University of Florida Journal of Law & Public Policy

Volume 21 | Issue 1 Article 2

2010

Sexual Abuse of Power

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SEXUAL ABUSE OF POWER

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* S.J.D. University of Virginia School of Law (2010), LL.M. University of Virginia School of Law (2007). I am deeply grateful and indebted to my doctoral dissertation advisor, Anne M. Coughlin, for her insightful thoughts and continuous advice during the research and writing of this Article. I would also like to thank Kim Forde-Mazrui, George Rutherglen, and Clare Kaplan for their valuable comments on my doctoral dissertation, which this Article is based upon. Thank you also to the editors and staff at the *University of Florida Journal of Law & Public Policy* for their work. Of course all errors and omissions are my own.

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I. INTRODUCTION

In January 2010, the U.S. Department of Justice published the findings of a recent survey it conducted; the National Survey of Youth in Custody (Survey) quantifies the scope of the daunting problem of sexual abuse of power.[1] The Survey defines sexual victimization as any unwanted sexual activity between youth and all sexual activity between youth and staff.[2] The data indicates that 10.3% of youth (2730 victims) in confinement facilities had been sexually victimized by facility staff.[3] Surprisingly, 6.4% of youth (1710 victims) reported neither any force, threat of force, or other explicit forms of coercion, nor offers of favors, protection, drugs, or alcohol in exchange for engaging in the sexual activity.[4]

These findings, however, are merely the tip of the iceberg, as they demonstrate only one facet of the overall phenomenon of sexual abuse of power. People in various professional and institutional settings endure many forms of unwanted sexual acts that are perpetrated against them by people in positions of power.[5] These perpetrators abuse their

1. ALLEN J. BECK ET AL., SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-09 (2010) [hereinafter SEXUAL VICTIMIZATION], http://bjs.ojp.usdoj.gov/index.cfm?iid= 2113&ty=pbdetail. The survey, which was mandated by the Prison Rape Elimination Act, reveals that an estimated 12% of youth (3220 victims) in state operated and locally or privately operated juvenile facilities reported experiencing one or more incidents of sexual victimization by another youth or by facility staff; 2.6% of youth (700 victims) reported an incident involving another youth; 10.3% (2730 victims) reported sexual contact with facility staff; and approximately 95% of these victims reported that they had been abused by female facility staff.

2. *Id.* at 4.

3. *Id.* at 8.

4. *Id.* at 9.

5. *See generally* STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF

power, authority, trust, and influence to obtain sexual intercourse.[6] In this Article, I use the phrase "sexual abuse of power" to refer to the different expressions of this phenomenon; these include various coercive pressures stemming from professional and institutional relationships that place victims in fear of non-physical harm (professional, institutional or economic injuries) and result in sexual submission.

Sexual abuses of power vary significantly in the degree of abuse and coercion that they demonstrate. They include a wide range of sexual misconducts. On one end of the coercion spectrum we find the first category of cases, namely, public officials who explicitly threaten to inflict harm, if their sexual demands are refused, on victims whose personal liberty is legally confined, such as suspects and inmates.[7] On the other end we find a second category: owners of private businesses who merely propose sexual relations to their employees, making neither a threat nor mentioning any employment-related decision.[8] Even though these misconducts are on opposite ends of the spectrum, they share some distinctive features: first, the perpetrator engages in unilateral sexual conduct with another person by exploiting that other person's body for the purposes of his own gratification, arousal or sexual pleasure, and against the will of that other person, thus resulting in substantial harm. Second, submission to unwanted sexual acts is not obtained by consent, but rather, by intimidation and coercive pressures stemming from the disparities in powers between the parties, which induce mere acquiescence.[9]

Yet, current laws fail to properly capture these features by offering an overall doctrinal framework that would criminalize such abuses of power. Despite many years of reform in laws pertaining to rape and sexual assault, various forms of sexual abuse of power continue to leave many victims without redress or legal remedy.[10] Furthermore, most of these abuses remain outside the scope of criminal regulation.[11] Current laws offer only partial and insufficient remedies to the problem of

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INTIMIDATION AND THE FAILURE OF LAW (1998).

6. *Id.*

7. *See, e.g.*, State v. Felton, 339 So. 2d 797 (La. 1976) (upholding the convictions of a police officer who forced a woman to have sexual intercourse with him by threatening to arrest her).

8. *See, e.g.*, State v. DiPetrillo, 922 A.2d 124 (R.I. 2007) (reversing the conviction of an employer who coerced sex on his employee).

9. Samedi v. Miami-Dade County, 206 F. Supp. 2d 1213, 1215 (S.D. Fla. 2002) (two county employees who coerced sex on a cleaning lady, telling her that they were her bosses and that they would fire her if she did not submit to their demands).

10. *See* SCHULHOFER, *supra* note 5, at 1-16 (discussing various examples of sexual abuses of power that remain outside the scope of criminal regulation).

11. *Id.*

sexual abuse of power. Criminal charges are sometimes brought against the first category, public officials who have abused their power, incorporating egregious and transparent examples of sexual abuse.[12] An abuse of power model, which acknowledges the effects of the disparities in positions between the parties, is often employed to criminalize these cases.[13] However, the cases in the latter category, including owners of private businesses, who propose sexual relations without explicit threats, are typically not criminalized.[14] Criminal charges are rarely brought in these seemingly ambiguous and less transparent cases of sexual abuse of power.[15] From a criminal law perspective, these cases are to be found at the peripheries of law, as they lie outside the "hard-core" egregious sexual misconduct.

When many sexual abuses of power are not viewed as justifying criminalization, civil laws come into play. Civil suits for damages and professional codes of ethics are often employed whenever professional and institutional relations are exploited to induce sexual submission.[16] In the workplace and in an academic setting, sexual abuses of power are typically treated in courts as merely one form of sexual harassment, which may be appropriate for intervention under Title VII or Title IX of the Civil Rights Act of 1964 outlawing employment and education discrimination because of sex.[17]

We must question, however, whether these civil remedies are a sufficient response to the criminal wrongs perpetrated in sexual abuse of power cases. Indeed, they are insufficient in coping with the specific

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12. *See, e.g.*, State v. Cummings, 1990 WL 40018 (Ohio App. 10 Dist., 1990) (upholding the conviction of a police officer who coerced sex on a DUI suspect).

