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HOW TO THINK (LIKE A LAWYER) ABOUT RAPE

*Kimberly Kessler Ferzan**

*Peter Westen***

ABSTRACT

From the American Law Institute to college campuses, there is a renewed interest in the law of rape. Law school faculty, however, may be reluctant to teach this deeply debated topic. This article begins from the premise that controversial and contested questions can be best resolved when participants understand the conceptual architecture that surrounds and delineates the normative questions. This allows participants to talk to one another instead of past each other. Accordingly, in this article, we begin by diffusing two non-debates: the apparent conflict created when we use “consent” to mean two different things and the question of whether rape law ought to be formulated in terms of consent or force. From here, we turn to the conceptual apparatuses that surround the normative questions of freedom from force, knowledge, and capacity. Here, we suggest how better understanding these concepts can frame the underlying discussions as to what sorts of coercion undermine consent, what kinds of deception invalidate consent, and when the victim is too incapacitated to consent. Finally, we turn to different formulations of consent, demonstrating that one conception better captures the harm of rape but that other formulations may better protect victims. We show how clarifying these questions allows discussants to see why different formulations are valuable and to debate the best all-things-considered formulation. Although this article is framed as a question of how (to teach students) to think like lawyers about rape, its ambition is to set forth a framework that is useful to reformers as well.

INTRODUCTION

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Rape is studied throughout universities, in departments as varied as Anthropology, Biology, History, Philosophy, Political Science, Psychology, Sociology, and Economics. Rape is also studied in law schools, principally as part of criminal law.

Any criminal law professor, however, inevitably faces the question of whether teaching rape law is “worth it.” Just last year, Jeannie Suk noted that new criminal law teachers are deciding that teaching rape law is “not worth the risk” and even seasoned professors are “seriously considering dropping rape law.”¹ And the risks are not insubstantial. Students who have been victims of sexual violence may be upset or even traumatized by the topic. And revealing their experiences to their professors can itself trigger mandatory reporting requirements for faculty, even when the assault occurred years prior to matriculation. Moreover, these potential individual harms occur within the framework of campuses that are trying to balance first amendment expression with the denunciation of needless offense. In this climate, even in the absence of deliberate, intentionally offensive speech, a stray remark may be misinterpreted or infelicitously expressed, creating substantial boundaries between professors and students or students with each other.² With such strife, it is no wonder that criminal law professors may simply opt to spend a couple of extra days on homicide. The merger limitation for felony murder liability is far less controversial.

But ignoring rape law is, as Susan Estrich claims, to “remove the classroom from reality, and to make ourselves irrelevant.”³ Although Estrich’s assertion was made over two decades ago, it is equally true today. First, the American Law Institute now has a group working on substantially

¹ Jeannie Suk, “The Trouble with Teaching Rape Law,” *The New Yorker*, News Desk, December 15, 2014.

² As Laura Kipnis articulates the faculty worry:

The reality is that the more colleges devote themselves to creating “safe spaces”—that new watchword—for students, the more dangerous those campuses become for professors. It’s astounding how aggressive students’ assertions of vulnerability have gotten in the past few years. Emotional discomfort is regarded as equivalent to material injury, and all injuries have to be remediated.

Most academics I know—this includes feminists, progressives, minorities, and those who identify as gay or queer—now live in fear of some classroom incident spiraling into professional disaster. After the essay appeared, I was deluged with emails from professors applauding what I’d written because they were too frightened to say such things publicly themselves. My inbox became a clearinghouse for reports about student accusations and sensitivities, and the collective terror of sparking them, especially when it comes to the dreaded subject of trigger warnings, since pretty much anything might be a “trigger” to someone, given the new climate of emotional peril on campuses.

Laura Kipnis, “My Title IX Inquisition,” *The Chronicle of Higher Education*, May 29, 2015.

³ Susan Estrich, “Teaching Rape Law,” *Yale Law Journal* 102(2) (1992): pp. 509-520, p. 515.

revising the Model Penal Code's sexual assault provisions.⁴ Second, colleges and universities are required under Title IX to promulgate sexual assault regulations, and over 800 colleges and universities have adopted affirmative consent provisions.⁵ How can anyone teach criminal law and not teach the portion of criminal law that touches everyone's lives?

There are rich normative debates to be had in rape law. What sorts of coercion invalidate consent? What kinds of misrepresentations undermine consent? How should we think about the relationship between intoxication and capacity? What should we think about individuals with reduced cognitive capacities and whether they can consent? To the extent that any of the answers rely on continuum concepts, how do these continua affect grading? And so forth.

Our goal in this paper is not to intercede in these normative debates, nor is our goal to advise others of how to teach these debates. Elsewhere, we have engaged with rape analytically and normatively,⁶ and others have written excellent articles on how to teach rape law as a respectful dialogue that fosters different viewpoints.⁷ Our goal instead is to define rape's analytical edges.

We believe that setting forth the conceptual and analytical architecture is a pedagogically superior approach to teaching rape law. First, much of what defines the perimeter is the bread and butter of what lawyers do. Certainly, law schools regard it as a central goal to train students to frame and help resolve disputed issues of social ordering, including training them to interpret and draft statutes. And among these skills are the abilities to identify when disputes are real and when they are false; when disputes that appear to be about one thing are about something else; when

⁴ See <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/>

⁵ Jake New, "The 'Yes Means Yes' World," *Slate*, October 17, 2014.

⁶ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Aldershot: Ashgate, 2004); Kimberly Kessler Ferzan, "Consent, Culpability, and the Law of Rape," (forthcoming, *Ohio State Journal of Criminal Law*); Kimberly Kessler Ferzan, "Sex as Contract," in Paul H. Robinson, Stephen P. Garvey, and Kimberly Kessler Ferzan (eds.), *Criminal Law Conversations* 308 (New York: Oxford University Press, 2009)

⁷ Michelle Oberman, "Getting Past Legal Analysis ... Or How I Learned to Stop Worrying and Love Teaching Rape," *Creighton Law Review* 45(4) (2012): pp. 799-825; Mary Heath, "Encounters with the Volcano: Strategies for Emotional Management in Teaching the Law of Rape," *The Law Teacher* 39(2) (2005): pp. 129-149; Kevin C. McMunigal, "Reducing the Risks and Realizing the Rewards: An Approach to Teaching Rape Law," *San Diego Law Review* 34 (1997): pp. 519-540; Kate E. Bloch, "A Rape Law Pedagogy," *Yale Journal of Law and Feminism* 7(2) (1995): pp. 307-340; Estrich, "Teaching Rape Law"; James J. Tomkovicz, "On Teaching Rape: Reasons, Risks, and Rewards," *Yale Law Journal* 102(2) (1992): pp. 481-508.

normative disputes that appear to be about a single thing are about competing understandings of it; when disputes that appear to be about rival norms are about a single norm; and when disputes that appear to be about norms are about facts. Analytical and conceptual skills of that sort do not wholly eliminate normative disputes, including those regarding the interpretation and drafting of statutes. But they facilitate normative understanding by clarifying what normative disputes are and are not about. And, in doing so, they enable participants to engage responsively with one another rather than unwittingly talking past one another.

On those suppositions, rape is an ideal subject for law students. And, on those questions, students can get their bearings in ways that allow them to tease out central conceptual and analytical questions about rape law—and critical questions within rape law—without having to commit emotionally or intellectually to the more contested normative questions.

This brings us to the second benefit of our discussion of rape’s conceptual and analytical boundaries. Of course, all criminal law professors aspire to have meaningful normative debates about rape law. And our goal here is not to advocate for the abandonment of rape’s emotional core. We aim neither to dehumanize nor to sterilize the topic. We do believe, however, that defining the boundaries and clarifying the terms of the debate can assist students in joining issue on important topics. Normative debates take place within analytic frameworks. Creating a shared understanding of that framework allows students to start with points of agreement and then dip their toes into (or dive into) the points of deep controversy. Understanding how drafting shapes the normative choices and gives voice to some claims, while extinguishing others, allows students to see more clearly what contested issues are at stake.⁸

Our goal in this paper, then, is to set forth the framework for how to think about and teach rape law. A secondary ambition is to shape the ways that laws and regulations are being drafted now. College campuses could greatly benefit from more depth of understanding of the concepts

⁸ One of us (Ferzan) defines a “safe space” to her students as “one in which students speak respectfully and listen charitably.” Neither of us endorses the idea that a safe space is one in which students are not presented with ideas that make them at all uncomfortable. See Greg Lukianoff and Jonathan Haidt, “The Coddling of the American Mind,” *The Atlantic*, September 2015.

with which they are engaging.⁹ Throughout this paper, then, we will point out the proliferation of error in our concepts. Progress in rape law cannot be made when the underlying concepts are not well understood.

This article proceeds in three parts. In part I, we argue that “consent” is often employed to mean two different things and that “consent” and “force” often capture the same thing. First, “consent” is used to capture both (1) assent or willingness, as well as (2) assent/willingness *plus* sufficient conditions of knowledge, capacity, and freedom. Does a woman consent to sex if she acquiesces at knife point? It depends on whether consent is used to capture just her choice or whether it also requires voluntariness. We aim to show, across a spectrum of cases, that both concepts are at play and that either usage is appropriate. However, seeing consent as a two-step process of assent plus freedom, knowledge, and capacity allows lawyers to hone in on precisely why we might deem a contact to be non-consensual in controversial cases. Second, we address the relationship between force and consent. Some scholars seek to define rape in terms of force and others in terms of consent. Our claim is that both force and consent are sufficiently capacious to capture the same instances of objectionable conduct. Once students understand why this is so, they can engage on the expressed meaning of using one set of terms or another—a topic ripe for debate—within the context of recognizing that either term can capture the very same behavior.

With the assent/consent distinction drawn and the force/consent debate largely dissolved, in Part II, we turn to those features that can prevent assent from becoming consent: coercion, deception, and incapacity. Although ultimately each of these concepts requires normative debate, that debate is better understood within a broader conceptual framework. With respect to coercion,

⁹ For instance, Princeton University equivocates on the meaning of “consent” within its one-paragraph definition:

In reviewing possible violations of sexual misconduct, the University considers consent as the voluntary, informed, un-coerced agreement through words and actions freely given, which a reasonable person would interpret as a willingness to participate in mutually agreed-upon sexual acts. Consensual sexual activity happens when each partner willingly and affirmatively chooses to participate.

Princeton University, Rights, Rules and Responsibilities, section 1.3.3 (4). Available at: <http://www.princeton.edu/pub/rrr/part1/index.xml#comp13>

The first and second sentences set forth very different standards for affirmative consent. The first sentence turns on a reasonable person standard, and the second turns on what the victim subjectively chooses.

we divorce compulsion (overwhelming physical strength) from coercion (threats of harm) because coercion, and the sorts of threats that count for rape, is controversial in a way that compulsion is not. We distinguish wrongful coercion on the part of a defendant from the victim's sense of being unduly coerced because the defendant's wrongful coercion may, though wrongful, not be sufficient for rape, and we discuss how the decision not to deem certain behaviors as coercive ultimately resurrects a form of the resistance requirement. Next, we turn to the sort of knowledge the victim must have, here distinguishing fraud in the factum (deception about the act) from fraud in the inducement (deception that procures assent), and note that, by sleight of hand, some courts shift fraud in the inducement into fraud in the factum, thereby masking a normative dispute as a factual one. We argue that the normative disputes ought to concern what sorts of falsehoods undermine consent and how much such deceptions ought to be punished. Finally, we turn to capacity. After noting the myriad sorts of incapacities that can undermine consent, we focus on the specific problems with intoxicated consent.

Even if assent is not tainted by incapacity, deception, or coercion, there is the final question of whether consent must be expressed to be efficacious. In Part III, we turn to the competing formulations of consent as an internal choice or an outward expression. What is centrally at stake with respect to this formulation is the question of what negates the harm or evil of rape. If a woman, frightened that she will be raped and killed, feigns that she welcomes sexual intercourse to avoid death, and the defendant is unaware of the fear, is she raped (though the defendant may lack *mens rea*)? Or, because she expresses what a reasonable person would take to be willingness, is she not raped? The former conclusion presupposes an internal choice view, whereas the latter relies on an outward expression. A further question must also be asked because even internal choice advocates (as well as some expressive views) must still face the question of whether the law should be more victim-protecting. Most errors are not due to feigned willingness but rather to defendants who take "no" or passivity to indicate consent. These errors render affirmative consent, verbal consent, and "no means no" models attractive to advocates. Despite the significant positive benefits, we also suggest that there are negative trade-offs that can and should be articulated.

Ultimately, of course, teaching rape law this way requires materials to support this

methodology. Our target audience thus includes casebook editors as well as those who write and teach criminal law. To editors: consider this a plea for a rethinking of teaching rape law—one that goes beyond the *Rusk, Berkowitz, M.T.S.* progression of thinking¹⁰ to the key concepts that underlie rape. To teachers: until casebooks are reformulated thusly, we are happy to provide companion casebook materials drafted by one of us, and successfully taught by the other.¹¹

I. THE RELATIONSHIP BETWEEN ASSENT, CONSENT, AND FORCE

In this part, we discuss two conceptual confusions about consent. First, we focus on the fact that some statutes use “consent” to mean only something akin to “assent,” an acquiescence or agreement that is (typically) necessary but not sufficient to render the defendant’s conduct permissible,¹² whereas other statutes use “consent” to mean assent under conditions of sufficient freedom, knowledge, and capacity such that consent is sufficient to render the defendant’s conduct permissible. We maintain that unbundling these concepts allows students to see more readily where normative debates take place. Here, one word means two different things, and confusion, as we demonstrate, can lead courts and commentators astray. Second, we turn to two words that can be employed to mean the same thing. We thus demonstrate that the debate between using “force” or “non-consent” is not a debate about the conduct that rape law ought to cover. Rather, both terms can cover the same conduct. Instead, it is a debate about what the statute expresses—should it focus on the wrongful conduct of the perpetrator (force) or the violation experienced by the victim (lack of consent)? This debate can be seen clearly only after the non-debate over force and consent is laid bare.

A. *Consent: Factual Conception or Legal One?*

There are difficult and contested questions about what consent *is*. Is it a mental act, an expression, or both? We shall leave these questions for later. The first thing we aim to do is to untangle

¹⁰ *State v. Rusk*, 424 A.2d 720 (Md. App. 1981); *Commonwealth v. Berkowitz*, 609 A.2d 1338 (Pa. App. 1992); *In re M.T.S.*, 609 A.2d 1266 (N.J. 1992).

¹¹ Peter Westen, “Rape,” available upon request and free of charge.

¹² We say that assent is “typically” necessary because assent is not necessary in cases where consent is imputed, for instance, the marital rape exemption.

potential misunderstandings, as opposed to true disagreements. Simply put, we use the word “consent” to mean two different things.

1. One Word, Two Meanings

One of the first questions about using the term “consent” is whether its existence is itself sufficient to render an action permissible, or whether consent *plus* features of voluntariness, capacity, and information are necessary. To illustrate this distinction, consider the way in which the Canadian rape statute of 1970 used consent to define the crime of rape:

A male person commits rape when he has sexual intercourse with a female person who is not his wife

- (a) without her consent, or
- (b) with her consent, if the consent
 - (i) is extorted by threats or fear of bodily harm
 - (ii) is obtained by impersonating her husband, or
 - (iii) is obtained by false and fraudulent representation as to the nature and quality of the act.¹³

The Canadian statute used “consent” to refer to a factual event that is necessary to negate the crime of rape but is not sufficient. It is necessary because, absent such consent, an actor A’s sexual intercourse with B is unlawful. Yet such consent is insufficient to render A’s sexual intercourse with B lawful, because A can be guilty under the statute even if he acts *with* B’s consent, e.g., in the event he induces B to consent by instilling fear of bodily harm. “Consent,” as Canada used the term, does not render sexual intercourse lawful unless a woman not only “consents” to it (in some unspecified way) but also does so under specified conditions of freedom and non-deception.¹⁴

¹³ c. C-34 Revised Statutes of Canada s. 143 (1970); Cf. 13A Code of Ala. s. 6-65(a)(1) (Lexis Advance through 2016 Sess.) (“A person commits the crime of sexual assault if [b]eing a male, he engages in sexual intercourse with a female without her consent ... or with her consent where consent was obtained by the use of any fraud or artifice”).

¹⁴ Although we will often refer to the defendant as male and the victim as female, this is not to imply that we endorse a heteronormative approach to rape. The “Sleepover” case, *Guam v. Tenorio*, 2007 Guam LEXIS 24 (2007),

Now, in contrast, consider the way in which Delaware defines rape in the second degree:

A person is guilty of rape ... when the person ... intentionally engages in sexual intercourse with another person, and the intercourse occurs without the victim's consent.¹⁵

Delaware uses consent to refer to something that is not only necessary for sexual intercourse to be lawful but also sufficient. For, contrary to the Canadian statute, Delaware implies that sexual intercourse *with* another's consent is necessarily lawful.

