

**RESPONSE TO TUERKHEIMER –
RAPE ON AND OFF CAMPUS**

**THE VULNERABLE SUBJECT OF RAPE LAW: RETHINKING
AGENCY AND CONSENT[†]**

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Professor Deborah Tuerkheimer is one of the most articulate voices in the U.S. legal academy on the twin issues of sexual violence and rape law reform. In a series of articles over the past decade, she has laid out many of the deep tensions surrounding matters of consent and agency,¹ the construction of female sexuality,² criminal justice in the domestic sphere³ and the role of law in combating sexual violence.⁴ Her central voice as a scholar in this area has also been recognized by the American Law Institute,⁵ and she is currently a participant in two major projects involving sexual violence—one aiming to improve campus policies and procedures involving sexual and gender-based misconduct,⁶ and the other to reform the Model Penal Code provisions on

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¹ Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335 (2013), <http://www.yalelawjournal.org/forum/sex-without-consent>.

² Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461 (2012) (exploring the construction of notions of female sexuality in jurisprudence).

³ Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 959–62 (2004); Deborah Tuerkheimer, *Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later*, 75 GEO. WASH. L. REV. (2007); see also Deborah Tuerkheimer *Breakups*, 75 YALE J.L. & FEMINISM 51 (2013).

⁴ Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453 (2014).

⁵ The American Law Institute (ALI), founded in 1923, is the leading independent organization in the United States producing scholarly work to clarify, modernize, and improve the law.

⁶ Tuerkheimer is an adviser on an ALI project to explore Sexual and Gender-Based Misconduct on Campus, which will consider a host of issues including reporting procedures; confidentiality; relationships with police and local criminal justice; interim measures and support for complainants; investigation and adjudication; the role of lawyers; the creation and maintenance of records; sanctions or remedies; and appeals. The project will also examine informal resolutions, as well as the nature of hearings. AM. LAW INST., PROJECT

sexual assault.⁷ Tuerkheimer's article for the *Emory Law Journal*, *Rape On and Off Campus*,⁸ extends her earlier work on sexual agency, consent, and the inadequate nature of U.S. rape law to examine the disconnect between widely acknowledged cultural norms around sex, and the stubborn recalcitrance of rape laws to social reform.⁹

This response will seek to apply some of the insights of vulnerability theory to Tuerkheimer's piece with the goal of extending these important conversations into new analytical fields. Vulnerability theory is a paradigm being developed by Professor Martha Fineman and a host of international scholars associated with the "Vulnerability and Human Condition Initiative" at Emory Law School, as will be discussed in detail below. The theory provides a useful vantage upon the systemic and historical patterns of inequality that lead to violence against women, as well as the legal and social means for redress. By tracking questions of consent, criminality, and sexual agency through a vulnerability lens, we may move away from the "vulnerable victim" model to engage a more robust understanding of resilience and institutional responsibility.

This response will briefly describe some key elements of Tuerkheimer's piece as relates to consent and criminal justice, turn to the language of "vulnerability" in a sexual assault case she discusses, and then introduce the vulnerability paradigm as an alternative figuring of the vulnerable subject of rape law. By applying vulnerability theory to questions of sexual agency and

ON SEXUAL AND GENDER-BASED MISCONDUCT ON CAMPUS: PROCEDURAL FRAMEWORKS AND ANALYSIS, <https://www.ali.org/projects/show/project-sexual-and-gender-based-misconduct-campus-procedural-frameworks-and-analysis/>.

⁷ Tuerkheimer is a member of the ALI consultative group on a project to re-examine Article 213 of the Model Penal Code, as concerns Sexual Assault and Related Offenses. *Model Penal Code: Sexual Assault and Related Offenses*, AM. LAW INST., https://www.ali.org/projects/show/sexual-assault-and-related-offenses/#_participants (last visited Mar. 9, 2016). While the Model Penal Code was progressive when approved by the ALI in 1962, it is now outdated and requires major revisions to remain a useful guide for legislatures and courts.

⁸ Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1 (2015).

