

SEXUAL VIOLATION WITHOUT LAW

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This Essay, written for a conference held in honor of Stephen Schulhofer, considers #MeToo era evidence that the spectrum of sexual violation remains mostly untouched by criminal law. In addition to highlighting the endurance of pronounced gaps in legal protection, I argue that #MeToo stories should catalyze needed reform.

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INTRODUCTION

It is a tremendous honor to celebrate Stephen Schulhofer. I am especially delighted to salute his pioneering work theorizing rape law and his continuing efforts to align criminal law with feminist understandings of sexual assault.¹ I greatly admire these achievements and, even more, Professor Schulhofer himself. My aim in this Essay is to revisit his core insights about sexual consent from the vantage of the #MeToo era, and to articulate a new set of insights that emerges from this analysis.

#MeToo—which in its current iteration² can be traced to publication of sexual misconduct allegations against Harvey Weinstein

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1. *Unwanted Sex* remains a seminal work. STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998). For purposes of this essay, Schulhofer’s conceptual development of sexual consent in relation to the legal definition of rape is of particular importance.

2. The “Me Too” campaign originated in 2007, when activist Tarana Burke founded a nonprofit to assist victims of sexual harassment and assault. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20,

in the *New York Times*³ and the *New Yorker*⁴—reflects a significant break from the past. What began as a #MeToo moment has lasted far longer than anyone might reasonably have expected when the hashtag first went viral, thus generating a ground-up movement,⁵ albeit one whose aims are diffuse. Many of the movement’s participants would likely disagree about priorities, tactics, and even end goals. Yet a unifying thread—perhaps the cohering thread—is the view that sharing one’s account of abuse is a powerful act, one that can help to reshape societal conceptions of sexual misconduct.⁶ What most distinguishes #MeToo is the rise of informal accusation, or what I call “unofficial reporting”—that is, disclosing sexual violation through channels other than those established to process such claims and mete out an appropriate sanction.⁷ Accusations leveled in the court of public opinion⁸ are often accompanied by detailed narratives, which provide a rich source of data for anyone interested in identifying persistent gaps between practices of sexual misconduct and the laws that purport to prohibit them.⁹ Here I will

2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/XUB2-KKGG>].

3. See Jodi Kantor & Meghan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/M47J-3XFQ>].

4. See Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/9DEY-SXH3>].

5. For thoughts on when a protest campaign like #MeToo becomes a movement, see Beverly Gage, *When Does a Moment Turn Into a ‘Movement’?*, N.Y. TIMES MAG. (May 15, 2018), <https://www.nytimes.com/2018/05/15/magazine/when-does-a-moment-turn-into-a-movement.html> [perma.cc/8SH2-4UQ8].

6. “Sexual misconduct” encompasses sexual assault, sexual harassment, and non-actionable sexual abuse. See Kathryn Casteel & Andrea Jones-Rooy, *We Need a Better Way to Talk About ‘Sexual Misconduct’*, FIVETHIRTYEIGHT (Apr. 17, 2018, 6:01 AM), <https://fivethirtyeight.com/features/we-need-a-better-way-to-talk-about-sexual-misconduct/> [<https://perma.cc/EKA8-W7WX>] (explaining the importance of distinguishing between various types of sexual misconduct).

7. See generally Deborah Tuerkheimer, *Unofficial Reporting in the #MeToo Era*, 2019 U. CHI. LEGAL F. 273 (2019).

8. While this raises several concerns, the public circulation of sexual misconduct narratives can also advance important interests, including victim empowerment, group member protection, epistemic justice, norm evolution, institutional change, and offender accountability. See Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1174-88 (2019).

9. Admittedly, the methodological advantages to be gained from mining #MeToo accounts are not without limitation. First (and relevant to a broader critique of the movement itself), these accounts may not be representative since more

focus on gaps between the substantive criminal law and practices of sexual assault.

The stories of sexual violation that have surfaced in the past three years—like those that, in far more piecemeal fashion, emerged before—fall on a spectrum. Here, I characterize this spectrum by reference to a trio of admittedly fuzzy categories, each defined in relation to consent: “no consent,”¹⁰ “coerced consent,”¹¹ and what I will call “pressured consent.”¹² On inspection, we see that, across the board, current criminal law definitions of sexual assault reach only a sliver of conduct that is harmful.¹³ That lawful conduct may nevertheless be harmful is a fundamental lesson of #MeToo.

The question that is particularly pressing for reformers is the extent to which the law should be expanded to prohibit more categories of sexual harm. This, of course, is an inquiry that has preoc-

privileged survivors have far greater media access than their marginalized counterparts. See Jamillah Bowman Williams, *Big Data Insights: #MeToo, Law, and Social Change*, 2020 U. CHI. LEGAL FORUM (forthcoming 2021). A second worry—especially for legal scholars—is that descriptions of misconduct reported in the court of public opinion lack the adversarial testing that attends formal proceedings. One response to this latter concern is that many of the accused men have acknowledged wrongdoing or been credibly accused by multiple individuals. More globally, journalistic norms and standards dictate that, with rare exception, an accuser’s account will not be published absent corroboration. While not failsafe, this approach tends to assure greater reliability to mainstream media stories, as compared to allegations appearing only on social media platforms like Twitter and Facebook.

10. See *infra* Part I.

11. See *infra* Part II. As a legal matter, coerced consent is the functional equivalent of no consent. See Kimberly Ferzan, *Consent and Coercion*, 50 ARIZ. ST. L. J. 951, 954 (“Consent waives a right one has against interference with one’s person or property, rendering something that was previously impermissible, permissible. But when coercion is present, it renders this act of consenting null and void.”). Like coercion, exploitation and deception (which I do not separately discuss here) may also invalidate consent. See *id.* at 960 n.38.

12. See *infra* Part III.

13. Definitions of sexual assault vary widely across the states. For a helpful synopsis, see Schulhofer, *infra* note 29, at 343-44 (“In almost half the states, sexual penetration is not a crime unless there is *both* non-consent *and* some sort of force. PENETRATION WITHOUT CONSENT IS NOT, IN ITSELF, A CRIME In all these jurisdictions, some sort of force is required, *in addition* to non-consent, to make out a crime. . . . That leaves two important issues where the trend is *not* clear and where reform still faces formidable opposition. First, what counts as consent? What is the minimum requirement? And second, when that minimum requirement is met—for example, when you have explicit permission—what circumstances nullify that *apparent* consent? When does yes *not* mean yes? These are the places where the key battles for reform are now being fought.”).

cupied Professor Schulhofer for decades—and one that continues to motivate his efforts to revise the Model Penal Code.¹⁴ Without defending the theoretical underpinnings of my normative claims here,¹⁵ I will use the occasion to gesture at the regulatory framework that would be generated by centering what we have come to know about consent.¹⁶

Part I of this Essay examines several high profile “no consent” cases from the #MeToo era,¹⁷ showing how a surviving force requirement¹⁸ functions to legalize nonconsensual sex that, outside the law, has come to be understood as sexual assault. Broadly speaking, if we care about sexual autonomy¹⁹ or sexual agency,²⁰ the “no consent” category is an easy case for prohibition. In a similar vein, these cases illustrate why passivity should not be legally equated with consent.²¹

Part II describes the adjacent category of “coerced consent,” in which a range of forces can negate what might otherwise appear to be consensual conduct.²² To be sure, locating borders between this

14. I am one of many consultants to the Project.

15. See, e.g., Deborah Tuerkheimer, *Sexual Agency and the Unfinished Work of Rape Law Reform*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 166 (Robin West & Cynthia G. Bowman, eds., 2018) (theorizing sexual agency in relation to rape and rape law); Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1478–1506 (2014) (same).

16. For a contrary view of the worth of consent, see Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 465 (2016) (“Consent is a pathetic standard of equal sex for a free people.”). For the proposed statutory language that emerges from this analysis, see *infra* note 88.