What is critical to see is that, in terms of criminalizing wrongful conduct, *nothing turns on this*. This difference in usage does not prevent jurisdictions from prohibiting what they wish. To the contrary, jurisdictions that follow Canada's 1970 usage can prohibit the same range of conduct as jurisdictions that follow Delaware's. Thus, just as the Canadian statute provided that sexual intercourse *with* a woman's consent was nevertheless unlawful if the consent was elicited by "threats or fear of bodily harm," Delaware provides that sexual intercourse is "without consent" if it is induced by "threat of ... physical injury."¹⁶ In effect, what Canada treated as *invalid* consent, Delaware treats as *non-existent* consent, both of which render sexual intercourse unlawful.

2. Sharpening the Analysis

Why, then, should we care about the difference between the two conceptions? We should care because conflating them causes conceptual confusion, whereas teasing apart the conceptions reveals that one conception makes transparent what the other tends to mask: the Canadian usage not only helps distinguish simple normative issues from difficult ones, it also manifests what the difficult issues regarding rape are essentially *about*.

is included in the rape casebook materials, Westen, "Rape," and discussed below. Nevertheless, some of the concerns that motivate rape reformers are directly responsive to concerns about gender norms and power. And, in this instance, the Canadian statute was itself gendered.

¹⁵ 11 DEL. CODE ANN. s. 772(a)(1) (Lexis Advance through 80 Del. Laws, Chapter 265).

¹⁶ 11 DEL. CODE ANN. s. 761(j) (Lexis Advance through 80 Del. Laws, Chapter 265).

To show how the Canadian usage operates, we shall adopt the term “assent” for the necessary-but-insufficient event that Canada called “consent”; and we shall use “consent” for the legally sufficient event that Delaware calls “consent.”¹⁷ Our usage of “assent” thus resembles what other jurisdictions commonly describe as “submission” to, or “acquiescence”¹⁸ in, X. To submit to, or acquiesce in, X is to consciously choose or accept X as something that B either unconditionally desires at the time or consciously, even if reluctantly, goes along with as a lesser of two evils under the circumstances.¹⁹

This distinction between assent and consent is significant because it reveals the resolution of rape cases to be a *two-step process*. The first step is to determine whether B actually assented to sexual intercourse with A. If B did not assent, A’s claim of consent fails without having to reach the second step. If B did assent, the second step is to determine whether her assent was the product of sufficient capacity to deliberate, absence of deception, and freedom from force and coercion to negate the harm or evil that the rape statute at issue seeks to prevent. If B’s assent lacked the latter features, B did not consent, and A’s sexual intercourse with her was unlawful. If B’s consent possessed the latter features, B did consent, and A’s intercourse with her was lawful.

More importantly, the distinction between assent and consent reveals the normative nature of the two steps. The first step—the inquiry into the existence of assent—is largely a *factual* inquiry: it is a factual inquiry into the question of whether A’s sexual partner, B, actually chose or accepted having sexual intercourse with A at the time it occurred—that is, either unconditionally desired it or consciously accepted it under such circumstances as she believed existed at the time.²⁰

¹⁷ Cf. MODEL PENAL CODE s. 2.11(3) (“assent does not constitute consent if [the victim did not operate under sufficient freedom, capacity, and knowledge]”).

¹⁸ See, e.g., 18 COLO. REV. STAT. s. 3-401 (Lexis Advance through 2015 Sess.) (submission); *Weatherford v. State*, 369 So.2d 863, 872 (Ala. Crim. App., 1979) (acquiescence); *Wilson v. State*, 655 P.2d 1246, 1257 (Wyo. 1982) (acquiescence). Cf. 38 MO. REV. STAT. s. 556.061(5)(c) (2015) (assent).

¹⁹ For discussion about whether assent extends to attitudes or acts of indifference, see Westen, *The Logic of Consent* pp. 28, 30, 53.

²⁰ The underlying question of what counts as “assent” that eliminates the harm of rape is contested. See Larry Alexander, “The Ontology of Consent,” *Analytic Philosophy* 55(1) (2014): pp. 102-113, pp. 107-109 (discussing intention, acquiescence, and other mental state formulations). But, once that is settled on, the question of whether this type of assent existed is wholly factual.

If it is determined she did, one must take the second step; the inquiry into the validity of assent is a normative inquiry. It is an inquiry into the circumstances under which B assented and, specifically, an inquiry into whether B's assent was the product of sufficient capacity to deliberate, absence of deception, and freedom from force and coercion in order to render the sexual intercourse her responsibility rather than the state's.²¹

3. Illustrations

To illustrate the nature of the two steps, we suggest consideration of three sets of cases, each of which juxtaposes a claimed lack of *assent* ("case 1") with a claimed lack of *consent* ("case 2"). The three respective sets vary depending upon which of three factors is claimed to have undermined assent or consent by the parties, namely, (i) incapacity to deliberate about sexual intercourse, (ii) deception regarding sexual intercourse, and (iii) force or coercion to engage in sexual intercourse.

a. Incapacity to Deliberate about Sexual Intercourse

Case 1: "Lithium Sleep" (*Tennessee v. Shropshire*).²² Ms. X was under the influence of medically prescribed Lithium and Valium when she attended a party at a male acquaintance's house. The male acquaintance gave Ms. X additional Valium, together with gin and beer, and she fell asleep on the couch. When she awoke the next morning, she found herself completely naked in her acquaintance's bed. He told her that he had sex with her five or six times during the night, and that the only thing he regretted was that she was not sufficiently sober or awake to enjoy it. The acquaintance was prosecuted under a Tennessee statute for "sexual penetration" of a woman "accomplished without [her] consent."

Case 2: "Drunkenness" (*Regina v. Bree*).²³ Ms. M drank two pints of cider and four to six vodkas at a party with a male acquaintance, Bree. Ms. M become sick from intoxication and

²¹ For an analysis of the two-step process, see Westen, *The Logic of Consent*, pp. 25-63.

²² 1995 Tenn. Crim. App. LEXIS 40 (1995).

²³ [2007] EWCA 804.

vomited repeatedly in her shower before lying down on her bed. When she regained consciousness, Bree was lying next to her. "I did nothing or said anything in response," Ms. M later testified:

I felt as if I wasn't in my body. I hadn't recovered significantly from how I felt in the bathroom The next thing I recall is his coming close by my face and asking if I had a condom. I said 'no.'

She further testified that, although she did not want to have sex, she did not say "no" when he began to initiate intercourse. She also testified that there were periods during the incident of which she had no recollection, and so she could not say whether she was responding to the defendant's advances or giving him encouragement. Bree was prosecuted under an English statute for penetration without Ms. M's "consent."

b. Deception regarding the Sexual Intercourse

Case 1: "Pelvic Exam" (*McNair v. Nevada*).²⁴ Ms. E went to her gynecologist for a routine breast, pelvic, and rectal exam. After performing an initial rectal exam with a glove and lubricant, the doctor positioned Ms. E to lean over an examining table for a further exam. Before Ms. E realized what was happening, the doctor had inserted his penis into her anus and ejaculated. The doctor was prosecuted under a Nevada statute for having anal intercourse with Ms. E "against her will."

Case 2: "Faux Ultrasound" (*R v. Mobilio*).²⁵ Miss H, who suffered from abdominal pains, went to an ultrasound clinic for diagnosis. The clinic radiologist proceeded to make an external ultrasound examination of Miss H's abdomen. He then told Miss H that, in order to see more, he would have to do an internal examination. He thereupon removed her underpants, leaving her naked, parted her legs, applied gel to her vagina, and inserted an ultrasound transducer rod into her vagina. When he first inserted the transducer, he moved it around in a circular motion. However, on later occasions, he inserted it more vigorously. After 15-20 minutes, he removed the transducer

²⁴ 825 P.2d 571 (Nev. 1992).

²⁵ [1991] VR 339.

and told Miss H that he did not see anything abnormal. When Miss H complained to her physician about the examination, her doctor told her that he had not ordered an internal ultrasound by the radiologist. The radiologist was arrested and prosecuted for rape.

c. Force or Coercion to Engage in Sexual Intercourse

Case 1: “Pool Table” (*Massachusetts v. Cordeira*).²⁶ Ms. C went to buy cigarettes at a local bar where she encountered a girlfriend and stayed for a drink. After Ms. C’s girlfriend left, two men whom Ms. C did not know approached and asked her to leave with them. When she refused, a third man grabbed her from behind and threw her onto the barroom’s pool table. She was stripped of her clothes, except for her sweater, and, while she struggled—screaming, “Stop ... I want to get out,” and pleading for help from the drinkers at the bar—she was repeatedly subjected to sexual intercourse over the course of two hours by four men while others held her down, all to the taunts and cheers of other bar patrons. Able to flee, she ran into the street, bruised and naked from the waist down, yelling, “Them fucking guys raped me.” Four men were prosecuted under a Massachusetts statute for having “sexual intercourse ... with a person ... by force and against his will.”

Case 2: “Sleepover” (*Guam v. Tenorio*).²⁷ T.Q., aged 19, volunteered to serve as a counselor for a local youth program, including an overnight sleepover. T.Q. slept next to the program’s adult adviser, Andrew Tenorio, who had been elected as the group’s leader. T.Q. awoke during the night and felt Tenorio’s hand under his boxers. Tenorio pulled down T.Q.’s pants, touched his penis until erect, and performed oral sex for about a minute, until T.Q. turned away. T.Q. did not say, “stop,” or push Tenorio away, or call out to others. He later said that he felt “betrayed because it’s—you know, he’s an advisor, someone we trust,” and that he felt “embarrassed to ... even talk about it.” T.Q. informed the police, as did two youngsters who

²⁶ *Commonwealth v. Cordeiro*, 519 N.E.2d 1328 (Mass. 1988); Jeannie Greeley, “The 30 Most Memorable Cases of the Last 30 Years: The Big Dan’s Case,” *Massachusetts Lawyers Weekly*, September 16, 2002; Jay Pateak, “Brothers break silence in Big Dan’s rape case,” *Herald News*, October 25, 2009; “Four Convicted in Mass. Barroom Rape,” *Facts on File World News Digest*, March 30, 1984: p. 230; Dudley Clendinen, “Barroom Rape Shames Town of Proud Heritage,” *New York Times*, March 17, 1983; “The Tavern Rape,” *Newsweek*, March 21, 1983: p. 25.

²⁷ 2007 Guam LEXIS 24.

reported having suffered similar conduct at Tenorio's hands. Tenorio was charged under a statute of Guam with having oral sex with T.Q. by means of "force or coercion."

d. Comparing Within and Across Cases

The paired cases *within* each of the three sets possess something in common with each other because, in each set, the alleged victims' assent/consent is tainted by the same respective factor. Thus, the women in the first set each contended that they were too drugged to properly deliberate; the women in the second set each contended that they were deceived into sexual intercourse; and the woman and young man in the third set each contended that they were forced or pressured into sexual intercourse. These three categories of taint, viz., incapacity to deliberate, deception regarding the circumstances, and force or coercion, are useful analytically, and we shall return to them in Section III, below.

For present purposes, however, what is significant is what cases *across* the three sets possess in common. Thus, consider the three cases labeled "Case 1." What Cases 1 have in common is that they all involve disputes that are confined to the first of the two steps at issue in rape cases: they consisted of disputes regarding whether the alleged victims had ever assented to sexual intercourse. This feature is significant because, as we have seen, disputes regarding assent are factual in nature, not normative.²⁸ By proving the facts as stated in Cases 1 to be true, the prosecution proved that the victims did not even assent to sexual intercourse, much less consent to it. The prosecution could establish the defendants' guilt without having to address any contestable policies regarding what should or should not normatively count as consent. Thus, by proving that the victim in "Lithium Sleep" was unconscious, the prosecution proved that she was incapable of consciously submitting to *anything*, much less to sexual intercourse; by proving that the gynecologist in "Pelvic Exam" misled the victim into thinking that she was submitting to a gynecological exam rather than sexual intercourse, the prosecution proved that she assented only to the former, not the latter; and by proving that the victim in "Pool Table" struggled as much as

²⁸ That said, there is still a question of what constitutes "assent." See Alexander, "The Ontology of Consent." For now, we only wish to clarify how breaking consent into two steps enables normative discussions.

she could, albeit in vain, to prevent the men in the bar from subjecting her to sexual intercourse, the prosecution proved that she at no time submitted to or acquiesced in having sexual intercourse with them. Once the prosecution established, as a matter of fact, that the three women did not consciously submit to sexual intercourse in any way, nothing further remained to be decided, except to sentence the defendants for their crimes. Moreover, that is why, as a historical matter, such cases have long been regarded as instances of rape.²⁹

The converse is true of “Cases 2.” The complainants in Cases 2 all satisfied the first element: they all assented to sexual intercourse because they were aware that they were about to be subjected to it and, given the circumstances, they opted not stop it. They submitted to sexual intercourse, albeit reluctantly, as the lesser of two evils under the circumstances. Of course, this does not mean that they consented. A person does not consent to sexual intercourse unless she not only assents to it but does so while possessed of sufficient capacity to deliberate, absence of deception, and freedom from force and coercion to preclude her incurring the harm or evil that the legislature seeks to prevent by means of its laws against rape. In contrast to assent, however, the issue of consent is *not* solely a factual question. It is essentially a normative question regarding which reasonable people may differ. In the end, the judges in Cases 2—judges in England, Australia, and Guam, respectively—ultimately acquitted the defendants because they agreed with them that the statutes at issue were not intended to prevent the respective harms that the three complainants suffered. Nevertheless, in each case, the prosecutors made strong normative arguments that the complainants’ capacity, knowledge, and freedom did *not* suffice to negate the harms that the statutes at issue were respectively designed to prevent. And that suggests that other judges interpreting the identical statutory terms, or even the same judges acting at other times or in other social contexts, might well reach opposite conclusions.

4. Drawing this Distinction does not Entail a Normative Judgment about the Gravity of the Wrongdoing

To this point, no normative work is being done. Importantly, drawing this distinction does not

²⁹ See Anne Coughlin, “Sex and Guilt,” *Virginia Law Review* 84(1) (1998): pp. 1-46.

entail that sexual intercourse *without* assent (Cases 1) is a graver wrong than sexual intercourse with *tainted* assent (Cases 2). Nor does it mean that instances of tainted assent are invariably controversial. On the contrary, consider the difference between non-existent assent in “Lithium Sleep” and the tainted assent in *Kaliku & Matthews v. United States*.³⁰ The victim in *Kaliku & Matthews*, Ms. H., was a prostitute who was performing a sex act for a client in an automobile when two armed men, Kaliku and Matthews, robbed her and her client and then ordered her from the car. She complied, telling them “I’ll do what you want me to. Please don’t hurt me. Please don’t kill me.” At their behest, and after helping one of them put on a condom, she performed oral sex on one of the men while the other penetrated her vagina from behind. The two men were ultimately convicted of causing Ms. H to submit to a sexual act by placing her in reasonable fear of death.

The defendants in “Lithium Sleep” and *Kaliku & Matthews* subjected their respective victims to sexual intercourse without consent, and they were rightly convicted of rape. The difference lies in the nature of the victims’ non-consent. Ms. X failed to consent in “Lithium Sleep” because, being unconscious, she did not even assent to sexual intercourse. In contrast, Ms. H failed to consent in *Kaliku & Matthews* because, although she assented to sexual intercourse—and, indeed, cooperated in enabling the defendants to complete their sexual acts—she did so out of reasonable fear that, if she refused, they would kill her. This difference does not mean that Ms. H’s rape was normatively controversial. On the contrary, although Ms. H assented to sexual intercourse, no jurisdiction would claim—or has ever claimed—that assent extracted at the point of a gun suffices to constitute a defense to rape.³¹ Nor does it mean that Ms. H suffered a less grave crime than Ms. X. On the contrary, although both women suffered the wrong of being subjected to sexual intercourse without their consent, Ms. H suffered the additional trauma of fearing for her life at the point of a gun.³²

³⁰ 994 A.2d 765 (D.C. App. 2010).

³¹ It is commonly said that, in order a man be convicted of rape by force, a woman has to resist to the utmost, even to the point of death. See, e.g., Joan McGregor, “Why When She Says No She Doesn’t Mean Maybe and Doesn’t Mean Yes,” *Legal Theory* 2(3) (1996): pp. 175-208, pp. 175-177; Robin West, “A Comment on Consent, Sex, and Rape,” *Legal Theory* 2(3) (1996): pp. 233-251, p. 237. This is not now, and never has been, the case. See Peter Westen, “Common Confusions about Consent in Rape Cases,” *Ohio State Journal of Criminal Law* 2 (2004): pp. 333-359, pp. 349-354. We discuss this confusion below in Section II.A.3.

