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The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power

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

*Michal Buchhandler-Raphael**

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This Article is dedicated to the memory of Stieg Larsson whose Millennium trilogy inspired this Article more than any legal doctrine.

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INTRODUCTION

Samuel B. Kent was a United States District Judge in the Southern District of Texas.¹ Cathy McBroom served as a Deputy Clerk assigned to Kent's courtroom. McBroom claimed that Kent started sexually abusing her in 2003, one year after she began working for him. According to her testimony, Kent would grab her and touch her groin, breasts, inner thighs, and buttocks, 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. . . ."² The Judicial Council accepted the recommendations. At that point, the Department of Justice independently began investigating the complaint

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1. See *Indictment of Samuel B. Kent, United States v. Samuel B. Kent*, U.S. Dist. Ct. S. Dist. of TX Houston Division (2007) (Criminal No. 08-596) (The indictment is on file with the author). See also H.R. Res. 520, 111th Cong. (2009); Department of Justice, Press Release, *U.S. District Court Judge Charged in Superseding Indictment with Aggravated Sexual Abuse and Abusive Sexual Contact* (Jan. 6, 2009), <http://www.justice.gov/opa/pr/2009/January/09-crm-009.html>.
 2. See Brenda Sapino Jeffreys, *Former Judge Samuel B. Kent Sentenced to 33 Months in Prison*, TEXAS LAWYER (May 11, 2009), <http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202430610099&csreturn=1&chbxlogin=1>.

and obtained a grand jury indictment against Kent for three sexual abuse charges in violation of federal law related to McBroom's allegations.³ The indictment included two counts of abusive sexual contact⁴ and one count of attempted aggravated sexual abuse.⁵ Kent pleaded not guilty to these charges. But 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.⁶ 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.⁷ Kent was sentenced to thirty-three months in prison.

This indictment elucidates an inherent connection between sexual abuse and rape which necessitates an examination of the contentious question: What *is* rape? What are the harms and risks of the criminal prohibition on rape, and the values that this criminal prohibition 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 or 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.⁸

3. See *supra* note 1.

4. See 18 U.S.C. § 2244(b)(2010).

5. See 18 U.S.C. § 2241(a)(1)(2010).

6. See 18 U.S.C. § 1512 (2010); Jeffreys, *supra* note 2.

7. *To Consider Possible Impeachment of United States District Judge Samuel B. Kent of the Southern District of Texas: Hearing Before the Task Force on Judicial Impeachment of the H. Comm. On the Judiciary*, 111th Cong. (2009).

8. See, e.g., STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INDIMIDATION AND THE FAILURE OF THE LAW 17–82 (1998); Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46

Under common law, rape was defined as intercourse accomplished through the use of force and against a woman's will.⁹ Today, American jurisdictions vary in their legislative schemes: some define the offense by focusing on the nonconsensual sex element, while others focus on the force element.¹⁰ Adopting the liberal premise that consent is the touchstone of the criminal regulation of sexuality,¹¹ most scholars today agree that the essential characteristic of rape is nonconsensual sex rather than an act of physical violence.¹² Thus, scholars rely on the notion of consent to sex as the predicate for rape law reform.¹³ Many scholars believe that the key to successful reforms lies with adopting an affirmative consent standard.¹⁴ 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.¹⁵

A sharply different picture, however, emerges in practice when examining the criminal prohibition on rape in the majority of jurisdictions: most jurisdictions today refuse to criminalize sex without consent when the force element is lacking.¹⁶ 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.¹⁷ 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

CLEV. ST. L. REV. 409 (1998); David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317 (2000).

9. See generally 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 17.1(a) 605–06 (2d ed. 2003) (common law definition of rape).
10. See generally Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1617 (2009) (positing that rape laws today are not monolithic and different jurisdictions adopt various statutory schemes).
11. See also Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 626–29 (1989). See generally Christine A. Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1045 (1987) (positing three theories to explain and resist women's inequality).
12. See, e.g., SCHULHOFER, *supra* note 8 at 171–73, 268–72 (advocating the adoption of an affirmative consent standard in rape laws).
13. See, e.g., PETER WESTEN, *THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT* (2004).
14. See SCHULHOFER, *supra* note 8.
15. See, e.g., ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 29–36 (2003).
16. See, e.g., CAL. PENAL CODE § 261 (Deering 2011); GA. CODE ANN. § 16-6-1 (2011); MASS. ANN. LAWS ch. 265 § 22 (LexisNexis 2010); N.C. GEN. STAT. § 14-27.2 (2010); VA. CODE ANN. § 18.2-61 (2011) (defining the sexual offense based on the force and nonconsent elements).
17. See LAFAVE, *supra* note 9.

requires both elements of force and nonconsensual sex.¹⁸ What accounts for this gap between theory and practice and why hasn't the law moved in the anticipated direction?

This Article argues that while rape law reform has accomplished significant changes in the past decades, the reform has since stalled. The contemporary focus on the element of consent might account for this stagnation. This move has both failed to effect instrumental change in the courts as well as in social norms, and is 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.¹⁹ 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.

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 or her power, authority, dominance, and influence to compel an employee's or student's submission to unwanted sex.²⁰ In these cases, 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 this 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 the current legal treatment of sexual abuses of power is problematic, as this type of indictment is seldom brought. The

18. See *infra* Part I.A. (describing most jurisdictions' refusal to criminalize nonconsensual sex).

19. See generally Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 627–28 (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).

20. See generally Michal Buchhandler-Raphael, *Sexual Abuse of Power*, 21 U. FLA. J.L. & PUB. POL'Y 77, 79 (2010) (explaining 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.)

Kent case is a rare example in which criminal charges were brought against a supervisor—a federal judge—for abusing his power in order to obtain his subordinates' submission to unwanted sexual demands. This type of abuse generally remains beyond the scope of criminal regulation.

Instead, courts and scholars typically treat these abuses 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 1964.²¹ Evaluating the limits of the sexual harassment framework requires that we revisit these abuses by challenging the legal boundary between civil sexual harassment and criminal sex offenses. 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 because it is unable to account for sexual acts that are criminal in nature?

Many scholars consider sexual harassment suits successful, but the media often exaggerates these alleged accomplishments.²² An examination of whether the anti-discriminatory framework captures the harms inflicted on victims calls into question the actual extent of this achievement. In fact, the problem of sexual abuses of power in professional and institutional settings is far from being cured because the current framework fails to provide a suitable remedy to address these abuses. The law's failure to accurately define the harms and wrongdoings of sexual abuses in these settings negates the actual experiences of victims.

Sexual harassment law cannot comprehensively account for 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 the premise of sexual harassment law that unwelcome intercourse, as well as gender-based comments, merely constitute different forms of sexual harassment. Instead, this 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,

21. See generally Michal Buchhandler-Raphael, *Criminalizing Coerced Submission in the Workplace and in the Academy*, 19 COLUM. J. GENDER & L. 409, 456–72 (2010) (describing the current legal treatment of coerced sex in the workplace and academy).

22. See generally Deborah Zalesne, *Sexual Harassment Law: Has It Gone Too Far, or Has the Media?*, 8 TEMP. POL. & CIV. RTS. L. REV. 351 (1999) (discussing the backlash against sexual harassment suits and, in particular, the media's responses to these suits. Some suggest that they have gone too far, stifling any opportunity for welcome sex between people of unequal power).

academia, and other professional and institutional settings ought to be viewed as crimes, namely, as one form of rape.²³

Turning to criminal law, however, poses further hurdles, as current definitions of sex offenses also prove inadequate.²⁴ 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.²⁵ 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 lack of consent element also is not established; typically the employee gives the superior permission to engage in sex with him or her in order to avoid harmful repercussions if he or she declines the sexual demands.

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, academia, and other professional and institutional settings 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?).²⁶

Given the theoretical questions concerning rape law reform in general and their application to sexual abuse of power in the workplace, what should the agenda for future rape law reform be? 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. In light of the drawbacks of the notion of consent, it

23. See generally Buchhandler-Raphael, *supra* note 20 (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).

24. See, e.g., MD. CODE ANN., CRIM. LAW § 3-303 (West 2010), N.Y. PENAL LAW §§ 130.05, 130.35 (Consol. 2010), VA. CODE ANN. §18.2-61 (2010).

25. See LAFAYE, *supra* note 9.

26. See, e.g., Indictment of Samuel B. Kent, Count Three: Abusive Sexual Contact, United States v. Samuel B. Kent, U.S. Dist. Ct. S. Dist. of TX Houston Division (2007) (Criminal Case No. 08-596) (“[E]ngaging in sexual contact with another person without that person’s permission . . . with intent to abuse, humiliate, harass, degrade and arouse and gratify the sexual desire of person A.”).

is imperative to consider alternative steps. While this Article supports rape law reform efforts, it contends that the reform ought to explore new directions. To accomplish this, it first evaluates the reasons behind the empirical failure of consent 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, but also to capture the wrongdoing embodied in rape.²⁷ Defining the offense as sex without consent also 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. It proposes that rape be defined as an act of abuse of power and as an 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.²⁸ 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 fundamentally change. This change can be accomplished by adopting a conceptual overhaul that captures the offense based on an abuse of power construct, articulating which conduct amounts to exploitation.

This Article proceeds as follows: Part I argues that the turn to consent has empirically failed to result in instrumental change in rape law as courts apply it. It does so by demonstrating that consent 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 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: the perpetrator's abuse of power.

27. See *infra*, Part II.B. (describing the reasons for the normative inadequacy of Consent-Based Models).

28. See, e.g., 18 PA. CONS. STAT. § 3121 (2007)(expanding force to include moral, psychological, and intellectual force).

I. THE EMPIRICAL FAILURE OF CONSENT

Susan 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; the latter is typically treated leniently by the criminal justice system.²⁹ Revisiting rape law twenty-four years later demonstrates that this sharp divide still exists today. While "real-stranger" rapes—the paradigmatic rape narrative of a stranger forcing himself on a chaste victim in a dark alley—are treated very seriously by the criminal justice system, acquaintance rapes are still under-reported, under-enforced, and under-punished.³⁰ In sharp contrast, these "acquaintance rapes" constitute the majority of sexual abuses in our society.³¹ Sexual abuse of power in professional and institutional settings—particularly in the workplace and in an academic setting—is one example of this problem.³²

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.³³ 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 relationship existed between the complainant and the defendant (such as dating or professional relations), the expressed consent to sex—or at least, the defendant's belief that she had consented—was reasonable.³⁴ The following sections revisit the centrality of the concept of

29. SUSAN ESTRICH, *REAL RAPE* 10–15 (1987) (positing that acquaintance rapes are underreported and underenforced).

30. See generally Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 591 (2009) (discussing the legal treatment of stranger rape and the legal system's disparate treatment of non-paradigmatic rape).

31. See generally Anderson, *supra* note 19, at 627 (comparing and contrasting the classic rape narrative with a typical acquaintance rape).

32. See generally SCHULHOFER, *supra* note 8, at 168 ("Any supervisor who offers to exchange job benefits for sex commits a form of extortion that should be considered a clear-cut criminal offense."), and at 280 ("Just as nonviolent threats to take property amount to criminal extortion, nonviolent coercion to induce consent to unwanted intercourse should constitute a serious criminal offense.").

33. See generally CATHARINE MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* 81–93, 112, 146, 174 (1989) (positing that what is perceived as "consent" is often the result of coercive forces ranging from threats of future violence to social or economic pressures).

34. See, e.g., *State v. Smith*, 554 A.2d 714 (Conn. 1989) (noting that defendant's mistaken, but reasonable belief that the complainant consented to engage in sex with him is

consent by questioning whether it has proved successful in accomplishing reform in rape law along with fostering social change by affecting prevailing norms.

A. The Refusal to Criminalize Nonconsensual Sex as Rape

Rape law reform's turn to consent has empirically failed. To date, most jurisdictions refuse to criminalize nonconsensual sex as rape, insisting that to convict a perpetrator of rape the prosecution needs to establish the defendant's use of force or threat of force, in addition to proving the complainant's lack of consent.³⁵

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 beyond its physical aspect.³⁶ Today, however, the focal point of reformers has clearly shifted in favor of statutory schemes that adopt consent models.³⁷

Under contemporary criminal law, consent to sexual relationships is the touchstone of the criminal regulation of sexuality.³⁸ *Lawrence v. Texas* established that consensual sex precludes harm to others.³⁹ After this decision, only nonconsensual sex can justify criminal regulation. The current trend, placing heavy emphasis on identifying when and where consent to sex is absent, aligns with the liberal view regarding the signif-

recognized in most jurisdictions as a mistake of fact defense, the most common defense in acquaintance rapes).

35. See, e.g., CAL. PENAL CODE § 261 (Deering 2011); GA. CODE ANN. § 16-6-1 (2011); MD. CODE ANN., CRIM. LAW § 3-303 (West 2010), MASS. ANN. LAWS ch. 265 § 22 (LexisNexis 2010); N.Y. PENAL LAW §§ 130.05, 130.35 (Consol. 2010); N.C. GEN. STAT. § 14-27.2 (2010); VA. CODE ANN. § 18.2-61 (2011) (setting out both force and absence of consent by the victim as elements of the crime).
36. See generally LAFAYE, *supra* note 9 (describing attempts to expand the definition of force to incorporate other forms of coercion).
37. See generally SCHULHOFER, *supra* note 8, at 82–98 (criticizing reforms that focus on expanding the definition of force and contending that they have practically failed).
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, 958 (2008) (“The substantive law is now phasing out the force requirement, with the objective of imposing criminal liability in those cases, typically acquaintance-rape cases, where the victim did not consent but the accused did not inflict or threaten serious bodily injury extrinsic to the sex act.”).
39. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (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”).

icance of an individual's right to exercise his or her sexual agency.⁴⁰ It holds that since sexual autonomy can be undermined in ways that 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.⁴¹

Many scholars today concede that the offense of rape ought to be defined as nonconsensual sex, and that the use of force ought not to be an element of the offense.⁴² Despite the conceptual view that nonconsensual sex is the essence of rape, in practice a different picture emerges. 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 still has not changed.⁴³ In forty-three states and the District of Columbia, in order to prove rape, the prosecution must establish two elements: the defendant's use of force against the complainant and the complainant's lack of consent to sex.⁴⁴ In thirty-six of those states, the criminal prohibition explicitly requires both force and non-consent as elements of the offense.⁴⁵ In the remaining eight states, the offense of rape is defined as intercourse without consent, but their statutes further elaborate that such terms mean compelled by the use of force.⁴⁶

40. See generally ROBIN WEST, *Sex, Law, and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 3–4 (Alan Wertheimer & William Miller eds., forthcoming), <http://ssrn.com/abstract=1172162> (articulating the libertarian position under which regulating consensual sex is unwarranted because it violates the right to individual autonomy).
41. SCHULHOFER, *supra* note 8, at 274–82 (arguing that the right to sexual autonomy is the missing entitlement that rape law reform must acknowledge).
42. See, e.g., ESTRICH, *supra* note 29, at 103 (“The threshold of liability . . . should be understood to include at least those nontraditional rapes where the woman *says* no”); see also SCHULHOFER, *supra* note 8, at 254 (“Intercourse without consent should always be considered a serious offense.”).
43. See generally LAFAYE, *supra* note 9, at § 17.3(a) (describing criminal prohibitions that resemble the usual common law definition of rape).
44. See generally Anderson, *supra* note 19, at 631–32.
45. See, e.g., CAL. PENAL CODE § 261 (Deering 2011); GA. CODE ANN. § 16-6-1 (2011); MD. CODE ANN., CRIM. LAW § 3-303 (West 2010), MASS. ANN. LAWS ch. 265 § 22 (LexisNexis 2010); N.Y. PENAL LAW §§ 130.05, 130.35 (Consol. 2011); N.C. GEN. STAT. § 14-27.2 (2010); VA. CODE ANN. § 18.2-61 (2011) (setting out as elements of the crime both force and absence of consent by the victim).
46. See, e.g., ARIZ. REV. STAT. § 13-1401(5)(a) (LexisNexis 2011) (“Without consent includes . . . [t]he victim is coerced by the immediate use or threatened use of force”); DEL. CODE ANN. tit. 11 § 761(j)(1) (2010) (“Without consent means: The defendant compelled the victim to submit by any act of coercion . . . or by force.”); TEX. PENAL CODE ANN. § 22.011(b)(1) (2010) (defining sexual assault as “without the consent of the other person if: the actor compels the other person to submit or participate by the use of physical force or violence”).

