RAPE AS INDIGNITY

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Rape law has a consent problem. The topic of sexual consent predominates any discussion of rape law, both doctrinally and socially. It is now widely taken as axiomatic that nonconsensual sex is paradigmatic of rape. But consent is in fact a deeply contested concept, as recent debates over affirmative consent have demonstrated. Grounding rape law in sexual nonconsent has also proven both over- and under-inclusive, too often leaving the law inadequate to vindicate some sexual harms and distorted in attempts to reach others. Moreover, the very structure of consent arguably reinforces problematic gender roles in sexual relations. Increasingly, the concept of consent is being questioned by scholars, who desire a rape law that more accurately reflects the lived experience of both victims and perpetrators.

This Article proposes a new grounding for U.S. rape law—not as a matter of consent, but as a matter of human dignity. Human dignity has been perhaps the premier value in both political and moral thought over the past two centuries. As the Article documents, dignity's relatively straightforward moral imperative—respect for persons—has a long tradition of being operationalized legally, making it ripe for use as the basis of a criminal prohibition. Building upon both federal and state efforts to combat the indignities of sex trafficking, the Article outlines a proposed framework for punishing as rape the infliction of indignity through certain means of compelling sex, namely force, fraud, and coercion.

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INTRODUCTION

The crime of rape is transforming.[1] At common law, rape was defined as intercourse accomplished through the use of force and against a woman's will.[2] Over the past several decades, however, rape law reformers have worked to eliminate or comparatively de-emphasize the element of physical force

1 Throughout this Article, I use the term "rape" rather than "sexual assault," which is sometimes treated as a synonym. *See, e.g.*, MODEL PENAL CODE § 213, (AM. L. INST. Tentative Draft No. 6, 2022). In some jurisdictions, "sexual assault" refers to a distinct, less seriously graded, crime or set of crimes, and the use of "rape" therefore avoids confusion. *See, e.g.*, ARK. CODE ANN. §§ 5-14-103, 5-14-124 (2023) (establishing the separate offenses of rape and sexual assault); 18 PA. CONS. STAT. §§ 3121, 3122.1 (2022) (same); AM. SAMOA CODE ANN. §§ 46.3604, 46.3610 (2021) (same).

2 4 WILLIAM BLACKSTONE COMMENTARIES *210.

(and the concomitant requirement that a victim resist to the utmost).[3] Reforms of this sort reflect the view that individual sexual autonomy—protected through the legal construct of consent—should be the touchstone for rape law.[4] It is now widely taken as axiomatic that all (and only) nonconsensual sex is rape.[5] Yet scholars fail to agree on how to define consent,[6] juries continue to impute consent into deeply troubling fact patterns,[7] and social narratives surrounding consent may be degrading sexual relations.[8]

The centrality of consent in contemporary rape law is an outgrowth of the classical liberal commitment to individual rights—the moment of consent is imagined as possessing some bit of "moral magic" that transforms an otherwise wrongful assault into a permissible encounter (permissible because it no longer violates another's rights).[9] But this myopic focus on the moment of rights-transfer blinds legal actors to the myriad ways—long captured by feminist accounts of rape—in which individual sexual choices are constrained by social inequalities.[10] Much unwanted, harmful, even violent sex remains arguably "consensual" legally.[11]

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3 Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 958 (2008).

4 *See, e.g.*, STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 11 (1998); Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 422–23 (2016).

5 Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 3 (2015); *see also* Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1404 (2005).

6 *See infra* subpart II.A.

7 *See infra* section I.A.3.

8 *See infra* subpart II.B.

9 *See* Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 124 (1996).

10 *See, e.g.*, Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 440 (2016); Tracy E. Higgins, *Why Feminists Can't (or Shouldn't) be Liberals*, 72 FORDHAM L. REV. 1629, 1632 (2004); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 814 (1988). *See generally* Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-direction*, 40 WM. & MARY L. REV. 805 (1999) (demonstrating how the classical liberal version of sexual autonomy fails to account for the myriad constraints and inequalities under which women live); CAROLE PATEMAN, THE SEXUAL CONTRACT (1988) (arguing that liberal contract theories are political fictions that are blind to the realities of domination and subordination that influence consensual agreements).

11 *See generally* Robin West, *The Harms of Consensual Sex*, *in* THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS 371, 371–73 (Raja Halwani, Alan Soble, Sarah Hoffman & Jacob M. Held eds., 2017).

Even with rape law's increasing focus on consent, conviction rates for reported rapes remain troublingly low—estimated to be between 8 and 23%[12]—and the successful prosecutions continue to be those that most resemble the traditional common-law understanding of a violent attack by a stranger.[13] Although rarely described in these terms, contemporary rape laws are effectively being nullified through widespread underenforcement and unjust or uneven application. Attempts to adopt an "affirmative" standard of consent may very well invite further backlash.[14]

Part of the problem is that contemporary rape law has shifted the spotlight of criminal proceedings away from the accused. By their very nature, consent-based prohibitions require repeated inquiry to the mental state and actions of the complainant.[15] It remains a hotly contested question whether legal institutions are able to perform this inquiry accurately and without inflicting additional trauma on rape survivors.[16] Juries have been known to simply impute consent—or even repressed desire—onto unsympathetic rape complainants,[17] necessitating special rules of evidence and courtroom procedure that address the ancillary symptoms of a more fundamental failure.[18]

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[12] *See* Cassia Spohn, *Sexual Assault Case Processing: The More Things Change, the More They Stay the Same*, 9 INT'L J. CRIME, JUST., & SOC. DEMOCRACY 86, 90 (2020) (reporting a 7.8% conviction rate for reported rapes in Los Angeles between 2005 and 2009); *The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system [https://perma.cc/ZZM6-6XA5] (last visited Oct. 10, 2022) (reporting a 9.0% conviction rape for reported rapes nationally); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1286 (1997) (reporting convictions rates ranging from 9% to 20% in studied cities).

[13] Spohn, *supra* note 12, at 89–90; *see also* Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 209–10 (2017) (showing how rape myths influence police gatekeeping of rape victims).

[14] Gruber, *supra* note 4, at 446–47.

[15] *See infra* subpart I.A.

[16] *See generally* Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 88–92 (2020) (detailing the process of retraumatization of witnesses).

[17] Mary Graw Leary, *Is the #Metoo Movement for Real? Implications for Jurors' Biases in Sexual Assault Cases*, 81 LA. L. REV. 81, 82–83 (2020) ("Juror research demonstrates it is axiomatic that juries judge sexual assault victims more harshly than other witnesses, base their verdicts on perceptions of the victim and not evidence, and contribute to the attrition that sexual violence cases experience from the time the offense occurs to trial.").

[18] *See generally* I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826 (2013) (tracing the history of rape shield laws and critiquing their role in reinforcing a de facto chastity requirement demanded by factfinders).

Rape law's systemic commitment to consent may even be contributing to problematic gender dynamics in cross-gender sexual relationships. In the abstract, consent is conceived of as an inherently unequal relationship: One party initiates sexual pursuit while the other acquiesces to initiation.[19] One party is a subject acting on the other as an object.[20] As practiced socially, consent is markedly gendered, mapping pursuit, hence subjectivity, to masculinity.[21] Scholars who have noticed and called out this pattern tend to focus on the inequality confronting women as an object of men's pursuit.[22] Few have examined the ways in which the widespread embrace of consent socially undermines the ideal of mutuality by encouraging men to see the women they pursue for sex as opponents rather than partners—as gatekeepers to sex, and thus obstacles in the path to masculine status.[23]

Given the failings of consent, this Article offers an alternative account of rape as a failure to respect another person's human dignity. At its most basic, human dignity represents a relatively straightforward imperative—respect for persons—that would seem to be a natural basis for substantive criminal prohibitions.[24] Moreover, dignity already has an extensive, and expanding, influence in law.[25] The concept of dignity has substantially influenced U.S constitutional law, including criminal procedure jurisprudence under the Fourth Amendment, Eighth Amendment, and Due Process clauses.[26] As a legal concept, human dignity has proven to be an especially useful tool for advocates seeking legal recognition of group-based subor-

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19 MacKinnon, *supra* note 10, at 440.

20 *See* Anupriya Dhonchak, *Standard of Consent in Rape Law in India: Towards an Affirmative Standard*, 34 BERKELEY J. GENDER L. & JUST. 29, 32 (2019); Heidi Kitrosser, *Meaningful Consent: Toward A New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL'Y & L. 287, 292 (1997). *But see* Tuerkheimer, *supra* note 5, at 42 (arguing that a rape law premised on consent, rather than force, affirms women as sexual subjects).

21 Ben A. McJunkin, *Deconstructing Rape by Fraud*, 28 COLUM. J. GENDER & L. 1, 25–26 (2014).

22 *See infra* subpart II.B.

23 *But see* McJunkin, *supra* note 21, at 28–29 (examining how contemporary masculinity attribute status to sexual conquests in the face of feminine resistance); ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 212 (2003) (explaining that, on a contractual model of sexual relations, "it is permissible for men to try to attain sexual gratification for themselves without much regard for the woman's interests, and it is the women's role to play 'gatekeeper' if she so desires").

24 *See* McJunkin, *supra* note 21, at 41–42.

25 MICHAEL ROSEN, DIGNITY: ITS HISTORY & MEANING 1–2 (2012).

26 *See infra* section IV.B.2.

dination.[27] For those who take seriously the idea that rape is a pervasive social practice of gender-based violence,[28] dignity should therefore be a natural touchstone for understanding the offense.

Although an admittedly broad concept, human dignity can nevertheless be protected through carefully tailored legal standards. The most notable examples domestically are state and federal criminal prohibitions against human trafficking, an offense generally understood to be grounded in the protection of human dignity.[29] Although trafficking laws vary in their precise contours, they typically target the use of force, fraud, or coercion to compel labor, including sexual labor.[30] Trafficking is typically punishable without regard to the putative consent of the trafficked victim.[31]

A rape law structured similarly to human trafficking laws would begin to ameliorate some of the fundamental problems with consent in rape law. Rather than focus narrowly on the complainant's behavior or state of mind at the moment of sexual contact, as consent-based prohibitions require,[32] a rape law grounded in dignity would emphasize the conduct of the accused—the forceful, fraudulent, coercive, or otherwise dehu-

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27 *See infra* section IV.B.1.

28 *See* MacKinnon, *supra* note 10, at 432–33 ("Authorities around the world increasingly recognize the reality that sexual violation is socially gender-based, whether that understanding is predicated on the large numbers and vast disproportion by sex between perpetrators and victims, on gender roles and stereotypes of masculine and feminine sexuality, or on the hierarchically gendered social meanings and consequences of sexual victimization and perpetration."). Acknowledging that rape is gender-based does not deny the prevalence or wrongfulness of male rape victimization. *But see* I. Bennett Capers, *Real Rape Too*, 60 UCLA L. REV. 1259 (2011) (arguing for reconceptualizing rape as a gender-neutral crime).

29 *See infra* subpart IV.C.

30 *E.g.*, 22 U.S.C. § 7102(11)(A)–(B) (defining "severe forms of trafficking" as, inter alia, using "force, fraud, or coercion" to compel labor); CAL. PENAL CODE § 236.1 (West 2023) (defining trafficking as involving "forced labor" through "force, fraud, duress, or coercion, or equivalent conduct that would reasonably overbear the will of the person"); LA. STAT. ANN. § 14-46.2 (2022) (defining trafficking as involving "fraud, force, or coercion to provide services or labor").

31 U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 34 (July 2022), https://www.state.gov/wp-content/uploads/2022/08/22-00757-TIP-REPORT_072822-inaccessible.pdf [https://perma.cc/XS37-RJBE] ("Human trafficking can take place even if the victim initially consented to providing labor, services, or commercial sex acts."). *See also* People v. Oliver, 269 Cal. Rptr. 3d 201, 210 (Cal. Ct. App. 2020) ("The offense of human trafficking . . . does not expressly contain the element that the act was accomplished against the victim's will or that the victim did not consent to his or her exploitation.").

32 *See infra* subpart I.A.

manizing means by which sex was compelled, even if ostensibly consensual.[33] Compared to consent-based rape laws, a rape law grounded in dignity would have an expanded scope of inquiry, both in terms of the relevant time frame and in terms of the forms of conduct recognized as wrongful.[34] This shift holds the power to make visible to the criminal system the subordinating effects of much morally culpable conduct that was previously beyond the scope of rape law.[35] Importantly, a reform of this sort holds the potential to disrupt harmful social narratives about sexual gatekeeping by shifting the focus of criminal responsibility onto the conduct of the accused.[36]

A turn toward dignity would also respond to the oft-voiced concerns of scholars who find consent insufficient to describe the wrongfulness of rape.[37] For years, academic proponents of rape law reform have questioned the very foundations of the crime. Scholars have alternately postulated rape as torture,[38] as slavery,[39] as an abuse of power,[40] or as a loss of self-possession.[41] Others have emphasized the harms of even consensual sex[42] and the failure of consent to grapple with the inequalities that too often constrain sexual decision making.[43] Viewing rape as an affront to human dignity harmonizes many of these concerns. It captures rape not merely as a threat to autonomy,

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33 *See infra* subpart V.A.

34 In other respects, however, a rape law grounded in human dignity may be narrower than current laws. *See infra* section V.C.1.

35 *See* Michal Buchhandler-Raphael, *The Failure of Consent: Re-conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 186 (2011) ("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."); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 623 (2009) (noting how the longstanding "view of rape victimhood allows society and the government to ignore the social predicates of rape and sexual subordination").

36 *Cf.* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 421–25 (1999) (explaining how criminal law can be wielded to manage public discourse).

37 *See infra* section II.D.

38 CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 172 (1989).

39 Jane Kim, *Taking Rape Seriously: Rape as Slavery*, 35 HARV. J.L. & GENDER 263, 293–300 (2012).

40 Buchhandler-Raphael, *supra* note 35, at 199–204.

41 Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1425–27 (2013).

42 West, *supra* note 11, at 371–73.

43 MacKinnon, *supra* note 10, at 439–42; Tuerkheimer, *supra* note 5, at 40–43.

but also as an invasion of bodily and personal integrity, as a denial of personhood, and as a subordinating social practice.[44]

More fundamentally, a turn toward dignity would better align rape law with core principles of criminal law. The criminal law contains a strong deontological component, which ties the wrongfulness of an act to our moral duties, not merely the consequences to the victim.[45] Human dignity is well-suited to this deontological role. Grounding rape law in the moral duty to respect the personhood of others[46] would justify reviving robust actus reus and mens rea requirements in a context where they have long been elided and would forge a path toward engaging more directly with the humanity of both potential victims and potential offenders.[47] Accepting rape as indignity may in fact set the stage for restorative and rehabilitative alternatives at a time of overcriminalization and mass incarceration.[48]

This Article offers a comprehensive critique of consent in rape law and an alternative path forward that attempts to respond to decades of rape law research. Part I illustrates consent's preeminent place in rape law, both doctrinally and discursively. It documents the myriad ways that questions of consent infect rape law jurisprudence, demanding that factfinders scrutinize the thoughts and behavior of complainants. And it details the increasing prevalence of consent discourse among the broader public. Part II demonstrates the contested contours of consent as a concept. Although seemingly simple, consent is in fact subject to numerous debates about its nature, its reach, and its appropriateness as a grounding for rape law. Part III then constructs an account of human dignity as a distinctly legal concept. It situates dignity within traditions of constitutional law and criminal procedure that emphasize respect for fundamental personhood and the rejection of group-based subordination. Part IV proposes and defends a model rape statute grounded in the account of human dignity just constructed. Fundamentally, this Article argues that a proper respect for human dignity requires that rape law reject consent as its lodestar and more broadly prohibit the use of dehumanizing means of compelling sex.

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44 *See infra* subpart V.A.

45 Heidi M. Hurd & Michael S. Moore, *The Ethical Implications of Proportioning Punishment to Deontological Desert*, 15 CRIM. L. & PHIL. 495, 495–96 (2021).

46 *See, e.g.*, R. George Wright, *Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle*, 36 U. RICH. L. REV. 271, 276–77 (2002).

47 *See infra* section V.A.2.

48 *See infra* section V.C.2.

I
Consent's Preeminence in Rape Law

In U.S. rape law, consent is seemingly everything. Sexual consent is centered in media accounts of rape,[49] as well as in academic conceptualizations of the crime.[50] Consent slogans—"no means no,"[51] "only yes means yes,"[52] and (my personal favorite) "consent is sexy"[53]—are shared widely and have even been codified as legal rules in some jurisdictions.[54] Rape trials overwhelmingly focus narrowly on questions of the complainants' consent.[55] And prosecutors closely scrutinize possible consent defenses before deciding whether to bring rape charges.[56]

Consent's rise to prominence has both doctrinal and discursive dimensions. At common law, rape was traditionally defined as sexual intercourse by force and without consent.[57] Over the past several decades, the requirement of force has been deemphasized through various well-meaning reforms.[58] Meanwhile, the requirement of nonconsent has been comparatively emphasized,[59] sparking extended and spirited debates about the nature and constituent features of legally valid

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49 Tuerkheimer, *supra* note 5, at 6.

50 McJunkin, *supra* note 21, at 7.

51 Michelle J. Anderson & Deborah Tuerkheimer, *The Thinking About Consent Has Evolved Drastically. This Code May Turn the Clock Back.*, N.Y. Times (May 16, 2022), https://www.nytimes.com/2022/05/16/opinion/metoo-sexual-assault-consent.html [https://perma.cc/7YX9-8P5T].

52 *See generally* Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Result of an Affirmative Consent Standard in Rape Law*, 58 Vand. L. Rev. 1321 (2005).

53 *See* Kristen Pizzo, *The Problem with Saying Consent is "Sexy,"* Medium (Apr. 29, 2019), https://pizzokristen.medium.com/the-problem-with-saying-consent-is-sexy-a009e3f37b89 [https://perma.cc/BNU2-Y6TX].

54 *See, e.g.*, Megan Hickey, *'No Means No:' Indiana Lawmakers Pass Bill Closing Loophole in Which There Was No Definition of Sexual Consent*, CBS News (Mar. 3, 2022), https://www.cbsnews.com/chicago/news/indiana-state-bill-no-means-no-sexual-consent/ [https://perma.cc/P53P-ZYYL]; Andrew Jeong, *Under Spain's New Sexual Consent Law, Only Yes is Yes*, Wash. Post (Aug. 26, 2022), https://www.washingtonpost.com/world/2022/08/26/spain-only-yes-law-sexual-consent/ [https://perma.cc/4X6N-N9JT].

55 Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 Colum. J. Gender & L. 436, 461–62 (2006).

56 Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 Just. Q. 651, 682 (2001).

57 Wayne R. LaFave, Criminal Law 913 (5th ed. 2010).

58 Dripps, *supra* note 3, at 958.

59 Gruber, *supra* note 4, at 416–17.

sexual consent.[60] Even in jurisdictions that retain some form of the force requirement, which is still most of them,[61] questions of consent predominate.[62]

The academic and social discourse surrounding consent has evolved further and faster than the law itself.[63] Some scholars have suggested that we've experienced a "consent revolution."[64] Consensual sex is now considered constitutionally protected.[65] Force in rape is regarded as "so archaic as to barely merit mention."[66] And on campuses around the country, college students are taught that consent is not only paramount, it is constitutive of good sex.[67] Indeed, it regularly surprises my first-year Criminal Law students to learn that the crime of rape has ever required more than mere nonconsent.

This Part explores the preeminence of consent in contemporary rape law. Doctrinally, questions of consent infect every aspect of rape, including the ostensibly independent requirements of mens rea and actus reus. These doctrines necessitate that factfinders focus their inquiry on the conduct and mental states of the complainant, rather than the defendant. Discursively consent has entered a reified place in discussing not only rape but also sex more generally. For better or worse, it is now virtually beyond debate that consent is the touchstone for all things sex.

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60 *See infra* subpart II.A; *see also* Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. L. REV. 665, 665–67 (2016) ("The current debate, now raging with intensity, centers on the appropriate understanding of that 'without consent' requirement.").

61 As of 2016, twenty-five states still defined rape by statute as requiring the conjunction of both force and nonconsent. MacKinnon, *supra* note 10, at 437 n.26. The other twenty-five states defined rape as requiring either force or nonconsent in the disjunctive, although these elements are sometimes defined circularly in terms of one another. *Id.*

62 *See infra* subpart I.A.

63 *See infra* subpart I.B.

64 Tuerkheimer, *supra* note 5, at 6; Caroline Davidson, *Rape in Context: Lessons for the United States from the International Criminal Court*, 39 CARDOZO L. REV. 1191, 1197 (2018).

65 Dripps, *supra* note 3, at 957 (citing Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

66 Gruber, *supra* note 4, at 416.

67 Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 926–27 (2016).

A. The Doctrines of Consent

Although a complainant's nonconsent is but one element of rape, at least as traditionally defined, questions about consent in fact permeate every corner of rape law doctrine. Scholars have long decried how rape prosecutions tend to put the complainant "on trial," with factfinders seemingly bent on investigating legally irrelevant considerations, such as the complainant's sexual history.[68] Few, however, have documented how rape law's complainant focus is demanded by the centrality of consent to each of rape law's various doctrines. Some of these doctrines have historical vestiges,[69] while others are relatively recent developments.[70] But the result is the same: consent is preeminent doctrinally (and is only becoming more so).

This subpart begins the critique of consent by problematizing the role of consent in informing the defendant's mens rea and actus reus—elements of the crime that should ostensibly focus on the defendant's culpable conduct, but that instead demand outward performances of nonconsent from the complainant. It then illustrates the harmful consequences of maintaining nonconsent as a separate and distinct element of the crime of rape, including the all too frequent possibility that factfinders adjudge consent based on long outdated rape myths and social scripts.

1. *Nonconsent as Actus Reus*

Actus reus is an essential component of a criminal charge. It is the voluntary, wrongful conduct attributable to the accused which the law prohibits.[71] The actus reus of rape, as defined at common law, is sexual intercourse "by force."[72] Proving the occurrence of sexual intercourse is typically uncomplicated, in-

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68 *See, e.g.*, Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 12–22 (1977); SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 372–73 (1975).