³² Compare *Kaliku & Matthews*, 994 A.2d at 771 (sentencing Kaliku and Matthews to life imprisonment for

Nevertheless, although sex with tainted assent can be just as grave a wrong as with non-existent assent, and although the former can be just as non-controversial as the latter, the distinction between non-existent assent (Cases 1) and tainted assent (Cases 2) remains significant. It is significant because it distinguishes cases that constitute rape *regardless* of a jurisdiction's normative views regarding the capacity, absence of deception, and freedom from coercion that is needed for a person's assent to negate the harm or evil of rape, from cases that constitute rape *depending upon* a jurisdiction's normative views regarding the capacity, absence of deception, and freedom from coercion that is needed for a person's assent to negate the harm or evil of rape. For clarity of thought, as well as clarity in drafting, statutes ought to distinguish "consent" from its component, "assent," rather than following Delaware and masking the latter within the former.

The pedagogical pay-offs of this analysis should be apparent. First, making these sorts of distinctions and unbundling concepts is simply what lawyers do. And it is important that students see that, even in the most controversial of areas, rigorous thinking helps clarify the actual debates. Second, by first demonstrating to students how the concepts interact, and then where the normative debates are interjected, students' initial discussions can focus on clarifying the terms of the debate and the points of agreement.

5. When Analysis Goes Awry

Of course, getting our concepts straight applies not only to law students but also to the potential for manifest injustice or blundering reforms. To demonstrate manifest injustice, consider the case in Travis County, Texas, in which the defendant broke into the victim's apartment and attacked her with a knife.³³ The victim, afraid she would be stabbed if she resisted and would be infected with HIV if the defendant successfully raped her, agreed to submit to sexual intercourse if the

aggravated rape under 22 D.C. Code s. 3002 (a)(1) and (2) (Lexis Advance through June 16, 2016)), and 22 D.C. Code s. 3020 (a)(4) and (6) (Lexis Advance through June 16, 2016)), with *State v. Shropshire*, 1995 Tenn. Crim. App. LEXIS 40 (1995) (sentencing Claude Shropshire to eight years in prison for simple rape under 39 Tenn. Code Ann. s. 13-503 (Lexis Advance through the 2015 Sess.) rather than aggravated rape under 39 Tenn. Code Ann. s. 13-502 (Lexis Advance through the 2015 Sess.)).

³³ Westen, *The Logic of Consent* pp. 1-2.

defendant used a condom. The grand jury did not indict the defendant for rape because the victim “consented.”

Either the grand jurors were moral monsters or they were legitimately confused. We’re prepared to charitably conclude that the second interpretation of these options is more likely. Who can blame them? We often use “consent” to include both assent and consent. By so doing, we invite locutions such as “she consented at knife point.” But, even if we cannot change ordinary usage by the publication of an article (or the drafting of a law), we can be alert to the possible error of conflation.

We should not simply guard against this error by average citizens. It is made by Yale Law professors too. For instance, Jed Rubenfeld begins with the following observation, “the law knows perfectly well that [underage minors] ... have consented [to sex] [S]tates distinguish between consenting and nonconsenting minors ... not for the illogical reason that a consenting minor can’t consent, but because such sex is deemed immoral and harmful even though consensual.”³⁴ Rubenfeld mistakenly assumes that, because minors can *factually* consent to sexual intercourse—that is, because minors can assent—minors must also possess the freedom and knowledge necessary for their conscious choice of sex to negate the harm to them that statutory-rape statutes are designed to prevent and, hence, *legally* consent. This is simply a *non sequitur*. Basic errors of this type can be avoided when the terms of the debate are clarified.

6. Summary

A core concept for rape law is the idea of “consent.” Students can grasp and master the two conceptions of consent that are in our statutes and in our ordinary discourse. This allows them to find errors, join issue, and understand the framework that structures the normative debates.

B. Force and Consent

³⁴ Jed Rubenfeld, “The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy,” *Yale Law Journal* 122(6) (2013): pp. 1372-1443, p. 1441.

Another important clarification to make with respect to rape is whether statutes should be written in terms of force or non-consent. Students should see that this distinction is a distinction without a difference, at least insofar as jurisdictions using either concept can capture the same conduct. Once both terms can capture the same conduct, students can assess whether the further goals of reformers are truly better served by one term or the other.

1. Two Concepts, One Idea

We have addressed sexual assault thus far in terms of non-consent. However, some commentators argue that rape laws should be framed in terms of force rather than non-consent.³⁵ Interestingly, such force advocates differ sharply with one another regarding what they would criminalize. Thus, Rubinfeld would invoke force to radically reduce the range of conduct that the law presently criminalizes,³⁶ while Catharine MacKinnon would invoke force to radically broaden what the law presently criminalizes, criminalizing sex that results from social domination or “sex inequality.”³⁷

How can the single concept, “force,” lend itself to such different usages? It can because force, like consent, is a protean concept that is capable of assuming the form of contrasting conceptions. Thus, “force” can be used narrowly, as William Blackstone³⁸ used it, to refer to

³⁵ See, e.g., Michal Buchhandler-Raphael, “The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power,” *Michigan Journal of Gender and Law* 18(1) (2011): pp. 148-228, p. 154; Robin West, “Legitimizing the Illegitimate: A Comment on ‘Beyond Rape’,” *Columbia Law Review* 93 (1993): pp. 1442-1459, p. 1459.

³⁶ Rubinfeld would confine the crime of rape to persons who use physical violence against unwilling victims. See Rubinfeld, “The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy.” As a result, he would eliminate entire categories of criminal conduct from existing rape statutes, including sexual intercourse (i) with underage minors, (ii) with persons who are unconscious, (iii) with persons who are mentally ill, (iv) by means of coercion other than threats of physical violence, e.g., threats to make public nude pictures, (v) by fraud in the factum, e.g., fake gynecological exams, (vi) by fraud in the inducement, e.g., impersonations of a spouse, (vii) with persons in an actor’s custody, e.g., prison guards from inmates, (viii) with persons in an actor’s care, e.g., clergymen from parishioners, and (ix) in the face of a verbal “No.”

³⁷ See Catharine MacKinnon, “A Sex Equality Approach to Sexual Assault,” *Annals of the New York Academy of Sciences* 989 (2003): pp. 265-275; Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), p. 245 (arguing that “rape should be defined as sex by compulsion, of which physical force is one form”); Catharine MacKinnon, “Feminism, Marxism, Method of the State,” *Signs* 8(4) (1983): pp. 635-658, pp. 650-655.

³⁸ See William Blackstone, *Commentaries on the Laws of England*, Book Four (Oxford: Clarendon Press, 1769), p. 210 (defining rape of non-minors as “carnal knowledge of a woman forcibly and against her will”). Georgia is the only state that still adheres to Blackstone’s definition of rape. See 16 GA. CODE ANN. s. 6-1 (Lexis Advance through

applied or threatened physical violence. Or, because rape involves an inherently physical act, i.e., sexual penetration, force can be used broadly, as the state of Michigan uses it, to include such bodily intrusions when brought about by deception and incapacity. Thus, having prohibited rape largely in terms of “force or coercion,” Michigan defines force or coercion to include, among other things, (i) gynecological examinations elicited by deception regarding their medical value, and (ii) sexual intercourse with persons who are mentally disabled, mentally incapacitated, or physically helpless.³⁹ Other jurisdictions do the same thing, ruling that in certain contexts of deception and incapacity, “force” consists of no more than what suffices to accomplish sexual intercourse.⁴⁰

To be sure, when force is used to encompass sexual intercourse in contexts of deception or incapacity, something more must obtain besides the force needed to effectuate intercourse. For, otherwise, every act of sexual intercourse would constitute rape. What must be proved, of course, is the deception or incapacity that, when it results in sexual intercourse, is regarded as an *instance* of forcible intercourse, much in the same way that deception and incapacity are treated as instances of non-consensual intercourse in jurisdictions that base sexual assault on non-consent.

The more serious, though not insuperable, problem is that, in contrast to statutes based on non-consent, statutes based on force require two statutory definitions of “force”: one definition for instances of compulsion or coercion in which “force” is defined as overwhelming physical strength or wrongful pressure; the other for instances of deception or incapacity in which “force” is defined in such contexts as nothing more than what suffices to effectuate sexual intercourse.

The point here is that everything consent can do, force can do as well. Both concepts can capture whichever cases constitute wrongful sexual intercourse. Both concepts must ask the same normative questions. The question, then, is why prefer one term over the other? This is a distinct

the 2015 Sess.).

³⁹ MICH. COMP. LAWS SERV. s. 750.520b, 750.520d (Lexis Advance through 2016 Public Act 184 (excluding Public Acts 181 and 183)).

⁴⁰ See, e.g., *People v. Borak*, 13 Ill. App. 3d 815 (1973) (a physician who subjects a patient to sexual intercourse by falsely pretending that it is a non-sexual gynecological exam is guilty of sexual intercourse by means of “force”); *North Carolina v. Moorman*, 358 S.E.2d 502 (N.C. 1987) (a man who has sexual intercourse with a woman who is asleep is guilty of rape by “force”).

normative question with which students can engage.

2. Is One Concept Preferable to the Other?

Most commentators who take a position on the matter are “consent advocates,” that is, they claim that rape statutes should be based solely on non-consent, rather than on force.⁴¹ However, if the terms “force” and “consent” do not themselves dictate choices over the sorts of intercourse that are wrongful, we should rightly ask: what turns on the terminology?

Force advocates have proposed two reasons for preferring force over non-consent. First, MacKinnon claims that statutes that are based on non-consent harm victims of force because they enable a sexual aggressor, A, to escape responsibility for using force against B by claiming that B consented to being forced. Now, reasonable people may disagree about whether B’s consent to sexual intercourse should ever be a defense to A’s use of compulsion or coercion, e.g., in sadomasochistic sex games. However, it is an analytic mistake to believe that such disagreements are resolved by predicating rape law on force rather than non-consent. “Force” and “non-consent” are each sufficiently capacious that, regardless of which is used, each can be used either to *authorize* consent as a defense to compulsion or coercion or to *prohibit* consent as a defense to compulsion or coercion, depending upon one’s normative views. Thus, consider the states of Montana and Michigan. Montana defines rape in terms of non-consent, and, yet, takes the position that consent is *not* a defense for persons who engage in sexual intercourse with inmates who are in their institutional custody, e.g., prison guards who have sexual intercourse with “consenting” prisoners, on the ground that such conduct is inherently non-consensual.⁴² In contrast, Michigan defines rape in terms of force and coercion and, yet, takes the position that consent *is* a defense to certain classes of force and coercion.⁴³

⁴¹ E.g., Buchhandler-Raphael, “The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power,” p. 150.

⁴² See 45 MONT. CODE s. 5-503, 5-501(1)(a)(ii)(E) (Lexis Advance through 2015 Legis. Sess.) (“‘without consent’ means ... the victim is incapable of consent because the victim is incarcerated in an ... adult ... detention ... facility ... and the perpetrator is an employee ... of the supervisory authority and has supervisory or disciplinary authority over the victim”).

⁴³ MICH. COMP. LAWS SERV. s. 750.520b, 750.520d (Lexis Advance through 2016 Public Act 184 (excluding Public Acts 181 and 183)).

The second reason that force advocates prefer force over non-consent is based on the concern that predicating rape on non-consent puts victims on trial rather than wrongdoers.⁴⁴ This claim can be understood in two ways, one forensic, the other didactic or political. The claim can be understood forensically to mean that “force” focuses a court’s attention on evidence regarding the defendant, A, and on what he did, while “non-consent” focuses the court’s attention on evidence regarding his putative victim, B, and on what B may have done, felt, or expressed. If so, the claim is misleading. All rape statutes, whether they are framed in terms of force or in terms of non-consent, address a bilateral relationship between two parties. Therefore, unless a defendant confesses to using force, a putative victim’s evidence regarding what she did, felt, and expressed remains relevant, regardless of whether rape is defined in terms of force or non-consent. Whether it is offered as direct evidence or circumstantial evidence, the putative victim’s evidence is relevant to whether the defendant had to use force to obtain sexual intercourse (as the prosecution alleges) or whether he did not (as the defendant alleges).

The didactic or political defense of force has more purchase. Every jurisdiction that drafts a rape law must ultimately decide upon the *gravamen* of the offense. By defining an offense in terms of “force,” a jurisdiction frames its elements around and by reference to the wrongful actions of sexual aggressors; by defining an offense in terms of “non-consent,” a jurisdiction frames its elements around and by reference to the rightful autonomy of sexual victims. Ultimately the two statutes may end up prohibiting the very same conduct based upon the same array of evidence. But the name that each statute gives to the gravamen of the offense differs to the extent that we think that each formulation signals something different about the proper focus of rape law.

It is at this point that a normative debate can begin with its analytic edges well defined. Even bracketing disagreement about the conditions that render sex “forcible” or “unconsented to,” students can explore which concept better reflects why rape is wrong. This debate, however, can take place within a shared understanding—that whatever wrongful sex is can be captured by either concept.

⁴⁴ See, e.g., Catharine MacKinnon, *Sex Equality: Rape Law* (St. Paul: Foundation Press, 2001), p. 818.

II. FROM ASSENT TO CONSENT: THE CONTOURS OF FREEDOM, KNOWLEDGE, AND CAPACITY TO DELIBERATE

Prophylactic rules aside, once a person, B, actually assents to sexual intercourse with A, the normative issue that remains is whether B did so under legally sufficient conditions of freedom, knowledge, and capacity to deliberate. Jurisdictions define such conditions differently because, although the public tends to share normative agreement about conditions at polar extremes, people disagree about conditions in between. Thus, people tend to agree that threats by A to kill or seriously injure B render B's assent to sexual intercourse invalid, while threats by A to stop dating B do not; that deceit by A in passing himself off as B's spouse renders B's assent invalid, while deceit by A regarding being "in love" with B do not; and that a state of intoxication by B that leaves B vomiting and unable to walk, talk, or utter more than a few words renders her assent invalid, while a few sips of wine do not. In contrast, people tend to disagree regarding whether threats by A to discharge B from employment renders A's sexual intercourse with B a sexual offense (as opposed to a Title VII tort of sexual harassment);⁴⁵ whether deceit by A regarding his ethnic origins⁴⁶ or deceit regarding whether he is using contraception renders A's sexual intercourse with B a crime;⁴⁷ and whether psychotherapy patients possess normative capacity to consent to sex with their therapists.⁴⁸

⁴⁵ The Model Penal Code would make such conduct criminal, see MODEL PENAL CODE AND COMMENTARIES s. 213.1, p. 312, and some jurisdiction do. See, e.g., *State v. Hanson*, 514 N.W.2d 600, 603 (Minn. App. 1994). However, the great majority of jurisdictions do not make them a crime. See Buchhandler-Raphael, "The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power," p. 167.

⁴⁶ Cf. CrimC (Jer) 561/08 *State of Israel v. Kashur* (July 19, 2010), Nevo Legal Database (by subscription), para. 13, 15 (a married Israeli Arab with young children is guilty of rape for eliciting sexual intercourse from an Israeli Jewish woman who was single by falsely presenting himself as a Jewish bachelor) with Tom Dougherty, "Sex, Lies and Consent," *Ethics* 123(4) (2013): pp. 717-744, p. 729 (whether lies about ethnicity taint consent to sex is "controversial").

⁴⁷ *Suliveres v. Commonwealth*, 865 N.E.2d 1086 (Mass. 2007) (a woman suffers no harm that the Massachusetts rape statute seeks to prevent if she is aware that she is engaging in sexual intercourse).

⁴⁸ Cf. Michael Borruso, "Sexual Abuse by Psychotherapists: The Call for a Uniform Criminal Statute," *American Journal of Law and Medicine* 17(3) (1991): pp. 289-311 (it ought to be a crime for a psychotherapist to have sexual intercourse with a current patient), with Patricia Illingworth, "Patient-Therapist Sex: Criminalization and Its Discontents," *Journal of Contemporary Health Law and Policy* 11(2) (1995): pp. 389-416 (it should *not* be a crime for a psychotherapist to have sex with a patient); Wesley Gorman, "Sex Outside of the Therapy Hour: Practical and Constitutional Limits on Therapist Sexual Misconduct Regulations," *UCLA Law Review* 56 (2009): pp. 983-1039

Reasonable people may disagree about issues of the aforementioned sort, depending upon their normative views regarding sexual intercourse, social relations between men and women, the gravity of the penalties at issue, and civil alternatives to criminal punishment. And that, in turn, means that such issues cannot be resolved by conceptual analysis alone. Nevertheless, there are some issues regarding freedom, knowledge, and capacity to deliberate that analysis can illuminate. In this part, we begin by making three claims about freedom: (1) that compulsion should be distinguished from coercion, (2) that wrongful coercion by the defendant can come apart from whether the pressure on the victim is legally sufficient to taint assent, and (3) that coercion implicitly revives the resistance requirement. With respect to deception, in this part, we distinguish fraud as to the act assented-to from fraud that procures sexual intercourse and we discuss the problematic conceptual sleight of hand when the latter collapses into the former, thereby masking normatively contestable questions. Finally, we discuss the range of capacity questions, and their scalar features, along with the trade-offs between paternalism and liberty.

