoing by defining in advance the circumstances that indicate sexual abuse of power, namely: abuse is established when people in supervisory positions exploit their power, authority, trust, dependence or influence to obtain sex from people in subordinate positions, by intimidating them and placing them in fear of professional or economic harm, such as losing their job. The proposal to criminalize sexual abuse of power in the workplace and in the academy strikes a careful balance between several competing interests, refraining from violating a complainant’s right to sexual agency and autonomy while making sure the prohibition applies only once a perpetrator’s blameworthy conduct has been identified.

2. Capturing the Harm and Complainants’ Narratives

A significant advantage in the abuse of power model is that it better aligns with victims’ accounts of the harm and injuries that they experience. Robin West persuasively points out that “the event of rape becomes not just unwanted but terrifying and terrorizing.” 171 Recall the conflicting accounts of the sexual acts in the Kent indictment: Sexual abuse of power in the workplace and in the academy is yet another illustration of the centrality of narratives in capturing complainants’ perspectives concerning their harms and injuries. The abuse of power model is best equipped to capture complainants’ narratives, as it provides an accurate account of the unique experiences of complainants in general and of employees and students in particular.

a. The Impaired Choices Narrative

What, then, is the essence of complainants’ accounts? A recurring theme in testimonies is the lack of choices narrative. 172 Complainants’ stories reveal that submission to unwanted sex

171 See, generally, West, CARING FOR JUSTICE, supra note 68 at 102

172 See, e.g., State v. Baby 404 Md. 220, 946 A. 2d 463 at 473 (the complainant was alone at night in a secluded area with two guys who made clear to her that she did not have any choice but to engage in sex with both of them and that she would not be able to leave until they are done. The decision offers some insights on the prosecutions’ theory regarding the complainant’s apparent “consent” under circumstances in which she believed that she did not have any alternative choices). But cf., Commonwealth of Pennsylvania v. Mlinarich, 518 Pa. 247, 542 A. 2d 1335 (Pa. 1988) (the court view the complainant as having made a difficult choice to submit to unwanted sex rather than endure the alternative of being sent back to a juvenile detention facility).
results from feeling that no other meaningful choices are available to them. The lack of choices narrative typically rests on economic or professional considerations, such as the fear of losing one’s job or academic position, along with a dependence on the perpetrator who controls their professional status. Given these circumstances, a victim of sexual abuse of power typically perceives the sex offense not as a case of nonconsensual sex, but as an exploitation of her lack of meaningful choices and an abuse of her dependent position.

The lack of choices narrative carries implications beyond the context of disparities in power. A similar account is present when a complainant submits to unwanted sex feeling that she does not have any other choice. The decision in State v. Baby\textsuperscript{173} is the paradigmatic example for the inadequacy of consent-based models to account for the complainant’s lack of meaningful choices: when the complainant was locked in a car at night in a secluded area with two male perpetrators who stated that she would not be free to leave until they had sex with her, the assumption that she could refuse permission is significantly undermined. The jury, however, failed to capture that ostensible permission was merely apparent, as it stemmed from a belief that no alternative choices were available.

A key problem in capturing complainants’ narratives is that the majority of criminal charges are resolved in plea bargains.\textsuperscript{174} In the absence of a jury trial, the victim’s story remains untold and the criminal justice system deprived of hearing the victim’s account of the offense and its harm. Without this narrative, the law is unable to accurately capture the wrongdoing in rape and we are left only with a few criminal charges that are rarely brought and seldom resolved in a judicial opinion.\textsuperscript{175}

Given the lack of court decisions in our own criminal justice system, the turn to comparative law might prove helpful. The Canadian decision in R. v. Stender offers the point of departure for developing the concept of impaired choices.\textsuperscript{176} The decision invokes the theory of

\textsuperscript{173}See, Baby, 946 A. 2d 463 at 467 (when asked by the prosecution whether she felt like she had a choice but to give permission to the sexual act, the complainant answered: “not really”.)

\textsuperscript{174}See, generally, Angela J. Davis, The American Prosecutor: Independence, Power and the Threat of Tyranny, 86 Iowa L. Rev. 393, 408-09 (2001) (positing that in most jurisdictions plea bargains resolves more than ninety percent of all criminal charges).

\textsuperscript{175}See, the Kent indictment, supra note 1.

involuntariness to reach the conclusion that consent is merely apparent when induced through threats to inflict non-physical harm because submission reflects the complainant’s belief that she has no alternative choice. This Article suggests that the concept of impaired choices ought to be further developed. However, rather than drawing on voluntariness — in itself a problematic notion\(^\text{177}\) — it favors articulating the concept of impaired choices based on the wrongdoing that stems from a perpetrator’s abuse of power to induce submission from a person in a subordinate position.