69 *See infra* section I.A.1.

70 *See infra* section I.A.2.

71 SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 222 (10th ed. 2017).

72 *See, e.g.*, 4 BLACKSTONE, *supra* note 2, at *210. Some commentators have included the victim's nonconsent as a component of the actus reus of rape. *See, e.g.*, Meredith J. Duncan, *Sex Crimes and Sexual Miscues: The Need for A Clearer Line Between Forcible Rape and Nonconsensual Sex*, 42 WAKE FOREST L. REV. 1087, 1094 (2007). Given that the victim's nonconsent is not voluntary conduct attributable to the accused, this Article adopts the position, shared by many courts and commentators, that the victim's nonconsent is better understood as an attendant circumstance of the crime. *See id.* at 1096 n.61.

deed this element is commonly undisputed.[73] Whether sexual intercourse occurred "by force," however, has been a source of endless contention in rape law doctrine.[74] Most courts require that the force used be extraneous to the sexual penetration itself, however forceful,[75] but they have found little agreement beyond that.

Rather than attempt to articulate a quantum of extrinsic force that would satisfy rape law's actus reus, early courts instead imposed a "resistance requirement" on rape victims.[76] These courts concluded that sexual intercourse is only "by force" when a perpetrator overcomes the required level of physical resistance of the victim.[77] Initially, a rape complainant was required to demonstrate that she had resisted "to the utmost."[78] More recently, U.S. jurisdictions have lessened the resistance requirement, demanding only "earnest" resistance or "reasonable" resistance.[79] Even where the resistance requirement was formally written out of some more contemporary rape law statutes, scholars have found that courts and juries continue to expect resistance in order to find the actus reus of force.[80]

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73 *See* David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 545, 554, 578 (1994) (suggesting that the most common defense in acquaintance rape cases is consent, where "the accused admits the act of intercourse").

74 Criminal law textbooks are filled with examples of courts struggling with the question whether the defendant's conduct is "by force." *See, e.g.*, KADISH, SCHULHOFER & BARKOW, *supra* note 71, at 364–84.

75 Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 17 (1998).

76 The resistance requirement traces back to the English common-law definition of rape as "carnal knowledge of a woman forcibly and against her will." 4 BLACKSTONE, *supra* note 2, at *210. Resistance was considered essential to prove that intercourse was "against her will." Anderson, *supra* note 5, at 1403 ("'Against her will' meant that the woman did not consent to having sexual intercourse with him, and the common law required that she resist him to the utmost of her physical capacity to express her nonconsent.").

77 B. ANTHONY MOROSCO, THE PROSECUTION AND DEFENSE OF SEX CRIMES §1.01[3][b], at 3–9 (1996) ("[F]orce is often defined in terms of the amount necessary to overcome the resistance that the woman puts forth to show her lack of consent.").

78 *See* Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962–63.

79 *Id.* at 964–65. Regardless of the amount of resistance required, the expectation of the resistance requirement is always that an unwilling victim will put up a physical fight. Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 628 (2005).

80 Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 595 (2011) ("Depending on how the jurisdiction defines force, a force element to rape may function as a de facto resistance requirement, especially in acquaintance rape cases: if the victim does not fight back against a nonstranger assailant, it will be difficult for the prosecution to establish that the defendant acted with the necessary force.").

The traditional view was that a victim who insufficiently resisted her attacker was in fact "willing"—that is to say consenting—and therefore complicit in her own violation.[81] As Ann Coughlin has documented, "courts frankly and unabashedly treated the woman who said 'no' to a man's sexual invitation, but who did not energetically endeavor to repel him physically, as if she had consented to the ensuing intercourse."[82] The resistance requirement was thus grounded in a deep skepticism of rape complainants,[83] along with a pervasive belief that raping a woman who was truly nonconsenting would be physically impossible.[84] And, historically, rape complainants frequently faced criminal charges of their own if a rape could not be proved, leading to a doctrine that shared more similarities with affirmative defenses than with other violent crimes.[85]

Thus rape's actus reus—sexual intercourse "by force"—ultimately turns on the question of how the complainant manifested nonconsent.[86] Because of this interplay of force and nonconsent, rape trials have long centered narrowly on the conduct of the complainant, more so even than the conduct of the defendant.[87] "Both the quantity and the quality of her response were put on trial, deliberated over, and adjudicated."[88] Indeed, if a victim fails to resist strenuously enough, the amount of force that a defendant used, or was prepared to use, becomes legally irrelevant.[89]

As rape law has evolved, the centrality of nonconsent to definitions of force has persisted. New Jersey provides a telling example. In 1978, the state legislature revised its criminal code to remove the requirement that rape must be "against the will" of the victim.[90] The revised statute defined rape simply, as "an

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81 Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1113–14 (1986).

82 Coughlin, *supra* note 75, at 14.

83 Patricia J. Falk, *"Because Ladies Lie": Eliminating Vestiges of the Corroboration and Resistance Requirements from Ohio's Sexual Offenses*, 62 CLEV. ST. L. REV. 343, 344–45 (2014).

84 Capers, *supra* note 18, at 834 n.26.

85 *See* Coughlin, *supra* note 75, at 29–40 (demonstrating how the resistance requirement emerged as part of a woman's defenses to potential criminal charges of adultery or fornication).

86 For this reason, scholars have at times criticized as "redundant" rape law's inclusion of both force and nonconsent as distinct elements. *See, e.g.*, MacKinnon, *supra* note 10, at 470.

87 Margo Kaplan, *Rape Beyond Crime*, 66 DUKE L.J. 1045, 1056 (2017).

88 Capers, *supra* note 18, at 834.

89 *See* Estrich, *supra* note 81, at 1107; SUSAN ESTRICH, REAL RAPE 63 (1987) [hereinafter ESTRICH, REAL RAPE].

90 State *ex rel.* M.T.S., 609 A.2d 1266, 1274–76 (N.J. 1992).

act of sexual penetration using physical force or coercion."[91] Nevertheless, in 1992, the state's Supreme Court interpreted the element of "physical force" as including all "*non-consensual* penetration involving no more force than necessary to accomplish that result."[92] By reading force to include any physical contact, but only if nonconsensual, the court's opinion ensures that the key question of actus reus remains not what the defendant did to the complainant, but rather what the complainant outwardly agreed to.[93]

2. *Nonconsent as Mens Rea*

In addition to proof of prohibited conduct, most criminal offenses require proof that the defendant possessed a sufficiently culpable mental state.[94] Termed "mens rea," this element of the offense protects against punishing those who are not truly blameworthy—for instance, those who stumbled into prohibited conduct inadvertently.[95] Although mens rea is often described as "fundamental"[96] or "foundational,"[97] courts and scholars frequently disagree about how blameworthiness ought to be assessed.[98] And the recent jurisprudential trend has been toward dispensing with the element entirely in crimes of sufficient public import.[99]

For most of the centuries in which rape was a punishable offense, mens rea in rape cases was not a contested issue.

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91 *Id.* at 1267.

92 *Id.* (emphasis added).

93 *See id.* at 1277 (holding that consent requires "affirmative and freely-given permission").

94 *See, e.g.*, Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. Crim. L. & Criminology 491, 493 (2019) ("Mens rea—a key component of the substantive criminal law and a staple of the first-year law school curriculum is the requirement that criminal conduct be accompanied by a 'bad mind' or guilty mental state.").

95 *But see* Michael Serota, *Strict Liability Abolition*, 98 N.Y.U. L. Rev. 112, 194 (2023) (documenting the breadth of strict liability provisions in U.S. criminal codes).

96 *See, e.g.*, Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 974 (1932).

97 *See, e.g.*, Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 Wake Forest L. Rev. 1201, 1201 (2017).

98 Michael Serota, *Guilty Minds*, 82 Md. L. Rev. 672, 672 (2022).

99 *See, e.g.*, Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. Crim. L. & Criminology 829, 859 (2001) (documenting the rise of strict liability in drug possession offenses); Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 Am. U. L. Rev. 313 (2003) (documenting the increasing rejection of mens rea defenses for statutory rape offenses).

Under English common law, rape was considered a "general intent" offense.[100] General intent requires only that the defendant have awareness that he is engaging in the prohibited conduct—in rape prosecutions, this would require awareness that the defendant engaged in sexual conduct through the use of force.[101] Absent extremely aberrant circumstances, this awareness would be evidenced by the conduct itself, rendering mens rea a perfunctory element.[102] Importantly, historical rape law required no awareness of the complainant's consent, or lack thereof.[103]

Roughly sixty years ago, however, a new defense to rape allegations emerged.[104] The "mistake of consent" defense would permit defendants to argue that they mistakenly believed sex was consensual, even where consent was in fact absent. The logic of the defense is that "criminal intent is lacking" where a mistake has led the defendant to believe that their conduct was innocent.[105] Even though "[a] mistake of fact is not supposed to exonerate unless it negates the mens rea required for the commission of the crime charged,"[106] a majority of U.S. jurisdictions promptly adopted this logic.[107] The mistake of consent defense proliferated.

The emergence of the mistake of consent defense brings questions of consent to the forefront of rape prosecutions, this time as a matter of the defendant's mens rea. Given the

100 Kit Kinports, *Rape and Force: The Forgotten Mens Rea*, 4 BUFF. CRIM. L. REV. 755, 776–77 (2001) ("Following the traditional common law definition of the crime, and given the absence of mens rea language in most rape statutes, a substantial number of courts have held that rape is a general intent crime, as opposed to a specific intent crime.").

101 *See, e.g.*, David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 325 (2000) ("At common law, rape was a 'general intent' crime: The requisite intention was merely to perform the sexual act, rather than to have nonconsensual intercourse.").

102 Kinports, *supra* note 100, at 780.

103 *See, e.g.*, State v. Smith, 554 A.2d 713, 716 (Conn. 1989) ("Most courts have rejected the proposition that a specific intention to have intercourse without the consent of the victim is an element of the crime of rape or sexual assault.").

104 Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815, 815 (1996) (citing People v. Hernandez, 393 P.2d 673, 678 (Cal. 1964)).

105 *See Hernandez*, 393 P.2d at 677.

106 Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of A Rape*, 71 FORDHAM L. REV. 263, 277 (2002). *See also* Dripps, *supra* note 3, at 962 (explaining that, logically, rape law would permit "a reasonable mistake defense only about intercourse, not about consent").

107 *See* Dripps, *supra* note 3, at 962.

prevalence of the defense,[108] the "fundamental" or "foundational" inquiry regarding the defendant's state of mind becomes whether the defendant believed the complainant consented, *given the complainant's outward conduct*.[109] Once again, the attention turns to evaluating a complainant's manifestations of nonconsent, including physical resistance, if any.[110] Problematically, some courts have even extended this inquiry beyond the specific beliefs held by the defendant: "That is, instead of determining whether a *particular* defendant *honestly* believed his victim consented and then whether that belief was reasonable, courts ask whether *any* defendant *could have* reasonably believed the victim consented."[111] Under this standard, the complainant must have expressed nonconsent in terms so clear that no defendant could plausibly misinterpret it.

The mistake of fact defense not only centers questions of consent in rape prosecutions, but also, it does so in a social context where men are routinely mistaken about women's sexual intentions.[112] Social science research has consistently revealed that men attribute sexual desire to women's behaviors that are intended as non-sexual.[113] Men see consent where women intend none.[114] This social context makes men's claims of mistake more credible, and women's claims of violation therefore less likely to be vindicated through prosecution.[115]

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108 *See* Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2694 (1991) ("The two most common defenses to rape charges in acquaintance rape cases are consent and reasonable belief of consent.").

109 California's mistake-of-consent defense, for example, requires "substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not." People v. Williams, 841 P.2d 961, 966 (Cal. 1992).

110 Berliner, *supra* note 108, at 2694.

111 *Id.*

112 *See* Anderson, *supra* note 5, at 1406 ("Any theory that relies on a man's ability to intuit a woman's actual willingness allows him to construct consent out of stereotype and hopeful imagination.").

113 *See generally* Kristen P. Lindgren, Michele R. Parkhill, William H. George & Christian S. Hendershot, *Gender Differences in Perceptions of Sexual Intent: A Qualitative Review and Integration*, 32 PSYCH. WOMEN Q. 423, 428 (2008).

114 The result, as Catharine MacKinnon has astutely observed, is that we live in a world in which "a woman is raped, but not by a rapist." Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 654 (1983).

115 *See* Spohn & Holleran, *supra* note 56, at 682.

3. *Nonconsent as Attendant Circumstance*

As the foregoing reveals, a complainant's external manifestations of nonconsent inform key questions of the defendant's actus reus and mens rea in rape law prosecutions. But nonconsent is also traditionally a distinct element of the crime of rape.[116] A complainant's nonconsent acts as an attendant circumstance—an extraneous fact, separate from the thoughts or actions of the accused—that must also be proved beyond a reasonable doubt to support a conviction.[117]

The attendant circumstance of nonconsent has become increasingly important in recent years, as rape law has broadened to take acquaintance rape more seriously.[118] "Over the past 50 years of sweeping cultural change, there has been a shift away from force and resistance toward consent as the proper dividing line between lawful and unlawful sex."[119] At least 16 states now criminalize sexual intercourse without consent, without any additional requirements such as force or physical resistance.[120] Here, on rape law's cutting edge, the element of nonconsent has a pivotal role to play.

Unfortunately, the attendant circumstance of nonconsent has long been a source of disappointment for those who study rape law.[121] As Catharine MacKinnon has explained, "'consent' is supposed to be the crucial line between rape and intercourse, but the legal standard for it is so passive, so acquiescent, that a woman can be dead and have consented under it."[122] In most jurisdictions today, a complainant's nonconsent must be proven by affirmative evidence that the complainant was unwilling to have sex.[123] "[A]ny conduct falling short of unequivocal rejection, including passive submission, is viewed

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116 LaFave, *supra* note 57, at 913–14.

117 *See, e.g.*, Estrich, *supra* note 81, at 1121 n.101; Kimberly Kessler Ferzan, *Beyond Intention*, 29 Cardozo L. Rev. 1147, 1189 (2008).

118 Gruber, *supra* note 4, at 416; Tuerkheimer, *supra* note 5, at 2.

119 Anderson & Tuerkheimer, *supra* note 51.

120 John F. Decker & Peter G. Baroni, *"No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law*, 101 J. Crim. L. & Criminology 1081, 1086 (2012).

121 *See* Gruber, *supra* note 4, at 419 (explaining that the shift toward a consent standard "proved unsatisfying to many activists who contended that biased or mistaken decision-makers misapplied the standard, leading to under-regulation of unwanted sex").

122 MacKinnon, *supra* note 38, at 150.

123 Decker & Baroni, *supra* note 120, at 1119.

by the criminal justice system as consent."[124] Even outright rejection has at times not been enough—courts continue to hold that "no" may sometimes mean "yes."[125]

Moreover, the conjunction of force and nonconsent as distinct elements, in jurisdictions that maintain a force requirement, means that "no matter how much force is used to obtain it, consent can still occur."[126] This has been concretely illustrated in certain well-known and high-profile examples. In Texas, a grand jury refused to indict a man who hid in a woman's apartment and confronted her at knifepoint before raping her.[127] Because the victim had insisted that her assailant use a condom, some jurors construed this as evidence of her "complicity in the encounter."[128] In Florida, a jury acquitted a man who abducted a woman at knifepoint and forced her to submit to sexual intercourse.[129] The jury concluded that the woman had consented after interpreting her provocative attire—a lace miniskirt without underwear[130]—as evidence that she had "asked for it."[131] Even today, rape prosecutions are empirically much less successful than other prosecutions.[132] It is no surprise that prosecutors lament the challenges of

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124 Buchhandler-Raphael, *supra* note 35, at 165.

125 *See, e.g.*, State v. Gangahar, 609 N.W.2d 690, 695 (Neb. Ct. App. 2000) ("In short, while Hatfield said 'no,' the statute allows Gangahar to argue that given all of her actions or inaction, 'no did not really mean no.'").

126 Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1793 (1992).

127 *Rapist Who Agreed to Use Condom Gets 40 Years*, N.Y. TIMES (May 15, 1993), https://www.nytimes.com/1993/05/15/us/rapist-who-agreed-to-use-condom-gets-40-years.html [https://perma.cc/KRK2-NSML].

128 *See id.* *See generally* Carla M. da Luz & Pamela C. Weckerly, *The Texas 'Condom-Rape' Case: Caution Construed as Consent*, 3 UCLA WOMEN'S L.J. 95, 95–96 (1993).

129 Barbara Walsh, *Jury Acquits Man of Rape, Cites Woman's Clothing*, S. FLA. SUN SENTINAL (Oct. 4, 1989), https://www.sun-sentinel.com/news/fl-xpm-1989-10-05-8902020477-story.html [https://perma.cc/AK2T-WFTE]; *see also Defendant Acquitted of Rape; 'She Asked for It,' Juror Says*, N.Y. TIMES (Oct. 7, 1989), https://www.nytimes.com/1989/10/07/us/defendant-acquitted-of-rape-she-asked-for-it-juror-says.html [https://perma.cc/J3WD-H4YD].

130 Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-type Defenses in the Criminal Law of Rape*, 4 WM. & MARY J. WOMEN & L. 203, 219 (1997) (quoting Lani Anne Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1104 (1993)).

131 Walsh, *supra* note 129. *See also* Dripps, *supra* note 126, at 1794 (discussing the case).

132 Kristen McCowan, Henry F. Fradella & Tess M.S. Neal, *A Rape Myth in Court: The Impact of Victim-Defendant Relationship on Sexual Assault Case Outcomes*, 26 BERKELEY J. CRIM. L. 155, 180 (2021) (finding only 57% of sexual assault

proving nonconsent beyond a reasonable doubt,[133] particularly where judges or juries continue to be influenced by outdated rape myths and social scripts. Regardless of the legal standard on the books, experience has shown that factfinders are willing to infer sexual consent from (or impute sexual consent into) deeply troubling fact patterns.[134]

As the legal reforms emphasizing nonconsent have progressed, however, perspectives on the topic have evolved.

> As nonconsent increasingly became the line separating legal and illegal sexual conduct, the concept expanded: lack of consent grew to mean more than physical or verbal resistance objection to sexual conduct, and today there is a live debate over whether consent should mean 'affirmative consent' as opposed to lack of objection.[135]

Those who favor affirmative consent argue that an external conduct standard will avoid concerns of factfinders misinterpreting internal willingness,[136] and that affirmative consent's presumption of nonconsent is morally superior to existing law.[137] Critics are quick to argue that sexual consent is simply too ambiguous, and too contextual, to impose an unrealistic bright-line rule that fails to reflect on-the-ground practices.[138] A few jurisdictions now have rape laws that appear to require affirmative consent, but "these laws are notoriously vague."[139]

As the debate over affirmative consent rages, rape law's doctrines will continue to narrowly focus on the outward conduct of the complainant, while obscuring inquiry into any power, coercion, or violence wielded by the defendant. As Michal Buchhandler-Raphael has detailed, when courts are tasked with interpreting the element of consent, they focus narrowly on the presence of "permission" rather than subjective willingness, structuring the legal inquiry to ignore substantive inequalities

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cases studied resulted in guilty verdicts compared to 90% of prosecuted cases generally).

133 Bryden & Lengnick, *supra* note 12, at 1216; Katherine Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 690 (1999).

134 *See generally* Gruber, *supra* note 130 (examining the ways in which factfinders often infer consent from victim actions).

135 Gersen & Suk, *supra* note 67, at 889.

136 *See* Bryden, *supra* note 101, at 400–02.

137 *See, e.g.*, Little, *supra* note 52, at 1347.

138 *See* Deborah Tuerkheimer, *Affirmative Consent*, 13 OH. ST. J. CRIM. L. 441, 445–46 (2016).

139 *See* Gruber, *supra* note 4, at 430 n.63 (citing as examples California, Illinois, New Jersey, and Wisconsin).

between the parties.[140] "In many cases, verbal permission is obtained through exerting a variety of coercive pressures and through an abuse of power, authority, trust, and dominance."[141] Catharine MacKinnon has reached a similar conclusion: "Consent as a legal standard in the law of sexual assault commonly exonerates sexual interactions that are one-sided, nonmutual, unwanted, nonvoluntary, nonreciprocal, constrained, compelled, and coerced."[142] Shifting rape law's doctrines away from consent has the potential to capture a broader picture of sexual interactions, including much culpable wrongdoing that is currently invisible to the criminal justice system.

B. The Discourses of Consent

Academically and socially, Americans have accepted consent's centrality, not only to rape law, but also to sex more generally. "Adopting the liberal premise that consent is the touchstone of the criminal regulation of sexuality, most scholars today agree that the essential characteristic of rape is nonconsensual sex rather than an act of physical violence."[143] Stephen Schulhofer, for example, claims that treating all nonconsensual sex as rape reflects "the unmistakable trend in the recent legislation, jurisprudence, and academic writing."[144] And Deborah Tuerkheimer contends that, socially, "[c]onsent is now widely understood as the governing principle in matters of sex."[145] So-called "consent culture"—the view that "all things are permissible so long as consenting adults enthusiastically consent"—appears to have taken root in the American psyche, and not always for the better.[146]

The predominance of consent academically and socially is a relatively recent phenomenon. It was only in the 1970s that scholars began arguing that nonconsent was "the central substantive element of rape" and that a "principled standard of effective nonconsent" was needed in rape law.[147] As recently as

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140 Buchhandler-Raphael, *supra* note 35, at 182.

141 *Id.*

142 MacKinnon, *supra* note 10, at 443.

143 Buchhandler-Raphael, *supra* note 35, at 150.

144 Schulhofer, *supra* note 60, at 665–66.

145 Tuerkheimer, *supra* note 5, at 6.

146 David French, *Consent Was Never Enough*, THE ATLANTIC (Apr. 4, 2022), https://newsletters.theatlantic.com/the-third-rail/624b278a6c9086002052fdd2/sexual-consent-culture-christine-emba/[https://perma.cc/EP92-9K2Z].