A. Freedom

1. Freedom from *Compulsion* versus Freedom from *Coercion*

Rape statutes address the issue of force in various ways. Some statutes, like Arizona's, refer to "consent" without specifying the kinds of force that vitiate consent, thus leaving it to the Arizona courts to define the latter as a matter of statutory interpretation.⁴⁹ Other statutes, like Utah's, require consent and further specify that consent is vitiated if an actor "overcomes the victim through the actual application of physical force or violence."⁵⁰ Terminology varies. Georgia uses "force." Michigan employs "force or coercion." Idaho refers to "force or violence."⁵¹ Alabama refers to "forcible compulsion."⁵² Maryland includes "force or the threat of force."⁵³ Oklahoma

(same).

⁴⁹ See *State v. Witwer*, 856 P.2d 1183 (Ariz. App. 1993).

⁵⁰ 76 UTAH CODE s. 5-406(2) (Lexis Advance through 2016 Second Special Sess.).

⁵¹ 18 IDAHO CODE s. 6101(4) (Lexis Advance through the 2016 Sess.).

⁵² 13A CODE OF ALA. s. 6-61(a)(1) (Lexis Advance through 2016 Sess.).

⁵³ 3 MD. CRIMINAL LAW CODE ANN. s. 303(a)(1) (Lexis Advance through June 1, 2016).

employs “force, violence, or threats of force or violence accompanied by apparent power of execution.”⁵⁴ And California refers to “force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.”⁵⁵

Ultimately, it may not matter greatly which term a jurisdiction uses because, responsively interpreted, each is expansive enough to do the normative work that a jurisdiction desires. Nevertheless, analytically, it is useful to distinguish between two kinds of force—two that we shall describe as “compulsion” and “coercion,” respectively. To illustrate, consider the contrast between the force used in “Pool Table” and that used in *Kaliku & Matthews*. The defendants in both cases forcibly subjected their victims to sexual intercourse, and the defendants in both cases were rightly convicted of doing so. But they did so in different ways. The four men in “Pool Table” subjected Ms. C to sexual intercourse by means of *compulsion*, that is, by using what one court called “superior physical strength”⁵⁶ to overwhelm all the physical resistance of which she was capable and all that she desperately, albeit futilely, exerted to prevent what she abhorred. In contrast, the defendants in *Kaliku & Matthews* coerced Ms. H into acceding to their wills, including submitting to sexual intercourse with them, by unlawfully threatening her with an evil she feared more than intercourse, namely, death.

The analytical difference between compulsion and coercion has normative import because it not only marks the difference between issues that are normatively self-evident and ones that are normatively contestable, it also reveals what normative contestable issues are *about*. When an actor achieves sexual intercourse with a person by means of compulsion (as in “Pool Table”), he does so without any act of will on his victim’s part. That is, he does so without her assent and, thus by any normative measure, without her consent as well. In contrast, when an actor achieves sexual intercourse by means of coercion (as in *Kaliku & Matthews*), he does so by structuring her options—or, at least, leading her to believe he has done so—such that she prefers sexual intercourse to the alternatives she fears she will otherwise suffer. Compulsion operates entirely

⁵⁴ 21 OKLA. STAT. s. 1114(5) (Lexis Advance through 2016 Second Regular Sess.).

⁵⁵ 9 CALIF. PEN. CODE s. 261(a)(2) (Deering, Lexis Advance through Chapter 22 of the 2016 Regular Sess. and Chapter 8 of the 2015-2016 2nd Extraordinary Sess.).

⁵⁶ *State v. Coleman*, 727 A.2d 246, 249 (Conn. App. 1999).

through application of *present* power; coercion operates through *anticipation of future consequences* (albeit anticipation that may derive in part from what B has already experienced and/or is currently experiencing at A's hands).

This difference between coercion and compulsion is significant because it helps explain why coercion is normatively contestable in ways that compulsion is not. Coercion is contestable because reasonable people may disagree about the kinds of alternative choices on B's part that, if structured by A to elicit sexual intercourse, ought to render any resulting sexual intercourse between them criminal on A's part.⁵⁷

Now it might be thought that any sexual intercourse that results from the pressure of alternatives ought to be criminal. However, as Sarah Conly observes, no contemporary society can make begrudging sexual intercourse a crime:

A woman may ... [be] tired, but her husband is leaving for a two-week trip, and she wants to have sex to feel closer to him. Perhaps she even wants to do it just because he wants to do it. He has read a lot of feminist literature, however, and is a sensitive guy and won't sulk or become angry if she doesn't have sex; he just won't feel as happy as he would if she did. She loves him, however, and wants him to feel loved. Even in the latter case, where his attitude contributes to her decision—where indeed, were it not for his desire she wouldn't want to have sex—her having sex doesn't plausibly seem to be rape, any more than my buying Girl Scout cookies only to avoid hurting the feelings of the little girl selling them means I've been robbed. Having a reason to oppose having sex as well as ... reasons to have sex doesn't mean that when she does have sex at another's behest it must be rape.⁵⁸

⁵⁷ Cf. 18 IDAHO CODE s. 6101 (Lexis Advance through the 2016 Sess.) (confining rape by coercion to "threatened infliction of bodily harm"), with 11 DEL. CODE s. 774 (Lexis Advance through 80 Del. Laws, Chapter 265) (defining "coercion" to include not only fears of "physical injury" but also fears of "damage to property," accusation "of a crime," publication of a secret intended to subject one to "hatred, contempt or ridicule," "any other act ... calculated to harm another person materially with respect to the other person's health, safety, business, calling, career, financial condition, reputation or personal relationships").

⁵⁸ Sarah Conly, "Seduction, Rape and Coercion," *Ethics* 115(1) (2004): pp. 96-121, p. 103.

If Conly is right, it means that, with respect to a person who assents to sexual intercourse because of the pressure of alternatives, the issue is not *whether* she feels pressured by what she fears will otherwise occur but *what* she fears will otherwise occur—and, specifically, whether it is something from which the law of rape declares she ought to be free, given the penalties at issue.

2. The Question of Whether the Coercion is *Wrongful* and the Question of Whether the Coercion is *Consent Undermining*

In probing the normative depths of what constitutes the sorts of coercion from which the law aims to protect persons, one can usefully deploy another conceptual distinction: the distinction between when it is wrong to coerce someone and when one's assent is inefficacious because one's options were unduly limited.⁵⁹ When A threatens to violate B's rights unless B performs some action, X, A is acting coercively. That is itself wrongful.⁶⁰ Yet, it is distinguishable from whether B's options have been sufficiently constrained so as to render B's choice invalid.

Before we turn to rape law, we can illustrate the distinction by analogy to a person, A, who threatens to toilet paper B's house unless B kills C.⁶¹ A's behavior is wrongful, both morally and legally, because it threatens to harm B's property. Still, the question of whether A's action is wrongful is independent of whether B's options are unfairly limited in a way that would entitle B to a defense of duress.⁶²

⁵⁹ Mitchell N. Berman, "The Normative Function of Coercion Claims," *Legal Theory* 8(1) (2002): pp. 45-89, p. 60.

⁶⁰ For purposes of this distinction, we are avoiding the further complexities of distinguishing extortion, blackmail, and wrongful offers. For the argument that conceptual analysis of coercion can assist in distinguishing and evaluating these kinds of behaviors, see Berman, "The Normative Function of Coercion Claims."

⁶¹ We owe this example to Mitch Berman.

⁶² Duress is in some ways the converse of coerced assent, though it nevertheless shares similarities with it. Consent in the context of coercion is a two-party relationship in which A brings wrongful pressure to bear on B to submit, or "assent," to X, the issue being whether, in the event B assents, A is culpable for causing X. In contrast, duress is a three-party relationship in which A brings wrongful pressure to bear on B to inflict a wrongful harm on a third person, C, the issue being whether, in the event B harms C, B has a defense of duress. Despite their differences, however, the crime of coercing a person to assent to X and the defense of duress share two things in common. First, in both cases, the respective threatener, i.e., A, is culpable in any event for making a wrongful threat. Second, and more significantly, the mere criminality of the threat does not itself suffice to render A culpable for coercing X (in the case of consent) or to provide B with a defense to harming C (in the case of duress). Rather, it must be further and separately determined

Evaluations of coercion in rape law can be similarly unpacked. Consider Heidi Malm's example of A threatening B, "Have sex with me or I will kill your goldfish."⁶³ Or, a police officer who threatens B with a \$10 parking ticket unless she has sex with him.⁶⁴ The question of whether A is engaging in wrongful action is easy. It is undoubtedly the case that it is wrong and illegal to threaten to kill another person's pet or to solicit sex by threatening to give a parking ticket.⁶⁵

Then, there is a second question. Irrespective of whether it should be a crime to wrongfully threaten someone's property or to obtain goods or services to forgo the official act of giving a parking ticket, there is the separate question of whether A's engagement in those sorts of coercive actions are sufficient to prevent B's assent from constituting consent. It is at this point that reasonable people may disagree about the normatively appropriate answer. Why might an action count as coercion by A and coerced assent by B, and yet not appropriately be criminalized? Return to the goldfish example. What is significant is the weight that *society* places on a person's sexual intimacy in relation to trade-offs. Society, in choosing to punish violations of sexual intimacy as the next-most-heinous crime after murder, must decide how much value it thinks the sexual intimacy that it safeguards ultimately possesses in relation to trade-offs. Given the stigma of conviction and given the penalties at issue, society may decide that the sexual intimacy that it means to safeguard is intimacy that is so *important* to people, so *precious* to them, that they would not trade it for, say, the life of a goldfish or to prevent getting a \$10 parking ticket. So, with respect to a person who sacrifices sexual intimacy to save a goldfish, society would say: "You have revealed by your actions that what you sacrificed to save your goldfish was not the precious interest that we mean to protect by means of our statute that carries a penalty of life in prison. To be sure, you may say that TO YOU the goldfish means as much as, say, physical bodily safety means to

whether the wrongfully threatened harm *sufficed*—that is, whether it constrained B's freedom sufficiently to render A culpable for causing X (in the event that B assents to X) and whether it constrained B's freedom sufficiently to give B a defense of duress for harming C.

⁶³ H.M. Malm, "The Ontological Status of Consent and its Implications for the Law of Rape," *Legal Theory* 2(2) (1996): pp. 147-164, p. 153.

⁶⁴ Under the proposed revisions to the Model Penal Code, this would be a third degree felony of sexual penetration by coercion because the officer knowingly obtains assent by threatening to "take or withhold action in an official capacity." See AMERICAN LAW INSTITUTE, PROPOSED MODEL PENAL CODE, DISCUSSION DRAFT NO. 2, s. 213.4(1)(a)(ii).

⁶⁵ See MODEL PENAL CODE s. 212.5.

other people. But what is significant is the value that *we* put on the sexual intimacy that we protect, not any individual's views. If we accepted your assertion of how much your goldfish means to you, we'd have to do the same thing with respect to someone who suffers a theft of an item that is worth \$10 who says, 'TO ME this item is worth as much as \$500 items to other people and, hence, should be punished as grand theft rather than petty theft.'

We suggest that "coercion" for purposes of rape law can be parsed thusly:

- (1) "coercion," refers to a threat of wrongful harm that A directs toward B in order that B assent to something, X;
- (2) "coerced assent" refers to assent by B that results from A's coercion, regardless of whether the coercion suffices to inculpate A for X; and
- (3) "coerced assent within the meaning of the statute at hand" refers to coercive assent that inculpates A under the statute that makes coerced X an offense, say, a rape statute.⁶⁶

This discussion leads to four questions that structure all questions of coercion, the latter two of which are ripe for normative debate: (1) What did B fear would befall her if she did not submit to sexual intercourse? (2) Does the statute at issue explicitly prohibit actors in A's position from eliciting sexual intercourse by means of such fears? (3) If not, should the statute be interpreted

⁶⁶ To the extent that it is B's lack of consent that makes rape wrongful, sex may be wrongful even if A is unaware of the circumstances that make the act non-consensual. Just as A may be unaware of the fact that B was administered drugs by C, or that B is underage, A may also be unaware of the coercive circumstances that undermine B's consent. Indeed, A may have sex with B while being fully aware of her lack of consent due to coercion and, yet, not be criminally responsible for it if he has no control over the coercion. Consider *People v. Burnham*, 176 Cal. App. 3d 1134 (1986). (For an account of the Burnham trial, see *San Diego Union-Tribune*, January 30, 1986, at B-17.) In that case, Burnham's husband threatened to severely beat her unless she seduced and had sex with passersby. Although the husband was convicted of rape, the passersby were not because they were unaware of the threats of bodily harm that induced the wife to submit. Now assume that the passersby *did* know that the wife was submitting under fear of bodily injury *and* they knew that they had no control over the husband. That is, assume that they knew that they could either accede to the wife's coerced requests for sex and thus prevent her from being beaten or refuse and leave her to be beaten. How should the law treat them if they accede to her requests? Should it punish them for rape as well as the woman's husband? See Westen, *The Logic of Consent*, p. 185. (Indeed, this is where radical feminist views get their foothold. The claim is that women's options are so societally restricted that no choice to engage in sex is normatively efficacious.)

to implicitly prohibit such conduct, given the penalties at issue?⁶⁷ (4) If not, should the statute, or the penalties it carries, be amended to prohibit such conduct?

3. The Resistance Requirement

The “resistance requirement” in rape law invites analysis because it implicates serious issues of sexual aggression, and, yet, it is ridden with conceptual confusion. The confusion is embedded in the very story that courts and commentators commonly recount about the resistance requirement. The story goes something like this:

The Resistance-Requirement Story

The law used to require, as a condition for successful prosecutions of forcible rape, that victims of sexual aggression resist to the utmost, even at the cost of putting their own lives and bodies in danger. The law no longer requires that victims resist to the utmost. Nevertheless, some jurisdictions continue to require that victims mount lesser forms of resistance, in part to put their aggressors on notice that have not consented to sexual intercourse. Fortunately, more and more jurisdictions are doing the right thing and eliminating resistance requirements altogether.⁶⁸

This story is more than misleading. Its every sentence is false. Moreover, its falsity is a function of failing to understand the logical relationship between the kinds of wrongful force that taint consent to sexual intercourse, on the one hand, and the correlative behaviors that they can entail, on the other. To show why this is so, we shall analyze the relationship between force and the behaviors that it implies and, then, assess the “Resistance-Requirement Story” in light of it.

⁶⁷ See *McNeal v. State*, 187 S.E.2d 271, 273 (Ga. 1972) (construing “forcibly” in 16 GA. CODE ANN. s. 6-1 (Lexis Advance through the 2015 Sess.) to mean either physical compulsion or threats of “serious bodily harm”).

⁶⁸ See, e.g., Michelle Anderson, “Reviving Resistance in Rape Law,” *University of Illinois Law Review* 1998(4) (1998): pp. 953-1011; *People v. Barnes*, 228 Cal. Rptr. 228 (1986).

It will be recalled that the kinds of wrongful force by an actor, A, that can taint B's consent to sex fall into two distinct categories: compulsion, that is, A's exercise of overwhelming physical strength that subjects B to sexual intercourse without the intervention of any willful compliance on B's part; and coercion, that is, threats by A of future harm, whether explicit or implicit, that induce B to willfully succumb to sexual intercourse for fear of harms that A would otherwise inflict on her.

We can start with compulsion and its relationship to correlative behaviors. Admittedly, there are some instances of compulsion that, far from implying resistance on B's part, are such as to foreclose all possibilities of resistance. Consider, for example, an actor, A, who subjects another, B, to sexual intercourse while the latter is asleep, unconscious, or in a mute and paraplegic state. A prevails in such cases not by physically overcoming B's efforts to thwart intercourse but by precluding the *very possibility* of such efforts. Needless to say, resistance is never required in such instances.

Now, in contrast, consider cases of attempted compulsion in which thwarting efforts *may* be possible, whether the efforts are verbal and/or physical in nature. Such cases fall into three subsets, depending upon how B assesses her ability to make such efforts and the risks of doing so: (1) cases like "Pool Table" in which B does everything she can to thwart sexual intercourse; (2) cases in which, even though B initially resorts to thwarting efforts, she eventually desists for fear of what she will suffer if she persists, and (3) cases in which, even if B initially resorts to some thwarting efforts, B eventually desists because she believes that doing so would be futile. Among the three attempts, #1 is the only one that, in the event it results in sexual intercourse, is an instance of sex by compulsion; for the others are instances of coercion and should be analyzed as such. #2 and #3 are both cases in which B knowingly succumbs to sexual intercourse for fear of what she would otherwise suffer—the only difference being that B in #2 succumbs to sexual intercourse for fear of harms *other* than sexual intercourse, while B in #3 succumbs to sexual intercourse at Time 1 for fear of what she will suffer during the time it takes for A eventually to prevail at Time 2.

More importantly, #1 reveals something of the relationship between the force that A brings

to bear and B's response to it. The relationship is not contingent but definitional: because compulsion consists of A's application of overwhelming physical strength to subject B to unwanted sexual intercourse, compulsion does not and cannot obtain with respect to a person who is capable of mounting physical resistance but refrains from doing so and thereby obviates any occasion for A's applying overwhelming strength. If it ceases to be necessary for A to exercise such strength—as it ceases to be necessary in #2 and #3—A is at most guilty of rape by coercion, not rape by compulsion.