⁹ Indeed, Tuerkheimer is particularly adept at tracing this type of disconnect between cultural norms and legal doctrine, as in her piece *Slutwalking in the Shadow of the Law*, which explores the manner in which a culture of growing sex-positivity coexists uneasily alongside the continuing and widespread rape of women by their friends, dates and acquaintances. Tuerkheimer, *supra* note 4. She uses the vehicle of "Slutwalks"—a grassroots initiative that began in Toronto, Canada and that has now become a global movement that embraces an unabashedly pro-sex mantra—to argue that a social consensus around female agency is now emerging and ready to push for major reforms to existing rape law. *Id.* The article does a handy job at balancing social analysis with calls for legal reform, and is a deft piece of scholarship firmly grounded in contemporary social developments. *Id.*

consent, this response aims to contribute to a vital conversation about legal reform and societal responsibility in the context of violence against women.

Overview of Rape On and Off Campus

Tuerkheimer's article is particularly concerned with discrepancies between the increasing focus on consent (and especially affirmative consent) on college campuses and university policy, and a continued emphasis on physical force and resistance in rape statutes.¹⁰ Tuerkheimer rightly criticizes the ongoing presence of statutory force requirements as rooted in archaic notions of both stranger rape and retrograde notions of female sexuality as consistently willing and available. In the article, she describes a series of cases wherein the presence of physical domination did not meet the legal threshold of force, and therefore was not categorized as rape, despite the sex in question being profoundly non-consensual.¹¹ Tuerkheimer offers these cases as a vehicle to ask important questions about the "ambiguous doctrinal treatment of sexual consent"¹² and the role of consent in rape reform efforts—most notably whether the absence of consent should be adequate to categorize a sexual act as rape.¹³

As Tuerkheimer writes, the failure to include a statutory definition of consent within rape law is "incompatible with prevailing understandings" of personal autonomy and sexual agency in the contemporary cultural context.¹⁴ This new culture of consent is crystallized by not merely the idea that "*No means No*," but by an affirmative mantra of "*Yes Means Yes*" as an emerging standard within (especially) college disciplinary codes. This vision of affirmative choice has sought to define rape not as the presence of aggressive physical force met by victim resistance, but as *all* forms of sex occurring without active consent.¹⁵ Given the prevalence of these new cultural norms, Tuerkheimer advocates for the reformation of rape statutes to more clearly define consent, while recognizing that rape may also occur without the

¹⁰ Tuerkheimer, *supra* note 8.

¹¹ *Id.* at 15–38.

¹² *Id.* at 3.

¹³ *Id.* at 4.

¹⁴ *Id.* at 3; *see also* Tuerkheimer, *supra* note 2 (discussing the role of the judiciary in interpreting (especially) female sexuality and sexual conduct).

¹⁵ Of course, the growing importance of consent is not evenly distributed across college campuses or other institutional locations. Nevertheless, Tuerkheimer points to a number of popular media depictions of female consent, and explains that, "[w]hile by no means universally shared, an understanding of consent as affirmative is becoming commonplace on campuses." Tuerkheimer, *supra* note 8, at 13.

presence of physical force. As she writes, this move would bring rape law into alignment with contemporary cultural norms around consent;¹⁶ focus judicial perspectives on rape by directing legal review and discouraging speculation as to whether consent was truly given;¹⁷ and ensure that non-consensual sex that occurs outside of the collegiate world is also subject to culturally appropriate review.¹⁸ Her underlying claim is that “efforts to end sexual assault, on and off campus, cannot succeed unless consent culture migrates to criminal justice.”¹⁹

To illustrate the harms of what she calls “criminal law’s consent problem,” Tuerkheimer walks through a set of cases involving nonconsensual intercourse that occurred without the presence of abundant physical force.²⁰ Instead, these encounters were marked by what she calls “functional force”²¹—sexual acts initiated with sleeping, intoxicated or relationally connected individuals against their will, but unmarked by vigorous physical domination.²² These cases involve teachers and students, parents and children, friends and acquaintances, elders and adults, with the defining feature being an absence of physical force capable of meeting the statutory force requirement.²³ While Tuerkheimer’s focus is on non-forcible sexual violations of women, the cases do range across male–male sexual encounters as well.²⁴ These cases powerfully illustrate how reliance upon a physical force model of culpability offers substantial latitude to defendants to contest the charges of rape.