Developing the concept of impaired choices is premised on the assumption that difficult life circumstances cannot in themselves serve as a basis for criminalization unless particular wrongdoing can be targeted. Line-drawing thus becomes crucial here: the key is distinguishing between difficult life circumstances that are inherently constrained and an individual perpetrator’s impermissible interference with these constrained choices which amounts to criminal conduct. Only the latter may be criminalized based on the theory that culpable interference with constrained choices indeed amounts to wrongdoing, thus justifying criminal sanctions.

Several scholars have briefly touched upon the concept of impaired choices in the context of sexual abuses of power, authority, trust and dependence.\(^\text{178}\) William Eskridge examines this issue from a gay law perspective, suggesting that the libertarian view of consent merely provides the point of departure in evaluating sexual choices, and that the law should insist that “choice” be viewed realistically by exploring the ways in which sexual choice can be impaired.\(^\text{179}\) Eskridge identifies several categories of impaired choices, among them undue pressure, contending that “undue pressure starts with the core concept of rape law that consent is negated by physical coercion or threats of coercion. Undue pressure would expand upon this concept, however, and consider other forms of coercion. At this point, conceptions of status reenter the policy calculi-


\(^{179}\) Id
not to render consent irrelevant, but instead to consider whether apparent consent ("yes") has been rendered meaningfully. In situations in which one party stands in a position of authority or power over the other party, the latter’s acquiescence in sexual relations might be doubted and more easily negated. In a footnote, Eskridge suggests that he is thinking specifically about employer-employee, minister/rabbi/priest-religious observant, guardian-ward, psychiatrist/doctor-patient or teacher-student relationships. Considering the Onofre decision, Marc Spindleman also draws on the idea of impaired choices by suggesting that: “the ‘consent’ in Onofre was stacked on top of inequalities and abuses of power. Never mind that Onofre’s respect for sexual freedom was achieved on the back of the multiple sexual injuries to the less powerful person that the sex it protected involved.”

While these scholars have begun sketching the problem of victims’ impaired choices, the concept remains essentially under-developed in the law of rape. Examining this concept in the context of criminal regulation of same sex relationships sheds some light on the analogies that can be drawn from this particular context to sexual abuses of power in professional and institutional settings in general. The idea of criminal regulation is contested both with respect to sexual abuses of power in the workplace and in the academy and in same sex relations. In both contexts, there is a noticeable tension between two conflicting considerations: on the one hand, scholars fear that the criminal regulation of sexuality might result in weakening, rather than empowering, a particular group. On the other hand, the law ought to acknowledge the need to protect these groups from the harms of sexual abuses of power. Protection from harm, however, fundamentally collides with the idea of exercising sexual agency and autonomy, and reconciling these contrasting concerns is challenging in both contexts.

While the positions above explore the concept of impaired choices mainly with respect to regulating gay sexual relations, its practical implications are much broader, extending above and beyond gay law to cover various forms of sexual abuses of power stemming from professional and institutional relations such as the workplace. Under this theory, when a person in a powerful

\(^{180}\) *Id*

\(^{181}\) Id, at FN 57

\(^{182}\) See, Spindelman, *supra note* 72 at 1639
position exploits a person’s lack of realistic choices, his conduct amounts to impermissible interference with free will and thus justifies criminal regulation.

3. Alignment with Conflicting Concerns

Another advantage in the abuse of power model lies in its ability to integrate contrasting considerations pertaining to the criminal regulation of sexuality. The idea of criminalizing sexual abuses of power in the workplace and in the academy is prone to resistance not only from pro-defendant scholars concerned about unfairness to the defendant, but also from feminist reformers, whose main concern is that criminalizing women’s sexuality might result in weakening, rather than strengthening, women by implying that they are vulnerable victims of an offense, and their sexual choices treated like those of incompetent victims.

Feminist legal theory today is not monolithic. Traditional strands of feminism -- developed in the late 1970s and early 1980s -- consisted of liberal feminism, cultural feminism and dominance feminism, with additional feminist theories developed in the early 1990s. While today feminism incorporates at least six conceptually distinct schools of thought, feminist theories continue to grapple with such questions as: what are the sources and nature of gender inequality? Which remedies best address gender injustice? Various answers have been offered; for instance, while dominance feminism views sex as a source of danger and exploitation of women, sex-positive feminism adopts the opposite premise under which sex for women is not only a source of pleasure, but also power. Despite these differences in approach, reformers have as their common goal the empowerment of women and strengthening of their social status.