As for coercion, there are instances of coercion—as there are with compulsion—that rather than imply resistance, imply the opposite. Thus, consider South Dakota's rape statute, which makes it a crime of rape to induce a person to succumb to sexual penetration by "threats of immediate and great bodily harm."⁶⁹ Now imagine an actor, A, in South Dakota who, armed with a knife, puts B in fear that, if B does not submit to sexual intercourse, he will stab her. Does South Dakota require, as a condition for A being guilty of rape, that B resist, thereby risking the very "immediate and great bodily harm" from which the statute seeks to protect her? Obviously not. Rather, it is implicit in such statutes that victims of threats of prohibited harms need not do anything that would expose them to harms from which the state seeks to protect them.⁷⁰ Indeed, that is what it means to criminalize the inducing of sexual intercourse by means of *threats* of specified harm. It means that victims of such threats need not—by resisting—subject themselves to the *infliction* of such harms.

Significantly, however, with respect to persons who succumb to sexual intercourse not for fear of suffering prohibited harm but out of reluctance to resist, something else is also implicit in coercion statutes: it is implicit in such cases that to refrain from resisting sexual intercourse is to *consent* to it. To illustrate, consider Louisiana's second-degree rape statute that (i) makes it an

⁶⁹ 22 S.D. CODIFIED LAWS s. 22-1(2) (Lexis Advance current through 2016 Sess.).

⁷⁰ See, e.g., *State v. Beck*, 368 S.W.2d 490, 492-495 (Mo. 1963) (a woman who is threatened with great bodily harm unless she submits to sexual intercourse need not resist if she fears that doing so would cause her to suffer the "great bodily harm" from which the statute seeks to protect her). Indeed, some statutes make explicit what the South Dakota statute leaves implicit, by making it a crime for A to have sexual intercourse with B when B is "*prevented from resisting* ... by threats of great and immediate bodily harm." 18 IDAHO CODE s. 6101(5) (Lexis Advance current through 2016 Sess.).

offense for an actor to have sexual intercourse with another “without the person’s ... consent,” and (ii) for purposes of coercion, defines “without ... consent” as intercourse that results from “threats of physical violence.” Now assume that two college students in Louisiana, A and B, meet for dinner and a movie before returning to A’s room; A commences to subject B to sexual intercourse; B believes she is at no risk of physical violence at A’s hands; and she also believes that, if she tried, she would be able to thwart A’s initiatives by shouting and/or by vigorously pushing A away; however, because B is embarrassed to have to scream and feels uncomfortable in being physically assertive, she does neither and, instead, reluctantly succumbs to sexual intercourse with A. Based on these facts, two things are apparent: first, given that B submits to sexual intercourse for reasons other than fear of physical violence, B’s act of submission is not “without” her “consent” for purposes of the statute; and, second, given that the statute treats such submissions as consensual, B’s only alternative to consenting to sexual intercourse is to resist. Resistance is the alternative that the statute itself envisages for B under such circumstances.

Now it might be thought that Louisiana’s statute is anomalous. But, it is not. The same relationship between prohibited threats by A and resistance by B obtains under any statute that prohibits the coercing of sexual intercourse by means of *some* pressures, e.g., threats of physical harm, and not *other harms*, e.g., threats to discharge from employment. To make it a crime to induce sexual intercourse by threats of certain specified harms is to take the position that it is not a condition of an assailant’s guilt that victims of such threats must resist at the cost of subjecting themselves to such harm. Yet, by the same token, to refrain from making it a crime to induce sexual intercourse by threats of other harms, e.g., threats to discharge from employment, is implicitly to leave victims of such threats to their own devices, including to such resistance as they can muster, unless and until resorting to it subjects them to threat of prohibited harm.

We can now see why the “Resistance-Requirement Story” is false. All Western jurisdictions have always made it a crime to induce sexual intercourse by threats of death or grievous bodily injury. And that means that no Western jurisdiction has ever required that victims resist sexual aggression to the extent of subjecting themselves to death or grievous bodily injury.

To be sure, jurisdictions do, indeed, continue to maintain resistance requirements.⁷¹ But providing defendants with notice of non-consent is at best only a derivative reason for doing so.⁷² Their principal reason is that resistance is implicit in coercion statutes that prohibit some kinds of pressure and not others. Moreover, although some jurisdictions claim to have abolished resistance requirements altogether,⁷³ their claims are misleading.⁷⁴ The coercion statutes in which they purport to wholly eliminate resistance requirements are at most implicit amendments to their definitions of “coercion.” They are at most amendments by which jurisdictions enlarge their definitions of feared consequences from which persons are protected (e.g., fears of having to physically repel physical pressure toward sexual intercourse), thereby eliminating some implicit resistance requirements (e.g., requirements of physical resistance to physical pressure), while retaining others (e.g., requirements of physical or verbal resistance to non-prohibited pressures such as threats to discharge from employment).

B. Knowledge

We have seen that, like force, deception can also undermine consent in two ways: (1) by negating assent altogether by concealing the very fact of sexual intercourse, e.g., “Pelvic Exam” (deception that is sometimes called “fraud in the factum”); and (2) by tainting assent, by inducing a person to engage in what she knows to be sexual intercourse under false pretenses, e.g., “Faux Ultrasound”

⁷¹ See, e.g., 14 LA. REV. STAT. ANN. s. 42(A)(1) (Lexis Advance through the 2016 First Extraordinary Sess.) (requiring “utmost resistance”); 13A CODE OF ALA. s. 6-60(8) (Lexis Advance through 2016 Sess.) (requiring “earnest resistance”); 38 MO. REV. STAT. s. 556.061(12) (Lexis Advance through June 29, 2016, Second Regular Sess.) (requiring “reasonable resistance”).

⁷² 11 DEL. CODE s. 761(j)(1) (Lexis Advance through 80 Del. Laws, Chapter 265) (“the victim need resist only to the extent that it is reasonably necessary to make the victim’s refusal to consent known to the defendant”).

⁷³ See, e.g., XVI IOWA CODE ANN. s. 709.5 (Lexis Advance through 2016 Sess.); L KY. REV. STAT. ANN. s. 510.010(2) (Lexis Advance through 2016 Sess.); 29 OHIO REV. CODE ANN. s. 2907.02(C) (Page, Lexis Advance through file 84 (HB 512)).

⁷⁴ See *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1348 n. 7 (Pa. App. 1992) (“Although [our state’s] ‘no resistance requirement’ does not, on its face, in any way restrict the situations to which it may apply, it appears that the statute must have limits If the ‘no resistance requirement’ were applied in [a] setting [in which prohibited coercion were lacking], the description of the type of threat which is sufficient would be rendered wholly meaningless. To be consistent, therefore, the ‘no resistance requirement’ must be applied only to prevent any adverse inference to be drawn against the person who, *while* being ‘forcibly compelled’ to engage in intercourse, chooses not to physically resist. Since there is no evidence that the instant victim was at any time ‘forcibly compelled’ to engage in sexual intercourse, our conclusion is not at odds with the ‘no resistance requirement.’”).

(deception that is sometimes called “fraud in the inducement”).⁷⁵ We shall focus here on tainted assent because negating a person’s assent to sexual intercourse is uncontrovertibly criminal, while tainting her assent can present contestable normative issues.

With respect to persons who assent to sexual intercourse, *fraudulent* choice differs from *coerced* choice in the way such persons experience the intercourse: a person who is coerced into having sexual intercourse begrudgingly assents to the intercourse because she consciously regards it as the lesser evil under the circumstances, while a person who is defrauded into having sexual intercourse mistakenly believes *ex ante* that the intercourse is more desirable than it really is. The two also differ in the extent to which statutes explicitly address them. In contrast to coerced choice, most rape statutes do not explicitly address problem” that arise when assent is tainted by deception, leaving prosecutors no choice but to argue that defrauding a person into submitting to sexual intercourse is equivalent to “forcing” the person to submit.⁷⁶

Nevertheless, some statutes do address fraud explicitly.⁷⁷ A number of states follow the Model Penal Code in making it an offense for a man to have sexual intercourse with a woman knowing that she mistakes him for her husband.⁷⁸ Idaho makes it an offense to induce a woman to submit to sexual intercourse by causing her to believe he is someone “other than” who he is;⁷⁹ Michigan makes it an offense to induce a person to submit to sexual intercourse by deceiving the

⁷⁵ Courts do not always use “factum” and “inducement” in this way but, rather, effectively use “fraud in the factum” to refer to any fraud that is serious enough to render sexual intercourse unlawful. See, e.g., *Boro v. California*, 163 Cal. App. 3d 1224, 1228 (1985).

⁷⁶ See, e.g., *People v. Borak*, 301 N.E.2d 1 (Ill. App. 1973) (a physician who subjects a patient to sexual intercourse by falsely pretending that it is a non-sexual gynecological exam is guilty of sexual intercourse by means of “force”). But cf. *Commonwealth v. Goldenberg*, 155 N.E.2d 187, 191-92 (Mass. 1959) (“forceful” penetration inflicts an injury and outrage to the feelings of a woman that fraud does not); *People v. Hough*, 607 N.Y.S.2d 884 (1994) (same).

⁷⁷ See generally John Decker and Peter Baroni, “‘No’ Still Means ‘Yes’: The Failure of the ‘Non-Consent’ Reform Movement in American Rape and Sexual Assault Law,” *Journal of Criminal Law and Criminology* 101(4) (2011): pp. 1081-1170, pp. 1132-1147.

⁷⁸ See MODEL PENAL CODE s. 213.1(2)(c); 9 CALIF. PENAL CODE s. 261(a)(5) (Deering, Lexis Advance through Chapter 22 of the 2016 Regular Sess. and Chapter 8 of the 2015-2016 2nd Extraordinary Sess.); 14 LA. REV. STAT. s. 43(3) (2014).

⁷⁹ See 18 IDAHO CODE s. 6101(9) (Lexis Advance current through 2016 Sess.) (“Rape is ... penetration accomplished with a female ... [w]here she submits under the belief that the person committing the act is someone other than the accused”).

person into thinking that intercourse is medically necessary.⁸⁰ California makes it a crime to induce a person to submit to sexual intercourse by any fraud that intentionally induces “fear.”⁸¹ Kansas makes it a crime to induce a person to submit to sexual intercourse by knowingly misrepresenting that sexual intercourse is “a legally required procedure within the scope of the [actor’s] authority.”⁸² Nebraska makes it a crime to induce sexual intercourse by deception regarding the actor’s “identity” or the “nature or purpose” of his act.⁸³ And at least four states—Alabama, Hawaii, Montana, and Tennessee—have general provisions that make it a crime to induce a person to submit to sexual intercourse by “fraud”⁸⁴ or “deception.”⁸⁵

Now, just as jurisdictions must decide when coercion is, and is not, a lawful way of eliciting assent to sexual intercourse, so, too, jurisdictions must decide when fraud is, and is not, a lawful way to elicit sexual assent. At one end of the spectrum, nearly all jurisdictions regard it as rape to induce persons to submit to sexual intercourse by impersonating their spouses.⁸⁶ At the other end, no jurisdiction regards it as rape to induce persons to submit to sexual intercourse by falsely telling them, “I love you.” On the spectrum between impersonation and false statements of “I love you,” jurisdictions differ regarding the kinds of frauds that are unlawful.⁸⁷

One conceptual sleight of hand that warrants particular attention is the shift from fraud in the inducement to fraud in the factum. The shift reduces a two-step inquiry into fact and norm into a simple inquiry into fact, but it does so at the risk of begging the normative question at issue. The

⁸⁰ MICH. COMP. LAWS SERV. s. 750.90 (Lexis Advance through 2016 Public Act 184 (excluding Public Acts 181 and 183)).

⁸¹ 9 CALIF. PEN. CODE s. 266c (Deering, Lexis Advance through Chapter 22 of the 2016 Regular Sess. and Chapter 8 of the 2015-2016 2nd Extraordinary Sess.).

⁸² KANSAS STAT. ANN. s. 21-5503(a)(5) (Lexis Advance through 2016 Sess.).

⁸³ NEB. REV. STAT. s. 28-318(8)(a)(iv) (Lexis Advance through 2016 Sess.).

⁸⁴ 13A CODE OF ALA. s. 6-65(a)(1) (Lexis Advance through 2016 Sess.); 39 TENN CODE ANN. s. 13-503(a)(4) (Lexis Advance through the 2015 Sess.).

⁸⁵ 37 HAW. REV. STAT. ANN. s. 702-235(4) (Lexis Advance through Chapter 125 of 2016 Legis. Sess.); 45 MONT. CODE ANN. s. 5-501 (Lexis Advance through 2015 Legis. Sess.).

⁸⁶ Cf. *Pinson v. State*, 518 So.2d 1220 (Miss. 1988) (rape) with *Suliveres v. Commonwealth*, 865 N.E.2d 1086 (Mass. 2007) (not rape). Cf. *People v. Morales*, 212 Cal. App. 4th 583 (2013) (although it is rape to elicit sexual intercourse from a woman by impersonating her husband, it is not rape to elicit intercourse by impersonating her boyfriend).

⁸⁷ See Russell Christopher and Kathryn Christopher, “Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape,” *Northwestern University Law Review* 101 (2007): pp. 75-122, pp. 83-103.

two-step process regarding factum and inducement in connection with fraud mirrors the two-step process regarding coerced consent to sex. Thus, with respect to coercion, one starts with the action by *A* that the statute explicitly defines as criminal when not consented to, i.e., “sexual intercourse,” and one makes a factual determination whether *B* ever assented to it (that is, whether *B* consciously acquiesced in sexual intercourse as the preferred alternative under the circumstances, something that *B* cannot do if, for example, she is asleep). If not, *B* is a victim of rape. If *B* did assent, one must then make a normative determination as to whether *B*’s options sufficed for her to exercise true sexual autonomy, given the criminal sanctions at issue. Similarly, with respect to fraudulently induced consent to sex, one starts by making a factual determination into whether *B* assented to the factum of statutorily proscribed “sexual intercourse,” that is, whether *B* actually realized that she was engaging in sexual intercourse. If not, *B* is a victim of rape. If *B* was aware, one must make a normative determination as to whether *B*’s knowledge of her sexual partner and of the sexual circumstances sufficed for her to exercise true sexual autonomy, given the criminal sanctions at issue. The two-step process does not obviate having to make contestable normative decisions about the conditions and information necessary for sexual autonomy. But it distinguishes relatively easy factual determinations from more difficult normative determinations, and it focuses attention on what the normative determinations are about.

In contrast, some adjudicators collapse the two steps into a single factual inquiry by redefining the factum of rape—that is, by redefining the action that is criminal when not consented to. To illustrate, consider *Queen v. Hutchinson*. The victim knowingly engaged in sex with her boyfriend, but she was unaware of the fact that the defendant had poked holes in the condoms.⁸⁸ The majority presented two alternative arguments in support of its conclusion that the boyfriend was guilty of rape. First, the victim’s consent to sex was vitiated through fraud. Second, “there was no ‘voluntary agreement’ to the ‘sexual activity in question’ which was, unbeknownst to the complainant, sexual intercourse without contraception.” The Court’s first argument takes “sexual intercourse” as what is criminal when not consented to and, accepting that the woman assented to sexual intercourse, then asks and answers whether her assent was “tainted” by her boyfriend’s deception regarding contraception. The second argument collapses the two steps into a factual inquiry by taking “sexual

⁸⁸ *Queen v. Hutchinson*, 2010 NSCA 3 (Nova Scotia Ct. App. 2010).

intercourse absent contraception” to be what is criminal when not consented to and then asking and answering whether the woman actually assented to that event, that is, whether she consciously engaged in “sexual intercourse without contraception.” Now this is not to say that the second argument is incapable of producing sound results. Rather, it means that, when it produces sound results, it does so with less transparency regarding the factual and normative steps involved.

When there is assent to sexual intercourse, the normative debate is clear: which deceptions taint assent? Commentators differ regarding the normative standard that distinguishes lawful sexual frauds from unlawful misrepresentations. Jonathan Herring and Joan McGregor argue that *any* false statement of fact that is material in inducing a woman to engage in sexual intercourse ought to suffice to render it rape, including a false promise to a prostitute that she will be paid following sexual intercourse.⁸⁹ Stephen Schulhofer argues that, while factual misrepresentations about a person’s wealth or health should be unlawful, misrepresentations regarding “feelings and commitments” should not be unlawful.⁹⁰ Jeffrie Murphy argues that the controlling principle is whether the misrepresentation concerns something that, if true, could induce a person to have sexual intercourse who regards sexual intimacy as a “sacred” aspect of her “self-identity,” thus excluding prostitutes among others.⁹¹ And Alan Wertheimer doubts that any single normative principle exists to distinguish unlawful sexual frauds from acceptable misrepresentations.⁹²

Some of these differences might be bridged by changing the question. Instead of asking *whether* certain misrepresentations should be punished, one might ask whether they should be

⁸⁹ Jonathan Herring, “Mistaken Sex,” *Criminal Law Review* (2005): pp. 511-524; McGregor, “Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes,” pp. 201-202; see also Dougherty, “Sex, Lies and Consent.”