Tuerkheimer’s argument for the inadequacy of statutory force requirements is convincingly made, and the cases demonstrate a series of obviously unwanted sexual acts that nevertheless left the victims unable to seek redress due to archaic legal formulations of the threshold for rape. Tuerkheimer turns a steady gaze upon a flawed system with her discussion of these cases, and her call for a wholesale reform of rape law is certainly overdue. In one of the more disturbing cases she recounts, *State v. Elias*,²⁵ the failure of the force requirement statutes to address non-consensual sex could hardly be more

¹⁶ *Id.* at 45.

¹⁷ *Id.* at 16.

¹⁸ *Id.* at 5.

¹⁹ *Id.*

²⁰ *Id.* at 15–38.

²¹ *Id.* at 4.

²² *Id.*

²³ *Id.* at 15–38.

²⁴ *E.g., id.* at 19–21 (discussing *People v. Tenorio*, No. CRA07-002, 2007 WL 4689038 (Guam Dec. 18, 2007)).

²⁵ No. 39139, 2013 WL 3480737 (Idaho Ct. App. July 12, 2013).

stark.²⁶ In this incident the defendant, Jess Elias, had entered a locked home where the victim was sleeping with her two young children, and had penetrated her with his fingers, stopping only when the victim awoke and recoiled in fear.²⁷ Elias was convicted at trial for forcible penetration by use of a foreign object, but upon appeal asserted that his conduct was not prohibited by the sexual assault statute under which he was prosecuted.²⁸ The issue raised on appeal was not whether the victim had consented—she clearly had not—but “whether there was sufficient evidence to sustain Elias’ conviction through proof that the act was accomplished against the victim’s will *by the use of force*.”²⁹

As Tuerkheimer points out, the *Elias* case is especially interesting because the facts allowed the court to “bypass familiar concerns about lying victims and misguided defendants.”³⁰ Nevertheless, with a statutory definition of forcible rape in hand, the court ultimately vacated Elias’s conviction as the circumstances did not involve threats, a weapon, or violent actions—all criteria necessary to sustain the charge of sexual assault.³¹

While I agree with Tuerkheimer that the clarity of the facts allows an avoidance of the he-said, she-said issues of consent that can muddy other sexual assault cases, there is also an interesting use of the notion of vulnerability at work as well. The court explicitly described how “Elias used the unlawful entry while she slept and her *vulnerability* to accomplish the act of penetration” against the victim’s will.³² Tuerkheimer also reads the victim’s unconsciousness as a form of vulnerability—the “vulnerability that sleep imposes”³³—as a way to catalog the varieties of functional force which involve sleeping victims. Indeed, the court makes full acknowledgement of the fact that the victim was asleep, and therefore found herself unable to resist Elias’ unwanted advances.³⁴

We are surely accustomed to hearing about victims of sexual violence as “vulnerable” and thinking of individuals or categories of people as “vulnerable

²⁶ See Tuerkheimer, *supra* note 8, at 17–19.

²⁷ *Id.* at 18 (citing *Elias*, 2013 WL 3480737, at *1).

²⁸ *Id.* (citing *Elias*, 2013 WL 3480737, at *6–7).

²⁹ *Id.* (emphasis added).

³⁰ *Id.* at 19.

³¹ *Id.*

³² *Elias*, 2013 WL 3480737, at *6 (emphasis added).

³³ Tuerkheimer, *supra* note 8, at 19.

³⁴ *Elias*, 2013 WL 3480737, at *6.

groups”. We often designate, for example, children, the elderly, sex workers, or drug addicts as so-called “vulnerable populations” in recognition of their special precarity or openness to harm. Thus in the *Elias* case, the victim may easily be understood as vulnerable not only due to her unconscious state, but due to a larger cultural narrative about the vulnerability of women to sexual violence. However, we might pause to consider other vulnerabilities here—and most critically the vulnerability of Jess Elias. How did the legal system operate to address *his* vulnerability at the expense of his victim and her children? In what ways does the statutory requirement of force respond *directly* to the vulnerability of male perpetrators? And how might it advance our understanding of rape reform to account for these multiple and competing vulnerabilities?