17. Criminal law definitions of consent vary considerably. As Schulhofer explains, “Even among states that treat absence of consent as sufficient (together with sexual penetration) to establish the offense, there is wide and consequential disagreement about what ‘consent’ means. There are three options in play. The first option says that to prove unwillingness, there must be some verbal protest. The second option says we should assume *non*-consent unless there is clear affirmative permission. In the first option, silence and passivity always imply consent; in the second option, silence and passivity always mean *no* consent. In the third option, silence and passivity can imply *either* consent or non-consent, depending on all the circumstances.” Schulhofer, *infra* note 29, at 344.

18. See *infra* note 29 and accompanying text.

19. See SCHULHOFER, *supra* note 1, at 99–114.

20. See *supra* note 15 and accompanying text.

21. This is a distinct minority view. See Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 451 (2016).

22. For present purposes, we need not choose between an understanding of consent as “an internal act of acquiescence or a communicative act, or somewhere in between.” Ferzan, *supra* note 11, at 966. As Professor Ferzan explains, “The focus on both the consentor’s acquiescence, as well as the consentee’s uptake, yields that we care about the actions and choices of both the consentor and the con-

category and the others is a contestable endeavor. Under the framework advanced here, defining the upper end of the spectrum is not especially consequential since both adjacent categories would be considered unlawful.²³ (For instance, at the boundary of what I am calling “coerced consent” and “no consent,” we might place apparent consent at gunpoint²⁴). But identifying the lower boundary between “coerced consent” and “pressured consent” is more fraught. Both categories squarely implicate social hierarchies—gender chief among them²⁵—that are not readily recognized by criminal law.²⁶ Nor is it always clear when the coercive forces at play suffice to invalidate consent.²⁷ Against the backdrop of steep and pervasive social inequalities, a complete absence of coercion is uncommon as the influx of women’s stories into public spaces has made far more evident. Criminal law, however, mostly overlooks this reality.

As I discuss in Part III, #MeToo has unearthed the widespread phenomenon of consented-to conduct that is harmful even absent the hallmarks of coercion that rise to (or *should* rise to) the level of criminality.²⁸ Yet there is a notable relationship between this type of misconduct—misconduct resulting in “pressured consent”—and the criminal law. Outlawing egregious sexual violations tends to foster female sexual agency, which, in turn, diminishes the power of pressure to consent.

In conclusion, I suggest that in order to make inroads on the problem of pressured consent, reform should bring the “no consent” and “coerced consent” cases more fully within the ambit of

sentee. Indeed, even where there is subjective acquiescence or communication, that acquiescence can be defeated by force, fraud, or incapacity. . . . To some scholars and courts, *assent* (the mental act or communication) does not become *consent* if there is force, fraud, or incapacity. To others, this is *consent* but not *valid consent*.” *Id.* at 967. For a philosophical treatment, see Scott A. Anderson, *Conceptualizing Rape as Coerced Sex*, 127 *ETHICS* 50, 52 (2016).

23. *But see* sources cited *infra* note 88 and accompanying text (describing holes in the law of coerced consent). *See also* Ferzan, *supra* note 11, at 957-58 (identifying the question of coercer wrongdoing as conceptually and legally distinct from whether a coercee’s choice is unacceptably constrained).

24. The law has long recognized that physical threats can negate consent. *See, e.g.*, MODEL PENAL CODE § 213.1(1) (1962) (stating that “a male who has sexual intercourse with a female not his wife is guilty of rape if . . . he compels her to submit by force *or by threat of imminent death, serious bodily injury, extreme pain or kidnapping*, to be inflicted on anyone.”) (emphasis added).

25. *See generally* KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* (2018).

26. This is a problem that transcends the redress of sexual violence. *See* Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 *U. PA. L. REV.* 2151 (1995).

27. *See infra* Part II.

28. *See infra* note 123 and accompanying text.

the law. It is important to underscore that criminal law reform is by no means a panacea. Quite the contrary—a range of mechanisms, legal and extra-legal, are essential to the process of cultural change. But the criminal law undoubtedly exerts a significant influence on social norms, including those that govern sex and gender relations. From this perspective, work to harmonize the criminal law with contemporary understandings of sexual violation is one facet of a much larger project—one that seeks to upend an entrenched system of male sexual entitlement.

I. NO CONSENT

A central teaching of #MeToo is that nonconsensual sexual penetration and contact can result even without the use of excessive physical force. Yet excessive physical force continues to preoccupy the criminal law. In just under half the states, this preoccupation manifests as an enduring force requirement.²⁹

The force requirement exists in stark tension with the typical realities of nonconsensual penetration by an acquaintance or intimate.³⁰ As feminist legal scholars have long insisted, defining sexual assault by reference to the use of physical force rather than the absence of consent *simpliciter* elides the harm of sexual assault.³¹ My objective here is not to retread this ground, but to show how emerging accounts provide new support for a longstanding critique, and

29. Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 L. & INEQ. 335, 342-43 (2017) (“In almost half the states, sexual penetration is not a crime unless there is both non-consent and some sort of force. *Penetration without consent is not, in itself, a crime.*”).

30. Of women victimized by rape, half are raped by an intimate partner, and 40% by an acquaintance. MICHELE C. BLACK ET AL., NAT’L CTR. FOR INJ. PREVENTION & CONTROL CNTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 21 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [<https://perma.cc/TM2E-XW96>]. For a taxonomy of common scenarios involving non-forcible, non-consensual penetration, see Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L. J. 1, 16-38 (2015).

31. A venerable line of feminist legal scholarship has argued for redefinition of the crime of rape as sex without consent. *See, e.g.*, SCHULHOFER, *supra* note 1, at 254 (“Under most existing criminal codes, the absence of consent does not by itself make intercourse illegal. Criminal penalties apply only when the sexual aggressor uses too much physical force. But respect for sexual autonomy requires a different view. Intercourse without consent should always be considered a serious offense.”). *See also* David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 322 (2000) (“Virtually all modern rape scholars want to modify or abolish the force requirement as an element of rape.”).

then to suggest that—for this very reason—the #MeToo movement is well positioned to propel a next wave of reform that abolishes the law’s regressive fixation with physical force.³²

* * *

We can begin with former film producer Harvey Weinstein, whose abuse has become synonymous with extreme sexual predation. In a blockbuster *New Yorker* piece by Ronan Farrow that helped to ignite the #MeToo movement,³³ actress Lucia Evans depicted an encounter in which she was “forced . . . to perform oral sex” on Weinstein.³⁴ During a meeting ostensibly related to the possibility of casting Evans for several roles, Weinstein indicated that someone from his film company would follow up.³⁵ According to Farrow’s report:

“At that point, after that, is when he assaulted me,” Evans said. “He forced me to perform oral sex on him.” As she objected, Weinstein took his penis out of his pants and pulled her head down onto it. “I said, over and over, ‘I don’t want to do this, stop, don’t,’” she recalled. “I tried to get away, but maybe I didn’t try hard enough. I didn’t want to kick him or fight him.” In the end, she said, “he’s a big guy. He overpowered me.” She added, “I just sort of gave up. That’s the most horrible part of it, and that’s why he’s been able to do this to so many people: people give up, and then they feel like it’s their fault.”³⁶

My interest here is not whether a prosecutor could prove these allegations (which Weinstein denied) beyond a reasonable doubt.³⁷

32. See *infra* note 56.

33. See *supra* notes 2-4 and accompanying text.

34. Farrow, *supra* note 4.

35. *Id.*

36. *Id.*

37. The office of the New York County District Attorney (disclosure: my former office) presented this incident to the grand jury, which returned an indictment, although the Evans count was later dismissed on the prosecutor’s consent. See Jan Ransom & Alan Feuer, *Harvey Weinstein Gets One Sexual Assault Charge Dismissed*, N.Y. TIMES (Oct. 11, 2018), <https://www.nytimes.com/2018/10/11/nyregion/harvey-weinstein-lucia-evans-charge-dismissed.html> [https://perma.cc/C8KY-LM24]; Letter from District Attorney Cyrus Vance to Benjamin Brafman (Sept. 12, 2018) (on file with author) (disclosing that a witness had come forward to describe an account by Evans that was “at odds with the factual account” previously provided, and that the case detective had failed to inform the prosecution of this conflicting account despite having known of it). In response, the *New Yorker* issued a statement “standing by our reporting and fact-checking process, which was assiduous and thorough.” Anna North, *One Woman’s Sexual Assault Charge Against Harvey Weinstein Has Been Dropped*, VOX (Oct. 11, 2018, 3:17 PM), <https://>

Rather, I am concerned with whether the conduct Evans described satisfies the legal definition of sexual assault.³⁸ Because most states have formally abolished a formal resistance requirement,³⁹ one might well conclude that the allegations constitute sexual assault. According to widespread if not universal consensus,⁴⁰ the fact that Evans “sort of gave up” should have no bearing whatsoever on whether Weinstein committed sexual assault if indeed he “pulled her head down onto [his penis]” and “overpowered” her.