Only a minority of jurisdictions—sixteen states—currently criminalize nonconsensual sex without the additional requirement of forceful compulsion.⁴⁷ However, even in these jurisdictions, nonconsensual sex does not always amount to actual rape—the state’s highest non-aggravated form of sexual offense.⁴⁸ Only in six states does nonconsensual sex constitute rape.⁴⁹ The remaining states have amended their statutes to create a differentiated scheme for sex offenses: the offense of rape is reserved only for forceful and violent nonconsensual sexual acts while nonconsensual sex is criminalized as a lesser sexual offense, often merely a misdemeanor.⁵⁰ Perhaps the most unsettling aspect of these empirical findings is that the majority of jurisdictions have currently failed to criminalize nonconsensual sex at all.⁵¹

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 nonconsensual sex without the additional force requirement. Currently, there is no consensus among scholars and

47. See generally Anderson, *supra* note 19, at 631–32 (“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.”).

48. See, e.g., CONN. GEN. STAT. §§ 53a-70, 53a-73a (2010) (distinguishing between a sexual assault in the first degree, which is a class B or A felony, and sexual assault in the fourth degree, requiring only non-consent, which is a class A misdemeanor or class D felony, “if the victim of the offense is under sixteen years of age . . .”). See also N.Y. PENAL LAW §§ 130.20, 130.35 (Consol. 2011) (distinguishing between rape, which is a first degree felony, and “sexual misconduct,” requiring only nonconsensual sex, which is merely a misdemeanor).

49. See, e.g., IOWA CODE § 709.1 (2010) (stating that the elements “by force” and “against the will” are alternative rather than cumulative requirements); see also COLO. REV. STAT. § 18-3-402 (2010) (defining the offense as nonconsensual intercourse).

50. See, e.g., OR. REV. STAT. §§ 163.375, 163.415 (2009) (proscribing rape in the first degree, which is a class A felony, and proscribing sexual abuse in the third degree, requiring only nonconsensual contact which is a misdemeanor); see also D.C. CODE §§ 22-3002, 22-3006 (LexisNexis 2011) (proscribing first degree sexual abuse a Class A felony, and a lesser offense of sexual abuse, requiring only a lack of permission, a misdemeanor).

51. See generally Stephen Schulhofer, *Rape in the Twilight Zone: When Sex is Unwanted but not Illegal*, 38 SUFFOLK U.L. REV. 415, 420 (2005) (positing that in most states the force requirement means that it is not necessarily illegal to have sex without consent).

legislatures about the legal standard to determine consent to sex.⁵² Even if all jurisdictions were to adopt consent models and abolish the force requirement, many forms of sexual abuse would still remain outside the scope of potential criminal regulation, as the affirmative consent standard has not taken hold in most jurisdictions.⁵³

While many scholars agree that the crux of rape is nonconsensual sex,⁵⁴ there is no consensus on the definition of consent. Indeed, consent in general, and consent to sexual relations in particular, is too murky to provide a clear legal standard.⁵⁵ 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.⁵⁶ 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.⁵⁷ This requires examining 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.⁵⁸ Resistance, however, is still often read into

52. See generally *id.* at 420–21 (explaining that American jurisdictions do not universally accept the “no means no” standard, arguing that we are still a long way from winning the battle for that standard).

53. *Id.* at 421 (“States adopting an affirmative-permission requirement remain in a small minority.”); see also Gruber, *supra* note 30, at 636 (“Today, affirmative consent appears less popular than ever, as both men and women reject the notion of a linguistic prerequisite to sex.”).

54. See, e.g., Michelle Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1404 (2005) (“[L]egal scholars have asserted that the crux of the crime of rape is sex without consent.”).

55. See generally Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO ST. J. OF CRIM. L. 333, 340–41 (2004) (contending that while we all employ claims of consent in everyday language, and courts commonly predicate legal rights and responsibilities on findings of consent or its absence, we do not share, either individually or institutionally, a common concept of consent).

56. See Schulhofer, *supra* note 51, at 420 (contending that there are major difficulties with the concept of consent and that the law often does not make clear what counts as consent).

57. See, e.g., WERTHEIMER, *supra* note 15, at 165–67 (contending that explicit and implicit threats should be criminalized due to their coerciveness).

58. See generally Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 987–89 (2008) (discussing the change in the requirement of “resistance to the utmost,” suggesting that most states no longer require physical resistance).

rape statutes as part of the elements of either force or non-consent.⁵⁹ Courts continue to consider lack of resistance as highly probative to the question of whether the complainant consented to sex.⁶⁰ 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”).⁶¹

Susan Estrich advocates the verbal refusal standard as the legal standard for lack of consent.⁶² 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.⁶³ Indeed, a complainant is often unable to verbally express refusal, a common response that psychologists refer to as “frozen fright.”⁶⁴ To address the drawbacks of 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

59. See generally Bryden, *supra* note 8, at 357 (contending, while discussing the resistance requirement, that “since force usually is still an element of the crime, the change seems to be mostly, if not entirely, semantic” and that most jurisdictions in effect require “reasonable resistance”).

60. See, e.g., *People v. Nelson*, 499 N.E.2d 1055, 1061 (Ill. App. Ct. 1986) (holding that while its not required that the victims physically resist to secure a rape conviction, “the lack of resistance by one able to resist conveys the impression of consent”).

61. See generally Anderson, *supra* note 54, at 1409–14 (comparing and contrasting the “no model” with the “yes model”).

62. See also Lynn Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 168 (1992) (arguing that verbal refusal to sexual relations suffices to objectively express lack of consent). See generally ESTRICH, *supra* note 29 (arguing that a complainant’s explicit verbal refusal should suffice to meet rape elements).

63. See generally SCHULHOFER, *supra* note 8, at 74 (arguing that the verbal refusal standard would not fill the gaps in existing rape laws).

64. See, e.g., *People v. Barnes*, 42 Cal. 3d 284, 299 (1986) (pointing out that recently 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. As psychologists note, while the complainant may smile, even initiate acts, and may appear relaxed and calm, 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).

legitimacy of the contact.⁶⁵ The justification behind this standard is that placing the burden of obtaining affirmative permission, prior to sexually proceeding, on the person who initiates sex would reduce the risk of engaging in nonconsensual sex.⁶⁶ 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.⁶⁷

Conventional wisdom suggests that developing a standard under which any sexual relation must be preceded by a non-equivalent affirmation would not only result in a significant change in rape law but also would establish the boundaries of permissible sex.⁶⁸ Ultimately, this would lead to acknowledging that acquaintance rape is a serious crime to be redressed by criminal law.⁶⁹ Modern scholars support the prevailing view that nothing but an affirmative expression of assent is legally sufficient to render sexual relationships legitimate.⁷⁰ However, a different picture emerges when the standard is applied in court decisions.⁷¹

C. In re M.T.S.: *The Swing of the Pendulum*

In New Jersey, affirmative consent has become the touchstone of criminal regulation of sex offenses.⁷² As defined under New Jersey law, all forms of sexual assault include acts of sexual penetration using physical force or coercion.⁷³ New Jersey law eliminated any reference to the

65. See SCHULHOFER, *supra* note 8, at 271 (“[C]lear 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.”).

66. See *id.* at 271 (“[T]he person who wants to have intercourse must be sure he has a clear indication of the other person’s consent.”).

67. See generally Lani Anne Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1129 (1992) (arguing that one must obtain either verbal or nonverbal consent prior to sexual intercourse).

68. See generally SCHULHOFER, *supra* note 8, at 272–73 (“The legal standard must move away from the demand for unambiguous evidence of [the victim’s] protests and insist instead that the man have affirmative indication that she *chose* to participate.” Schulhofer further contends that “[w]ith this change of focus, criminal law should no longer have trouble reaching many of the clear-cut abuses that slip through the gaps in existing law.”).

69. See SCHULHOFER, *supra* note 8, at 280 (“Any person who engages in intercourse, knowing that he does not have unambiguous permission from his partner, commits a serious sexual abuse, and he should be held guilty of a serious criminal offense.”).

70. See generally SCHULHOFER, *supra* note 8, at 271 (asserting that only clearly communicated permission should count as consent).

71. See *infra*, Part II.A.5 (discussing the implications of the *Baby* decision).

72. See *In re M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992) (articulating the affirmative permission standard to determine consent to sexual relationships).

73. See N.J. STAT. ANN. § 2C:14–2 (West 2004) (defining the offense of sexual assault).

complainant's consent by focusing exclusively on the forcible character of the perpetrator's conduct.⁷⁴ In the landmark case, *In re M.T.S.*, however, the New Jersey Supreme Court re-reads consent back into the statutory provision 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 to the act of sexual penetration."⁷⁵

This decision reveals a surprising disconnect between the court's 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.⁷⁶ 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.⁷⁷ 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.⁷⁸ The second part of the decision, however, moves from defining the offense in terms of force and violence towards re-defining it in terms of sex without permission.⁷⁹ This is a surprising move since New Jersey law does not mention consent in its definition of the offense.⁸⁰ The court, however, chooses to re-define the sex offense by not only bringing

74. See N.J. STAT. ANN. § 2C:13-5 (West 2010) (New Jersey law defines "sexual assault" not only when the actor uses physical force but also when he uses "coercion." This term is defined 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).

75. See *In re M.T.S.*, 609 A.2d at 1277.

76. *In re M.T.S.*, 609 A.2d at 1275 ("Since the 1978 reform, the Code has referred to the crime that was once known as 'rape' as 'sexual assault.'").

77. *In re M.T.S.*, 609 A.2d at 1276 (N.J. 1992) (holding that "in reforming the rape laws, the Legislature placed primary emphasis on the assaultive nature of the crime, altering its constituent elements so that they focus exclusively on the forceful or assaultive conduct of the defendant").

78. *In re M.T.S.*, 609 A.2d at 1276 ("The alleged victim is not put on trial, and his or her responsive or defensive behavior is rendered immaterial.").

79. *In re M.T.S.*, 609 A.2d at 1277 (holding "that any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault").

80. See N.J. STAT. ANN. § 2C:14-2 (defining sexual assault as: "commit[ing] an act of sexual penetration . . . under any one of the following circumstances: (6) the actor uses physical force or coercion").

consent back, but also by making it the core component of the wrongful conduct.⁸¹

The *MTS* decision, therefore, demonstrates the full swing of the pendulum. Given the elaborate description of the amendment's purposes, the amendment to New Jersey law was theoretically aimed at breaking away from consent models by targeting sexual violence that amounts to forceful compulsion.⁸² 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.⁸³ 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 that takes into account the complainant's wishes and right to sexual autonomy.⁸⁴ However, he is wary that the standard was wrongly construed in *MTS*, as its application might be too broad due to its failure to provide guidelines to determine when consent is freely given.⁸⁵ Schullhofer posits that "the requirement of freely given consent [if broadly construed] would create criminal liability whenever [submission to sex] was influenced by emotional demands or social pressure."⁸⁶ He concludes that the standard

81. See *In re M.T.S.*, 609 A.2d at 1276–77 ("Under the reformed statute, permission to engage in sexual penetration must be affirmative and it must be given freely, but that permission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances.").

82. *In re M.T.S.*, 609 A.2d at 1276 ("The understanding of sexual assault as a criminal battery, albeit one with especially serious consequences, follows necessarily from the Legislature's decision to eliminate non-consent and resistance from the substantive definition of the offense.").

83. 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").

84. See SCHULHOFER, *supra* note 8, at 96 ("[T]he New Jersey approach offers several clear benefits for rape reform policy . . . [I]t makes clear that a man who engages in sexual intercourse, knowing he does not have the permission of a woman, has indeed committed a crime.").

85. SCHULHOFER, *supra* note 8, at 97 ("Unfortunately, the New Jersey Supreme Court provided no standard to determine *when* consent is 'freely given.'").

86. SCHULHOFER, *supra* note 8, at 97 ("If broadly read, the requirement of freely given consent would create criminal liability whenever a woman's acquiescence was influenced by emotional demands or social pressure.").

as applied in *MTS* fails to guide decision-makers in drawing the line between legitimate and criminal pressures.⁸⁷

Katharine Baker also favors an affirmative consent standard.⁸⁸ Baker's study, which focuses on "non-violent" rape between acquaintances, mainly college students, suggests that while "requiring explicit verbal assent each and every time one engages in sexual activity . . . may go too far given the alarming frequency with which sex occurs on college campuses without a meeting of the minds on the question of consent . . . forcing people to focus on what consent means is not only appropriate, but essential."⁸⁹

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.⁹⁰ Rejecting the continued reliance on the problematic notion of consent, Michelle 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.⁹¹

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.⁹² 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 of sexual assault

87. See SCHULHOFER, *supra* note 8, at 96–97 (criticizing *MTS*'s application of the affirmative consent standard).

88. See generally Katharine Baker, *Sex, Rape and Shame*, 79 B.U.L. REV. 663, 689 (1999) ("To find assent, contract doctrine looks to words. So should rape law.")

89. *Id.* at 688. The 1993 Antioch College Sexual Offense Policy established a code of students' conduct. Among other things, it required that "the request for consent must be specific to each act." The College closed in 2008 and its policy is no longer online. Requiring unequivocal verbal permission before every stage of sexual relations engendered many furious criticisms and much ridicule. See also Gruber, *supra* note 30, at 635–36 and accompanying citations.

90. See Anderson, *supra* note 54, at 1414–21.

91. See Anderson, *supra* note 54, at 1421.

92. See, e.g., Dripps, *supra* note 38 (noting that in those jurisdictions which recognize the mistaken consent defense, liability for rape is based on a negligence standard).

rather than conscious wrongdoing.⁹³ These critics further contend that popular opinion deems requiring a “yes” before intercourse inappropriate and unfair.⁹⁴

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.⁹⁵ 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—have legislatively adopted this standard.⁹⁶ Although these jurisdictions define consent as requiring either words or overt conduct that indicates affirmative permission, they remain in the minority.⁹⁷ Moreover, in most jurisdictions today, rape laws still require overt verbal resistance in order to prove that the sex was nonconsensual.⁹⁸ 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.

93. Dripps, *supra* note 38, at 962–63.

94. See Gruber, *supra* note 30, at 635.

95. Gruber, *supra* note 30, at 585 (“Affirmative consent is nearly universally rejected by judges and legislatures, and the concept of requiring a ‘yes’ before sex continues to engender public disdain.”).

96. See, e.g., WIS. STAT. ANN. § 940.225 (West 2009) (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, 478 (Wis. Ct. 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 still required to prove the victim did not by either words or overt actions freely agree to have sexual contact or intercourse with the defendant.” The court in *State v. Lederer*, 299 N.W.2d 457, 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 *State v. Camara*, 781 P.2d 483, 486–87 (Wash. 1989), Washington courts typically instruct the jury that the burden rests with the defendant to prove that the sexual intercourse was consensual. See also *State v. Gregory*, 147 P.3d 1201, 1258 (Wash. 2006) (requiring proof of consent by a preponderance of the evidence).

97. See Klein, *supra* note 58, at 1007 (stating that the affirmative permission standard has been adopted only in New Jersey, Wisconsin and Washington states).

98. See generally LAFAYE, *supra* note 9, at § 17.4 (discussing the verbal resistance requirement).

In New York, for example, even the complainant's clear verbal refusal does not necessarily indicate non-consent.⁹⁹ 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."¹⁰⁰ 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.¹⁰¹ Only a few jurisdictions reject this defense by opting for strict liability in place of the mens rea requirement as to the element of consent.¹⁰²

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 coercion is employed to the same effect.¹⁰³ 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.¹⁰⁴ This seemingly broad language supposedly covers threats to inflict harm, such as firing or demotion in the workplace. The wording, "threats to cause substantial harm to someone's career," appears sufficiently expansive to include sexual abuses of power in the workplace, in which unwilling submission was given in order to avoid repercussions.¹⁰⁵

99. See N.Y. PENAL LAW § 130.05(2)(d) (Consol. 2011) (stating that non-consent is established only when the victim clearly expressed it "and a reasonable person in the [defendant's] situation would have understood such person's words and acts as an expression of lack of consent . . .").

100. *Id.*

101. The State of California was the first jurisdiction to adopt the mistake of fact defense in *People v. Mayberry*, 542 P.2d 1337, 1344–47 (Cal. 1975). See also *State v. Smith*, 554 A.2d 713, 717–18 (Conn. 1989); *State v. Oliver*, 627 A.2d 144 (N.J. 1993).

102. See, e.g., *Commonwealth v. Simcock*, 575 N.E.2d 1137 (Mass. App. Ct. 1991) (imposing strict liability with respect to the element of nonconsent).

103. See N.J. STAT. ANN. § 2C:13–5(a) (West 2010).

104. *Id.*

105. See generally LAFAYE, *supra* note 9, at §17.3(d) (positing that courts have barred any extension of the crime of rape to include other varieties of coercion, no matter how severe).