13. *See generally* WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW § 17.3 (2d ed. 2009) (discussing legislative reforms that criminalize sexual abuses of authority).

14. *See* SCHULHOFER, *supra* note 5, at 112 (suggesting that criminal law is not always the best tool for regulation).

15. *Id.*

16. *Id.* at 206-26 (discussing various forms of civil regulations that might apply when psychia-trists and psychologists abuse their professional power to induce their patients' submission to sexual demands).

17. Title VII of the Civil Rights Act of 1964 provides:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

42 U.S.C. § 2000e-2(a) (2000). Title IX of this Act provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2000).

harms that result from these abuses. Furthermore, they are far too weak and cannot offer an inclusive legal tool that would help diminish this phenomenon.

This Article evaluates whether current laws are taking into account the experiences of victims of sexual abuse of power and the full extent of harm they suffer. It contends that current laws do not do so. It further argues that sexual abuse of power induced by fears and pressures, stemming from professional and institutional relations, is wrongful conduct that warrants its own definition and criminal sanctions above and beyond those currently available. However, the current legal frameworks have distracted both legislatures and scholars from dealing with the harms inflicted by these abuses, thus obfuscating the need to provide an adequate legal response to them.

Current views fail to acknowledge that because coerced sex in these settings provide a poignant example of sexual abuse of power, it should be criminalized like other forms of sexual abuse of power. It further obfuscates the close similarities between sexual abuses of power in the workplace and in an academic setting, and sexual offenses that typically occur in comparable professional and institutional settings, such as in cases where police officers coerce sex on unwilling suspects. Legislatures and commentators alike have failed to consider the application of one doctrinal framework that would allow criminalizing these various forms of sexual abuse of power. An abuse of power model has never been extended beyond the context of official abuse of authority to encompass similar abuses in cases in which formal authority to enforce obedience is lacking, such as in the workplace and in an academic setting. Moreover, the current focus on the right to sexual autonomy has distracted reformers and legislatures from capturing two fundamental rights: the right to remain free from sexual coercion and the right to enjoy sexual integrity.

This failure to properly address the harms of different forms of coerced sex through the criminal law lens is why this Article focuses on these sexual abuses of power so often overlooked by criminal law. Indeed, although at the margins of criminal law, the significance of these types of sexual abuses of power and the harms they inflict are certainly not marginal. This Article's key goal is to take up the challenge of separately addressing these subtler and less transparent types of sexual abuse of power by providing an inclusive doctrinal model that would enable their criminalization.

This Article's main thesis is that these different forms of sexual abuse of power can and should be treated as criminal conduct, and, in particular, as one subcategory of sexual offenses. The Article contends that all sexual abuses of power inflict similar harms stemming from the perpetrator's wrongful conduct, and therefore may justify

criminalization. This Article further argues that sexual abuses of power should not only be viewed as one form of *unwanted* sexual relationship, as they are typically viewed today, but also as a prominent example of a *nonconsensual* sexual relationship.

The Article proposes a comprehensive doctrinal model that would also enable the criminalizing of cases that typically lie outside the boundary of criminal sexual misconduct. By offering an overall legal response to the problem of sexual abuse of power, the model draws neither on threats to harm the victims, nor on the perpetrators' or the victims' features, including the question of official abuse of authority. In particular, the Article argues that this model may equally apply to those categories of sexual abuses of power that traditionally have not been viewed as amounting to criminal conduct, mainly in the workplace and in an academic setting where the victims are competent adults.

The Article takes up this task by challenging the current definitions of two key notions, authority and consent, and by proposing the adoption of modified definitions for them. Under current criminal laws, the construction of the notion of power is typically limited to incorporate only the official authority to enforce and command obedience. This Article argues that the definition of "authority," for the purposes of the criminal prohibition, should be broadly construed to enable criminalizing additional expressions of power that stem from influence, dominance, and dependency. This definition would acknowledge that power includes the capacity to influence and to dominate the actions and decisions of vulnerable adult victims, by subjugating their will to that of the powerful perpetrator and inducing their submission to unwanted sexual demands.

Second, this Article makes the connection between sexual abuses of power and the definition of consent in the context of sexual relations. In particular, it contends that consent to sexual relations is not obtained when it is induced by sexual abuse of power. Instead, pressures and intimidation stemming from the abuse of power, authority, trust, and dependence induce apparent consent. The Article suggests that current views of consent have distracted our attention from asking the right questions. A key question this Article attempts to grapple with therefore is not whether technical permission or authorization of the sexual act was given, but rather why. It explores the reasons for the decision to give permission; only then can it be determined whether this permission in fact qualifies as valid consent. The Article therefore proposes adopting a modified definition for the notion of consent to sexual relations, one that would capture the link common to all sexual abuses of power: that consent to sex is not obtained when it is induced by fears and pressures stemming from sexual abuse of power.

The Article proceeds as follows: Part II demonstrates that sexual abuses of power provide a prominent example of harmful sexual conduct. It suggests that when Justice Kennedy refers in *Lawrence v. Texas*[18] to people "who are situated in relations where consent might not easily be refused," he is alluding to sexual abuses of power in professional and institutional relationships. It further contends that the current legal understanding of sexual abuses of power as consensual is misguided, because it is based on a mistaken understanding of consent.

Part III examines the poignant problem of apparent consent to sexual relations by defining it as "permission or authorization to engage in sexual acts, either by the complainant's express words or by her behavior, which is given for any reason other than the complainant's positive willingness." It challenges the contemporary definition of consent by arguing that, under current judicial decisions, this definition is flawed. The decision in *State v. Baby*[19] best illustrates this problem by focusing exclusively on the objective expressions of consent, and by viewing consent as encompassing merely permission rather than a mutual decision that indicates willingness.[20] In response to these drawbacks, this part offers a modified definition of consent that encompasses both the subjective perception of the complainant's willingness as well as its objective manifestations.

