

RAPE ON AND OFF CAMPUS

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The need for institutional reform to address the problem of sexual assault, particularly on college campuses, is widely acknowledged. Unnoticed, however, is a profound disconnect between cultural norms around sex and the legal definition of rape. The Model Penal Code and a majority of states still retain a force requirement, effectively consigning most rape—that is, non-stranger rape—to a place beyond law’s reach. Of special concern, the dominant statutory approach misconceives or overlooks entirely the role of consent, which has become central to popular and political discourses around sexual assault. In the midst of increasing moves on campus to codify affirmative consent standards (“yes means yes”), rape law remains mired in an archaic view of consent as rather beside the point. This Article recasts the significance of law’s preoccupation with force by introducing a taxonomy of cases in which force and non-consent tend to diverge. The no-force/no-consent cases raise a question critical to ongoing reform efforts: does the absence of consent make sex rape? Outside of law, this inquiry has for the most part been resolved; what remains is to reconcile competing interpretations of consent’s meaning. In stark contrast, the criminal justice system’s treatment of non-stranger rape reflects a doctrine woefully out of step with modern conceptions of sex. Sexual agency provides the theoretical underpinning needed to close this gap.

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INTRODUCTION

Rape has moved to the forefront of our collective consciousness. One striking feature of this new visibility is the centrality of non-stranger rape—the kind of rape that is most ubiquitous and, for most of our history, has remained most hidden.¹ Today, it is acquaintance rape that is in the zeitgeist;² no longer does the weapon-wielding stranger dominate television portrayals,³ captivate the news media,⁴ or saturate political discourse.⁵ These developments both reflect and shape an emerging consensus: when it comes to rape, the most pervasive danger is different from what once was most feared and the problem is more widespread than ever perceived.

The emergence of non-stranger rape as an issue of national importance has generated a range of critiques, focused particularly on the military, on college campuses, and on a “rape culture” that surrounds and sustains faulty institutional responses. Largely absent from these conversations, however, is the substantive criminal law. To be sure, commentators subject the decision-

¹ For a seminal treatment, see SUSAN ESTRICH, *REAL RAPE* (1987).

² As one recent commentary observed, “Rape is everywhere today.” *What Rape Culture? A Conversation with Kate Harding and Anne K. Ream*, *NEW CITY* (June 19, 2014), <http://newcity.com/2014/06/19/what-rape-culture-a-conversation-with-kate-harding-and-anne-k-ream/>.

³ Non-stranger rape has been featured on a number of television blockbusters, including *Mad Men*, *Girls*, *House of Cards*, and *Downton Abbey*. See Amanda Hess, *Was That a Rape Scene in Girls?*, *SLATE: XXFACTOR* (Mar. 11, 2013, 4:19 PM), http://www.slate.com/blogs/xx_factor/2013/03/11/girls_adam_and_natalia_sexual_assault_and_verbal_consent_on_hbo_s_girls.html; David Itzkoff, *Watching ‘Downton Abbey’: A Shocking Crime*, *N.Y. TIMES: ARTSBEAT* (Jan. 12, 2014, 10:00 PM), <http://artsbeat.blogs.nytimes.com/2014/01/12/watching-downton-abbey-a-shocking-crime/>; Emily Nussbaum, *Nussbaum on ‘Mad Men’: How Joan’s Rape Changed Everything*, *VULTURE* (Oct. 24, 2008), http://www.vulture.com/2008/10/nussbaum_on_mad_men_why_joans.html; Kelsea Stahler, *‘House of Cards’ Season 2 Tackles Rape Like No Other Thriller Has*, *BUSTLE* (Feb. 14, 2014), <http://www.bustle.com/articles/15595-house-of-cards-season-2-tackles-rape-scene-like-no-other-thriller-has>.

⁴ In just this past year, high profile media coverage of non-stranger rape, especially on campus, has been extensive. For a few of many, many examples, see Alan Blinder & Richard Perez-Peña, *Vanderbilt Rape Trial Didn’t Stir Vanderbilt*, *N.Y. TIMES*, Jan. 29, 2015, at A14; Walt Bogdanich, *Reporting Rape, and Wishing She Hadn’t*, *N.Y. TIMES*, July 13, 2014, at A1; Eliza Gray, *Sexual Assault on Campus*, *TIME*, May 26, 2014, at 20; James Hamblin, *How Not to Talk About the Culture of Sexual Assault*, *ATLANTIC* (Mar. 29, 2014), <http://www.theatlantic.com/health/archive/2014/03/how-not-to-talk-about-the-culture-of-sexual-assault/359845/>.

⁵ In the political realm, reform efforts have focused on sexual assault in the military and sexual assault on campus (still ongoing). For an overview of the former, see Helene Cooper, *Pentagon Study Finds 50% Increase in Reports of Military Sexual Assaults*, *N.Y. TIMES*, May 2, 2014, at A14; Helene Cooper, *Senate Rejects Blocking Military Commanders from Sexual Assault Cases*, *N.Y. TIMES*, Mar. 7, 2014, at A11. For a discussion of evolving political responses to the campus sexual assault crisis, see *infra* notes 53–55 and accompanying text.

making of police and prosecutors to scrutiny, and rightly so.⁶ But, for the most part, ongoing efforts to address rape have ignored the criminal statutes that define rape.

This neglect is troubling. In many areas, rape law is in desperate need of modernization,⁷ and a failure to notice its retrograde features virtually guarantees their endurance. This Article focuses on one such feature—the ambiguous doctrinal treatment of sexual consent. As we will see, in most jurisdictions a statutory force requirement displaces the question of consent.⁸ It is surprising, then, that the issue still tends to surface throughout the case law. When defendants appeal their convictions on grounds that the proof of force was inadequate, courts not only tend to agree, but to remark—gratuitously—on the likelihood that the victim actually consented to the intercourse. To reach this conclusion, courts often deploy retrograde notions of consensual sex and female sexuality. Lacking an applicable statutory definition of consent, rape law enables judicial imaginings that are incompatible with prevailing understandings.⁹ This failing is especially striking when juxtaposed with the notable turn, of late, toward a culture of consent.¹⁰ Until rape statutes are reformed to reflect this cultural shift, judicial perspectives on consent will remain unmoored from legislative guidance and immune from review.

Part I describes this revolution by examining the contemporary campus rape crisis. In this context, consent occupies a critical place in ongoing discussions of both the problem and its solution. Indeed, it is virtually axiomatic that nonconsensual sex is rape; the challenge outstanding is to define consent. On this score, college disciplinary codes seem to be converging on a standard that requires an affirmative expression of some sort, verbal or

⁶ See, e.g., Tyler Kingkade, *Prosecutors Rarely Bring Charges in College Rape Cases*, HUFFINGTON POST (June 17, 2014), http://www.huffingtonpost.com/2014/06/17/college-rape-prosecutors-press-charges_n_5500432.html; Amanda Marcotte, *Why Not Just Turn Campus Rape Allegations Over to the Police? Because the Police Don't Investigate*, SLATE: XXFACTOR (Sept. 15, 2014, 1:51 PM), http://www.slate.com/blogs/xx_factor/2014/09/15/new_york_times_on_the_laughable_tallahassee_police_response_to_sexual_assault.html. See generally Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145 (2012) (documenting the attrition of rape allegations as cases progress through the criminal justice system).

⁷ See, e.g., Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461 (2012) (critiquing outdated views of normative female sexuality as reflected in the evidentiary doctrine of the rape shield).

⁸ On the quantum of force recognized as legally sufficient, see *infra* note 80 and accompanying text.

⁹ See *infra* notes 41–56 and accompanying text.

¹⁰ “A consent culture is one in which the prevailing narrative of sex is centered around mutual consent.” M_Wanderers, Post to *Consent Culture*, URBAN DICTIONARY (Feb. 17, 2014), <http://www.urbandictionary.com/define.php?term=consent%20culture> (last visited July 25, 2015).

nonverbal.¹¹ Although this standard is not without its detractors,¹² the starting point for debate is that non-consent—as opposed to force—defines rape. Against this backdrop, the Model Penal Code and many state statutes—about half—continue to insist otherwise.¹³ In these jurisdictions, absent force, sex without consent does not qualify as rape. The treatment of this common fact pattern reflects a profound gap between the criminal law and widely shared social norms.

Part II develops a new perspective on the criminal law’s consent problem. It does so by analytically isolating a set of cases that might fairly be said, notwithstanding the governing legal framework, to involve rape without force—that is, sex without consent. These cases involve the operation of what I will call “functional force”—recurring dynamics that obviate the need for abundant physical force to accomplish nonconsensual intercourse. This taxonomy of functional force includes three categories: sleep,¹⁴ intoxication,¹⁵ and relational control.¹⁶ In each of these categories, the absence of consent (which I will sometimes refer to as non-consent) is the salient feature; yet rape law renders non-consent largely irrelevant. Where consent appears at all, it is conceived in startlingly archaic ways.

The disconnect between criminal definitions of rape and university definitions of rape has emerged without discussion.¹⁷ The analysis that follows begins to fill this void.¹⁸ I argue that a fundamental divide between the

¹¹ See Jake New, *The “Yes Means Yes” World*, INSIDE HIGHER ED (Oct. 17, 2014), <https://www.insidehighered.com/news/2014/10/17/colleges-across-country-adopting-affirmative-consent-sexual-assault-policies> (reporting that 800 colleges have adopted standards of affirmative consent). I will argue that, because it fetishizes force, the criminal law—which one might view as a natural source of workable definitions of consent—cannot guide efforts in this regard.

¹² See *infra* notes 58–65 and accompanying text.

¹³ See *infra* notes 71–76 and accompanying text.

¹⁴ See *infra* Part II.A.

¹⁵ See *infra* Part II.B.

¹⁶ See *infra* Part II.C.

¹⁷ What has been noticed is the far more limited set of procedural protections afforded those accused of sexual assault in college disciplinary proceedings (as compared to protections afforded criminal defendants). See, e.g., Elizabeth Bartholet et al., Opinion, *Rethink Harvard’s Sexual Harassment Policy*, BOSTON GLOBE, Oct. 15, 2014, <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqBM/story.html> (detailing the objections of dozens of members of Harvard’s law faculty to new rules governing sexual assault; to date, these rules do not include an affirmative consent standard). Although the procedural deficiencies of college disciplinary processes are outside the scope of this discussion, it is worth noting the importance of both appropriate substantive standards of conduct and adequate procedures for implementing these standards.

¹⁸ I first identified this divide in a public “debate” over policy responses to campus rape. Deborah Tuerkheimer, *Improving the Criminal System’s Response Would Cut Campus Rape*, N.Y. TIMES (Dec. 12,

treatment of rape on and off campus has consequences that reverberate across domains.

Part III discusses why dueling definitions of rape on and off campus are of concern. Overall, this division raises the specter of campus rape as a sub-criminal offense, one located mainly outside the bounds of our criminal justice system—a reality not lost on victims of campus rape, the vast majority of whom choose not to involve the police.¹⁹ But the burdens of a quasi-criminal approach to rape are not distributed equally. Rather, the discrepancy between competing rape definitions functions to discount the non-forcible sexual violations of women (and men) who are not presently attending college—as it happens, women who are *even more vulnerable* to these violations than their undergraduate counterparts.²⁰ For victims living in jurisdictions that maintain a force requirement, unless they attend college, there is no resort to an alternate (albeit sub-criminal) definition of rape as sex without consent.²¹ This prospect raises a global critique: insistence that force is the defining feature of rape affords relatively less legal protection to women who lack privileged collegiate status. To help remedy this breach, this Article offers a theory of why—regardless of status—sexual consent matters.

In conclusion, I urge the renovation of rape law.²² Efforts to end sexual assault, on and off campus, cannot succeed unless consent culture migrates to criminal justice.²³

2014), <http://www.nytimes.com/roomfordebate/2014/12/12/justice-and-fairness-in-campus-rape-cases/improving-the-criminal-systems-response-would-cut-campus-rapes>.

¹⁹ See SOFI SINOZICH & LYNN LANGTON, U.S. DEP'T JUSTICE BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013, at 1 (Jill Thomas & Lynne McConnell, eds., Dec. 2014), <http://www.bjs.gov/content/pub/pdf/rsavca9513.pdf> (finding that 80% of sexual assaults on campus were not reported to police); see also Kimberly Hefling, *Justice Department: Majority of Campus Sexual Assault Goes Unreported to Police*, PBS NEWSHOUR (Dec. 11, 2014), <http://www.pbs.org/newshour/rundown/four-five-acts-campus-sexual-assault-go-unreported-police/> (explaining the massive underreporting of campus rape as significantly attributable to the fact that victims “know in our society that the only rapes that are taken seriously are those committed by strangers and are significantly violent”); *infra* notes 244–46 and accompanying text.

²⁰ See SINOZICH & LANGTON, *supra* note 19, at 4 (finding that women aged eighteen to twenty-four who were not college students were 1.2 times more likely to be sexually assaulted than women in the same age bracket who attended college; and that non-students experienced approximately twice the number of sexual assaults as their student counterparts).

²¹ See *infra* text following notes 240–48.

²² See *infra* notes 263–70 and accompanying text.

²³ Decades ago, Lynne Henderson succinctly observed that “[law and culture] reciprocally influence understandings of what is and is not the crime of rape.” Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 132 (1992). For more general thoughts on the law’s relationship to social norms, see Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Lawrence Lessig, *The*

I. THE CONSENT REVOLUTION

Consent is widely understood as the governing principle in matters of sex. Although the concept is not novel, its visibility and importance are new. These days, sexual consent is prominently featured in mainstream and social media.²⁴ Consent animates social movements,²⁵ it even enters political discourse.²⁶ The meaning of consent remains contested—a subject to which we will return.²⁷ Still, more than ever, consent is on the collective mind.

The rise of consent as a construct of paramount significance is especially evident in the college setting. This development has been propelled by the campus rape crisis.²⁸ Of late, unprecedented attention has been given to the stunning incidence of sexual assault during the undergraduate years—up to one in five women, according to the much-debated federal figure.²⁹ At the same time, due in no small part to the activism of college rape victims,³⁰ it has

Regulation of Social Meaning, 62 U. CHI. L. REV. 943 (1995); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

²⁴ See, e.g., Tara Culp-Ressler, *What 'Affirmative Consent' Actually Means*, THINKPROGRESS (June 25, 2014), <http://thinkprogress.org/health/2014/06/25/3453041/affirmative-consent-really-means/>; Natalie Kitroeff, *Making Consent Cool: Students Advocate for Consensual Sex*, N.Y. TIMES, Feb. 9, 2014, at ED16; Abby Young-Powell, *Do Students Need Classes on Sexual Consent?*, GUARDIAN (June 5, 2014), <http://www.theguardian.com/education/2014/jun/05/sexual-consent-classes-for-university-students>.