Notwithstanding this apparent consensus, applying the law of force to Evans’s account is potentially problematic. The New York statute with which Weinstein was charged requires proof of “forcible compulsion,” meaning, “to compel by . . . use of physical force.”⁴¹ While the relevant case law is varied on the quantum of force necessary to satisfy the definition, some courts have set the bar quite high.⁴² Predictably, citing these cases, Weinstein moved to dismiss the Evans count of his indictment on the ground that the grand jury presentation was insufficient with regard to the requisite force.

www.vox.com/identities/2018/10/11/17963758/harvey-weinstein-charges-lucia-evans-benjamin-brafman [<https://perma.cc/AA95-SHUP>].

38. *See supra* note 29.

39. *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.1 Reporters’ Notes 26-27 (AM. LAW INST., Tentative Draft No. 3, 2017) (summarizing statutory law of resistance); *see also* Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953 (1998) (recounting history of rape law’s resistance requirement and describing its partial endurance in judicial decision making around force and nonconsent).

40. To my knowledge, none of the abundant public commentary surrounding the allegations suggested that, if true, what Evans described was anything other than sexual assault.

41. N.Y. PENAL LAW § 130.00(8)(a). The definition of forcible compulsion also includes “a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped.” *See supra* note 24. With regard to the Evans incident, Weinstein was indicted for criminal sexual act in the first degree, which prohibits “oral sexual conduct by forcible compulsion.” N.Y. PENAL LAW § 130.50(1). A lesser charge of criminal sexual act in the third degree prohibits oral sexual contact without consent. N.Y. PENAL LAW § 130.50(1).

42. *See* Tuerkheimer, *supra* note 30, at 15-38 (discussing cases where non-consent and force diverge); MacKinnon, *supra* note 16, at 465-69 (criticizing the physical force frame); *see also* State v. Mirabal, 278 A.D.2d 526, 527 (N.Y. App. Div. 2000) (notwithstanding complainant’s testimony that “defendant placed his penis in her mouth and had his hands on the back of her head . . . [and] that she unsuccessfully attempted to stop the act,” holding that the element of forcible compulsion was not satisfied) (cited in support of Weinstein’s motion to dismiss the indictment for lack of legally sufficient evidence of force).

To be clear, I am not convinced that—had the Evans count not been dismissed by the prosecutor for other reasons⁴³—Weinstein ultimately would have prevailed on his insufficiency claim, or that a properly charged jury would have acquitted, or that a reviewing court would have reversed a hypothetical conviction on insufficiency grounds. But regardless, these questions would have been much closer than commentators and the public realized. Subsequent developments in the Weinstein prosecution lend support to this view.

In early 2020, Weinstein went to trial on sexual assault charges involving two main witnesses, Miriam Haley and Jessica Mann. After weeks of testimony and days of deliberations, the jury reached a split verdict—Weinstein was found guilty of forcibly assaulting Haley, not guilty of forcibly assaulting Mann (but guilty of a lesser charge), and not guilty of two counts of predatory assault that also involved an older allegation by Annabella Sciorra.⁴⁴ As commentators puzzled over the verdict, the controlling legal definitions went largely unremarked.

The force requirement can explain the jury's decision to acquit Weinstein of rape in the first degree for the assault on Mann. The problem for the prosecution was not that the jury disbelieved her. Based on her testimony, they convicted him of third-degree rape, a less serious felony that prohibits nonconsensual intercourse. But the prosecution was unable to satisfy the "forcible compulsion" requirement for first degree rape.⁴⁵ A close look at Mann's description of the assault shows how nonconsensual intercourse can be accomplished without the kind of physical force that many rape statutes continue to demand.

The incident in question took place in a hotel room where Mann had been hectorred into accompanying Weinstein.⁴⁶ Mann told jurors that she repeatedly tried to open the door to leave, but each time Weinstein blocked her escape. Mann's testimony at trial continued:

43. See *supra* note 37.

44. Shayna Jacobs, *Harvey Weinstein Guilty on Two Charges, Acquitted on Others in New York Assault Case*, WASH. POST (Feb. 24, 2020, 5:25 PM), https://www.washingtonpost.com/lifestyle/harvey-weinstein-trial-verdict/2020/02/24/057b9f36-5284-11ea-b119-4faabac6674f_story.html [https://perma.cc/9U8D-E55Q].

45. See *supra* note 41 (defining New York's "forcible compulsion" standard).

46. Transcript of Testimony of Jessica Mann, *People v. Harvey Weinstein*, Nos. 2335-18 & 2673-19, 2256 (N.Y. Sup. Ct. Jan. 31, 2020) (on file with author).

I kind of shut down a little bit and then he told me to undress and I still was not undressing. And then he comes at me and grabs my hand to try to force me to start undressing myself as he held my hand to do it, and . . . I gave up at that point, and I undressed and he stood over me until I was completely naked, then he told me to lay on the bed. And once I was naked and laying on the bed, he walked into the bathroom and sort of closed the door behind him. He was gone for not very long at all, and the door is still kind of open a little bit. And then he came out naked and he got on top of me and that is when he put himself inside of me, his penis inside of me.⁴⁷

Mann described herself as “panicked.” “He would have commanding type statements such as you know, undress now,” she explained, adding that his tone of voice was “like a drill sergeant and sharp and angry.”⁴⁸

The direct examination continued:

Q: When he was putting his penis in your vagina, where was your body and where was his?

A: I was laying completely on my back the whole time, and he was completely laying on top of me, which is not very comfortable.

Q: Were you able to move or get up?

A: No, you can’t under him.⁴⁹

While apparently crediting this testimony, the jury concluded that this attack did not qualify as first degree rape. Mann’s will was overborne, but not by enough physical force to satisfy the applicable definition.⁵⁰ This outcome suggests that even if we bracket the difficulties of proof that invariably arise in sexual assault cases,⁵¹ the force requirement makes the viability of charges in many—even most—cases of non-stranger rape far less obvious than it ought to be.

47. *Id.* at 2258-59.

48. *Id.* at 2258-60.

49. *Id.* at 2260.

50. Rape in the third degree is punishable by up to four years in prison. *New York Rape Laws*, FINDLAW, <https://statelaws.findlaw.com/new-york-law/new-york-rape-laws.html> [<https://perma.cc/4MWG-LNBA>] (last visited March 2, 2020). By contrast, rape in the first degree is punishable by five to twenty-five years in prison. *Id.*

51. See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 27-41 (2017) (documenting the systemic under-enforcement of sexual assault laws).

It is worth noting that the proposed changes to the Model Penal Code also include a force standard that is designedly high.⁵² While the revisions under consideration would designate nonconsensual (non-forcible) conduct as a lesser crime,⁵³ it is nonetheless striking that the kind of force allegedly deployed by Weinstein against Evans might not qualify as such under the proposed definition, which requires force that causes physical injury, inflicts significant physical pain, or significantly impedes mobility.⁵⁴ If this outcome seems undesirable, one possible response would be to ratchet down the requisite level of force so that it becomes simply a proxy for non-consent.⁵⁵ But this solution misses the point. The very framework of physicality detracts attention from the gravamen of the sexual assault—namely, the absence of consent.⁵⁶ Only by abolishing the force requirement do we turn our attention where it ought to be trained.

Before moving on, let us consider one more example of how the force requirement is inaptly applied to a fairly typical incident of sexual assault.⁵⁷ Ileana Douglas is a former actress and writer who came forward in July 2018 with public accusations against Les

52. See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES, *supra* note 39, at § 213.1 (defining forcible rape as requiring the use or threatened use of “physical force or restraint.” According to the Reporters’ Notes, “the fact that an actor’s larger size or weight limits the other person’s movements in an act of sexual penetration or oral sex does not itself constitute the use of physical force or restraint”). *Id.* Subsequent drafts reiterate this commitment to a high force threshold, but—because these later iterations are not yet publicly available—an earlier version is cited.