However, none of the jurisdictions that criminalize nonconsensual sex per se acknowledge that submission to unwanted sex, resulting from being threatened or placed in fear of economic or professional harm in the workplace, academia, and other professional and institutional settings warrants criminal regulation.¹⁰⁶ 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.¹⁰⁷

This finding is surprising in light of previous attempts to criminalize threats to inflict non-physical harm without mentioning the victim's consent.¹⁰⁸ Such proposals start as early as the Model Penal Code which provides in § 213.1(2)(a) that a male commits the offense of "Gross Sexual Imposition" if he "has sexual intercourse with a female . . . [and] if he compels her to submit by any threat that would prevent resistance by a woman of an ordinary resolution."¹⁰⁹ 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.¹¹⁰ Though the commentary specifically acknowledges threats to fire an employee as criminal conduct,¹¹¹ this theory has failed to take hold in the majority of the jurisdictions that neither adopted the gross sexual imposition provision nor any other provision that criminalizes these types of threats.¹¹² Coercive pressures to induce submission in the workplace are viewed as a form of civil sexual harassment, rather than as a criminal sex offense.¹¹³

Revising the practical applications of the affirmative permission standard requires considering which types of sexual misconduct still fall

106. See generally Buchhandler-Raphael, *supra* note 21, at 441 (contending that none of the jurisdictions which expanded their rape laws criminalize coerced submission in the workplace).

107. Buchhandler-Raphael, *supra* note 21, at 441. See generally *Rhode Island v. DiPetrillo*, 922 A.2d 124 (R.I. 2007) (refusing to expand the coercion rationale to the workplace setting).

108. MODEL PENAL CODE § 213.1(2)(a) (2009).

109. *Id.*

110. *Id.* at § 213.1(2) cmt. at 301–14 (Proposed Official Draft 1962) ("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."

111. *Id.* at § 213.1(2) cmt. at 312 (referring to threats to cause a woman to lose her job).

112. See Buchhandler-Raphael, *supra* note 21, at 441.

113. See generally SCHULHOFER, *supra* note 8 (discussing civil liability for sexual harassment in the workplace).

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, academia, and other professional and institutional settings.¹¹⁴ 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.¹¹⁵ Courts and scholars draw a sharp divide between *nonconsensual* sex, which might justify criminalization, and *unwelcome* sex, which might amount to civil sexual harassment.¹¹⁶ Given this dichotomy, the turn to criminal law proves unhelpful, as consensual, albeit unwelcome, sex in the workplace is not considered criminal wrongdoing.¹¹⁷ 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.

Today, nearly eighteen years after the affirmative permission standard was first applied in *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 and indicative of radical reform in the law of rape, turned out to be much less influential, as it failed to take hold in practice.¹¹⁸ 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.

114. *See, e.g.*, Rhode Island v. DiPetrillo, 922 A.2d 124 (R.I. 2007) (prosecuting an employer for sexually abusing his employee).

115. *See generally* SCHULHOFER, *supra* note 8, at 112 (“Consent can be tainted by constraints that are inherent in relationships between teachers and students, between job supervisors and their subordinates, and between prison guards and inmates. Respect for autonomy normally obliges us not to interfere with voluntary choices and not to criminalize consenting relationships between competent adults.”).

116. *See generally* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (The doctrinal basis for Chief Justice Rehnquist’s holding in the landmark sexual harassment decision 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).

117. *See* Buchhandler-Raphael, *supra* note 21.

118. *See* Gruber, *supra* note 30, at 634–35.

In addition to failing to take hold legally, the *MTS* standard has 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 crime¹¹⁹ and shaping a new culture that values the individual's sexual agency as well as respect in sexual relationships,¹²⁰ these hopes remain utopian. Acknowledging this failure, Aya Gruber concludes, "[t]oday, affirmative consent appears less popular than ever, as both men and women reject the notion of a linguistic prerequisite to sex."¹²¹ Katharine Baker is wary of this alarming finding, cautioning that "[t]he popular rejection of verbal communication in the sexual context not only perpetuates the alarming level of miscommunication, it robs the less physically powerful of the one tool at their disposal—language."¹²²

D. Affirmative Consent in Comparative Law: Canada

One source of authority supporting the assertion that the affirmative permission standard is unable to provide the basis for criminalizing many forms of sexual abuses of power is Canadian law. Canadian law has taken an important legislative step by fully adopting an affirmative consent standard.¹²³ Under Canadian sexual assault law, nonconsensual sex is the touchstone of the criminal offense.¹²⁴ The basic premise of Canadian law is that the offense of rape is essentially an act of violence, an assault of a sexual nature.¹²⁵ Consequently, the offense of sexual assault

119. See generally ESTRICH, *supra* note 29.

120. See, e.g., Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J.L. & GENDER 447, 454 (2005) (suggesting that rape reform sends a clear message that sex must be voluntarily given).

121. Gruber, *supra* note 30, at 636.

122. Baker, *supra* note 88, at 689.

123. See Criminal Codes, R.S.C. 1985, c. C-46, s. 273.1(1) (defining "consent" as: "the voluntary agreement of the complainant to engage in the sexual activity in question"). For application of the legislative affirmative consent standard, see the judicial decision in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (Can.).

124. See generally Janine Benedet and Isabel Grant, *Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief*, 52 MCGILL L.J. 243, 261 (2007) (stating that to convict an accused of sexual assault, the prosecution needs to "prove a sexual touching, the absence of consent on the part of the complainant, or an incapacity to give consent, . . . and that the accused knew or was reckless with respect to whether the complainant was not giving consent").

125. See Criminal Code, R.S.C. 1985, c. C-46, s. 265 (Can.) (Section 265(1) provides that "a person commits an assault when: (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly." Section

provides that: "A person commits an assault when without the consent of another person, he applies force intentionally to that other person, directly or indirectly."¹²⁶ While the definition of sexual assault incorporates the force element, the notion of force itself is broadly construed. By interpreting the force element to include any intentional touching, Canadian law in fact abandoned the traditional English common law requirement of establishing severe physical force; under the Canadian Criminal Code, any contact of a sexual nature suffices to meet this definition.¹²⁷ The *actus reus* of sexual assault is thus "established by the proof of three elements: touching, the sexual nature of the contact, and the absence of consent."¹²⁸

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."¹²⁹ The Code 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."¹³⁰ The Code also limits the defendant's ability to rely on mistaken belief in consent by stating that "[i]t 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 (i) self-induced intoxication, or (ii) recklessness or wilful blindness; or (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting."¹³¹

In 1999, the Canadian Supreme Court explicitly adopted the affirmative consent standard in the landmark *R v. Ewanchuk* decision.¹³² In *Ewanchuk*, the complainant was a seventeen-year-old woman who

265(2) provides that: "this section applies to all forms of assault, including sexual assault").

126. See Criminal Code, R.S.C. 1985, c. C-46, s. 265(1)(a) (Can.).

127. See Renu Mandhane, *Efficiency or Autonomy? Economic and Feminist Legal Theory in the Context of Sexual Assault*, 59 U. TORONTO FAC. L. REV. 173, 181-84 (2001) (discussing the legislative history of the sexual assault prohibition, stressing the fact that the *actus reus* of the offense consists of "intentional touching of a sexual nature without valid consent").

128. See *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, para. 25 (Can.) (holding that "the *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent").

129. See Criminal Code, R.S.C. 1985, c. C-46, s. 273.1(1) (Can.).

130. See Criminal Code, R.S.C. 1985, c. C-46, s. 273.1(2)(c) (Can.).

131. See Criminal Code, R.S.C. 1985, c. C-46, s. 273.2 (Can.).

132. *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (Can.).

met the accused man, Ewanchuk, in a mall's parking lot.¹³³ She testified that the accused told her that he was looking for staff for his wood-working business; the complainant showed interest and gave him her phone number.¹³⁴ The next day the accused interviewed the complainant for the job in his van.¹³⁵ At some point, the accused 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.¹³⁶ When the accused proceeded to fondle the complainant's breast, she verbally resisted by saying "[n]o."¹³⁷ The accused then moved to non-sexual massaging in response to which the complainant also said "no."¹³⁸ Eventually, the accused began massaging the complainant's inner thighs and pelvic area, rubbing his pelvic area against hers.¹³⁹ The complainant testified that she did not want the accused to touch her in this manner but, out of fear, she did not say anything.¹⁴⁰ Eventually the accused took out his penis and the complainant asked him to stop; soon after she left the trailer.¹⁴¹

The trial judge acquitted the defendant based on the defense of implied consent.¹⁴² The trial court held that objectively the complainant's conduct raised a reasonable doubt regarding her lack of consent.¹⁴³ The Court of Appeal upheld the acquittal on the basis that there had been an honest but mistaken belief in consent.¹⁴⁴ The Supreme Court of Canada reversed the decision and found the defendant guilty of sexual assault.¹⁴⁵

The decision brings the element of consent to the forefront both with respect to the *actus reus* and the *mens rea* requirements of the offense of sexual assault. Regarding the *actus reus* requirement of sexual assault, the Canadian Supreme Court held that the presence or absence of consent is a purely subjective inquiry.¹⁴⁶ The Court further concluded

133. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 2.

134. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 2.

135. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 3.

136. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 4.

137. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 5.

138. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 6.

139. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 7.

140. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 7.

141. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 9–11.

142. *Ewanchuk*, [1999] 1 S.C.R. 330, at part II(A).

143. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 15–17.

144. *R. v. Ewanchuk* (1998), 212 A.R. 81 (Can. Alta. C.A.).

145. *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, para. 67 (remanding the case to the trial judge for sentencing).

146. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 26–27 (concluding that the absence of consent is determined by reference to the complainant's subjective, internal state of mind towards the touching at the time that it occurred).

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*.¹⁴⁷ The Court also held that the defendant could not suggest that there was implied consent to negate the mens rea of the offense.¹⁴⁸ 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."¹⁴⁹ The court further stated that "a belief by the accused that the complainant, in her own mind, wanted him to touch her but did not express her desire, is not a defense."¹⁵⁰ 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."¹⁵¹ Moreover, with respect to the mens rea, the Court held that the defendant cannot enjoy the defense of mistaken consent in circumstances where he abused his position of trust or authority to obtain acquiescence.¹⁵²

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 touching by repeatedly saying "no" every time the defendant touched her.¹⁵³ 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.¹⁵⁴ The utterance of the word "no" suggests that the defendant cannot enjoy the defense of mistaken belief in consent.¹⁵⁵

147. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 36 (explaining that the Criminal Code enumerates conditions under which the law will deem an absence of consent including when the complainant's ostensible consent or participation was induced by reason of "force, fear, threats, fraud or the exercise of authority").

148. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 31 ("The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts but sexual assault is not one of them. There is no defence of implied consent to sexual assault in Canadian law.").

149. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 46.

150. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 46.

151. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 51.

152. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 50 ("Not all beliefs upon which an accused might rely will exculpate him. Consent in relation to the mens rea of the accused is limited by both the common law and the provisions of ss. 273.1(2) and 273.2 of the *Code*, which provide that: [n]o consent is obtained . . . where the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority . . .").

153. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 58.

154. *Ewanchuk*, [1999] 1 S.C.R. 330, at para. 65.

155. *See Ewanchuk*, [1999] 1 S.C.R. 330, at para. 58.

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 with respect to criminal regulation of sexual misconduct and therefore consent must sometimes be supplemented with an additional requirement such as voluntariness.¹⁵⁶ In 2004, the Ontario Court of Appeal incorporated the notion of voluntariness into the definition of consent in *R. v. Stender*.¹⁵⁷ In *Stender*, the defendant had been in a romantic relationship with the complainant that ended prior to the sexual assault in question.¹⁵⁸ Without her knowledge, the defendant had taken pictures of the complainant engaging in sexual activity with him.¹⁵⁹ 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.¹⁶⁰ The trial court acquitted the defendant on the grounds that the nature of the threat was not meant to be criminalized.¹⁶¹ The Ontario Court of Appeal found the defendant guilty on the grounds that consent requires an informed choice and that no such choice exists if the complainant does not have the option to participate.¹⁶²

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 he or 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 choice seems promising. In particular, the criminal code's explicit provision stating that "[n]o consent is

156. See generally Benedet and Grant, *supra* note 124, at 282–83 (positing that the *Stender* court held that there was no voluntary consent at the beginning of the sexual encounter).

157. R. v. D.G.S. (2004), 72 O.R. 3d 223 (Can. Ont. C.A.), *aff'd sub nom.*, R. v. Stender, [2005] 1 S.C.R. 914 (Can.).

158. R. v. Stender (2004), 72 O.R. 3d 223, para. 1 (Can. Ont. C.A.).

159. *Stender*, 72 O.R. 3d 223, at para. 12.

160. *Stender*, 72 O.R. 3d 223, at para. 1.

161. R. v. Stender, 2003 CarswellOnt. 2044, para. 56 (Ont. Sup. Ct. J.) (WL) ("I am not convinced beyond a reasonable doubt that Parliament intended to criminalize this situation.").

162. *Stender*, 72 O.R. 3d 223.

obtained . . . where the accused induces the complainant to engage in the activity by abusing a position of trust, power, or authority” also seems to encompass abuses of disparities within the professional and institutional settings that are used to induce submission to unwanted sex.¹⁶³ Indeed, these abuses are seemingly the paradigmatic examples for circumstances in which exploitation of a person in a subordinate position results in submission. Surprisingly, despite such explicit wording, this promising potential has not materialized in practice.

Canadian case law reveals that, like American jurisdictions, applying the affirmative consent standard has not resulted in the expansion of the offense of sexual assault to cover sexual abuses of power in professional and institutional settings, particularly in the workplace and academia. 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.¹⁶⁴ 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 that 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 academia, as well as similar abuses in private relationships.¹⁶⁵ 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 academia. Furthermore, although Canadian law acknowledges that submission to unwanted sex due to the belief in a lack of alternative choices taints consent as involuntary, in the context of sexual relations in a private setting, the case law does not offer an example of similar legal treatment where lack of alternative choices is demonstrated in a professional setting.

163. Criminal Code, R.S.C. 1985, c. C-46, s. 273.1(2) (Can.).

164. See Benedet and Grant, *supra* note 124, at 284 (positing that s. 273.1(2) of the Criminal Code was rarely discussed in the cases that the authors have sampled, “despite the fact that many of the cases involved an accused who was in a position of power or trust”).

165. *Stender*, 72 O.R. 3d 223.

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 models are unable to provide a comprehensive solution to the problems identified above.

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 models to accomplish substantial reform in rape law. This stagnation also requires examining what accounts for the normative inadequacy of the affirmative permission standard to cover sexual abuses in the workplace, academia, and additional professional and institutional settings by failing to recognize 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; many individuals still believe that when the force element is lacking, no “real rape” has occurred.¹⁶⁶ In practice, the old distinction between “stranger violent rape” and “acquaintance rape” is still intact today.¹⁶⁷ Societal perceptions tend to adhere to the view that when a previous relationship existed between the complainant and the defendant, and the complainant did not actively resist the sexual acts, the fact that they were not genuinely

166. See generally Baker, *supra* note 88, at 680–81 (“Date rapists do not see forced sex as really all that wrong. Indeed, despite what the law explicitly says, they do not define it as rape.”).

167. See generally Gruber, *supra* note 30, at 596–97 and accompanying citations (comparing and contrasting the legal treatment of paradigmatic and non-paradigmatic rapes).

consensual does not, in itself, justify criminalizing the conduct as rape.¹⁶⁸ While most jurisdictions have legally abolished the resistance requirement, the common societal perception is that the complainant's resistance and the perpetrator's use of physical force or the threat of using violence 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.¹⁶⁹ 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 majority of the communities adopted the belief that the crux of the rape is nonconsensual sex, a more controversial hurdle concerning the legal construction of the phrase "consent to sex" remains. The main explanation for the empirical failure of consent lies in the 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 model fail to align with prevailing societal perceptions.¹⁷⁰

2. 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.¹⁷¹ 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.¹⁷² Kahan's project uses an 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.¹⁷³ Kahan's

168. See generally Baker, *supra* note 88, at 679 ("In declaring date rape wrong, the criminal law has encountered the common, if intractable, problem of trying to proscribe behavior that society has yet to condemn as wrongful.")

169. See Dripps, *supra* note 38, at 971.

170. See Dripps, *supra* note 38, at 971.

171. See generally Dripps, *supra* note 38, at 971 (discussing the gap between scholarly elite opinions and prevailing social perceptions about the ways to express consent).

172. See generally Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why*, in *Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729 (2010).

173. *Id.* at 753-924 (describing the experimental study in which individuals were asked to voice their opinion on an acquaintance rape scenario).

study uses the infamous *Commonwealth v. Berkowitz* case to demonstrate his hypotheses.¹⁷⁴ In *Berkowitz*, the complainant unequivocally expressed verbal resistance to sex with the defendant.¹⁷⁵ However, the defendant was acquitted 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.¹⁷⁶ 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.¹⁷⁷ The study reveals that potential jurors, particularly hierarchical women, still tend to view verbal refusal as ambivalent.¹⁷⁸ 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.¹⁷⁹

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.¹⁸⁰ In our criminal justice system, jurors make decisions about culpability based on social norms 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.¹⁸¹

174. *Id.* at 765–67 (describing the sixteen-paragraph vignette that the subjects in the study were given).