147 Lucy Reed Harris, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 613 (1976).

1990, journalists and pop culture media were openly mocking efforts to promote affirmative consent on college campuses, "predicting that kissing itself would be outlawed."[148] But, in the decades that followed, Americans were inundated with slogans purporting to combat sexual violence by ensuring sexual consent, first "no means no" and later "yes means yes."[149]

By 2014, when then-President Obama announced an initiative to combat sexual violence, the White House proclaimed in no uncertain terms "that if someone does not or cannot consent to sex, it's rape."[150] Though an inaccurate statement of rape law at the time,[151] the White House's redefinition of the crime was very much in line with the winds of social change. Evolution in the social understanding has outpaced legal reforms, resulting in the pervasive belief that a party's nonconsent is, or at least *should be*, constitutive of rape.[152]

Perhaps the most poignant example of the social embrace of a robust model of consent comes from the #MeToo movement. Originally coined in 2006 for the use and empowerment of women of color who were survivors of sexual assault,[153] the hashtag #MeToo took the United States by storm in 2017 as victims of sexual abuse shared their personal stories of violation and abuse on social media.[154] The #MeToo movement led to few criminal prosecutions, but it had social and employment consequences for a large number of men who used their positions of power to assault the women around them.[155] The

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148 Jocelyn Noveck, *In Defining Consent, There's a Gap Between the Law, Culture*, AP NEWS (May 20, 2019), https://apnews.com/article/d761c7a5824c4932bce440f5adbb90f8 [https://perma.cc/UL9Y-7UZT].

149 Jake New, *More College Campuses Swap 'No Means No' for 'Yes Means Yes'*, PBS NEWS HOUR (Oct. 17, 2014), https://www.pbs.org/newshour/education/means-enough-college-campuses [https://perma.cc/E4UM-QW6P].

150 Tanya Somanader, *President Obama Launches the "It's On Us" Campaign to End Sexual Assault on Campus*, WHITE HOUSE (Sep. 19, 2014), https://obamawhitehouse.archives.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus [https://perma.cc/WK77-8M4N].

151 *See supra* note 61.

152 *See* Anderson & Tuerkheimer, *supra* note 51.

153 Abby Ohlheiser, *Meet the Women who Coined 'Me Too' 10 Years Ago—To Help Women of Color*, CHI. TRIB. (Oct. 19, 2017), https://www.chicagotribune.com/lifestyles/ct-me-too-campaign-origins-20171019-story.html [https://perma.cc/R57H-3UYV].

154 Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RES. CTR. (Oct. 11, 2018), https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/ [https://perma.cc/9UYJ-KD9B].

155 Dan Corey, *A Growing List of Men Accused of Sexual Misconduct Since Weinstein*, NBC NEWS, https://www.nbcnews.com/storyline/sexual-misconduct/

movement pushed for legal reforms focused on consent, including incorporating affirmative consent into rape laws and mandating consent-centered sexual education.[156] Following this push, numerous state lawmakers brought bills to the floor that would mandate an affirmative consent standard for rape and require the teaching of affirmative consent in schools.[157]

The breadth of consent's embrace following the #MeToo movement can also be seen in the increasing backlash by pundits who reject rape's transformation in the social discourse. Consider, for example, the comments of *Breitbart* Editor-in-Chief Alex Marlow amidst the movement in 2017. Marlow lamented that "[r]ape used to have a narrow definition. Rape used to have a definition where it was—it was brutality, it was forced sexual attack and penetration. Now it's become, really, any sex that the woman ends up regretting that she had."[158] *The New York Times* Opinion columnist Bari Weiss suggested that young feminists were "radically redefining" consent by insisting that it must be "affirmative, active, continuous, and—and this is the word most used—enthusiastic."[159] And then-President Donald Trump suggested that the movement to believe women's account of violation made it "a very scary time for young men in America."[160]

Consent's role in distinguishing between licit and illicit sexual intercourse is increasingly being conflated with distinguishing between good and bad sex. Colleges across the country have begun to emphasize "enthusiastic consent" as *the* model for healthy sexual relations.[161] The University of Wyo-

weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546 [https://perma.cc/DY5H-4FP9] (Jan. 10, 2018).

156 Rebecca Beitsch, *#MeTooMovement Has Lawmakers Talking About Consent*, STATELINE (Jan. 23, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/23/metoo-movement-has-lawmakers-talking-about-consent [https://perma.cc/VXA9-88JC].

157 *Id.*

158 Maya Oppenheim, *Breitbart News Editor-in-Chief Argues Rape is Now Defined as Regrettable Sex*, INDEPENDENT (Nov. 22, 2017), https://www.independent.co.uk/news/world/americas/breitbart-news-rape-regrettable-sex-editor-in-chief-alex-marlow-steve-bannon-a8069021.html [https://perma.cc/75DA-M6VZ].

159 Bari Weiss, *Aziz Ansari is Guilty. Of Not Being a Mind Reader.*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html [https://perma.cc/5F53-AXWY].

160 John Wagner, *Trump Says It's a 'Very Scary Time' for Young Men Who Can Be Falsely Accused of Bad Behavior*, WASH. POST (Oct. 2, 2018), https://www.washingtonpost.com/politics/trump-says-its-a-very-scary-time-for-young-men-who-can-be-falsely-accused-of-bad-behavior/2018/10/02/5c45af34-c629-11e8-9b1c-a90f1daae309_story.html [https://perma.cc/BVN8-ZEVD].

161 Gersen & Suk, *supra* note 67, at 924–26.

ming instructed students that asking for consent can "make the sexual interaction more intimate."[162] The University of California, San Diego announced in its materials that "[c]onsent is not only necessary, but also *foreplay*."[163] Yet, college students are demonstrably confused about which behaviors actually count as valid consent.[164]

In 2009, the Supreme Court announced that consensual sex is even, in some circumstances, constitutionally protected.[165] One scholar suggested that "*Lawrence v. Texas* established that consensual sex precludes harm to others."[166] This is the liberal logic of consent: because sex is chosen, it must not be harmful.[167] "Any suggestion that legal transactions to which individuals freely consent may be harmful, and hence *bad*, will invariably be met with skepticism—*particularly* where those transactions are sexual in nature."[168] It does not matter whether sex was chosen as the best of bad options[169] or whether sex was genuinely desired. It does not even matter that "the record the Court had before it contained no proof that Lawrence and Garner consented to the sex they were convicted under Texas law for having had."[170] The lesson of *Lawrence* socially has been that consent is the very touchstone of constitutionally protected sex.[171]

According to author Christine Emba, our culture now—problematically—regards consent as "the only rule."[172] Provided

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162 *Id.* at 928 (quoting UNIV. OF WYO., WHERE IS YOUR LINE: CONSENT IS SEXY, [https://perma.cc/45FK-BQRQ]).

163 *Id.* at 929 (quoting UNIV. OF CAL., SAN DIEGO, 2014 ANNUAL SECURITY REPORT 15 (2014), https://web.archive.org/web/20150607150349/http://police.ucsd.edu/docs/AnnualClery.pdf [https://perma.cc/4UZU-U35X]).

164 Nick Anderson & Peyton M. Craighill, *College Students Remain Deeply Divided Over What Consent Actually Means*, WASH. POST (June 14, 2015), https://www.washingtonpost.com/local/education/americas-students-are-deeply-divided-on-the-meaning-of-consent-during-sex/2015/06/11/bbd303e0-04ba-11e5-a428-c984eb077d4e_story.html [https://perma.cc/2UB6-RNGS].

165 *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

166 Buchhandler-Raphael, *supra* note 35, at 157.

167 *See* West, *supra* note 11, at 375.

168 *Id.* at 319.

169 *See id.* at 317–18 (providing examples).

170 Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1649 (2004).

171 *See id.* at 1657–58.

172 Louise Perry, *"Sex Means Nothing, and Everything": Christine Emba on Consent, Incels and Modern Dating*, NEW STATESMAN (Apr. 11, 2022), https://www.newstatesman.com/culture/books/2022/04/sex-means-nothing-and-everything-christine-emba-on-consent-incels-and-modern-dating [https://perma.cc/ZD6X-W5Q5] (reviewing CHRISTINE EMBA, RETHINKING SEX: A PROVOCATION (2022)).

that this minimal ethical hurdle is surpassed, our contemporary commitment to sexual pluralism means not questioning other aspects of the encounter.[173] "In this line of thinking, sex after yes, sex without violence or coercion, is good."[174] Emba questions whether this state of affairs is contributing to widespread sexual dissatisfaction.[175] After all, consent merely establishes a boundary for behavior that may nevertheless remain predatory: "[T]he end goal is still to Get the Sex from someone else without having committed an actual violation."[176]

In many respects, the embrace of consent also reflects the victory of sex-positive feminism over the competing dominance account of feminism.[177] Where dominance feminism concerned itself with the myriad ways in which women were subordinated through heteronormative sex and sexuality,[178] sex-positive feminism saw the potential for liberation in the embrace of sexual desire.[179] "Young feminists have adopted an exuberant, raunchy, confident, righteously unapologetic, slut-walking ideology that sees sex—as long as it's consensual—as an expression of feminist liberation."[180] Consistent with the sex-positive vision, the widespread embrace of consent treats sex as a matter of individual volition. "In this sense, the norms of sex are like the norms of capitalist free exchange."[181] What matters is merely whether each party's agreement is sufficiently voluntary—background inequalities that might have informed and motivated the exchange are removed from the picture.[182]

II
Consent's Contested Contours

Given the widespread commitment to consent documented above, one could be forgiven for assuming that it is a settled

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173 *See id.*

174 Rebecca Traister, *Why Sex That's Consensual Can Still Be Bad*, N.Y. Mag. (Oct. 20, 2015), https://www.thecut.com/2015/10/why-consensual-sex-can-still-be-bad.html [https://perma.cc/3XML-JJDM].

175 *See* Perry, *supra* note 172.

176 *See* Traister, *supra* note 174.

177 Amia Srinivasan, *Does Anyone Have the Right to Sex?*, London Rev. Books (Mar. 22, 2018), https://www.lrb.co.uk/the-paper/v40/n06/amia-srinivasan/does-anyone-have-the-right-to-sex [https://perma.cc/J6MJ-2NTW].

178 *See generally* MacKinnon, *supra* note 38.

179 Srinivasan, *supra* note 177.

180 Traister, *supra* note 174.

181 Srinivasan, *supra* note 177.

182 *See id.*

concept with clear legal applications. The reality is far less rosy. Debates over affirmative consent mask deep-seated disagreements about the nature of consent itself.[183] "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."[184] Meanwhile, invocations of consent in rape law frequently deviate sharply from theoretical models—sometimes construing consent so narrowly as to undermine individual autonomy, other times construing consent so broadly as to fail to protect it.[185] These inconsistencies have unearthed a number of consent "skeptics," scholars who seek to challenge consent's foundational place in rape law.[186] This Part examines the contested contours of consent, demonstrating the concept's limitations in both theory and practice.

A. Theorizing Consent

Consent is the primary legal mechanism through which the criminal law protects individual autonomy.[187] To say that consent is a "contested" concept,[188] however, is to massively understate the problem. For decades, scholars have disputed the moral and legal features of consent, the necessary conditions for consent's validity, and the theories of autonomy that animate consent's preeminence. As Donald Dripps has astutely noted, "The turn to consent [in rape law] is essentially lawless, because there is no determinate and widely-shared understanding of what constitutes consent."[189] At the risk of eliding the nuances of these disputes, this section briefly surveys the leading models of consent and autonomy—in particular, *sexual* consent and *sexual* autonomy—to highlight the analytical struggles inherent in deploying consent as rape law's touchstone.

The best understanding of consent in the criminal law is that it "creates a Hohfeldian 'privilege'" that negates another's

183 *See infra* subpart II.A.

184 Buchhandler-Raphael, *supra* note 35, at 159.

185 *See infra* subpart II.C.

186 *See infra* subpart II.D.

187 WERTHEIMER, *supra* note 23, at 31–32 ("[A]utonomy refers to the *value* that is to be protected, whereas consent refers to the means for protecting and promoting that value . . . .").

188 Buchhandler-Raphael, *supra* note 35, at 159.

189 Dripps, *supra* note 3, at 958.

duty of non-interference.[190] Put another way, "[c]onsent takes an action that was wrongful, and renders it not wrongful because it no longer violates the consenter's rights."[191] As Peter Westen has remarked, consent "can transform the most horrific crimes into noncrimes, turning 'rape' into sexual intercourse, 'maiming' into therapeutic surgery, 'kidnapping' into vacation, 'trespass' into hospitality, and 'theft' into gift-giving."[192]

But the mechanism by which consent does this normatively transformative work is heavily disputed. Some scholars argue that consent describes an individual's mental attitude towards a particular activity.[193] For those who subscribe to this view, a person who internally consents to an activity, such as sexual intercourse, cannot be wronged by the occurrence of that activity, even if their consent was not outwardly expressed.[194] Other scholars contend that consent's moral significance depends on its being communicated to another party, that consent is fundamentally performative.[195] They argue that the relevant moral considerations are a person's *reasons* for interfering with another, which can only be altered by communicative conduct.[196]

Westen's pathmarking account of sexual consent identifies no fewer than seven "consent" concepts that may be deployed in rape law.[197] At a basic level, Westen distinguishes between "factual consent," which may be either an attitude or an expression,[198] "prescriptive consent," which requires

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[190] Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO ST. J. CRIM. L. 333, 334 (2004).

[191] Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 400 (2016).

[192] PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 15 (2004).

[193] *See* Hurd, *supra* note 9, at 124–25; Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165, 166 (1996); Larry Alexander, *The Ontology of Consent*, 55 ANALYTIC PHIL. 102, 107 (2014).

[194] *See* Larry Alexander, Heidi Hurd & Peter Westen, *Consent Does Not Require Communication: A Reply to Dougherty*, 35 LAW & PHIL. 655, 655 (2016).

[195] *See* H.M. Malm, *The Ontological Status of Consent and Its Implications for the Law on Rape*, 2 LEGAL THEORY 147, 147 (1996); Stephen J. Schulhofer, *Rape in the Twilight Zone: When Sex is Unwanted But Not Illegal*, 38 SUFFOLK U. L. REV. 415, 422 (2005); Tom Dougherty, *Yes Means Yes: Consent as Communication*, 43 PHIL. & PUB. AFFS. 224, 227 (2015).

[196] *See, e.g.*, WERTHEIMER, *supra* note 23, at 146 ("B's consent is morally transformative because it changes *A*'s reasons for action.").

[197] *See* Kenneth W. Simons, *The Conceptual Structure of Consent in Criminal Law*, 9 BUFF. CRIM. L. REV. 577, 580 (2006) (depicting Westen's consent framework visually).

[198] WESTEN, *supra* note 192, at 4–6.

factual consent plus the additional normative conditions of "competence, knowledge, freedom, and motivation,"[199] and "imputed consent," which describes common legal fictions about the presence of consent where factual consent is in fact absent.[200] Westen's work has been extremely influential in describing the operation of consent in the criminal law, but it leaves open a number of critical questions. For instance, "[d]etermining specifically how *much* freedom, knowledge, and competence [is] required for consent to be legally valid is a difficult normative question over which there is significant disagreement."[201]

Nor is the sexual autonomy protected by consent an uncontested concept. As Dripps has observed, "Autonomy is a spacious word, capable of containing a variety of philosophical implications."[202] Dripps distinguishes between two basic forms of sexual autonomy: positive autonomy—"the freedom to have sex with whomever one wishes"—and negative autonomy—"the freedom to refuse to have sex with any one for any reason."[203] Given the operation of consent, rape law is best understood as protecting only negative autonomy, or the right of every person to decide "who may touch [their] bodies, when, and under what circumstances."[204] Some scholars have conflated this distinction, much to the detriment of their work.[205]

Stephen Schulhofer is a leading defender of protecting sexual autonomy through rape law. He observes that law often under-protects sexual autonomy relative to other individual interests, such as the protection of property:

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199 *Id.* at 6–7.

200 *Id.* at 7–10.

201 Jonathan Witmer-Rich, *It's Good to Be Autonomous: Prospective Consent, Retrospective Consent, and the Foundation of Consent in the Criminal Law*, 5 CRIM. L. & PHIL. 377, 380 (2011).

202 Dripps, *supra* note 126, at 1785.

203 *Id.*

204 State *ex rel.* M.T.S., 609 A.2d 1266, 1278 (N.J. 1992). *See also* Daniel Maggen, *"When You're a Star": The Unnamed Wrong of Sexual Degradation*, 109 GEO. L.J. 581, 593 (2021) ("Rape and sexual assault are today believed to be odious on account of their injury to the victim's sexual autonomy, which though substantial disagreement exists, might be thought of as the ability to freely determine the extent of one's sexual availability to others without intervention from the state or other people.").

205 *See* Luis E. Chiesa, *Solving the Riddle of Rape-by-Deception*, 35 YALE L. & POL'Y REV. 407, 442 (2017) (arguing that Jed Rubenfeld's influential critique of sexual autonomy in rape law fails to grasp that autonomy is in fact multidimensional and scalar).

> The emotional vulnerability and potential physical danger attached to sexual interaction make effective legal safeguards at least as important for sex as they are for the sale of land or the purchase of a used car . . . . A decent regime for safeguarding fundamental rights should place sexual autonomy at the center of attention and protect it directly, for its own sake, just as we protect physical safety, property, labor, and informational privacy, the core interests of every human being.[206]

Yet scholars continue to disagree about the nature of autonomy that rape law should protect—for example, is it John Stuart Mill's theory of autonomy as "self-interest,"[207] Joel Feinberg's theory of autonomy as a "right of self-determination,"[208] or Joseph Raz's theory of autonomy as "a constituent element of the good life"?[209] Some scholars have gone further and suggested that *sexual* autonomy is a distinct form of autonomy that deserves even greater legal protection vis á vis other forms of individual autonomy.[210]

Meanwhile, feminist scholars for years have pushed back on leading philosophical accounts of sexual autonomy, which are typically seen as classically liberal, decontextualized, and constituted by the unrestrained exercise of personal sovereignty.[211] For example, Deborah Tuerkheimer and Kathryn Abrams have each separately challenged rape law's commitment to sexual autonomy as assuming a classical liberal perspective that is insensitive to "gender as a primary locus of subordination."[212] They advocate for "agency" rather than autonomy because the concept of agency still allows for individual self-direction and self-definition,[213] but also acknowledges the myriad ways in which the individual is socially constrained, importantly including through gender.[214] Despite this disagreement about the value to be protected through rape law, Tuerkheimer has

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206 SCHULHOFER, *supra* note 4, at 100–02.

207 *See* JOHN STUART MILL, ON LIBERTY 137 (1859).

208 *See* 3 JOEL FEINBERG, HARM TO SELF 59 (1989).

209 *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 408 (1988).

210 *See* Mary Childs, *Sexual Autonomy and Law*, 64 MOD. L. REV. 309, 311 (2001).

211 *See* Abrams, *supra* note 10, at 809.

212 Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335, 338 (2013); *see also* Abrams, *supra* note 10, at 818–19.

213 Abrams, *supra* note 10, at 824.

214 *See id.* at 822–39; Tuerkheimer, *supra* note 212, at 338.

redoubled her commitment to consent as the legal construct protecting female agency.[215]

What becomes evident is the breadth and depth of theoretical disputes over sexual consent and sexual autonomy. Scholars disagree about what constitutes consent, not just legally but factually.[216] They disagree about the conditions under which consent ought to be valid legally.[217] And they disagree about what value consent is protecting, even where they agree on the necessity of consent as the vehicle to protect it. These theoretical disagreements have profound consequences for rape law in practice, given the centrality of consent to its doctrines.[218] The reality is that consent and autonomy represent a surprisingly unstable foundation for understanding sexual violence, despite widespread commitment to the concepts.

B. Consent's Gendered Dimensions

Often missing in the theoretical analysis of consent is an acknowledgement of how our conceptions of consent inform on-the-ground sexual practices.[219] As traditionally conceived, sexual consent is ostensibly an abstract concept that posits both a pursuing party and a pursued party who are presumed to be social equals.[220] In moral philosophy, accounts of valid sexual consent are often stripped of context and presented as if universal. To offer a few prominent examples, Alan Wertheimer has said that "[i]f B consents to sexual relations with A, it is (*ceteris paribus*) permissible for A to have sexual relations with B."[221] Peter Westen has defined legally valid consent as "attitu-

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215 Tuerkheimer, *supra* note 212, at 342 ("An insistence that sex and rape are distinguishable by consent's presence or absence furthers sexual agency.").

216 One common challenge to Westen's account of factual consent is that it counts acquiescence in response to overwhelming coercion as "consent." *See, e.g.*, Heidi M. Hurd, *Was the Frog Prince Sexually Molested?: A Review of Peter Westen's* The Logic of Consent, 103 MICH. L. REV. 1329, 1332 (2005).

217 *See, e.g.*, Chamallas, *supra* note 10, at 814 (suggesting that "consent is not considered freely given if secured through physical force, economic pressure, or deception"); WESTEN, *supra* note 192, at 187 (suggesting that consent is freely given if "it is *not* the product of either a wrongful threat by anyone or wrongful oppression by the accused").

218 *See* WESTEN, *supra* note 192, at 309–27 (documenting how confusion about consent has permeated legal decision-making).

219 For an examination of how law influences social behavior beyond the direct threat of coercion, see generally Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 LAW & SOC. INQUIRY 60 (2017).

220 *See* MacKinnon, *supra* note 10, at 440.