²⁵ See Deborah Tuerkheimer, *SlutWalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1475–78 (2014) (describing why sexual consent emerged as the “touchstone” of an international anti-rape movement).

²⁶ See *infra* notes 35–39 and accompanying text.

²⁷ See *infra* notes 58–65 and accompanying text.

²⁸ For an overview, see Michelle Goldberg, *Why the Campus Rape Crisis Confounds Colleges*, NATION (June 5, 2014), <http://www.thenation.com/article/180114/why-campus-rape-crisis-confounds-colleges>.

²⁹ SEXUAL VIOLENCE: FACTS AT A GLANCE, CENTERS FOR DISEASE CONTROL AND PREVENTION (2012), <http://www.cdc.gov/violenceprevention/pdf/sv-datasheet-a.pdf>. The accuracy of the 18% figure has been attacked based on limitations of the data set and on studies suggesting that women are raped on campus with far less frequency. For a useful explanation of discrepancies in the research, see Dana Goldstein, *The Dueling Data on Campus Rape*, MARSHALL PROJECT (Dec. 11, 2014), <https://www.themarshallproject.org/2014/12/11/the-dueling-data-on-campus-rape>. The prevalence of sexual violence against undergraduate men, as compared to women, is even less understood. See U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, SEXUAL VIOLENCE ON CAMPUS 2 (July 9, 2014) [hereinafter SEXUAL VIOLENCE ON CAMPUS], <http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf>.

³⁰ “It seems as though each day, there is another survivor coming forward with a story about the crime against them being treated with either incompetence or indifference by a university.” Olivia Nuzzi, *Campus Sex Assault Law Could Be 'Two Years' Away*, DAILY BEAST (July 3, 2014, 5:45 AM), <http://www.thedailybeast.com/articles/2014/07/03/campus-sex-assault-law-could-be-two-years-away.html>. For recent accounts of survivors who publicly described their experience of rape and condemned a failed college response, see, for example, Bogdanich, *supra* note 4; Anonymous, *Dear Harvard: You Win*, HARV. CRIMSON (Mar. 31, 2014), <http://www.thecrimson.com/article/2014/3/31/Harvard-sexual-assault/>; Emma Bogler, *Frustrated by Columbia's Inaction, Student Reports Sexual Assault to Police*, COLUM. DAILY SPECTATOR

become uncontroversial to proclaim that universities are not responding effectively to the problem.³¹

This massive institutional breakdown encompasses many components, including failure to encourage reporting; failure to provide adequate training to faculty, staff, and investigators; failure to provide adequate services for survivors; failure to coordinate with the efforts of law enforcement; and failure to comply with the requirements and best practices for adjudicating allegations.³² For present purposes, however, one deficit is most relevant: until recently, most college disciplinary codes did not define sexual consent. This omission became glaring—so much so that, last summer, the Department of Education proposed a rule requiring all institutions of higher education to include a definition of consent in their codes.³³

Without a doubt, the nationwide response to sexual assault is on the precipice of change. Three features of the discourse around campus rape are telling. First, reformers begin from the proposition that sex without consent is rape, regardless of the quantity of force used to accomplish it.³⁴ Second, an increasingly mainstream conception of consent requires an affirmative expression of one's will; on this view, passivity (in its extreme incarnation, unconsciousness) does not signify consent to intercourse. Finally, efforts to lend content to the notion of affirmative consent are proceeding without

(May 16, 2014, 5:05 PM), <http://columbiaspectator.com/news/2014/05/16/frustrated-columbias-inaction-student-reports-sexual-assault-police>. See also Jake New, *Major Sexual Assault Settlement*, INSIDE HIGHER ED (July 21, 2014), <http://www.insidehighered.com/news/2014/07/21/u-connecticut-pay-13-million-settle-sexual-assault-lawsuit#sthash.DYYNvyU.dpbs> (reporting that the University of Connecticut agreed to pay nearly \$1.3 million to settle a federal lawsuit alleging the mishandling of students' sexual assault complaints).

³¹ The Department of Education is currently investigating ninety-five colleges and universities for possible Title IX violations. Tara Culp-Ressler, *These Are the Colleges and Universities Now Under Federal Investigation for Botching Rape Cases*, THINKPROGRESS (Jan. 13, 2015, 9:00 AM), <http://thinkprogress.org/health/2015/01/13/3610865/title-ix-investigations/>. As conservative commentator Ross Douthat has observed, "In the debate over sexual violence on college campuses, two things are reasonably clear. First, campus rape is a grave, persistent problem, shadowing rowdy state schools and cozy liberal-arts campuses alike. Second, nobody—neither anti-rape activists, nor their critics, nor the administrators caught in between—seems to have a clear and compelling idea of what to do about it." Ross Douthat, Opinion, *Stopping Campus Rape*, N.Y. TIMES, June 29, 2014, at SR11.

³² These deficiencies were specifically cited and discussed in Senator McCaskill's Report. SEXUAL VIOLENCE ON CAMPUS, *supra* note 29.

³³ Violence Against Women Act, 79 Fed. Reg. 35418 (proposed June 20, 2014). To read the final version of the rule, see Violence Against Women Act, 79 Fed. Reg. 62752 (proposed Oct. 20, 2014) (codified at 34 C.F.R. pt. 668).

³⁴ Many colleges now use the term "nonconsensual sex" instead of rape. Claire Gordon, 'Nonconsensual Sex': *How Colleges Rebranded Rape*, AL JAZEERA AM. (Apr. 17, 2014), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/4/17/nonconsensual-sexwhenrapeisreworded.html>.

engaging the law of rape, which is relatively un-evolved. I discuss these observations in turn.

A. *Consent Culture*

Last spring, the White House produced a one-minute public service announcement devoted to non-stranger rape—rape “on college campuses, at bars, at parties, even in high schools.”³⁵ The video features President Obama and Vice Present Biden, along with superstars Daniel Craig, Benicio del Toro, Dulé Hill, Seth Meyers, and Steve Carell. At the outset, del Toro declares, “if she doesn’t consent, or if she can’t consent, it’s rape.” The rest of the spot functions as a call to action: speak up, help her, do not blame her, do not be a part of the problem, be a part of the solution.³⁶

When it was released, the public service announcement received a good deal of notice and its message generated no real dispute.³⁷ Notably, the basic admonition—without consent, sex is rape—prompted no dissension. By considering the PSA and the response it did *not* provoke, one can discern what might be described as an increasingly settled cultural consensus: consent is now generally viewed as the essence of lawful sex.

This cultural consensus has—again, without notice—framed the policy discourse around campus rape. For instance, in April 2014, the First Report of the White House Task Force to Protect Students From Sexual Assault reiterated: “[I]f she doesn’t consent—or can’t consent—it’s a crime.”³⁸ The

³⁵ The White House, *I is 2 Many PSA: 60 Second*, YOUTUBE (Apr. 29, 2014), <https://www.youtube.com/watch?v=xLdElcv5qqc>.

³⁶ The role of bystander intervention in preventing campus rape has become a topic of considerable discussion. See Nancy Cohen, *Training Men and Women on Campus to ‘Speak Up’ to Prevent Rape*, NPR (Apr. 30, 2014), <http://www.npr.org/2014/04/30/308058438/training-men-and-women-on-campus-to-speak-up-to-prevent-rape>.

³⁷ See, e.g., Gael Fashingbauer Cooper, *Biden, Obama Join Hollywood Stars in Anti-Rape PSA*, TODAY (Apr. 30 2014, 1:00 PM), <http://www.today.com/entertainment/biden-obama-join-hollywood-stars-anti-rape-psa-2D79601776>; Amanda Hess, *Daniel Craig, Steve Carrell, and Seth Meyers Would Like You to End Rape, Please*, SLATE: XXFACTOR (Apr. 30, 2014, 11:16 AM), http://www.slate.com/blogs/xx_factor/2014/04/30/obama_anti_rape_psa_daniel_craig_steve_carell_seth_meyers_and_benicio_del.html; Alexandra Petri, *The White House’s New PSA Against Rape is a Good Start*, WASH. POST: COMPOST (May 1, 2014), <http://www.washingtonpost.com/blogs/compost/wp/2014/05/01/the-white-houses-new-psa-against-rape-is-a-good-start/>; Marisa Taylor, *PSA Tells Men on College Campuses to Step in and Stop Rape*, AL JAZEERA AM. (April 30, 2014), <http://america.aljazeera.com/articles/2014/4/30/college-sexual-assaultpsabidenwhitehouse.html>.

³⁸ WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 2 (Apr. 2014) [hereinafter TASK FORCE REPORT], http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf; see also

White House Checklist for Sexual Misconduct Policies recommended that schools “clearly define all conduct prohibited,” as well as consent itself.³⁹

Efforts to combat rape on campus manifest widespread agreement that, as a normative proposition, sex must be consensual.⁴⁰ Conversely, sex without consent is considered rape. In the course of reshaping the institutional response to sexual assault, this much has become apparent: The necessity of consent is the premise that frames the discussion.

B. *Consent as Affirmative*

As consent has ascended in importance, social and institutional definitions of its meaning are shifting. While by no means universally shared, an understanding of consent as affirmative is becoming commonplace on campuses.⁴¹ As one commentator recently remarked, “from coast to coast, colleges are rethinking how they define consent on their campuses.”⁴²

WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION (Jan. 2014), http://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf.

³⁹ See *Checklist for Campus Sexual Misconduct Policies* 4, NOT ALONE, <https://www.notalone.gov/assets/checklist-for-campus-sexual-misconduct-policies.pdf>.

⁴⁰ See Rebecca Nagle, *Five Great College Campaigns Promoting Consent*, BITCH MEDIA (Oct. 9, 2013, 9:33 AM), <http://bitchmagazine.org/post/five-great-college-campaigns-promoting-consent> (discussing ways that college students are “fighting rape culture on their campuses” with “consensual-sex promoting actions”).

⁴¹ See New, *supra* note 11 (reporting that 800 colleges have adopted standards of affirmative consent). A number of prominent feminist writers have expressed support for affirmative consent standards. See, e.g., Amanda Hess, *“No Means No” Isn’t Enough. We Need Affirmative Consent Laws to Curb Sexual Assault*, SLATE: XXFACTOR (June 16, 2014, 2:13 PM), http://www.slate.com/blogs/xx_factor/2014/06/16/affirmative_consent_california_weights_a_bill_that_would_move_the_sexual.html (“Having sex with a person who is lying limply on a bed is not consensual, unless that person happens to be really, really into that—but that’s a situation that requires a conversation, not an assumption.”); Amanda Marcotte, *Can Affirmative Consent Standards Fix the Problem of Alcohol and Rape?*, SLATE: XXFACTOR (Feb. 18, 2014, 12:57 PM), http://www.slate.com/blogs/xx_factor/2014/02/18/alcohol_and_rape_it_s_time_to_embrace_affirmative_consent_standards.html (“[It is] important, then, to support the push for states and universities and other institutions to create an affirmative consent standard, where both parties should display a ‘demonstrated intent to have sex’ in order for it to be considered consent.”).

Some feminists have also noted that “affirmative consent” standards, which represent an improvement, may still fail to account for female sexual agency. See, e.g., Maya Dusenbery, *“Affirmative Consent” Just Means Mutual Desire. And It Should Definitely Be the Standard*, FEMINISTING, <http://feministing.com/2014/06/25/affirmative-consent-just-means-mutual-desire-and-it-should-definitely-be-the-standard/> (last visited July 25, 2015). This perspective has been articulated as follows:

Frankly, sometimes I think we should ditch the term “consent” altogether. It feels like a carryover from the old male-aggressor/female-gatekeeper model of (hetero) sex, and, even with the addition of adjectives like “affirmative” or “enthusiastic,” retains this contractual connotation that, I think, detracts from the shift we’re actually trying to make here. The point is that people shouldn’t be “consenting” to sex as if they’re acquiescing to a request to borrow your damn toothbrush.

One indication of this movement's mainstream appeal is the recent passage of a California law requiring all institutions of higher education to incorporate affirmative consent definitions into their disciplinary codes.⁴³ According to the groundbreaking legislation,

“Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.⁴⁴

Although California was the first state to mandate a “yes means yes” standard for all institutions of higher education,⁴⁵ universities around the nation were already moving in this direction.⁴⁶ For instance, Yale's definition of consent requires “positive, unambiguous, voluntary agreement at every point

Id.

⁴² New, *supra* note 11.

⁴³ Ian Lovett, *California Bill Focuses on Curbing Campus Sexual Assaults*, N.Y. TIMES, Sept. 11, 2014, at A16. The law has unsurprisingly encountered many of the criticisms generally aimed at efforts to define affirmative consent. Some objections relate to the involvement of the state. *See, e.g.*, Editorial, *Sex and College Students: Should the Legislature Be in the Mix Too?*, L.A. TIMES (May 28, 2014, 4:25 PM), <http://www.latimes.com/opinion/editorials/la-ed-affirmative-consent-20140525-story.html> (“A state law is not the way to convey messages better imparted by experts. It's one thing for the government to say what people may not do, but it's more worrisome when politicians tell us what we must do.”). Still other areas of disagreement concern the contents of affirmative consent rules. *See infra* notes 58–65 and accompanying text. At times, the critique has distorted the proposed legislation. *See* Tracy Clark-Flory, *The Media Slams a Bill for Banning Foreplay on College Campuses—Except Everything They're Writing Is a Lie*, SALON (June 5, 2014, 6:59 PM), http://www.salon.com/2014/06/05/the_media_slams_a_bill_for_banning_foreplay_on_college_campuses_except_everything_theyre_writing_is_a_lie/.

⁴⁴ 2014 Cal. Stat. ch. 748 (S.B. No. 967).