175. *Commonwealth v. Berkowitz*, 609 A.2d 1338 (Pa. Super. Ct. 1992) (per curiam), *aff'd in part, rev'd in part*, 641 A.2d 1161 (Pa. 1994)[hereinafter *Berkowitz*].

176. *Berkowitz*, 641 A.2d at 1165.

177. See Kahan, *supra* note 172, at 756–60.

178. Kahan, *supra* note 172, at 733 (contending that the study found that individuals who adhere to traditional gender norms "are highly likely to believe that 'no' did not mean 'no' in *Berkowitz*").

179. Kahan, *supra* note 172, at 756–60.

180. Kahan, *supra* note 172, at 733.

181. See generally Andrew E. Taslitz, *Forgetting Freud: The Courts' Fear of the Subconscious in Date Rape (and Other) Cases*, 16 B.U. PUB. INT. L.J. 145, 155, 185–86 (2007) ("Even the most well-meaning, 'feminist' jurors may find that they have a reasonable doubt about the . . . rape case . . . if the tale told fits the cultural stories about 'sluttish women.'").

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 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 Kahan's 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 failed. Effectively allowing community views and prevailing social norms 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.

3. Prosecutorial Discretion and Social Norms

The problem of sexual abuses of power in the workplace and academia goes beyond the lack of statutory provisions that criminalize these abuses and the ongoing debate over which legal standard ought to be adopted to determine when consent is expressed. The problem goes further to implicate issues pertaining to prosecutorial policy choices about the scope of enforcement of sexual misconducts.¹⁸² While many scholars

182. N.J. STAT. ANN. § 2c:13-5 (West, 2010) (defining coercion to include: inflicting bodily harm, accusing someone of a crime, exposing a secret, or "perform any other act which would not in itself substantially benefit the actor but which is calculated to substantially harm another person with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships"). New Jersey law theoretically enables prosecuting threats to inflict 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. *See* 18 PA. CONS. STAT. ANN. § 3101 (West 2010)(defining "forcible compulsion" to include compulsion by "intellectual, moral, emotional or psychlogical force" used to compel a victim to engage in sexual intercourse). This expanded construction, however, is successfully used mainly to prosecute sexual abuses concerning minors or incompe-

argue against over-enforcement of criminal laws, when it comes to sexual abuses of power, particularly in professional and institutional settings such as the workplace and academia, the problem clearly becomes one of under-enforcement.¹⁸³ Prosecutors are reluctant to pursue criminal charges in cases that are viewed as highly contested, controversial, and ambiguous.¹⁸⁴ 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 of the prosecutors.

4. Criminal Law's Role in Changing Social Norms

The relationships between law and social change are complex. One highly contested aspect lies in the debate over 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.¹⁸⁵ Moreover, a growing body of literature challenges the value of legal tools in producing social change, suggesting that the law provides a mechanism that is deeply limited in successfully fostering social change.¹⁸⁶

Effecting 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

tent victims such as in *Pennsylvania v. Smolko*, 666 A.2d 672 (1995). In *Smolko*, the victim was handicapped and unable to talk and was 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.

183. See, e.g., Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1744-47 (2005) (surveying literature critical of over-enforcement policies).

184. See generally SCHULHOFER, *supra* note 8, at 97 (stating that prosecutors believe that current standards make it difficult to prosecute cases that fall outside the traditional rape categories).

185. See generally Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 964 (1996) (discussing the general role of norms in effectuating social change and addressing the expressive function of law that is designed to influence behavior).

186. See generally Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (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).

communities believe to be criminal conduct.¹⁸⁷ Dan Kahan argues that given the reality of “sticky norms,” criminal law should “gently nudge” rather than “shove through” new norms.¹⁸⁸ Criminal prohibitions, posits Kahan, should only be slightly more progressive than prevailing social norms; radical legislative reforms that stray too far from the status quo are bound to fail and may even result in strengthening the old problematic norms.¹⁸⁹ 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.¹⁹⁰ David Bryden also favors using relatively minor lesser-included sexual offenses in cases where the law seeks to change social attitudes, suggesting that lighter penalties would increase the probability that juries would convict.¹⁹¹

Paul Robinson, a leading criminal law scholar who writes extensively on the criminalization debate, offers an important contrasting view.¹⁹² Robinson argues that serious moral condemnation ought to be a prerequisite for criminalization and that, generally, “the moral condemnation relied upon ought to be that reflected in community views, not moral philosophy.”¹⁹³ However, Robinson contends that there can be legitimate reasons for deviating from community views.¹⁹⁴ Robinson further uses rape law reform as an example of a situation in which deviating from existing societal norms is justified, in order to bring about important changes in societal norms.¹⁹⁵ For example, Robinson suggests “adopting a culpability requirement as to lack of consent,” such as a recklessness or negligence requirement, which “would avoid the perceived injustices likely to result from a strict liability standard.”¹⁹⁶ This shift would focus

187. See, e.g., Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000) (articulating the sticky norms problem, namely that, when social norms are prevalent, law enforcement is reluctant to enforce a law that intends to change such norms).

188. *Id.* at 608 (“[N]orms stick when lawmakers try to change them with ‘hard shoves’ but yield when lawmakers apply ‘gentle nudges.’”).

189. *Id.* at 609.

190. See Dripps, *supra* note 38, at 1804–05.

191. Bryden, *supra* note 8, at 426; see also David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1288 (1997).

192. See generally Paul H. Robinson, *Criminalization Tensions: Empirical Desert, Changing Norms & Rape Reform* (forthcoming 2009), <http://ssrn.com/abstract=1584779>.

193. *Id.* at 6; see also Paul H. Robinson, *Empirical Desert*, in CRIMINAL LAW CONVERSATIONS 29–39 (Paul H. Robinson, Steve P. Garvey & Kimberly Kessler Ferzan eds., 2009).

194. Robinson, *supra* note 192, at 4.

195. Robinson, *supra* note 192, at 4.

196. Robinson, *supra* note 192, at 5.

on the issue of “what the society should reasonably expect with regard to assuring full and free consent.”¹⁹⁷ Robinson further contends that “[f]or rape reformers, the approach may suggest focusing public discussion and education on the impropriety of coercive pressures for sex—building the analogy between psychological coercion and physical coercion—and on the harmful effects of intercourse without consent—building the analogy to assault”.¹⁹⁸

Criminal law can and should play a more active role in changing social norms concerning sexual misconduct. Criminal law should go beyond merely reflecting social changes that have already occurred. In the context of rape law reform, 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. Furthermore, criminal law has a potential to change common norms concerning sexual misconduct and shape societal values by amending existing laws and legal standards that fail to cover harmful sexual abuses.¹⁹⁹

Any attempt to use criminal law to change prevailing norms is controversial.²⁰⁰ 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, the implications of the above debate in a hypothetical racist, sexist, and chauvinistic community; should the criminal justice system simply reflect these prevailing norms and refrain from changing them? Sexual harassment law also provides a lens through which we see law effectuating social change. Over the last thirty years, sexual harassment has evolved from a social phenomenon into an established cause of action.²⁰¹ Sexist comments, gender-based remarks, and unwanted sexual advances that were once perceived as “business as usual” have since been banned in the workplace. The widespread success of sexual harassment suits in our justice system demonstrates that shifts in social norms achieved through the use

197. Robinson, *supra* note 192, at 5.

198. Robinson, *supra* note 192, at 7.

199. See generally ESTRICH, *supra* note 29, at 104 (advocating rape reforms that would announce to society that certain actions should not be done).

200. See generally Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 508 (2003) (“[W]e repeatedly find that the question of how law ought to respond to cultural conflict is deeply dependent upon the specific nature, content and history of proposed legal interventions, as well as their likely consequences.”).

201. See generally Katherine M. Franke, *What’s Wrong With Sexual Harassment?* 49 STAN. L. REV. 691 (1997) (arguing that sexual harassment is a tool for perpetuating, policing, and enforcing gender hierarchies).

of law might contribute to reducing gender inequality.²⁰² The success of sexual harassment law thus casts doubt on the common belief that laws cannot change existing norms and promote social change.

5. Interpreting Consent as Permission

The murky and highly-contested notion of consent to sex does not provide an agreed upon workable legal standard.²⁰³ The main practical problem with the concept of consent lies with the fact that courts currently construe it as permission.²⁰⁴ In the context of rape law, however, equating consent with permission-giving or technical authorization of the sexual act fails to account for the prerequisite that consent to sex ought to be an expression of willingness. The criminal justice system fails to capture the fact that verbal permission to engage in sex is often merely apparent.²⁰⁵ In many cases, verbal permission is obtained through exerting a variety of coercive pressures and through an abuse of power, authority, trust, and dominance.²⁰⁶

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.²⁰⁷ After driving to a secluded area, the perpetrators both attempted to have sex with the complainant, ignoring her verbal demand to stop.²⁰⁸ After being told she would not be able to leave until she had

202. See generally LAURA REESE & KAREN LINDENBERG, IMPLEMENTING SEXUAL HARASSMENT POLICY: CHALLENGES FOR THE PUBLIC SECTOR WORKPLACE 43–46 (1998) (noting that there is a societal consensus that certain conduct qualifies as harassment).

203. See generally Wertheimer, *supra* note 15, at 30–36 (examining different models of consent and their effect on the criminal justice system).

204. See *In Re M.T.S.*, 129 A.2d 1266, 1277 (N.J. 1992) (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. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (rejecting the idea that constitutionally valid consensual searches require a waiver of Fourth Amendment rights). Waivers of constitutional rights must be knowing, intelligent and voluntary. *Id.* at 235–42. Because consensual searches are justified on policy grounds, rather than on grounds of waiver, the Court required that consensual searches merely be voluntary. This holding equates voluntariness with consent on the grounds that “the community has a real interest in encouraging consent.” *Id.* at 243.

205. See Buchhandler-Raphael, *supra* note 20, at 104.

206. See Buchhandler-Raphael, *supra* note 20, at 105–06.

207. *State v. Baby*, 946 A.2d 463, 466–68 (Md. 2008).

208. See *Baby*, 946 A.2d at 467.

sex with them, she verbally gave permission to Baby, the defendant.²⁰⁹ The jury accepted Baby's account that he received initial consent to sex.²¹⁰ However, the jury concluded that, as intercourse proceeded, the complainant withdrew her consent by demanding that the defendant stop; he ignored her demand and was therefore convicted of rape.²¹¹

Despite the ultimate conviction, construing the initial permission, which was given under clearly coercive circumstances, as indicative of 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 he or 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.²¹²

The result is that, under consent 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, academia, and other professional and institutional settings are the most prominent examples in which obtaining passive submission to unwanted sexual demands is not recognized as warranting criminal sanctions.²¹³ Instead, these sexual relations are typically viewed as consensual sex. Conflating consent with permission thus accounts for the practical failure of consent 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 models, this Article will now examine the normative inadequacy of the nonconsensual sex framework

209. See *Baby*, 946 A.2d at 467.

210. See *Baby*, 946 A.2d at 472.

211. See *Baby*, 946 A.2d at 472.

212. See *Baby*, 946 A.2d at 467–70 (complainant's testimony demonstrates that she felt that she had no other choice but to submit to the sexual demands).

213. See generally SCHULHOFER, *supra* note 8, at 281 ("Criminal sanctions are . . . out of place in most consensual sexual relationships between supervisors and subordinates or between teachers and students . . .").

to demarcate criminal rape from legitimate sex. This analysis aims to explain why the current framework has not only failed to take hold in practice but also is 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 that the offense inflicts on its victims, when the harmful conduct itself justifies criminalization.

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,"²¹⁴ it was judicially endorsed in relation to sexual activity in the landmark *Lawrence v. Texas* decision.²¹⁵ *Lawrence* made clear that any criminal regulation of sexual misconduct ought to rest on the premise that the sexual acts in question are harmful.²¹⁶ A proposal to criminalize additional forms of sexual abuses, beyond those already recognized as criminal conduct, depends on the adoption of the premise that all forms of unwanted sex constitute harmful conduct.²¹⁷

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*²¹⁸ and *People v. Onofre*.²¹⁹

Lawrence stands for the proposition that harm to others is the key justification for criminalizing sexual conduct.²²⁰ The *Lawrence* court

214. See RICHARD J. BONNIE, ANNE M. COUGHLIN, JOHN CALVIN JEFFRIES, JR., PETER W. LOW, *CRIMINAL LAW* 47 (2d ed. 2004) (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 O. Brink, *Mill's Moral and Political Philosophy*, in *STAN. ENCYCLOPEDIA PHIL.* (Oct. 9, 2007), <http://plato.stanford.edu/entries/mill-moral-political/>.

215. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that consenting adults, "engaged in sexual practices common to a homosexual lifestyle," are protected in engaging in those practices by the Due Process Clause).

216. See *Lawrence*, 539 U.S. at 578 (holding that harm to others is the core predicate for criminal regulation of sexual acts between consenting adults in private settings).

217. See ROBIN WEST, *CARING FOR JUSTICE* 100–78 (1997) (discussing the various harms stemming from unwanted and unwelcome sexual relations); see also Wertheimer, *supra* note 15, at 89–118 (discussing the harms sustained by victims of unwanted sex in general, and rape victims in particular).

218. See *Lawrence*, 539 U.S. at 558.

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

220. See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality and Marriage*, 55 *SUP. CT. REV.* 27, 29–30 (2003) (discussing various readings of the *Lawrence* decision).

makes clear that the defendant did not engage in any form of harmful behavior, by holding that: "The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused . . . The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle."²²¹

In both *Lawrence* and *Onofre*, the courts examined the constitutionality of states' criminal prohibitions against sodomy, ultimately striking them down.²²² From a libertarian perspective, these decisions are generally viewed as victories to same-sex couples as they ostensibly promote same-sex couples' rights to engage in consensual sex.²²³ But upon closer examination, a less optimistic picture emerges, casting doubts on the true nature of the sexual acts in the *Onofre* case and on the successes of the decision.

The underlying circumstances in *Onofre*²²⁴ stand in sharp contrast to the facts in *Lawrence*. First, while *Lawrence* involved two adults who engaged in harmless sex, *Onofre* involved sex between an adult and an underaged seventeen-year-old boy.²²⁵ Moreover, unlike in *Lawrence*, in *Onofre* there was clearly demonstrated harmful conduct, including physical harm.²²⁶ Lastly, in contrast to *Lawrence* where the accused were caught in the midst of the sexual act, the victim in *Onofre* reported the event to the police in an attempt to keep the defendant from similarly injuring other victims.²²⁷ 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."²²⁸

Even though *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.²²⁹ But was it? By accepting this assumption, the court failed

221. See *Onofre*, 415 N.E.2d at 943; *Lawrence*, 539 U.S. at 578.

222. See *Onofre*, 415 N.E.2d at 943; *Lawrence*, 539 U.S. at 578.

223. See generally Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1399-1400 (2004) (describing the reactions to the *Lawrence* decision).

224. See *Onofre*, 415 N.E.2d at 936.

225. See *Onofre*, 415 N.E.2d at 937.

226. See generally Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1638-42 & nn.109-29 (2003).

227. *Id.* at 1638.

228. *Id.* at 1638.

229. See *Onofre*, 415 N.E.2d at 941 (stating that "there has been no showing of any threat, either to the participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomouos conduct").

to consider the underlying circumstances that characterized the sexual relations between the parties. In particular, the *Onofre* court did not address the sexual abuse of power that was demonstrated in this case.²³⁰ 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, the different social positions, and the victim’s emotional vulnerability²³¹—and by doing so, failed to acknowledge that apparent “consent” resulted from abuse of power, rather than from genuine willingness.²³²

The *Onofre* court’s focus on the defendant’s right to exercise his sexual autonomy failed to consider at whose expense the autonomy was exercised, and at what cost. The sexual abuse in this case inflicted serious injuries on the victim and violated the victim’s own right to exercise sexual autonomy and avoid harmful and unwanted sex. This interpretation casts doubt on whether the *Onofre* court struck the proper balance between these two conflicting rights. The decision reveals an unsettling failure of the court to protect a subordinate person’s right to avoid sexual abuses of power. It further demonstrates that viewing sexual acts within 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.

2. Failure to Capture Criminal Wrongdoing

Conceptualizing rape as nonconsensual sex fails to capture the wrongdoing embodied in the perpetrator’s conduct, because nonconsensual sex does not exhaust the field of particular wrongs that justify 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.