Part IV exposes the links between sexual abuse of power and the definition of consent. It reveals that consent is not obtained when it is induced by sexual abuse of power, authority, influence, and dependence, because permission to engage in sexual acts is affected by fears and pressures and is merely apparent. To demonstrate this claim, this part compares and contrasts abuses of power by public officials and by private employers to show that these abuses share similar features and thus justify criminalization.

Part V proposes the adoption of a comprehensive sexual abuse of power model. It articulates the prohibition's two key components, disparities in powers in professional and institutional relations and the element of exploitation or abuse. Part V further articulates several circumstances that illustrate this exploitation, emphasizing the divergence from community standards of expected and acceptable conduct, and the departure from professional norms. This part demonstrates that expanding the definition of sexual coercion to include

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18. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that the case "does not involve persons who might be injured or coerced," but rather "adults who, with full and mutual consent from each other engaged in sexual practices common to a homosexual lifestyle").

19. *See* Baby v. State, 910 A.2d 477 (Md. Ct. Spec. App. 2006), *superceded by* Baby v. State, 916 A.2d 410 (Md. Ct. Spec. App. 2007), *vacated by* State v. Baby, 946 A.2d 463 (Md. 2008).

20. *Id.*

those pressures and fears stemming from professional and institutional settings would allow criminalizing various forms of abuse of power, above and beyond those that are currently acknowledged as criminal conduct, including in the workplace and in academic settings.

II. SEXUAL ABUSE OF POWER AS HARMFUL CONDUCT

> She does not resist. All she does is avert herself: avert her lips, avert her eyes. She lets him lay her on the bed and undress her: she even helps him . . . Not rape, not quite that, but undesired nevertheless, undesired to the core. As though she had decided to go slack, die within herself for the duration, like a rabbit when the jaws of the fox close on its neck. So that everything done to her might be done, as it were, far away.
>
> J.M. Coetzee, Disgrace.[21]

A. Lawrence's *Implications*

Harm to others is the key justification for criminalizing sexual abuses of power. While harm has always played a prominent role under contemporary rape law, the landmark *Lawrence v. Texas* decision explicitly endorsed this premise.[22] Recall *Lawrence*'s language:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in *relationships where consent might not easily be refused* . . . The case does involve two adults who, *with full and mutual consent from each other*, engaged in sexual practices common to a homosexual lifestyle.[23]

The *Lawrence* Court places substantive constitutional limits on the extent to which criminal law can be used as a mechanism of regulating

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21. J.M. COETZEE, DISGRACE 25 (1999) (portraying a university professor who coerces sexual relations on his unwilling student. The protagonist's thoughts reveal his mens rea, which is knowingly engaging in sex with a person who does not want the sexual acts). *See also* Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1631-34 (2009) (discussing the multiple potential stories about the sexual encounters between the professor and the student in the novel, and the fact that there is no settled story, and suggesting that the second sexual encounter between the professor and the student seems to be rape, not mere harassment).

22. *See Lawrence*, 539 U.S. at 578 (holding that the case "does not involve persons who might be injured or coerced," but rather "adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle").

23. *Id.* (emphasis added).

sexual conduct of consenting adults.[24] Writing for the Court, Justice Kennedy outlines the framework for criminal regulation of sexuality by identifying its outer boundaries. In outlining this framework, Justice Kennedy makes clear that the conduct at issue in *Lawrence* falls outside of the framework's outer boundaries.[25] The Court holds that harm to others is the core predicate for criminal regulation of sexual acts between consenting adults in private settings.[26] Under this holding, whenever harm to others is not established, the fundamental right to sexual autonomy should prevail, and the idea of criminal regulation of sexual conduct must be rejected.[27]

Over the seven years that have passed since the decision in *Lawrence*, numerous scholars have suggested different understandings of the Court's holding.[28] While the Court's language itself suggests that either broader or narrower interpretations of its holding are plausible, under any reading of the case, consent and harm play a prominent role. After *Lawrence*, criminal prohibitions apply only with nonconsensual sexual relationships that inflict harm on others.

But does *Lawrence* have anything to do with sexual abuse of power? This Article argues that it does, as it sheds a new light on potential, yet unexplored, links between the underlying notions of harm, consent, and

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24. *Id.*

25. *Id.*

26. *Id.*

27. *See, e.g.*, Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 67 (2006) (arguing that under *Lawrence* the right to autonomy at home flourishes at the expense of criminal law regulation).

28. *See, e.g.*, Cass R. Sunstein, *Liberty After* Lawrence, 65 OHIO ST. L.J. 1059, 1061 (2004) [hereinafter Sunstein, *Liberty After* Lawrence]; *see also* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1426 (2004) (arguing that *Lawrence* offers an "uncharted territory that is worth exploring and possibly expanding . . ."); Cass R. Sunstein, *What Did* Lawrence *Hold: Of Autonomy, Desuetude, Sexuality and Marriage*, 55 SUP. CT. REV. 27, 29-30 (2003) [hereinafter Sunstein, *What Did* Lawrence *Hold*] (discussing various readings of the *Lawrence* decision). Under a broad reading, which draws on principles of autonomy and liberty, the *Lawrence* Court grants a general right to engage in consensual sexual behavior; this right is seen as a fundamental right for the purposes of due process. It holds that the criminal prohibition on sodomy is unconstitutional because it intrudes on private sexual conduct that does not harm third parties. Another reading focuses on the rational basis of the offense. Under that reading the prohibition on sodomy is unconstitutional because it is not supported by a legitimate state interest. The state cannot interfere with consensual sexual behavior in which third parties are not harmed for only moral reasons. However, more narrow, and perhaps less optimistic readings of the holding focus on protecting the privacy aspect of a sexual relationship. Under this modest interpretation, *Lawrence* extends privacy protections to consensual sexual activities. A criminal prohibition on sodomy is unconstitutional because it intrudes on private sexual conduct without having a significant moral basis in existing public commitments. In other words, in certain circumstances, the criminal law cannot be enforced if it has lost public support. *See* Sunstein, *What Did* Lawrence *Hold*, *supra*, at 29-30.

sexual abuse of power. By linking people in relationships where consent might not easily be refused with injured, coerced, and minor victims, the *Lawrence* Court implicitly alludes to sexual abuses of power.[29] Furthermore, the Court mentions those whose consent might not easily be refused in the same breath with injured, coerced, and minor victims, suggesting that the former type of relationship offers one example of harmful conduct, similar to the other forms of harmful sexual misconduct it mentions.[30]

The *Lawrence* decision directly addresses only the issue of criminalizing a homosexual relationship between competent and consenting adults.[31] It therefore leaves unresolved many crucial implications only briefly touched upon. One open question that is raised in *Lawrence* but remains unresolved is: In what types of relationships might consent not easily be refused?[32] *Lawrence* neither clarifies the nature of these relationships, nor does it articulate the circumstances under which they occur.