⁴⁵ Other states are already following suit. In New York, Governor Andrew Cuomo is spearheading legislative efforts to require all universities and colleges to adopt an affirmative consent definition. *E.g.*, Amanda Marcotte, *Andrew Cuomo Proposes Affirmative Consent for New York Universities*, SLATE: XXFACTOR (Jan. 19, 2015, 9:11 AM), http://www.slate.com/blogs/xx_factor/2015/01/19/affirmative_consent_in_new_york_gov_andrew_cuomo_proposes_legislation.html. Other states, including New Jersey and New Hampshire, are considering passage of similar laws. *E.g.*, New, *supra* note 11.

⁴⁶ *See* New, *supra* note 11 (reporting that 800 colleges have adopted standards of affirmative consent). Colleges in the University of California system already had a similar standard in place when the law was enacted defining consent as “an affirmative, unambiguous and conscious decision by each participant to engage in mutually agreed upon sexual activity.” *Sexual Violence Prevention & Response: Education & Training*, U.C., BERKELEY, <http://survivorsupport.berkeley.edu/sexual-assault-facts> (last visited July 25, 2015).

during a sexual encounter—the presence of an unequivocal ‘yes’ (verbal or otherwise), not just the absence of a ‘no.’⁴⁷ At the University of Iowa, “consent must be freely and affirmatively communicated between both partners in order to participate in sexual activity or behavior. It can be expressed either by words or clear, unambiguous actions Silence, lack of protest, or no resistance does not mean consent.”⁴⁸ At schools that have not yet incorporated a rule of affirmative consent, students are pressuring administrators to do so.⁴⁹ For example, staffers at the *Harvard Crimson* (the daily newspaper) recently endorsed language that would require a “demonstrated intent to have sex from both parties,” adding that this change is “number one on [the] list of demands” of a campus group aimed at “dismantling rape culture.”⁵⁰ Each month, it seems, more colleges amend their disciplinary codes to reflect this imperative.⁵¹

Affirmative consent’s mainstream status is also evidenced—and no doubt bolstered—by the Obama Administration’s recent involvement in the problem of campus rape. According to the Sexual Assault Task Force, consent must be affirmative; “[s]ilence or absence of resistance does not imply consent.”⁵² Given recent interventions by the White House,⁵³ the Department of Education,⁵⁴ and Congress⁵⁵ to spur campus reform, we should expect to see

⁴⁷ Tara Culp-Ressler, *Yale University Works to Strengthen Its Sexual Assault Policy by Clarifying ‘Consent’*, THINKPROGRESS (Sept. 13, 2013, 9:07 AM), <http://thinkprogress.org/health/2013/09/13/2616531/yale-university-consent/>.

⁴⁸ *Affirmative Consent Is Sexy: University of Iowa Policy Summary*, UNIV. OF IOWA, <http://dos.uiowa.edu/assistance/consent/>.

⁴⁹ Alongside this effort is activism aimed directly at college cultural norms. See Kitroeff, *supra* note 24.

⁵⁰ See, e.g., Editorial, *Fixing Sexual Assault Response*, HARV. CRIMSON (Apr. 7, 2014) (citing Deborah Tuerkheimer, Opinion, *We Preach ‘No Means No’ for Sex, But That’s Not What The Law Says*, GUARDIAN (Jan. 12, 2014, 8:30 PM), <http://www.theguardian.com/commentisfree/2014/jan/12/rape-definition-use-of-force/>, <http://www.thecrimson.com/article/2014/4/7/fixing-sexual-assault-response/>; *Our Demands*, OUR HARV. CAN DO BETTER, <https://ourharvardcandobetter.wordpress.com/our-demands/> (last visited July 25, 2015).

⁵¹ New, *supra* note 11.

⁵² *Sample Language and Definitions of Prohibited Conduct for a School’s Sexual Misconduct Policy 4*, NOT ALONE, <https://www.notalone.gov/assets/definitions-of-prohibited-conduct.pdf>.

⁵³ See *supra* notes 35–39 and accompanying text.

⁵⁴ See *supra* note 33 and accompanying text.

⁵⁵ See Jennifer Steinhauer, *Proposed Bill Targets Assaults On Campus*, N.Y. TIMES, July 31, 2014, at A14. According to Senator McCaskill, a sponsor of the proposed legislation, “[T]he bipartisan Campus Accountability and Safety Act will create incentives for schools to take proactive steps to protect their students and rid their campuses of sexual predators.” See Press Release, U.S. Senator Claire McCaskill, *The Bipartisan Campus Accountability and Safety Act 1*, <http://www.mccaskill.senate.gov/imo/media/doc/CampusAccountabilityAndSafetyAct.pdf> (last visited July 26, 2015). The bill is designed in part to address the problem of confusion regarding “acceptable standards of conduct and definitions of rape and sexual assault.”

growing uniformity in the definition of consent across disciplinary codes, with an emphasis on its affirmative qualities. But it is unlikely that this equilibrium will be achieved without a struggle.

C. *Consent on the Ground*

A workable definition of affirmative consent is elusive.⁵⁶ Americans rarely talk about what consent looks like, and a conception of passive sexuality—particularly passive female sexuality—persists.⁵⁷ Many who support affirmative consent in the abstract balk at incorporating this norm into a binding rule. Three separate but related concerns animate the opposition to codifying affirmative consent.

One preoccupation stems from the claimed impossibility of interpreting a party's signals in a sexual encounter, a situation that is presented as hopelessly confusing and ambiguous.⁵⁸ Among those who reject this characterization, many nevertheless concede the difficulty of specifying with precision what constitutes adequate consent.⁵⁹

A second and related group of criticisms center on the “unsexiness” of affirmative consent rules and how they will detract from the spontaneity of

Press Release, U.S. Senator Claire McCaskill, Bipartisan Bill Takes Aim at Sexual Assault on College and University Campuses (July 30, 2014), <http://www.mccaskill.senate.gov/media-center/news-releases/campus-accountability-and-safety-act>.

⁵⁶ A rich body of scholarship considers the ontology of consent from both legal and philosophical perspectives. See, e.g., Robin West, *Sex, Law, and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 221, 224 (Franklin G. Miller & Allan Wertheimer eds., 2010). Although theories of consent are largely outside the scope of this discussion, it is worth noting that affirmative consent rules tend to reflect a performative (as opposed to a subjective) orientation. See ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 145–47 (2003) (describing different philosophical approaches to defining consent).

⁵⁷ This point is referenced obliquely in a video that educates University of California, Berkeley students about the impact of intoxication on consent. In the video, trainers urge students to “think[] about sex as something that you do *with* someone, versus *to* someone.” See University Health Services-Tang Center, *EmpowerU: Let's Talk About Consent*, YOUTUBE (Feb. 20, 2014) (emphasis added), https://www.youtube.com/watch?v=dV_Tp8eO9YE.

⁵⁸ See, e.g., Editorial, *supra* note 43 (worrying that the bill's language seems “vague—what exactly would constitute an unambiguous sign of consent?”); Emma Woolf, *Does California's College Rape Bill Go Too Far in Regulating Sex?*, DAILY BEAST (June 23, 2014, 5:45 AM), <http://www.thedailybeast.com/articles/2014/06/23/does-california-s-college-rape-bill-go-too-far-in-regulating-sex.html> (“[R]esolving whether ‘affirmative consent’ was not only present but ‘continuous’ throughout an act will be nearly impossible.”).

⁵⁹ See, e.g., Hess, *supra* note 41 (“It's a bit ironic that the lawmakers behind the California bill seem more comfortable specifying what constitutes rape than actually describing what clear, unambiguous, enthusiastic consensual sex looks like. I suppose that's because consensual sex is intimate and fraught; like obscenity, you kind of know it when you see it.”).

sexual encounters at a substantial cost,⁶⁰ whether this cost is framed in terms of diminished sexual pleasure,⁶¹ or the greater awkwardness that will result from communication around sex.⁶²

Last, some critics of affirmative consent rules are troubled by the prospect of penalizing men who fail to conform their sexual practices to an idealized vision, given how dramatically this vision is said to depart from reality.⁶³ From this perspective, what are billed as “gray zone” cases should not be defined as rape unless and until sexual norms shift.⁶⁴ A stronger form of this objection despairs that all or most sex would count as rape if an affirmative consent requirement were to be adopted.⁶⁵

My purpose in cataloguing these objections is not to answer them here,⁶⁶ but to observe that, while the content of an affirmative consent rule is

⁶⁰ One commentator suggested that California lawmakers “want sex to be as spontaneous as doing your taxes,” and criticized the bill as “the sort of law that is designed to suck everything joyous, spontaneous, creative, intimate and beautiful out of human existence.” In short, lamented this critic, “for normal people, it’s a buzz kill to say the least.” Tad Cronn, *California Proposes a License to Breed*, POL. OUTCAST (June 5, 2014), <http://politicaloutcast.com/2014/06/california-proposes-license-breed/#YSP0Yg5OwTFVDsRU.99> (last visited July 26, 2015).

⁶¹ See Steve Straub, *California Liberals Pass Bill to Regulate Sex; Requires Specific Verbal or Written Consent*, FEDERALIST PAPERS PROJECT, www.thefederalistpapers.org/education-2/california-liberals-pass-bill-to-regulate-sex-requires-specific-verbal-or-written-consent (last visited June 23, 2015) (worrying that sex “that occurs during the ‘heat of the moment’ would be outlawed” by the California affirmative consent law); Cathy Young, *California’s Absurd Intervention over Dorm Room Sex*, REASON (June 22, 2014), <http://reason.com/archives/2014/06/22/californias-absurd-intervention-over-dor> (criticizing requirement of affirmative consent because “[w]hether anyone could feel ‘sexy’ under such conditions seems dubious at best”).

⁶² See Kitroeff, *supra* note 24 (observing, without endorsing the perspective, that “[t]oday, as it was decades ago, the butt of the joke is the awkward formality of the ask”); Young, *supra* note 61 (citing the “common view that such negotiations [around affirmative consent] are awkward moment-ruiners”).

⁶³ One commentator has suggested, “the fact that many people seem to feel like [an affirmative consent requirement] marks such a radical departure from our current approach to sex reveals the depths of rape culture more than all the stats on sexual assault, in my opinion.” Dusenbery, *supra* note 41.

⁶⁴ With respect to this concern, the specific language used to describe affirmative consent is critical. Cf. Young, *supra* note 61 (approving changes to the bill that removed “the warning against relying on nonverbal communication and the admonishment to stop for a safety check if any ambiguity seems to arise”).

⁶⁵ See, e.g., David Bernstein, *YOU Are a Rapist; Yes YOU!*, VOLOKH CONSPIRACY (June 23, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/23/you-are-a-rapist-yes-you/> (warning that some definitions “make[] almost every adult in the U.S. (men AND women)—and that likely includes you, dear reader—a perpetrator of sexual assault”); Woolf, *supra* note 58 (discussing critics that caution the affirmative consent law would “make most ordinary couples potentially liable for sex offenses”).

⁶⁶ Many commentators have roundly rejected the idea that a cultural shift toward requiring affirmative consent is unduly onerous. For example, Amanda Taub has observed:

From the perspective of actually trying to have a genuinely consensual sex life, there’s nothing particularly burdensome here. Don’t take advantage of someone else’s inebriation. Hold out for enthusiasm instead of resignation. You don’t need to be a rocket scientist in order to have

vigorously contested, the criminal law is altogether missing from the interpretative debate. This absence merits attention. One might think of the law of rape—or, more precisely, rape statutes that define what is prohibited—as a source of workable consent definitions, or at least a jumping off point.⁶⁷ In fact, quite the opposite is true.

There are a few notable exceptions. For instance, California defines consent as “positive cooperation . . . pursuant to an exercise of free will. . . . freely and voluntarily” given.⁶⁸ Similarly, Wisconsin’s consent definition requires “words or overt actions . . . indicating freely given agreement.”⁶⁹ But for the most part, as we will see, the criminal law lags far behind settled understandings of rape.⁷⁰ Campus rape reform cannot draw upon the law of rape because the law of rape is almost entirely disconnected from the culture of consent.

a conversation in advance about boundaries or to agree on a safe word. And if your partner sends signals that confuse you, stop. What you lose in nights of passion, you will gain in nights of not being a rapist.

Amanda Taub, “*Yes Means Yes*” *Is About Much More than Rape*, VOX (Oct. 13, 2014, 3:00 PM), <http://www.vox.com/2014/10/10/6952227/rape-culture-is-a-tax-on-women-CA-yes-means-yes-dierks-katz>. As Amanda Taub has further argued:

The [California] law didn’t come out of nowhere. It emerged as a response to a status quo that has proved to be an all-too-powerful tool for sexual predators, because it enables them to claim to see consent in everything except continuous, unequivocal rejection. That status quo puts women in the position of having to constantly police their own behavior to make sure that they are not giving the appearance of passive consent. That’s not only exhausting; it’s limiting. It reinforces power imbalances that keep women out of positions of success and authority.

Id.

⁶⁷ The available sanctions for a violation obviously differ dramatically from the campus disciplinary context to the criminal justice system, which presumably accounts for the operation of divergent standards of proof and disparate procedural safeguards.

⁶⁸ See, e.g., CAL. PENAL CODE § 261.6 (West Supp. 2015).

⁶⁹ See WIS. STAT. § 940.225(4) (2014); see also WASH. REV. CODE ANN. § 9A.44.010(7) (West 2009) (defining “consent” to mean that “at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse”).

⁷⁰ To emphasize an earlier point, even vociferous critics of affirmative consent standards view sex without consent as rape. See, e.g., Young, *supra* note 61 (“To say that sex without consent is rape is to state the obvious.”).

II. CRIMINAL LAW'S CONSENT PROBLEM

Even today, a majority of jurisdictions rely on the concept of force in defining rape.⁷¹ State statutory schemes are more varied than ever,⁷² meaning that cross-jurisdictional comparisons are necessarily inexact. That said, a survey of rape laws shows that many states expressly define rape as requiring force,⁷³ while others define rape as sex without consent but then include force as a component of non-consent.⁷⁴ The Model Penal Code falls in the former category, though this may be changing: for the first time in five decades, the American Law Institute is engaging in a multi-year process of reforming the Model Penal Code provisions on rape.⁷⁵ For now, however, the Model Penal Code reflects the fact that, across a majority of states and in various guises, the force requirement endures,⁷⁶ meaning that sex without consent is not itself rape.

⁷¹ See John F. Decker & Peter G. Baroni, "No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1084–86 (2011).