221 WERTHEIMER, *supra* note 23, at 122.

dinal or expressive acquiescence by *S* to *A*'s conduct x . . . that *constitute* complete or partial criminal defenses to *A* for doing x."[222] Formulations like these purport to offer generalizable descriptions of sexual consent, and general accounts of the conditions under which such consent is valid, without reference to the social realities that give content to A and B (or A and S). In law, sexual consent is similarly defined without regard to context. Indeed, consent *simpliciter* operates as a general defense to a wide variety of crimes, with little regard to why a party may have consented or potential inequalities between the parties.[223]

But sexual practices are not abstract, and context often matters. In practice, sexual pursuit is heavily gendered and situated in a context of background inequalities that meaningfully constrain the exercise of consent. Catharine MacKinnon recently offered a poignant critique of the concept of sexual consent that accounts for the gender roles and the sex-based inequality that often gives context to acts of sexual consent in practice.[224] As she explains, the abstract version of consent describes a passive submission to the active pursuit of a sexual aggressor: "active A initiates, passive B acquiesces in or yields to A's initiatives."[225] In social practice, however, sexual pursuit often constitutes masculinity while sexual acquiescence constitutes femininity.[226] In heterosexuality, these gender roles map onto men and women, respectively.[227] Thus the dominant paradigm of sexual consent is one in which "[m]en initiate sexual behavior; women surrender to male sexual initiation."[228] I have explored this dynamic in previous work.[229]

What MacKinnon's critique reveals is how philosophical and legal treatments of consent necessarily erase a common source of social inequality between the parties. According to MacKinnon, "So long as A's power over or relative to B, i.e., their inequality, is kept out of the picture, including in constructing B's options or even desires . . . , the interaction between A and B may break no law, even if B says A raped or otherwise violated her."[230] Legally, questions of consent frequently in-

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222 WESTEN, *supra* note 192, at 107.

223 *See, e.g.*, MODEL PENAL CODE § 2.11(1).

224 *See* MacKinnon, *supra* note 10, at 439–42.

225 *Id.* at 440.

226 *See id.*

227 *Id.*

228 Anderson, *supra* note 5, at 1409.

229 McJunkin, *supra* note 21, at 25–26.

230 MacKinnon, *supra* note 10, at 442.

volve interrogating the thoughts or actions of the yielding party with little to no investigation into the nature or character of the pursuit. "In legal operation, consent to sex, or failure of proof of nonconsent, is routinely found in situations of despairing acquiescence, frozen fright, terror, absence of realistic options, and socially situated vulnerability."[231] The abstraction of consent thus masks power inequalities while a legal finding of consent exonerates them.

But the logic of consent does not merely mask inequality, it reconfigures it along gender lines. The work of sociologist Michael Kimmel highlights how the patterns of pursuit and acquiescence visible in the concept of consent are in fact formative components of gender socialization: "Boys are taught to try to get sex; girls are taught strategies to foil the boys' attempts."[232] Sexual attainment—"getting" sex—becomes a marker of masculinity, and hence a source of status for men.[233] In this story, women are commonly depicted as sexual "gatekeepers,"[234] who have the power to control men's access to sex but who are socialized to withhold that access.[235]

My previous work has detailed how the pursuer-pursued dynamics of consent, when mapped to gender performances, degrade cross-gender sexual relationships.[236] "With such a view, sex becomes a contest, not a means of connection; when sexual pleasure happens, it's often seen as his victory over her resistance."[237] As I have written elsewhere, "women are thus depicted as opponents rather than as potential partners—at best, mere obstacles in the path to masculine status."[238] And since the inequalities that constrain women's choices are all-too-often legally invisible, consent is frequently understood as empowering the pursued party to act as a sexual gatekeeper, fueling misogynistic narratives about who has power in, and over, sex.[239] Viewing sex in this light, "it is permissible for

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231 *Id.* at 447.

232 MICHAEL S. KIMMEL, THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY 5 (2005).

233 *See* McJunkin, *supra* note 21, at 28.

234 *See, e.g.*, WERTHEIMER, *supra* note 23, at 212.

235 *See* Little, *supra* note 52, at 1347 n.164.

236 *See* McJunkin, *supra* note 21, at 28–29.

237 KIMMEL, *supra* note 232, at 5.

238 McJunkin, *supra* note 21, at 28.

239 McJunkin, *supra* note 21, at 30 ("Because women are seen as controlling where and when sex happens, this narrative posits women as a locus of power over men at the same time that normative masculinity objectifies women as obstacles in the path to masculine status.").

men to try to attain sexual gratification for themselves without much regard for the woman's interests."[240] Some communities of men have even systematized sexual pursuit into "a game with formalized rules and objective measures of success."[241] Thus, the preeminence of consent discourse socially may very well be contributing to the prevalence of sexual interactions that are both unequal and unwanted.

C. The Bounds of Consent

Consent's preeminence in rape law doctrine and discourse has a tendency to obscure more searching inquiry into what is wrongful about particular sexual practices. In at least two key contexts—intercourse with an intoxicated partner and intercourse with an underage partner—courts and commentators overwhelmingly invoke the concept of consent to justify desired outcomes that are at odds with the theoretical models of consent articulated above. The result is rape law doctrines that potentially impinge on, rather than protect, sexual autonomy. In two other contexts—material fraud and nonviolent coercion—rape law fails to reach obviously wrongful conduct precisely because the concept of consent is too narrowly focused on the moment of choice to capture the wrong. Even where fraud or coercion are the proximate cause of the resulting consent, both scholars and the broader public are hesitant to declare expressions of consent invalid. This subpart thus critiques rape law's overreliance on consent by demonstrating that, in application, consent is simultaneously overinclusive and underinclusive.

1. *Age and Intoxication*

Age and intoxication provide a unique window into the contemporary overuse of consent in rape law. Almost every U.S. jurisdiction criminalizes sexual intercourse with an underage partner or a severely intoxicated partner.[242] And the rhetoric surrounding these prohibitions consistently invokes the idea of consent: Both age and intoxication are presumed to undermine the basic *capacity* to consent in ways that render sexual intercourse

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[240] WERTHEIMER, *supra* note 23, at 212.

[241] McJunkin, *supra* note 21, at 27.

[242] *See* Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 284 (2017); Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 138 (2002).

impermissible.[243] A closer inspection brings these prohibitions into question, however, at least on the logic of consent. Rape law's conclusions about legally invalid consent in these contexts do not turn on findings of internal, subjective unwillingness or on the absence of external, objective manifestations of consent. Instead, rape law prophylactically denies the validity of consent based on age and intoxication without any rigorous examination of the capacity of ostensibly consenting individuals.[244]

Every state has established an "age of consent" by statute.[245] These laws often create *per se* prohibitions on sexual activity with persons below a specified age.[246] The history of age-of-consent laws, however, reveals that the specific age of prohibition has long been a contentious political issue, rather than one grounded in evolving understandings of the capacity for sexual consent.[247] English common law, initially adopted in most American states, prohibited sexual intercourse with young girls under the age of 10.[248] In the late Nineteenth Century, a surprising coalition of reformers—including "antivice organizations, feminist reform movements, and social purity campaigns"—succeeded in raising the age of consent around the country to 16, 17, or 18.[249] The chosen ages were in fact a political compromise, as many reformers at the time sought to establish an age of consent as old as 21.[250] Given this history, it might be best to see age-of-consent laws as regulating "fears over emerging childhood sexuality" more so than protecting true sexual autonomy.[251]

In recent years, states' own legislation has belied the superficial linking of age and capacity to consent. Across the country, age gap or so-called "Romeo and Juliet" laws have

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243 *See, e.g.*, State v. Collier, 411 S.W.3d 886, 898 (Tenn. 2013) ("As a matter of law, a minor is indeed incapable of consenting to a statutory rape."); Commonwealth v. Urban, 880 N.E.2d 753, 757 (Mass. 2008) ("[T]he jury must find not just that she was intoxicated, but that her degree of intoxication was such that it rendered her incapable of consenting to intercourse.").

244 *See* Judith Butler, *Sexual Consent: Some Thoughts on Psychoanalysis and Law*, 21 COLUM. J. GENDER & L. 3, 4–5 (2012).

245 Godsoe, *supra* note 242, at 284.

246 *See* Joseph J. Fischel, *Per Se or Power? Age and Sexual Consent*, 22 YALE J.L. & FEMINISM 279, 281 (2010).

247 *See generally* CAROLYN COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES (2004).

248 *Id.* at 11.

249 Fischel, *supra* note 246, at 287.

250 *See id.*

251 Butler, *supra* note 244, at 5.

proliferated, carving out exceptions to age-of-consent laws for sex among similarly aged individuals.[252] These laws provide concrete evidence that states' age-of-consent laws do not meaningfully reflect conclusions about individual capacity: It is now widely accepted that the sexual consent of individuals as young as 13 is valid, provided their partner is of a similar age.[253]

Some scholars have noticed and critiqued the operation of age-of-consent laws on this very ground. Perhaps most prominently, Catharine MacKinnon has suggested that age-of-consent laws obscure inquiry into the power inequalities that the statutes are fundamentally concerned with.[254] She writes:

> It is a common refrain that children cannot consent to sex, hence intergenerational sex is rape by statute, but it is never said whether this means that children cannot give a meaningful yes (at age sixteen? seventeen?) or cannot enforce or be expected to sustain the consequences of a meaningful no. Nor is it explained whether and why whatever it is changes at age seventeen plus 366 days.[255]

Others have suggested that age-of-consent laws in fact *disrespect*, rather than protect, sexual autonomy. "If many or most young people are first having sex while below the age of consent, our social and legal obligation is not to penalize the sex—making it more difficult for teenagers to report coercion—but to protect young people's choices, desires, and safety."[256]

The criminalization of intoxicated sex operates differently, but it raises similar questions of consent and autonomy. Alcohol consumption does not inherently render sexual activity nonconsensual: "intoxicated individuals do not lose their right to choose to engage in desired sex," even if some intoxicated sexual activity is "regrettable after the fact and would not have occurred but for the intoxication."[257] Most jurisdictions do not have a statute that directly prohibits sexual intercourse with a

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[252] Steve James, Comment, *Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and A Call for Reform*, 78 UMKC L. Rev. 241, 256 (2009) ("In fact, forty-five states, the District of Columbia, and federal law have already enacted some type of age gap consideration.").

[253] *See* Godsoe, *supra* note 242, at 284 (showing that a minority of states invariably criminalize sex involving a 13-year-old participant).

[254] *See* Catharine A. MacKinnon, Women's Lives, Men's Laws 245–46 (2005).

[255] MacKinnon, *supra* note 10, at 462.

[256] Fischel, *supra* note 246, at 300.

[257] Michal Buchhandler-Raphael, *The Conundrum of Voluntary Intoxication and Sex*, 82 Brook. L. Rev. 1031, 1038 (2017).

voluntarily intoxicated partner.[258] Instead, these situations are commonly prosecuted under existing rape laws on the logic that a severely intoxicated partner lacks the capacity to consent.[259] Because rape law has historically required proof of force in addition to nonconsent, criminal liability for intercourse with a voluntary intoxicated partner depends on drawing an analogy to two other forms of intercourse that have been criminalized as rape even in the absence of force: intercourse with a mentally incapacitated partner and intercourse with an unconscious or physically helpless partner.[260] As a consequence of these ill-fitting analogies, both courts and scholars have struggled with how to properly conceptualize and apply rape law when one or both parties are voluntarily intoxicated.[261]

Determining the point at which intoxication renders someone incapable of consent is arguably a complicated psychological (and perhaps philosophical) inquiry, one which courts have generally not attempted. Instead, most states employ open-ended legal standards that leave the question in the hands of juries.[262] The legal standards for incapacity to consent vary dramatically, with some states requiring that the victim be unable to appraise or control their behavior,[263] other states requiring that the victim be unable to understand the nature of the sex act,[264] and some states refusing to define the standard at all beyond mere "incapacity."[265]

Scholars have noted how the test for incapacity due to intoxication is divorced from the more direct inquiry into the presence or absence of consent in a given case.[266] Michal Buchhandler-Raphael, who has offered perhaps the most comprehensive treatment of the issue in legal scholarship, has

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258 *See id.* at 1033.

259 *See id.* at 1033–34.

260 *See* Falk, *supra* note 242, at 135–37.

261 *See* Allison C. Nichols, Note, *Out of the Haze: A Clearer Path for Prosecution of Alcohol-Facilitated Sexual Assault*, 71 N.Y.U. ANN. SURV. AM. L. 213, 230–31 (2015).

262 *See* Buchhandler-Raphael, *supra* note 257, at 1063 ("None of the criteria developed by courts, however, provide clear guidelines on how to determine when a victim's intoxication has reached the level that renders him or her incapacitated.").

263 *See, e.g.*, OR. REV. STAT. ANN. § 163.305(2) (West 2021).

264 *See, e.g.*, WASH. REV. CODE. ANN. § 9A.44.010(7) (West 2023).

265 *See, e.g.*, State v. Chaney, 5 P.3d 492, 498 (Kan. 2000) ("Lay persons are familiar with the effects of alcohol. If the jury concluded [the victim] was drunk enough to be unable to consent to sex, we should give great deference to that finding.").

266 *See* Tuerkheimer, *supra* note 5, at 29.

challenged the legal standards for intoxication as overinclusive, with the potential for "invalidating a complainant's affirmative and clearly communicated consent."[267] For instance, some courts have suggested that the capacity to consent is absent when an individual is unable to make a "reasonable judgment," a test that permits factfinders to find nonconsent based on their own views of whether a complainant's choice in the moment was reasonable.[268] "Incorporating the reasonableness language into the incapacity-to-consent test does not provide any substantive criterion because it remains unclear what reasonableness entails in the context of the choice to engage in sexual acts and why such choice has to be reasonable at all."[269] Once again, a legal standard rhetorically cast as about protecting individual autonomy may in fact *reduce* sexual autonomy by prophylactically denying the capacity to consent.[270]

To be clear, intoxication and age may significantly impact a person's ability to make choices that are consistent with their higher-order preferences or long-term well-being. But, in other contexts, consent doctrine has never required that an exercise of autonomy meet those conditions.[271] Nor do most of the philosophical models of consent discussed previously. Even under the most demanding model, an individual is considered capable of consenting if they are able "to assess their options with respect to their long-term interests."[272] And the conditions of legal validity for sexual consent in practice seem to demand much less.[273] Rather than consent, at root of the prohibitions treating sexual intercourse with intoxicated or underage partners as rape appears to be a calculation that an amorphous *risk* of harm in such contexts outweighs the right to exercise one's (possibly limited) autonomy.[274]

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267 Buchhandler-Raphael, *supra* note 257, at 1066.

268 *See id.* at 1065 (citing People v. Giardino, 98 Cal. Rptr. 2d 315, 321–22 (Cal. Ct. App. 2000)).

269 *Id.* at 1065–66.

270 *See id.* at 1036 ("[A]lcohol plays a critical role not only in nonconsensual sexual encounters but also in those that are mutually desired.").

271 *See, e.g.*, Jennifer A. Drobac & Oliver R. Goodenough, *Exposing the Myth of Consent*, 12 IND. HEALTH L. REV. 471, 481 (2015) ("Even as criminal law may invalidate the legal significance, however, civil law might credit adolescent consent to bar the teenager from recovery for her injuries under tort or antidiscrimination law.").

272 WESTEN, *supra* note 192, at 191.

273 *See infra* section II.C.2 (documenting how rape law doctrine treats as valid sexual consent procured through non-physical coercion or material fraud).

274 *See* Elaine Craig, *Capacity to Consent to Sexual* Risk, 17 NEW CRIM. L. REV. 103, 124–30 (2014) (developing a theory of capacity to consent based on risk allocation).

One final piece of evidence supporting the unique roles played by both age and intoxication in rape law's consent analysis is the inconsistent behavior of courts with respect to mens rea. Even in states that do not typically require a defendant to have knowledge that a victim did not consent, such knowledge may be demanded when nonconsent is a product of age or incapacity. Consider Massachusetts, for example. The state's Supreme Judicial Court has long proclaimed that a prosecutor "is not required to prove either that the defendant intended the sexual intercourse be without consent or that he had actual knowledge of the victim's lack of consent."[275] Not only does a typical rape prosecution in Massachusetts have no mens rea requirement with respect to nonconsent, but the high court has similarly rejected any mistake-of-fact defense.[276] In 2008, however, that same court famously read into the statute a mens rea requirement when nonconsent is due to intoxication rather than subjective unwillingness.[277] This is true even though the state's rape statute does not distinguish between intoxication and other forms of nonconsent.[278] Other states have reached the same conclusion.[279] And in other jurisdictions, this same story has played out with respect to age of consent.[280]

The mismatch between the mens rea required in forcible rape cases and mens rea required in cases of age and intoxication underscore that the latter are not merely an application of traditional consent concepts to new contexts. Even when cast as species of "nonconsent," age and intoxication are sufficiently distinct as to require differing doctrinal developments. Labeling sexual activity in these circumstances as nonconsensual

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[275] Commonwealth v. Cordeiro, 519 N.E.2d 1328, 1333 n.11 (1988).

[276] Commonwealth v. Lopez, 745 N.E.2d 961, 966 (2001) ("Any perception (reasonable, honest, or otherwise) of the defendant as to the victim's consent is consequently not relevant to a rape prosecution.").

[277] Commonwealth v. Blache, 880 N.E.2d 736, 745, 745 nn. 17–18 (2008) ("[T] he Commonwealth must prove that the defendant knew or reasonably should have known that the complainant's condition rendered her incapable of consenting to the sexual act.").

[278] The General Laws of Massachusetts Chapter 265, Section 22(b) defines rape simply as sexual intercourse "by force and against his will." MASS. GEN. LAWS ch. 265, § 22(b) (2020). Intoxication to the point of incapacity is treated as just an instance where sex is "against her will." *See* Commonwealth v. Burke, 105 Mass. 376, 380–81 (1870).

[279] *See, e.g.*, State v. Jones, 804 N.W.2d 409, 414 (S.D. 2011).

[280] *See, e.g.*, People v. Hernandez, 393 P.2d 673, 677–78 (Cal. 1964) (declaring that an honest and reasonable belief that the victim was above the age of consent operates as a complete defense to a charge of statutory rape).

is arguably "just a proxy for whatever one views as harmful or unacceptable sexual behavior."[281]

2. *Fraud and Coercion*

If rape law's depiction of consent is stretched and distorted in the attempt to cover cases of age and intoxication, it is downright emaciated in its failure to reach instances of material fraud or non-violent coercion. For years, scholars have noted how rape law's failure to criminalize material fraud seems inconsistent with its ostensible commitment to sexual autonomy.[282] Perhaps less noticed, but as seemingly inconsistent, is rape law's tendency to construe consent coerced by non-violent means as legally valid.[283] Some of the most famous cases in the criminal law canon involve fraud or coercion of this sort.[284] Despite scholarly outcry, rape law in practice has proven staunchly resistant to reforms aimed at capturing the wrongs of fraudulently or coercively procured consent.

Early theorists blamed rape law's force requirement for the legislative resistance to criminalizing coercive or fraudulent sexual intercourse. In her groundbreaking article examining sex procured by coercion and fraud, Patricia Falk concluded that "exclusive reliance on force or violence as the indispensable element of rape has the undesirable effect of insulating a broad range of blameworthy conduct from criminal condemnation."[285] In this conclusion, Falk echoed Dorothy Roberts, who had previously written that, "[b]y defining most male sexual conduct as nonviolent, even when it is coercive, it has been possible to exempt a multitude of attacks on women's autonomy from criminal punishment, or even critical scrutiny."[286] These theorists assumed that fraud and coercion undermined autonomy—indeed invalidated consent—but that legal reforms were ham-

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[281] Gruber, *supra* note 4, at 419.

[282] *See* Estrich, *supra* note 81, at 1182; Rubenfeld, *supra* note 41, at 1402–03; McJunkin, *supra* note 21, at 8.

[283] *See, e.g.*, Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 175–77 (1998) (surveying academic proposals to criminalize nonviolent coercion).

[284] *See, e.g.*, Commonwealth v. Mlinarich, 542 A.2d 1335, 1336 (Pa. 1988) (sex coerced by threat of adult guardian to return 14-year-old girl to a juvenile detention facility); Boro v. Superior Court, 210 Cal. Rptr. 122, 126 (Cal. Ct. App. 1985) (fraudulently representing sex as a medical treatment).

[285] Falk, *supra* note 283, at 146.

[286] Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 362–63 (1993).

pered by the law's commitment to viewing rape exclusively as a crime of violence.[287] The experience of the past twenty years has now belied that assumption.

Even as rape law has evolved away from the force requirement and has increasingly embraced the view that nonviolent rapes are still "real" rapes, both fraud and coercion have remained sidelined in the legal analysis of nonconsent. Only a minority of states explicitly criminalize procuring sexual consent through nonviolent coercion.[288] In the overwhelming majority of states, sexual consent is considered legally valid even when procured through extortion, intimidation, public humiliation, or threats against property.[289] Moreover, as John Decker and Peter Baroni have demonstrated, even in the states where coercion is formally outlawed, "courts often conflate coercion with forcible compulsion in practice."[290] Only a select few states have ever prosecuted defendants accused of sexual coercion without additional evidence of violence or threats of violence.[291] Decker and Baroni conclude that the "lack of convictions [for coercion] indicates that states are failing to protect their citizens."[292]

Even if society wanted to criminalize nonviolent coercion, it is not clear that the concept of consent is the appropriate vehicle. Kim Ferzan has carefully studied the interaction of coercion and sexual consent.[293] Although she does not distinguish between violent and non-violent forms of coercion, she posits that not all forms of coercion are sufficiently "choice undermining" to render consent morally and legally ineffective.[294] The central question must be "whether the consenter's choice was under such pressure that it should no longer count as a choice."[295] But Ferzan proceeds to argue that there remains

[287] *See id.*; Falk, *supra* note 285, at 154–55 ("The exclusive focus on physical force may deny the philosophical and empirical reality that other types of pressures erode or negate consent.").

[288] Decker & Baroni, *supra* note 120, at 1119.

[289] *Cf. id.* at 1120 (finding that only eighteen states criminalize the use of nonphysical threats, such as those described above, in their sexual assault statutes).

[290] *Id.* at 1123.

[291] *Id.* at 1125.

[292] *Id.*

[293] *See generally* Kimberly Kessler Ferzan, *Consent and Coercion*, 50 ARIZ. ST. L.J. 951 (2018).

[294] *Id.* at 968–69.