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183 See, e.g., Dripps, supra note 36 (suggesting that current views results in prosecutorial discretion to bring rape charges against men in far more cases than the system can manage, for wrongdoing that the legislature’s intent to punish seems very doubtful).

184 See, generally, Gruber, supra note 16 at 603-606 (discussing existing feminist critique of criminal rape law and the inherent tensions between conflicting considerations).

185 See, generally, Bridget Crawford, Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the praxis of Pleasure, 14 Mich. Journal of Gender & Law 99 (2007) (examining third-wave feminism by contending that contemporary feminists writing offers new insights on familiar issues such as pornography).


187 See, e.g., Vicki Schultz, The Sanitized Workplace, 112 Yale L. J 2061, at 2087 (2003) (rejecting the view that sex in the workplace is always harmful to women).
This Article proposes that reformers integrate elements which are conceptually associated with competing theories. The sexual abuse of power model places a heavy emphasis on the exploitation element as the key feature that defines the wrongdoing in the sex offense. In that respect, it aligns with dominance feminism, under which subordination and exploitation of women play a crucial role, as rape and sexual harassment are perceived as practices that perpetuate the systemic subordination of women. But recall that the abuse of power model seeks to distance itself from the position that imbalances in powers per se are exploitative by rejecting the view that sex between people in disparate positions is inherently coercive. When circumstances such as coercive atmosphere, intimidation, and placing people in fear of economic or professional harm are lacking, sex between un-equals remain beyond the scope of criminal regulation. Instead, the abuse of power model aims at targeting wrongdoing by identifying a perpetrator’s blameworthy conduct, namely, proving actual exploitation of disparities in powers.

Dominance feminism has been continuously criticized on the grounds that this theory of male power and women subordination obscures the possibility of female sexual agency. A significant agenda in liberal feminism is promoting women’s sexual autonomy. Libertarians stress that traditionally, criminal law has served to restrict and place legal limitations on women’s sexual autonomy; thus, contemporary reforms should be wary of further constraining women’s sexual choices by adopting additional prohibitions pertaining to women’s sexuality.

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188 See, generally, MacKinnon, supra note 147 at 172 (“If sexuality is central to women’s definition and forced sex in central to sexuality, rape is indigenous, not exceptional, to women’s social condition). See also, Catharine A. MacKinnon, SEXUAL HARASSMENT OF WORKING WOMEN, A CASE OF SEX DISCRIMINATION (1979) at 235-245 (referring to this idea as the “inequality approach”, while in her later Articles: Difference and Dominance: on Sex Discrimination, in Feminism Unmodified: Discourses on life and Law, she refers to the same idea as “the dominance approach”).

189 See, generally, Denise Schaeffer, Feminism and Liberalism Reconsidered: The Case of Catharine MacKinnon, 95 Am. Political Science Rev. 699, 702 (2001)

190 See, generally, Berger, supra note 120 at 522 (suggesting that overprotecting women through the criminal law of rape cheapens rather than celebrates “the rights to self-determination, sexual autonomy and self and societal respect of women).

191 See, generally, Naomi Kahn, Policing Women: Moral Arguments and the Dilemmas of Criminalization, 49 DePaul L. Rev. 817 at 828 (2000) (discussing the dilemmas of criminalization for women, suggesting that while criminalization might be important, it does not address the actual reasons for the perpetrator’s behavior and thus by itself cannot provide a meaningful solution to the problem).
Acknowledging the significance of sexual agency should not result in rejecting the sexual abuse of power model because criminalization under this model would not violate complainants’ rights to sexual agency. The model concedes that sexual autonomy, just like other fundamental rights, is not an absolute right; it must be balanced against competing interests and values—in this case: the right to be free from sexual abuse of power and avoid sexual violence.\textsuperscript{192}

The sexual abuse of power model would only criminalize sex obtained through pressure, intimidation and placing complainants in fear of non-physical harm. It would leave untouched any other sexual relations between people of unequal power. For example, the model would not violate a person’s right to trade upon her sexuality by initiating sex with her superior at work for economic and professional gain. A competent adult’s decision to trade such benefits with sexual favors is part of exercising her sexual agency. When a perpetrator’s wrongdoing is not identified, there is no justification for criminal regulation. In contrast, a complainant’s reluctant submission to unwanted sex that is induced through placing her in fear of non-physical harm ought not be viewed as exercising her sexual agency because this “choice” is anything but free and autonomous.