⁷² See Patricia J. Falk, *Not Logic, But Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-by-Fraud*, 123 YALE L.J. ONLINE 353, 357 (2013) ("[T]he once-unitary common law crime of rape, with its heavy reliance on force, has given way to a vast array of criminal statutes differing in coverage and degrees of severity. Rape has transcended its constrictive, one-dimensional roots to become an umbrella for a large number of diverse offenses.").

⁷³ For states that include force in their statutory offense definition, see ALA. CODE § 13A-6-61 (2006); ARK. CODE ANN. § 5-14-103 (West 2012); CAL. PENAL CODE § 261 (West 2014); CONN. GEN. STAT. ANN. § 53a-70 (West 2012); D.C. CODE § 22-3002 (2013); FLA. STAT. ANN. § 794.011(3) (West 2015); GA. CODE ANN. § 16-6-1 (West 2011); HAW. REV. STAT. § 707-730 (West 2008); 720 ILL. COMP. STAT. 5/11-1.20 (2012); IND. CODE ANN. § 35-42-4-1 (West 2012); IOWA CODE ANN. § 709.1 (West 2003); KAN. STAT. ANN. § 21-5503 (West 2012); KY. REV. STAT. ANN. § 510.040 (West 2006); LA. STAT. ANN. § 14:42.1 (2007); ME. REV. STAT. tit. 17-a, § 253 (2006); MD. CODE ANN. CRIM. LAW. § 3-303 (West Supp. 2014); MASS. GEN. LAWS ch. 265, § 22 (LexisNexis 2014); MICH. COMP. LAWS § 750.520b (Supp. 2015); MO. ANN. STAT. § 566.030 (West Supp. 2015); N.M. STAT. ANN. § 30-9-11 (West Supp. 2014); N.Y. PENAL LAW § 130.35 (McKinney 2009); N.C. GEN. STAT. § 14-27.2 (2013); OHIO REV. CODE ANN. § 2907.02 (LexisNexis 2008); OKLA. STAT. tit. 21, § 1114 (Supp. 2013); OR. REV. STAT. ANN. § 163.375 (West 2015); 18 PA. STAT. AND CONS. STAT. ANN. § 3121 (West Supp. 2014); 11 R.I. GEN. LAWS ANN. § 11-37-2 (West 2014); S.C. CODE ANN. § 16-3-652 (Supp. 2014); S.D. CODIFIED LAWS § 22-22-1 (2006); VA. CODE ANN. § 18.2-61 (West Supp. 2013); WASH. REV. CODE ANN. § 9A.44.040 (West 2009); W. VA. CODE ANN. § 61-8B-3 (West Supp. 2014); WIS. STAT. ANN. § 940.225 (West Supp. 2014); WYO. STAT. ANN. § 6-2-302 (2007).

⁷⁴ For states with consent definitions that include force, see ALASKA STAT. ANN. § 11.41.410 (West 2007); ALASKA STAT. ANN. § 11.41.470(8) (West 2007); ARIZ. REV. STAT. ANN. § 13-1406 (West 2014); ARIZ. REV. STAT. ANN. § 13-1401(5) (West 2014); DEL. CODE ANN. tit. 11, § 773 (West 2010); DEL. CODE ANN. tit. 11, § 761 (West 2010); MONT. CODE ANN. § 45-5-502 (West 2009); MONT. CODE ANN. § 45-5-501(1) (West 2009).

⁷⁵ See *Project to Revise MPC Article 213 on Sexual Offenses Begins*, 35 ALI REP., no. 4, Summer 2012, at 1; see also MODEL PENAL CODE § 213 (1962).

⁷⁶ This is despite decades of scholarly criticism, most of it aimed at a redefinition of rape as sex without consent. Indeed, "[v]irtually all modern rape scholars want to modify or abolish the force requirement as an

This Part identifies three categories of cases that place this exclusion in stark relief by depicting the circumstances under which force and non-consent diverge. These cases involve sleep,⁷⁷ intoxication,⁷⁸ and relational control.⁷⁹ As this taxonomy makes evident, nonconsensual intercourse can be accomplished without “force”—a term that, for purposes of rape law, generally means more force than that inherent in the act of intercourse.⁸⁰ Where nonconsensual sex without force is accomplished, the dominant statutory approach classifies such intercourse as *not rape*.

Isolating these cases for analysis yields new perspectives on why, practically speaking, the rape definition matters. As a survey of the case law shows, these are instances where a statutory force requirement is often difficult or impossible to satisfy (despite the absence of consent).⁸¹ To the extent this result is normatively unsound, it suggests the need for a more inclusive definitional approach.

Examination of the no-force/no-consent cases exposes not only statutory shortcomings, but also underlying judicial attitudes toward consent. In these cases, consent is typically not an issue on appeal, either because it is not an element of rape or because the force requirement is by far the more difficult to establish.⁸² Still, the case law reflects a telling judicial inclination to posit, needlessly, the presence of consent—and to do so under unlikely circumstances. In dicta, judges manifest deep skepticism of non-consent in the absence of force.⁸³ The effect is a legal presumption of perpetual consent.

element of rape.” David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 322 (2000). Historically, resistance to this type of reform has been deeply entrenched. Still today, though deviations from the paradigm of stranger rape are not expressly invoked to justify the persistence of force as a defining feature of rape, application of the force requirement reveals an abiding concern for over-criminalizing sex between acquaintances and intimates. See Victoria Nourse, *The “Normal” Successes and Failures of Feminism and the Criminal Law*, 75 CHI.-KENT. L. REV. 951, 959 (2000) (“[C]ourts applying the stranger-rape-as-paradigm rule do not say that rape only happens outside voluntary relationships; they say that they are defining force.”).

⁷⁷ See *infra* Part II.A.

⁷⁸ See *infra* Part II.B.

⁷⁹ See *infra* Part II.C. The cases were selected from various jurisdictions to illustrate recurring problems in the judicial treatment of consent.

⁸⁰ See, e.g., *State v. Jones*, 299 P.3d 219, 228 (Idaho 2013) (defining “extrinsic force” as “anything beyond that which is inherent or incidental to the sexual act itself”).

⁸¹ To be clear, I do not mean to suggest that courts are always correct to reverse based on the insufficiency of evidence of force. But it is important to emphasize that these reversals are typically predicated on the need to give independent meaning to a statutory force element. At times, reversal is virtually dictated by this need.

⁸² See *supra* note 71 (describing statutory framework).

⁸³ The preoccupation with force (and resistance) is a longstanding feature of the common law that persists. See, e.g., Meredith J. Duncan, *Sex Crimes and Sexual Miscues: The Need for a Clearer Line Between*

Related to this presumption is a recurring implication that, absent force, nonconsensual sex itself is not violative.⁸⁴ Because these understandings are entirely untethered from a formalized definition of consent, which most criminal statutes lack, they are insulated from review. The unbounded quality of these judgments is striking—especially since, as we will discern, judicial conceptions of consent are antithetical to the affirmative standards sweeping college campuses and, more generally, incompatible with contemporary norms around sex.

A. Sleep

The first category of functional force involves sleeping victims. In these cases, there is no real dispute about non-consent: the victim could not consent to the penetration while sleeping and did not consent to it at any point prior. Yet—unlike in the campus sexual assault setting—non-consent does not define the crime of rape. Instead, the issue of consent almost disappears. What takes its place is an inquiry into whether there is evidence of force sufficient to sustain a rape conviction.⁸⁵ In general, courts find that there is not. Under a definition of rape as forcible nonconsensual intercourse, sex with a sleeping victim does not qualify.

I. State v. Elias⁸⁶

The victim, unnamed in the Idaho appeals court opinion, met Jess Elias through her neighbor, and the two occasionally spent time with friends in the

Forcible Rape and Nonconsensual Sex, 42 WAKE FOREST L. REV. 1087, 1103 (2007) (“Proof that the victim resisted, therefore, is helpful in at least three respects—proving the victim’s nonconsent, proving the defendant’s threat or use of force, and proving the defendant’s culpability.”).

⁸⁴ If the harm of rape were indeed contingent on the use or threatened use of physical violence, as the common law tradition would have it, the force requirement might be justified. In the latest incarnation of this argument, Jed Rubenfeld posits that rape implicates a right of physical self-possession, which means that force sufficient to “dispossess” a woman of her body is required for sex to be rape. Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1426 (2013). As Rubenfeld characterizes it, this understanding of rape provides “a legal and theoretical framework in which the force requirement finds its proper place and explanation.” *Id.* at 1434 (“[T]he right of self-possession offer[s] rape law what it has always lacked.”). For reasons that will become apparent, I disagree. *See infra* notes 248–61 and accompanying text; *see also* Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335 (2013).

⁸⁵ Many states separately criminalize sex with a physically helpless victim. In the cases discussed in this part, however, the defendant was charged with forcible rape.

⁸⁶ No. 39139, 2013 WL 3480737, at *6–7 (Idaho Ct. App. July 12, 2013).

backyard of the triplex where she lived. Elias and the victim were never physically or romantically involved.⁸⁷

The court described the incident:

On the night of the crime, Elias entered the victim's home and then her bedroom where she was sleeping with her two small children lying next to her. The victim slept in only a t-shirt and awoke around 3:30 a.m. because Elias had his fingers inside of her vagina. She rolled over onto her side and felt a razor-cut-like burning in her vagina. Her rolling over had caused Elias's hand to move. . . . Elias asked if the victim wanted him to leave. She said she did, and after Elias left her bedroom, she immediately called both a friend and the police to report what had just occurred.⁸⁸

After a medical examination of the victim found evidence consistent with her account, Elias was arrested and charged with burglary and forced penetration by use of a foreign object.⁸⁹

Elias did not challenge the evidence of non-consent.⁹⁰ Rather, the question raised on appeal was "whether there was sufficient evidence to sustain Elias's conviction through proof that the act was accomplished against the victim's will by the use of force."⁹¹ To decide the issue, the court applied the force requirement found in the state's rape statute as interpreted by the Idaho Supreme Court.⁹² According to the court, "As with the forcible rape statute, [the forcible penetration statute] requires *both* an act that is against the will of the victim *and* the use of force; therefore, the force inherent in the penetration itself cannot be sufficient to uphold a conviction."⁹³ Given this standard, the state argued that the totality of circumstances suggested that Elias used the requisite force: he entered a locked home; he necessarily moved the victim's legs in order to penetrate her; he caused her to experience pain when he did so.⁹⁴

⁸⁷ *Id.* at *1.

⁸⁸ *Id.*

⁸⁹ Elias did not challenge the burglary conviction. *Id.*

⁹⁰ As the court noted, "Elias does not contest that the act was against the will of the victim." *Id.* at *3.

⁹¹ *Id.*

⁹² "[A] defendant is guilty of forcible rape if he accomplishes penetration of the victim where 'she resists but her resistance is overcome by *force or violence*.'" *Id.* at *4 (citing IDAHO CODE ANN. § 18-6101(4) (West 2011)).

⁹³ *Id.*

⁹⁴ *Id.* at *6.

Rejecting this perspective on force, the court concluded that “even accepting the State’s version of the evidence, the surrounding circumstances here do not constitute force within the meaning of [the statute].”⁹⁵ Elias did not have a weapon;⁹⁶ he did not threaten the victim;⁹⁷ and he did not “act violently.”⁹⁸ While Elias’s conduct was “deplorable and blameworthy,”⁹⁹ it was not sexual assault. The defendant’s conviction was vacated.¹⁰⁰

What is important to see about this case is that the facts allowed the court (and prosecutor and jury before it) to bypass familiar concerns about lying victims and misguided defendants. Here, nonconsensual penetration was undoubtedly accomplished; just not by force. Instead, Elias used the victim’s “vulnerability,” as the court put it¹⁰¹—the vulnerability that sleep imposes—to achieve penetration against her will. Laying bare the function served by force as a defining feature of rape, the court struggled to articulate the harm suffered by the victim. According to the court, this was “an unconsented to and initially unperceived violation of *her body* while she slept.”¹⁰² But what the victim endured was apparently neither a violation of her self, nor a cognizable wrong of sexual assault.

2. *People v. Tenorio*¹⁰³

T.Q. was nineteen years old and the president of his youth group, the Mangilao Youth Crime Watch. Andrew Tenorio was the group’s advisor.¹⁰⁴ On the night of the group’s sleepover at the community recreation center, T.Q. awoke to find Tenorio’s hand “in his pants touching his penis.”¹⁰⁵ According to the evidence,

Tenorio moved his hand under T.Q.’s boxers, pulled down his pants, touched his penis until erect, and performed oral sex for about a

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at *7.

¹⁰⁰ *Id.* at *8.

¹⁰¹ *Id.* at *6.

¹⁰² *Id.* at *7 (emphasis added).

¹⁰³ No. CRA07-002, 2007 WL 4689038 (Guam Dec. 18, 2007).

¹⁰⁴ *Id.* at *1.

¹⁰⁵ *Id.*

minute. T.Q. then turned over on his side. After T.Q. turned over, Tenorio pulled up T.Q.'s pants and T.Q. went back to sleep.¹⁰⁶

Tenorio was charged with multiple sexual offenses for the incident involving T.Q.¹⁰⁷ The most serious crime of criminal sexual conduct in the third degree (“CSC III”) required that sexual penetration be accomplished by force or coercion.¹⁰⁸ Citing language from the Michigan Supreme Court, the Supreme Court of the Territory of Guam explained that “the force must be greater than what is inherently required to accomplish penetration and must be sufficient to allow the defendant to control the victim.”¹⁰⁹ More specifically, the requisite force

does not encompass nonviolent physical interaction in a mechanical sense that is merely incidental to an act of sexual penetration. Rather, the prohibited ‘force’ encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim’s wishes.¹¹⁰

The government argued that Tenorio applied force to T.Q. “by pulling down the front of his pants and putting his penis in his mouth.”¹¹¹ This reasoning was unpersuasive to the court, which held simply that “the statute and the better reasoned cases indicate that the force applied by Tenorio was not sufficient.”¹¹² Because the record did not support a finding of physical force to accomplish the sexual act—however nonconsensual—the conviction for CSC III was reversed.¹¹³

Because the statute prohibited the use of “force or coercion” to accomplish sex, the court’s ruling focused on the evidence of force, rather than non-consent.¹¹⁴ But in a separate portion of the opinion, the court revealed its

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* Tenorio was also charged with committing sexual offenses against two minors involved in the youth group. *Id.*

¹⁰⁸ In a separate discussion, the court found the evidence of coercion insufficient to sustain the conviction. *Id.* at *3–11.