I would argue that this ruling allowed Elias’s *own* vulnerability to prosecution to be mediated by a rape statute which requires force, threats or weapons to be present. The statutory requirement of force is clearly not crafted to consider the needs of a sleeping mother who awakes to find her neighbor making unwanted sexual advances. However it just as clearly served Elias well, thanks to a narrow definition of force as physical and overpowering strength. The case thus invites us to think more carefully about the nature of contemporary rape laws and the historic vulnerabilities they *have* been designed to address. In order to understand these competing notions, I will turn now to the vulnerability paradigm introduced above. This analysis will give us a structural modality to think through many of the issues that Tuerkheimer raises, including both the limitations of statutory force requirements and the affirmative consent culture of college campuses.

Vulnerability Theory

The concept of vulnerability does not describe merely our susceptibility to harm or danger, but represents a fundamental and universal element of the human condition.³⁵ As articulated by Fineman, this understanding challenges the manner in which vulnerability has commonly been applied, most often in reference to “vulnerable populations” as a specific and negatively stigmatized subset of society.³⁶ Rather than focusing on the vulnerability of a select few

³⁵ Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 255 (2010).

³⁶ Martha Albertson Fineman, “Elderly” as Vulnerable: *Rethinking the Nature of Individual and Societal Responsibility*, 20 ELDER L.J. 71, 86 (2012) (“The designation of vulnerable (inferior) populations reinforces and valorizes the ideal liberal subject, who is positioned as the polar opposite of the vulnerable population.”)

(and thereby presuming the relative *invulnerability* of others), the vulnerability paradigm asks that we expand the frame to recognize our commonly held vulnerability. We are *all* vulnerable as embodied beings, and over the course of our individual lives we will all require the care and support of others.³⁷

This need is most evident when we are infants, and perhaps also as we age into our elder years or fall ill. These are clear relations of dependency that, “although episodic, [are] universally experienced.”³⁸ Instead of thinking of these relations of dependency as aberrations from the autonomy and independence imagined by the liberal subject of law, however, vulnerability theory asks us to reimagine the myth of autonomy altogether.³⁹ It requires that we look not to the rational, independent, self-sufficient liberal subject as the foundation for our legal and social order, but to the vulnerable materiality of our human embodiment.⁴⁰

When the liberal subject is replaced with the vulnerable subject, the universal relations of care upon which society depends are thrown into relief. A vulnerability approach allows us to understand our dependency not as a liability, but as the “compelling impetus for the creation of social relationships and institutions.”⁴¹ Indeed, Fineman argues that it is precisely our universal vulnerability that has necessitated “the formation of families, communities, associations, and even political entities and nation-states.”⁴² The social institutions we construct are explicitly designed to mitigate human vulnerability, and to provide (at least some) with resources and support as we move across the life course.⁴³

Applying a Vulnerability Analysis

This framework gives us a number of conceptual tools to apply to contemporary rape law. Rather than focus on the “vulnerability” of victims, we can analyze the body of rape jurisprudence as an institutional system expressly

This liberal subject is thus constructed as invulnerable, or at least differently vulnerable, and represents the desirable and achievable ideals of autonomy, independence, and self-sufficiency.”)

³⁷ See *id.*; see also Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13, 18 (1999).

³⁸ Martha Albertson Fineman, *Equality and Difference—The Restrained State*, 66 ALA. L. REV. 609, 614 (2015).

³⁹ MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

⁴⁰ Fineman, *supra* note 35.

⁴¹ Fineman, *supra* note 38, at 614.