The sexual abuse of power model also aligns with cultural feminism, a school of thought which is associated with the scholarship of Carol Gilligan and Robin West.\textsuperscript{193} The notion that women have a distinct voice is a prominent theme in Robin West’s writing.\textsuperscript{194} West argues that women suffer unique gendered-injuries, including harms of a sexual nature, and advocates legal responsiveness to women’s different voices, characteristics and values.\textsuperscript{195} Again, drawing on the notion of abuse of power accounts for the actual experiences and narratives of the victims of sexual abuse, who often happen to be women.

Defining the sex offense in negative rather than positive terms is yet another advantage of the abuse of power model. Conceptualizing rape as sexual abuse of power rather than as

\textsuperscript{192} See, generally, Anderson, All American Rape supra note 10 at 640 (positing that “Autonomy is not an absolute concept, and constraints on sexual autonomy are not always bad”).

\textsuperscript{193} See, generally, Carol Gilligan, IN a DIFFERENT VOICE (1982)

\textsuperscript{194} See, generally, Robin West, CARING FOR JUSTICE, supra note 68 (positing that women disproportionately and distinctively suffer unique gendered-harms).

\textsuperscript{195} See, generally, Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 13 (1988)
nonconsensual sex thus aligns with sex-positive feminism. The central theme of sex-positive feminism is that sex is essentially a good thing, capable of granting pleasure and power. The sex offense therefore should not be defined by using such terms as “sex without consent,” but in negative terms that incorporate the perpetrator’s wrongdoing: an act of abuse and exploitation.

Compare S/M sex: Under the abuse of power model’s rationale, S/M sex is distinct from sexual abuse of power not because sex is consensual in the former case while non-consensual in the latter; the real difference is that sexual abuse of power is simply not sex, but rather an act of sexual violence, while S/M relations are indeed one form of sex and therefore not subject to criminal regulation. The difference thus hinges on the distinction between criminalizing sexuality, which is generally unjustified, and criminalizing sexual violence, which is.

The sexual abuse of power model best captures the necessary conceptual distinction between sex -- which conceptually does not justify criminal regulation-- and rape, which requires the criminal regulation of a sexually violent act. Creating this fundamental gap that cannot be bridged between rape and sex is significant because it situates rape as distinctively different from sex, something the consent-based models fail to do.

F. The Model’s Doctrinal Implications

What are the practical implications of characterizing the sex offense as an act sexual abuse of power? After articulating the normative strengths of the abuse of power model, we can return to explore an empirical question, namely, whether adopting such a model would indeed work better in practice compared to existing consent-based models.

The proposed conceptual framework redefines the links between the theoretical underpinnings of rape law and the elements that define the offense. In practical terms, the elements of the proposed sex offense would be redefined through the use of the phrases “abuse and exploitation” and “imbalance in powers,” without any reference to the murky and problematic notion of consent. Moreover, the proposed offense does not substitute unwelcome-

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196 See, e.g., Katherine M. Franke, Theorizing Yes: An Essay in Feminism, Law and Desire, 101 Columb. L. R. 181, at 206 (positing that feminists have failed to formulate a positive theory of female sexuality by framing sexuality only as a matter of danger or dependency)

197 See, generally, Gayle Rubin, Thinking Sex: Notes for a radical Theory of the Politics of Sexuality, In Carole S. Vance (Ed) Pleasure and Danger: exploring women’s sexuality, at 267-319 (Boston, Routledge & Kegan, 1984) (addressing the conflict over sex within feminism)
ness with non-consent. Under sexual harassment law, the lack of consent element has been replaced with an unwelcome-ness requirement\textsuperscript{198}, but this civil standard is inadequate in the criminal law context because once abuse of power is demonstrated, the prosecution does not need to further prove that the complainant did not welcome being abused, pressured and intimidated.\textsuperscript{199} Rejecting the unwelcome-ness standard rests on the premise that exploitation of power to obtain submission is never welcome.

The abuse of power model consists of two key components: power disparities or position differentials and their actual abuse or exploitation.\textsuperscript{200} The common feature to all sexual abuses of power is that power, authority, trust, and dependence are exploited to induce sexual submission by influencing and dominating the people in subordinate positions and subjugating their free will. The key predicate for criminalization under the proposed model thus rests on the effects of power, authority, influence and trust that stem from professional and institutional relations where power disparities between the parties are considerable.