⁹⁰ Stephen Schulhofer, “Taking Sexual Autonomy Seriously,” *Law and Philosophy* 11(1-2) (1992): pp. 35-94, 91-93.

⁹¹ Thus, with respect to a prostitute who does not regard sexual intimacy as sacred, Murphy would not punish an actor who induces her to engage in sexual intercourse by falsely promising to pay her afterwards because Murphy does not believe she suffers harm of the kind and magnitude that he believes rape laws are designed to prevent. See Jeffrie Murphy, “Some Ruminations on Women, Violence, and the Criminal Law,” in Jules Coleman and Allen Buchanan (eds.), *In Harm's Way* (New York: Cambridge University Press, 1994), pp. 209-230, pp. 216-217. Cf. *Regina v. Linekar*, [1995] 3 All ER 69 (sexual intercourse with a prostitute who is induced to assent to sexual intercourse by a false promise to pay is not rape). But cf. *Michael v. Western Australia*, [2008] WASCA 66 (S. Ct. W. Australia) (a defendant who induces a prostitute to have sexual intercourse for half her usual fee by falsely claiming that he is a police officer who might otherwise arrest her is guilty of rape).

⁹² Alan Wertheimer, *Consent to Sexual Relations* (New York: Cambridge University Press, 2003), pp. 193-209, 213-214.

punished were they punished *less* than they presently are. Thus, consider Alabama’s approach. Alabama is one of only four states with general statutes that prohibiting sexual intercourse by fraud or deception. However, in contrast to the other states, which treat “fraud” and “force” as comparable methods of committing the same sexual offense and which attach the same penalties to the two methods, Alabama treats sexual intercourse by “fraud” very differently than “forcible” sexual intercourse. Thus, while Alabama labels forcible intercourse as “rape in the first degree, a class A felony punishable by up to life in prison, it treats sexual intercourse by fraud as the class A misdemeanor of “sexual misconduct,” punishable by no more than a year in jail. The Alabama statute, therefore, raises the question: regarding members of the public who now appear to disagree about whether certain sexual frauds ought to be punishable—say, misrepresentations regarding whether an actor has a sexually transmitted disease, whether he or she is using contraception, or whether he is married—would they disagree if such conduct were a misdemeanor of “sexual misconduct” punishable by no more than some months in jail?

One sort of deception that ought to be uncontroversial by any measure is deception that induces fear of something that, if it were genuine, would be coercive. Thus, any jurisdiction that now prohibits sexual intercourse by means of fear of bodily harm ought, at the very least, follow California’s lead by making it a crime to induce a person to submit to sexual intercourse by any fraud that induces “fear.”⁹³ After all, with respect to a person who has been led to believe that she will suffer grievous bodily harm unless she submits to sexual intercourse, there is no difference in coerciveness between a threat that is true and a threat that is false.

C. Capacity to Deliberate

The last category, i.e., capacity to deliberate, is, in some respects, merely a hybrid of the two we have already considered (i.e., freedom and knowledge) because all tainted assent is tainted by a lack of freedom or lack of knowledge, or both. Yet, in another respect, it is useful to treat capacity

⁹³ See 9 CALIF. PEN. CODE s. 266c (Deering, Lexis Advance through Chapter 22 of the 2016 Regular Sess. and Chapter 8 of the 2015-2016 2nd Extraordinary Sess.), repudiating a decision of the California Supreme Court (*Boro v. California*, 163 Cal. App. 3d 1224 (1985) (ruling that an actor does not commit rape by passing himself off as a physician, misleading a patient into thinking that she suffers from a dangerous, highly infectious and possibly fatal disease, and then inducing her to believe that the only viable cure for the disease is to submit to sexual intercourse).

to deliberate as a distinct category. For, in contrast to ordinary coercion and ignorance cases in which an actor, A, can remove a putative taint by taking measures to enhance B's freedom or knowledge, A cannot do so when B's lacks the capacity to process A's overtures. To illustrate, consider an adult, A, who contemplates having sexual intercourse with a 14-year-old girl, B. Western societies universally condemn such intercourse because, regardless how much knowledge and freedom of action A may endeavor to give B, they believe that the risk is unacceptably high that B will either feel inappropriate pressure or be unaware of the social consequences of the intercourse (or both), particularly given the low value attached to such intercourse.

Rape statutes differ in the way they address capacity to deliberate. Every jurisdiction makes it a crime to have sexual intercourse with children or young adolescents, although jurisdictions differ regarding how old adolescents must be to possess maturity,⁹⁴ and regarding whether offenders must be older than their victims and, if so, by how much.⁹⁵ Most jurisdictions also make it an offense to have sexual intercourse with persons who are mentally deficient.⁹⁶ And some jurisdictions go further and make it an offense for actors in positions of trust or authority over others to have sexual intercourse with their subjects, regardless of assent, e.g., health-care professionals *vis-à-vis* patients,⁹⁷ psychotherapists *vis-à-vis* patients,⁹⁸ prison or hospital personnel *vis-à-vis* persons over whom they have custody,⁹⁹ clergy *vis-à-vis* parishioners,¹⁰⁰ and school officials *vis-à-vis* students.¹⁰¹

The most challenging capacity-to-deliberate cases are ones in which (i) incapacity is scalar,

⁹⁴ Most states defining it as under 16, some states defining it as under 17, and the remaining states defining it as under 18. See Megan Anitto, "Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors," *Yale Law and Policy Review* 30(1) (2011): pp. 1-70, pp. 31-32.

⁹⁵ Michelle Oberman, "Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law," *Journal of Criminal Law and Criminology* 85(1) (1994): pp. 15-79.

⁹⁶ See Deborah Denno, "Sexuality, Rape, and Mental Retardation," *University of Illinois Law Review* 1997(2) (1997): pp. 315-434.

⁹⁷ See, e.g., 76 UTAH CODE ANN. s. 5-406(12) (Lexis Advance through 2016 Second Special Sess.).

⁹⁸ See, e.g., MINN. STAT. ANN. s. 609.344(1)(h)-(j) (Lexis Advance through Act Chapter 160).

⁹⁹ See, e.g., 17-A ME. REV. STAT. s. 253(2)(E) (Lexis Advance through 2016 Sess.).

¹⁰⁰ See, e.g., N.M. STAT. ANN. s. 30-9-10(A)(5), 30-9-10(F)(11) (Lexis Advance through 2016 Sess.).

¹⁰¹ See, e.g., MICH. COMP. LAWS s. 750.520d (1)(e) (Lexis Advance through 2016 Public Act 184 (excluding Public Acts 181 and 183)). See generally Decker and Baroni, "'No' Still Means 'Yes': The Failure of the 'Non-Consent' Reform Movement in American Rape and Sexual Assault Law," pp. 1127-1132 (listing states with such statutes).

that is, a matter of degree along a spectrum, rather than binary; (ii) the incapacity is difficult to measure *ex ante*; (iii) society perceives some value in sexual intercourse along the spectrum; and (iv) risks of harm are nevertheless genuine. A good example is sexual intercourse with a person who has intentionally ingested alcohol. Intoxication is scalar, ranging from a mild buzz to complete unconsciousness. It is socially implausible to expect people to take or submit to blood-alcohol testing before engaging in sexual intercourse. And, in contrast to sexual intercourse with minors or among psychotherapists and their patients, the mix of alcohol and sexual intercourse has some social value, at least in some social circles, for the very reason that alcohol lessens social and sexual inhibitions. Yet the risks of harm are genuine because approximately half of all rape victims, as well as half of all perpetrators, drink alcohol beforehand.¹⁰²

In the end, the criminal law is not reluctant to punish actors who have sexual intercourse with persons who due to intoxication are unconscious, e.g., “Lithium Sleep,” because people who are unconscious cannot even assent to sexual intercourse.¹⁰³ Nor is it reluctant to punish actors who have sexual intercourse with persons who, because of the *involuntary* ingestion of drugs like Rohypnol, find it difficult to understand what is happening, difficult to decide what they want, and/or difficult to mount resistance.¹⁰⁴ Yet courts hesitate to punish actors who have sexual intercourse with persons whose consumption of alcohol is voluntary. This is in part because the relationship between paternalism and liberty is a zero-sum game: every paternalistic move to protect persons who are drunk from decisions they may later regret does so at the cost of limiting the liberty of persons to decide such matters for themselves.¹⁰⁵ Society is willing to protect adolescents because such protections are temporary and because society places low social value on the intercourse they may have. And societies are generally willing to protect the mentally handicapped because societies bear general responsibility for them.¹⁰⁶ However, liberal societies

¹⁰² See Christine Chambers, “Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent,” *Brigham Young University Law Review* 2009(1) (2009): pp. 57-98, pp. 58-59 n. 2.

¹⁰³ See *Commonwealth v. Helfant*, 496 N.E.2d 433 (Mass. 1986); *State v. Moorman*, 358 S.E.2d 502 (N.C. 1987).

¹⁰⁴ See, e.g., H N.Y. PENAL LAW s. 130.00(6) (Consol., Lexis Advance through 2016 released Chapters 1-72); MODEL PENAL CODE s. 213.1(1)(b).

¹⁰⁵ See Alexander Boni-Saenz, “Sexuality and Incapacity,” *Ohio State Law Journal* 76 (6) (2015): pp. 1201-1253, p. 1204.

¹⁰⁶ But see Michael L. Perlin, “Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?,” *New York University Review of Law and Social Change* 20 (1993-1994): pp. 517-545, p. 537.

are reluctant to oversee the decisions of adults whose consumption of alcohol is voluntary, particularly given the difficulty of identifying objective, *ex ante* standards for distinguishing excessive from non-excessive intoxication.¹⁰⁷

III. DEFINING CONSENT: INTERNAL CHOICE OR OUTWARD EXPRESSION?

We have thus far assumed that “consent to sex” is a form of acquiescence or submission, namely, acquiescence in, or submission to, sexual intercourse under the legally sufficient conditions of freedom from coercion to engage in it, knowledge regarding it, and capacity to deliberate about it. However, that assumption masks a further ambiguity—and a further disagreement—about the conceptual nature of consent.

Specifically, commentators and jurisdictions differ regarding whether consent to sex is an *internal choice* that a person subjectively experiences (and that she may, or may not, objectively communicate to others) or an *expressive act* that a person objectively performs (and that may, or may not, reflect what she subjectively feels). Thus, the Canadian Supreme Court takes the position that consent to sex is a mental state that a person subjectively experiences,¹⁰⁸ while the state of Washington takes the opposite position that consent to sexual intercourse consists of “actual words or conduct indicating freely given agreement to have sexual intercourse.”¹⁰⁹ Commentators take similarly conflicting positions on the issue, some arguing that consent to sex ought to be defined

¹⁰⁷ Cf. Joan McGregor, “Force, Consent and the Reasonable Woman,” in Jules Coleman and Allen Buchanan (eds.), *In Harm’s Way* (New York: Cambridge University Press, 1994), pp. 244-245 (it ought to be a crime to have sexual intercourse with anyone who is “drunk or high on drugs”) with Shlomit Wallerstein, “‘A drunken consent is still consent’—or Is It? A Critical Analysis of the Law on a Drunken Consent to Sex Following Bree,” *Journal of Criminal Law* 73(4) (2009): pp. 318-344, pp. 340, 343 (arguing that it ought to be a crime to have sexual intercourse with anyone who has had “a lot to drink” or is “very drunk”), with Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Cambridge: Harvard University Press, 1998), p. 269 (arguing that it ought to be a crime to have sexual intercourse with anyone who is too intoxicated to express her wishes verbally), and with Heidi Hurd, “The Moral Magic of Consent,” *Legal Theory* 2(2) (1996): pp. 121-146, pp. 141-142 (arguing that, short of being so intoxicated as to be incapable of committing a crime, a voluntarily intoxicated person who assents to sexual intercourse should be deemed to legally consent to it).

¹⁰⁸ See *Regina v. Ewanchuk*, 195 W.A.C. 1 para. 26 (S. Ct. Canada, 1999) (“The absence of consent, however, is subjective and determined by reference to the complainant’s subjective internal state of mind towards the touching, at the time it occurred”).

¹⁰⁹ 9A WASH. REV. CODE s. 44.010 (Lexis Advance through 2016 Sess.).

as a mental state or choice,¹¹⁰ while others argue that it ought to be defined as an expressive act.¹¹¹

Although we both contend that some form of the internal choice view better captures the essential harm or evil of rape,¹¹² our goal here is to offer the distinctions that will facilitate discussion of these different conceptions. First, we must ask which conception better captures why rape is wrong. From here, the question remains whether even if one formulation better captures the wrong of rape, the other formulation is prophylactically more useful in protecting victims. Noting why expression models may be more useful to protect victims, we then turn to the negative repercussions of prophylactic rules. To choose among competing formulations, it is essential to clarify what is and is not at stake.

A. What is the Primary Harm of Rape?

The formulation of consent matters when people do not say what they feel. Hence, the dispute over whether consent is a mental state or an expressive act is immaterial regarding persons who feel what they express, and vice versa. Consider Ms. C in “Pool Table.” She felt abhorrence toward being subjected to sexual intercourse, and she repeatedly and continuously expressed her abhorrence. Therefore, regardless of whether Massachusetts defined consent as a mental state or an expressive act, Ms. C was a victim of rape in the law’s eyes, and the men who assaulted her were guilty of rape. Similarly, consider a woman who, while possessed of the requisite capacity and knowledge, wholeheartedly welcomes sexual intercourse with her boyfriend and fully communicates her enthusiasm. Regardless of whether consent is defined as a mental state or an

¹¹⁰ See Larry Alexander, “The Moral Magic of Consent (II),” *Legal Theory* 2(3) (1996): pp. 165-174; Joshua Dressler, “Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform,” *Cleveland State Law Review* 46(3) (1998): pp. 409-442, p. 424; Hurd, “The Moral Magic of Consent,” pp. 124-125; Douglas Husak, “The Complete Guide to Consent to Sex: Alan Wertheimer’s ‘Consent to Sexual Relations’” (book review), *Law and Philosophy* 25(2) (2006): pp. 267-287, p. 287.

¹¹¹ See David Archard, *Sexual Consent* (New York: Westview Press, 1998), pp. 4-5; Brenda Baker, “Understanding Consent in Sexual Assault,” in Keith Burgess-Jackson (ed.), *A Most Detestable Crime: New Philosophical Essays on Rape* (New York: Oxford University Press, 1999), pp. 49-70, pp. 52-53; John Kleinig, “The Nature of Consent,” in Franklin Miller and Alan Wertheimer (eds.), *The Ethics of Consent: Theory and Practice* (New York: Oxford University Press, 2010), pp. 3-24, pp. 5, 9-11; Malm, “The Ontological Status of Consent and its Implications for the Law of Rape,” pp. 147-155; McGregor, “Force, Consent and the Reasonable Woman,” p. 242; Schulhofer, “Taking Sexual Autonomy Seriously,” pp. 74-77; Emily Sherwin, “Infelicitous Sex,” *Legal Theory* 2(3) (1996): pp. 209-231, pp. 216-217; Wertheimer, *Consent to Sexual Relations*, pp. 144-152.

¹¹² See, e.g., Ferzan, “Consent, Culpability, and the Law of Rape”.

expressive act, the woman is not a victim of rape in the law's eyes, and her boyfriend is not culpable.

Nevertheless, the definition of consent does make a difference when what B feels about sexual intercourse with A diverges from what B expresses her feeling to be. First, a victim may express "yes" when she experiences "no." For instance, B might feel coerced even though A has no reason to be aware of B's experience (a situation we detail below). Alternatively, B might express "no" when she means "yes." Although the studies on this question are a bit outdated at this point, and thus there is no clear empirical conclusion of how prevalent the behavior is, it is certainly empirically possible (and even occasionally likely) that some individuals token "no" simply so as not to appear promiscuous despite their underlying wholehearted welcoming of the sexual contact. We suggest that the first step in deciding what consent *is* is to determine which conception is sufficient to prevent the harm of rape.¹¹³ Both the harm at issue, and the gravity of the offense, turn on how we identify what consent is.