Many contemporary theorists agree that a criminal theory must incorporate philosophical arguments concerning what conduct constitutes a moral wrong, contending that criminal sanctions should only be used to punish harmful conduct which results from wrongdoings.²³³ Joel Feinberg argues that harm in itself is insufficient to criminalize certain conduct, and that it should be further supplemented with identifying

230. See Spindelman, *supra* note 226, at 1639 (suggesting that the relationship between the parties in *Onofre* were characterized by abuse of power).

231. See, e.g., Spindelman, *supra* note 226, at 1638–40 (describing the underlying circumstances in *Onofre* which indicate abuse of power).

232. Spindelman, *supra* note 226, at 1638–40.

233. See generally 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* (1984).

the perpetrator's wrongful conduct.²³⁴ Feinberg espouses requiring a two-pronged account of what justifies criminalization. The first element, perpetrator-oriented, consists of a wrongful act and a moral and legal determination that the perpetrator's conduct is wrong and that personal guilt and sanctions should be placed on him or her.²³⁵ The second element, victim-oriented, consists of an identification of the setback or violation of the victim's personal interests and of the harms that the perpetrator's wrongful conduct inflicts on the victims.²³⁶

Similar to other criminal prohibitions, the prohibition on rape must precisely identify a wrongdoing in the perpetrator's conduct in order to place personal liability on him or her and justify the criminal label with its social stigma of a "sex offender."²³⁷ 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.²³⁸ The conceptual underpinning of the offense of rape ought to incorporate this feature, by clearly targeting the unequivocal wrongdoing, namely, identifying the type of conduct that indeed justifies criminal regulation.

Conceptualizing rape as nonconsensual sex, however, fails to accomplish this goal, as it is unable to capture the precise wrongdoing embodied in the perpetrator's conduct. The source of the problem lies in 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

234. *Id.*

235. See FEINBERG, *supra* note 233, at 34–35, 187–90, 215–16.

236. See also DOUGLAS HUSAK, *PHILOSOPHY OF CRIMINAL LAW* 224–44 (1987) (providing another illustration of 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); HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* 414–15 (1979) ("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.").

237. See Baker, *supra* note 88, at 679–81 (noting that "date rapists" view themselves as "technical criminals," rejecting their own "moral culpability").

238. See generally Anderson, *supra* note 19, at 636–39 (citing divergent scholarly definitions of rape and its harms).

permission construct does not convey the unequivocal message that rape is indeed a serious sex offense as it does not identify the harmful wrongdoings. 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.²³⁹ In eight of the sixteen states that criminalize nonconsensual sex, the offense is reduced to a mere misdemeanor.²⁴⁰ 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.²⁴¹ Victor Tadros argues that “[t]he definition of criminal offenses ought also appropriately to describe the conduct of the defendants who are 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 wrongful.”²⁴² 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.”²⁴³

According to Katherine Baker, “the problems with securing date rape convictions stem from cultural ambivalence about how wrong date rape is, cultural confusion about what it is, and contextual and constitutional barriers that make it very difficult to prove whether date rape happened.”²⁴⁴ Baker further contends that “in declaring date rape wrong, the criminal law has encountered the common, if intractable, problem of trying to proscribe behavior that society has yet to condemn as wrongful.”²⁴⁵ Baker posits that in the context of date rape, people believe

239. See Anderson, *supra* note 19, at 631–32.

240. Anderson, *supra* note 19, at 631–32.

241. See Anderson, *supra* note 54, at 1409 (rejecting rape laws’ focus on the notion of consent which implies a passive response and submission to the will of another).

242. Victor Tadros, *Rape Without Consent*, 26 OXFORD J. LEGAL STUD. 515, 524 (2006).

243. *Id.* at 519.

244. Baker, *supra* note 88, at 679.

245. Baker, *supra* note 88, at 679.

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."²⁴⁶ Baker thus contends that a criminal proscription on nonconsensual sex cannot accomplish a meaningful change in societal perceptions.²⁴⁷ As Baker stated, "[t]o alter the belief that nonconsensual sex is a substitute for consensual sex, we need to move beyond a sense that nonconsensual sex is wrong and toward a recognition that it is truly the "other."²⁴⁸

This type of critique, however, remains underdeveloped, as many legal scholars continue to adhere to the view that the essence of the offense of rape is nonconsensual sex.²⁴⁹ An alternative theoretical construct of what is the wrongdoing in rape has not taken hold yet, which explains why no substantive changes in the law of rape have occurred in recent years.²⁵⁰ This leads to the conclusion that a criminal offense ought to be defined through negative terms, accounting for the perpetrator's criminal wrongdoing.

3. Failure to Account for Complainants' Narratives

An additional problem with consent 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.²⁵¹ 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."²⁵²

246. Baker, *supra* note 88, at 664.

247. Baker, *supra* note 88, at 664.

248. Baker, *supra* note 88, at 664.

249. See generally SCHULHOFER, *supra* note 8, at 280 (contending that criminal sanctions are justified when a person engages in intercourse with another knowing he does not have unambiguous permission from his partner).

250. See generally Anderson, *supra* note 54, at 1437-38 (advocating the adoption of an alternative model).

251. See generally Kimberle Crenshaw, *Whose Story is it, Anyway?: Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER 402, 409 (Toni Morrison ed., 1992) (discussing rape trials and storytelling); ANDREW TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM (1999) (discussing four narratives in rape trials); Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277 (1993).

252. See generally Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 81-82 (1987).

Andrew Taslitz has incorporated storytelling theory as a method for better understanding the dynamics of a rape trial.²⁵³ Under Taslitz's theory, "the story of the case must be told in a way to satisfy a jury's needs for narrative coherence and fidelity."²⁵⁴ Taslitz identifies four rape story narratives: bullying, black beasts, silenced voices, and a little more persuading.²⁵⁵ Under the "silenced voices" narrative, rape victims' voices are neutralized and their stories are lost in the process of the rape trial.²⁵⁶ The result is that the jury does not hear the complainants' nuanced narratives. The "persuasion" narrative equates rape with successful seduction and effectively protects perpetrators' freedom to exercise more pressure even in light of clear verbal resistance.²⁵⁷ It further puts the burden on the complainant to demonstrate that he or she took every action to avoid being raped.²⁵⁸ Anne Coughlin further expands storytelling theory from the substantive criminal law of rape to the criminal investigation context.²⁵⁹ Coughlin's project exemplifies the role that different narratives, including the interrogator's own, play in the criminal interrogation context, particularly in the context of investigating suspects in rape offenses.²⁶⁰

The significance of narratives becomes even more crucial when it comes to sexual abuse of power in the workplace, academia, and other professional and institutional settings. Recall the Kent indictment:²⁶¹ the criminal charges against the judge begged the question of what really happened between the defendant and the complainants. 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 style, of the same event?²⁶² Recall that initially, the defendant's account was that he had a romance with the complainant, which turned sticky.²⁶³ Kent's lawyer's stated, "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."²⁶⁴ In sharp contrast, the complainant's account of the same events was that

253. See TASLITZ, *supra* note 251, at 10–30.

254. TASLITZ, *supra* note 251, at 15.

255. TASLITZ, *supra* note 251, at 19.

256. TASLITZ, *supra* note 251, at 19.

257. TASLITZ, *supra* note 251, at 33–34.

258. TASLITZ, *supra* note 251, at 33–34.

259. See generally Coughlin, *supra* note 10.

260. Coughlin, *supra* note 10.

261. See *supra* notes 1 and 3 and accompanying citations.

262. See generally RASHOMON (Daiei Motion Picture Company 1950).

263. See Juan A. Lozano, *Federal Judge Pleads Guilty Before Start of Trial*, ASSOCIATED PRESS, Feb. 24, 2009, [Source On File With Author].

264. *Id.*

she had reluctantly submitted to her employer's unwanted sexual demands for fear of losing her job.²⁶⁵ In her own words: "Being molested and groped by a drunken giant is not my idea of an affair."²⁶⁶ Kent's secretary, with whom he was alleged to have had an affair, said that Kent "maliciously manipulated and controlled everyone around him."²⁶⁷

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 him or her. Unfortunately, for many complainants, the need to keep their job often proves stronger than exercising their right to avoid unwanted sexual relations.

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, promoting 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 beyond its physical aspects.²⁶⁸ Reformers have thus advocated the acknowledgement of emotional and psychological harm as fundamental injuries that are inflicted on victims.²⁶⁹ But, considering the mental state of victims, this acknowledgment risks portraying them as weak and psychologically

265. See John Council, *Truth and Consequences: Cathy McBroom's Bravery Alters Federal Judicial Disciplinary Procedure*, TEXAS LAWYER, Dec. 21, 2009, <http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202436995946&csIreturn=1&hblogin=1>.

266. Jeffreys, *supra* note 2.

267. Jeffreys, *supra* note 2.

268. See generally Bryden, *supra* note 8, at 320–24 (discussing proposals to redefine the crime of rape).

269. See generally Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 41 (1988) (suggesting that "the fear of sexual and fetal invasion is the fear of being occupied from within, not annihilated from without; of having one's self overcome, not ended"); West, *supra* note 217, at 120–27 (addressing the non-physical invasive harm, which consists among other things the violation of privacy right).

unstable.²⁷⁰ Moreover, reformers have focused on identifying which types of inducements invalidate consent.²⁷¹ However, this ultimately results in weakening, rather than empowering, victims.²⁷² The practical implication of focusing on circumstances that negate consent often leads to adult individuals' choices being viewed with suspicion.²⁷³ Moreover, this position implies competent individuals, who often happen to be women, are unable to make their own sexual choices, similar to incompetent victims such as those with mental disabilities.²⁷⁴

What then should an appropriate balancing between the interest in protecting victims from harm and the interest in 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."²⁷⁵ Anderson 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.²⁷⁶ Rape, contends Anderson, involves a dehumanization not reflected by a mere "lack of sexual choice."²⁷⁷

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.*

270. 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).

271. See generally WERTHEIMER, *supra* note 15, at 165–92 (discussing various forms of conduct which might invalidate consent).

272. See generally Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 199, 1251 (2010) (contending that focusing on the harm and trauma that women suffer has resulted in ultimately weakening them).

273. See generally Kathryn Abrams, *Sex War Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 305 (1995) (discussing the view that treating women as victims runs counter to female agency).

274. 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, 522 ("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.'").

275. Anderson, *supra* note 19, at 640.

276. Anderson, *supra* note 19, at 640.

277. See also Lynn N. Henderson, *What Makes Rape A Crime?* 3 BERKLEY WOMEN'S L.J. 193, 226 (1988) (describing rape as an experience that denies the victim's humanity).

Texas scenario,²⁷⁸ cannot be confused with its role in sexual abuse cases. The scope of protection that 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 when the negative aspect of sexual autonomy is implicated and 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 models to accomplish significant changes both in the criminal justice system and in social norms has 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.²⁷⁹ Dripps further describes a gap between “elite” and “popular” opinions regarding sexual mores and gender roles, which results in different views of consent.²⁸⁰ Dripps proposes that the criminal justice system bypass the jury and make sexual abuse a misdemeanor with a maximum punishment of six months in jail.²⁸¹

In contrast, Aya Gruber, promoting a feminist agenda, contends that feminist reformers should abandon criminal law as a tool to accomplish

278. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

279. See generally Dripps, *supra* note 38.

280. Dripps, *supra* note 38, at 971 (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).

281. Dripps, *supra* note 38, at 976 (“[W]here sex without consent is a separate crime (a lesser-included offense of forcible rape or its statutory equivalent), the legislature should authorize trial by the court in specialized tribunals with no authority to impose more than six months in jail.”).

legal reform.²⁸² Gruber asserts that “[b]y 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.”²⁸³ 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 of the criminal justice system.²⁸⁴

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 rests not only with the criminal justice system itself, but also 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 models and turning towards an alternative conceptual understanding of rape. This Article proposes that we redefine the theoretical framework of rape 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 that attempted to define rape by expanding the notions of force and non-

282. See generally Gruber, *supra* note 30, 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 system that is unable to produce social justice.”).

283. Gruber, *supra* note 30, at 585.

284. Gruber, *supra* note 30, at 585–86 (asserting that feminists should be extremely wary of further entanglement with the penal system); and 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).

physical coercion, without any reference to consent.²⁸⁵ Before developing an alternative framework for the offense of rape, a critical evaluation of the problems associated with previous reforms is necessary. Might the turn to force models offer an alternative solution to the problems associated with consent models?

Arguing that the definition of force is too narrow for successful reform, some scholars propose expanding the definition of force to include additional manifestations of non-physical coercion.²⁸⁶ The purpose behind these reforms was to shift the focus away from consent to whether the perpetrator's actions were effectively coercive. Consent models focused on asking the following key question: what did the complainant do to suggest that he or she consented to the sexual relations with the perpetrator?²⁸⁷ In contrast, coercion models focus on identifying the factors that characterize a perpetrator's abusive conduct. These latter models suggest that, rather than scrutinizing the complainant's behavior and responses, as consent models focus on, 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;²⁸⁸ the second type of reform focused on including the broader notion of non-physical coercion, mainly economic coercion.²⁸⁹ Under jurisdictions that adopted these reforms, rape is defined as forceful compulsion, without any reference to the problematic notion of consent.²⁹⁰

285. See generally SCHULHOFER, *supra* note 8, at 39 (discussing the disappointments of the 1970s rape reforms).

286. See, e.g., CATHARINE A. MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 247 (2005) (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 should prohibit taking advantage of unequal social positions to coerce sex on a person who does not want it).

287. See generally Buchhandler-Raphael, *supra* note 21, at 442-54 (comparing and contrasting consent-based models with coercion-based models).

288. See, e.g., PA CONS. STAT. §3121 (2003); MICH. COM. LAWS ANN. § 750.520b (West 2010).

289. See, e.g., N.J. STAT. ANN. § 2c:13-5 (West 2010); R.I. GEN. LAWS § 11-37-1 (West 2010).

290. See, e.g., MICH. COM. LAWS ANN. § 750.520b (West 2010); PA CONS. STAT. § 3121 (2003); R.I. GEN. LAWS § 11-37-2 (West 2010).

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.²⁹¹ The concept of coercion has never been expanded to incorporate additional forms of intimidation and fears 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.²⁹²

Conceptually, sexual coercion is the inverse 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 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.²⁹³

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.²⁹⁴ 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:

291. See MODEL PENAL CODE § 212.5 (2010); see also N.J. STAT. ANN. § 2c:13-5 (West 2010).

292. See, e.g., N.J. STAT. ANN. § 2c:13-5 (West 2010) (Criminal Coercion includes threats to “inflict bodily harm; accuse anyone of an offense, expose any secret [. . . or] perform any other act which would not in itself substantially benefit the actor but which is calculated to substantially harm another person with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships”).

Despite this broad definition of coercion 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. Rhode Island also adopted a definition that criminalizes coercion. See R.I. GEN. LAWS § 11-37-1 (West 2010), which states: “‘Force or coercion’ means when the accused does any of the following: . . . (iii) Coerces the victim to submit by any threatening to use force or violence on the victim and the victim reasonably believes that the accused has the present ability to execute these threats.”

293. See, e.g., *People v. Khan*, 264 N.W. 2d 360, 366–67 (1978).

294. See generally SCHULHOFER, *supra* note 8, at 97–98.

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.²⁹⁵

Schulhofer further argues that expanding the force definition to include more forms of coercive power negates women's sexual autonomy, and is "neither practically workable nor politically realistic, and thus it is bound to fail" ²⁹⁶

The example used by scholars to demonstrate the failure to recognize additional violations that fall short of physical force is the infamous *Commonwealth v. Berkowitz* case.²⁹⁷ 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.²⁹⁸ 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.²⁹⁹

The common critique of any proposal to expand criminalization is: why should we return to legal terrains that have proved futile?³⁰⁰ 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 because previous reforms have failed to develop the features that characterize the perpetrator's abusive conduct; these features extend beyond the current narrow understanding of the notions of force and coercion. Rather than articulating what conduct amounts to force or coercion, we should focus on identifying circumstances that demonstrate exploitation of power.

295. SCHULHOFER, *supra* note 8, at 97–98.

296. SCHULHOFER, *supra* note 8, at 88.

297. *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994).

298. *Berkowitz*, 641 A.2d at 1165; *see also supra*, Part II.A.2 (discussing the *Berkowitz* case).

299. *See* 18 PA. COST. STAT. ANN. § 3121 (West 2010); *see also Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1986) (discussing the circumstances that meet the definition of force).

300. *See generally* SCHULHOFER, *supra* note 8, at 97–98.