Regarding the abuse element: identifying several conditions that point to exploitation serves as a supporting tool; in order to prove exploitation in a particular case, a key question is what circumstances establish this feature. Targeting these factors is crucial to this inquiry because they are common features present in many situations involving sexual abuse of power. These mainly include the divergence from community standards of expected conduct and exceeding the scope of the professional role, namely, identifying the perpetrator’s deviance from acceptable and expected conduct in professional and institutional settings, but also targeting the


\textsuperscript{199} See, e.g. Catherine Abrams Directions in Sexual Harassment, at 118 (arguing that: “given the heterogeneity of harassing behavior it may make little sense to subject all of it to the same unwelcome-ness test. It would be analytically more precise – and more responsive to the varying experiences of plaintiffs—to tailor the showing that separates acceptable from unacceptable sexual behavior to the nature of the harassment that is being alleged. One important category of harassing behavior includes physical violence and sexual assault. Behaviors within this category constitute coercive, insulting conduct that would not be welcomed by anyone. Conduct within this category should not be subject to the unwelcome-ness test”.)

\textsuperscript{200} See, generally, Buchhandler-Raphael, supra note 12 at 476-480 , See, also, Buchhandler-Raphael, supra note 11 (elaborating on the doctrinal implications of the abuse of power model)
complainant’s fear and intimidation of harmful repercussions if she refuses the perpetrator’s sexual demands.\textsuperscript{201}

Under the abuse of power model, sexual relationships between people of disparate power should \textit{not} be viewed as exploitative per se. Rather, abuse is an independent element which the prosecution bears the burden of separately establishing. There is no preliminary presumption regarding the exploitative nature of sexual relations based merely on imbalances of power. The mere presence of disparate positions between the parties is insufficient to justify criminalization. Instead, the model separately examines two steps: whether there is a marked imbalance in the respective powers of the parties accounting for the victim’s vulnerable position and dependence on the perpetrator. But power disparities, vulnerability and dependence are in themselves insufficient to establish exploitation; criminalization is fundamentally based on conduct rather than status. The key predicate for criminalization thus rests on identifying a culpable perpetrator’s wrongdoing, namely, exploitation. The second step requires establishing evidence that submission was induced through exploitation of circumstances, namely, that a complainant’s reluctance was overwhelmed by pressure and intimidation.

In light of the above features, re-conceptualizing the sex offense as an act of abuse of power would ultimately lead to practical changes in rape law. Focusing on the perpetrator’s criminal wrongdoing rather than scrutinizing the complainant’s demeanor would result, over time, both in legal change as well as a change in societal perceptions about the boundary between permissible and illicit sexual conduct. Once the perpetrator’s abuse of power has been established, the complainant’s consent becomes irrelevant as one cannot reasonably consent to sex after being pressured, intimidated and placed in fear of harm. As a practical matter, defining the sex offense without the problematic notion of consent, together with removing the use of consent as a defense to an abuse of power criminal charge, offers hope that the proposed model would indeed work better to convince the public at large, and the jury in particular, that the sexually coercive conduct in question warrants criminal sanction. This understanding would result in recognizing more sexual abuses -- coerced submission in the workplace among them -- as justifying criminal regulation.

\textsuperscript{201} Id.
G. Other Applications of the Abuse of Power Model

The proposed conceptual framework of rape draws on two other types of harmful conduct that adopt an abuse of power model to capture their distinctive features. These additional contexts provide useful analogies that illustrate the centrality of the notions of abuse and exploitation. The domestic violence context best demonstrates the perpetrator’s wrongdoing through abuse of his power, as well as the harms that this wrongdoing inflicts on victims. Social scientists as well as legal scholars have long recognized that the crime of domestic violence extends above and beyond the specific incidents of physical violence. Domestic violence, it is argued, is largely defined by non-physical manifestations of domination, with the struggle for power lying at the heart of the battering process. The dynamics of domestic violence focus on the significance of power and control to understand the abusive relations. An accurate description of battering is premised on an understanding of coercive behavior, power and control, and includes a continuum of sexual and verbal abuse, threats, economic coercion, stalking and social isolation. Re-conceptualizing rape as an act of abuse of power, dominance and control acknowledges that the notion of violence extends beyond its physical manifestations, similar to the dynamics that characterize domestic abuse.

The second conceptual analogy focuses on the role of abuse of power in sexual harassment law. Sexual harassment is traditionally defined as an abuse of power made possible by power inequalities between men and women. In the workplace, men historically had power over women as a result of their higher organizational positions, and thus were able to abuse their power to harass women. Social science researchers offer various models of power. Many


203 See, generally, Mary Ann Dutton, Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Women Syndrome, 21 Hofstra L. Rev. 1191, 1204 (2003) (explaining that in the scientific field, spouse abuse, domestic violence, woman abuse and battering… are used interchangeably to refer to the broad range of behaviors considered to be violent and abusive with an intimate relationship).