[295] *Id.* at 970.

a distinct wrong—perhaps a wrong worth criminalizing[296]—in cases of coercion that are not choice-undermining.[297] She suggests that defendants should not be permitted to avail themselves of a consent defense when that consent was *caused by* wrongful coercion, even if the consent is technically valid.[298] Ferzan's work shows a key limitation of relying on consent to punish sexual wrongdoing. Some forms of coercion may not create sufficient pressure such that consent "no longer counts as a choice,"[299] but they nevertheless may be an appropriate target of criminal intervention.[300]

The same might be said of fraud. Rape law has long distinguished between those species of fraud that vitiate consent—commonly labeled fraud "in the factum"—and those species of fraud that do not—commonly labeled fraud "in the inducement."[301] But fraud in the factum is an exceedingly narrow legal category, primarily criminalizing only fraud about whether sex is occurring at all.[302] The factum-inducement dichotomy has been heavily criticized as inconsistent with contemporary notions of sexual autonomy,[303] and some scholars have suggested adopting a more lenient standard for sexual deception.[304]

Mirroring Ferzan's conclusions about coercion, however, Deborah Tuerkheimer has recently explained why not all frauds should be understood to vitiate consent.[305] Her view is that sexual agency is simply constrained in so many ways that "imperfect" consent cannot as a general matter be criminalized.[306] Tuerkheimer would hold that a rape occurs only when there is

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296 *Id.* at 992. To be clear, Ferzan declares herself to be "rather ambivalent" about whether this behavior ought to be a crime, *id.* at 998, and she "tentatively" concludes that criminalization is inappropriate, *id.* at 992.

297 *Id.* at 974.

298 *Id.* at 984 ("The normative impairment of the coercer thus derives from both a wrongful act and the fact that this wrongful act caused the consent.").

299 *See id.* at 970.

300 *Id.* at 992.

301 *E.g.*, Rubenfeld, *supra* note 41, at 1398 (explaining that fraud in the factum comprises only instances of medical misrepresentation—sex falsely presented as a medical procedure—and impersonation of a spouse).

302 *See* McJunkin, *supra* note 21, at 9–12.

303 *See id.* at 8; Estrich, *supra* note 81, at 1182; Rubenfeld, *supra* note 41, at 1402–03.

304 *See, e.g.*, Chiesa, *supra* note 205, at 451–59 (proposing to criminalize certain sexual deceptions).

305 Tuerkheimer, *supra* note 212, at 343.

306 *See id.* at 345.

"a wide enough gap between what a party consents to and what actually transpires."[307] In other cases, the defrauded party should be considered "informed enough to pass muster."[308] Tuerkheimer stops short, though, of clarifying how the law is to determine when a gap is "wide enough."

Recent research in experimental psychology underscores the difficulty in attempting to criminalize deception under the rubric of consent.[309] This research reveals that the general public views deceived sexual consent as legally and morally binding, even when the deception is material.[310] Interestingly, the research found that the public viewed material deception as more *wrongful* than coercion, even though it found coercion to be more undermining of consent.[311] These findings support extending Ferzan's proposal about criminalizing minor forms of coercion into the context of fraud. Intuitively, there is something wrongful about using fraud or coercion to *cause* another to consent, even when we view the consent itself as morally and legally valid.

The juxtaposition of these four circumstances—age and intoxication, on the one hand, and coercion and fraud, on the other hand—reveals fundamental weaknesses in relying on a singular concept of consent as the touchstone for rape law. We cast some expressions of consent as invalid without a strong basis for excluding them while we fail to reach other expressions of consent that are nevertheless widely recognized as problematic.

D. Questioning Consent

Consent is not without its critics. As the concept has increasingly dominated social and academic understandings of rape law, scholars have also increasingly questioned whether it is sufficiently capacious to do the normative work with which it is tasked. In particular, scholars that have sought to describe the lived experiences of rape victims have demonstrated how consent is inadequate to capture rape's harms, which frequently include dehumanization, humiliation, and gender-based terror. Conversely, scholars have challenged the

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307 *Id.*

308 *Id.* at 343.

309 *See generally* Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232 (2020).

310 *See id.* at 2268–70, 2277–81.

311 *Id.* at 2277–78.

prevailing wisdom that the presence of consent ensures harmless sex, noting how even consensual sex may produce psychological dissociation, physical injury, and emotional trauma. As a result of these findings, a number of scholars have proposed rethinking rape's very foundations. Their proposals, though distinct, are in many ways complementary, emphasizing the denial of self and loss of personhood that is integral to rape and seeking to regulate problematic means of obtaining sex, consensual or otherwise. This subpart surveys the leading critiques of consent's centrality to rape law and highlights a number of recent proposals for reform. It demonstrates the limitations of consent in accurately capturing the broad range of morally culpable and socially harmful sexual practices that arguably qualify as rape.

As described above, the consent framework for rape law assumes that the essential harm of rape is the denial of negative sexual autonomy.[312] But scholars—particularly feminist scholars—have long documented how this understanding of rape does not reflect the gravity of harm experienced by rape victims. Michelle Anderson, for example, has contended that "[t]he lived experience of rape for rape victims and rapists" centers on themes of "dehumanization, objectification, and domination" that are deeper than mere "lack of sexual choice."[313] She has proposed conceptualizing rape, not as a denial of autonomy, but as "sexually invasive dehumanization."[314] Other scholars have similarly focused on rape victims' experience of degradation and humiliation.[315] Catharine MacKinnon has suggested that, when women are "compromised, cajoled, pressured, tricked, blackmailed, or outright forced into sex" they experience "unspeakable humiliation, coupled with the sense of having lost some irreplaceable integrity."[316]

Scholars have also emphasized the experience of gender-based terror that results from rape as a pervasive social practice. For example, Susan Brownmiller famously claimed that rape is "a conscious process of intimidation by which *all men*

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312 *See supra* subpart II.A.

313 Anderson, *supra* note 79, at 641.

314 *Id.* at 643.

315 *See, e.g.*, ANN J. CAHILL, RETHINKING RAPE 2 (2001) ("Rape is, for many feminists, the ultimate expression of a patriarchal order, a crime that epitomizes women's oppressed status by proclaiming, in the loudest possible voice, the most degrading truths about women that a hostile world has to offer.").

316 MACKINNON, *supra* note 38, at 149.

keep *all women* in a state of fear."[317] Expanding on this observation, Luis Chiesa has described rape in America as "a kind of sexual lynching that serves to perpetuate patriarchal norms of appropriate behavior."[318] According to Robin West, rape pairs a violent physical invasion with an implied threat of continuing violence that terrorizes the victim: "This coupling of unwanted and painful sexual penetration with the experience of terror . . . is the most gender-specific aspect of the experience of rape." [319]

Corey Rayburn Yung recently synthesized a wide swath of rape law scholarship in an effort to chronicle the distinctive harms of rape over and above the simple violation of autonomy.[320] At the risk of oversimplifying, Yung identifies three distinctive harms of rape. First, rape, as experienced by victims, is psychologically destructive. "Rape is not merely an attack on the body, but a violation of the psyche of an individual."[321] Second, the social practice of rape is grounded in patriarchy and is therefore a distinctly gendered harm. "Rape is different than other assaults and personal violations because it is inextricably intertwined with gender and patriarchy."[322] Third, the pervasiveness of sexual violence make rape a constituent act of widespread terror that pervades people's everyday lives. "The net result of the terror inflicted upon women by rape is that they bear, as a class, a unique social burden."[323] The sustained efforts of scholars to document the realities of rape for both rape victims and perpetrators reveals the limitations of the consent framework. Rape is more than a denial of individual autonomy; it has been shown to be consistently dehumanizing, psychologically destructive, and a primary contributor to a patriarchal system of gender-based subordination.

Consent may also be inadequate from another angle—not due to its failure to capture the harms of sex but as a result of its failure to identify *harmless* sex. Advocates of the consent framework typically contend that consensual sex should

317 BROWNMILLER, *supra* note 68, at 15.

318 Luis E. Chiesa, *Sexual Lynching*, 29 CORNELL J.L. & PUB. POL'Y 759, 761 (2020).

319 *See* ROBIN WEST, CARING FOR JUSTICE 102 (1997).

320 Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1, 20–27 (2015).

321 *Id.* at 20.

322 *Id.* at 25.

323 *Id.* at 27.

be understood as *prima facie* legitimate because it is freely chosen.[324] But Robin West has detailed the various ways in which even consensual sex can be harmful when it is unwelcome:

> Women who engage in unpleasurable, undesired, but consensual sex may sustain real injuries to their sense of selfhood, in at least four distinct ways. First, they may sustain injuries to their capacities for self-assertion: the "psychic connection," so to speak, between pleasure, desire, motivation, and action is weakened or severed. *Acting* on the basis of our own felt pleasures and pains is an important component of forging our own way in the world—of "asserting" our "selves." Consenting to *un*pleasurable sex—acting in spite of displeasure—threatens that means of self-assertion. Second, women who consent to undesired sex may injure their sense of self-*possession*. When we consent to undesired penetration of our physical bodies we have in a quite literal way constituted ourselves as what I have elsewhere called "giving selves"[325]—selves who cannot be violated, because they have been defined as (and define themselves as) being "for others." Our bodies to that extent no longer belong to ourselves. Third, when women consent to undesired and unpleasurable sex because of their felt or actual dependency upon a partner's affection or economic status, they injure their sense of autonomy: they have thereby neglected to take whatever steps would be requisite to achieving the self-sustenance necessary to their independence. And fourth, to the extent that these unpleasurable and undesired sexual acts are followed by contrary to fact claims that they enjoyed the whole thing—what might be called "hedonic lies"—women who engage in them do considerable damage to their sense of integrity.[326]

The four harms of consensual sex that West identifies—harms to self-assertion, self-possession, autonomy, and integrity—share much in common with the accounts harm from rape victims above. Elsewhere, West adds that the harms of rape and the harms of unwelcome consensual sex also overlap through the shared experience of objectification—of one's body being used to fulfil the desires of another.[327]

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324 *See, e.g.*, WERTHEIMER, *supra* note 23, at 124–25 (arguing that consent legitimizes sexual interactions because freely-chosen interactions typically "will leave both parties better off than they otherwise would be").

325 *Id.*

326 *See* West, *supra* note 11, at 372–73.

327 Robin West, *Desperately Seeking a Moralist*, 29 HARV. J.L. & GENDER 1, 28 (2006).

> When your body's internality, and access to your body's internality, is put toward the end of pleasuring others, and what you are getting from that giving over of your internal self is not pleasure, but fear, physical injury, displeasure, boredom, ennui, disgust, or nothing but pain, then (canary in the mine, here) something is very, very wrong.[328]

Authors outside of the legal arena have now, like West, openly doubted whether consent succeeds in ensuring sex worth celebrating.[329] Christine Emba writes that, in the era of consent, "[a] lot of us are having a lot of bad sex. . . . Unwanted, depressing, even traumatic: if this is ordinary, something is deeply wrong."[330] Emba proposes that it is time to move beyond consent, instead embracing an Aristotelean ethic (by way of St. Thomas Aquinas) centered on "willing the good of the other."[331] At its core, this standard requires "recognising that other people we encounter are people" with "intrinsic dignity," and rejecting the sexual commodification of others that is too often permitted in a world centered on consent.[332]

Some scholars have advanced proposals to replace consent with a principle of mutuality. Martha Chamallas offered an influential account of "egalitarian" sexual relations—those in which "the more passive target of sexual overtures actually welcomed the initiative."[333] Under this model, sexual interactions warrant legal regulations—including possibly criminalization—when they are "exploitative and nonmutual," even if consensual.[334] Chamallas contended that mutuality might be particularly able to avoid the dangers of objectification, "a chief mechanism by which male supremacy is established and maintained."[335] Michelle Anderson has similarly called for a rape law that centers mutuality by requiring bilateral negotiation.[336] According to Anderson, "[c]ommunication is a mechanism of treating one's partner as fully human, as a separate

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328 *Id.*

329 *See, e.g.*, Perry, *supra* note 172 ("There is a wide area between 'consensual'—that is to say, 'non-criminal'—sex and the sort of sex we want to have.") (quoting EMBA, *supra* note 172).

330 *Id.* (quoting EMBA, *supra* note 172) (internal quotation marks omitted).

331 *Id.*

332 *Id.*

333 Chamallas, *supra* note 10, at 836.

334 *See id.* at 841–43.

335 *Id.* at 839–40.

336 Anderson, *supra* note 5, at 1407.

and valuable person with his or her own desires and needs."[337] Under the negotiation model, the use of force, fraud, or coercion would be evidence of the lack of mutuality.[338] Recently, Daniel Maggen posited that the #MeToo movement is best understood as "a primordial effort to flesh out the contours of a pervasive yet condemnable form of behavior" grounded in the lack of mutuality.[339] Maggen refers to this as the wrong of "sexual degradation,"[340] which is importantly distinct from mere nonconsent.[341]

Donald Dripps has criticized the role that nonconsent plays in rape cases. He advocates instead for replacing rape with two distinct crimes. One, sexually motivated assault—essentially "causing sex by violence"—would render nonconsent to sex immaterial.[342] The other, sexual expropriation, would cover the non-violent taking of sex from another by improper means.[343] West, while critical of core details of Dripps' proposal,[344] has agreed both with his critique of consent and with his focus on the *means* of sexual exploitation. She emphasizes: "We might very profitably ask not which sexual practices are consensual or not, but rather which of our sexual practices are legitimate means of obtaining sex and which are not."[345]

In 2011, Michal Buchhandler-Raphael critiqued the role of consent in rape law as both empirically and normatively inadequate.[346] Empirically, most states continue to demand evidence of more than mere nonconsent to support a rape allegation.[347] Normatively, "[c]onceptualizing 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,

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337 Anderson, *supra* note 79, at 643–44.

338 *Id.*

339 Maggen, *supra* note 204, at 605.

340 *Id.* at 583.

341 *See id.* at 585 ("In focusing on degradation rather than on sexual assault, #MeToo expresses the belief that the formal meaning of "consent" fails to address all forms of sexual wrongdoing sufficiently; specifically, it suggests that the involvement of material inducements can be detrimental to positive sexuality even when it is formally voluntary.").

342 Dripps, *supra* note 126, at 1797-98.

343 *See id.* at 1799–1804.

344 *See* Robin L. West, *Legitimating the Illegitimate: A Comment on* Beyond Rape, 93 COLUM. L. REV. 1442, 1452–59 (1993).

345 *Id.* at 1459.

346 Buchhandler-Raphael, *supra* note 35, at 155–92.

347 *Id.* at 157.

when the harmful conduct itself justifies criminalization."[348] Indeed, "nonconsensual sex does not exhaust the field of particular wrongs that justify criminal regulation."[349] Like Dripps and West, Buchhandler-Raphael instead proposed that rape law should focus on the means of obtaining sex, specifically "a wrongdoer's culpable exploitation of dominance, influence, and control over a person in a subordinate position."[350]

More recently, Jed Rubenfeld suggested that we might benefit from viewing rape not as a violation of sexual autonomy, but as a violation of a person's right to self-possession.[351] Bodily self-possession, he explained, "is central to our selfhood and intimately connected to dignity."[352] Paradigmatic losses of self-possession include both slavery and torture, and Rubenfeld contended that rape "is poised halfway between slavery and torture, sometimes more like the one, sometimes more like the other."[353] Rubenfeld critiqued sexual autonomy for being "a red herring" that fails to capture the wrongfulness and harm of rape.[354]

Each of these critiques of consent exposes some truth about the inability of consent, and sexual autonomy more generally, to appropriately capture why rape is wrong. Rape *can be* profoundly dehumanizing, in ways go well beyond mere lack of sexual choice. Rape *can be* more akin to torture or slavery, and it is not infrequently coextensive with them. The loss of self-possession *is* a distinct harm from the deprivation of sexual agency. And we may well be better off with a rape law grounded, not in consent, but in the recognition of others as "fully human"[355] persons with "intrinsic dignity."[356]

III
Dignity's Content

Dignity has ancient roots and modern purchase. Once conceived of as a high social status reserved for a select few, dignity is now commonly thought to be inherent in every human

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348 *Id.* at 184.

349 *Id.* at 186.

350 *See id.* at 199–200.

351 Rubenfeld, *supra* note 41, at 1425–27.

352 *Id.* at 1426.

353 *Id.* at 1427.

354 *Id.* at 1424.

355 *See* Anderson, *supra* note 79, at 644.

356 *See* Perry, *supra* note 172.

and to form the basis for many fundamental rights.[357] Since the Enlightenment, dignity's influence has spread, in America and elsewhere.[358] Indeed, human dignity has been described as "perhaps the premier value underlying the last two centuries of moral and political thought."[359] It has emerged as a constitutional value[360] and it presents a distinct grounding for criminal prohibitions.[361]

In moral philosophy, the most influential conception of dignity is that offered by Immanuel Kant.[362] Dignity in the Kantian tradition is premised on human beings' unique ability for moral reasoning—to distinguish good actions from bad and to conform their conduct to that assessment.[363] Because humans have the capacity to reason morally, it is an affront to dignity to reduce people to mere instruments for the use of others.[364] The maxim that human beings must be treated as an end in themselves, and never merely a means is in perhaps the defining feature of Kantian dignity. "For Kant, dignity generated not only an obligation to respect people's free will, but also the concomitant obligation not to abrogate it by treating them as an instrument of another's free will."[365]

Another ancient source of the universal conception of human dignity is the widely shared religious tenet *imago dei*, the belief that humans are made in the image of God.[366] From this

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357 JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 14–15 (Meir Dan-Cohen ed., 2009).

358 Phyllis Goldfarb, *Arriving Where We've Been: Death's Indignity and the Eighth Amendment*, 103 IOWA L. REV. ONLINE 386, 395 (2018).

359 Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 145, 145 (Michael J. Meyer & William A. Parent eds., 1992).

360 Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 171–73 (2011).

361 Michal Buchhandler-Raphael, *Drugs, Dignity, and Danger: Human Dignity as a Constitutional Constraint to Limit Overcriminalization*, 80 TENN. L. REV. 291, 309 (2013).

362 *See, e.g.*, Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2135 ("Despite these ancient roots of dignity, most scholars agree that modern conceptions of dignity can be traced back to the eighteenth century when Immanuel Kant expounded on the idea.").

363 *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS xxviii (Mary Gregor, trans. & Jens Timmermann, ed., Cambridge Univ. Press 2012) (1785).

364 IMMANUEL KANT, THE METAPHYSICS OF MORALS 209 (Mary J. Gregor, trans. & ed. Cambridge Univ. Press 1996) (1797).

365 Henry, *supra* note 360, at 207.

366 Ben A. McJunkin, *Rank Among Equals*, 113 MICH. L. REV. 855, 858 (2015). *See generally Genesis* 1:27 ("So God created Man in his own image, in the image of God he created him; male and female he created them.").

teaching, dignity emerges as a special status that humans have over other living creatures by virtue of this resemblance to the divine.[367] This conception of dignity applies equally to all humans, but must be protected from "debasement and humiliation."[368] Pope John Paul II illustrated this position in his *Encyclical Letter on the Value and Inviolability of Human Life*. While contending that "[n]ot even a murderer loses his personal dignity," he also suggested that some behaviors "insult" human dignity, particularly "subhuman living conditions, arbitrary imprisonment, deportation, slavery, prostitution, the selling of women and children; as well as disgraceful working conditions, where people are treated as mere instruments of gain rather than as free and responsible persons."[369]

Despite foundational differences in the nature and source of human dignity, the leading moral accounts of the concept have meaningful overlap. All posit that dignity is universally held.[370] All also posit that dignity is deontological; a person with dignity is entitled to demand specific treatment from others (and owes a corollary duty to respect the dignity of others).[371] However, some scholars are wary of the seeming overreliance on human dignity in jurisprudence and rights discourse, given longstanding disagreement about dignity's content.[372] The

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367 *See, e.g.*, ROSEN, *supra* note 25, at 3 ("The dignity of each and every human being is grounded in [its] objective likeness of God" (alteration in original) (quoting Jürgen Moltman, *Christianity and the Revaluation of the Values of Modernity*, *in* A PASSION FOR GOD'S REIGN: THEOLOGY, CHRISTIAN LEANING, AND THE CHRISTIAN SELF 34 (Miroslav Volf, ed. 1998))); Doron Schultziner, *A Jewish Conception of Human Dignity: Philosophy and Its Ethical Implications for Israeli Supreme Court Decisions*, 34 J. RELIGIOUS ETHICS 663, 667 (2002) ("By this view, God implanted in human beings a sacred kernel of worth, and demanded that we protect human dignity in us and in others, and thus damaging human dignity is a direct offence to God.").

368 Schultziner, *supra* note 367, at 668.

369 John Paul II, *The Encyclical: Evangelium Vitae (The Gospel of Life)*, 24 ORIGINS 692 (1995), https://www.cctwincities.org/wp-content/uploads/2015/10/Evangelium-Vitae-The-Gospel-of-Life.pdf [https://perma.cc/RL69-MCB7].

370 *But see* MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITIES, NATIONALITY, SPECIES MEMBERSHIP 1–2 (2006) (suggesting that leading theories of justice fail to recognize the dignity of humans with disabilities).

371 Meir Dan-Cohen, *Basic Values and the Victim's State of Mind*, 88 CALIF. L. REV. 759, 771 (2000).

372 *E.g.*, Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 712 (2008) ("Dignity discourse has, so far at least, done little to provide a conception with significant enough substantive content to solve the most profound issues in the judicial resolution of human rights claims . . . .").

strongest critique of the value of human dignity comes from those who emphasize the concept's malleability.[373]

Sidestepping the disputes in moral philosophy, this Part surveys the concept of human dignity as it is used legally. In particular, it considers the role that dignity currently plays in constitutional jurisprudence and in U.S. criminal justice. This Part demonstrates that the value of human dignity has distinct legal content that can be operationalized to inform criminal prohibitions: dignity is infringed by objectification, by bodily invasion, by the denial of substantive equality, or by group-based subordination. These findings provide normative grounding for legal rules designed to preserve or protect dignity, such as the criminalization of human trafficking.