While Justice Kennedy does not elaborate on the types of relationships in which consent might not easily be refused, a plausible reading of the above passage suggests that sexual abuses of power are precisely those types of relationships.[33] When submission to unwanted sex is induced by sexual abuse of power, consent might not easily be refused. Refusing it is too risky, because victims fear that rejecting the perpetrator's demands would have harmful consequences. The features that underline sexual abuses of power include the exploitation of the stark imbalances in powers and positions between the parties that often lead a victim to submit to unwanted sexual demands if only to avoid potential harmful repercussions. Refusing consent under these circumstances is too costly and is often an unrealistic course of action. Rather, reluctant permission induced by pressures and fears seems to be the only plausible option.

Distinguishing the *Lawrence* scenario from the other types of sexual relationships mentioned by the Court attempts to set clear boundaries between harmful and harmless sexual relationships. It further offers an important insight into which types of relationships are harmful and might justify criminalization. Justice Kennedy alludes to four separate categories in which sexual relationships might be harmful: injured, coerced, and minor victims; as well as people who are situated in relationships where consent might not easily be refused.[34] The court

29. *See Lawrence*, 539 U.S. at 567, 578.
30. *See id.*
31. *See id.*
32. *See id.* at 560.
33. *See id.*
34. *See id.* at 578.

does not further clarify, however, whether these four different categories should be similarly treated. In particular, the Court does not articulate whether all four categories might justify criminalization.

The *Lawrence* decision neither resolves the question of whether sexual relationships in which consent might not easily be refused should be treated as nonconsensual, nor whether consent that is given under these circumstances is valid. Grouping injured, coerced, and minor victims with people in relationships where consent might not easily be refused, however, might imply two things. The first and narrower reading is that the Court views all four categories as examples of harmful conduct. If these relationships in which consent might not easily be refused indeed allude to sexual abuses of power, the underlying result would be that the Court views these abuses as one example of harmful sexual misconduct.

The second broader, yet unexplored, reading suggests that the Court not only views these abuses as examples of harmful conduct, but also as potentially amounting to criminal conduct. While *Lawrence* itself does not elaborate on this issue, the decision might be understood as raising such a theoretical possibility, by excluding from the scope of its constitutional protection cases in which consent might not easily be refused. The Court suggests that these sexual relationships are indeed harmful; this reading seems a straightforward application of the Court's different categories, and invites us to contemplate whether this harmful conduct may justify criminalization as well, similar to the previous categories including coerced and minor victims. This Article suggests that it does, by arguing that applying the harm principle, different forms of sexual abuse of power justify criminalization.

An additional question that the *Lawrence* court did not elaborate on is: what does an "abuse of an institution" mean? Justice Kennedy explicitly excluded from the protection granted in *Lawrence* cases that involve both "injury to a person" as well as "abuse of an institution the law protects."[35] But when is an institution itself being abused? Which types of institutions does the Court allude to, and under which circumstances does the abuse occur? Again, the Court leaves these questions unresolved.[36] One plausible reading of this exclusion may suggest that abuses of institutions such as the workplace, an academic setting, the healthcare profession, the legal profession, or law enforcement agencies may meet this definition. Indeed, when perpetrators who represent these institutions induce victims' unwanted submission through abuse of their power, the institution itself is abused.

35. *See id.* at 567 (suggesting that the state could not intrude on sexual liberty "absent injury to a person or abuse of an institution the law protects").

36. *See id.*

Such abuse may damage the institution's reputation by compromising its integrity and the public's trust in it.[37] This reading of "abuse of an institution" in *Lawrence* thus further explains why these abuses of power are harmful conduct that potentially justifies criminalization. Again, we are left to wonder whether cases in which perpetrators abuse the institution they represent, and in particular, those that take place in the workplace or in an academic setting may qualify as examples of the abuses of institutions that the Court refers to. Yet neither *Lawrence* nor subsequent Supreme Court decisions have addressed these questions, leaving courts, as well as legal scholars, to keep struggling with their far-reaching implications.

B. *The Harms of Sexual Abuse of Power*

Unwanted sexual acts are harmful and painful to their victims.[38] Substantial similarities can be seen between the specific harms inflicted on victims whose submission is induced by abuse of power, and the harms inflicted in other sexual assaults. These common features illustrate that the harms sustained by all victims of unwanted and nonconsensual sex are in fact comparable, and therefore, when combined with the perpetrator's wrongful conduct, support the justifications for criminalizing these cases.

One preliminary clarification is necessary here: It may seem that this Article mistakenly confuses nonconsensual sex with unwanted sex. It does not. While at this stage the use of both terms interchangeably might be somewhat confusing, the choice of both terms here is anything but random. For now, the links between these two concepts remain ambiguous. They will be clarified, however, as the Article unfolds.

Discussions of the common harms that various forms of abuse of power inflict focus on identifying the victims' injuries and sufferings, which are perceived in terms of invading and violating the rights to which victims are entitled.[39] Under this view, it is the violation of the

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37. *But cf.* S. Wesely Gorman, Comment: *Sex Outside of the Therapy Hour: Practical and Constitutional Limits on Therapist Sexual Misconduct Regulations,* 56 UCLA L. REV. 983, 1026 (2009) (suggesting that some may argue that this is too broad a reading of this limitation). I am aware, of course, that my reading is not the typical interpretation of the Court's language. Under the more common view, Justice Kennedy is referring to the institutions of marriage and the family in order to address Justice Scalia's criticism. *Id.* Again, *Lawrence* itself did not elaborate what is meant by an abuse of an institution. *Lawrence*, 539 U.S. at 567. This leaves the interpretation I suggest here a plausible one.