¹⁰⁹ *Id.* at *11.

¹¹⁰ *Id.* (citing *People v. Carlson*, 644 N.W.2d 704, 709 (Mich. 2002)).

¹¹¹ *Id.*

¹¹² *Id.* at *12.

¹¹³ The court affirmed Tenorio’s conviction on the less serious charge of criminal sexual conduct in the fourth degree, requiring that the victim be “physically helpless.” *Id.* at *12–13.

¹¹⁴ *Id.* at *8.

[E]ven though affirmative non-consent is not required in Guam and in a number of other states, the force or coercion requirement may be interpreted in the context of replacing the non-consent

doubts about whether the sleeping T.Q. was in fact an unwilling participant in the sex—or, more to the point, whether Tenorio should have realized that T.Q. was not consenting. As the court maintained, “Here, T.Q. never indicated to Tenorio his lack of consent to receive oral sex.”¹¹⁵ Since the statute at issue was “designed to deter non-consensual sexual penetration,”¹¹⁶ the court offered this bit of advice: “In most instances, the best first step in avoiding non-consensual relations is presumably for the non-consenting party to indicate a lack of consent.”¹¹⁷

In this manner, a formally-abolished resistance requirement found outlet; the court was admittedly “wary of applying criminal sexual conduct statutes where the complainant never expressed a lack of consent.”¹¹⁸ Even where T.Q. was asleep, he was expected somehow to communicate that he did not want his penis to be touched. Absurd though this may seem, it suggests a number of possibilities, which I have already suggested resonate in rape law.¹¹⁹ One is deep judicial skepticism of claims of non-consent absent force. Another is an assumption of perpetual consent (absent an expressed indication otherwise) and a willingness to excuse mistakes made in reliance on this assumption. Last is the denial of injury that attends sex without consent. In Tenorio’s case, the court implied that there was no harm in the defendant’s conduct *even if* the sleeping boy did not consent to the sex.

3. Commonwealth v. Thompson¹²⁰

Reginald Thompson began molesting his daughter, Marie Moses, when she was twelve years old.¹²¹ One night, the girl “was sleeping and awoke to find defendant on top of her and his penis moving in and out of her vagina. Defendant told Marie that she looked like her mom, and that he would not hurt her. Marie immediately attempted to rise, but could not because defendant’s legs were over her legs.”¹²² Thompson was subsequently charged with rape.¹²³

requirement. In other words, the force or coercion should be strong enough to demonstrate that the complainant did not consent.

Id.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at *9.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See *supra* notes 83–84 and accompanying text.

¹²⁰ 2 Pa. D. & C. 4th 632 (C.P. Phila. Cty. 1989).

¹²¹ *Id.* at 633.

¹²² *Id.* at 634.

On appeal, he argued that the evidence could not sustain a finding of forcible compulsion.¹²⁴ The Pennsylvania appeals court agreed.¹²⁵ Marie “was asleep when penetration occurred,” and after she awoke, the “defendant immediately disengaged.”¹²⁶ There was “no evidence that defendant grabbed her, pushed her down, struck her, threatened her, or exerted any physical force to continue copulating.”¹²⁷ Marie’s “inability to get up immediately was merely the result of the force of gravity. . . . and was *not* that ‘force’ contemplated under the statute.”¹²⁸

Like other courts construing forcible rape statutes, the court also rejected the argument that the force required to effect penetration could constitute sufficient force.¹²⁹ If the legislature wished to define rape as nonconsensual intercourse it could do so,¹³⁰ otherwise, an additional force element must be afforded independent meaning.

Consent was not an issue in the case, in part because of the statutory language defining the offense. Interestingly, the court did nonetheless reference the nonconsensual nature of the intercourse, but only once—to observe that Marie pushed Thompson away from her when she awoke to find him inside her. “Her pushing defendant manifested her unwillingness,” stated the court, “and it was acknowledged by defendant when he removed his penis and arose at once.”¹³¹ The suggestion that Marie’s “unwillingness” to engage in intercourse with her father was “manifested” merely by her physical resistance is unsettling.¹³² On this view, before Marie pushed Thompson—

¹²³ *Id.* at 633.

¹²⁴ The court posed the question presented: was evidence of force sufficient “where the victim was asleep at the time of penetration and the defendant ceased the intercourse and disengaged when the victim awoke?” *Id.* at 635. The court was quick to note that Thompson was not prosecuted for violating the section of the rape statute covering an “unconscious victim,” which was clearly a mistake on the part of the Commonwealth. *Id.* However, the fact that Thompson could have been convicted of a crime other than forcible rape—including, as he was in this case, “corrupting the morals of a minor” and “indecent assault”—does not change the analysis of how forcible rape definitions map onto situations involving functional force. *Id.* at 635–36.

¹²⁵ *Id.* at 636 (“[T]he evidence was insufficient to support a conviction for rape by ‘forcible compulsion.’”).

¹²⁶ *Id.*

¹²⁷ *Id.* at 652.

¹²⁸ *Id.* at 653.

¹²⁹ *Id.*

¹³⁰ *See id.* at 646, 648–51.

¹³¹ *Id.*

¹³² This did not lead to a finding of force because Marie “actually succeeded in pushing defendant from her.” *Id.*

while she was sleeping, that is—there may have been reason to believe that she was a willing participant.

Even where the twelve-year-old girl was asleep at the time her father penetrated her, the court fixed on the lack of provision of a certain kind of notice.

4. *State v. Wine*¹³³

S.D. was seventy-one years old at the time of the incident.¹³⁴ Her daughter, Clarinda, was married to Douglas Wine. On the evening in question, S.D. and her husband were spending the night at the home of Wine and Clarinda. S.D. fell asleep after reading her grandson a bedtime story.¹³⁵ She awoke to Wine kneeling beside the bed, his finger in her vagina.¹³⁶

Wine was convicted of gross sexual imposition, which prohibits sexual contact when the offender “compels [the victim] to submit by force or threat of force.”¹³⁷ Although a victim is not required by statute to prove physical resistance,¹³⁸ the Ohio appeals court found the evidence of force insufficient to sustain the conviction.¹³⁹ The court explained:

The evidence presented at trial demonstrated that S.D. was sleeping and unaware of the sexual contact, and, as soon as she awoke, Wine withdrew his hands from her body, ending the sexual contact. Significantly, no sexual contact occurred after S.D. was awake and aware of the sexual contact.¹⁴⁰

Distinguishing its holding from cases where convictions on similar facts were affirmed, the court emphasized that, unlike the victims in those cases, “S.D. was asleep during the entire time the sexual contact occurred—S.D.’s fear and distress occurred after the sexual contact occurred when she realized what Wine had done.”¹⁴¹

¹³³ 2012-Ohio-2837U (Ohio Ct. App.).

¹³⁴ *Id.* ¶ 8.

¹³⁵ *Id.* ¶ 9.

¹³⁶ *Id.* ¶ 10.

¹³⁷ *Id.* ¶ 39 (quoting OHIO REV. CODE ANN. § 2907.05(A)(1) (LexisNexis 2015)).

¹³⁸ *Id.* ¶ 41.

¹³⁹ *Id.* ¶ 52. The court entered judgment on a lesser-included offense of sexual imposition, which prohibits the defendant from engaging in offensive sexual contact with someone not his spouse, knowingly or recklessly. *Id.* (citing OHIO REV. CODE ANN. § 2907.06(A)(1) (LexisNexis 2015)).

¹⁴⁰ *Id.* ¶ 47.

¹⁴¹ *Id.* ¶ 51.

In this case, the court was quite willing to accept that S.D. did not consent to Wine's penetration of her vagina while she slept. But the opinion reflects considerable agnosticism on the question of harm. Implicit in the court's reasoning was that, while S.D. may have been injured in some way, the violation was *different enough* from the injury that results from forcible nonconsensual intercourse to justify the distinction drawn by the statute. The court's finding of insufficient force was a way of protecting the legislature's prerogative "to treat offenders differently depending on the nature of their conduct."¹⁴² Per the criminal code, Wine's conduct was less serious than it would have been had the victim awakened in time to necessitate his use of force.

B. Intoxication

Like sleep, intoxication can increase one's vulnerability to rape without force. In this scenario, nonconsensual sex is achieved by virtue of a victim's impaired state—no force is necessary. These cases recur with alarming frequency in the college setting,¹⁴³ though of course in others as well.

To be clear, as a conceptual matter, this category of cases does not include so-called "intoxicated consent" cases.¹⁴⁴ Rather, in this category, the victim did *not* consent to the conduct, but the defendant nevertheless proceeded; the victim's intoxication simply obviated the defendant's need to use force to accomplish sex without her consent.

Where the defendant administered the intoxicant, the cases are generally conceived as rape. The notion of "constructive force" is readily applied to situations where a victim is drugged, for instance by her date.¹⁴⁵ And this scenario presents no real possibility of mistaken consent.¹⁴⁶

¹⁴² *Id.* ¶ 50.

¹⁴³ In a major study of rape on campus, researchers found that 7.8% of women were sexually assaulted after voluntarily consuming drugs, alcohol, or both, to the point of incapacitation, as compared to 4.7% of women who were victims of physically forced sexual assault. See CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT vii (Dec. 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

¹⁴⁴ See Christine Chambers Goodman, *Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent*, 2009 BYU L. REV. 57, 58.

¹⁴⁵ Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 135 (2002).

¹⁴⁶ *Id.* at 136 ("No ambiguity exists about the victim's consent to intercourse when the defendant has deprived her of the ability to give consent by administering an intoxicating agent.").

More often, however, the victim's intoxication is voluntary. Here, as in the sleep context, a legal force requirement is problematic. In response, most jurisdictions have separately criminalized nonconsensual sex with a person incapable of giving consent due to intoxication.¹⁴⁷ However, this statutory scheme raises its own set of dilemmas, as evinced by the case law surrounding it. As in the sleep context—and, for that matter, in cases involving minors—nonconsensual sex with extremely intoxicated victims can be punished in many jurisdictions under separate statutory provisions. Even so, analyzing the legal treatment of this recurring fact pattern, which severs force from non-consent, provides insights into modern rape law's conceptual underpinnings.¹⁴⁸

For present purposes, what is most striking is how an inquiry into consent is once again subsumed—this time, not by discussions of force, but by fixating on the level of intoxication. While a victim's impairment may well help to explain how nonconsensual sex is achieved in these cases, the definition of incapacitating intoxication as an independently-significant legal category is peculiar. Underlying this framing of incapacity, I suspect, is an unacknowledged preoccupation with mistakes about consent. These cases reveal a judicial conception of consent as inherently ambiguous.

*I. State v. Jones*¹⁴⁹

E.B. celebrated her twenty-first birthday with a friend. The two women began the night at a bar, where E.B. consumed eight to ten beers and at least three shots of alcohol, and then moved to another bar, where they met up with E.B.'s friend's boyfriend, Chance, and his friend, Christopher Jones.¹⁵⁰ The group drank more before heading to Chance's house, where E.B. consumed three or four more beers.¹⁵¹ Later, E.B. and Jones fell asleep in the living room—E.B. on the couch and Jones on an ottoman nearby.¹⁵²

As a court would later describe,

E.B. testified that although she went to sleep on the couch, she woke up on the floor with Jones on top of her, orally and digitally penetrating her. After physically resisting and verbally refusing, E.B. succeeded in getting Jones off of her. Because of the amount of

¹⁴⁷ *Id.* at 136–37.

¹⁴⁸ *See supra* note 124 (making a similar observation in the context of a sleeping minor).

¹⁴⁹ 804 N.W.2d 409 (S.D. 2011).

¹⁵⁰ *Id.* at 410.

¹⁵¹ *Id.*

¹⁵² *Id.* Like many cases in the intoxication category, this one also involved sleep. *Id.*

alcohol she drank, E.B. testified she went back to sleep on a nearby chair instead of leaving. E.B. awoke a second time on the couch, with Jones behind her, with her pants and underwear at her knees and Jones penetrating her from behind. E.B. testified she yelled at Jones, pulled her clothes back on, and retreated to the bathroom until Jones left.¹⁵³

The following day, E.B. went to the hospital and reported the rape. Jones was later charged, but not under the section of the rape statute requiring force—presumably because Jones was able to accomplish intercourse with E.B. without using the kind of force recognized by law. Instead, Jones was prosecuted under a provision that prohibits intercourse with a victim “incapable of giving consent” due to intoxication.¹⁵⁴ He was convicted.

The question for the Supreme Court of South Dakota on appeal was whether the jury was properly instructed on the prosecution’s burden of proof with regard to the victim’s intoxication level.¹⁵⁵ To resolve the issue, the court was called upon to interpret the statutory language defining rape as “an act of sexual penetration accomplished . . . [i]f the victim is incapable of giving consent because of any intoxicating agent, narcotic, or anesthetic agent or hypnosis.”¹⁵⁶ Jones argued that he could not be convicted of rape without proof that he *knew* E.B. was incapable of giving consent because of intoxication.¹⁵⁷ According to the state, the absence of a knowledge requirement in the statute meant that Jones could be convicted upon proof that E.B. was incapable of giving consent, without regard to what Jones knew about her level of intoxication *per se*.¹⁵⁸

The court reversed the conviction, adding yet another layer of complexity to the prosecution of nonconsensual sex with an intoxicated victim.¹⁵⁹ Going forward, the state “must prove the defendant knew or reasonably should have known that the complainant’s intoxicated condition rendered her incapable of

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 411; *see infra* note 163.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 412 (quoting S.D. CODIFIED LAWS § 22-22-1(4) (2006)).

¹⁵⁷ *Id.* at 411.

¹⁵⁸ *Id.* at 411–12. The court conceded that “[t]his language places no apparent requirement on the State to prove that the accused knew or reasonably should have known the victim was too intoxicated to consent”; yet the court was unwilling to impose what it viewed as a form of strict liability. *Id.* at 412.