C. Rejecting Both Consent and Force

Acknowledging the fundamental problems associated with consent and force models has led several scholars to criticize the continuing reliance on force and non-consent.³⁰¹ Michelle Anderson argues that not only must rape law abolish the force and resistance requirements, it must also abolish the non-consent requirement.³⁰² 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.³⁰³ This model has some important strengths; it acknowledges that consent models have failed and thus should be replaced with an alternative conceptual model.³⁰⁴ Drawing on such ideas as communication and mutuality as inherent components in any sexual relationship offers a significant step towards acknowledging that sexual relations must incorporate an agreement and a willingness on the part of both parties to engage in sex.³⁰⁵

The Negotiation Model, however, does not offer a thorough reform in the conceptual framework of sex offenses. Rather than viewing the sex offense as nonconsensual 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. The phrase "failure to negotiate" is unable to capture what rape *is* because it fails to provide 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.³⁰⁶ 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 model.³⁰⁷ Alan Wertheimer contends that there is no difference

301. See Anderson, *supra* note 54, at 1407.

302. Anderson, *supra* note 54, at 1407.

303. Anderson, *supra* note 54, at 1422.

304. Anderson, *supra* note 54, at 1421.

305. Anderson, *supra* note 54, at 1425.

306. See SCHULHOFER, *supra* note 8, at 111.

307. See WERTHEIMER, *supra* note 15, at 31–32 (explaining that the sexual autonomy model is essentially a consent-based model and does not offer a distinct construct).

between a consent 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.³⁰⁸

Contemporary rape law reform should distance itself from the traditional elements of rape. Both consent and force models have practically failed, as have reforms that attempt to draw on expanding the notion of force to include non-physical forms of coercion.³⁰⁹ Although the offense of rape may be viewed as an act of sexual coercion on the theoretical level, a more favorable understanding of the offense 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 difficulty in drawing a workable legal boundary between permissible and impermissible pressures is overrated. 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 - and 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 law should reconceptualize the offense of rape by suggesting that the essence of rape is sexual abuse of power, namely, a wrongdoer's

308. WERTHEIMER, *supra* note 15, at 31-32.

309. See SCHULHOFER, *supra* note 8, at 82-98 (criticizing reforms that focus on expanding the concept of coercion).

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, rape would be theorized differently, and its elements would be redefined to better capture the wrongdoing and harms inflicted by this offense. Accordingly, rather than defining 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 is an act of violence.³¹⁰ 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 grounded in a political motivation to dominate women.³¹¹ 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.³¹² 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”³¹³ The Model Penal Code adhered to this position, by defining the offense of rape as intercourse by forcible compulsion, without any reference to the complainant’s lack of consent.³¹⁴

310. See generally Mary Ann Lergen, *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”).

311. See generally SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 14, 256 (1975) (stating that “rape, became not only a male prerogative, but man’s basic weapon of force against women,” and arguing that “all rape is an exercise in power”).

312. See Vikki Bell, *Beyond the Thorny Question: Feminism, Foucault and the De-sexualization of Rape*, 19 *INT’L J. SOC. LAW* 83, 85 (1991).

313. See MICHEL FOUCAULT, *POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977–1984* 200 (Alan Sheridan and others trans., Lawrence Kritzman ed., 1988). The French original uses the word “sexe” instead of “genitalia.”

314. See generally MODEL PENAL CODE § 213 (2010) (stating seven sexual offenses ranging from deviate sexual intercourse by force or impositions, corruptions of minors and seduction, sexual assault, and indecent exposure); Deborah W. Denno, *Why the Model Penal Code’s Provisions Should be Pulled and Replaced*, 1 *OHIO ST. J. OF CRIM. L.*

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.³¹⁵ 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.³¹⁶ MacKinnon argues that “rape is not less sexual simply by virtue of being violent.”³¹⁷ She believes that violence against women within a sexist society is always sexual and places rape within the confines of “normal” but imposed sexuality.³¹⁸ She posits that heterosexuality is marked by a dominance/submission model of desire, and that this model is at work whenever women are victimized and whenever powerlessness and ascribed inferiority are sexually exploited.³¹⁹ Criminal law, contends MacKinnon, maintains a legal definition of rape that fails to capture many instances of intercourse that women often experience as rape.³²⁰

MacKinnon offers invaluable insights about rape, dominance, and power. Her theories accurately capture current rape laws’ failure to account for both rape victims’ narratives and for the actual harm inflicted on them. MacKinnon does this by pointing out the practical gap between rape as it is narrowly defined by the criminal justice system and rape as it is experienced by its victims.³²¹ The main drawback in MacKinnon’s arguments, 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 arguments leave a landmark blueprint in the context of sexual harassment law, their application to the criminal law of rape fails to leave us with either further practical guidelines or legislative schemes to adequately address the problem.

207 (2003) (discussing the problematic aspects of the Model Penal Code’s sexual offenses provisions).

315. See generally Holly Henderson, *Feminism, Foucault, and Rape: A Theory and Politics of Rape Prevention*, 22 BERKELEY J. GENDER L. & JUST. 225, 244 n. 97 (2007).

316. See generally MACKINNON, *supra* note 33, at 171–83.

317. MACKINNON, *supra* note 33, at 173 (“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.”).

318. MACKINNON, *supra* note 33, at 174. (noting that: “perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance”).

319. MACKINNON, *supra* note 33, at 178.

320. MACKINNON, *supra* note 33, at 172–78.

321. MACKINNON, *supra* note 33, at 174.

MacKinnon's theories have been widely criticized,³²² and a second theory on rape and its harms has received far more acceptance by scholars.³²³ The second of the two alternative theories is premised on the libertarian idea of sexual agency; it posits that rape ought to be viewed as a violation of the right to exercise sexual autonomy.³²⁴ The main goal of traditional rape law was not to protect women's interests in controlling their own bodies and sexuality.³²⁵ Historically, rape law has primarily regulated competing male interests in controlling sexual access to females and constraining women's sexuality.³²⁶ 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."³²⁷

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.³²⁸ Drawing on Estrich's idea of sexual autonomy, the position that rape is about abusive sexual desire that interferes with individuals' right to exercise sexual agency, 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.³²⁹ 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

322. See, e.g., Robin West, *Desperately Seeking a Moralist*, 29 HARV. J. L. & GENDER 1, 19–21 (2006) (criticizing MacKinnon's theories for conflating the harms of unwanted and nonconsensual sex).

323. See, e.g., LAFAYE, *supra* note 9 (referring to the theory of Schulhofer, see *supra* note 8, 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, 176 (1998)).

324. See generally SCHULHOFER, *supra* note 8, at 120 (stating that, "sexual autonomy . . . [i]s an independent interest, indeed one of the most important interests for any free person").

325. See generally Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 2–4 (1998) (noting that the primary elements of the offense of rape appear calculated to restrain, rather than enhance, women's exercise of sexual autonomy. Coughlin further contends that rape law existed as a quasi defense for women who had engaged in unwanted prohibited sex, and was always part of the state's effort to constrain sexual autonomy).

326. See generally Dorothy Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 363 (1993) ("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.").

327. See generally ESTRICH, *supra* note 29, at 102.

328. ESTRICH, *supra* note 29, at 102.

329. See SCHULHOFER, *supra* note 8, at 105 (proposing the offense of "sexual abuse").

subsequently expressly revoking that refusal.”³³⁰ 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.³³¹

A few scholars have begun to question the characterization of sexual abuse as non-violent sexual misconduct.³³² 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.”³³³ Roberts concludes that “before we can move beyond violence, we must see all the violence that still escapes the law.”³³⁴ 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.”³³⁵

This type of critique, however, has not resulted in the adoption of either alternative rape law models or in the redefinition of the elements of the offense.³³⁶ 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.³³⁷ They have, thus, failed to capture that these views result in the dilution of the severity of sex offenses; although the violent sexual assault is viewed as a serious wrongdoing, the seemingly non-violent sexual abuse is typically reduced to a mere misdemeanor.³³⁸ This lenient view fails to consider most types of acquaintance rapes as

330. See Dripps, *supra* note 38, at 1807 (developing the commodity theory of sexuality under which individuals have a property right to the use of their bodies).

331. See generally, Dripps, *supra* note 38, at 971.

332. See, e.g., Anderson, *supra* note 19, at 640 (contending that characterizing sexual abuse as nonviolent conduct minimizes the harm of the offense of rape).

333. Roberts, *supra* note 326, at 381.

334. Roberts, *supra* note 326, at 381.

335. See generally Anderson, *supra* note 19, at 640.

336. *But cf.* Anderson, *supra* note 54 (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).

337. See Roberts, *supra* note 326, at 381 (“[D]isconnecting all seemingly nonviolent sexual coercion from sex accompanied by physical violence will obscure the common nature of both.”).

338. See Anderson, *supra* note 19, at 632 (positing that more than half of the states that criminalize nonconsensual sex categorize the offense as mere misdemeanors).

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.³³⁹ Viewing sexual abuse as non-violent sexual misconduct narrowly construes violence to necessarily mean physical force.³⁴⁰ This view fails to appreciate the ongoing effects of power, authority, dominance, influence, and control of those in positions of power on victims in subordinate positions.³⁴¹ However, nothing in the term “violence” itself prevents the law from rethinking the legal meaning of violence and redefining it in the context of sexual offenses; sexual violence is different and broader from mere physical non-sexual violence.³⁴²

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 was 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 that 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.

339. Roberts, *supra* note 326, at 381 (“The boundaries of violence against women are still in dispute.”).

340. Roberts, *supra* note 326, at 381 (“An alternative approach would rethink the legal meaning of violence and explore how men use violence on many different levels to impose their will upon women.”).

341. See MACKINNON, *supra* note 286, at 247 (suggesting that criminal law prohibit taking advantage of unequal social positions to coerce sex on a person who does not want it. She further contends that rape should be defined as: “a physical attack of a sexual nature under coercive conditions, and inequalities are coercive conditions”).

342. See Roberts, *supra* note 326, at 381, 388 (noting that current proposals to define sexual abuse as nonviolent conduct obscure rape’s relationship to violence).

E. *The Proposed Model's Normative Strengths*

This Article will now examine the normative advantages of a Sexual Abuse of Power Model that draws on the above ideas.

1. Capturing Wrongdoing

The Sexual Abuse of Power Model better accounts for the fundamental wrongdoing in rape than traditional rape law models. Generally speaking, criminal law aims to target a perpetrator's culpable conduct to place personal liability and criminal sanctions on him or her.³⁴³ 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.³⁴⁴ This account has, thus, failed to foster instrumental change in social norms concerning the proper demarcation between legitimate sex and sexual abuse.³⁴⁵ 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 has 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 fail to distinguish among notions of power, dominance, and subordination, and actual abuse and exploitation in particular cases.

This Article contrasts with MacKinnon's contention that all imbalances in power in a society characterized by male dominance and female

343. See generally HUSAK, *supra* note 236, at 223–44 (arguing that only wrongful, blameworthy, immoral conduct should be criminalized).

344. See generally Baker, *supra* note 88 (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).

345. Baker, *supra* note 88; see also *supra* Part II.B.2.

submission are inherently coercive.³⁴⁶ 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,³⁴⁷ the concepts of abuse and exploitation in the context of sexual misconduct remain theoretically underdeveloped and doctrinally narrowly construed.³⁴⁸ 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. The articulation of these concepts is therefore the best way to capture the wrong in rape.

Several scholars are wary of expanding the scope of criminal regulation to criminalize additional forms of sexual abuses that fall short of physical force because of a concern for raising the risk of unfairness to defendants.³⁴⁹ 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, which would ultimately lead to wrongful convictions.³⁵⁰

Criminalizing sexual abuses of power under the proposed Model offers a response to this type of critique because it comports with fundamental criminal law considerations, particularly the requirement that fair warning be provided.³⁵¹

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. Abuse is established when people in supervisory positions exploit their power to obtain sex from people in subordinate positions, by intimidating them and placing them in fear of

346. See MACKINNON, *supra* note 286, at 245–47.

347. See *generally* FOUCAULT, *supra* 313, at 109, 119–22. 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 organization, hierarchical cluster of relationships.

348. See, e.g., *State v. DiPetrillo*, 922 A.2d 124, 134 (R.I. 2007) (refusing to expand the abuse of power construct to the workplace context).

349. See, e.g., Dripps, *supra* note 38, at 958–59.

350. Dripps, *supra* note 38, at 958–60.

351. See Peter Westen, *Two Rules of Legality in Criminal Law*, 26 L. & PHIL. 229, 234–74 (2007) (discussing the fair warning requirement in criminal law).

professional or economic harm, such as losing their job.³⁵² The proposal to criminalize sexual abuse of power in the workplace, academia, and additional professional and institutional settings 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 Sexual Abuse of Power Model is that it better aligns with victims' account of the harm and injuries that they experience. Robin West persuasively points out that "[t]he painful physical invasion becomes not just *unwanted*, but terrifying and terrorizing."³⁵³ Recall the conflicting accounts of the sexual acts in the Kent indictment: sexual abuse of power in the workplace is yet another illustration of the centrality of narratives in capturing complainants' perspectives concerning their harms and injuries.³⁵⁴ The Sexual 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.

3. The Impaired Choices Narrative

What, then, is the essence of complainants' accounts? A recurring theme in testimonies is the lack of choices narrative.³⁵⁵ Complainants' stories reveal that submission to unwanted sex results from feeling that there are no other meaningful choices available to them.³⁵⁶ The lack of choices narrative typically rests on economic or professional considerations, such as the fear of losing one's job, along with a dependence on

352. See generally Buchhandler-Raphael, *supra* note 20, at 132–39.

353. See generally WEST, *supra* note 269, at 102.

354. See Council, *supra* note 265 (providing McBroom's narrative concerning Kent's abusive conduct).

355. See, e.g., *State v. Baby*, 946 A.2d 463, 467 (Md. Ct. App. 2008) (describing a factual scenario in which the complainant was alone at night in a secluded area with two men who made it clear that she did not have a choice but to engage in sex with both of them before she would be able to leave); *Commonwealth v. Mlinarich*, 542 A.2d 1335, 1337 (Pa. 1988) (recounting the complainant's difficult choice between submitting to unwanted sex or being sent back to a juvenile detention facility).

356. See *R. v. D.G.S.* (2004), 72 O.R. 3d 223, at para. 16 (Can. Ont. C.A.), *aff'd sub nom.*, *R v. Stender*, [2005] 1 S.C.R. 914 (Can.).

the perpetrator who controls their professional status.³⁵⁷ 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 his or her lack of meaningful choices and an abuse of his or her dependent position.³⁵⁸

The lack of choices narrative carries implications beyond the context of disparities in power. A complainant may also submit to unwanted sex, feeling that he or she does not have any other choice, in additional social settings. The decision in *State v. Baby* is the paradigmatic example for the inadequacy of consent models to account for the complainant's lack of meaningful choices.³⁵⁹ In *Baby*, 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.³⁶⁰ In this situation, the assumption that she could refuse permission is significantly undermined. The jury, however, failed to recognize that ostensible permission was merely apparent, as it stemmed from a belief that no alternative choices were available.³⁶¹

A key problem in capturing complainants' narratives is that the majority of criminal charges are resolved in plea bargains.³⁶² In the absence of a trial, the victim's story remains untold, and the criminal justice system is deprived of hearing the victim's account of the offense and its harm. Without this narrative, the law is unable to accurately reflect the wrongdoing in rape, and we are left with the few criminal charges that are actually brought; even these are seldom resolved in a judicial opinion.³⁶³

Given the lack of court decisions in our own criminal justice system, a turn to comparative law might shed more light. The Canadian court's decision in *R. v. Stender* offers a point of departure for developing

357. See *State v. DiPetrillo*, 922 A.2d 124, 128–29 (R.I. 2007) (citation from the trial court, holding that: “a command by someone who has a position of authority, and who is forcibly able to back up that authority, need not be accompanied by an explicit threat in order for such a command to be effectively and inherently coercive”). The Rhode Island Supreme Court however, reversed the trial court's conviction.

358. *DiPetrillo*, 922 A.2d at 128–29.

359. See *Baby*, 946 A.2d at 467 (quoting testimony revealing that when asked by the prosecution whether she felt like she had any choice but to give permission to the sexual act, the Complainant answered: “not really”).

360. See *Baby*, 946 A.2d at 466–67.

361. See *supra* Part II.A.5 (discussing the *Baby* decision).

362. See generally Angela J. Davis, *The American Prosecutor: Independence, Power and the Threat of Tyranny*, 86 IOWA L. REV. 393, 409 (2001) (positing that in most jurisdictions plea bargains resolve more than ninety percent of all criminal charges).