⁴² *Id.*

⁴³ Fineman, *supra* note 36.

designed to mitigate certain forms of human vulnerability. It is a structure created to provide resources and support to some people, while potentially denying those same mechanisms of support to others. So what vulnerabilities is rape law actually responding to? As discussed above, Elias's vulnerability to prosecution was nicely mitigated by the forcible rape statute. A preoccupation with force is a longstanding feature of the common law, and one that engineers rape law as a tool best designed to respond to "stranger rape"—scenarios where the physical domination of a rape victim is uncontested and consent is clearly withheld. Yet according to a five-year study conducted by the U.S. Department of Justice, more than four out of five rapes are committed by someone known to the victim, with a full 82% of sexual assaults being perpetrated by a non-stranger.⁴⁴ The current statutory model of forcible rape may thus be read as profoundly attuned to the vulnerabilities of sexual assailants who are acquainted with their victims. The statutes identified by Tuerkheimer are operating to protect the legal vulnerabilities of known assailants while denying those same attentions to the vulnerability of their victims.

Of course, these laws were not consciously crafted for such diabolical ends. Sexual assault law has merely balanced the vulnerability of men to false accusations of rape with the vulnerability of women to being raped. However, this gendered dimension of rape law has long tended to tip in favor of male vulnerability, which is why the focus has historically rested upon the character and deportment of the victim—What was she wearing? Has she been sexually available in the past? Did she fight back against the accused?⁴⁵ Such a concern also materializes in the relationship between force and consent, where (as we have seen) male vulnerability to rape accusations is mitigated by a statutory requirement for physical violence. Such an evidentiary requirement is a strategy to protect men from false accusations and is often present in judicial reasoning around the presence or absence of consent. The role of consent is critical for Tuerkheimer in this piece, and as she rightly says, "In dicta, judges

⁴⁴ U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION STUDY: 2009–2013 (2014).

⁴⁵ There is of course a rich and carefully articulated history of American rape laws, with particular attention to their specifically gendered nature. My application of the vulnerability paradigm does not intend to reinvent this work, but it does hope to reveal the competing institutional and structural vulnerabilities at play within contemporary projects for reform. For far more depth on the history of rape and sexual violence jurisprudence than can be provided here, see Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993).

manifest deep skepticism of non-consent in the absence of force. The effect is a legal presumption of perpetual consent.”⁴⁶ Such deliberations are difficult to read if not a concern for the vulnerability of the alleged assailant to rape accusations, at the expense of the claims made by their victims.⁴⁷

While these operations of rape law hold a marked gender dimension, they are just as deeply racialized.⁴⁸ As Aya Gruber argues, a critical dimension of rape law has been the historic enforcement of white racial supremacy.⁴⁹ Thus the profound vulnerability of black men to accusations of rape by white women, and the casting of black masculinity as inherently violent and “bestial.”⁵⁰ As Gruber explains, it is this figure of racialized male danger which served as the prototypical rapist—“a black man, lurking in the shadows, ready to violently assault the presumed-chaste (white) woman.”⁵¹ As this figure of brute and forcible strength composed one side of the rape dyad, so did the figure of the victim emerge as a virtuous white woman ready to struggle to the death against an assault upon her virginity. Within this crucible of race and sex panic were forged our modern statutory force requirements.

Although feminist reformers have been successful at introducing evidentiary prohibitions (shield laws) and actus reus standards, which responded to the vulnerability of women to non-stranger rape under nineteenth century criminal codes, they have been far less successful at shifting the issue of consent. Tuerkheimer focuses on this issue for the remainder of her piece, and I hope the issue of consent may most centrally benefit from a vulnerability analysis.

⁴⁶ Tuerkheimer, *supra* note 8, at 16.

⁴⁷ In marked contrast to other assault crimes, when it comes to rape the legal system has emphasized not the actions of the *accused*, but the *victim's* character, behavior, and words. For example, the crime of battery is established based solely on the perpetrator's actions and/or intent. The victim's response to being punched is irrelevant. A lack of consent is assumed—nobody wants to get punched. Determining a charge of rape, on the other hand, has been focused not on the action of the *assailant*, but on the victim's perceived influence upon and response to the perpetrator. Rather than examining the actions of the accused to establish the presence of a crime, as with other forms of assault, the focus shifts to determine whether or not the victim consented or led on the perpetrator on.