53. See *id.* at § 213.4 (defining sexual penetration or oral sex without consent as a felony in the fifth degree).

54. See *supra* note 52 and accompanying text. Again, it might be argued either way; the question would be close.

55. See, e.g., State *ex rel.* M.T.S., 609 A.2d 1266 (N.J. 1992); see also *supra* notes 30-31 and accompanying text.

56. While the use of physical force arguably aggravates the harm of nonconsensual sex acts and the moral culpability surrounding their infliction, grading by reference to the use of weapons, threats, or injury provides alternatives to deeming physical force itself the penalty enhancer. Regardless of whether physical force (or some tangible manifestation of it) is treated as a factor that aggravates nonconsensual sex acts, for conceptual reasons, I maintain that non-consent itself should lie at the core of the definition. See *supra* note 15.

57. Notably, the most commonplace kind of sexual assault—again, by a non-stranger—is becoming increasingly visible in the #MeToo era. See, e.g., Samantha Schmidt, Fenit Nirappil & Laura Vazzella, *Professor Who Accused Virginia Lt. Gov. Justin Fairfax of 2004 Sexual Assault Issues Statement Detailing Alleged Incident*, WASH. POST (Feb. 6, 2019), https://www.washingtonpost.com/local/virginia-politics/2019/02/06/daed33aa-2a30-11e9-b2fc-721718903bfc_story.html [https://perma.cc/ANN7-2622].

Moonves, the former head of CBS.⁵⁸ The event in question allegedly occurred in March 1997, around the time Douglas was cast in a comedy called *Queens*, which prompted a meeting called by Moonves in his office.⁵⁹ The two were alone at the time.⁶⁰ When Moonves turned the conversation from work to whether Douglas was single and then asked to kiss her, Douglas tried to return to the subject of *Queens*.⁶¹ At this point, she alleged, he grabbed her.⁶² Douglas described her version of events as follows:

In a millisecond, he's got one arm over me, pinning me," she said. Moonves was "violently kissing" her, holding her down on the couch with her arms above her head. "What it feels like to have someone hold you down—you can't breathe, you can't move," she said. "The physicality of it was horrendous." She recalled lying limp and unresponsive beneath him. "You sort of black out," she told me. "You think, How long is this going to go on? I was just looking at this nice picture of his family and his kids. I couldn't get him off me." She said it was only when Moonves, aroused, pulled up her skirt and began to thrust against her that her fear overcame her paralysis. She told herself that she had to do something to stop him. "At that point, you're a trapped animal," she told me. "Your life is flashing before your eyes."⁶³

According to Douglas, Moonves stood up after Douglas made a remark aimed at stopping him.⁶⁴ Although she escaped the room without further harm, the damage done was lasting. As she related more than two decades later, "[i]t has stayed with me the rest of my life, that terror."⁶⁵

Douglas did not make a report to police—"it was obvious that it would be career suicide," a friend later explained.⁶⁶ But even if

58. See Ronan Farrow, *Les Moonves and CBS Face Allegations of Sexual Misconduct*, NEW YORKER (July 27, 2018), <https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct> [https://perma.cc/54H2-AMUQ]. Moonves resigned from CBS shortly after the allegations were first reported.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. See Farrow, *supra* note 58.

64. *Id.*

65. *Id.* Douglas said that, the next day, she described the assault to a friend, who apparently corroborated her account. *Id.*

66. *Id.* According to recent Justice Department estimates, the population most vulnerable to sexual assault—females ages 18-24—report to police at rates of only twenty percent for college students and thirty-two percent for non-college

Douglas had chosen to report, the force involved in the alleged incident may well have been deemed insufficient to constitute an attempted sexual assault, and likewise insufficient to constitute a sexual assault had penetration been accomplished. Despite Douglas's perceptions—the kissing was “violent”; the “physicality of it was horrendous”; “you're a trapped animal”—the force involved in the attack described was arguably not enough to constitute force under law in states like New York,⁶⁷ where the CBS offices are located. Although the sufficiency of evidence to support a finding of “forcible compulsion” demands a highly fact dependent inquiry, the force alleged might well fall short in a hypothetical Moonves prosecution.⁶⁸

A more generalizable inquiry is whether this force would qualify under the Model Penal Code definition now under consideration.⁶⁹ On my reading, it would not.⁷⁰ This result runs counter to a widespread and growing consensus around what constitutes the essence of sexual assault. The #MeToo stories have affirmed the importance of centering consent rather than force in our definition of sexual assault. This reform should by now be fairly uncontroversial.⁷¹ Yet, across the states, much work remains.⁷²

students. See SOFI SINOZICH & LYNN LANGTON, U.S. DEP'T JUST. BUREAU OF JUST. STATS., RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995-2013, 9 (2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> [<https://perma.cc/A2RZ-MFY2>]. Women of color, both on and off campus, may be even less likely to report sexual assault than their white counterparts. *Id.* One reason is the predictability of a non-response. Among non-students, nearly one in five surveyed did not report because “police would not or could not do anything to help.” *Id.*

67. See *supra* note 41.

68. See *supra* notes 41-42 and accompanying text. Moonves responded to the initial allegations against him by stating, “I always understood and respected—and abided by the principle—that ‘no’ means ‘no.’” Even if we take this assertion as true, it reflects the traditionally crabbed understanding of consent. See *infra* notes 73-79 and accompanying text (discussing the importance of affirmative consent); see also Peggy Orenstein, *It's Not that Men Don't Know What Consent Is*, N.Y. TIMES (Feb. 23, 2019), <https://www.nytimes.com/2019/02/23/opinion/sunday/sexual-consent-college.html> [<https://perma.cc/P7HD-MM96>].

69. See *supra* notes 52-55 and accompanying text; but see *supra* note 53 and accompanying text (noting proposed lesser crime of nonconsensual penetration or oral sex).

70. Douglas was not physically injured, nor did she suffer “significant physical pain.” Whether Moonves “significantly impeded” her ability to move freely (per the applicable force definition) is perhaps a closer question, but these allegations might well fall short.

71. See Schulhofer, *supra* note 29, at 342.

72. See *supra* note 29 and accompanying text.

Work to dislodge force from the crime of sexual assault will surely place greater pressure on the meaning of consent, about which there is considerable disagreement.⁷³ Professor Schulhofer, among others, has argued for a standard that requires some external indication of a willingness to engage in the sexual conduct at issue.⁷⁴ The main alternative is a rule that effectively presumes that silence and passivity constitute consent to sexual contact,⁷⁵ or even penetration, and requires the complainant to demonstrate unwillingness to engage in the activity.⁷⁶

Without rehashing the arguments for and against an affirmative consent standard in the abstract, I turn now to consider how the #MeToo stories inform this debate. My contention is that the criminal law's extant failure to adopt an affirmative consent standard reifies a view of passive female sexuality—that is, a view of women as sexual subjects who exist for the touching and the taking.⁷⁷

73. *Id.* at 343; see also Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. L. REV. 665, 674-80 (2017) (cataloguing objections to codifying affirmative consent); Tuerkheimer, *supra* note 21, at 444-47 (summarizing the bases of opposition to affirmative consent).

74. See Schulhofer, *supra* note 29, at 341 (“For practical and theoretical reasons, willingness should never be assumed.”).

75. For an understanding of consent as “willed acquiescence,” see Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 404-07 (2016).

76. In essence, these laws reinstate the traditional resistance requirement in a formulation that allows verbal resistance to suffice. See, e.g., NEB. REV. STAT. ANN. § 28-318(8), 319(1) (West 2010) (criminalizing penetration without consent and defining without consent as “express[ing] a lack of consent through words . . . or conduct” and requiring the victim to “make known to the actor the victim’s refusal to consent”); N.H. REV. STAT. ANN. § 632-A:2(I)(m) (2010) (prohibiting penetration “[w]hen at the time of the sexual assault the victim indicates by speech or conduct that there is not freely given consent to performance of the sexual act”); N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2013) (defining consent to require that “the victim clearly expressed that he or she did not consent to engage in [a sexual] act, and a reasonable person in the actor’s situation would have understood such person’s words and acts as an expression of lack of consent to such act under all the circumstances”); UTAH CODE ANN. § 76-5-402(1), 406(2) (West 2015) (criminalizing sexual intercourse without consent and defining consent as the victim “express[ing] lack of consent through words or conduct”).