204 See, generally, Susanne Baer, Dignity or Equality? Responses to Workplace Harassment in European, German and U.S. Law, in Directions in Sexual Harassment Law 582, at 590 (Catharine A. MacKinnon & Reva Siegal eds. 2004).

205 See, generally, MacKinnon, SEXUAL HARASSMENT OF WORKING WOMEN, supra note.

suggest that the legal system’s definition of sexual harassment is premised on the organizational power model. Under this model, sexual harassment is most likely to occur when the harasser has a higher position in the workplace hierarchy than the victim. Sexual harassment is the result of certain opportunity structures created by organizational climate, hierarchy, and specific authority relations.\(^{207}\)

1. **Current Applications of an Abuse of Power Model**

The above understandings of abuse of power generally do not extend to the criminal law context.\(^{208}\) Criminal law has not yet adopted a comprehensive abuse of power model as the conceptual basis for capturing the wrongdoing in rape. No jurisdiction has adopted an overhaul reform of rape law which draws on an abuse of power model. Practically speaking, however, the criminal justice system is not a complete stranger to such a model, as it has already been sporadically implemented within certain settings; abuses of power are currently criminalized mainly in cases in which perpetrators exercise official authority to enforce obedience on victims whose personal liberty is somewhat confined.\(^{209}\)

Nevertheless, attempts to apply a similar conceptual model in the context of sexual abuse of power in the workplace have generally failed, as the Rhode Island Supreme Court’s decision in *State v. DePetrillo* demonstrates.\(^{210}\) In this case, the complainant “Jane”, a 19-year-old college student, was employed by the defendant in his privately-owned business. Using work as a pretext

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\(^{208}\) *See, e.g.,* Tuerkheimer, *supra note* 197 (positing that the understanding of the dynamics of the abusive relationships in domestic violence do not extend to the criminal justice system).

\(^{209}\) The context of police misconduct provides a salient example for applying the abuse of power model: sexual abuse of power often occurs when a police officer stops a suspect for some offense, and induces the victim’s sexual submission by threatening arrest if the demands are refused. Many jurisdictions have recognized these sexual abuses as criminal conduct. *See, e.g.,* State v. Burke, 522 A. 2d 725 (R.I., 1987) (a uniformed police officer was prosecuted for abusing his authority to coerce sex on a drunken woman whom he had picked up in his police cruiser while she was hitchhiking. *See, also,* State v. Motiff 104 Or. App. 340, 801 P. 2d 855 (Or. App. 1990) (A uniformed police officer was convicted of official misconduct for demanding sex from a 22 year old intoxicated victim. Another prominent example in which many jurisdictions acknowledge that the misuse of official authority justifies criminalization is the prison context. *See, e.g,* Colo. Rev. Stat. 18-3-403 (1986 & Supp. 1995 (Criminalizing guard-inmate sexual relations when it can be proved that the officer coerced the victim to submit.

\(^{210}\) *See,* State v. DePetrillo 922 A. 2d 124 (R.I, 2007)
for staying after hours, the defendant sexually attacked Jane after plying her with beer.\textsuperscript{211} DePetrillo was prosecuted for sexual assault which is broadly defined in Rhode Island law to include coercion. The defendant, who waived his right to a jury, was convicted following a bench trial on the grounds that coercion consists of the imposition of psychological pressure upon a person who is vulnerable and susceptible to such pressure. The trial court further held that the law recognizes that a command issued by a person in a position of authority need not be accompanied by an explicit threat in order for such a command to be effectively and inherently coercive, and that the defendant was able to overbear the will of the complainant either by the authority that it presented or by a modicum of force.\textsuperscript{212} The State’s Supreme Court reversed, unwilling to extend the abuse of power model -- which it uses when police officers abuse their position to induce a suspect’s submission—to the workplace context.\textsuperscript{213}

The military justice system has recently taken a significant legislative step in the direction of criminalizing sexual abuse of power, where exploiting disparities in power, position, and rank induces submission.\textsuperscript{214} An amendment to the Unified Code of Military Justice incorporates the abuse of power model in its criminal provisions.\textsuperscript{215} Sexual assault is defined as “engaging in a sexual act by threatening or placing another person in fear.” The provision specifies that harm incorporates “a threat through the use or abuse of military position, rank or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.”\textsuperscript{216} The amendment concedes that coercion may be established when acquiescence is prompted by the dominance and control presented by the perpetrator’s superior rank and position.\textsuperscript{217} It acknowledges that sexual abuses of power in a workplace setting, such as in the