¹⁵⁹ *Id.* The decision drew a dissent, which charged the court with “impos[ing] its own opinion over that of the Legislature.” *Id.* at 414–15 (Gilbertson, J., dissenting).

consenting.”¹⁶⁰ Animating the decision was concern for the “innocent state of mind” possessed by a man who “reasonably and in good faith believed he had engaged in consensual adult sex” with a woman who “later establishes that she drank too much to have given her consent.”¹⁶¹ Though entirely inapt as applied to the facts of *Jones*, this possibility does suggest fault lines in a statutory regime that makes incapacity the governing standard. The idea that incapacity would be established after the fact is troubling, perhaps not for the reason suggested by the court, but because it elides an inquiry that should be central: did the alleged victim in fact consent?¹⁶²

Observe that whether E.B. actually consented is obscured by the dominant legal construct of incapacity to consent. Unless a victim is fully impaired,¹⁶³ there is no redress for the harm of unwilled sex—however nonconsensual in fact. A legal regime sympathetic to confusion about whether a victim was so thoroughly impaired by alcohol or drugs as to be *incapable* of consent¹⁶⁴ manifests a faulty conception of consent. It is difficult to imagine circumstances less conducive to misinterpretation than, as in this case, a woman lying on the floor in a drunken slumber, “physically resisting and verbally refusing” advances when she awakes before returning to her drunken slumber.¹⁶⁵ Yet the legislature criminalizes the sex forced on her (albeit without enough force to count) only if she is drunk enough to be *legally incapable* of consenting. And a court worries that the man who pulled down her pants and penetrated her from behind might have made a justifiable mistake.¹⁶⁶

¹⁶⁰ *Id.* at 414 (majority opinion).

¹⁶¹ *Id.*

¹⁶² A separate question is whether, if she did not consent, he nonetheless believed that she did, and believed so reasonably.

¹⁶³ Short of unconsciousness (which might be a byproduct of extreme intoxication, but is not its equivalent), a level of impairment so extreme that one is *incapable* of consenting to intercourse seems unlikely.

¹⁶⁴ “[W]here is the line drawn between conscious intoxication and incapacitating intoxication?” wondered the court. *Id.* at 414. In the court’s estimation, since “the State relied on an expert witness to help the jury understand how intoxicated the victim was,” the defendant could not have been expected to realize that she was incapable of consenting. *Id.*

¹⁶⁵ *Id.* at 410.

¹⁶⁶ See *id.* at 414 (“For rape by intoxication . . . where is the line drawn between conscious intoxication and incapacitating intoxication? In this case, the State relied on an expert witness to help the jury understand how intoxicated the victim was. Yet the very fact that the State needed an expert makes the idea of strict liability for this offense even more problematic.”).

2. Commonwealth v. Urban¹⁶⁷

Martin Urban and his victim, unnamed in the opinion, were both affiliated with the Harvard School of Dental Medicine, she as a dental student and he as a postdoctoral resident.¹⁶⁸ For a while, the two lived in the same dormitory, and Urban was an occasional supervisor of the victim's clinical work.¹⁶⁹ On repeated occasions, Urban expressed romantic interest in the victim, which she did not reciprocate.¹⁷⁰

On the night in question, the two attended the same party at a local bar. Over the course of the evening, the victim—who would later testify that she “get[s] drunk easily”—drank a beer and up to seven shots of alcohol, three or four of them purchased for her by Urban.¹⁷¹ Eventually, the “highly intoxicated” victim ended up at Urban's apartment, along with eight or so friends, where she fell asleep on the couch.¹⁷² Later in the night, when it was time to go home, the victim was helped out to Urban's car, where she again drifted into sleep.¹⁷³

Urban first drove home the victim's friend, who indicated that a mutual friend would be waiting at the dorm to assist the victim to her room. The victim heard this but then went back to sleep.¹⁷⁴

The court described what followed:

[T]he next thing she remembered was that the car was parked and the defendant was kissing her, which awakened her. The complainant was “in shock,” scared, and confused. The defendant pulled her head toward his penis and placed it in her mouth; she tried to pull back and fell back against the seat. The defendant then vaginally raped her and said to her, “You don't know how long I've been waiting for this.” The complainant testified that during these events she was “really drunk,” had no energy, felt physically paralyzed, said nothing because she was scared, could not move, and was unable to push him off.

¹⁶⁷ 880 N.E.2d 753 (Mass. 2008).

¹⁶⁸ *Id.* at 755.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 755–56.

¹⁷³ *Id.* at 756.

¹⁷⁴ *Id.*

The defendant put the complainant's clothes back on and helped her to the front seat, explaining that he did not want [her friend] "to be suspicious."¹⁷⁵

The next day, a medical examination of the victim found a genital tear "caused by blunt force trauma that was consistent with sexual assault."¹⁷⁶ Urban was subsequently convicted of rape.¹⁷⁷

His appeal challenged the jury instructions on non-consent, particularly regarding the evidence needed to establish that the victim lacked *the capacity* to consent.¹⁷⁸ To suffice, according to the Supreme Judicial Court, the level of intoxication must be extreme: the prosecution must demonstrate that "the complainant was so impaired as to be incapable of consenting to intercourse."¹⁷⁹ Because the trial court's charge "failed to clarify that an extreme degree of intoxication is required before the incapacity rule will apply," Urban's conviction was reversed.¹⁸⁰

The facts of the case underscore the workings of intoxication as functional force. Here the victim's level of impairment—regardless of whether it rose to the level where she was "incapable" of consenting—made her an easy target for Urban, in large part because he could achieve nonconsensual intercourse without resorting to physical force.

The case also illuminates a curious feature of rape law: utter passivity on the part of a victim is equated with consent to intercourse.¹⁸¹ This presumption is afforded particular strength where there is scant evidence of physical force. So instead of asking whether the victim consented to the intercourse—which is a more straightforward inquiry—the law contorts the question. The jury must decide whether she was *incapable* of consenting. Anything less is too ambiguous to find legal outlet. So while *extreme* intoxication may, like unconsciousness, "vitiat[e] consent,"¹⁸² one wonders: what if (as seems the case here) there was no consent to vitiate?

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 756–57.

¹⁷⁷ *Id.* at 754.

¹⁷⁸ *Id.* at 757. The definition of force in Massachusetts is fairly expansive, which might explain Urban's failure to appeal the sufficiency of evidence on this element.

¹⁷⁹ *Id.* at 758.

¹⁸⁰ *Id.* at 758–59.

¹⁸¹ See Tuerkheimer, *supra* note 25, at 1496–502 (discussing the "Passive Woman" in rape law).

¹⁸² *Urban*, 880 N.E.2d at 758.

Once again, we can discern the legal sidestepping of sex without consent.

C. *Relational Control*

The last category of functional force includes cases where the victim's ongoing relationship with the defendant obviates the need for force to accomplish nonconsensual sex. What I term "relational control" encompasses two (sometimes interrelated) dynamics: fear and trust.

I. *Fear*

Rape law has long contemplated the relevance of a victim's fear of her assailant. When the law still formally required that a woman resist her attacker, her failure to do so was considered acceptable if she was reasonably in fear.¹⁸³ Likewise today, a threat of force sufficient to place a reasonable person in fear often satisfies the force requirement.¹⁸⁴

A difficulty for rape law lies in assessing the reasonableness of fear where, as is common, a victim's response to the defendant's conduct is rooted in the context of their relationship. Unlike the woman who confronts a knife-wielding stranger, the woman whose fear stems from past interactions with her would-be rapist confronts a hostile legal landscape. Interpreting the force requirement, courts have conceptualized fear as "general fear" where its origins can be traced to conduct on the part of the defendant that preceded the incident in question.¹⁸⁵ "General fear" is not the kind of fear that turns nonconsensual intercourse into rape.¹⁸⁶

This narrow temporal frame does not correspond to the phenomenology of fear. From the perspective of the person experiencing it, fear of the defendant—whether based on his behavior just moments beforehand or years earlier—is fear of the defendant; either way, its presence can render unnecessary the use of force to achieve nonconsensual intercourse.

¹⁸³ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 574, 577 (6th ed. 2012).

¹⁸⁴ *Id.*

¹⁸⁵ See, e.g., *State v. Alston*, 312 S.E.2d 470, 476 (N.C. 1984).

¹⁸⁶ The case of *Alston*, which appears in most criminal law casebooks, raises just this issue. *Alston*, 312 S.E.2d 470. Reversing a rape conviction based on insufficient force, the North Carolina Supreme Court specifically dismissed the relevance of the defendant's prior abuse of the victim. *Id.* at 476. As the court emphasized, "Although [the victim's] general fear of the defendant may have been justified by his conduct on prior occasions, absent evidence that the defendant used force or threats to overcome the will of the victim to resist the sexual intercourse alleged to have been rape, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape." *Id.*

Rape law's non-recognition of general fear as functional force has clear implications for domestic violence victims.¹⁸⁷ But relational control manifests itself in other, less obvious, ways that are also overlooked by the legal privileging of just-instilled fear. A prime example of this dynamic is the treatment of fear stemming from past childhood sexual abuse by the defendant.

a. *State v. Magel*¹⁸⁸

When the victim was young, her mother went to prison, and she and her sister were sent to live with their father, Jack Magel, and his wife.¹⁸⁹

Magel had sex with the victim when she was nine years old.¹⁹⁰ While she held her legs together and said “no,” Magel “would just open them up.”¹⁹¹ When the victim told him that she “didn’t want to do it,” he responded that “everything would be okay.”¹⁹² He also told her “not to tell because if [she] did something would happen to [her] sister” and that “he would hurt [her] sister.”¹⁹³

The victim returned to live with her mother a few years later.¹⁹⁴ One day during the summer that the victim was twelve years old, she and Magel wound up picking cherries at a farm near his mobile home.¹⁹⁵ According to the evidence,

At defendant’s invitation, the victim accompanied him inside the mobile home. Defendant went into his bedroom and then called for the victim to come in. When she did, she found him naked. She told him that she “didn’t want to do it,” and he responded by telling her that “everything was going to be okay.” Defendant told the victim that she “could get on the bed[,]” and she did so. Defendant then had

¹⁸⁷ In abusive relationships, physical violence and sexual violence often coexist. See Jacquelyn C. Campbell, *Health Consequences of Intimate Partner Violence*, 359 LANCET 1331, 1332 (Apr. 13, 2002) (discussing a meta-analysis in which researchers found that 40–45% of battered women also experienced sexual violence).

¹⁸⁸ 268 P.3d 666 (Or. Ct. App. 2011).

¹⁸⁹ *Id.* at 667.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 667–68.

sexual intercourse with her. She did not “put up a fight” because she believed that if she tried to do so, “he would just fight right back.”¹⁹⁶

The victim waited a year to disclose the incident because, as she explained, her sister still lived with Magel’s ex-wife and because Magel knew where she (the victim) lived and “could still get to [her].”¹⁹⁷

Magel was later convicted of first-degree rape.¹⁹⁸ Under the applicable statute, forcible compulsion included “a threat, express or implied, that placed the victim in fear of immediate or future death or physical injury to self or another person[.]”¹⁹⁹ Because the state did not allege that Magel used physical force, the issue presented on appeal was whether the defendant “engaged in conduct that . . . constituted an implied threat.”²⁰⁰ Even accounting for “the surrounding circumstances,”²⁰¹ as required by precedent, the appellate court held that the evidence in this case could not sustain a finding of forcible compulsion.²⁰² Magel’s conviction for rape in the first degree was reversed.²⁰³

The court’s reasoning exemplifies decontextualized legal analysis:

*Although it is not disputed that the victim actually believed that defendant would physically force her to engage in sexual contact . . . nothing in the record suggests that defendant engaged in any force on the day of the picnic other than the force inherent in the sexual conduct at issue. Furthermore, there was a significant lapse in time since the prior incidents; the victim no longer lived with the defendant nor was he in a parental position in her life; defendant had divorced his wife and moved from the home where the victim’s sister lived; and defendant’s conduct and statements to the victim on the day of the [incident] itself were not threatening in nature. In the end, the state presented no evidence of an implied threat by defendant at the time of the sexual conduct at issue and, therefore, no evidence of forcible compulsion.*²⁰⁴

¹⁹⁶ *Id.* at 668.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* Magel was also convicted of rape in the second degree and sexual abuse based on conduct occurring on other occasions. *Id.*

¹⁹⁹ *Id.* (alteration in original) (quoting OR. REV. STAT § 163.375 (2009)).

²⁰⁰ *Id.* at 669.

²⁰¹ *Id.* at 671 (“[A] threat that is sufficient to compel a person to submit to sexual contact will vary depending on the surrounding circumstances, including the parties’ respective ages and the history and relationship between them.”).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 671 (emphasis added).

Note the court's expressed awareness that, based on her experience of having been forcibly raped by him in the past, the victim was indeed *compelled* to engage in intercourse with her father—who was, rather inconceivably, described as not occupying a “parental position in her life.”²⁰⁵ The court subsequently reiterated that “the prior incidents, though remote in time, influenced the victim's expectations of defendant and, indeed, compelled her to submit.”²⁰⁶ But even so, “that influence does not qualify as an implied threat in the legal sense and, therefore, does not constitute forcible compulsion.”²⁰⁷

The legal meaning of implied threat, then, ignores the influence of relationships in which violent control has been exercised over time. This narrow reading tends to reinforce the force requirement as a manifestly physical construct. To the extent it matters at all, consent is relegated to the periphery of concerns.

2. *Trust*

Trust is perhaps the most difficult variant of functional force to isolate because it tends to overlap with sleep or intoxication. In many (though certainly not all) of the cases that fall into these two categories, the victim relied on the goodness of a man who would become her rapist.

Even so, trust is important in its own right. In the context of non-stranger rape, trust imposes vulnerability.²⁰⁸ This vulnerability often substitutes for force, enabling sex without consent.²⁰⁹ Stripped of alcohol, sleep, and longtime fear, the pure trust cases highlight an independent mechanism of control.

²⁰⁵ *Id.*; *cf.* State v. Schaim, 600 N.E.2d 661, 663–64 (Ohio 1992) (finding insufficient evidence of force in a case alleging that the defendant raped his twenty-year-old daughter, a victim of childhood incest whose “will to resist [was] overcome by a prolonged pattern of abuse” by her father).

²⁰⁶ *Magel*, 268 P.3d at 671.

²⁰⁷ *Id.*

²⁰⁸ Linda Fairstein, former chief of the Manhattan District Attorney's Sex Crimes Unit, has observed,

[M]ost sexual assaults occur when there is a combination of two critical conditions: opportunity and vulnerability. The rapist needs the *opportunity* to commit the crime, and he succeeds when a victim is *vulnerable* at the moment of his opportunity. . . . She was vulnerable precisely because she *did* know her assailant; she was vulnerable because she *trusted* him. And we rarely speak with a survivor attacked by a co-worker, date, friend, or relative who doesn't tell us that the reason they were together (and usually together alone) was because she knew and trusted him.