⁴⁸ Gail Elizabeth Wyatt, *The Sociocultural Context of African American and White American Women's Rape*, 48 J. SOC. ISSUES 77, 79–80 (1992).

⁴⁹ Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 587 (2009). Gruber argues that rape law also served two other interlocking goals: it was part of the larger state effort to police sexuality in general, and it sought to entrench male domination over women through chastity and ownership paradigms. *Id.*

⁵⁰ N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1320 (2004) (analyzing construction of Black men as sexual “beasts”).

⁵¹ Gruber, *supra* note 49, at 587.

Consent and Vulnerability

Tuerkheimer recognizes that neither statutory rape law nor the collegiate response to on-campus rape has been able to adequately respond to the prevalence of non-stranger sexual assault. She acknowledges that colleges have faced a “massive institutional breakdown” in responding to sexual assault that encompasses many factors,⁵² but (at least for this article) focuses her analysis primarily on the failure to adequately define sexual consent. Her argument is that even as we move to reshape the institutional response to sexual assault, “the necessity of consent is the premise that frames the discussion.”⁵³ We may then ask, What changes when we add a need for affirmative consent? What does that shift in the relationship between the actors, their social relationships, and the unequal distributions of power that may be in play? To begin answering these questions it may be helpful to return to some of Tuerkheimer’s examples and the social relationships between the litigants in a number of the cases she discusses.

As mentioned above, the vulnerability analysis is directly concerned with relationships of care and dependency. It is also focused on the embedded nature of those relationships within our key social institutions—the relationship of a teacher and student within a school; a parent and child within a family; an employer and employee within a workplace; an elderly person and a young adult within the home. Many of Tuerkheimer’s examples focus on just these sorts of relationships, which carry an inherent power imbalance due to their dependent nature. As part of her development of the categories of “functional force” Tuerkheimer dubs these interactions as ones of “relational control” where “the victim’s ongoing relationship with the defendant” means that physical force is not necessary to coerce non-consensual sex.⁵⁴ These are paradigmatic relations of dependency, and it is true that the responsible party in each instance abused their position in order to initiate unwanted sexual contact.

However, in many of these cases, and particularly those involving children and youth, the issue of consent appears to miss the point. We indeed desire spaces free of sexual exploitation as a society, and this is why we have both laws and taboos around incest and underage sexual contact. Consent puts undue attention upon the individual, however, when in fact it is the relationship

⁵² Tuerkheimer, *supra* note 8, at 7.

⁵³ *Id.* at 9.

⁵⁴ *Id.* at 30.

of child/parent, student/teacher itself that requires protection. It is the *structural relationship* of dependency and care that matters, which is why (for example) many educational institutions have policies prohibiting sexual contact between undergraduate students and faculty, regardless of the age of the student or the presence of consent. It is the relationship of teacher/student that is important to the integrity of the school, not the individual consent (or otherwise) of the parties. Such policies recognize that exploitation is inherent to certain relationships and limits must be placed upon them for the greater social good.

Also important to focus on is the question of responsibility. In the examples of student/teacher and parent/child, there are different levels of responsibility and capacity inherent within each relationship. While the child certainly has a role to play in this regard, the parent carries the overwhelming burden of responsibility. These are not *intended* to be equal relationships between autonomous individuals but are inherently uneven in terms of the distribution of power. For its part, the state must also shoulder responsibility in creating the laws and social institutions that will prevent conditions of exploitation from occurring. Thus, responsibility again is not about the characteristics of the individual, but the context in which each social relationship occurs. Under the consent model, responsibility falls upon each individual within a he-said, she-said scenario that masks both institutional context and social relationships. Rather than continuing to focus on individual actors, a vulnerability analysis would broaden the frame to share responsibility within the context of the institutional setting while also taking into account the nature of their social relationship and its inherent dependencies.