\textsuperscript{211} 922 A. 2d at 127-128

\textsuperscript{212} 922 A. 2d at 134

\textsuperscript{213} 922 A. 2d, at 135


\textsuperscript{215} Id

\textsuperscript{216} Id

\textsuperscript{217} See, generally, Buchhandler-Raphael, supra note 11 (providing an elaborate discussion of the Military Justice Code’s provision, its advantages and shortcomings)
military, justify criminalization when position disparities are exploited to induce submission. It further acknowledges that persons in subordinate positions are often placed in fear of harm not only whenever threats to harm them are expressed but also when perpetrators employ other techniques of intimidation and create a pressured environment to coerce sex. While the military setting is characterized by a formal authority to enforce obedience, the criminal justice system has also applied an abuse of power model in the following two other types of sexual relationships in which this feature is clearly absent. Similar reasoning might also extend beyond these relationships to incorporate abuses of power in the workplace and in the academy.

a. Exploitation of Minors

Exploitation of influence, dominance, and control over victims plays a major role in criminalizing sexual abuses of power concerning minors. Several jurisdictions criminally prohibit sexual abuse of authority, trust, and dependence to induce minors’ submission to the sexual demands of people who have the capacity to influence and dominate them. The state of Michigan, for example, prohibits sex with a minor between 13 and 16 when the defendant is in a position of authority and uses this authority to coerce the victim to submit.

Michigan courts have interpreted this provision quite broadly. For instance, in Buyssee, the defendant invited his daughter’s teenage friends over for a sleep-over, during which he showed sexually explicit movies and let them consume alcohol. After one of these friends, a 14 year-old girl, became intoxicated, the defendant isolated her in his bedroom and sexually

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218 Id, (elaborating on the interpretation of the amended military provision).

219 See, generally, Patricia J. Falk, Rape by Fraud and Rape by Coercion, 64 Brook. L. Rev. 39 at 106(discussing criminalization of rape by coercion and providing examples of various jurisdictions that criminalize sexual abuse of power when the victims are minors).

220 See, e.g. Ohio Rev. Code Ann. section 2907.03 (Ohio provides an example for a jurisdiction which adopted similar criminal provisions that criminalize the sexual abuse of power of minors whenever professional and institutional relations between these minors and powerful adults result in submission to unwanted sexual demands.)

221 See, e.g., M.C.L.A. 750.520 b (chapter 750 Michigan Penal Code defines criminal sexual conduct in the first degree as: ..."engages in sexual penetration with another person and if any of the following circumstances exists: ...(b) the other person is at least 13 but less than 16 years of age and any of the following: (iii) the actor is in a position of authority over the victim and used this authority to coerce the victim to submit. (iv) the actor is a teacher, substitute teacher, or administrator of the public school, nonpublic school, school district, or intermediate school district in which the other person is enrolled).

penetrated her after she passed out. The Michigan court of appeals held that coercion extends beyond physical violence, can be implied, legal or constructive, and is to be determined in light of all circumstances. The court construed the prohibition to incorporate two separate elements: the prosecution needs to establish evidence that the defendant was in a position of authority and second, evidence that the defendant exploited his position to coerce the victim to submit. The Court held that there was sufficient evidence to establish both elements: The defendant had placed himself in a position of authority to influence and dominate the victim, coercing her to submit by abusing this authority, and the victim was constrained by subjugation to do what her free will would refuse. A similar construction, based on the abuse of power and authority framework, was adopted in other Michigan cases.

As these cases reveal, when minors are involved, the definitions of power and authority are expanded above and beyond the official power to enforce obedience, as the defendants do not possess such legal power. Michigan courts acknowledge that this conduct justifies criminal sanctions; they accomplish this goal by broadly defining authority to encompass additional forms of exercising power to influence and dominate vulnerable victims by affecting and controlling their decisions, resulting in submission. Most jurisdictions, however, refuse to adopt this approach and criminalize additional forms of coercive pressures stemming from professional and institutional relationships, where the victims are competent adults, particularly in the workplace and in an academic setting.

b. Sexual Abuse of Power in the Mental Therapy Context

The abuse of power model also plays a crucial role in considering sexual relationships between mental therapists and their patients. Several jurisdictions have adopted prohibitions that criminalize cases in which therapists such as psychiatrists and psychologists abuse their power, trust and influence to obtain sex from their patients.