We suggest juxtaposing the following two cases to pry apart the different conceptions of consent. First, consider a variation on an incident that arose in California in the 1970s involving a woman who submitted to sexual intercourse out of fear of death and, yet, did everything she could to conceal her non-consent:

Frightened Hitchhiker

Chris, an adult waitress, who had just left her car to be serviced, set out to hitchhike home from work. She was picked up by a man in a camper truck. As she took her seat in the cab, she saw that the man had three photos of nude women affixed to the dashboard; and he, noticing her glance, explained that he was a "porno" photographer. She became frightened when he prepared to exit the freeway in advance of her exit, because she remembered that a friend of hers, also a hitchhiker, was raped and murdered in the same

¹¹³ This would render sexual intercourse potentially permissible because there are reasons that consented-to sex might still be wrong—say because it constitutes adultery—even when it does not instantiate the wrong of rape.

general area. She began to believe that rape was inevitable and, to save herself, initiated “a discussion of sex in order to attract his interest in her for the future and thus insure her survival.” She suggested that they go “to a motel,” but, instead, he pulled off the road in order to use the camper. They both entered the camper, and she undressed. She offered to copulate the man orally in order to “avoid having [him] on top of her [and] in a position to strangle her.” She performed two acts of oral sex, and, afterwards, the man suggested that they meet again. She feigned agreement and wrote down her name, phone number, and address. He offered to drive her to the garage where her car was being serviced, and she accepted. After he dropped her at the garage, she told the garage attendants that she had been raped and called her brother and the police to report the rape. She also went to the hospital to collect semen for a rape kit. Three days later, while she was talking to detectives, the phone rang. It was the man from the camper, asking her for a date. With the help of the police, Chris feigned agreement and, when man arrived, the police arrested him and charged him with rape. The man defended himself on the grounds that Chris consented to perform oral sex and that, even if she didn’t, he did not know or have reason to know that she did not consent.¹¹⁴

In contrast, consider a 1978 case from New York involving complainant whose behavior was the converse of Chris’s—a complainant who feigned fear that he was not actually feeling.

Sexual Sting Operation

Complainant, a 17-year-old juvenile arrestee, was placed in a jail cell in Albany, New York, with inmate Harold Bink. The complainant told jail authorities during the day that Bink had used “threat[s]” of physical beating and of forcible anal intercourse to “force” him to perform fellatio on Bink, and that Bink had ordered him to perform the same sexual act again the following morning. The authorities offered to protect the complainant but he refused protection. Instead, he proposed to catch Bink in a sting by pretending to still be in fear of Bink the next morning, so that the authorities, who would be observing the

¹¹⁴ Cf. *People v. Hunt*, 72 Cal. App. 3d 190 (1977).

cell the next morning through a one-way window, could catch Bink “in the act.” The parties proceeded as agreed. When the jail authorities saw Bink follow the complainant into the cell and put his penis in the complainant’s mouth, they entered the cell and charged Bink with non-consensual fellatio.¹¹⁵

Let’s start with what is not at stake in both of these hypotheticals. Irrespective of how consent is conceptualized, the defendant in “Frightened Hitchhiker” will not go to jail and Bink will. A case like “Frightened Hitchhiker” would likely end in an acquittal, regardless of how consent is defined, because a prosecutor will likely have a hard time proving beyond a reasonable doubt that the defendant possessed *mens rea*, that is, that he knew or should have known that Chris was only saying “yes” because she feared for her life. A case like “Sexual Sting Operation” would likely end in a conviction, irrespective of how consent were defined, provided that the court believed that (i) the complainant was telling the truth when he said that Bink had threatened to beat and anally penetrate him unless he performed fellatio, and (ii) Bink believed, or should have believed, that the complainant submitted on both occasions out of fear for his bodily safety and integrity. The only question in “Sexual Sting Operation” is whether Bink committed rape, or attempted rape, a question that turns on how consent is formulated. Either way, however, Bink is guilty. What does turn on our conception of consent is the determination of (1) whether the victim was raped and (2) how much punishment the defendant deserves.

First and foremost, we have to figure out what the primary harm or evil of rape is, such that we know why consent negates it. Reconsider “Frightened Hitchhiker.” A jurisdiction like Washington, which defines consent as “words or conduct indicating freely given agreement to have sexual intercourse,” defines the harm of rape as being essentially a *dignitary* harm—the harm that A inflicts upon B by subjecting B to sexual intercourse without according B the *respect* of attending to B’s express or implied feelings about it. In contrast, a jurisdiction like Canada, which defines consent as a mental state of free acquiescence in sexual intercourse, defines the harm of rape as consisting not in the derivative harm of A’s lack of respect for B’s expressed wishes, but in the bodily invasion B suffers in being subjected to sexual intercourse that she does not

¹¹⁵ *People v. Bink*, 444 N.Y.S.2d 237 (1981).

subjectively choose. Therefore, in a case like “Frightened Hitchhiker,” in which B experiences fear that she conceals from her sexual partner, Washington and Canada would treat B quite differently. Canada would declare B to be a victim of rape, that is, a victim of the very kind of forced sex from which it seeks to protect persons (albeit forced sex of which it might excuse A for lack of *mens rea*). In contrast, Washington would take the position that B is *not* a victim of non-consensual sex. Indeed, Washington would have to take the position that B has suffered no harm at all—or, at least, none from which Washington seeks to protect persons by means of its law against rape.

Although we find the internal act view to better capture the harm or evil at work in rape,¹¹⁶ our goal here is merely to show how teasing out these questions gets to the normative heart of the matter. Students should see that, when they are arguing about whether Chris was raped and/or whether Bink’s victim was, they are arguing about the core, central feature of what makes consent render an act that is otherwise impermissible, permissible.¹¹⁷

Second, consider what these different conceptions of consent yield with respect to Bink. Specifically, the way a jurisdiction defines consent determines the gravity of Bink’s offense regarding the second act of fellatio, that is, the fellatio that occurred when the complainant knew full well that he could abort the sting at any time he wished and, hence, was no longer in fear of Bink. A jurisdiction like Canada, which defines consent by reference to what B subjectively experiences, would convict Bink of what jurisdictions typically convict persons in sting operations: *criminal attempt*, specially, the crime of attempted non-consensual fellatio. It would take the position that, although the complainant did not suffer the experience of coercive sex, nevertheless the defendant, Bink, believed that the complainant was acting out of fear. In contrast, a jurisdiction like Washington, which defines B’s consent not by what B is feeling but by what A believes, or should reasonably believe, that B is feeling, would convict Bink of the *completed* crime of non-consensual fellatio, even though the complainant did not feel coerced into committing the second act of fellatio.

¹¹⁶ See, e.g., Ferzan, “Consent, Culpability, and the Law of Rape.”

¹¹⁷ For further concerns about the “dignity” view, see Ferzan, “Consent, Culpability, and the Law of Rape.”

In short, both jurisdictions would treat the complainant in “Sexual Sting Operation” as having suffered a dignitary injury, namely, the injury that Bink inflicted upon him by disregarding his express views regarding sexual intercourse. And neither jurisdiction would find that the complainant suffered the further, physical harm of being forced to submit to unwanted sexual intercourse by fear of violence. Nevertheless, because the two jurisdictions define the harm of rape differently, they would differ regarding the gravity of Bink’s offense. Washington would convict Bink of the most serious sexual offense it possesses, while Canada would reserve the most serious sexual offense for persons who succeed in eliciting sexual intercourse by means of fear of violence.¹¹⁸

B. Which Conception is Prophylactically the More Useful?

We would fully expect students to divide on which formulation of consent best addresses the fundamental harm of rape. From here, we suggest shifting from this question to the question of what the law should do. The point here would be to articulate the upsides and downsides of adopting the view of consent as an expressive act.

Parsing the idea of which formulation of consent negates the harm of rape from the question of how the law ought to define consent reveals the benefits (and difficulties) of adopting prophylactic rules. A prophylactic rule is an overly broad rule enacted out of concern that enacting anything narrower would be under-protective. An example is the *Miranda* rule, which requires the police to advise custodial suspects of their Fifth Amendment rights or forgo using against the suspects any incriminating statements they may make in the course of interrogation. *Miranda* protects some suspects who are already fully aware of their rights and, hence, need no protection, e.g., criminal-procedure professors and law-enforcement officers, who find themselves under

¹¹⁸ Certainly, whether a jurisdiction ought to draw a distinction here depends on whether one believes that attempts ought to be punished the same as completed crimes. Here, we disagree. Cf. Larry Alexander and Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge: Cambridge University Press, 2009), Chapter 5 (arguing attempts should be punished the same as completed crimes) with Peter Westen, “Why criminal harms matter: Plato’s abiding insight in the *Laws*,” *Criminal Law and Philosophy* 1 (2007), pp. 307-326 (members of society are rightfully relieved when harm does not occur and this justifies less punishment for attempts).

arrest. However, it does so for fear that case-by-case inquiries into whether individual suspects felt “compelled” to incriminate themselves are error-prone and operate in practice to deny protection to suspects who need it.

Rape statutes, too, are rife with prophylactic rules. Statutes regarding abuse of authority are an example. For instance, some statutes that prohibit sexual intercourse by those in authority, such as health-care professionals, prison guards, clergymen, and teachers, over persons in their care.¹¹⁹ Not all patients, prison inmates, parishioners, and students who have sexual intercourse with their superiors are coerced into doing so, e.g., a female prison guard who has sexual intercourse with her husband following his incarceration in the facility in which she is a custodial officer. Nevertheless, in the eyes of the drafters, the risk of coercion is sufficiently great, the task of proving it is sufficiently difficult, and the social value of the intercourse is sufficiently low to justify an outright ban. The same is true of statutory-rape laws. Thus, California makes it a crime for a person to have sexual intercourse with a girl who is under 18 years of age. Not all 17-year-old girls need to be protected from being pressured or deceived into having sexual intercourse with their boyfriends, e.g., girls who are days short of their birthdays. But California protects them all for fear that case-by-case inquiries into coercion or fraud would deny protection to 17-year-olds who would benefit from it.

Although most students are well aware of affirmative consent standards, because they are used throughout colleges and universities, we suggest beginning by walking students through why the consent-as-expression standards have gained such prominence. We suggest two cases to unpack the analysis: a case of whether “no” means “yes” and a case of passivity.

1. When a Defendant Takes “No” to Mean “Yes”

A jurisdiction might ultimately adopt prophylactic rules in response to the problem of entrenched misogynistic norms:

¹¹⁹ See Decker and Baroni, “‘No’ Still Means ‘Yes’: The Failure of the ‘Non-Consent’ Reform Movement in American Rape and Sexual Assault Law,” pp. 1126-1132.

Step One: Assume for sake of argument that consent is an internal act.

Step Two: Assume a jurisdiction punishes sex without consent as sexual assault.

Step Three: Start with the Model Penal Code's general position that, as to every material element, recklessness ought to be the minimum level of culpability.

Step Four: Imagine a defendant who believes that women say "no" when they mean "yes."¹²⁰

Step Five: Ask whether the defendant is guilty of sexual assault if the woman said "no" and meant it, but the defendant honestly believed she consented internally and meant "yes."

At this point, one can see the concern that an internal act view of consent may be insufficient to protect victims. The idea that a misogynistic, insensitive man would fully escape responsibility would motivate reform. From here, one might opt for a *mens rea* fix.

Step Six: Alter the *mens rea* requirement for sexual assault, reducing it to negligence.

The defendant presented in *Step Five* can now be reassessed. Notice that the fact that the victim said "no" would not itself be sufficient to conclude that the victim did not consent. Instead, the jury would have to conclude that a reasonable man could not take a "no" to mean "yes."¹²¹

To press this question of what a reasonable man ought to conclude, one must take into

¹²⁰ See, e.g., Dan M. Kahan, "Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance Rape Cases," *University of Pennsylvania Law Review* 158 (2010): pp. 729-813 (conducting a study wherein subjects found that women who said "no" actually consented).

¹²¹ For a jurisdiction that takes the position that proceeding to have sexual intercourse in the face of a "no" is not criminal unless a reasonable person under the circumstances would understand the "no" to be a "genuine and real" refusal of consent," see *Gangahar v. State*, 609 N.W.2d 690 (Neb. App. 2000). See also H N.Y. Penal Law s. 130.05(2)(d) (Consol., Lexis Advance through 2016 released Chapters 1-72).

account the (admittedly somewhat outdated) empirical studies that suggest, in practice, American women who say “no” to incipient intercourse do not always mean, “No, I don’t want to have sexual intercourse with you.” Thus, in a well-known 1988 study of Texas female college undergraduates, 39%—61% of whom were sexually experienced—admitted that they sometimes said “no” to sexual advances when they meant “yes.” The undergraduates’ most important reasons for meaning “yes” while saying “no” were “fear of appearing promiscuous,” “nature of the relationship,” “uncertainty of the partner’s feelings,” and “situational problems” (presumably having to do with fear of being caught in the act). Other reasons were “inhibition-related,” including “emotional, religious or moral reasons,” and “self-consciousness or embarrassment about the body.” The undergraduates’ last reasons were “manipulative” in nature, including “anger with partner,” “desire to be the one in control,” and “game playing” consisting of wanting the man “to beg,” “to talk [her] into it,” or “to get him more sexually aroused by making him wait.”¹²² Even Dan Kahan’s recent study wherein subjects evaluated a situation in which the victim said “no” but did not resist or leave, “40% of the subjects, across conditions, indicated they agreed that [d]espite what she said or might have felt after, Lucy really did consent to sexual intercourse with Dave.”¹²³ Indeed Schulhofer notes:

If we consider actual behavior of real people in our world as it stands, mistakes about consent, including mistakes about the meaning of “no,” are undoubtedly frequent. And *sometimes*, in *some* settings, those mistakes will be “reasonable,” even from the perspective of many women.¹²⁴

Moreover, even if one is disinclined to believe this of most, much less all, women the defendant will be assessed against the background of his community’s norms. If the community

¹²² Charlene Muehlenhard and Lisa Hollabaugh, “Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women’s Token Resistance to Sex,” *Journal of Personality and Social Psychology* 54(5) (1988): pp. 872-879, pp. 875-877; see also Richard Klein, “An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness,” *Akron Law Review* 41(4) (2008): pp. 981-1058, p. 1012 (“[R]ecent studies have found very similar results as the Texas findings across the country . . . [including] one study [that] found that 90% of sexually experienced women who had said ‘No’ when they meant ‘Yes,’ had stated that an important factor in their initial ‘No’ had been the fear of appearing promiscuous.”) (footnotes omitted).

¹²³ Kahan, “Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance Rape Cases,” p. 784.

¹²⁴ Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, p. 65.

often or even sometimes takes “no” to mean “yes,” then using a reasonable person standard may fail to protect victims, but instead, may reinforce the much gendered norms that currently exist. Hence, a jurisdiction will be unable to rely on *mens rea* to protect the victim. Instead, it will need to alter what it takes to be consent.

2. Passivity: Acquiescence or Frozen Fright?

Consider how a similar problem is presented by passivity:

Step One: Assume for sake of argument that consent is an internal act.

Step Two: Assume a jurisdiction punishes sex without consent as sexual assault.

Step Three: Start with the Model Penal Code’s general position that, as to every material element, recklessness ought to be the minimum level of culpability.

Step Four: Imagine a defendant who believes that women who do not verbally object to sex are consenting.

Step Five: Ask whether the defendant is guilty of sexual assault if the woman did not physically or verbally object to the contact but did not choose it, but the defendant honestly believed that her passivity indicated that she consented.

Step Six: Alter the *mens rea* requirement for sexual assault, reducing it to negligence.

Again, then, altering the *mens rea* requirement to negligence will be insufficient to be fully protective of rape victims. Why? We are all familiar with settings in which passivity connotes consent, e.g., where the chairperson of a meeting declares that a prior affirmative vote will be deemed unanimous unless dissenters explicitly object. Indeed, psychologists Susan Hickman and Charlene Muehlenhard claim that the same thing is commonly the case regarding consent to sexual

intercourse. Hickman and Muehlenhard surveyed students in 1999, asking them how they typically expressed consent to sexual intercourse. Hickman and Muehlenhard found that both men and women reported that they “most frequently signaled sexual consent by not resisting: letting their partner undress them, not stopping their partner from kissing or touching them, not saying no,” leading Hickman and Muehlenhard to conclude that young people most often consent to sexual intercourse passively, rather than actively.¹²⁵ Some courts take the same position, ruling that passivity in the face of sexual overtures is fully consistent with expressive consent to sexual intercourse.¹²⁶

Despite this potential social norm, the worry is that some women freeze, that is, experience “frozen fright,”¹²⁷ in the face of unwanted sexual advances. For instance, imagine that A and B are kissing, and A proceeds to touch B’s breast. B does not wish her breast to be touched, and tries to gently block A’s contact. A stops but tries again in a few minutes. B does the same thing. A tries five minutes later. By this point, B, who might like A very much and, therefore, not want to shout “GET YOUR HANDS OFF ME!” does not reject the contact. The same interplay occurs as A escalates the sexual contacts and, each time, B increasingly feels that A intends to have his way with her irrespective of her feelings. By this point, she may not like him very much, but her level of fear may have substantially escalated. As he seems to become more and more aggressive, she becomes more and more passive, taking his conduct to relay the message that he intends to have sex with her irrespective of her consent. Adopting an internal act view, or even an expressive view that allows silence to constitute the expression of consent, would be insufficient to protect B.