A. Legal Indignity

In contrast to what might be considered the "top-down" approach of importing moral philosophy's conceptions of human dignity into the legal sphere, we might alternatively benefit from a "bottom-up" evaluation that considers what role dignity already plays in legal decision making and constructs a conception that is consistent with that role. This subpart therefore explores what might be considered the jurisprudence of human dignity, with a particular emphasis on the fields of constitutional law and criminal justice. In constitutional law, human dignity is frequently invoked to protect personal integrity and to combat group-based subordination.[374] In criminal justice, dignity prohibits particularly dehumanizing means of objectification or instrumentalization.[375] Legal dignity thus provides a surprisingly coherent basis for specific criminal prohibitions, as later sections reveal.

1. *Dignity in Constitutional Law*

Over the past century, human dignity has become one of the most important concepts in constitutional jurisprudence, both internationally and domestically.[376] Internationally, dig-

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373 *See, e.g.*, Ruth Macklin, *Dignity is a Useless Concept*, 327 BRITISH MED. J. 1419, 1419 (2003); Steven Pinker, *The Stupidity of Dignity*, NEW REPUBLIC (May 28, 2008), https://newrepublic.com/article/64674/the-stupidity-dignity [https://perma.cc/L4WV-86QY] (contending that dignity "spawns outright contradictions at every turn").

374 *See infra* section IV.B.1.

375 *See infra* section IV.B.2.

376 *See* Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUROPEAN L. 201, 202 (2008).

nity is embedded in the Preamble to the Charter of the United Nations,[377] the Universal Declaration of Human Rights,[378] the German Basic Law,[379] the Israeli Basic Law,[380] the Canadian Bill of Rights,[381] and the South African Constitution.[382] Domestically, dignity informs the interpretation of multiple constitutional rights, despite not appearing in the U.S. Constitution.[383] As scholars have identified, modern constitutional law involves appeals to dignity that seemingly draw upon both the Kantian and the Judeo-Christian conceptions of dignity, discussed above.[384]

Although the international interest in human dignity is commonly traced to the Holocaust,[385] dignity actually began appearing in international constitutions around the beginning of the Twentieth Century.[386] According to Christopher McCrudden, "the combination of the Enlightenment, republican, socialist/social democratic, and Catholic uses of dignity together contributed significantly to these developments, with each being more or less influential in different countries."[387] When dignity was later incorporated into the German Basic Law, Kantian thought was also influential.[388] Despite substantial differences in the conceptions of dignity that influenced these developments, the various uses of dignity in international instruments can be seen to share a "basic minimum content."[389] McCrudden posits that this content includes the idea that dignity is universally held, that it demands particular treatment from others, and that the state is obligated recognize and protect the intrinsic worth of individuals.[390]

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377 *See* U.N. Charter pmbl.

378 *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pmbl., art. 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

379 *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW]. May 23, 1949, BGBI. I art. 1 § 1 (Ger.).

380 *See* Israeli Basic Law: Human Dignity and Liberty, SH No. 139, § 2 (Isr.).

381 *See also* R. v. Oakes, [1986] 1 S.C.R. 103, para. 136 (declaring that the Canadian Charter of Rights and Freedoms must be interpreted to embody "respect for the inherent dignity of the human person").

382 *See* S. AFR. CONST., 1996 §§ 1, 7, 10.

383 Henry, *supra* note 360, at 172–73.

384 Rao, *supra* note 376, at 207.

385 *See id.* at 202.

386 McCrudden, *supra* note 372, at 664.

387 *Id.*

388 *See id.* at 665.

389 *See id.* at 679.

390 *See id.*

The international experience with human dignity suggests that governments have a positive obligation to "provide a minimum set of standards to ensure that each person's human dignity is protected."[391] Entailed by this positive conception of dignity is the corresponding obligation of the state to protect against private indignities. "In other words, the affirmative mandate is translated into a specific code of conduct applicable to the private individual that then can be acted upon by another private party."[392] Doron Schultziner has examined several landmark invocations of dignity in international case law, finding that dignity is frequently used "to advance the human rights of excluded groups in the face of longstanding legal barriers or established cultural practices."[393] In this respect, dignity might be seen as intervening as an available remedy when "longstanding legal rules result in a legal yet unjust reality in the face of changing social values."[394]

Domestically, dignity was first invoked by the U.S. Supreme Court as early as 1793.[395] Over the following 230 years, the concept would appear in roughly 1,000 Supreme Court opinions, many interpreting core constitutional guarantees.[396] Perhaps most notably, human dignity has come to inform the "liberty" guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments. In this context, dignity reflects a commitment to principles of "autonomy, equality, and respect."[397]

In her article *The Jurisprudence of Dignity*, Leslie Meltzer Henry provided a detailed accounting of the various ways that dignity has been invoked in U.S. constitutional jurisprudence.[398] Her work suggests that, as a legal concept, dignity may play as many as five distinct roles in judicial opinions.[399] Some of these roles are unrelated to *human* dignity, such as when the Supreme Court grounds its sovereign immunity

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391 Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 111 (2011).

392 *Id.* at 115–16.

393 Doron Shultziner, *Human Dignity in Judicial Decisions: Principles of Application and the Rule of Law*, 25 CARDOZO J. INT'L & COMP. L. 435, 453 (2017).

394 *Id.* at 463.

395 Chisholm v. Georgia, 2 U.S. 419, 471 (1793) (Jay, C.J.)

396 *See* Henry, *supra* note 360, at 178 & n.41 (finding dignity mentioned in 926 Supreme Court cases as of 2011).

397 Rao, *supra* note 376, at 203.

398 *See generally* Henry, *supra* note 360.

399 *Id.* at 189–90.

analysis in the dignity of U.S. states.[400] Other roles, however, are distinctly human. Dignity has been cited as the basis for equal treatment of individuals,[401] for the freedom to make intimate personal choices,[402] and for the protection of personal integrity.[403]

Although Henry views the various roles played by human dignity in Supreme Court jurisprudence as reflecting distinct *conceptions* of dignity,[404] there is considerable overlap among them. Consider, for instance, equality and liberty. Henry suggests that dignity's role in equality cases stems from either a Judeo-Christian conception of dignity or Enlightenment-era conceptions of dignity as universal human worth.[405] By contrast, she contends that the dignity motivating individual liberty stems from "American political liberalism."[406] But the Court's cases often blur these distinctions. As Larry Tribe has explained, the Court's recent opinions "have tightly wound the double helix of Due Process [liberty] and Equal Protection [equality] into a doctrine of *equal dignity*."[407] Indeed, the very cases that Henry cites as examples of "liberty as dignity" have substantial antisubordination and personal integrity components.[408] Constitutional dignity is certainly multifaceted, but perhaps less fractured than Henry suggests.

In recent work, I've closely examined the role of human dignity in the Court's substantive due process jurisprudence, concluding that it is "best understood as ensuring a specific capacity for self-determination, particularly with respect to bodily autonomy and interpersonal relationships, and as opposed to the subordinating effects of criminalization."[409] The Court's due process cases reveal that dignity is simultaneously concerned with respecting the most intimate choices of individuals

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400 *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 58 (1996).

401 Henry, *supra* note 360, at 203–05.

402 *Id.* at 208–12.

403 *Id.* at 217–20.

404 *Id.* at 189–90.

405 *Id.* at 199–203.

406 *Id.* at 206.

407 Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015).

408 *See* Henry, *supra* note 360, at 210–11; Lawrence v. Texas, 539 U.S. 558 (2003). In prior work, I have performed an extensive analysis of the *Lawrence* decision, highlighting the various interplays of equality and liberty. *See* Ben A. McJunkin, *The Negative Right to Shelter*, 111 CALIF. L. REV. 127, 175–85 (2023).

409 McJunkin, *supra* note 408, at 175.

and elevating those within socially disfavored groups.[410] In many instances, these intimate choices are specifically linked to sex and sexuality:

> *Lawrence* decriminalized same-sex sodomy, *Windsor* undermined DOMA, and *Obergefell* extended the privilege of marriage to all. Even *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* involved Justice Kennedy invoking dignity as a means to recognize the "community-wide stigma" that might affect gay couples who are denied services.[411]

While some may view these cases as centrally about protecting personal choices, dignity's antisubordination function is no mere accident:

> Just as Germany and South Africa adopted universal human dignity as a lodestar of their legal systems after rejecting devastating racist ideologies, so too the United States adopted the Fourteenth Amendment in the wake of the Civil War for strikingly similar reasons—to atone for our nation's own original sin and extend our Constitution's promises to all citizens.[412]

2. *Dignity in Criminal Justice*

Dignity has also found a home in the administration of criminal justice. While a comprehensive accounting of dignity's invocations in these contexts would exceed the space available in this Article, a brief overview of three specific contexts amply illustrates the continuity between moral conceptions of dignity and legal ones. In the legal arenas of punishment, investigations, and sexual violence, dignity protects against instrumentalism, bodily invasions, and coercion designed to overpower a person's will. In the sexual violence context, in particular, dignity has also played an antisubordination role similar to that seen in the Supreme Court's substantive due process cases.

To begin with, human dignity constitutionally constrains criminal punishment. As Chief Justice Earl Warren has explained, the "basic concept" behind the Eighth Amendment's prohibition on cruel and unusual punishments is "nothing less than the dignity of man."[413] That Amendment outlaws both

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410 *See* Note, *Equal Dignity—Heeding Its Call*, 132 HARV. L. REV. 1323, 1329 (2019).

411 McJunkin, *supra* note 408, at 182.

412 Tribe, *supra* note 407, at 21.

413 Trop v. Dulles, 356 U.S. 86, 100 (1957).

modes of punishments that are considered inhumane[414] and quanta of punishment that are disproportionate to the gravity of the offense.[415] Respect for human dignity informs both functions. With respect to modes of punishments, "[e]volving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."[416] With respect to the severity of punishment, "[t]he primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings."[417]

Although this facet of the Court's Eighth Amendment jurisprudence is "no beacon of clarity," scholars have identified several features of the conception of dignity that regulates criminal punishments.[418] First, the Eighth Amendment mandates that criminal sentences "should fit not only the crime[,] but also the individual offender."[419] Characteristics of the offender, such as age and cognitive capabilities, inform whether punishment is consistent with human dignity.[420] Second, punishment may not involve the gratuitous infliction of "terror, pain, or disgrace."[421] Both of these facets seem to align with the Kantian requirement that an individual must not be treated instrumentally. They may also be informed by the Judeo-Christian concern with bodily and personal integrity. Other scholars have traced the Eighth Amendment's requirement of humane prison conditions to conceptions of dignity grounded in "communitarian virtue."[422]

Second, in a number of high-profile decisions, the Supreme Court has announced that government officials must respect the fundamental dignity of criminal suspects by not treating them instrumentally to extract information. For example, in *Rochin v. California*,[423] the Court concluded that involuntary

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414 *See id.* at 99 (examining "whether denationalization is a cruel and unusual punishment").

415 *Id.*; *see also* Atkins v. Virginia, 536 U.S. 304, 311 n.7 (2002) ("[W]e have read the text of the Amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.").

416 Louisiana v. Kennedy, 554 U.S. 407, 420 (2008).

417 Furman v. Georgia, 408 U.S. 238, 238 (1972) (Brennan, J., concurring).

418 Ryan, *supra* note 362, at 2157.

419 *Id.* at 2158.

420 *See, e.g.*, Graham v. Florida, 560 U.S. 48, 48 (2010).

421 *See* Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878).

422 *See* Buchhandler-Raphael, *supra* note 361, at 319–20 (citing Brown v. Plata, 536 U.S. 493 (2011)).

423 342 U.S. 165 (1952).

stomach pumping deprived a criminal suspect of due process because the procedure is "so brutal and so offensive to human dignity."[424] According to the *Rochin* Court, the U.S. Constitution must preserve "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[425] The forcible extraction of stomach contents does "more than offend some fastidious squeamishness or private sentimentalism"; it "shocks the conscience."[426] *Rochin*'s conception of dignity is primarily about bodily inviolability. The Court has invoked dignity in a number of similar cases that involve physical invasions of bodily integrity.[427]

In *Miranda v. Arizona*,[428] the famous self-incrimination case, Chief Justice Earl Warren elaborated on how criminal investigations may run afoul of human dignity. There, he described how "the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures."[429] Although the record contained no evidence of "overt physical coercion or patent psychological ploys," Warren explained that the "interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner."[430] The Court deemed these practices "equally destructive of human dignity" as physical intimidation would have been.[431]

Miranda's conception of human dignity picks up on several themes that emerge from the above analysis of moral philosophy. In particular, the notion of subjugating another's will echoes the Kantian ideal that people ought to be treated fully as ends rather than mere means. But, again, this kind of dignity does not reduce to mere autonomy—indeed, the *Miranda* Court noted that the confessions in that case might not "have been involuntary in traditional terms."[432] Rather, it is the use of specific techniques to reduce another human being to a vehicle for the interrogator's own will that is paradigmatic of prohibited instrumentalism. Dignity-infringing techniques for extract-

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424 *Id.* at 174.

425 *See id.* at 169.

426 *Id.* at 172.

427 *See* Buchhandler-Raphael, *supra* note 361, at 320–21 (citing Schmerber v. California, 384 U.S. 757 (1966) and Winston v. Lee, 470 U.S. 753 (1985)).

428 384 U.S. 436 (1966).

429 *Id.* at 457.

430 *Id.*

431 *Id.*

432 *Id.*

ing confessions include not only physical force, but also fraud ("patent psychological ploys") and nonphysical coercion.[433]

To fully understand the contours of the dignity claim at issue, it is instructive to compare *Miranda* to a well-known rape prosecution, *People v. Evans*.[434] In Evans, a con-artist procured consent to sex through a convoluted scheme that lasted several hours. The scheme included deception about the defendant's identity, voluntary intoxication, removing the complainant to an unfamiliar location, and then berating her while making thinly veiled threats to her physical safety.[435] Although there was no physical violence, the complainant was "intimidated," "confused," "had been drowned in a torrent of words and perhaps was terrified."[436] As with *Miranda*, it was clear in *Evans* that the environment of intimidation was crafted precisely to subjugate the complainant's will to that of the defendant. What *Miranda* teaches is that these very techniques—when used to procure a criminal confession rather than sexual intercourse—are an unconstitutional affront to human dignity. The *Evans* complainant was subjected to indignity, even though the law said she had not been subjected to rape.

Very recently, Anna High conducted a searching inquiry of the uses of the term "dignity" in sexual violence caselaw, both domestically and internationally.[437] Her research revealed four key themes in the judicial uses of dignity in this context.[438] First, dignity is frequently invoked to emphasize the gravity of the offence, in particular as a violation of bodily and psychological integrity.[439] Second, dignity has occasionally been said to encompass sexual autonomy—the right to say "no."[440] Third, dignity is often spoken of as "not only permanent, but equally inherent in all people."[441] Lastly, dignity resists group-based subordination, specifically "acknowledging that rape is disproportionately a crime against women and that the threat of rape has functioned to subordinate women in society."[442] High's re-

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433 *Id.*

434 379 N.Y.S.2d 912 (1975).

435 *Id.* at 915–17.

436 *Id.* at 919.

437 Anna High, *Sexual Dignity and Rape Law*, 33 YALE J.L. & FEMINISM 1, 19–30 (2022).

438 *Id.* at 19.

439 *See id.* at 19–23.

440 *See id.* at 23–24.

441 *Id.* at 25.

442 *Id.* at 28.

search is consistent with the preceding analysis of dignity's use elsewhere in law. It reveals the influence of both religious dignity (dignity as inherent and permanent, as well as group-based) and Kantian dignity (dignity as protecting individual autonomy), and it mirrors U.S. constitutional law's parallel commitments to bodily integrity and anti-subordination.

The myriad uses of dignity legally paint a surprisingly complete portrait of the concept. It can fairly be said that dignity is a universal entitlement to be respected as a full member of humanity, rather than to be used instrumentally toward the ends or will of another. Dignity appears to be particularly implicated in the legal questions surrounding sexuality, because sexual behavior so obviously implicates issues of bodily and personal integrity, but also because sexuality has long been a site of social subordination. To treat others with dignity is to elevate them as equals, to respect their body, and to refrain from compelling their behavior, whether through physical violence, fraud, or psychological coercion.

B. Human Trafficking as Indignity

As the foregoing analysis has shown, human dignity is a foundational concept in contemporary legal regimes, both foreign and domestic. But one area of law in which dignity has so far been underappreciated is as a value to be protected through the operation of U.S. criminal law, much as traditional rape law has protected the value of sexual autonomy. The criminal law is well suited to the protection of human dignity.[443] Indeed, "[d]ignity has been of particular interest to criminal law theorists, who see it as a potential substitute for the classic harm principle."[444] But there is only one criminal context to date in which human dignity has been extensively and expressly tied to criminalization: human trafficking. The trafficking context thus provides a valuable vehicle for examining the ways in which criminal law might operationalize attempts to punish the imposition of indignities more broadly. This subpart unpacks

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443 *See* Markus Dirk Dubber, *Toward A Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 546 (2004).

444 McJunkin, *supra* note 21, at 42 (citing Meir Dan-Cohen, *Thinking Criminal Law*, 28 CARDOZO L. REV. 2419, 2420–22 (2007) and JOHN GARDNER, OFFENCES AND DEFENSES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 16 (2008)). *See generally* MEIR DAN-COHEN, *Defending Dignity*, *in* HARMFUL THOUGHTS: ESSAYS ON LAW, SELF AND MORALITY 150 (2002); Meir Dan-Cohen, *Dignity, Crime, and Punishment: A Kantian Perspective*, *in* FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 101 (Markus D. Dubber, ed. 2014).

the criminalization of human trafficking and its expressive connections to human dignity in order to lay the groundwork for constructing and operationalizing a dignity-based rape law.

Human trafficking is widely misunderstood and deeply undertheorized. Broadly speaking, human trafficking refers to various forms of forced labor, including sexual labor, under conditions such as involuntary servitude, peonage, debt bondage, or slavery.[445] Although many people equate human trafficking with the forced migration of individuals across national and international boundaries, "the movement of the individual, either within or across borders, is not a necessary component of trafficking."[446] Rather, at the heart of trafficking laws—both domestically and internationally—is the use of prohibited means for the purpose of compelling labor.[447] Discussions of trafficking generally are also frequently reduced to discussions of sex trafficking specifically, which receives an outsized portion of both public and government attention despite comprising a subset of all human trafficking globally.[448]

Federal definitions of trafficking typically require the application of "force, fraud, or coercion" to render the trafficking actionable.[449] In addition, "every state has enacted laws establishing criminal penalties for traffickers seeking to profit from forced labor or sexual servitude."[450] These state laws play a sig-

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445 *See, e.g.*, Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 18 U.S.C. §§ 1589–1592 and 22 U.S.C. §§ 7101–7114).

446 Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2983 (2006).

447 *See* U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, art. 3, para. (a), U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/25 (Jan. 8, 2001), *reprinted in* 40 I.L.M. 335 [hereinafter U.N. Protocol] (defining trafficking as involving the "means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person" for the purpose of labor exploitation); 22 U.S.C. § 7102(11) (A) & (B) (defining "severe forms of trafficking" as, inter alia, involving the means of "force, fraud, or coercion").

448 The International Labour Organization estimated that sex trafficking made up about 19% of all forced labor globally as of 2016. INT'L LABOUR ORG., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 10 (2017), https://www.ilo.org/global/publications/books/WCMS_575479/lang--en/index.htm [https://perma.cc/5JKT-RV97].

449 *See* 22 U.S.C. § 7102(11)(A) & (B); 22 U.S.C. § 1591.

450 HUMAN TRAFFICKING STATE LAWS, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx [https://perma.cc/7HF5-EWYM] (last visited Oct. 28, 2022).

nificant role in the battle against human trafficking.[451] Many states have adopted the elements of force, fraud, or coercion from federal law, though other states vary with respect to their definitions, elements, and penalties.[452] All states, however, require that "traffickers *compelled* their victims into forced labor or sexual servitude."[453]

The "force" element in U.S. trafficking laws is typically broader than that term is used in rape law. Like rape law, force in trafficking naturally encompasses physical violence.[454] It also however sometimes encompasses forms of constructive force, such as locking a victim in a room.[455] Likewise, the "fraud" and "coercion" elements of trafficking far exceed any recognized counterparts in rape law. Any deception that was the proximate cause of the compelled labor is typically considered actionable fraud.[456] Coercion in trafficking law can include exploiting material dependencies.[457] Coercion also specifically encompasses exploiting legal vulnerabilities, such as immigration status.[458] Indeed, one key motivation for the U.S. enacting comprehensive trafficking laws in the early 2000s was the reality that "existing criminal laws did not factor in the psychological (as opposed to physical) coercion that accounted for many trafficked persons' inability to leave exploitative working conditions."[459]

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451 Tiffany Dupree, *You Sell Molly, I'll Sell Holly: Prosecuting Sex Trafficking in the United States*, 78 LA. L. REV. 1025, 1038 (2018).

452 *Human Trafficking State Laws*, *supra* note 450.

453 *Id.* (emphasis added).

454 *See, e.g.*, United States v. Todd, 627 F.3d 329, 331 (9th Cir. 2010) ("[The defendant] maintained his rules physically by beating [the victim] 'from head to toe,' blacking one of her eyes and chipping one of her teeth."); People v. Hines, 491 P.3d 578, 582 (Colo. App. 2021) (defendant "shattered the whole side of [the victim's] face" (alteration in original)).

455 *E.g.*, State v. Rogers, Nos. 2013AP992, 2013AP993, 2014 WL 114323, at *1, *12 (Wis. Ct. App. Jan. 14, 2014).

456 *See* United States v. Maynes, 880 F.3d 110, 113–14 (4th Cir. 2018).