363. See *supra* note 1 and 3 and accompanying citations.

the concept of impaired choices.³⁶⁴ The decision invokes the theory of involuntariness to reach the conclusion that consent is merely apparent when induced through threats to inflict non-physical harm because the submission is based on the complainant's belief that he or she has no alternative choice.³⁶⁵ This Article suggests that the concept of impaired choices ought to be further developed. However, rather than drawing on voluntariness—in itself a problematic notion³⁶⁶—it favors articulating the concept of impaired choices caused by the perpetrator's wrongdoing that stems from the perpetrator's abuse of power to induce submission from a person in a subordinate position.³⁶⁷

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.³⁶⁸ Line-drawing thus becomes crucial here: as Stephen Schulhofer suggests, “we must not confuse these two distinct issues—the key is distinguishing between the wrongfulness of background conditions and the wrongfulness of individual conduct.”³⁶⁹ Proposing to criminalize abuses of power rests on the premise that only the wrongfulness of individual conduct 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

364. *See* R. v. D.G.S. (2004), 72 O.R. 3d 223, at para. 16 (Can. Ont. C.A.), *aff'd sub nom.*, R v. Stender, [2005] 1 S.C.R. 914 (Can.). *See also infra* Part I (discussing this decision further). In *Stender*, the defendant and the complainant had been in a romantic relationship that had ended prior to the sexual assault. The defendant had, without the complainant's knowledge, taken pictures of the complainant while they were involved in sexual activity. He coerced her into sexual activity later, after they broke up by threatening to distribute those pictures to the complainant's friends and acquaintances.

365. D.G.S., 72 O.R. 3d 223, para. 49.

366. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 68 (1986) (holding that the legal standard for a sexual harassment cause of action is not voluntariness). *See generally* Andrew E. Taslitz, *A Feminist Fourth Amendment: Consent, Care, Privacy and Social Meaning in Ferguson v. City of Charleston*, 9 DUKE J. GENDER L. & POL'Y 1, 40–61 (2002) (discussing feminist views on consent and comparing it to the views on consent in the Fourth Amendment context).

367. *See* Benedet and Grant, *supra* note 124, at 284 (“*Stender* makes clear that participation must be the result of free choice.”).

368. *See generally* WERTHEIMER, *supra* note 15, at 189–92 (discussing the effects of economic difficulties, and arguing that these should not invalidate consent).

369. *See* SCHULHOFER, *supra* note 8, at 110.

dependence.³⁷⁰ William Eskridge examines this issue from a gay law perspective, suggesting that the libertarian view of consent merely provides a 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.³⁷¹ Eskridge identifies several categories of impaired choices, among them undue pressure, contending that:

[U]ndue 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 calculus—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.³⁷²

In a footnote, Eskridge suggests: “I am thinking specifically about employer-employee, minister/rabbi/priest-religious observant, guardian-ward, psychiatrist/doctor-patient, or teacher-student relationships.”³⁷³ Considering the *Onofre* decision, Marc Spindelman 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.”³⁷⁴

While these scholars have begun sketching the problem of victims’ impaired choices, the concept remains essentially underdeveloped in rape law. Examining this concept in the context of criminal regulation of same-sex relationships sheds some light on the analogies that can be drawn between this particular context and sexual abuses of power in professional and institutional settings in general. Criminal regulation is contested both with respect to sexual abuses of power in professional and institutional settings such as the workplace and in same-sex rela-

370. See generally William N. Eskridge, Jr., *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47, 66–67 (1995).

371. *Id.*

372. *Id.*

373. *Id.* at 67, n.57.

374. See Spindelman, *supra* note 226, at 1639.

tions.³⁷⁵ 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.³⁷⁶ On the other hand, the law ought to acknowledge the need to protect these groups from the harms of sexual abuses of power.³⁷⁷ Protection from harm, however, fundamentally conflicts with the idea of exercising sexual agency and autonomy. Reconciling these contrasting concerns is challenging in both contexts.

While the positions above explore the concept of impaired choices with respect to regulating gay sexual relations, its practical implications more broadly 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 position exploits a person's lack of realistic choices, his or her conduct amounts to impermissible interference with free will and thus justifies criminal regulation.³⁷⁸

4. Alignment with Conflicting Concerns

Another advantage in the Sexual Abuse of Power Model is its ability to integrate contrasting considerations pertaining to the criminal regulation of sexuality. The idea of criminalizing sexual abuses of power in various professional and institutional settings, including in the workplace, is prone to resistance not only from pro-defendant scholars concerned about unfairness to the defendant, but also from feminist reformers.³⁷⁹ The reformers' 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 by treating their sexual choices like those of incompetent victims.³⁸⁰

Feminist legal theory today is not monolithic.³⁸¹ Traditional strands of feminism—developed in the late 1970s and early 1980s—consisted

375. See Eskridge, *supra* note 370, at 66 (suggesting that the key question concerning consent is whether it has been rendered meaningfully).

376. See generally Abrams, *supra* note 273, at 305.

377. See Spindelman, *supra* note 226, at 1638–40.

378. See Eskridge, *supra* note 356, at 66–67.

379. See, e.g., Dripps, *supra* note 38, at 958 (suggesting that current views “result 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”).

380. See generally Gruber, *supra* note 30, at 603–06 (discussing existing feminist critiques of criminal rape law and the inherent tensions between conflicting considerations).

381. See generally Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99 (2007)

of liberal feminism, cultural feminism, and dominance feminism.³⁸² Additional feminist theories, including sex-positive, intersectional and post-structural/post-modern feminism were developed in the early 1990s.³⁸³ While the late 1970's theories focus on comparing and contrasting liberal feminism with dominance feminism, the 1990's feminist theories critique the former's narrow construction of gender, assumptions about "male" and "female" views of sexuality, and the treatment of gay issues.³⁸⁴

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 to these questions 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 that sex for women is a source of not only pleasure, but also of power.³⁸⁵ Despite these differences in approach, reformers have the same common goal: the empowerment of women and the strengthening of their social status.

This Article proposes that reformers integrate elements that are conceptually associated with the competing theories. The Sexual Abuse of Power Model places a heavy emphasis on the exploitation element as the key feature defining the wrongdoing in the sex offense. In that respect, it aligns with dominance feminism, under which the 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.³⁸⁶ But recall that the Sexual Abuse of Power Model seeks to distance itself from the position that imbalances in pow-

(examining third-wave feminism by contending that contemporary feminist writing offers new insights into familiar issues such as pornography).

382. See generally Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 279–86 (2007) (providing an overview of the six main strands in feminism today).

383. *Id.*

384. See generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 30–33 (Routledge ed., 1990).

385. See, e.g., Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2087 (2003) (rejecting the view that sex in the workplace is always harmful to women).

386. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN, A CASE OF SEX DISCRIMINATION* 199–203 (1979) (referring to this idea as the "inequality approach," while in a later article, *Difference and Dominance: on Sex Discrimination, in Feminism Unmodified: Discourses on life and Law*, she refers to the same idea as "the dominance approach"). See generally MacKinnon, *supra* note 33, at 172 ("If sexuality is central to women's definition and forced sex is central to sexuality, rape is indigenous, not exceptional, to women's social condition.").

ers per se are exploitative by rejecting the view that sex between people in disparate positions is inherently coercive.³⁸⁷ When circumstances such as coercive atmosphere, intimidation, and fear of economic or professional harm are lacking, sex between un-equals remain beyond the scope of criminal regulation. Instead, the Sexual 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 female subordination obscures the possibility of female sexual agency.³⁸⁸ Promoting women's sexual autonomy is a significant goal of liberal feminism.³⁸⁹ Libertarians stress that an "exclusive focus on the criminal law system" as the remedy for rape "detrimentally affects women's agency" by restricting their sexual autonomy.³⁹⁰ Contemporary reforms should be wary of further constraining women's sexual choices by adopting additional prohibitions pertaining to women's sexuality.³⁹¹

Acknowledging the significance of sexual agency should not result in the rejection of the Sexual Abuse of Power Model. Criminalization under this model would not violate complainants' rights to sexual agency.³⁹² 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, it must be balanced with the right to be free from sexual abuse of power and avoid sexual violence.³⁹³

The Sexual Abuse of Power Model would only criminalize sex obtained through pressure, intimidation, or 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

387. See *supra* Part III.E.1.

388. See generally Denise Schaeffer, *Feminism and Liberalism Reconsidered: The Case of Catharine MacKinnon*, 95 AM. POL. SCIENCE REV. 699, 702 (2001).

389. See generally Berger, *supra* note 274, 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'").

390. See generally Gruber, *supra* note 30, at 608 (discussing criminal rape laws effect on female agency).

391. See generally Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 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).

392. See generally Buchandler-Raphael, *supra* note 21, at 452–53, 481.

393. See generally Anderson, *supra* note 19, at 640 ("Autonomy is not an absolute concept, and constraints on sexual autonomy are not always bad.").

violate a person's right to trade upon his or her sexuality by initiating sex with his or 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 his or her sexual agency. When a perpetrator's wrongdoing is *not* identified, there is no justification for criminal regulation. As Alan Wertheimer correctly notes, "it is a mistake to think that difficult circumstances and inequalities should be regarded as invalidating consent in either morality or law."³⁹⁴ In contrast, a complainant's reluctant submission to unwanted sex that is induced through placing him or her in fear of nonphysical harm ought not be viewed as exercising his or her sexual agency, because this "choice" is anything but free and autonomous.³⁹⁵

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.³⁹⁶ The notion that women have a distinct voice is a prominent theme in Robin West's writing.³⁹⁷ 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.³⁹⁸ Again, this is drawing on the notion that the Sexual Abuse of Power Model accounts for the actual experiences and narratives of the victims of sexual abuse, who often happen to be women.

The definition of the sex offense in the negative rather than the positive terms is yet another advantage of the Sexual Abuse of Power Model. Conceptualizing rape as sexual abuse of power rather than as nonconsensual sex aligns with sex-positive feminism.³⁹⁹ A central theme of sex-positive feminism is that sex is essentially a good thing, capable of granting pleasure and power.⁴⁰⁰ Therefore, the sex offense should not be defined by using such terms as "sex without consent," but in negative

394. See WERTHEIMER, *supra* note 15, at 191.

395. See SCHULHOFER, *supra* note 8, at 280 (contending that criminal sanctions are warranted to protect sexual autonomy when a person engages in sexual acts with another person, knowing he/she does not have an affirmative, freely given permission).

396. See generally WEST, *supra* note 217, at 100–38.

397. See generally WEST, *supra* note 217 at 100–78 (positing that women disproportionately and distinctively suffer unique gendered-harms).

398. See generally West, *supra* note 269, at 40–42.

399. See, e.g., Katherine M. Franke, *Theorizing Yes: An Essay in Feminism, Law and Desire*, 101 COLUM. L. REV. 181, 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).

400. See generally Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING WOMEN'S SEXUALITY, 267–319 (Carol S. Vance, ed., 1984) (addressing the conflict over sex within feminism).

terms that incorporate the perpetrator's *wrongdoing*: an act of abuse and exploitation.

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.⁴⁰¹ Clearly distinguishing between rape and sex is significant because it situates rape as distinctively different from sex, something the consent models fail to do.⁴⁰²

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 Sexual 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 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 "imbalances in powers," without any reference to the murky and problematic notion of consent.⁴⁰³ Moreover, the proposed offense does not substitute unwelcome-ness with non-consent. Under sexual harassment law, the lack of consent element has been replaced with an unwelcome-ness requirement.⁴⁰⁴ However, 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.⁴⁰⁵ Rejecting the unwelcome-ness standard rests on the premise that exploitation of power to obtain submission is never welcome.

401. See generally Roberts, *supra* note 326, at 381.

402. See generally Baker, *supra* note 88, at 693–94.

403. See *supra* Part I.B.

404. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

405. See, e.g., Kathryn Abrams, *Subordination and Agency in Sexual Harassment Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 111, 118 (Catharine MacKinnon & Reva Siegel, eds., 2003) ("[G]iven the heterogeneity of harassing behavior, it may make little sense to subject all of it to the same unwelcomeness 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

The Sexual Abuse of Power Model consists of two key components: power disparities or position differentials and their actual abuse or exploitation.⁴⁰⁶ 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.⁴⁰⁷ The key predicate for criminalization under the proposed model 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.⁴⁰⁸

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 the exploitation and abuse elements.⁴⁰⁹ Targeting these factors is crucial to this inquiry because they are common features present in many situations involving sexual abuse of power.⁴¹⁰ These include diverging 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. These factors also include targeting the complainant's fear and intimidation of harmful repercussions if he or she refuses the perpetrator's sexual demands.⁴¹¹

Under the Sexual Abuse of Power Model, "sexual relationships between people of disparate power should *not* be viewed as exploitative per se but rather, abuse is an independent element, which the prosecution bears the burden of separately establishing. Furthermore, "[t]here is no preliminary presumption regarding the exploitative nature of sexual relations based merely on imbalances of power."⁴¹² "The mere presence of disparate positions between the parties is insufficient to justify criminalization."⁴¹³ Instead, the model separately examines two steps. First, the model examines whether there is a marked imbalance in the respective

anyone. . . [C]onduct within this category should not be subject to an unwelcomeness test.").

406. See generally Buchhandler-Raphael, *supra* note 21 at 476–80; Buchhandler-Raphael, *supra* note 20, at 134–43 (elaborating on the doctrinal implications of the abuse of power model).

407. Buchhandler-Raphael, *supra* note 20; Buchhandler-Raphael, *supra* note 21.

408. Buchhandler-Raphael, *supra* note 20; Buchhandler-Raphael, *supra* note 21.

409. See generally Buchhandler-Raphael, *supra* note 21, at 476–80.

410. See, e.g., Showalter v. Allison Reed Group, 767 F. Supp. 1205 (D.R.I. 1991), *aff'd sub nom* Nenh Phetosomphone v. Allison Reed Group, 984 F.2d 4 (1st Cir. 1993).

411. Showalter, 767 F. Supp. at 1205–15.

412. See Buchhandler-Raphael, *supra* note 20, at 139.

413. Buchhandler-Raphael, *supra* note 20, at 139.

powers of the parties accounting for the victim's vulnerable position and dependence on the perpetrator. However, power disparities, vulnerability and dependence are not dispositive in establishing exploitation. Criminalization is fundamentally based on conduct rather than status.⁴¹⁴ The key predicate for criminalization rests on identifying a culpable perpetrator's wrongdoing, namely, exploitation. This 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.⁴¹⁵

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 and a change in societal perceptions about the boundary between permissible and illicit impermissible 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 along with removing the use of consent as a defense to an abuse of power criminal charge, offer 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.

1. Applying the Proposed Model

A recent case which is currently being litigated in a civil lawsuit in a state court in DeKalb county, Georgia,⁴¹⁶ demonstrates the hypothetical application of the proposed Sexual Abuse of Power Model. In September

414. See generally BONNIE ET AL., *supra* note 214, at 69 (discussing the conduct requirement).

415. See, e.g., *Nichols v. Frank*, 42 F.3d 503, 509 (9th Cir. 1994) (discussing the conduct requirement).

416 See Complaint, *Flagg v. Long*, Ga. Dist. Ct. (Sep. 21, 2010) (No. 10A32029-4); Complaint, *Parris v. Long*, Ga. Dist. Ct. (Sep. 22, 2010) (No. 10A32053-4); Complaint, *Robinson v. Long*, Ga. Dist. Ct. (Sep. 21, 2010) (No. 10A32028-4); Complaint, *Legrande v. Long*, Ga. Dist. Ct. (Sep. 2010) (No. 10A32104-4) [hereinafter *Long* Complaints]; see also *Fourth Lawsuit Filed Against Georgia Pastor*, CNN WIRE (Sep. 24, 2010), http://articles.cnn.com/2010-09-24/justice/georgia.pastor.lawsuit_1_fourth-lawsuit-kenya-trip-pastor?_s=PM:CRIME.

2010, four young men filed separate lawsuits against Bishop Eddie Long alleging that Long abused his pastoral influence to coerce them into unwanted sexual acts with him.⁴¹⁷

Bishop Long was the senior pastor of a mega church called “New Birth Missionary Baptist Church,” which consists of thousands of congregants.⁴¹⁸ The victims were all part of the “Fellows Youth Academy,” a group of teenage boys picked by Long for spiritual mentoring. According to the allegations, Long put the victims on the church’s payroll, took them on trips around the world, and bought them jewelry, electronics, cars and clothes. In return, the lawsuits allege that Long enticed the victims to engage in various unwanted sexual acts with him.⁴¹⁹ The lawsuits further allege that Long would discuss the Holy Scripture to justify and support the sexual activity.⁴²⁰ The lawsuits allege that the defendant “through manipulation, coercion, deception, and fraud resulting from the abuse of his confidential relationship with plaintiff . . . convinced plaintiff that engaging in sexual relationship was a healthy component of his spiritual life.”⁴²¹

The allegations described in the lawsuits demonstrate why current law fails to provide a suitable legal framework to properly address the wrongdoing inflicted in these repeated sexual abuses. Moreover, current law is unable to account for the fact that these abuses are akin to rape and other sexual offenses, and therefore they justify criminalization. In particular, the *Long* case demonstrates the shortcomings of consent models to address sexual abuses of power in professional and institutional settings, which include, among others, sexual relations between clergy and parishioners. In these settings, on the face of it, consent to sexual relations is seemingly obtained. Therefore, criminal charges could not have been brought in this case: first, in Georgia the age of consent is sixteen and all four young men were above that age.⁴²² Second, the victims seemingly consented to engaging in the sexual acts with Long.⁴²³ This case could not have been criminalized under the consent model

417. *Long Complaints*, *supra* note 416.