LINDA A. FAIRSTEIN, *SEXUAL VIOLENCE: OUR WAR AGAINST RAPE* 132–33 (1993).

²⁰⁹ Research into the sexual assault of young women found that more than half the cases occurred when the perpetrator “just did it before you had a chance to protest.” Laurel Crown & Linda J. Roberts, *Against*

a. *People v. Carlson*²¹⁰

The victim was a tenth grader at the high school that Eric Carlson attended.²¹¹ The two had known one another for a few years at the time of the incident. One day after school, Carlson called the victim and asked if she wanted to “hang out.”²¹² She agreed and the two drove in Carlson’s car to the parking lot of a YMCA.²¹³ According to the court’s description of the evidence,

The complainant allowed the defendant to unbutton her blue jeans and to digitally penetrate her. The complainant testified, “He started making out again, the same stuff^[214], and then wanted to have sex with me and I said no. He asked me why. I just said because I don’t want to.” After an interval, the defendant repeated his request that they have sexual intercourse. The complainant again said “no,” explaining that she “didn’t want to.” “He [next] asked me if he could just stick [it] in once and I said no.” He essentially repeated the question several times, and she would not answer him “[bec]ause I didn’t want to answer him any more.” She acknowledged that she did not physically restrain or push him away and then said, “He stuck it in anyways and kept moving and asked me if I was enjoying it and I said I didn’t want to do it.” When asked how he got it in, she said, “He got on top of me and put it in.”²¹⁵

Carlson was later charged with criminal sexual conduct in the third degree, which prohibits the use of force or coercion to accomplish penetration. At the preliminary hearing, his lawyer did not challenge the sufficiency of evidence on non-consent.²¹⁶ The girl had, after all, said no to intercourse repeatedly and unequivocally. Yet Carlson was able to achieve sex without her consent, and without using force, because she trusted Carlson to respect her expressed desires. She did not expect that this boy from her high school might get “on top of [her] and put it in.”²¹⁷ Consequently, Carlson was able to do just that.²¹⁸

Their Will: Young Women’s Nonagentic Sexual Experiences, 24 J. SOC. & PERS. RELATIONSHIPS 385, 392 (2007).

²¹⁰ 644 N.W.2d 704 (Mich. 2002) (per curiam).

²¹¹ *Id.* at 705. Although the case had not been tried, the facts were developed from the complainant’s testimony at a preliminary hearing and treated by the court as true for the purpose of analysis. *Id.* at 705 n.2.

²¹² *Id.* at 705.

²¹³ *Id.*

²¹⁴ On an occasion two weeks prior, Carlson and the complainant drove to a different parking lot, where “consensually he digitally penetrated her and she manually masturbated him.” *Id.*

²¹⁵ *Id.* (alterations in original) (footnote added).

²¹⁶ *Id.*

²¹⁷ *Id.*

While not contesting non-consent, the defense argued that evidence of force or coercion was lacking.²¹⁹ Calling this “your classic example of date rape,” the prosecutor responded that the victim “was not a willing partner at this time and that’s all the force that is necessary.”²²⁰ Carlson “wanted what he wanted,” added the prosecutor, “and he took it from her without her permission when she said no.”²²¹

The trial court found insufficient evidence that Carlson used physical force or coercion to overcome the victim.²²² An intermediate appeals court affirmed, stressing that “[b]oth parties were apparently in such a state of undress from their admittedly mutually agreeable sexual activity”—another reflection of the complainant’s trust in Carlson, though the court did not perceive this—“that no further undressing was necessary. The Defendant then got on top of her and inserted his penis into her vagina.”²²³

The appeals court also sounded a cautionary note:

There is no evidence that Defendant forced Complainant’s legs apart or placed her body in a position to receive him. This may have happened but there is no evidence of it in the record leaving only speculation for the Court to draw such a conclusion. The inference from the record is just as probable that in addition to no longer answering Defendant’s questions about engaging in sex she also *cooperated* by placing her body in a position to receive Defendant just as she had cooperated in the prior sexual activity.²²⁴

We should observe that this reasoning is in tension with the function of an appellate court; when reviewing the sufficiency of the evidence, inferences are to be drawn in favor of the prosecution.²²⁵ But the court seemed intent on articulating its own perspective on the underlying facts. In particular, doubts

²¹⁸ It bears mention that rape is especially prevalent among teenagers. According to the latest research, over 40% of female rape victims are first raped before the age of eighteen. MICHELE C. BLACK ET AL., NAT’L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 25 (2011) [hereinafter, NISVS], http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

²¹⁹ *Carlson*, 644 N.W.2d at 705.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 705–06.

²²³ *Id.*

²²⁴ *Id.* (emphasis added).

²²⁵ In general, questions of fact are to be resolved in favor of the prosecution when a court is deciding whether the evidence is sufficient to proceed, and, subsequently, whether the evidence is sufficient to sustain a conviction. *See* 5 AM. JUR. 2D *Appellate Review* § 627, Westlaw (database updated May 2015).

about force entailed doubts about non-consent; the absence of physical force indeed became a proxy for consent.

The court's expression in this regard was quite unnecessary—again, the statute did not contain a consent element. Faced only with the question of whether evidence of force was sufficient, the court was nevertheless moved to emphasize its disbelief that sex was accomplished against the complainant's will. As is often the case, the court reached beyond the statutory definition to address consent, then to presume its presence.²²⁶

*b. State v. Rodriguez*²²⁷

Alexander Rodriguez, a 24-year-old man, met Dilillo, age nineteen, at a religious retreat, after which the two “exchanged e-mail addresses and promised to stay in touch.”²²⁸ They exchanged emails almost daily, discussing “their respective religious callings and past personal relationships,” and Rodriguez invited Dilillo to attend an all-night adoration at St. John's Cathedral.²²⁹

Instead, the two wound up sitting on a couch in the enclosed front porch of Dilillo's home.²³⁰ A court would later describe what transpired: “Rodriguez asked to kiss Dilillo and she consented. The two kissed for a while and . . . at

²²⁶ The Michigan Supreme Court ultimately vacated the appellate court's opinion and remanded the case for reconsideration in light of the proper standard of force, which it defined as follows:

To be sure, the “force” contemplated in [the statute] does not mean “force” as a matter of mere physics, i.e., the physical interaction that would be inherent in any act of sexual penetration, nor, as we have observed, does it follow that the force must be so great as to overcome the complainant. It must be force to allow the accomplishment of sexual penetration when absent that force the penetration would not have occurred. In other words, the requisite “force” . . . does not encompass nonviolent physical interaction in a mechanical sense that is merely incidental to an act of sexual penetration. Rather, the prohibited “force” encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes.

Id. at 709. On remand, the trial court again found that there was insufficient force to proceed and dismissed the case. Email from Deborah Tuerkheimer to Ryan Pulley (June 30, 2015, 2:55 PM) (on file with author) (memorializing a conversation with Prosecutor Gregory Babbitt of Ottawa County Office of Prosecuting Attorney on March 27, 2014, in which Gregory Babbitt relayed information about the trial court's dismissal of the case, without a written order, after finding insufficient force).

²²⁷ 2003-Ohio-7056U (Ohio Ct. App.).

²²⁸ *Id.* ¶ 9.

²²⁹ *Id.*

²³⁰ *Id.* ¶ 11.

some point Rodriguez inserted his finger into her vagina.”²³¹ Dilillo would later testify that she was “shocked.”²³²

A jury convicted Rodriguez of rape, defined under the Ohio statute as “sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.”²³³ On appeal, Rodriguez argued that the evidence of force was insufficient to sustain his conviction.²³⁴

The law does not generally recognize rape by surprise. Noting that the element of force can be “inferred from the circumstances surrounding the sexual conduct,” the appeals court emphasized that, to establish the element, the victim’s non-consent must be overcome *by fear or duress*.²³⁵ Put differently, the proper inquiry is not whether the victim’s will was overcome, full stop, but whether her will was overcome by fear or duress.

Given the applicable statutory framework, the court might have reversed the conviction based on the reasonable conclusion that no force was used to overcome Dilillo’s will. The court could well have surmised that, by virtue of her trust, the use of force was unnecessary. But the court’s reversal rested on quite a different line of reasoning.

After explaining that Rodriguez never threatened Dilillo or used force, the court went on to advance its view of the relevance of Dilillo’s behavior to this determination. As the court explained, “At no time did Dilillo indicate that Rodriguez forced her.”²³⁶ Even more emphatically, “*Everything in this record suggest [sic] consensual behavior between two adults.*”²³⁷

Note that this judgment evinced a particular understanding of consent—one that is, outside of the law, highly contested. We might wonder what exactly Dilillo did to show that she consented to Rodriguez inserting his finger in her

²³¹ *Id.*

²³² *Id.* Later that same night, the two were kissing when Rodriguez again “inserted his finger into her vagina.” *Id.* ¶ 13. Dilillo “protested immediately, but Rodriguez ignored her and kept his finger inserted for almost ten minutes.” *Id.* She “told him to stop,” but he did not until she tried pushing him off. *Id.*

²³³ *Id.* ¶¶ 19, 22 (citing OHIO REV. CODE ANN. § 2907.02(A)(2) (LexisNexis 2002)).

²³⁴ *Id.* ¶ 20. Digital penetration satisfied the state’s definition of “sexual conduct.” *Id.* ¶ 22. Rodriguez was also convicted of “gross sexual imposition,” which likewise requires force or the threat of force but defines sexual contact more narrowly, to include touching any erogenous zone of another for the purpose of sexual gratification. *Id.*

²³⁵ *Id.* ¶ 23.

²³⁶ *Id.* ¶ 28.

²³⁷ *Id.* ¶ 23 (emphasis added).

vagina.²³⁸ (Recall that prior to this, the two had only kissed.²³⁹) But we should also attend to the extralegal nature of the court's judgment in this regard. Again, the statute outlawed sexual submission by force or threat of force, failing altogether to center consent, much less define it. This failure enabled resort to unfettered judicial preconceptions about the significance of passivity.

The court's formulation of consent is unsettling, at best. If its interpretation of the events at issue reflected idiosyncratic views, they could be more readily dismissed. But throughout rape law, the affirmative features of consent are profoundly misunderstood. This misunderstanding can persist because considerations of consent are subsumed by the requirement of force.

²³⁸ To be sure, this case is a difficult one; many prosecutors would choose not to pursue it. But the victim was sufficiently credible for a jury to convict the defendant. Given that the jury convicted, the appeals court was also supposed to credit the victim's testimony. *See supra* note 225.

Consider that non-stranger rape cases often feature just the sort of ambiguities presented here: consensual conduct of some sort (albeit only kissing in this case) that precedes the unconsented-to act; perhaps even consensual conduct of some sort subsequent to it. There may well be a delayed reaction to the experience of violation. *See infra* note 239.

²³⁹ For the court, what happened afterwards made this encounter seem consensual:

We are reminded that Dilillo [later] consented to giving Rodriguez a 'hand job.'

Furthermore, after Dilillo realized Rodriguez had not left, but was sitting in his car in her driveway, she voluntarily went out, entered the car, accepted chewing gum, resumed kissing, fell asleep, and did not re-enter her house until 2:30 a.m. the next morning. Dilillo spent approximately three hours in the car with Rodriguez.

Rodriguez, 2003-Ohio-7056, ¶¶ 23–24. Concerned that Rodriguez had drugged her, Dilillo went to the hospital the next day. *Id.* ¶ 13.

The court's inability to fathom why Dilillo might spend time with Rodriguez in the immediate aftermath of nonconsensual intercourse reflects a failure to consider the context of their relationship. The trust that enabled him to accomplish sex without her consent would not necessarily evaporate at the moment of her violation. Empirical research on "confidence rape" helps to explain this response. In one study, victims were "significantly slower in seeking medical attention or rape crisis intervention in comparison to their blitz counterparts." Sally I. Bowie et al., *Blitz Rape and Confidence Rape: Implications for Clinical Intervention*, 44 AM. J. PSYCHOTHERAPY 180, 185 (Apr. 1990). Researchers posited that this delay was perhaps "related to heightened feelings of shame and/or an unrealistic sense of responsibility and guilt." *Id.* Researchers further hypothesized that "[b]ecause of their familiarity with the assailant, some confidence rape victims, e.g., 'date rape' victims, are unclear that the attack or forced sexual encounter to which they were subjected constitutes rape." *Id.*

III. RAPE WITHOUT FORCE, ON AND OFF CAMPUS

Society is in the midst of a consent revolution. This shift is especially salient on college campuses, where a perceived crisis has triggered emphatic responses from policymakers and university administrators.²⁴⁰ These responses have certainly encountered challenges. As we are now seeing, operationalizing the concept of consent—especially in affirmative formulations—can be a difficult task.²⁴¹ Even more formidable is the difficulty of constructing adequate procedures for investigating and adjudicating sexual assault allegations.²⁴² But overall, a basic idea has taken hold: sex without consent is rape.

Within the law, quite the opposite is true. As we have observed, rape statutes position consent as far less central than other operative constructs, or as not relevant whatsoever.²⁴³ The contrasting treatment of unconsented-to sex suggests a deepening divergence: on campus, this is rape; off campus, it often is not.

This divergence portends a number of troubling prospects. One is the classification of rape as a sub-criminal offense for the population of college women who survive it. While in theory criminal justice remedies can be pursued simultaneously with a college disciplinary proceeding or subsequent to it, aggressive measures to handle an allegation administratively may well be in tension with criminal prosecution.²⁴⁴ For those who experience it on campus, rape may constitute, in effect, a quasi-crime.²⁴⁵

²⁴⁰ See *supra* notes 38–55 and accompanying text.

²⁴¹ See *supra* notes 56–57 and accompanying text.

²⁴² See Barholet et al., *supra* note 17 (expressing the objections of members of Harvard’s law faculty to various aspects of the university’s new sexual assault policy, including its inconsistency with principles of “due process of law . . . and the rule of law generally”).

²⁴³ See *supra* notes 71–81 and accompanying text.