38. *See, e.g.*, ROBIN L. WEST, CARING FOR JUSTICE 100-78 (N.Y. Univ. Press 1997) (1954) [hereinafter WEST, CARING FOR JUSTICE] (discussing the types of harms stemming from unwanted or unwelcome sex).

39. *See generally* ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 89-118 (2003) (discussing the harms sustained by victims of unwanted sex in general, and rape victims in

victims' fundamental rights that is at the core of the wrongness of both rape and sexual abuse of power.[40] Sexual abuse of power, like rape, constitutes serious harms to victims precisely because it typically violates these rights. The right to remain free from sexual coercion stands at the basis of these violations. Sexual coercion occurs whenever a person engages in unilateral sexual acts with another person, by exploiting that other person's body for the purposes of his own gratification, arousal or sexual pleasure, against the will of that other person.[41] Criminalizing sexual abuse of power is thus justified because there is a paramount community interest to promote this fundamental right.

The main types of harm inflicted in sexual abuses of power, which I have elaborated more fully elsewhere,[42] may be summarized as follows: first, violation of the right to remain free of sexual coercion; second, violation of bodily integrity; third, privacy violations as well as violation of sexual integrity, namely, harms of non-physical invasiveness, such as personal violation of self, invasion of the psyche, psychological impairment and distress, and invasion of privacy; and fourth, violation of human dignity. This Article will not reiterate these harms, because the injuries flowing from various forms of abuse of power in professional and institutional relations are largely undisputed, as many scholars agree that the fears and coercive pressures that often characterize these relations are indeed harmful to victims.[43] Rather, it will pursue a more controversial, yet not fully explored claim: sexual abuses of power are not only harmful but also nonconsensual sexual acts.

Harm does not suffice to criminalize sexual abuses of power; recall that the core predicate for criminalization under *Lawrence* is

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particular). *See also* Robin L. West, *Legitimating the Illegitimate: A Comment on* Beyond Rape, 93 COLUM. L. REV. 1442, 1448 (1993) [hereinafter West, *Legitimating the Illegitimate*] (arguing that "from the victim's perspective, unwanted sexual penetration involves unwanted force," and unwanted force is violent, and often leaves scars).

40. WERTHEIMER, *supra* note 39, at 108-09 (comparing and contrasting an experiential and an essentialist account of the harm). While Wertheimer favors the experiential account of the harm, the analysis I offer here is an essentialist account.

41. *See generally* Martha C. Nussbaum, *Objectification*, 24 PHIL. & PUB. AFF. 249 (1995) (articulating the wrong in abusing victims' bodies to fulfill personal urges. Nussbaum points out to the wrong in objectification of women's bodies, namely the conversion of subjects into instruments or tools. She focuses on notions of instrumentality and denial of autonomy and subjectivity).

42. *See generally* Michal Buchhandler-Raphael, *Criminalizing Coerced Submission in the Workplace and in the Academy*, 19 COLUM. J. GENDER & L. 409, 422-27 (2010).

43. *See, e.g.*, Robin L. West, *Desperately Seeking a Moralist*, 29 HARV. J.L. & GENDER 1, 19-20 (2006) [hereinafter West, *Desperately Seeking a Moralist*] (arguing that unwanted sexual acts, including those stemming from severe power imbalances, inflict serious harm on victims but are nonetheless consensual).

establishing nonconsensual sexual relations.[44] It is the lack of consent element that establishes the perpetrator's wrongful conduct, thus justifying criminalization. Many scholars agree that coercive pressures stemming from professional and institutional relations result in substantial harm and injuries to victims.[45] However, most reject the idea of criminalizing these abuses, viewing them as consensual, albeit unwanted, sexual relations.[46] Most scholars therefore treat nonconsensual and unwanted sexual relations as different concepts in the context of criminal law.[47]

Robin West, for example, adopts this view.[48] Exploring the concept of "unwanted sex," West suggests that:

> Sometimes unwanted sex is non-consensual, and when it is, it is rape. Sometimes, however, unwanted (or unwelcome or undesired) sex is "consensual" in all the ways that matter to law, and when such, it is not rape, and, entirely properly, not the target of criminal rape law. However, even consensual sex that is unwanted—meaning, unwanted sex that is not rape—might nevertheless be harmful, injurious and the product of not-so subtle background conditions of necessity and coercion. . . .[49]

This Article argues a different position; exploring the current construction of the notion of consent to sexual relations, a task I take up in the next part of this Article. Before doing so, and to better capture what is missing in the current legal framework, here is a brief summary of the current legal treatment of sexual abuses of power.

C. *Current Legal Framework*

The common understanding that most sexual abuses of power demonstrate harmful, albeit consensual, sexual acts reflects the prevalent view among most courts and legal scholars.[50] Many

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44. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that this case "does not involve people who are injured or coerced").

45. *See, e.g.*, WEST, CARING FOR JUSTICE, *supra* note 38, at 100-27. *See also* West, *Desperately Seeking a Moralist*, *supra* note 43, at 19-21.

46. West, *Desperately Seeking a Moralist*, *supra* note 43, at 19.

47. *Cf.* Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 68 (1986) (holding that for the purposes of sexual harassment, unwanted sex rather than nonconsensual sex should be the controlling legal standard). *See generally* SCHULHOFER, *supra* note 5, at 280-81 (distinguishing between unwanted and nonconsensual sex for purposes of criminalization).

48. *See* West, *Desperately Seeking a Moralist*, *supra* note 43, at 19-21 (discussing the controversial distinction between nonconsensual and unwanted sexual relations).

49. *Id.* at 19.