77. A handful of states incorporate an affirmative consent standard in the criminal code. See, e.g., WIS. STAT. ANN. § 940.225(4) (West 2011) (requiring “words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact”); VT. STAT. ANN. tit. 13, § 3251(3) (West 2011) (defining consent as “words or actions by a person indicating a voluntary agreement to engage in a sexual act”); see also *State ex rel. M.T.S.*, 609 A.2d 1266 (N.J. 1992) (holding that consent requires “permission to engage in sexual penetration [that] must be affirmative and it must be given freely”).

This retrograde understanding sits uneasily with agency norms that have become increasingly salient with the rise of #MeToo.

Apart from the element of surprise that is present in many of the allegations, it is typical for an accuser to describe significant power differentials between herself and her abuser and to recount how this imbalance undermined her ability to express a lack of consent to the (mis)conduct. In jurisdictions with resistance-based consent definitions, as we might call them,⁷⁸ these accusers would likely be deemed to have consented. The opposite is true in states that require affirmative consent.⁷⁹

To see what is at stake in how we define consent, consider one of dozens of sexual misconduct allegations against Charlie Rose, who was once among the nation's most influential television journalists.⁸⁰ Like so many others, the accuser, a young woman whose name has not been reported, was attempting to “break into” an industry dominated by men. Rose offered her the prospect of a job as executive producer for global content, which the woman was “[e]ager to land.”⁸¹ To “see how they travelled together,” she says the two drove to Rose's home about sixty miles outside of Manhattan, stopping to eat en route and arriving after midnight to an empty residence. The woman gave the following account of what then transpired:

At the pool, Rose dangled his legs in the water and then said that he needed to change because his pant legs were wet. He returned wearing a white bathrobe, which was open; he wore nothing underneath.

“I thought, I'm doomed,” she said. “I was completely panicked. In retrospect, I thought of a million things I could have done.”

78. See *supra* note 76 and accompanying text.

79. The draft of the revised Model Penal Code defines consent as “a person's willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact;” “consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.” See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0(4)(a), (b) (AM. LAW INST., Tentative Draft No. 3, 2017).

80. See Claire Atkinson, *Charlie Rose Accused by 27 Women of Sexual Harassment*, NBC NEWS (May 3, 2018), <https://www.nbcnews.com/news/amp/ncna871021> [<https://perma.cc/P5KF-EB4T>]; Irin Carmon & Amy Brittain, *Eight Women Say Charlie Rose Sexually Harassed Them—With Nudity, Gropping and Lewd Calls*, WASH. POST (Nov. 20, 2017), https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexuallyharassed-them-with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d_story.html [<https://perma.cc/622F-S5PQ>].

81. Carmon & Brittain, *supra* note 80.

She said she was not intoxicated — Rose had drunk his wine and then hers at the restaurant — but said he appeared to be. It was nearly 2 a.m. and she was exhausted, she said. She also said she felt alone and powerless. It was the middle of the night, they were on his secluded property, and she did not know how to drive.

“I started talking in this feeble and compulsive way,” she said. “I started talking about power, how the abuse of power can be. He completely lost it. ‘What are you talking about? That’s certainly not the case.’”

She said he then tried to put a hand down her pants.

“By the time he touched me the first time, he was already very angry,” she said. “I was scared, and I was also kind of frozen.”⁸²

The woman’s understandable sense of powerlessness and fright not only explains her behavior, it makes her “frozen” reaction seem almost inevitable.⁸³ But because she did not demonstrate her unwillingness to be touched, the majority rule would count this as consent. If this result is at odds with a developing normative consensus, it means that the criminal law is trailing cultural progress.

#MeToo has laid bare a set of social inequalities that should impact the legal framing of consent.⁸⁴ Again and again, we have seen how power can be deployed to inhibit resistance to conduct that is, by any reasonable measure, unconsented-to. Put differently, resistance-based consent definitions, physical and verbal alike, are incompatible with extremely hierarchical interactions. These are the very interactions that #MeToo is continuing to uncover.

82. *Id.*

83. After that, the woman says her memory became “hazy,” but she somehow ended up in Rose’s bedroom, “crying the entire time,” as he “reached down her pants” and she “pushed his hands away.” *Id.* According to her account, the “encounter ended when he appeared to be asleep and she felt she could leave the room.” *Id.*

84. See Melena Ryzik, Cara Buckley & Jodi Kantor, *Louis C.K. is Accused by 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html> [<https://perma.cc/V2VM-2NHQ>]; see also Louis C.K. *Responds to Accusations: “These Stories are True”*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/2017/11/10/arts/television/louis-ck-statement.html> [<https://perma.cc/3SEX-Y87D>] (admitting to misconduct and explaining, “At the time, I said to myself that what I did was okay because I never showed a woman my dick without asking first.”).

II. COERCED CONSENT

Affirmative consent definitions are by no means a complete solution to the problem of unequal power. Coercive forces, structural and otherwise, are often harnessed in service of generating an apparent willingness to engage in conduct that is, by any meaningful measure, nonconsensual.⁸⁵ While the law recognizes that physical threats render consent invalid,⁸⁶ the same cannot be said for other types of coercive forces, which may include not only conduct on the part of the coercing party, but also surrounding conditions that enhance the conduct's coercive effects.⁸⁷ Although statutory prohibitions are varied, they generally fall short of protecting against nonphysical coercion.⁸⁸

To better see these shortcomings, consider the allegations against singer R. Kelly that were published by *Rolling Stone* around the time the Weinstein story broke. Unlike the teenage accusers who had already come forward against Kelly (and many others who would later do so),⁸⁹ Kitti Jones was, at the time of the alleged

85. See *supra* note 22 and accompanying text.

86. See *supra* notes 22-24 and accompanying text.

87. There are rare exceptions. See, e.g., 18 PA. STAT. AND CONST. STAT. ANN. § 3101 (West 2014) (defining forcible compulsion as “compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied”).

88. See Schulhofer, *supra* note 29, at 345 (“The issue we are fighting over today is the same one that has been unresolved since the 1960s: what things other than physical violence make consent inauthentic? Broadly speaking, the major disagreement on this issue is between those who wanted the list to be very short—limited to things that are almost as coercive as physical violence—and on the other side, those who want that list to include many or all the other circumstances that limit a completely free choice.”). See also MacKinnon, *supra* note 16, at 474 (recognizing “psychological, economic, and other hierarchical forms of force—including age, mental and physical disability, and other inequalities, including sex, gender, race, class, and caste when deployed as forms of force or coercion in the sexual setting”).