²⁴⁴ The coordination of multi-system responses to rape allegations is complicated and appropriately the subject of independent consideration. Here it suffices to note that the odds of a successful criminal justice investigation and prosecution will often diminish where a campus proceeding has already been initiated. See Eliza Gray, *Why Victims of Rape in College Don’t Report to the Police*, TIME (June 23, 2014), <http://time.com/2905637/campus-rape-assault-prosecution/> (explaining that law enforcement officers find it “difficult . . . to pursue criminal action when they don’t collect evidence from the victim early in the process”).

²⁴⁵ As a practical reality, such may be the current status of non-stranger rape. See Lonsway & Archambault, *supra* note 6 (documenting a “justice gap” for sexual assault cases); *infra* note 268. Still, to calcify this treatment by way of formalizing disparate criminal offense definitions reflects movement in the wrong direction. See *infra* note 270.

For victims whose sexual assault did not occur in the college setting, the only resort is to the criminal justice system. Where the statutory force requirement endures, sex without consent does not count as rape; campus rape reform is meaningless. Those subject to the less inclusive definition may find their core injuries unrecognized by the law.²⁴⁶

Further, the yawning gap between rape law and widespread sexual norms undermines the legitimacy of the criminal law itself. Unless and until the law evolves, it risks obsolescence in the realm of non-stranger rape. This progression may well require a new theoretical foundation.

As I have written:

Modern rape law is undertheorized. Over time, its original justifications have eroded. In their place, certain propositions have become generally (if not universally) accepted: women are sexual beings; their chastity no longer needs protecting. All this time, however, rape has persisted. Indeed, we now know that the danger is less a stranger in an alley than a husband, co-worker, date, or hook-up. In response to profound shifts in the way we understand both rape and female sexuality, the law of rape has become unstable. It badly needs reconstructing. Yet the old rationales cannot tell us why rape ought to be specially criminalized in the present day (or how).²⁴⁷

To this end, I stake a conceptual claim: rape law should protect sexual agency.²⁴⁸ The idea of agency grounds a theory of rape; it also helps to explain the emergence of a culture of consent. Given the significance of these dual functions, the meaning of agency warrants discussion.

A. *Theorizing Sexual Agency*

Sexual agency entails recognition that the self is socially constructed in a “context of intersecting power inequalities,”²⁴⁹ a context featuring gender as a

²⁴⁶ For many rape victims, the experience of violation derives from the fact that sex was imposed without consent. See Tuerkheimer, *supra* note 25, at 1475–78.

²⁴⁷ Tuerkheimer, *supra* note 84, at 335.

²⁴⁸ This turn from the more traditional autonomy norm is rooted in feminist attention to subordination and its consequences for women in particular. See Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 805 (1999) (describing how “the liberal norm of autonomy has been modified—or . . . ‘reconstructed’—by its encounters with contemporary feminist theory”). As for the relationship between autonomy and agency, Kathryn Abrams has noted, “It remains an open question whether the feminist influences I describe will, in fact, ‘reconstruct’ liberal autonomy, or transform it into something else altogether.” *Id.*

²⁴⁹ *Id.* at 806.

primary locus of subordination.²⁵⁰ Unlike the traditional autonomous self, who can operate largely free of external influences, the agentic subject experiences substantial constraints. Yet within these constraints, the agentic subject is capable of exerting a will. This phenomenon is essential both to self-definition²⁵¹ and to self-direction.²⁵²

This insight reflects a positive understanding of sex—sex not only as pleasure, but also as resistance to subordination.²⁵³ On this view, female sexuality has the potential to defy repronormative ideologies that linger still today.²⁵⁴ Sexual subjectivity may even prove fundamental to achieving a more egalitarian social structure.²⁵⁵

Without denying the existence of constraints,²⁵⁶ a theory of sexual agency posits that agentic beings are nevertheless capable of consent. Indeed, agency makes consent the pivot point for distinguishing rape from sex. As I have

²⁵⁰ *Id.* at 821.

²⁵¹ “Self-definition” involves “determining how one conceives of oneself in terms of the goals one wants to achieve and the kind of person, with particular values and attributes, one considers oneself to be.” *Id.* at 824.

²⁵² “Self-direction” includes “the identification of particular goals and the implementation of particular projects and lifeplans.” *Id.* at 829.

²⁵³ Sex-positive feminists have conceived sex as “a potentially important site of pleasure, fulfillment, and even power.” Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 282 (2008) (citations omitted).

²⁵⁴ *See id.* (“A key source of injustice, for sex-positive feminists, is the way in which women’s sexual agency is limited by prevailing ideologies, particularly ‘repronormative’ ideologies, i.e., those that valorize reproduction over other socially productive activities and cast[] non-reproductive sex for women as dangerous and illegitimate.” (citation omitted)).

²⁵⁵ Admittedly, profound tensions inhere in the concept of sexual agency. *See* Tuerkheimer, *supra* note 25, at 1478 (noting that “core tensions inhere in the concept of agency that threaten to undermine it,” and identifying the dilemmas of objectification, sexualization, and decontextualization). A range of coercive practices—even short of rape—influence women’s sexual choices, meaning that sexuality cannot be abstracted from social hierarchies. As Robin West persuasively argues, some sex is neither rape nor cause for celebration. In particular, West has developed the “possibility that the sexual choices women make, when those choices are contrary to felt desires, are harmful.” West, *supra* note 56, at 246. Consensual sex that is unwanted and unwelcome “often carries harms to the personhood, autonomy, integrity, and identity of the person who consents to it” *Id.* at 224.

²⁵⁶ The existence of structural constraints means that sexual agency is imperfect. As I have summarized this conception:

It contemplates rampant sexual violence by non-strangers and strangers alike, along with a culture that excuses this violence and conditions rape protection on sexual conformity. It acknowledges that women and girls consent to sex for reasons other than desire, and it resists the unthinking exaltation of this kind of sex. It recognizes that female sexuality is constructed along multiple axes, and that the path to liberation has as many forks. It is complicated, both contingent and tentative. And it is partial, positioning sexual agency not as everything, but as essential.

Tuerkheimer, *supra* note 25, at 1494.

previously argued,²⁵⁷ living as a subject means that one can consent to sex—for whatever the reason, without judgment. Consensual sexual expressions bear tremendous equalizing potential, including the possibility to “disrupt dominant sexual discourses,²⁵⁸ to assert power within a relationship, to contest imposed definitions of one’s self, and to forge new definitions.”²⁵⁹ To consent to sex is indeed to assert agency—especially for those whose sexuality has, over time, been variously denigrated, co-opted, denied, stigmatized, mythologized, and punished.

Likewise, for women to *not consent* to sex is to assert agency. Not consenting to sex manifests an insistence that one’s decision not to have sex matters—that it is not subordinate to any other’s. If sex is done to a woman irrespective of this decision, her agency has been quintessentially violated. Put differently, if sex without consent is simply sex (and not rape), a non-consenting woman is more akin to object than subject. As compared to the actor who imposed his will upon her, she is relatively powerless.

Regardless of the quantum of force employed, sex without consent is rape because disregarding consent vanquishes agency. Indeed, sex against one’s will is sexual agency’s antithesis. Consent qua consent thus becomes a matter of paramount importance. In short, distinguishing sex and rape by consent’s presence or absence affords meaning both to a woman’s consent and to her non-consent, affirming her existence as a sexual subject.

With agency as a guiding principle, the law’s adherence to a force requirement is highly problematic. If rape is a violation of sexual agency, sex with a (non-consenting) sleeping woman is akin to sex with an object, not a subject; the woman is acted upon. In much the same way, a non-consenting woman, because of intoxication or fear or trust, can be forced absent physical force to have sex. Since sex obtained without consent *for whatever reason* is sex without agency, it is rape. The harm of rape is best described in relation to the promise, and the imperfection, of agency.

Similarly, sexual agency explains the cultural ascendance of consent and provides impetus for reforming its legal definition. Statutory language that describes consent as “words or overt actions . . . indicating freely given

²⁵⁷ Tuerkheimer, *supra* note 84.

²⁵⁸ Abrams, *supra* note 248, at 839.

²⁵⁹ Tuerkheimer, *supra* note 84, at 342; *see also supra* notes 251–52 and accompanying text.

agreement”²⁶⁰ contemplates the interaction of sexual subjects; not objects. On this view, women and men are deemed capable of having and of expressing an intention to engage in sexual conduct. Without somehow expressing this intent, one cannot be said to have acted as a subject.²⁶¹

Affirmative consent definitions—like the campus disciplinary codes that have become commonplace²⁶²—construct sexuality to underscore its agentic qualities. By doing so, these definitions have the greatest potential to promote agency.

CONCLUSION

The decisive advance of consent culture positions rape law at a liminal moment. Having repudiated its patriarchal foundations,²⁶³ but not completely, the law of rape risks obsolescence absent further reform.²⁶⁴

Much of what remains contested in rape law²⁶⁵ can be explained by a failure on the part of reform efforts to fully dislodge the stranger-rape paradigm.²⁶⁶ Despite the fact that the vast majority of victims know their

²⁶⁰ See *supra* notes 68–69 and accompanying text.

²⁶¹ See *supra* notes 257–59 and accompanying text.

²⁶² See *supra* notes 41–51 and accompanying text.

²⁶³ Marking the area already traversed, a number of antiquated doctrinal tenets have been disavowed. Now the rape of wives by husbands is formally outlawed. The law recognizes that men, too, can be raped. Victims must no longer resist in order to avail themselves of legal protections, and unique evidentiary and procedural requirements have been formally abolished. These developments qualify as real successes.

²⁶⁴ It has been almost two decades since Stephen Schulhofer described a “myth of reform” in his influential book on rape law. STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 1 (1998) (“Despite three decades of intensive public discussion and numerous statutory reforms, the problem of rape has not been ‘solved.’”); see also Nourse, *supra* note 76, at 954 (characterizing the “myth of reform”).

²⁶⁵ Notwithstanding the general prohibition, women’s sexual histories may still be allowed in evidence if judges deem these behaviors deviant, or outside the normal bounds of female sexuality. See Tuerkheimer, *supra* note 7. More proof that rape law’s evolution is incomplete is the ongoing doctrinal presence of resistance as a means of defining force, or even consent. See Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953. As Victoria Nourse has astutely observed in this very context, “Outdated norms resurface but remain undisclosed in newer, more ambiguous guises.” Nourse, *supra* note 76, at 959.

²⁶⁶ Susan Estrich once described this paradigm:

A stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse. In that case, the law—judges, statutes, prosecutors and all—generally acknowledge that a serious crime has been committed. But most cases deviate in one or many respects from this clear picture, making interpretation far more complex. Where less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date, where the woman says no but does not fight, the understanding is

rapist,²⁶⁷ the elements of the offense of rape have traditionally been premised on exactly the opposite scenario.²⁶⁸

Most notably, reform efforts have left intact a bizarre patchwork of laws requiring the use of force for nonconsensual intercourse to qualify as rape. Nested in the dominant statutory approach are a set of related assumptions: without force, a woman cannot be compelled to engage in sex; the harm of rape is defined by force; an absence of consent matters only insofar as force is employed to overcome it. Consistent with a stranger-rape paradigm, if not wholly derived from it, these assumptions relegate the giving of consent to a place of little or no concern.

Within these parameters, appellate courts are still finding ways to opine on consent—mostly to emphasize its likely presence notwithstanding utter passivity on the part of the victim (and a jury finding to the contrary). Yet judicial conceptions of consent are unconstrained by definitional boundaries; the criminal law remains remarkably undeveloped in this regard.

My analysis has isolated the phenomenon of rape without force, both to show that it exists and to critique its legal treatment. This examination has exposed a body of law shot through with retrograde notions of female

different. In such cases, the law, as reflected in the opinions of the courts, the interpretation, if not the words, of the statutes, and the decisions of those within the criminal justice system, often tell us that no crime has taken place and that fault, if any is to be recognized, belongs with the woman.

Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1092 (1986).

²⁶⁷ Of women victimized by rape, half are raped by an intimate partner, and 40% by an acquaintance. NISVS, *supra* note 218, at 17–18.

²⁶⁸ David Bryden has described the criminal justice system's bifurcated treatment of rape as follows:

Whatever their other disputes, rape-law scholars agree about several fundamental realities. They agree that, for practical purposes, forcible rape is really two crimes. The consensus is that the criminal justice system performs at least reasonably well in dealing with "aggravated" rapes, defined as rapes by strangers, or men with weapons, or where the victim suffers ulterior injuries. With equal unanimity, scholars agree that the justice system often has performed poorly in cases involving rapes by unarmed acquaintances (dates, lovers, neighbors, co-workers, employers, and so on) and in which the victim suffers no additional injuries. Victims are less likely to report these acquaintance rapes (or even to recognize that they are rapes); if a victim does report it, the police are less likely to believe her; prosecutors are less likely to file charges; juries are less likely to convict; and any decision by an appellate court is more likely to be controversial.

Bryden, *supra* note 76, at 317–18 (footnotes omitted); *see also* Estrich, *supra* note 266, at 1161 ("The available data suggest that while violent, stranger rape may be among the most frequently reported crimes in this country, the non-traditional rape—the case involving non-strangers, less force, no beatings, no weapons—may be among the least frequently reported, even when its victims perceive it to be 'rape.' In many if not most of these cases, forced sex is tolerated by its victims as unavoidable, if not 'normal.'").

sexuality. So too is rape law entirely disconnected from an emerging culture of consent—a culture that is evidenced by the movement surrounding campus rape.

The insight that sex without consent is rape is true regardless of whether the non-consenting party is a college student: across educational status, rape ought to be properly defined.²⁶⁹ Statutory reform in this direction would resolve many of the doctrinal tensions embedded in the cases.²⁷⁰ It would focus attention on the meaning of consent. It would conform to widespread norms surrounding sex. And it would bring into alignment the definitional treatment of rape on and off campus.

For now, archaic understandings of female sexuality saturate the criminal law. Until this changes, the consent revolution will remain incomplete.

²⁶⁹ See *supra* note 20 and accompanying text (describing recent empirical evidence that non-college women are more vulnerable to sexual assault than their college counterparts).

²⁷⁰ This solution is of course partial. In particular, it does not address either the problem of under-enforcement or the difficulties involved in proving guilt beyond a reasonable doubt—concerns that tend to arise in non-stranger rape cases. See *supra* note 268. These are important issues that merit separate attention. In my view, neither enforcement nor evidentiary challenges should be conflated with the threshold definitional question that has been the focus of this discussion. Likewise, the appropriate structure of penalties—both direct and collateral—warrants independent consideration.