50. *See, e.g.*, SCHULHOFER, *supra* note 5, at 280-81 (arguing that the likelihood and the

jurisdictions, however, partially acknowledge the effects of coercive pressures that stem from professional and institutional settings by criminalizing at least some forms of abuse that take place under these settings.[51] The core predicate for criminalizing these cases rests on demonstrating that the perpetrator has abused his powerful position to coerce the victim's unwanted submission.[52] But these laws are significantly limited in criminalizing sexual abuses of power stemming from institutional and professional relations; criminalization relies heavily on the personal features of either the perpetrator or the victim.[53] Two main features characterize this type of legislation. One is perpetrator-oriented: the official authority to exercise power; the other is victim-oriented, and is two-folded: the victim's legal rights as well as her alternative choices.[54]

Many jurisdictions acknowledge that the perpetrator's abuse of his official position of authority to enforce obedience demonstrates sexual abuse of power that justifies criminalization.[55] This feature is most common in situations in which the perpetrator has custodial control over a victim, who is legally confined.[56] These jurisdictions criminalize abuses of power whenever the perpetrators are officially authorized to exercise power over the victims.[57]

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degree of harm is much harder to justify in relations between parties of unequal power, and thus criminal sanctions are out of place in most consensual sexual relations between supervisors and subordinates or between teachers and students).

51. *See, e.g.*, OHIO REV. CODE ANN. § 2907.03(A)(6) (West 2008) ([t]he other person is in custody of law or a patient in a hospital or other institution, and the offender has supervisory disciplinary authority over such other person"). *See also* COLO. REV. STAT. ANN. § 18-3-402 (2004) (criminalizing guard-inmate sexual relations when it can be proved that the officer coerced the victim to submit).

52. *See generally* Wayne LaFave, 2 Sust. Crim. L. § 17.3 subsection (d) Coercion: "Some states have criminalized sexual intercourse between victims and persons holding positions of trust or authority, as by making it a crime to use that position to cause submission, altering or removing the consent requirement with regard to certain relationships (e.g., psychotherapist-patient) or by prohibiting sexual extortion in employment."

53. *See, e.g.*, CAL. PENAL CODE § 261 (West 2010); CONN. GEN. STAT. ANN. § 53a-71 (West 2010); FLA. STAT. ANN. § 794.011 (West 2010); MICH. COMP. LAWS ANN. § 750.520B (West 2010); MINN. STAT. ANN. § 609.343 (West 2010); OHIO REV. CODE ANN. § 2907.03 (West 2010).

54. *See supra* note 53.

55. *See* LAFAVE, *supra* note 13, at 631-35 (discussing criminal prohibitions that adopt the sexual abuse of power model).

56. *Id.*

57. *See generally* 720 ILL. COMP. STAT. § 5/11-9.2 (2001) (jurisdictions that adopt provisions which criminalize certain forms of abuse of power stemming from institutional settings); MICH. COMP. LAWS ANN. § 750.520b (West 2008); MINN. STAT. ANN. § 609.344(1)(e) (2007); OHIO REV. CODE ANN. § 2907.03 (West 2008).

In these cases, the perpetrators have the official power to command the victims' obedience due to the victim's confinement.[58] These perpetrators are authorized by the government, the state, the city, or another public institution to perform a professional role, and exceed the scope of this authority by engaging in private conduct of a sexual nature.[59] The inability of the victims, given their confinement, to exercise free choices makes the sexual abuse of power in these cases particularly egregious.[60] The more transparent examples of sexual abuse occur where police officers, prison guards, and military commanders exploit their formal authority to enforce obedience over people who are legally subjugated to their control by coercing them into unwanted sexual demands.[61] Under current laws, the main focus of the coercion inquiry rests on whether the perpetrator's conduct violated any of the complainant's legal rights by threatening to harm her, or instead offers her some beneficial professional or institutional action in exchange for sexual relations.[62] Most jurisdictions are willing to acknowledge only the former cases as coercive conduct, refusing to concede that beneficial offers stemming from professional and institutional relations could be equally coercive.[63]

Previous proposals for rape law reform have generally not acknowledged the central feature that is common to many situations involving coercion: abuse of power, authority, trust, or dependence to

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58. *See, e.g.*, State v. Burke, 522 A.2d 725, 728 (R.I. 1987) (a uniformed police officer who coerced sex on a drunken woman who he had picked up in his police cruiser while she was hitchhiking).

59. *See, e.g.*, State v. Motiff, 104 Or. App. 340, 801 P.2d 855 (Or. App. 1990) (a police officer who was convicted of official misconduct after ordering an intoxicated victim to perform oral sex on him. The court rejected the defendant's argument that a purely personal benefit, in this case, sexual gratification, for a public official does not satisfy the elements of the offense of official misconduct).

60. *Id.*

61. *See, e.g.*, State v. Felton, 339 So. 2d 797, 799, 801 (La. 1976) (affirming the extortion conviction of a police officer, who forced a woman to have sexual intercourse with him by threatening to arrest her). *See also* State v. Robertson, 649 P. 2d. 569, 571 (Or. 1982) (discussing the case of defendants who were accused of coercing the victim into sexual conduct by threatening to expose a secret and publicize an asserted fact which would tend to subject her to hatred, contempt, and ridicule).

62. *See generally* ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 171-72 (2003) (positing that where threats are absent, and proposals are made to engage in sex in exchange for beneficial rather than detrimental employment decisions the criminal prohibitions do not apply, since typically "offers" are not coercive).

63. *See generally* SCHULHOFER, *supra* note 5, at 166 (acknowledging that coercive pressures do not end with threats and include two additional sets of circumstances. First, that proposals cast as "offers" to provide benefits but may just as well be coercive; second, where offers to engage in sexual acts are proposed. However, under the second set of circumstances, a causal link between employment decisions and sexual submission is absent).

induce sexual submission.[64] Instead, they have focused on threats to harm as the main feature justifying criminalization, refusing to concede that coercive pressures that fall short of threats also amount to criminal conduct. For example, previous proposals have not considered the following as criminal: beneficial "offers" in exchange for sexual acts or mere proposals to engage in sexual relations under professional and institutional imbalances in powers between the parties.[65] For instance, a police officer waiving a DUI violation in exchange for sexual acts would not be criminally liable.[66]

The context of police misconduct provides a salient example in which sexual abuses of power typically occur.[67] Abuse of power takes

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64. *Id.*

64. *Id.* at 112 (contending that "criminal law is not always the best tool of regulation, however, civil liability standards and private workplace norms are often better means of protecting sexual autonomy, especially in the absence of illegitimate threats").