457 *See, e.g.*, United States v. Lacy, 904 F.3d 889, 895 (10th Cir. 2018) (finding coercion where victim "was homeless and living out of her car, and all of her most important belongings were stored in the trunk of her car," and defendant took her phone and car keys); State v. Brown, 134 N.E.3d 783, 798–99 (Ohio Ct. App. 2019) (finding coercion where victim "would have no means to support herself or her son" because the defendant kept all of the revenue from the victim's sex work).

458 *See, e.g.*, United States v. Chang Ru Meng Backman, 817 F.3d 662, 664 (9th Cir. 2016).

459 Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1661 n.13 (2010).

One additional aspect of trafficking merits mention in laying the groundwork for a dignity-based rape law: consent to labor, including sexual labor, is not a defense.[460] Because criminal prosecutions turn on the use of inappropriate means of compelling labor, a consent defense, if available at all, would be limited to consent to those means.[461] Sex trafficking, in particular, commonly begins with victims who are voluntarily engaging in sex work but who are later trafficked through the subsequent application of force, fraud, or coercion.[462] The lack of a consent defense emphasizes that the moral value implicated by trafficking prohibitions is more than mere autonomy.

Although human trafficking has been widely criminalized for at least several decades, and indeed sex trafficking has been criminalized in some form the United States since the turn of the Twentieth Century,[463] criminal law theorists have scarcely offered a theoretical justification for the practice. Rhetorically, however, prohibitions on human trafficking are often tied to the principle of human dignity. This is especially true with respect to the Catholic conception of dignity. In 2000, Pope Francis described trafficking as "a scourge that wounds the dignity of our weakest brothers and sisters."[464] Two years later, Pope John Paul II wrote, "The trade in human persons constitutes a shocking offense against human dignity and a grave violation of fundamental human rights."[465] But we also find this tie in secular proclamations about human trafficking. In July 2004, then-President George W. Bush declared, "Human trafficking is one of the worst offenses against human dignity."[466] And in July 2021, U.S. Secretary of State Anthony

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460 U.S. DEPT. OF STATE, *supra* note 31.

461 *E.g.*, United States v. Rivera, 799 F.3d 180, 185 (2d Cir. 2015).

462 *See, e.g.*, *Brown*, 134 N.E.3d at 798 (noting that the trafficking victim "initially voluntarily engaged in prostitution").

463 *See* Alien Prostitution Importation Act, Pub. L. 43-141, 18 Stat. 477 (1875) (amended 1903). For a comprehensive overview of national sex trafficking legislation, see Chacón, *supra* note 446, at 3012–17.

464 *Pope Francis: Trafficking a Scourge Against Human Dignity*, VATICAN NEWS (Aug. 1, 2020), https://www.vaticannews.va/en/pope/news/2020-08/pope-francis-human-trafficking-scourge-against-dignity.html [https://perma.cc/D9EF-MHZU].

465 Letter of John Paul II to Archbishop Jean-Louis Tauran on the Occasion of the International Conference "Twenty-First Century Slavery - The Human Rights Dimension to Trafficking in Human Beings" (May 15, 2002), https://www.vatican.va/content/john-paul-ii/en/letters/2002/documents/hf_jp-ii_let_20020515_tauran.html [https://perma.cc/XQ4N-FWXY].

466 Chacón, *supra* note 446, at 2291 n.70 (citing President George W. Bush, Remarks Regarding First National Training Conference on Human Trafficking in the United States: Rescuing Women and Children from Slavery (July 16, 2004)).

Blinken pronounced that trafficking is "an affront to human rights; it is an affront to human dignity."[467]

Though often articulated, the link between human trafficking and human dignity is rarely examined in depth. Nevertheless, trafficking has obvious linkages to the various moral conceptions of dignity examined above, as well as to the dignity jurisprudence developed both domestically and internationally. For one, the use of force, fraud, coercion, or similar techniques for compelling labor is a form of instrumentalism or objectification that is fundamentally incompatible with the Kantian conception of dignity.[468] Through trafficking, people are reduced to things—mere tools for sex or labor—and are frequently deprived of agency over their lives.[469] For another, trafficking frequently targets women, children, and people of color, meaning that it, as a social practice, contributes to group-based subordination.[470] This subordination compounds the preexisting substantive inequalities—in particular, socioeconomic inequality and social marginalization—that render victims vulnerable to trafficking in the first instance.[471] The subjective experience of trafficking is often intentionally dehumanizing and degrading, including through the denial of basic human needs.[472] The criminalization of trafficking, both domestically and internationally, can thus be seen as one way for the state to discharge its positive obligation to protect the equal dignity of all humans.

IV
Toward a Dignity Doctrine

What if the criminal law prohibited compelled sex to the same extent that it prohibits compelled labor, including sexual labor? Sexual relations frequently implicate the same

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467 U.S. Dept. of State, *Human Trafficking – An Affront to Human Rights and Dignity*, YouTube (Jul. 2, 2021), https://www.youtube.com/watch?v=tB5ioqxSDUs.

468 *See* James C. Hathaway, *The Human Rights Quagmire of "Human Trafficking,"* 49 Va. J. Int'l L. 1, 44–45 (2008) (noting how international antitrafficking efforts are led by religious and feminist nongovernmental entities that adopt an anti-instrumentalist perspective borrowed from Kant).

469 Rachel J. Wechsler, *Deliberating at A Crossroads: Sex Trafficking Victims' Decisions About Participating in the Criminal Justice Process*, 43 Fordham Int'l L.J. 1033, 1036 (2020).

470 *See, e.g.*, Kathleen Kim, *The Thirteenth Amendment and Human Trafficking: Lessons & Limitations*, 36 Ga. St. U. L. Rev. 1005, 1024–25 (2020) (exploring the "intersectional subordinating effects" of trafficking on women and girls of color).

471 *See* Hathaway, *supra* note 468, at 4.

472 Sabrina Balgamwalla, *Trafficking Rescue Initiatives as State Violence*, 122 Penn St. L. Rev. 171, 206 (2017).

dignitarian concerns that motivate laws against human trafficking—questions of instrumentalism and objectification,[473] questions of bodily and personal integrity,[474] and questions of group-based subordination.[475] One possibility for a dignity-based rape law therefore would be to draw upon the model of human trafficking domestically, explicitly prohibiting particularly problematic *means* of obtaining sex—namely, force, fraud, and coercion.

This Part provides an initial foray into constructing a rape law doctrine grounded in human dignity. It begins by offering a model statute, borrowing heavily from domestic trafficking laws, and examining the implications of the statute for foundational criminal law questions of actus reus and mens rea. It then explores what role remains for sexual consent under a dignity doctrine, concluding that consent is best understood not as a standalone element in rape law but as a component of proximate causation. Lastly, this Part considers some of the limitations of a turn toward dignity in rape law doctrine, including the risk of both under- and over-criminalization. In so doing, it highlights how dignity, properly understood, may better align rape law with much-needed alternatives to imprisonment in a time of mass incarceration and racial inequality in criminal justice.

A. The Model Statute

Grounding rape law in human dignity would require reconsidering the essential elements of the crime, and therefore rewriting statutory language across the country. As an initial effort to begin that process, consider the below model statute:

> *Rape.* It shall be unlawful to recklessly, knowingly, or purposefully cause an act of sexual penetration or an act of oral sexual contact through the application of force, fraud, or coercion.

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473 *See, e.g.*, MacKinnon, *supra* note 38, at 140–41; West, s*upra* note 327, at 28; Chamallas, *supra* note 10, at 839–40; Immanuel Kant, Lectures on Ethics 156 (Peter Heath & J.B. Schneewind eds., Peter Heath trans., Cambridge Univ. Press 1997).

474 *See, e.g.*, Brownmiller, *supra* note 68, at 381; West, *supra* note 319, at 102; Michal Buchhandler-Raphael, *Criminalizing Coerced Submission in the Workplace and in the Academy*, 19 Colum. J. Gender & L. 409, 424 (2010).

475 *See, e.g.*, Pateman, supra note 10, at 2–18; McJunkin, *supra* note 21, at 45; Gruber, *supra* note 35, at 624; Chiesa, *supra* note 205, at 431.

> *Sexual Penetration.* Any penetration, however slight, into the vulva, anus, or penis of another person by any body part or object.
>
> *Oral Sexual Contact.* Any oral contact with the vulva, anus, or penis of another person.
>
> *Force.* Any use, or threatened use, of wrongful physical contact with another person, including physical violence and unlawful restraint of a person.
>
> *Fraud.* Any knowingly false statement made with the purpose to deceive another person.
>
> *Coercion.* Any scheme, plan, or pattern of conduct undertaken with the purpose to cause another person to believe that a failure to perform an act would result in the wrongful infliction of harm, including physical, psychological, financial, reputational, or legal harm.

The above formulation of the crime of rape is only one of many possibilities that might emerge from a commitment to human dignity. It draws heavily upon domestic trafficking law's emphasis on force, fraud, and coercion,[476] but also broadens those elements to better capture the wide variety of morally problematic conduct commonly used to compel sex. A following section will address admitted limitations to the model statute, some of which may be objectionable or even disqualifying to those committed to the narrower protection of sexual autonomy. But first, it is important to explore key doctrinal consequences of the model statute that would work to bring rape law in closer alignment with longstanding principles of criminal law theory.

1. *Refocusing Actus Reus*

A rape law structured similarly to human trafficking laws would be responsive to many of the longstanding critiques of consent in rape law, perhaps none more so than the need to refocus the crime on the offender's conduct. For too long, rape law's doctrines have paid almost exclusive attention to the thoughts and conduct of the victim, even for the essential question of actus reus.[477] Rape law reformers have called out this exceptional deviation from traditional criminal law

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[476] *See* 18 U.S.C. § 1591. Under federal trafficking statutes, the elements of "force" and "fraud" are typically undefined and left to judicial interpretation. *See, e.g.*, *id.* at § 1591(e).

[477] *See supra* section I.A.1.

principles,[478] under which the conduct of the accused should be the centerpiece of prosecution.[479]

Rather than focus on the complainant's response to sexual pursuit, as consent-based prohibitions require,[480] the model statute is defined solely in terms of the *wrongful conduct* that caused sex to occur, even if the sex was ostensibly consensual. This shift brings rape law more in line with mainstream criminal law theory, which typically requires both wrongful conduct and a harmful result.[481] Defining rape by reference to sexual nonconsent fails to describe with any specificity what was wrongful about the offender's conduct.[482] It might fairly be said that "nonconsensual sex" describes a harm, rather than a wrong. The shift to a rape law grounded in dignity creates an opportunity to surface the wrongfulness of the offender's conduct itself—the forceful, fraudulent, or coercive means by which sex was obtained. Compared to contemporary rape laws, a rape law grounded in dignity also makes relevant causal conduct occurring at an earlier point in time, which is often obscured by the inquiry into nonconsent.[483]

Astute observers will note that the model definitions for force, fraud, and coercion are broader than those terms are commonly understood in the crime of human trafficking. This choice was intentional. Under federal law, the use of force, fraud, or coercion constitutes "severe forms of trafficking in persons."[484] To define rape in the criminal law similarly—that is, to criminalize only "severe" rapes—would be to turn back the clock on years of reforms designed to gain legal recognition of the most commonly occurring forms of sexual violence.[485] Instead, the model statute largely follows the lead of rape law

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[478] *See, e.g.*, SCHULHOFER, *supra* note 4, at 31; Buchhandler-Raphael, *supra* note 257, at 1072.

[479] *See* DOUGLAS N. HUSAK, PHILOSOPHY OF CRIMINAL LAW 224–44 (1987).

[480] *See supra* subpart II.B.

[481] *See, e.g.*, 1 JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 105 (1984).

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

[483] *See* MacKinnon, *supra* note 10, at 440 ("Consent covers multitudinous forms of A's hegemony that are typically so elided as not to be seen to infect or inflect, far less vitiate, B's freedom.").

[484] 22 U.S.C. § 7102(11)(A).

[485] *See, e.g.*, Emily Pedersen, Note, *The New Rape: Proposal of a Comprehensive Rape Law Reform to Increase Rape Convictions in Cases of Acquaintance Rape*, 84 UMKC L. REV. 1111, 1111, 1116–17 (2016).

reformers who have sought to more broadly criminalize fraud and coercion under the traditional rubric of consent.[486]

This breadth also adds much-needed contextual flexibility. Line-drawing issues about the necessary quantum of force, fraud, or coercion are more properly resolved as a function of their causal significance, which permits a case-by-case evaluation. Sex with an unconscious person, for example, is *caused by* the application of physical force, even if relatively slight. By contrast, some force, fraud, or coercion, even if relatively more serious, may lack the necessary causal connection, as in a fraud that is immaterial.[487] Similarly, the requirement that the force and coercion used be "wrongful" permits an individualized assessment of the moral character of the conduct in light of society's norms, which is to say a direct assessment of whether the conduct is inconsistent with shared understandings of human dignity.[488]

One possible concern is that the model statute may indeed be too narrow with respect to actus reus. International instruments addressing human trafficking condemn not only the use of force, fraud, or coercion, but also "abduction," "deception" (as distinct from fraud), "the abuse of power or of a position of vulnerability," or "the giving or receiving of payments or benefits to achieve the consent of a person having control over another person."[489] A robust commitment to human dignity may eventually lead us to conclude that additional means of compelling human behavior are sufficiently wrongful as to be criminalized *as rape*. Some scholars are already there.[490] However, my goal in this Article is to propose an initial area of "overlapping consensus" as a foray into developing a dignity-based rape law doctrine.[491] Further exploration at the law's periphery will be needed.

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486 *See* Chamallas, *supra* note 10, at 821–23, 830–31 (identifying some such proposals and legal developments).

487 For the role of one partner's consent in the causation analysis, see *infra* subpart IV.B.

488 I share the view offered by John Gardner that conduct is wrongful when it constitutes a breach of duty. *See* John Gardner, *Wrongs and Faults*, 59 REV. METAPHYSICS 95, 100 (2005).

489 *See* U.N. Protocol, *supra* note 447.

490 *See* MacKinnon, *supra* note 10, at 474 (proposing that rape be defined as "a physical invasion of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability").

491 *See generally* John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 1 (1987).

2. *Reviving Mens Rea*

The second area in which the model statute would better align rape law with the foundational tenets of criminal law theory is with respect to mens rea. Mens rea is the essential ingredient of criminal culpability that makes an actor blameworthy, hence justifies the imposition of criminal punishment.[492] In recent decades, some of the criminal law's leading thinkers have worked to revive the concept of mens rea through legislative reform proposals.[493] These efforts have generated the culpability structure of the Model Penal code, which "restricts the set of mental (or quasi-mental) states in statutes to exactly four, each of which is carefully defined: purpose, knowledge, recklessness and negligence."[494] The Model Penal code approach to mens rea is not beyond critique,[495] but it is widely accepted as an "immense success."[496]

As noted previously, the longstanding mens rea requirement for traditional rape law has been "general intent," which is effectively no standard at all.[497] General intent requires little more than that an offender's conduct be a voluntary act—that is, not a reflex or unconscious movement.[498] Importantly, general intent typically does not require any mental state whatsoever with respect to the *harm* that the statute is trying to prevent.[499] This weakness in rape law's traditional mens rea likely explains the recent widespread adoption of the mistake-of-consent defense, despite its logical inconsistency and its emphasis on the conduct of the victim over that of the offender.[500]

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492 *See* Serota, *supra* note 97, at 1202.

493 *See, e.g.*, Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 New Crim. L. Rev. 319, 331–32 (2007); Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 Colum. L. Rev. 1425, 1436 (1968); David Wolitz, *Herbert Wechsler, Legal Process, and the Jurisprudential Roots of the Model Penal Code*, 51 Tulsa L. Rev. 633, 637 (2016).

494 Douglas Husak, *"Broad" Culpability and the Retributivist Dream*, 9 Ohio St. J. Crim. L. 449, 454 (2012).

495 *See, e.g.*, Vera Bergelson, *The Depths of Malice*, 53 Ariz. St. L.J. 399, 412 (2021) (detailing criticisms).

496 *Id.* at 399.

497 *See supra* notes 100–101 and accompanying text.

498 *See, e.g.*, Jennings v. State, 806 P.2d 1299, 1303 (Wyo. 1991) ("[I]t is sufficient to demonstrate that the defendant undertook the prohibited conduct voluntarily, and his purpose in pursuing that conduct is not an element of the crime.").

499 Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 Wake Forest L. Rev. 769, 790–91 (2012).

500 *See supra* notes 104–111.

By contrast, the model statute would require one of recklessness, knowledge, or purpose with respect to *both* the use of force, fraud, or coercion *and* that conduct's causal influence on the resultant sexual contact. Each of recklessness, knowledge, and purpose require a person to have meaningful subjective awareness about the risks or consequences of their own conduct.[501] In this way, the breadth of the actus reus under the model statute is counterbalanced by a more demanding mens rea—a person's wrongdoing is only actionable when paired with a culpable awareness of both the wrongful conduct and its causal consequences. This is intuitively satisfying: "a wide array of studies has shown that our intuitive moral sense of how to respond to harm or wrongdoing is keenly sensitive to what is happening in the minds of others."[502] If the criminal law is to track moral blameworthiness, as it should, it must therefore account for the nature of an offender's thoughts and understandings (and may even apportion punishment in line with them).

B. Consent as Causation

There is a key complication to the model statute: sexual consent is more than a legal concept, it is a social practice.[503] Every day, people agree to engage in sexual intercourse, whether enthusiastically or begrudgingly, whether wanted for its own sake or instrumentally toward another goal.[504] In many instances, people consent to sex *despite* the prior use of force, fraud, or coercion. Some people find uses of force erotic.[505] Some people romanticize even material frauds.[506] In these instances, it might rightly be said that one party's sexual consent, rather than their partner's force, fraud, or coercion, was the true cause of sexual intercourse.

Reconfiguring rape law around human dignity cannot therefore remove questions of sexual consent from rape law entirely. But the model statute proposed in this Article

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501 MODEL PENAL CODE §§ 2.02(a)–(c).

502 Michael Serota, *How Criminal Law Lost Its Mind*, BOSTON REV. (Oct. 27, 2020), https://www.bostonreview.net/articles/michael-serota-mens-rea-reform/ [https://perma.cc/E7P6-BAUQ].

503 *See* Gruber, *supra* note 4, at 442–43 (surveying the social science literature on how Americans express sexual consent in practice).

504 *See* West, *supra* note 11, at 372–73.

505 *See* Margo Kaplan, *Sex-positive Law*, 89 N.Y.U. L. REV. 89, 116–17 (2014).

506 Rubenfeld, *supra* note 41, at 1415–16 (touting the merits of deceptive sex).

relocates questions about consent doctrinally, mitigating both their complexity and their social effects. Rather than making nonconsent an attendant circumstance, as traditional rape law does, the model statute cabins the issues and questions relevant to consent into the notion of causation, specifically proximate cause. This subpart examines how issues of sexual consent would be resolved under the criminal law doctrine of causation. It highlights the ways in which causation doctrine is both more nuanced and more sensitive to inequalities than the traditional nonconsent requirement in rape law. As a result, a dignity-based rape law has the potential to disrupt the traditional thinking about sexual consent for the better.

Under well-established criminal law proximate cause doctrine, subsequent voluntary actions by humans may sever the causal chain that ordinarily links a defendant's actions to a specified result.[507] This includes subsequent voluntary actions by victims themselves.[508] In the case of the model rape law statute proposed above, legal liability only lies for a defendant whose force, fraud, or coercion *causes* the resulting sexual intercourse.[509] If a sexual partner freely and voluntarily consents to intercourse, that consent may properly be deemed a superseding cause, absolving a defendant of criminal liability despite their use of force, fraud, or coercion. Thus, even under a dignity-based rape law, consent reemerges as a question of causation.

The framework of causation, however, provides several conceptual advantages over traditional rape law doctrine. To begin with, in most jurisdictions a "foreseeable" subsequent human action does not sever the chain of causation.[510] Again, this is true even of actions by the purported victim that are necessary to bring about the prohibited result.[511]

> In assessing causal responsibility for victim self-endangerment, courts have considered victims who refused medical treatment for violent injuries, endangered themselves in flight from assault, entered fires started by arsonists, injured

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507 Michael S. Moore, *The Metaphysics of Causal Intervention*, 88 CALIF. L. REV. 827, 828 (2000) ("Certain interventions by third-party actors or by nature break the causal chains that would otherwise have existed between some defendant's action and some harm to another.").

508 *See* Guyora Binder & Luis Chiesa, *The Puzzle of Inciting Suicide*, 56 AM. CRIM. L. REV. 65, 99 (2019).

509 *See supra* subpart IV.B.

510 Binder & Chiesa, *supra* note 508, at 97–98.

511 *Id.* at 99.

> themselves while competing with others in dangerous contests, overdosed on illegal drugs supplied by others, as well as those encouraged or assisted to commit suicide.[512]

Under the proposed model statute, then, a sexual partner's consent to intercourse—if a foreseeable consequence of the defendant's use of force, fraud, or coercion—would not necessarily alleviate the defendant of causal responsibility. What might this look like in practice? Recall again the example of the Texas woman who was deemed to be consenting to sexual intercourse when she (at knifepoint) asked her assailant to wear a condom.[513] Under traditional rape law principles, the presence of the victim's consent relieved the defendant of any responsibility for the intercourse that followed, notwithstanding his threatened use of physical force.[514] Under a causation framework, however, the victim's acquiescence to intercourse would most probably be interpreted as a foreseeable consequence of the assailant's threatened use of force—indeed, it was in all likelihood his *intended* outcome—meaning that such force remains the relevant proximate cause of the sex act.

This analysis is sometimes framed as a question of "coincidental" causes versus "responsive" causes[515] or "independent" versus "dependent" causes.[516] Typically, subsequent human action is an independent cause when it is not itself a product of the defendant's prior acts. By contrast, subsequent human action is a dependent cause when the action itself is caused by the defendant's prior acts. In jurisdictions that adopt such frameworks,[517] even independent causes will not break the chain of causation if they are sufficiently foreseeable, while dependent causes almost never break the chain of causation.[518]

Even in those jurisdictions that do not adopt "foreseeability" as the marker of causation, a subsequent human action does not sever the causal chain if it is insufficiently voluntary.[519]

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512 *Id.*

513 *See supra* text accompanying notes 127–28.