While I applaud Tuerkheimer for seeking to recognize the forms of “relational control” that may inhere within such social dynamics—and this is important work—her sole focus in this regard remains on the presence of fear and trust.⁵⁵ Indeed, as she argues, “In the context of non-stranger rape, trust imposes vulnerability.”⁵⁶ While I appreciate that we are using the term in different registers, I would argue that vulnerability is produced not by trust in

⁵⁵ *Id.*

⁵⁶ *Id.* at 33. In fact, I found this section to be more tenuous than the carefully constructed arguments around sleep and intoxication. I am simply not convinced by Tuerkheimer’s claim that it was the victim’s “trust” that allowed the perpetrator to foist unwanted sex upon her. As she writes, “Carlson was able to achieve sex without [the victim’s] consent, and without using force, because she trusted Carlson to respect her expressed desires.” *Id.* at 34. This passage feels overly speculative and unnecessary. A range of social pressures and motivations may come into play during such intimate relationality, and there does not seem a need to impute the victim’s ‘trusting’ mindset except to fit the bounds of Tuerkheimer’s own taxonomy.

human relationships but by the failure of our laws and institutions to adequately recognize and mitigate the inherent power imbalances within those relationships. Where power is distributed unequally, we require robust guidelines and frameworks to stop exploitation from occurring. Again, this is not merely a question of individual consent and personal autonomy; rather, it involves awareness of the institutional context and shared responsibility across multiple and often dependent actors.

Consent and Criminality

Where I find Tuerkheimer's argument for consent most compelling is in regard to the need for a statutory definition of consent, specifically in order to prevent the judiciary from speculating at any rate about its presence or absence.⁵⁷ As she argues, without a statutory definition it becomes easier for "unfettered judicial preconceptions about the significance of passivity" to emerge.⁵⁸ I think this is correct, and I am sympathetic with Tuerkheimer's frustration at the necessary link between force and rape, as well as its tension with the culture of consent that is slowly emerging. However, it is not always clear from her text why incidents of sexual violence must be captured under expanded criminal rape statutes.

For example, while the model of collegiate affirmative consent is held up as a superior vision, the article does not contrast criminal rape proceedings with what she refers to as the "sub-criminal"⁵⁹ reviews of non-consensual sexual intercourse which occur on college campuses. Yet the reader is led to the conclusion that such tribunals are more effective, because they engage a more capacious understanding of (especially) affirmative consent, and presumably offer more protection for the survivors of sexual assault.⁶⁰ Nevertheless, given that other provisions are available and the range of scenarios and relationships presented may warrant a mobile range of laws and prosecutions, it is not always clear why criminal rape proceedings are viewed as the ideal response.

⁵⁷ See *id.* at 3.

⁵⁸ *Id.* at 38.

⁵⁹ *Id.* at 5, 39.

⁶⁰ Tuerkheimer mentions that the "prevalence of sexual violence against undergraduate men, as compared to women, is even less understood." *Id.* at 6 n.29. This is not a tremendously comforting reflection, given that the consent model is being advanced here as the correct location for legal reform. *Id.* In the same footnote, she cites a piece by Dana Goldstein, *The Dueling Data on Campus Rape*, which describes the difficulties in locating accurate statistics on sexual violence among college populations. *Id.*

What should be the relationship between the degree of injury and the punishment of the offender? This appears to be Tuerkheimer's underlying question, although it is never addressed as such. If a sexual offender is not convicted on the most serious charges because force was not found to be present, but was nevertheless subjected to criminal penalty, what then becomes the issue? Is it symbolic? Consequential? Tuerkheimer never explains why the more serious charges should be championed. At least in regard to some varieties of sexual assault, she explains that "nonconsensual sex with extremely intoxicated victims can be punished in many jurisdictions under separate statutory provisions."⁶¹ More information is required as to why "the classification of rape as a sub-criminal offense" is such a problem.⁶²

Sexual Agency

Ultimately, Tuerkheimer locates her solution to antiquated rape statutes in sexual agency. "Unlike the traditional autonomous self, who can operate largely free of external influences, the agentic subject experiences substantial constraints. Yet within those constraints, the agentic subject is capable of exerting a will."⁶³ She is arguing here against positions like that taken up by Jed Rubenfield, who "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."⁶⁴ This is a classical view of the liberal subject built upon expressly gendered foundations. As the liberal subject is a self-possessed and sovereign subject, rape then becomes the dispossession of that bodily autonomy. We are both in disagreement with Rubenfield's position, but Tuerkheimer's move is to agency instead of autonomy. This is more relational in orientation, but I am concerned that it still does not yet move far enough from particularized notions of the self.