65. *Id.*

66. *Id.* at 150 (explaining that under current laws such circumstances amount to bribery, but not to coercion).

67. Sexual abuses of power by police officers are often treated under federal law as a constitutional violation. Federal law acknowledges the abuse of power by public officials as a criminal offense. However, criminalizing sexual abuse of power by public officials is accomplished indirectly, through the use of a constitutionally-based provision. There is no specific federal statute that criminalizes sexual abuse of power by public officials. Rather, broadly written civil rights provisions make it a crime to deprive a person of her civil rights under the Constitution or laws of the United States. 18 U.S.C. section 242 employs broad language to protect people against the violation of federal rights under color of law. This section provides as follows:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of . . . being an alien, or by reason of his color, or race, . . . shall be fined . . . or imprisoned . . . and if bodily injury results . . . imprisoned not more than ten years, or both, and if death results . . . any term of years or for life . . . .

18 U.S.C. § 242 (1996). Many criminal civil rights prosecutions are brought under this provision against government officials for sexual assaults of victims under color of law. *See, e.g.*, United States v. Lanier, 520 U.S. 259, 117 S. Ct. 1219 (1997) (criminal charges were brought against a judge who sexually assaulted court employees and litigants who appeared before him). These prosecutions include mainly three types of perpetrations: sexual assaults by judges, sexual assaults by police officers, and sexual assaults by border patrol and correctional officers. Mary-Christine Sungaila, *Litigating Women's Rights as Human Rights: The Case of* United States v. Lanier, 7 S. CAL. REV. L. & WOMEN'S STUD. 329, app. (providing a list of cases in which criminal charges were brought against public officials for sexual assaults). However, this provision does not apply in cases in which the officer provided the suspect with some benefit, to which she was not otherwise legally entitled. Under the common distinction between threats to harm and offers to benefit, these beneficiary gains are not criminalized. For criminal prosecutions of police officers under section 242, see, e.g., United States v. Contreras, 950 F.2d

place in one of its most egregious forms takes place when a police officer stops a suspect for an offense, and induces the victim's sexual submission by threatening arrest if the demands are refused.[68] Many jurisdictions have recognized these sexual abuses as criminal conduct, and have amended their laws to prohibit this abuse of power.[69] In these cases, the coercive features of the perpetrators' conduct are hard to dispute; a police officer who forces a suspect to choose between submitting to sexual demands and some harmful consequence clearly abuses his authority.

Many jurisdictions acknowledge that the misuse of official authority in the prison context justifies criminalization.[70] Inmates who are legally confined and are subject to the formal authority of prison guards are easy prey to sexual abuse of power. Their alternative courses of action are significantly limited since they are in custodial control, and their liberty is constrained.

However, most jurisdictions refuse to adopt similar criminal provisions to include other forms of coercive pressures stemming from professional and institutional settings when the official abuse of authority element is lacking.[71] Criminalization is typically not considered whenever the victims are competent adults who are not legally confined, and the perpetrators are not authorized to exercise power by any official public institution. An example of this situation is one where the perpetrators are private employers and business owners.

Under current laws, as well as under reformers' proposals, many forms of sexual abuse of power remain outside the scope of potential criminal regulation because they are viewed as consensual, albeit often unwanted, sexual relationships.[72] These relationships include mainly

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232, 234-35 (5th Cir. 1991) (affirming the conviction of a Laredo police officer who raped a Mexican woman while he was on duty, and conspired to murder her when she was about to testify against him); United States v. Davila, 704 F.2d 749, 750-51 (5th Cir. 1983) (affirming convictions of border patrol officers who abused their positions of authority to coerce sex from illegal aliens); United States v. Sanchez, 74 F.3d 562, 563 (5th Cir. 1996) (reversing the conviction of a Galveston police officer who was convicted of coercing five women into engaging in sexual acts with him while on duty); United States v. Volpe 224 F. 3d 72, 74 (2d Cir. 2000) (affirming the conviction of a police officer who forced a broken broomstick into a suspect's rectum).

68. *See, e.g.*, State v. Cummings, No. 89AF-866, 1990 WL 40018, at *1 (Ohio Ct. App. Apr. 5, 1990).

69. *See, e.g.*, State v. Burke 522 A.2d 725, 728 (R.I. 1987) (affirming the conviction of a police officer who abused his power to coerce sexual acts on a hitchhiker).

70. *See, e.g.*, COLO. REV. STAT. § 18-3-402(1)(f) (2004) (criminalizing guard-inmate sexual relations when it can be proved that the officer coerced the victim to submit to such relations). *See also* SEXUAL VICTIMIZATION, *supra* note 1.

71. *See* SCHULHOFER, *supra* note 5, at 112, 132-34 (limiting criminalization in these settings to situations in which threats to harm are established).

72. *See, e.g.*, Meritor Sav. Bank v. Vinson 477 U.S. 57 (1986).

coerced sex in the workplace and in an academic setting, where the victims are affected by economic, professional, and institutional inducements. In these settings, permission is viewed as valid consent as the victims are competent adults.[73] These views leave unpunished a range of sexual transactions that might result in unwanted sexual relations, because sex is given in exchange for some benefits desirable to victims, including economic advantages in the workplace. Thus, many sexual practices, which are essentially nonconsensual, are characterized as legally permissible "sexual bargains."[74] While reformers propose to relax the criteria for what conduct constitutes a sexual offense, most of them agree that submission resulting from economic coercion in the workplace should not constitute a sexual offense.[75] Both courts and reformers thus refuse to recognize as criminal conduct compulsion of an economic nature.[76]

III. THE PROBLEM OF APPARENT CONSENT

Lawrence made clear that only nonconsensual sexual acts might justify criminal regulation. This view is premised on a preliminary assumption that the term "nonconsensual" is clear and unambiguous. It further

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73. *See, e.g.*, Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1162 (9th Cir. 2003) (a 47-year-old woman who decided to submit to the sexual demands of the professor for whom she worked in order to keep her job).