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223 See, Buyssee, 2008 WL 2596341 at 5 (holding that a defendant’s conduct constitutes coercion where, as here, the defendant abuses his position of authority to constrain a vulnerable victim by subjugation to submit to sexual contact).

224 Id

225 See e.g., Premo, 213 Mich. App. 406, 540 N.W. 2d 715 (holding that a teacher abused his power and authority over a student to sexually assault her), Reid, 233 Mich. App. at 468-473 (the accused placed himself in a position of acting as a therapist by offering to counsel the complainant about his problems, Regts 219 Mich. App. 294 (involving a psychiatrist who sexually abused his patient’s trust and dependence)
In *Commonwealth v. Starr*, the defendant, who had been the victim’s psychiatrist for at least three years, was charged with several counts of rape and aggravated indecent assault. The victim, a 23-year-old woman, testified that the defendant was someone she had trusted, that he knew she was lonely, depressed and vulnerable, and that he had taken advantage of her despite knowing about her previous sexual abuses. She also testified that she was scared of the defendant’s actions, and that she submitted for fear he would have her committed or her 3 month-old child taken away from her.

The *Starr* case cites the Pennsylvania Supreme Court’s landmark decision in *Commonwealth v. Rhodes*, which held that the term “forcible compulsion” encompassed the act of using superior force -- moral, psychological or intellectual-- to compel a person to do a thing against that person’s volition. In applying the *Rhodes* factors, the *Starr* court took into account several circumstances to infer that the victim’s duress resulted in her submission. These include: the victim’s mental condition (she was depressed and vulnerable while she found the defendant to be forceful and demanding), the atmosphere and physical setting (alone in her apartment with a 3 month-old child, having nowhere to go for help, the defendant was in a position of authority and dominion over the victim as her treating psychiatrist and because of her belief that he had the authority to commit her and to remove her 3 month old child from her by reason of his position as her treating psychiatrist.

The *Starr* court further held that the case is distinguished from *Berkowitz* where there was no evidence of any psychological coercion; the victim and the defendant were both college students, and their relationship was not one of trust or confidence that would have led the victim to reasonably believe the defendant had power over her. There was no evidence to suggest that the victim had any reason to be fearful of the defendant. Moreover, the victim in *Starr* was a competent adult; she was neither placed under the formal authority of her therapist nor an incompetent person, despite her emotional problems. The *Starr* decision thus further demonstrates that courts sometimes acknowledge that the sexual abuse of professional position, power and trust to obtain sex indeed justifies criminalization.


227 See, Commonwealth v. Rhodes, 510 A. 2d 1217, 1226 (Pa., 1986)
CONCLUSION

In the past decades, rape law reform has accomplished several changes in addressing certain forms of sexual abuse by taking important steps in the direction of expanding the legal and social perceptions concerning the types of conduct that amount to sex offenses. Without minimizing or trivializing these achievements, this Article has tried to demonstrate that rape law reform is still far from complete, as many forms of sexual abuse remain beyond the scope of criminal regulation. The Article has suggested that what accounts for the lack of progress rests on the fact that rape law reform has taken the wrong turn: the turn to consent. The Article’s goal was two-fold: to demonstrate the empirical failure of consent-based models to accomplish instrumental change both in law and prevailing social norms, and to point out the normative inadequacy of the lack of consent construct for criminalizing various forms of abuse.

In response to the drawbacks in current rape law which focuses on the notion of lack of consent to sex as the essence of the offense, the Article has advanced an alternative framework of rape discourse, one which better aligns with the actual experiences of victims, better captures the harm inflicted on them, and better accounts for the wrongdoing embodied in the perpetrator’s culpable conduct. The Article has argued that rather than theorizing the crux of rape as nonconsensual sex and conceptualizing sexual abuse of power as non-violent misconduct, rape law should be redefined as an act of abuse of power, dominance and control. This alternative understanding of the wrongdoing in rape concedes that these abuses amount to yet another form of sexual violence.

An important implication of shifting the focus away from consent is that the proposed sexual abuse of power model would acknowledge various forms of exploitation of power that currently remain beyond the scope of criminal sanctions-- abuses of power in the workplace and in the academy among them—as justifying criminal regulation. Generally, the majority of sexual abuses of power that stem from professional and institutional relationships are currently not treated as criminal conduct simply because the law persistently views them as consensual – albeit often unwelcome or unwanted--sexual relations. Viewing rape as an act of abuse of power, dominance and control focuses on targeting a culpable perpetrator’s conduct, thereby remedying its harms through the lens of criminal law, which could lead to instrumental legal and social change.