¹²⁵ Susan E. Hickman and Charlene L. Muehlenhard, “‘By the Semi-Mystical Appearance of a Condom’: How Young Women and Men Communicate Sexual Consent in Heterosexual Situations,” *Journal of Sex Research* 36(3) (1999): pp. 258-272, p. 271; see also Dan Subotnik, “‘Hands Off’: Sex, Feminism, Affirmative Consent, and the Law of Foreplay,” *Southern California Review of Law and Social Justice* 16 (2007): pp. 249-318, pp. 293-298.

¹²⁶ See, e.g., *R. v. RJS*, 1994 Nfld. & P.E.I.R. LEXIS 1345 (Prince Edward Island S. Ct. 1994) (a person can consent to sexual intercourse by doing nothing under circumstances in which a person who did not desire it would act accordingly).

¹²⁷ *People v. Iniguez*, 872 P.2d 1183, 1185 (Cal. 1994); see also Jennifer J. Freyd, “What Juries Don’t Know: Dissemination of Research on Victim Response is Essential to Justice,” *Trauma Psychology Newsletter* (Fall 2008): pp. 15-16, p. 16 (studies show that many women respond to forcible sexual advances by falling into a state of “tonic immobility” characterized by “dissociation” and “paralysis”).

3. Prophylactic Rules

Once it is apparent that an internal act view cannot protect these victims, the next question is whether the law can be formulated to protect them. Consent-as-expressive-act can be defined in specific ways that give it prophylactic force: (a) by requiring that consent be *affirmative*; (b) by requiring that expressions of consent be *verbal*; and (c) by stipulating that “No,” “Stop,” “Don’t,” and other verbal expressions of rejection constitute non-consent.

a. Affirmative Consent

To protect the victim of frozen fright, a jurisdiction cannot adopt an internal act view. Rather, because silence can sometimes “express” consent, a jurisdiction will have to go even farther. Here, some courts and commentators take the position that, in addition to being expressive, consent ought to take the prophylactic form of being *affirmative* in nature. That is, they take the position that, regardless of whether passivity suffices in practice to connote autonomous assent, passivity should be treated as insufficient in law to constitute consent.¹²⁸ Requiring that expressive acts of consent to sex be affirmative in nature is a prophylactic rule. It is over-broad because it treats some people as victims of rape, who are not victims of rape, e.g., the college women in Hickman and Muehlenhard’s study. Yet jurisdictions may regard the rule as necessary to protect persons who would otherwise go unprotected, e.g., persons who are subjected to unwanted sexual intercourse as a result of frozen fright. Such a person would be protected in a jurisdiction that requires that expressive acts of consent to sex be affirmative.¹²⁹

b. Requiring that Consent be Verbal.

¹²⁸ See *In the Interest of M.T.S.*, 609 A.2d 1266 (N.J. 1992) (“We conclude, therefore, that any act of sexual penetration engaged in by the defendant without the affirmative and freely given permission of the victim to the specific act of penetration constitutes the offense of sexual assault.”); Stephen Schulhofer, “The Feminist Challenge in Criminal Law,” *University of Pennsylvania Law Review* 143 (1995): pp. 2151-2207, p. 2181 (“Consent for an intimate physical intrusion into the body should mean in sexual interactions what it means in every other context—affirmative permission clearly signaled by words or conduct.”).

¹²⁹ Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, p. 271.

Among jurisdictions that define “consent” to be a communication for purposes of the crime of rape, most, if not all, allow such communication to be either verbal or nonverbal.¹³⁰ Nevertheless, some commentators, including Ilene Seidman and Susan Vickers, argue that sexual intercourse ought to be unlawful unless a person not only communicates autonomous assent but does so verbally.¹³¹ Michelle Anderson would go still further and require that parties to sexual intercourse verbally “negotiate” their encounters. She argues that sexual intercourse ought to be unlawful unless the parties “consult with their partners before sexual penetration occurs” by engaging in “an expressive [verbal] exchange ... about whether they want to engage in sexual intercourse Negotiations would have to be verbal unless the partners had established a context in which they could reliably read one another’s nonverbal behavior to indicate free and autonomous agreement.”¹³²

Such rules to the effect that “Only ‘Yes’ Means ‘Yes’” are prophylactic in nature. The rules protect persons who do not need protection (i.e., persons who are fully capable of communicating and expressing themselves about sex without discussing it), in order to safeguard persons whom the law would otherwise leave unprotected (e.g., persons whose nonverbal behavior, as measured by prevailing social conventions, does not express their true feelings). The rules both empower and disempower B: they empower B because, regardless of what B may otherwise be feeling or nonverbally expressing, the rules empower B to criminalize sexual conduct by A merely by remaining silent; the rules disempower B by preventing B from using nonverbal communication to authorize others to have sexual intercourse with B.

The thought here is that, even in those instances in which affirmative consent is supposed to protect victims of frozen fright, reading consent from conduct can create ambiguities. And, to protect unwilling victims from having their behavioral cues misread, the idea is that men can simply stop and ask their partners about their willingness to proceed. Notably, Anderson only

¹³⁰ See, e.g., LXII N.H. REV. STAT. ANN. s. 632-A:2(i)(m) (Lexis Advance through Chapter 309 of 2016 Sess.); WIS. STAT. ANN. s. 940.225(4) (Lexis Advance through 2015); see also Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, p. 272.

¹³¹ Ilene Seidman and Susan Vickers, “The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform,” *Suffolk University Law Review* 38(2) (2005): pp. 467-491, p. 490.

¹³² Michelle Anderson, “Negotiating Sex,” *Southern California Law Review* 78(6) (2005): pp. 1401-1438, p. 1407.

advocates for this model with respect to penetration, recognizing that applying this standard to all sexual contacts would be unduly formalistic and stunting for both participants.¹³³

c. Codifying “No Means No.”

A growing number of jurisdictions and commentators take the position that, regardless of whether he uses any force, an actor is guilty of rape if he has sexual intercourse with a person in the face of her explicitly saying “no” or equivalent utterances (e.g., “stop,” “don’t”).¹³⁴ The state of Pennsylvania is an example. The Pennsylvania Supreme Court ruled in 1994 that sexual intercourse in the face of a “no,” although not forcible rape, was a misdemeanor of non-consensual sexual contact.¹³⁵ The Pennsylvania legislature went still further the following year by declaring such conduct to be a felony of sexual assault.¹³⁶

Statutes like Pennsylvania’s are the product of a reform movement that operates under the maxim, “No means no.” Unfortunately, the maxim “No means no” can be understood in two distinct ways, one of which renders the maxim true, the other of which does not.

Let us start with the understanding of “no” that is false. When people say, “No means no,” they often mean that women who say “no” to incipient sexual intercourse do so in order to emphatically communicate: ‘*I do not want to have sexual intercourse with you, or, at least, I do not want to have it now.*’ This understanding of “No means no” is false for two reasons.

First, no word or statement in any language, including the statements “no” or “No, I don’t want to have sexual intercourse with you,” can be reduced to having a single meaning. A speaker’s meaning in making any statement depends upon the speech act she intends the statement to

¹³³ Anderson, “Negotiating Sex,” p. 1421.

¹³⁴ See Don Dripps, “Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent,” *Columbia Law Review* 92(7) (1992): pp. 1780-1809, pp. 1804-1805, 1807.

¹³⁵ See *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994). Cf. *Ex parte Gordon*, 706 So.2d 1160, 1164 (Ala. 1997) (Houston, J., concurring).

¹³⁶ See 18 PA. CONS. STAT. ANN. s. 3124.1 (Lexis Advance through 2016 Sess.).

perform.¹³⁷ Thus, a speaker who says to a host at dinner, “This food is really good,” may intend her statement to convey precisely what it literally states. Alternatively, she may mean it to convey the exact opposite of what it literally states, as when a person sarcastically says about an ugly, racist joke, “That was really funny” Or she may mean it to convey something like, “Regardless of whether I think the food is good, I sincerely appreciate your trying to please me by preparing it.”

Nevertheless, the maxim, “No means no,” can be given a legal meaning. Just as red lights don’t represent the fact that there is opposing traffic, but rather, merely by turning that color have the legal effect of rendering it impermissible to continue through the intersection, so too, “no” can render it legally impermissible to proceed. The truth of “no means no” is a function of something other than what women do or do not intend to communicate in saying “no.” Its truth is a function the kind of speech act that “no” is when uttered in response to acts of incipient sexual intercourse (provided it is uttered in jurisdictions like Pennsylvania). Within such jurisdictions, “no” in response to incipient sexual intercourse is an expressive act that John Searle calls a “declaration.”¹³⁸ It is a word like an umpire’s saying “strike” following a pitch in baseball, or a public figure saying at a shipyard, “I hereby christen this destroyer ‘The Intrepid.’” It derives its meaning not from what speakers intend to communicate by it but from the rule-based consequences of merely uttering it. Thus, when an umpire calls “Strike” following a pitch in a baseball, players don’t ask themselves, “What does he mean by that?” They know that the rule-based consequence of an umpire’s uttering “Strike” following a pitch is that the pitch *is* a strike, just as the legal consequence of a public figure’s saying “I hereby christen this destroyer ‘The Intrepid.’” is that the destroyer *is* “The Intrepid.”¹³⁹

The same is true of a woman’s saying “no” in the face of incipient sexual intercourse within jurisdictions like Pennsylvania. Regardless of what individual women may mean when they say “no” to incipient sexual intercourse, their merely uttering it has the legal consequence in such

¹³⁷ See John Searle, *Expression and Meaning: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969).

¹³⁸ Searle, *Expression and Meaning: An Essay in the Philosophy of Language*, pp. 16-17, 26-27.

¹³⁹ See Searle, *Expression and Meaning: An Essay in the Philosophy of Language*.

jurisdictions of *invalidating* sexual intercourse that takes place despite it. Thus, just as the authors of the rules of baseball empower an umpire to create a rule-based “time out” merely by *saying* “time out,” the legislative authors of statutes like Pennsylvania’s empower women to render sexual intercourse unlawful merely by saying “no” to incipient sexual intercourse. And, just as it is irrelevant to ask an umpire in baseball, “What do you mean by ‘time out’?,” it is irrelevant to ask complaining witnesses in rape trials in Pennsylvania, “What did you mean by ‘no’?” The maxim, “No means *no*,” is true within jurisdictions like Pennsylvania, provided that the maxim is understood as “No sexual intercourse to which you may subject me at present is lawful.”¹⁴⁰

In short, “no means no” is a prophylactic rule designed to protect persons from coercion to submit to sexual intercourse over their protests. Just as *Miranda* obviates inquiries into the voluntariness of custodial confessions by automatically outlawing incriminating statements that are elicited without warnings, so, too, “no means no” obviates inquiries into the conditions under which persons submit to sexual intercourse by automatically criminalizing intercourse that proceeds in the face of “no.” Rather than oblige the prosecution to prove that A coerced B, the rule, “no means no,” deems *any* sexual intercourse to which A subjects B in the face of B’s “no” to have been coercive.

4. The Pitfalls of Prophylaxis

Having teased out the benefits of various prophylactic rules, it is also important to specify the concerns with such rules. As affirmative consent models gain increasing acceptance, it is essential that students be able to engage critically with them.

Because prophylactic rules are by their nature over-inclusive, it means that there is a trade-off to be made between victims who will be left unprotected if the prophylactic rule is not adopted and future defendants who are caught within the over-inclusivity of the prophylactic rule. One of us views over-inclusive rules as more problematic than the other.¹⁴¹ Still, it ought to be clear that

¹⁴⁰ See Westen, *The Logic of Consent*, pp. 79-87.

¹⁴¹ See Alexander and Ferzan, *Crime and Culpability*, pp. 297-302 (“In the criminal law context, an overinclusive rule is a rule that creates the potential for punishing an innocent actor.”); Ferzan, “Consent, Culpability, and the Law

a rule that is over-inclusive allows for punishing individuals to whom the background justification does not apply. In its simplest formulation (and least concerning to students), one might see this as the question of whether a driver should be punished for running a red light when she can see that there is no oncoming traffic.

We suspect that students will have little difficulty condemning the red-light runner, so the next question is this: what if everyone thinks that a “blinking yellow light” means “speed up” and the law steps in to change that norm? If the sexual mores for expressing consent that Hickman and Muehlenhard describe are widespread, is it appropriate to use criminal punishment as a means for changing mores?¹⁴² If A takes passivity to mean yes—and B means “yes” by her passivity—is it appropriate to conclude that A has sexually assaulted B because we now want A to wait for B to affirmatively say “yes?”

To push the analogy to red lights farther, assume that a study finds that the incidence of red-green colorblindness is on the rise and recommends that traffic lights be changed to purple and orange.¹⁴³ Now, the law is trying to change what counts as “stop” and “go.” What if the defendant thinks that purple means “stop,” but it is actually orange? Even if we think that law can sometimes effectively change social norms (drunk driving laws serve as a striking example), is it fair to punish A in the absence of knowledge of the law? Typically, we do not think that knowledge of the law is required for punishment.¹⁴⁴ However, when we are attempting to alter how people usually behave, and thus they cannot rely on their own senses of what constitutes consent, should the law aim to achieve effective notice?¹⁴⁵

Affirmative verbal consent rules pose further specific challenges. Once such rules take

of Rape,” (discussing in the rape context, the implication that over-inclusivity allows for punishing the innocent).

¹⁴² Cf. Douglas Husak and George Thomas, “Date Rape, Social Convention and Reasonable Mistakes,” *Law and Philosophy* 11(1/2) (1992): pp. 95, p. 112 (No), with Kahan, “Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance Rape Cases,” pp. 750-752, 798-804 (Yes).

¹⁴³ See https://nei.nih.gov/health/color_blindness/facts_about (noting “[t]raffic lights pose challenges” for a color blind person).

¹⁴⁴ For a compelling argument that perhaps ignorance of the wrongfulness of one’s conduct should always excuse, see Douglas N. Husak, *Ignorance of Law: A Philosophical Analysis* (forthcoming 2016 Oxford University Press).

¹⁴⁵ See Anderson, “Negotiating Sex,” p. 1433 (advocating “widespread public education on television, in schools, and in the media about the ethical and legal importance of negotiating penetration”).

effect, the As of the world are likely to learn of them and pressure their partners to utter the requisite words, thus raising the question: what conditions of freedom are required to ensure that B's "yes" constitutes valid assent as opposed to coerced assent? If the conditions are the same as those that are presently required within jurisdictions that do *not* embrace "Only 'Yes' Means 'Yes,'" then, with respect to persons who are pressured to say "yes" to sexual intercourse, requiring a "yes" does not perform any function that is not already served by existing rules.¹⁴⁶ Finally, while such rules empower B to criminalize A's conduct whenever B refuses to utter the required words in response to A's sexual pressures, they are a two-way street: they also enable A to criminalize B's conduct whenever B submits to A without B herself having A himself utter the required words. That is, the man can charge the woman with rape if she does not get a "yes" from him. (A similar issue is presented when intoxication negates consent, given that both parties are often intoxicated.)

C. Summary

Today's lawyers are confronting how consent should be formulated in rape statutes and university codes of conduct. To resolve dueling formulations, lawyers must be able to parse different claims that are being made. We must first decide what concept of consent renders sex permissible. From there, we must ask whether particular formulations are better legal rules because they protect victims or defendants. And, we must be aware of the trade-offs involved in adopting one rule over another.

CONCLUSION

The American Law Institute for the first time in a half-century is seriously engaged in redrafting the Model Penal Code's provisions regarding rape and sexual assault. Not surprisingly, there are some issues on which Advisory Committee members disagree that resist easy resolution: being a function of settled views regarding the nature of sexual intercourse, social relations between men and woman, the gravity of the harm of unwanted sex, the capacity or appropriateness of using

¹⁴⁶ See Aya Gruber, "Rape, Feminism, and the War on Crime," *Washington Law Review* 84 (2009): pp. 581-658, p. 647.

criminal law to change sexual mores, and the desirability of civil alternatives to criminal punishment. Nevertheless, we have argued here that some of the matters regarding sexual assault that commonly divide people are false controversies because they are based on conceptual confusion regarding the nature of consent and force. And we have argued that other controversies, though not false, are misdirected because they distract attention from the underlying norms on which resolution must ultimately turn. We have tried to resolve such controversies regarding rape law by exposing the conceptual scaffolding that underlies them.

Within the classroom, our hope is to foster respectful dialogue grounded in a shared conceptual architecture. While one of us teaches the rape materials in a small group seminar, the other has launched into these materials with first-year, first-semester students. In the latter case, students have noted, “I’m incredibly glad we devoted so much rigorous discussion to sexual assault,” finding the topic “difficult yet important,” and “challenging.” Simultaneously, students have found the discussions to be “open,” and the atmosphere “safe and comfortable.” As one student summarized, “[w]e grappled with important issues in a very sophisticated, balanced way. Other 1Ls were jealous of our unit!”

Certainly no set of materials nor any approach can be a silver bullet to such a contested and difficult to broach topic. Still, providing clear, conceptual markers allows students to hold discussions in productive and respectful ways. And clear thinking makes for better laws. What more can law professors aspire to?