418. *See Sex Scandal Threatens a Georgia Pastor’s Empire*, N.Y. TIMES (Sep. 25, 2010), available at http://www.nytimes.com/2010/09/26/us/26pastor.html?_r=1&pagewanted.

419. *Id.*

420. *See Long Complaints*, *supra* note 416.

421. *Long Complaints*, *supra* note 416.

422. *See* GA. CODE ANN. § 16-6-4(a) (West 2010) (“[a] person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person.”); *see also* GA. CODE ANN. § 16-6-3 (West 2010) (“A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years . . .”).

423. *See Long Complaints*, *supra* note 416.

simply because at first sight, apparent permission was obtained. Furthermore, no physical force or the threat of it was used to obtain the sexual submission. The Long case demonstrates the failure of consent models to account for the abuse and exploitation that lead to submission to unwanted sexual acts. These models are unable to take into consideration the background context and the underlying circumstances that characterize the sexual relationships between the pastor and the young boys: When "consent" is induced by exploitation of power disparities and by abuse of the victims' trust and reliance on the perpetrators, apparent permission should not render these sexual abuses legally permissible.

In contrast, the proposed Sexual Abuse of Power Model would enable criminalizing this factual scenario: The first component of the model is established here because there is marked imbalance in the respective powers of the parties; Long was an influential pastor, exercising religious authority over his congregants and particularly over the young group of boys that he personally picked for mentoring. The victims were young boys who trusted the pastor and relied on him for providing religious guidance and spiritual mentoring. The second requirement of the proposed model is met by demonstrating that Long exploited these position differentials and abused his influence and authority over the victims. This was accomplished through enticing the victims into engaging in sexual acts with him by offering ample economic benefits.⁴²⁴ Several factors support the abuse and exploitation element: Long's actions exceeded the scope of his professional role, demonstrating a marked deviation from standards of conduct that a pastor is expected to exercise over his congregants. Furthermore, the allegations suggest that Long used his pastoral influence and significant dominance over the victims to induce their participation in the sexual acts by persuading them that the sexual acts were an integral part of religious ceremonies.⁴²⁵ These features demonstrate that Long exercised undue pressure and intimidated the victims into participating in the sexual acts. In sum, the underlying circumstances that characterize the relationships between the pastor and the young boys in this case illustrate that had a sexual abuse of power prohibition been in force, criminal charges could have been brought against Long.

424 See *Long Complaints*, *supra* note 416.

425 *Long Complaints*, *supra* note 416.

G. Other Applications of the Sexual Abuse of Power Model

The proposed conceptual framework of rape draws on two other types of harmful conduct that adopt a Sexual Abuse of Power Model to capture their distinctive features: domestic violence and sexual harassment law. These additional contexts provide useful analogies that illustrate the centrality of the notions of abuse and exploitation.⁴²⁶ The domestic violence context best demonstrates the perpetrator's wrongdoing through abuse of power, as well as the harms that this wrongdoing inflicts on victims.⁴²⁷ 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.⁴²⁸ 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.⁴²⁹ The dynamics of domestic violence focus on the significance of power and control to understand the abusive relations.⁴³⁰ "[A]n 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.'" ⁴³¹ The reconceptualization of rape as an act of abuse of power recognizes that violence extends above and beyond physical force to include additional forms of abusive conduct, 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.⁴³² In the workplace, men historically had power over

426. See generally Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 555 (2007) (discussing the features of domestic violence).

427. *Id.*

428. See generally Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY, 959, 962-63 (2004).

429. 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 in an intimate relationship").

430. See Burke, *supra* note 426; Tuerkheimer, *supra* note 428.

431. Tuerkheimer, *supra* note 428; see Burke, *supra* note 426.

432. 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, 590 (Catharine MacKinnon & Reva Siegel eds., 2004).

women as a result of their higher organizational positions, and thus were able to abuse their power to harass women.⁴³³ Social science researchers offer various models of power.⁴³⁴ Many suggest that the legal system's definition of sexual harassment is premised on the organizational power model.⁴³⁵ Under this model, sexual harassment is most likely to occur when the harasser has a higher position in the workplace hierarchy than the victim.⁴³⁶

1. Current Applications of a Sexual Abuse of Power Model

The above understandings of abuse of power generally do not extend to the criminal law context.⁴³⁷ Criminal law has not yet adopted a comprehensive Sexual Abuse of Power Model as the conceptual basis for capturing the wrongdoing in rape. No jurisdiction has adopted an overhaul reform of rape law that draws on a Sexual 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, such as the military and law enforcement (police officers and prison guards).⁴³⁸ 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.⁴³⁹

433. See generally MacKinnon, *supra* note 286.

434. For an elaborate discussion of the various power models, see generally Anne Carey Juliano, *Harassing Women with Power: The Case for Contra-Power Sexual Harassment*, 87 B.U. L. REV. 491, 503–04 (2007).

435. See generally Sandra S. Tangri, Martha R. Burt & Leonor B. Johnson, *Sexual Harassment at Work: Three Explanatory Models*, 38 J. SOC. ISSUES, no. 4, 33, 34–46 (1982).

436. *Id.*; see also *supra* Introduction.

437. See, e.g., Tuerkheimer, *supra* note 428, at 962–63 (positing that the understanding of the dynamics of the abusive relationships in domestic violence do not extend to the criminal justice system).

438. See, e.g., National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 920, 119 Stat. 3136 (2005) (exhibiting the U.S. military proscribes rape and other sexual misconduct based, among others, on an abuse of power model).

439. 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) (prosecuting a uniformed police officer for abusing his authority to coerce sex on a drunken woman whom he had picked up in his police cruiser while she was hitchhiking); *State v. Moffitt*, 801 P.2d 855, 857 (Or. Ct. App. 1990) (convicting a uniformed police officer of official misconduct for demanding sex from a 22-year-old intoxicated victim). Another prominent example in which many jurisdictions acknowledge that the

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.⁴⁴⁰ In this case, the complainant "Jane," a nineteen-year-old college student, worked for the defendant in his privately-owned business.⁴⁴¹ Using work as a pretext for staying after hours, the defendant sexually attacked Jane after plying her with beer.⁴⁴² DePetrillo was prosecuted for sexual assault, which is broadly defined in Rhode Island law to include coercion.⁴⁴³ The defendant, who waived his right to a jury, was convicted in a bench trial on the grounds that coercion "consist[s] of the imposition of psychological pressure upon a person who . . . is vulnerable and susceptible to such pressure."⁴⁴⁴ 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."⁴⁴⁵ The defendant was able to overbear the will of the complainant "either by the very authority that he presented or by a modicum of physical force."⁴⁴⁶ The Rhode Island Supreme Court reversed the decision, unwilling to extend the Sexual Abuse of Power Model—which it uses when police officers abuse their position to induce a suspect's submission—to the workplace context.⁴⁴⁷

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.⁴⁴⁸ An amendment to the Unified Code of Military Justice incorporates the Sexual Abuse of Power Model in its criminal provisions.⁴⁴⁹ Sexual assault is defined as "engaging in a sexual act by threatening or placing another

misuse of official authority justifies criminalization is the prison context. *See, e.g.*, COLO. REV. STAT. § 18-3-403 (West 2004) (Criminalizing guard-inmate sexual relations when it can be proved that the officer coerced the victim to submit).

440. *State v. DiPetrillo*, 922 A.2d 124, 135 (R.I. 2007).

441. *DiPetrillo*, 922 A.2d at 126–27.

442. *DiPetrillo*, 922 A.2d at 127–28.

443. *See* R.I. GEN. LAWS § 11-37-2 (2011) (Rhode Island prohibits engaging in sexual penetration by using "force or coercion.").

444. *DiPetrillo*, 922 A.2d at 128.

445. *DiPetrillo*, 922 A.2d at 128–29 (citing the trial court's holding).

446. *DiPetrillo*, 922 A.2d at 134.

447. *DiPetrillo*, 922 A.2d at 135.

448. Uniform Code of Military Justice, 10 U.S.C. § 920 (2007) (including "rape, sexual assault, and other sexual misconduct"); *See* National Defense Authorization Act for Fiscal Year 2006, H.R. 1815, 109th Cong. § 552(a)(1) (2005).

449. Uniform Code of Military Justice, 10 U.S.C. § 920.

person in fear.”⁴⁵⁰ 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.”⁴⁵¹ 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.⁴⁵² The amendment acknowledges that sexual abuses of power in a workplace setting, such as in the military, “justify criminalization when disparities in position are exploited to induce submission.”⁴⁵³ 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.⁴⁵⁴

The military amendment offers an innovative construct that relies heavily on adopting a Sexual Abuse of Power Model. However, the military setting is characterized by the presence of a formal authority to enforce obedience. This begs the question of whether a similar model can also apply in additional social settings, in which the perpetrator does not have any formal authority to command obedience. The criminal justice system has partially answered this question in the positive, applying a Sexual Abuse of Power Model in cases involving sexual exploitation of minors and of mental therapy patients.⁴⁵⁵ While in these settings formal authority to command the victims’ obedience is lacking, the perpetrators exercise substantial influence and dominance over the victims, which results in the victims’ sexual submission. Applying the Sexual Abuse of Power Model in these two other types of sexual relations suggests that perhaps similar reasoning might also extend beyond the above military relationships to incorporate abuses of power additional professional and institutional settings.

450. See Uniform Code of Military Justice, 10 U.S.C. § 920(c)(1)(A).

451. Uniform Code of Military Justice, 10 U.S.C. § 920(t)(7)(B)(2)(III).

452. See generally Buchhandler-Raphael, *supra* note 20, at 125–27 (providing an elaborate discussion of the Military Justice Code’s provision, its advantages and shortcomings).

453. Buchhandler-Raphael, *supra* note 20, at 126–28 (elaborating on the interpretation of the amended military provision).

454. See Uniform Code of Military Justice, 10 U.S.C. §920(t)(7)(B)(iii).

455. See, e.g., *People v. Buyssee*, No. 04-011598-01, 2008 WL 2596341, at *3 (Mich. Ct. App. July 1, 2008).

2. Exploitation of Minors

Exploitation of influence, dominance, and control over victims plays a major role in criminalizing sexual abuses of power concerning minors.⁴⁵⁶ 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.⁴⁵⁷ The state of Michigan, for example, prohibits sex with minors between the ages of thirteen and sixteen when the defendant is in a position of authority and uses that authority to coerce the victim to submit.⁴⁵⁸

Michigan courts have interpreted this provision quite broadly. For instance, in *People v. Buissee*, 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.⁴⁵⁹ After one of these friends, a fourteen-year-old girl, became intoxicated, the defendant isolated her in his bedroom and sexually penetrated her after she passed out.⁴⁶⁰ The Michigan Court of Appeals held that coercion extends beyond physical violence, legal or constructive, can be implied, and is to be determined in light of all circumstances.⁴⁶¹ The court construed the prohibition to incorporate two separate elements that the prosecution needed to establish: first, 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.⁴⁶² The Court held that there was

456. See generally Falk, *supra* note 323, 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).

457. See, e.g., OHIO REV. CODE ANN. § 2907.03 (2010) (adopting 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).

458. See, e.g., MICH. COMP. LAWS ANN. § 750.520(b) (2010) (defining 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, non-public school, school district, or intermediate school district in which the other person is enrolled”).

459. See *Buissee*, 2008 WL 2596341, at *9.

460. See *Buissee*, 2008 WL 2596341, at *6.

461. See *Buissee*, 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”).

462. See *Buissee*, 2008 WL 2596341, at *4–5.

sufficient evidence to establish both elements: that the defendant had placed himself in a position of authority to influence and dominate the victim and that he coerced her to submit by abusing this authority, the victim was constrained by subjugation, forced to do what her free will would refuse.⁴⁶³ A similar construction, based on the abuse of power and authority framework, was adopted in other Michigan cases.⁴⁶⁴

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.⁴⁶⁵ Michigan courts acknowledge that this conduct justifies criminal sanctions; the courts 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.⁴⁶⁶ Most jurisdictions, however, refuse to adopt this approach, refusing to criminalize additional forms of coercive pressures that stem from professional and institutional relationships, where the victims are competent adults, particularly in the workplace.⁴⁶⁷

3. Sexual Abuse of Power in the Mental Therapy Context

The Sexual Abuse of Power Model also plays a crucial role in assessing 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.⁴⁶⁸

In *Commonwealth v. Starr*, the defendant, who had been the victim's psychiatrist for at least three years, was charged with several counts

463. See *Buyssee*, 2008 WL 2596341, at *5.

464. See, e.g., *People v. Premo*, 540 N.W.2d 715, 718 (Mich. Ct. App. 1995) (holding that a teacher abused his power and authority over a student to sexually assault her); *People v. Reid*, 592 N.W.2d 767, 770 (Mich. Ct. App. 1999) (showing that the accused misled the complainant by offering counsel to the complainant as a therapist would); *People v. Regts.*, 555 N.W.2d 896, 897 (Mich. Ct. App. 1996) (involving a psychiatrist who sexually abused his patient's trust and dependence).

465. *Supra* note 464 and citations.

466. See, e.g., *People v. Reid*, 592 N.W.2d 767, 770–72 (Mich. Ct. App. 1999); *People v. Regts.*, 555 N.W.2d 896, 897 (Mich. Ct. App. 1996).

467. See, e.g., *Rhode Island v. DiPetrillo*, 922 A.2d 124, 128–129 (R.I. 2007) (refusing to criminalize abuse of power in the workplace).

468. See, e.g., ARIZ. REV. STAT. § 13-1418 (2011); WIS. STAT. § 940.22 (2010) (criminalizing sexual relations between mental therapists and their patients).

of rape and aggravated indecent assault.⁴⁶⁹ The victim, a twenty-three-year-old woman, testified that "the defendant was someone whom she had trusted," who "knew that she was lonely, depressed and vulnerable," and "had taken advantage of her" despite knowing about her previous sexual abuses.⁴⁷⁰ She also testified that she was scared of the defendant's future actions, and that she submitted for fear "he would have her committed or have her three-month-old child taken away from her."⁴⁷¹

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.⁴⁷² In applying the *Rhodes* factors, the *Starr* court took into account several circumstances to infer that the victim's duress resulted in her submission.⁴⁷³ The circumstances considered, as stated by the court, were the following:

[T]he alleged victim's mental condition was that she was lonely, depressed and vulnerable while she found defendant to be forceful and demanding; the atmosphere and physical setting, alone in her apartment with a 3-month-old child, was such that the alleged victim had nowhere to go for help and was responsible for the safety of her 3-month-old daughter; the defendant was in a position of authority and dominion over the alleged victim as her treating psychiatrist and because of the alleged victim's 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 alleged victim's duress is inferable from her lack of consent and her submission to defendant's demands because of her fear and what the alleged victim believed to be the power that the defendant had over the alleged victim.⁴⁷⁴

The *Starr* court further held that the case is distinguished from *Berkowitz*, where there was no evidence of any psychological coercion. In *Berkowitz*, the victim and the defendant were supposedly equals as they were both college students, and their relationship was not one of

469. See *Commonwealth v. Starr*, 40 Pa. D. & C.4th 192, 193 (Pa. C.P. Lawrence Cnty. 1998).

470. *Starr*, 40 Pa. D. & C.4th at 199.

471. *Starr*, 40 Pa. D. & C.4th at 202–03.

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

473. *Starr*, 40 Pa. D. & C.4th at 204.

474. See *Starr*, 40 Pa. D. & C.4th at 204.

trust or confidence that would have led the victim to reasonably believe the defendant had power over her.⁴⁷⁵ While in *Berkowitz* there was no evidence to suggest that the victim had any reason to be fearful of the defendant, the *Starr* court found that the victim's testimony demonstrates that she indeed feared that the defendant might harm her.⁴⁷⁶ The significance of the *Starr* decision lies in the fact that despite the victim being a competent adult, who was not placed under the formal authority, the court was willing to recognize that the defendant exerted pressures over her and intimidated her by abusing his informal power to coerce her submission. 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.

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. This 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. This Article's goal was two-fold: to demonstrate the empirical failure of consent 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, this 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. This 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

475. See *Berkowitz*, 609 A.2d at 1163.

476. *Berkowitz*, 609 A.2d at 1339-41.

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 academia among them—as justifying criminal regulation. The majority of sexual abuses of power that stem from professional and institutional relationships are not currently treated as criminal conduct simply because the law 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. ♣