89. See Jacey Fortin, *R. Kelly's Two-Decade Trail of Sexual Abuse Accusations*, N.Y. TIMES (May 10, 2018), <https://www.nytimes.com/2019/07/12/arts/music/rkelly-accusations-sexual-assault-history.html> [<https://perma.cc/TKJ5-2XYE>]. In the wake of the #MuteRKelly campaign and the release of *Surviving R. Kelly* (Netflix 2019), a documentary series first aired in January 2019, Kelly was indicted on a range of sex offenses by offices in both Chicago and New York. See Jason Meisner, Madeline Buckley & Megan Crepeau, *R. Kelly Hit with Federal Indictments in New York, Chicago; Faces New Racketeering, Sex Crime Charges, Allegations He Paid to Recover Sex Tapes and Cover Up Conduct*, CHI. TRIB. (July 12, 2019), <https://www.chicagotribune.com/news/criminal-justice/ct-r-kelly-arrested-federal-charges-20190712-6ghntysw3zf3lpncn4owcfzyje-story.html> [<https://perma.cc/Z5KC-GZDD>] (summarizing the criminal charges pending against R. Kelly).

abuse, a grown woman with a career in radio, an ex-husband, and a child.⁹⁰ According to her account, Jones met Kelly at a party in 2011 and began a “two-year relationship . . . rife with alleged physical abuse, sexual coercion, emotional manipulation and a slew of draconian rules that dictated nearly every aspect of her life . . . [including] what and when to eat, how to dress, when to go to the bathroom and how to perform for the singer sexually.”⁹¹ When Jones moved from Dallas to Kelly’s Chicago apartment, he “began governing” her behavior, “starting with the requirement that she wear baggy sweatpants whenever she went out and text near-constant updates on her whereabouts . . . Jones says she was forced to text with the singer or one of his employees for even the slightest request. (Sample text message: ‘Daddy, I need to go to the restroom.’).”⁹²

Jones alleges that Kelly began physically abusing her less than a month after she moved in with him.⁹³ When he later “moved Jones” from his Trump Tower residence to his nearby recording studio, she became even more isolated. Jones says Kelly would “frequently take away [her] phone as punishment—sometimes as long as two months—cutting off her ability to request food or perform basic functions.”⁹⁴ Jones recalls that Kelly also “began using starvation on her as punishment for not following his orders.”⁹⁵ Among the perceived infractions that could allegedly trigger “punishment” was “looking at” a man or laughing “if a male would say something funny.”⁹⁶

In March 2013, Jones was introduced to another of Kelly’s girlfriends, who was brought in naked and “told [] to crawl toward Jones and perform oral sex on her.”⁹⁷ Jones recounts, “[Kelly] told me, ‘I raised her. I’ve trained this bitch. This is my pet.’”⁹⁸ This was

90. See Jason Newman, *Surviving R. Kelly*, ROLLING STONE (Oct. 23, 2017), <https://www.rollingstone.com/culture/culture-features/surviving-r-kelly-118608/> [<https://perma.cc/VG3G-EP32>].

91. *Id.*

92. *Id.*

93. *Id.* (stating that the first incident of physical abuse allegedly involved kicking and slaps to Jones’s face; in the first year she lived with Kelly, Jones says he “physically abused her approximately 10 times, with the frequency increasing the following year.”).

94. Newman, *supra* note 90.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

the beginning of “a new, darker chapter.”⁹⁹ For purposes of analysis, we can posit that, at least on some occasions, Jones acquiesced to Kelly’s desires, performing a willingness to do just what he wanted. Yet we need not—and indeed should not—equate this with valid consent. As Jones explains, “‘You can’t say no because you’re going to get punished,’ she says. ‘You just become numb to what’s happening. It’s so traumatic the things that he makes you do to other people and to him.’ . . . ‘You have to actually be there to know exactly what it felt like for a person to overpower you and make you feel like there’s nothing for you outside of him.’”¹⁰⁰

This conception of what it means to be overpowered is dramatically different from what the law recognizes.¹⁰¹ Notice that Jones’s description encompasses not simply physical force or threats, although these mechanisms are often integral to an abuser’s efforts to control his victim.¹⁰² Kelly’s power over Jones extended well beyond the physical to dimensions not adequately captured by most existing definitions of coercion.¹⁰³ The feeling she had that “there’s nothing . . . outside of him” reflects a profound loss of agency.¹⁰⁴ Regardless of whether Jones’s compelled performance exhibited a

99. Newman, *supra* note 90 (“Kelly would frequently fly girls in for sex, says Jones, and order her and his other girlfriends to hook up with them. ‘You can’t say no because you’re going to get punished,’ she says. ‘You just become numb to what’s happening. It’s so traumatic the things that he makes you do to other people and to him.’”).

100. *Id.*

101. *See, e.g.*, State v. Alston, 312 S.E.2d 470, 476 (N.C. 1984) (holding that, while the alleged victim’s “general fear of the defendant may have been justified by his conduct on prior occasions,” there was insufficient evidence of force or threats of force at the time of the intercourse to sustain the rape conviction). Prosecutors can certainly attempt to introduce prior acts of violence on the part of the defendant in order to show the complainant’s fear on the occasion in question, but this would not necessarily overcome the law’s (unduly) narrow fixation on force or threats that occur close in time to the sex act in question.

102. *See* Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 962-69 (2004).

103. *See supra* note 88 and accompanying text; 18 PA. STAT. AND CONST. STAT. ANN. § 3101 (WEST 2014); *see also supra* text accompanying note 39.

104. Newman, *supra* note 90. As Jones later described her state of mind at her lowest moment, shortly before leaving Kelly, “I can either kill myself or kill him. What use am I when I walk out of here?” *Id.*

superficial veneer of consent,¹⁰⁵ the sexual acts that she described were deeply violative—even those that were lawful.¹⁰⁶

The #MeToo movement is unmasking an array of forces that can vitiate outward manifestations of willingness.¹⁰⁷ Because the most powerful constraints are imposed on the most marginalized members of society, their accounts—when they manage to surface¹⁰⁸—tend to vividly illustrate coerced consent.¹⁰⁹

Many examples are found in Bernice Yeung’s documentation of sexual violence against immigrant women in low-paying industries.¹¹⁰ For instance, Georgina Hernández recalls that her supervisor started flirting with her soon after she began working as a hotel cleaner.¹¹¹ Early on, “her supervisor flirted with her and tried to convince her to have sex with him. She rebuffed him, and he retaliated by giving her more work.”¹¹² Hernández says that less than a week later,

105. In his statement denying Jones’s allegations, Kelly’s representative remarked, “It is unfortunate that Ms. Jones, after public statements to the contrary, is now attempting to portray a relationship history with Mr. Kelly as anything other than consensual involvement between two adults. As stated previously, Mr. Kelly does not control the decision-making or force the actions of any other human being, including Ms. Jones. . . .” See Newman, *supra* note 90.

106. See *supra* notes 86-87 and accompanying text.

107. See MacKinnon, *supra* note 16, at 465 (“Under unequal conditions, many women acquiesce in or tolerate sex they cannot as a practical matter avoid or evade. Many initiate sex to stop other abuse and do their best to make it sexy so it will end quickly. That does not make the sex wanted. It certainly does not make it equal. It does make it legally consensual in most jurisdictions.”).

108. Because the most vulnerable accusers also face the strongest reporting disincentives, their victimization remains largely invisible to outside observers. In the #MeToo era, however, exceptional reporting has begun to probe the workings of coerced consent. See, e.g., Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html> [<https://perma.cc/GYY3-6WHW>] (detailing the accounts of female employees whose supervisors “traded better assignments for sex and punished [workers] who refused”).

109. See Collier Myerson, *Sexual Assault When You’re On the Margins: Can We All Say #MeToo?*, THE NATION (Oct. 9, 2017), <https://www.thenation.com/article/archive/sexual-assault-when-youre-on-the-margins-can-we-all-say-metoo/> [<https://perma.cc/UR8W-TRN3>]; Lia Russell, *Saying #MeToo is Harder for Low-Wage Workers*, AM. PROSPECT (May 3, 2018), <https://prospect.org/economy/saying-metoo-harder-low-wage-workers/> [<https://perma.cc/BA47-NCKY>].

110. BERNICE YEUNG, IN A DAY’S WORK: THE FIGHT TO END SEXUAL VIOLENCE AGAINST AMERICA’S MOST VULNERABLE WORKERS (2018) (chronicling sexual abuse throughout the agricultural, domestic, hospitality, and janitorial industries).

111. *Id.* at 18.