The vulnerable subject of rape law would not rest upon individualized claims made by a rational self-willed actor. Rather than focusing on the 'vulnerable' victim/agent, or even upon the vulnerability of the perpetrator/criminal, a vulnerability analysis asks that we consider questions of responsibility and power as embedded within an institutional matrix. Autonomy and agency do not simply arise; they emerge from our ability to build resilience over the life-course. They are also rooted in our relations of

⁶¹ *Id.* at 25.

⁶² *Id.* at 39.

⁶³ *Id.* at 41.

⁶⁴ *Id.* at 17 n.84.

dependency and cannot be decontextualized from the moment of harm. A focus on consent and agency is too narrow to account for the responsibilities held by each individual within our social relationships, particularly when such relationships are loaded with unequal distributions of dependency and care. Nor does a focus on consent and agency easily allow us to account for the responsibility to be attached to our social institutions as well.

To that end, I agree with Tuerkheimer that an important phenomenon has been emerging from college campuses in recent years as students and administrators are beginning to genuinely address the widespread incidence of non-stranger rape. Tuerkheimer describes the White House's recent initiatives in this area, including a one-minute public service announcement devoted to non-stranger rape which features President Obama alongside celebrities such as Daniel Craig, Benicio del Toro and Steve Carell. As Tuerkheimer explains,

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.⁶⁵

She also points approvingly to affirmative consent definitions being enshrined in campus disciplinary codes, which "construct sexuality to underscore its agentic qualities."⁶⁶ While her piece as a whole is aimed at pointing out the gap between such evolving cultural norms and the recalcitrant nature of statutory rape law—and it by no means lauds the collegiate model as an easy fix—she does note that college students have access to institutional support unavailable to the general population. As Tuerkheimer explains,

[T]he 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. 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.⁶⁷

I would argue, however, that the most critical divergence between collegiate sexual assault provisions and jurisdictions with statutory force

⁶⁵ *Id.* at 8.

⁶⁶ *Id.* at 43.

⁶⁷ *Id.* at 5.

requirements is not the “emerging culture of consent”⁶⁸ that Tuerkheimer identifies. Rather, it is the presence of a culture of institutional responsibility on the part of the university. *This* is why non-collegiate people are less resilient: because the only institution they can look to is a criminal justice system with an antiquated notion of force that remains entrenched upon profoundly racist and gendered roots. Consent may be one manifestation of that divergence, but it is not the distinguishing factor. The real difference between college sexual assault policies and criminal rape law is that the former have begun to take responsibility for the vulnerability of students, albeit in haphazard fashion, even as universities seek to ameliorate their own institutional vulnerability to Title IX violations. Consent may thus be understood as a factor in pushing forward campus protocols, but as part of a larger apparatus of collegiate sexual assault reform. The inclusion of affirmative consent policies is part of this institutional shift, but the reason that collegiate women enjoy greater protections is not because of consent per se, but because an institutional culture is slowly developing to take responsibility for the vulnerability of students to sexual assault.

Ultimately, the language of vulnerability is often used to describe victims of rape in ways that are not entirely productive. This response piece has aimed to recalibrate that language and demonstrate the generative nature of vulnerability as well as the analytical frames that a vulnerability analysis may open when we seek to consider the vulnerable subject of rape law. Such a conceptual reframing helps us move from designating individuals as vulnerable victims of violence, toward recognizing that one’s susceptibility to sexual violence emerges from an intersecting array of factors that include a lack of individual resources, legislative and judicial failures, and the limitations of institutional support. The focus then becomes not one of agency and consent, but of social relationships and institutional context. This helps us to see past criminal justice as the central mode for response to sexual violence, while placing an impetus of responsibility upon all actors—individual, institutional, and state—to address the conditions of possibility for sexual exploitation.

⁶⁸ *Id.* at 45.