514 *See supra* section I.A.3.

515 LAFAVE, *supra* note 57, at 364.

516 Eric A. Johnson, *Two Kinds of Coincidence: Why Courts Distinguish Dependent from Independent Intervening Clauses*, 25 GEO. MASON L. REV. 77, 77–78 (2017).

517 *See id.* at 78 ("Some courts, when faced with proximate cause issues, apply a straight 'foreseeability' or 'probability' test without bothering to classify individual intervening events as dependent or independent.").

518 *See id.* at 83–84.

519 Moore, *supra* note 507, at 839.

In the traditional formulation of proximate causation, a subsequent human action is not voluntary if it is reflexive, if it is coerced, if it mandated by a professional duty, or if the actor is not possessed of their psychological faculties.[520] Each of these situations—save perhaps professional duty—can arise with respect to sexual intercourse that traditional rape law has long treated as consensual. At common law, for example, the failure to resist a sexual attack was treated as tantamount to consent.[521] We now know that "frozen fright" is a reflexive response,[522] as such it would not be deemed a superseding cause of sexual intercourse.[523] Coerced consent is likewise not voluntary under causation doctrine, even when the coercion is non-physical,[524] such as a threat to expel a student or to fire an employee.[525] The same is true of fraudulently procured consent.[526] Lastly, causation doctrine has deemed non-voluntary, and thus non-superseding, actions undertaken by individuals with diminished capacity, whether due to intoxicants, mental illness, or even age.[527] Thus, rape liability would remain for defendants who used force, fraud, or coercion to procure putative consent to sex from someone who is drunk, mentally incapacitated, or underage.

One final benefit of adopting a causation framework for addressing questions of intervening sexual consent is that factfinders may be less inclined to infer or impute consent to situations based on their conclusions about the complainant's mental state. One quintessential feature of an intervening human action is that it is an *action*.[528] Superseding causes, by definition, involve tangible conduct that produces real-world effects. Under a causation framework, therefore, rape law would no longer be subject to determinations that a complainant

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520 *Id.*

521 *See, e.g.*, Anderson, *supra* note 78, at 967–68 (collecting cases).

522 *See, e.g.*, Buchhandler-Raphael, *supra* note 35, at 160.

523 *Cf.* Moore, *supra* note 507, at 839–40.

524 *See id.* at 842 ("A threat of serious bodily harm, or of damage to property, or a threat of economic injury, can so reduce the intervenor's options as to render his choice to intervene nonvoluntary.").

525 *Cf.* Rubenfeld, *supra* note 41, at 1411 (considering how these examples of non-physical coercion result in acquittal under traditional rape law).

526 *See* Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. Pa. L. Rev. 395, 408–09 (2007).

527 Moore, *supra* note 507, at 843.

528 *See id.* at 840 ("[O]missions are not voluntary acts even where the intervening actor was under a legal duty not to omit.").

consented merely because her clothes or personal characteristics suggested that she was "asking for it."[529]

There is much more that can be said for construing consent as a matter of proximate causation. The philosophical nuances of causation doctrine are manifold, and a full exploration of the issues that might arise in rape law cases exceeds the space allotted in this Article. Nevertheless, the foregoing sketch demonstrates obvious advantages that a dignity-based rape law would have over rape law's traditional approaches to questions of consent. These advantages are possible both without centering consent in either the doctrine or the discourse of rape law and without risking criminalizing sex as it is routinely practiced.[530]

C. The Limits of Indignity

Dignity is not without its drawbacks. The model statute developed in this Article would be narrower than contemporary rape law in at least two prominent respects: it does not expressly criminalize sex with underage or intoxicated partners. At the same time, because the model statute is in other ways broader than contemporary rape law, it runs the risk of either over-criminalizing or being subject to underenforcement by legal actors. Some may also fear that an embrace of dignity puts U.S. criminal law on the slippery path toward legal moralism. This subpart anticipates and responds to each of these objections.

1. *Age and Intoxication*

Perhaps the most obvious objection to the model statute is that is does not criminalize sexual intercourse with parties who are intoxicated or under a specified age. As detailed above, criminal law reformers have gone to great lengths to ensure that contemporary rape laws extend to cover intoxicated sex and sex with underage partners.[531] But since those prohibitions are grounded in the *capacity* of the consenting party rather than the *means* used to compel sex, they are incompatible with the framework for criminalization represented by the model statute.[532]

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529 *See supra* text accompanying notes 129–131.

530 *Cf.* Gruber, *supra* note 4, at 440–47 (arguing that rape law reforms that center on requiring affirmative consent are inconsistent with sex as actually practiced and are an improper means of nudging sexual norms).

531 *See supra* section II.C.1.

532 Some courts consider surreptitiously administering intoxicants to be a constructive form of force, Falk, *supra* note 242, at 135–36 & n.29, in which case the model statute would arguably reach such conduct.

This is not to say, however, that lawmakers would be unjustified in criminalizing sexual intercourse with people who are substantially intoxicated or who are under a specific age. It merely reflects that the basis for any such prohibitions must be something other than the specific vision of human dignity constructed here. (Nor should such prohibitions be grounded in sexual autonomy, for reasons that by now should be clear.[533]) The harms of intoxicated sex and youthful sex are of a different character than the dehumanization involved in the application of force, fraud, or coercion to compel sex. But alternative justifications abound.

As an initial attempt to provide an alternative justification for criminalization, I note that both age and intoxication are conditions that entail heightened vulnerability. Vulnerability theory, most famously developed by Martha Fineman, provides that governments have an affirmative obligation to protect all citizens from inherent human vulnerabilities.[534] In previous work, I have suggested that Fineman's vulnerability theory shares important commonalities with leading theories of human dignity, though they are ostensibly distinct.[535] Under vulnerability theory, criminal law would "account for the responsibilities held by each individual within our social relationships, particularly when such relationships are loaded with unequal distributions of dependency and care."[536] Vulnerability theory is thus ideal for considering the permissibility of sex between unequal parties.[537]

Youth and intoxication can both lead people to make choices (even fully autonomous choices) that are seriously detrimental to their higher-order interests and overall well-being. These choices may come to be sources of regret, shame, embarrassment, or even physical injury. Criminalization of sex with an intoxicated

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533 *See supra* text accompanying notes 247–256 and 262–274.

534 *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9–15 (2008); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 255–56 (2010).

535 Ben A. McJunkin, *Homelessness, Indignity, and the Promise of Mandatory Citations for Urban Camping*, 52 ARIZ. ST. L.J. 955, 964 (2020) (comparing Fineman's vulnerability theory with Martha Nussbaum's capabilities theory of human dignity).

536 Stu Marvel, *Response to Tuerkheimer:* Rape On and Off Campus*: The Vulnerable Subject of Rape Law: Rethinking Agency and Consent*, 65 EMORY L.J. ONLINE 2035, 2048 (2016).

537 *See id.* at 2044 (providing examples of "a teacher and student within a school; a parent and child within a family; an employer and employee within a workplace; an elderly person and a young adult within the home").

partner, or with a too-young partner, may therefore be justifiable as a prophylactic measure to protect vulnerable citizens. Indeed, I have hinted at this idea in other work.[538] Irrespective of whether vulnerability theory is a persuasive ground for criminalization, my point here is simply to highlight that a narrow rape law—grounded in human dignity—does not preclude the possibility of distinct sex crimes with alternative justifications.

2. *The Potential for Underenforcement*

A more pressing concern is the possibility that those charged with enforcing rape law—in particular, police and prosecutors, but also judges and juries—will reject the turn toward dignity. Dan Kahan has previously diagnosed law's "sticky norms problem," which arises "when the prevalence of a social norm makes decisionmakers reluctant to carry out a law intended to change that norm."[539] In other words, if our legal prohibitions condemn behavior that legal decisionmakers do not consider condemnable, decisionmakers will be inclined to under-enforce those prohibitions.[540] If our sexual norms include an embrace of, for example, deception and coercion, a dignity-based rape law may be a prime candidate for under-enforcement.

Sticky norms have a long history of subverting rape law reform. Kahan himself noted how early attempts to eliminate the force requirement in rape law had little practical effect: "Empirical studies suggest . . . that such reforms have little effect on juries, which continue to treat verbal resistance as equivocal evidence of nonconsent, or on prosecutors, who remain reluctant to press charges unless the victim physically resisted the man's advances."[541] Indeed, sticky norms may also explain why feminist reform efforts to broaden the definition of "force" in the 1970s were mostly ineffective[542]—the paradigm of rape at the time was a violent attack on a white woman by a racialized stranger; "sinister blackness against innocent whiteness, in a conflict that draws red blood."[543]

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538 *See* McJunkin, *supra* note 21, at 35–36.

539 Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. Chi. L. Rev. 607, 607 (2000).

540 *Id.* at 608.

541 *Id.* at 607.

542 For an overview of these reforms, see Schulhofer, *supra* note 4, at 39. For a discussion of their ineffectiveness, see Decker & Baroni, *supra* note 120, at 1119–23.

543 Anderson, *supra* note 78, at 625–26.

Aya Gruber has cited the sticky norms problem as a key reason why adopting affirmative consent standards would be misguided.[544] "Experts note that because society reacts poorly to the widespread criminalization of ordinary behavior, laws that 'shove' through change by radical behavioral prescriptions are less effective than laws that 'nudge' a culture already at a tipping point."[545] But how can we tell when society is at a tipping point? Proponents of affirmative consent, for example, contend that an overwhelming majority of young adults view strong consent requirements—such as the "yes means yes" standard—as a realistic expectation for sexual activity.[546] And how does society reach that tipping point if not for sustained efforts by legal reformers? After all, it is not so long ago that acceptance of acquaintance rape as "real" rape was a radical position.[547]

To be sure, the sticky norms problem counsels in favor of adopting incremental reforms.[548] This is one reason why the model statute's conduct elements are limited to force, fraud, and coercion. Social science research indicates that these behaviors are widely understood as *wrongful* even when they are not understood as vitiating sexual consent.[549] Moreover, these elements are already entrenched in our criminal trafficking laws, making them at least somewhat familiar to actors charged with enforcing and applying criminal law. By contrast, attempts to construe indignity more broadly, in line with international instruments,[550] may well have self-defeating effects.

3. *The Potential for Overcriminalization*

The flipside of the above concern is that a dignity-based rape law would simply criminalize *too much* conduct. It has been said that the purpose of criminalization is "[t]o announce to society that these actions are not to be done and to secure that fewer of them are done."[551] It is in this spirit that the model statute seeks to criminalize sexual acts inconsistent with hu-

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544 *See* Gruber, *supra* note 4, at 446.

545 *Id.*

546 *See* Schulhofer, *supra* note 60, at 671.

547 *See generally* ESTRICH, REAL RAPE *supra* note 89.

548 *See* Kahan, *supra* note 539, at 619.

549 *See* Sommers, *supra* note 309, at 2268–70, 2277–81.

550 *See supra* text accompanying notes 489–491.

551 H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 6 (1968).

man dignity. But we live in an era of overcriminalization, where "[e]verything is a crime, and everyone is a criminal."[552] The United States is the world leader in incarceration.[553] Approximately 5.5 million Americans are under correctional supervision on any given day.[554] And the number of federal crimes alone is thought to exceed 300,000, far more than any one person reasonably can be expected to be aware of or comply with.[555]

Overcriminalization has been a concern of criminal justice reformers since at least the 1960s.[556] In recent years, however, researchers have increasingly tied overcriminalization to racial disparities in the criminal justice system.[557] Overly broad criminal laws may lead to racially discriminatory policing and racial bias in prosecutorial decision-making.[558] And while sex crimes are still frequently cited as a site of under-criminalization,[559] feminist reforms seeking to protect female victims of date rape and domestic violence have been called out as contributing to the criminal justice system's victimization of young men of color.[560] Thus, broadening rape law to reach previously non-criminal behaviors, such as the use of sexual fraud or coercion, could be socially detrimental if it contributes to the problems of overcriminalization and mass incarceration.

We are not left without hope, however. A dignity-centered rape law is well suited to be paired with emerging alternatives

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552 Levin, *supra* note 94, at 498.

553 *See, e.g.*, David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 28 (2011).

554 RICH KLUCKOW & ZHEN ZENG, U.S. DEP'T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2020 – STATISTICAL TABLES (Mar. 2022), https://bjs.ojp.gov/content/pub/pdf/cpus20st.pdf [https://perma.cc/D327-JE4A].

555 John C. Coffee Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 (1991).

556 *See* Levin, *supra* note 94, at 498 (suggesting that the problem was "first diagnosed" by Sanford Kadish).

557 *See, e.g.*, Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 305 (2018) (citing Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 163 (2016)); Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 610 (2016)).

558 Cynthia Jones, *Confronting Race in the Criminal Justice System: The ABA's Racial Justice Improvement Project*, 27 CRIM. JUST. 12, 12 (2012).

559 *See, e.g.*, Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1305–08 (2017) (detailing the under-criminalization of domestic violence, rape, and sexual harassment).

560 AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION 121–50 (2020); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 822–23 (2007).

to incarceration, most notably restorative justice.[561] "Restorative justice is a theory of justice that emphasizes repairing the harm caused by criminal behavior."[562] Restorative justice involves a non-adversarial process of bringing together those affected by criminal conduct—typically, the offender, the victim, and impacted community members—to negotiate an appropriate resolution.[563] The negotiation process is intended to be collaborative, and centers on offender accountability and repairing any harm caused.[564] Although restorative justice has been primarily adopted within the juvenile system or for non-violent offenses, it has increasingly been accepted as an alternative to the traditional criminal process.[565] Where used, restorative justice has been empirically shown to enhance victim satisfaction, improve offender compliance with restitution agreements, and reduce recidivism.[566]

A central step in the restorative justice process is for the offender to acknowledge their responsibility for the harm caused to the victim. "From a restorative justice perspective, rehabilitation cannot be achieved until the offender acknowledges the harm caused to victims and communities and makes amends."[567] Research has demonstrated that victims of sexual harm want to see the offender take responsibility even when they do not desire harsh punishments.[568] Where offender responsibility is defined in terms of identifiable conduct—under the model statute, the application of force, fraud, or coercion—this step in the

561 Some may suggest that transformative justice is preferable to restorative justice in the context of crimes of sexual violence. *See, e.g.*, Jill C. Engle, *Sexual Violence, Intangible Harm, and the Promise of Transformative Remedies*, 79 WASH. & LEE L. REV. 1045, 1066 (2022). To be sure, transformative justice has several advantages over restorative justice, including the recognition of structural violence and its intersectionality and critical theory influences. *See id.* at 1078. However, transformative justice is traditionally conceived as "an affirmatively nonlegal approach with the goal of dismantling the criminal justice system." *Id.* at 1073. This Article's focus on restorative justice is due to the role that restorative justice already plays within the criminal justice system; it is not intended to reject the efforts of scholars like Jill Engle, who advocate for importing transformative justice concepts into the criminal justice system. *See id.* at 1076.

562 OFF. OF JUV. JUST. & DELINQUENCY PROGRAMS, RESTORATIVE JUSTICE (Nov. 2010), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/restorative_justice.pdf [https://perma.cc/7MMJ-KKXK].

563 *See, e.g.*, Alexa Sardina & Alissa R. Ackerman, *Restorative Justice in Cases of Sexual Harm*, 25 CUNY L. REV. 1, 28 (2022).

564 *See id.* at 29–30.

565 *Id.* at 26–27.

566 OFF. OF JUV. JUST. & DELINQUENCY PROGRAMS, *supra* note 562.

567 *Id.*

568 Sardina & Ackerman, *supra* note 563, at 12.

restorative justice process is intuitive and unproblematic. By contrast, where offender responsibility is defined in terms of the victim's conduct or state of mind—i.e., victim nonconsent—the process may not see the desired results.[569]

Recognizing rape as indignity may also be valuable for non-criminal interventions, such as sexual violence education programs.[570] We've already experienced the power of educational institutions in proliferating so-called "consent culture" among American college students.[571] Some states have passed legislation mandating sexual violence outreach and education among college students, and there have been calls to extend those programs to high school students.[572] As with restorative justice, these sexuality education efforts may be benefitted by adopting an understanding of rape that centers the offender's wrongful conduct in procuring sex. The model statute would establish clearer rules for guiding individual choices and would disrupt the harmful social narratives that have emerged from equating consent with the power to gatekeep sexual access. We therefore need not be committed to carceral solutions in order for a dignity-based understanding of rape to contribute to remedying sexual violence.

4. *The Path to Legal Moralism*

Because dignity is not coextensive with autonomy, a thick commitment to dignity in the substantive criminal law could potentially justify the criminalization of some consensual sexual conduct—in particular sex work[573] and consensual BDSM.[574] Given that the legal regulation of consensual sexual activity in the U.S has been liberalized over the past half-century, critics may fear that a dignity-based rape law regime will thus pave the way for the return of sexually repressive

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569 Perpetrators of sexual harm have been shown to internalize rape myths that shift blame onto victims. *Id.* at 22. For restorative justice to be effective in cases of sexual harm, meanwhile, it is important that the victim be absolved of responsibility. *Id.* at 34.

570 *Cf.* GRUBER, *supra* note 560, at 195 (suggesting that "sexuality education" is a widely supported "nonpunitive intervention to address sexual assault").

571 *See supra* subpart I.B. *See generally* Gersen & Suk, *supra* note 67.

572 Wendy Adele Humphrey, *"Let's Talk About Sex": Legislating and Educating on the Affirmative Consent Standard*, 50 U.S.F. L. REV. 35, 62–66 (2016).

573 *See, e.g.*, Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 10–11 (2011).

574 *See, e.g.*, R. v. Brown [1994] 1 AC 212, 237 (appeal taken from Eng.) (concluding that consensual sadomasochistic sex acts may be criminalized because such "[c]ruelty is uncivilized").

criminal prohibitions.[575] However, the prohibitions on force, fraud, and coercion contained in the model statute criminalize only behaviors that encroach on a specific, and carefully constructed, understanding of human dignity. These behaviors reduce people to objects, rather than treating them as shared partners in a sexual encounter; they threaten bodily and personal integrity; and they are constitutive of social practices that subordinate on the basis of gender.

The rationale for criminalizing the behaviors prohibited by the model statute would not extend to criminalizing the kinds of sexual activities that have been widely decriminalized, such as sodomy, adultery, and fornication.[576] Indeed, human dignity has done much of the normative work in *decriminalizing* these behaviors.[577] Targeted reforms of the sort proposed in this Article need not put us on the slippery slope to legal moralism. If anything, the fear of moralism comes from the threat of unprincipled uses of dignity rhetoric untethered from its legal content.[578] But if moralism is the fear, there are more salient and imminent threats than adopting a jurisprudence of dignity.[579]

Principled legal reforms, such as those represented by the model statute, have the power to change the way the criminal law expresses the essence of rape and why it is wrong.[580] Conceiving of rape as indignity, rather than as a violation of individual autonomy, holds some promise for bringing a broader swath of morally culpable conduct within the ambit of the criminal law while nudging societal understandings of rape away from the kind of decontextualized rights talk that masks gender-based inequalities.

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575 *See* High, *supra* note 437, at 33 ("[D]ignity could be used to justify the 'trumping' of sexual autonomy, including the choice to debase oneself, with implications for the legal regulation of consensual but non-normative sexual behaviour.").

576 *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

577 McJunkin, *supra* note 408, at 174–82.

578 *See* High, *supra* note 437, at 33 (suggesting that "an uncritical dignity approach to sexual behaviour generally might lead to a moralistic preoccupation with dignity as honor or respect").

579 *See, e.g.*, Caleigh Harris, *The Draconian Future Following the Dobbs Decision*, 91 U. CIN. L. REV. BLOG (July 20, 2022), https://uclawreview.org/2022/07/20/draconian-future-following-dobbs-decision/ [https://perma.cc/85FB-TVPV].

580 *See generally* Joel Feinberg, *The Expressive Function of Punishment*, 49 PHIL. L. 397, 400 (1965) ("Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those 'in whose name' the punishment is inflicted.").

CONCLUSION

This Article proposes a novel normative grounding for U.S. rape law as a matter of human dignity. As it details, dignity has a long and surprisingly coherent tradition in human rights law, in constitutional law, and in criminal justice. The picture of dignity that emerges from this legal tradition harmonizes various accounts of the concept in moral philosophy—dignity is universal, it deontically demands that individuals are treated as equal participants in the experience, and it is antithetical to group-based subordination. When used as the grounds for criminal prohibitions, dignity forbids the use of force, fraud, or coercion, broadly defined, to compel human conduct. Building upon both federal and state efforts to combat the indignities of sex trafficking, the Article proposes a model statute that punishes as rape the indignity of compelled sex.

Viewing rape as indignity provides new insights into long-standing criticisms of existing rape law. Indignity more accurately captures the experiences of victims that were not cognizable under the rubric of sexual autonomy. Indignity also recenters rape law on the thoughts and actions of the perpetrator, better aligning it with the fundamental tenets of criminal law theory. This alignment also opens the door to much-needed alternatives to incarceration, such as restorative justice, in a moment of criminal justice reform.

Importantly, indignity offers an account of rape that rivals the conventional view of rape as nonconsensual sex. While consent has an appropriate role in the legal analysis of rape, the preeminence of consent in rape law has been not only theoretically unjustifiable but also socially harmful. The concept of consent remains contested at its very foundations, and its conceptual structure exonerates much unequal and morally blameworthy behavior. Consent-talk has infected every aspect of rape law's doctrines, distorted its outcomes, and fueled dangerous narratives that increasingly threaten women's standing and safety in society.

As always, there is more work to do. This Article provides a first foray into understanding rape as an affront to human dignity, but a broader examination of the relationship between dignity and various forms of sexual harm is needed. Committing to human dignity in the criminal law may have implications for the criminalization of behaviors ranging from consensual sex work to interfamily sexual violence to pornography. My hope is that this Article provides an appropriately exhaustive foundation for the work that is surely to follow.