112. *Id.*

[he] told her that he needed to talk to her privately about her work in his car. This made [her] uncomfortable, but he said, “You need this job, don’t you?” He instructed Hernández to meet him in the parking garage. Worried about losing her job, she went to see him. When she got [there], he told her to get into his car. She hesitated, but he was the boss. She did what she was told. The supervisor drove them to a higher floor of the garage, where it was darker. . . . After he parked, [he] began to touch her legs. . . . She told him she didn’t want to go on, and he replied that he’d give her more days off and better pay. Hernández told him that she didn’t want more days off; she had taken the job because she wanted to work for her paycheck. When he began touching her breasts, she became afraid. Then . . . he took off her pants. As he forced himself on her, she panicked and her body froze.¹¹³

Hernández returned to work without telling anyone what had happened. As she explains, “[t]he shame of it was too much, and she knew it would be a challenge to quickly find a new job as an undocumented worker who couldn’t read or write.”¹¹⁴ Her travails continued:

About a week later, Hernández’s supervisor told her to meet him again. When she said no and tried to quit, he threatened to hurt [her] and her daughter, and added that if she wanted to stay in the country, she needed to keep him happy. This time he drove them to a motel.¹¹⁵

What happened at the motel is not described.¹¹⁶ It is quite possible that Hernández once again panicked and froze. But we could also suppose (as seems quite plausible) that because she had no viable options, Hernández behaved in a manner that—under diametrically different circumstances—might appear as if she was willingly participating in the sexual conduct. Regardless, what transpired at the motel cannot be considered consensual.¹¹⁷ The array of forces deployed by her supervisor was overwhelming, and it resulted in sexual violation—violation that most criminal law definitions would exclude.¹¹⁸ As Hernández put it, “There’s no way to say

113. *Id.* If passivity is understood to signify *the absence of consent*, as I have argued it should, this episode falls squarely within the no-consent category.

114. YEUNG, *supra* note 110, at 19.

115. *Id.*

116. A third incident alleged includes more detail. *Id.*

117. See *supra* note 22 and accompanying text.

118. A broader understanding of coercion than what the law typically employs would prohibit this conduct. See *supra* notes 86-87 (noting competing proposals to

no. When you need the job, you become the victim of others. That's why you deal with everything, all the harassment, the discrimination, everything. You deal with it—because you need the job.”¹¹⁹

By assigning totemic significance to the performance of consent in sexual interactions, we ignore the influence of steep and pervasive hierarchies that, like physical threats, can erode the will.¹²⁰ The #MeToo stories of the most marginalized assault survivors are amplifying the ways in which coercion invalidates consent. In time, we may come to more fully realize the harm inflicted by this kind of violation. But for now, the criminal law continues to lag behind better understandings.

III. PRESSURED CONSENT

Adjacent to the category of coerced consent, but distinct in important ways from it, are the “pressured consent” cases, which involve sexual contact that I will describe as unwanted but consensual.¹²¹ The problem of pressured or extracted consent has become far more discernible with the rise of the #MeToo movement. Without delving into how best to demarcate the line between coercion that invalidates consent and pressure that generates it,¹²² I contend that the latter dynamic is also harmful. Although my view is that the pressured consent cases should remain outside the pur-

reform the criminal law of coerced penetration). For analysis of the differing approaches in relation to sexual agency, see Tuerkheimer, *Sexual Agency*, *supra* note 15, at 182-83.

119. YEUNG, *supra* note 110, at 20.

120. Other scholars have noted that the law's failure to recognize the impact of coercion on consent “ultimately resurrects a form of the resistance requirement.” Kimberly Kessler Ferzan & Peter K. Westen, *How To Think (Like a Lawyer) About Rape*, 11 CRIM. L. & PHIL. 759 (2017). For a statutory proposal to address this gap, see MacKinnon, *supra* note 16.

121. For a fuller discussion, see Tuerkheimer, *Sexual Agency*, *supra* note 15, at 180-83.

122. Constraining forces—including what I am calling pressure and coercion—exist on a spectrum. See *supra* note 88 (noting competing approaches to defining prohibited coercion). As Deborah Denno has aptly observed, “There are many line-drawing dilemmas throughout the criminal law.” Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 274 (2002).

view of criminal law,¹²³ this ought not to immunize them from feminist critique.¹²⁴

To see why, it is helpful to elaborate on the nature of the violation. Over a decade ago, Robin West observed that “consensual sex, when it is *unwanted and unwelcome*, often carries harms to the personhood, autonomy, integrity and identity of the person who consents to it—and that these harms are unreckoned by law and more or less unnoticed by the rest of us.”¹²⁵ At the time West wrote, the harms to women and girls of participating in unwanted consensual sex and certainly the ubiquity of this kind of sex were “largely *unrecognized*.”¹²⁶ But #MeToo has begun to fill this epistemic void by shining a light on unwanted sex—even the kind that is consented-to.

The public conversation around this kind of sex was catalyzed by the published recounting of a woman known as Grace of her sexual encounter with comedian Aziz Ansari.¹²⁷ Grace, a woman in

123. My intuition is based on considerations of moral blameworthiness, degrees of harm, and rule administrability, which all seem to militate against outlawing pressured sex.

124. A feminist critique of pressured consent extends beyond the recognition that most (or even all) of our choices are made under conditions of constraint. Feminists have long identified sexual violation, whether within or without law, as a major contributor to enduring gender inequality. For this reason alone, sexual consent that results from the deployment of any structural hierarchy—gender in particular, but certainly not alone—is of special concern. (I thank Heidi Hurd for prompting me to articulate this point.)

125. Robin West, *Sex, Law, and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 221, 224, 236 (Franklin G. Miller & Alan Wertheimer eds., 2010) (emphasis added). As Professor West elaborates:

Heterosexual women and girls, married or not, consent to a good bit of unwanted sex with men that they patently don’t desire, from hook-ups to dates to boyfriends to cohabitators, to avoid a hassle or a foul mood the endurance of which wouldn’t be worth the effort, to ensure their own or their children’s financial security, to lessen the risk of future physical attacks, to garner their peers’ approval, to win the approval of a high status man or boy, to earn a paycheck or a promotion or an undeserved A on a college paper, to feed a drug habit, to survive, or to smooth troubled domestic waters. Women and girls do so from motives of self-aggrandizement, from an instinct for survival, out of concern for their children, from simple altruism, friendship or love, or because they have been taught to do so. But whatever the reason, some women and girls have a good bit of sex a good bit of the time that they patently do not desire.

Id. Some of these constraints would lead to coerced consent, while others would lead to pressured consent.

126. *Id.* at 237.

127. See Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life*, *BABE* (Jan. 13, 2018), <https://babe.net/2018/01/13/aziz-ansari->

her early 20's, was, by her own account, excited to be on a first date with Ansari. According to her account,¹²⁸ after dinner the two went back to his apartment, where he quickly began kissing, touching, and undressing her, to Grace's discomfort.¹²⁹ As she describes,

When Ansari told her he was going to grab a condom within minutes of their first kiss, Grace voiced her hesitation explicitly. "I said something like, 'Whoa, let's relax for a sec, let's chill.'" She says he then resumed kissing her, briefly performed oral sex on her, and asked her to do the same thing to him. She did, but not for long. "It was really quick. Everything was pretty much touched and done within ten minutes of hooking up, except for actual sex."¹³⁰

As the night proceeded, Grace says that a similar pattern repeated itself. Ansari persistently attempted, both verbally and physically, to pressure Grace to engage in more sex.¹³¹ At one point, she told him, "I'd rather not feel forced because then I'll hate you, and I don't want to hate you."¹³² Even after hearing this, Ansari allegedly continued his efforts to wear her down.¹³³ As she explains, in the midst of these interactions, "It really hit me that I was violated. I felt really emotional all at once when we sat down there. That that

28355 [<https://perma.cc/P2ZL-EVNL>]; see also Julianne Escobedo Shepard, *The Next Step for #MeToo Is Into the Gray Areas*, JEZEBEL (Sept. 24, 2018), <https://jezebel.com/the-next-step-for-metoo-is-into-the-gray-areas-1829269384> [<https://perma.cc/UB4N-KU7H>] (describing multiple allegations of sexual abuse resulting from "emotional abuse, manipulation, and gaslighting" by journalist Jack Smith IV).

128. Way, *supra* note 127. Ansari acknowledged that he had engaged in "sexual activity" with the accuser, adding that "by all indications [it] was completely consensual." See Halle Kiefer, *Aziz Ansari Issues Statement After Sexual-Misconduct Allegation: "I Took Her Words to Heart"*, VULTURE (Jan. 14, 2018), <https://www.vulture.com/2018/01/aziz-ansari-issues-statement-on-sexual-misconduct-accusation.html> [<https://perma.cc/8NPH-FGTG>]. For a discussion of how Ansari addressed the incident involving Grace (and sexual abuse more generally) on his first major comedy tour since the allegations arose, see Anna North, *Aziz Ansari's New Standup Set, and its Complicated, Necessary Role in #MeToo*, VOX (March 20, 2019, 7:00 AM), <https://www.vox.com/2019/3/20/18263783/aziz-ansari-tour-2019-sexual-misconduct-allegations> [<https://perma.cc/PY3F-LAKT>].

129. As Grace described, "In a second, his hand was on my breast." Way, *supra* note 127. Then, according to her account, "he was undressing her, then he undressed himself. She remembers feeling uncomfortable at how quickly things escalated." *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Way, *supra* note 127.

whole experience was actually horrible.”¹³⁴ Grace recalls crying the whole way home. As she told Ansari the next night when he texted that it was fun meeting her, “Last night might’ve been fun for you, but it wasn’t for me.”¹³⁵

Limitations in the reporting on Grace’s allegations¹³⁶ make it difficult to parse critical details of what happened that night. But with regard to some of the sexual activities at issue, at the very least, it seems that Grace engaged in conduct that she did not in fact want to engage in. We could say that the sexual acts she consented to were lawful but unwanted.

Under other circumstances, this episode might well have passed with little notice. In the midst of the #MeToo movement, however, it catapulted a national conversation about pressured consent. Grace’s story—a “Rorschach test” of sexual normativity¹³⁷—came to stand in for a commonplace experience that had rarely been discussed.¹³⁸ Even the appropriate vernacular to describe the encounter with Ansari was confusing.¹³⁹ Surveying this muddled frontier, one commentator observed that “[t]here is a sizable chasm between an ‘awkward sexual experience’ and sexual assault and its topography is largely unmapped.”¹⁴⁰

Amidst a rather chaotic collective effort to begin charting this terrain, what emerged was a nearly universal consensus that Grace’s

134. *Id.*

135. *Id.*

136. See Jill Filipovic, *The Poorly Reported Aziz Ansari Exposé Was a Missed Opportunity*, GUARDIAN (Jan. 16, 2018), <https://www.theguardian.com/commentisfree/2018/jan/16/aziz-ansari-story-missed-opportunity> [<https://perma.cc/7CC4-P7BD>].

137. See James Hamblin, *This is Not a Sex Panic*, ATLANTIC (Jan. 17, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/this-is-not-a-sex-panic/550547/> [<https://perma.cc/2DQC-UFCW>] (“The story of Aziz Ansari and ‘Grace’ is playing out as a sort of Rorschach test.”).

138. Rather suddenly, a public in the throes of grappling with sexual assault and harassment was confronted with untold “stories of gray areas.” See *id.* (summarizing Grace’s account and its aftershocks).

139. See, e.g., Jenny Hollander, *You’re Right, Everything Aziz Ansari Did Was Legal*, BUSTLE (Jan. 17, 2018), <https://www.bustle.com/p/youre-right-everything-aziz-ansari-did-was-legal-7923237> [<https://perma.cc/6GTU-35UM>] (puzzling, “What do we call it when a man repeatedly pressures a woman to engage in sexual acts? What do we call it when someone says ‘no,’ but then appears to change their mind? What do we call it when someone feels violated after a sexual encounter?”).

140. Stassa Edwards, *It’s Time to Map the Wilderness of Bad Sex*, JEZEBEL (Jan. 19, 2018, 3:20 PM), <https://jezebel.com/its-time-to-map-the-wilderness-of-bad-sex-1822171954> [<https://perma.cc/7MVR-VY97>].

account was one with which women were exceedingly familiar.¹⁴¹ As Jessica Valenti tweeted in the story's immediate wake, "A lot of men will read that post about Aziz Ansari and see an everyday, reasonable sexual interaction. But part of what women are saying right now is that what the culture considers 'normal' sexual encounters are not working for us, and oftentimes [are] harmful."¹⁴² A reckoning with sexual assault and harassment grew to indict "our broken sexual culture."¹⁴³

We now realize that, while consent can be extracted in many ways,¹⁴⁴ a familiar pattern involves men badgering women into reluctant submission.¹⁴⁵ Male treatment of female sexuality as passive is not an outlier, but rather a commonplace dynamic.¹⁴⁶ When women are seen as vessels for male sexual pleasure—objects, not subjects—their actual desires are unimportant.¹⁴⁷ What matters, at most, is securing their permission to be acted upon.¹⁴⁸

Because the promise of female sexual agency is unrealized, gender is often bound up in pressured consent (it is worth emphasizing that many other forces can be brought to bear on consent, and gender is not always implicated). At the same time, extracted consent can diminish the consenting party's agency. In other words, the very inequalities that tend to produce unwanted sex are exacerbated by unwanted sex.

141. See, e.g., Anna North, *The Aziz Ansari Story is Ordinary. That's Why We Have to Talk About It*, Vox (Jan. 16, 2018), <https://www.vox.com/identities/2018/1/16/16894722/aziz-ansari-grace-babe-me-too> [<https://perma.cc/U4TD-ZHXE>] (suggesting that "the sheer commonness of Grace's experience . . . makes it so important to talk about."). Even commentators unsympathetic to Grace's plight acknowledged the normality of the incident. See, e.g., Bari Weiss, *Aziz Ansari is Guilty. Of Not Being a Mind Reader*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html> [<https://perma.cc/7GBE-VMA6>] (remarking, "every adult woman I know" has had similar "lousy romantic encounters.").

142. Caitlin Flanagan, *The Humiliation of Aziz Ansari*, ATLANTIC (January 14, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/> [<https://perma.cc/V573-MKL9>].

143. Weiss, *supra* note 141.

144. See West, *supra* note 125 and accompanying text.

145. See *supra* notes 129-134 and accompanying text.

146. See *supra* notes 138-143 and accompanying text.

147. We live in a society that "still sees sex as primarily about male pleasure; that continues to position women's bodies as sexual objects, receptacles and stand-ins for sex itself; and that encourages sexual aggressiveness in men and congeniality and passivity in women." Filipovic, *supra* note 136.

148. For a philosophical examination of ethical sexual negotiation and how it advances sexual agency, see Rebecca Kukla, *That's What She Said: The Language of Sexual Negotiation*, 129 ETHICS 70 (2018).

CONCLUSION

The #MeToo stories highlight a significant legal gap—women experience a range of sexual violation that the criminal law does not prohibit. By considering cases involving no consent, coerced consent, and pressured consent, we can better discern the types of harm that are currently overlooked in many, if not most, jurisdictions.

I have aimed in these pages to explore the space between criminal definitions of sexual violation and sexual violation as it is experienced in the world. But I have also suggested that the law should capture more than it currently does and begun to sketch what this might look like statutorily. Without purporting to draw every line, I have argued that no-consent cases and coerced (invalid) consent cases should be more effectively outlawed. The pursuit of gender equality makes it necessary for women to possess a full measure of sexual agency, which requires *at bare minimum* protection from non-consensual sex.

In a similar vein, pressured consent is harmful because it reinforces constraints on the exercise of agency. Circa 2020, these constraints—particularly on women’s agency, sexual and otherwise—have become widely discernible. The pressured consent cases should not be outlawed. But they nevertheless undermine sexual agency. Unwanted sex will remain rampant as long as nonconsensual sex absent abundant physical force is deemed lawful.

Statutory reform is surely not everything.¹⁴⁹ Indeed, as the path of #MeToo unfolds, it brings into clearer focus the danger of rape myopathy.¹⁵⁰ But it would be a terrible mistake to leave intact the vestiges of an archaic body of law designed to maintain men’s control of women’s sexuality. Women’s sexual violations, unlawful and lawful, sparked #MeToo, perfectly positioning this movement to drive needed legal reform.

149. See Tuerkheimer, *supra* note 51, at 27.

150. See Megan Garber, *Aziz Ansari and the Paradox of ‘No’*, ATLANTIC, (Jan. 16, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/aziz-ansari-and-the-paradox-of-no/550556/> [https://perma.cc/LF2U-3B7D] (decrying the “awful irony” that “[w]omen spent so much of their time and energy and capital reminding the world of their right not to be raped, that the next obvious step in their sexual liberation—discussions about what makes sex good, in every sense, for all involved—got obstructed.”).