74. *See, e.g.*, West, *Legitimating the Illegitimate*, *supra* note 39, at 1443, 1448. West correctly criticizes this model on two levels. First, she argues that viewing non-consensual sexual relations as an expropriation wildly misdescribes the subjective experience of the victim involved. *Id.* at 1448. More importantly, West contends, this model would leave untouched two important classes of questionable sexual transactions. *Id.* at 1442. These include sexual transactions in which the exchange of goods for sexual acts is secured through a legitimate bargaining process born of necessity rather than choice. The first category that would be left not criminalized includes sexual transactions, which result from fraudulent misrepresentation. But more importantly, this proposal leaves not criminalized a range of sexual transactions that might result in unwanted, undesired, and unpleasurable sex for women, but that are a part of what "complex relationships" in which sex is given in exchange for some bundle of goods presumably desirable by women, such as fidelity, economic security, or friendship. West critiques Dripps's proposal as defending from criminalization many problematic social practices as "sexual bargains" that women engage in, which are in his view, totally permissible both legally and morally. *Id.* at 1452-59.

75. *See generally* Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 820-25 (1988) (discussing the refusal of contemporary jurisdictions to outlaw submission that is affected by economic coercion).

76. *See generally* WERTHEIMER, *supra* note 39, at 189-92 (discussing the effects of economic pressure and conditions of inequality on the question of consent to sexual relations. He argues that it is a mistake to think that difficult circumstances and inequalities in positions due to economic constraints should be regarded as justifications for invalidating the legal power of consent).

assumes that legislatures, courts, and scholars unanimously agree upon the precise definition of consent. Yet, in practice, this is far from accurate: consent to sexual relations is a highly controversial issue. The concept of consent, persistently ambiguous, calls for a contextual interpretation.

What is "consent"? Legislatures, courts, and scholars are unable to come up with one definition for the term. As some scholars note, statutes and case law sometimes imply one meaning rather than the other.[77] They further point out that "sometimes the usage in statutes and cases is unclear or internally inconsistent."[78] Scholars and judicial decisions alike fail to articulate whether consent embodies an objective act or rather a subjective state of mind.[79] Instead, they have focused their attention on developing the legal standard to determine when consent to sexual relations is obtained. But looking into the question of how consent is expressed, without having first resolved the preliminary question of what consent means, misses the mark. The result is that the current understanding of consent to sexual relations is flawed and misguided. One of the fundamental problems in rape laws today stems from failing to incorporate some crucial elements in the definition of consent. The two missing elements are an envisioning consent as a subjective state of mind, as one of willingness and mutuality.

A. *The Judicial Discourse on Consent to Sex*

Evaluating the judicial discourse on consent to sexual relations is a crucial component in understanding the drawbacks to the current views

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77. *See* STANFORD KADISH ET AL., CRIMINAL LAW AND ITS PROCESS, CASES AND MATERIALS 331 (8th ed. 2007) (citing PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT (2004) (contending that while we all employ claims of consent in everyday language and courts commonly predicate legal rights and responsibilities on findings of consent or its absence, we do not share, either individually or institutionally, a common concept of consent. He further claims that a number of the competing concepts of consent that are regularly employed are either in themselves conceptually incoherent or are frequently combined in ways that produce conceptual confusion. Westen also argues that our failure to sort out our conceptual confusions results in gross injustice as we punish the innocent and acquit the guilty.); *see generally* Heidi Hurd, *Was the Frog Prince Sexually Molested*, 103 MICH. L. REV. 1329, 1329 (2005) (positing that Westen proves that (1) we do not share, either individually or institutionally, a common concept of consent, (2) a number of the competing conceptions of consent that are regularly employed are either, in themselves, conceptually incoherent, or are frequently combined in ways that produce conceptual confusion, and (3) our failure to sort out our conceptual confusions results in gross injustices and inequalities as we punish the innocent and acquit the guilty).

78. *Id.*

79. *See, e.g.*, SANFORD KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 331 (8th ed. 2007) (suggesting that it is unclear whether consent is a state of mind: something that a person feels, like willingness, or whether it is an action: something a person does, like giving authorization).

regarding this issue. We ask a fundamental question: What accounts for the flawed understanding of what consent means? Answering this question would not only clarify what is lacking in the current definition of consent but would also facilitate incorporating these missing elements in an alternative and improved definition.

1. Against a Person's Will or Without Consent?

The Court in *State v. Rusk* held that: "[I]t is well settled that the terms 'against the will' and 'without consent' are synonymous in the law of rape."[80] Under common law, rape is defined as "the carnal knowledge of a woman forcibly and against her will."[81] Many modern rape laws have abandoned the obsolete phrase "against her will" and replaced it with the neo-liberal phrase "without consent."[82] What assumption that underlies this change is that the phrases capture identical meanings. The Maryland prohibition against rape, under which *Rusk* was convicted, used both phrases "against the will" and "without consent" in its definition.[83] The *Rusk* Court, like many other courts, held that the phrases are synonymous.[84]

While this premise has never been thoroughly challenged, it is questionable whether it is truly accurate, and whether these phrases secure precisely the same meaning. We must ask whether the current view of consent is able to effectively capture the complainant's genuine will, namely, whether she truly wants the sexual acts to take place. Evaluating court decisions illustrates that the answer to these questions is no.[85] The contemporary shift from focusing on the complainant's will to focusing on her consent results in missing a crucial component on what consent to sexual relations must incorporate.

This Article suggests that under the current views on consent, the phrases "against the will" and "without consent" are not synonymous. There is a significant difference between these phrases as they capture separate aspects in the definition of consent, and may therefore result in different understandings of what genuine consent is. The phrase

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80. *See* State v. Rusk, 424 A.2d 720, 725 (Md. 1981).

81. *See* WILLIAM BLACKSTONE, 4 COMMENTARIES *210.

82. *See* MD. CODE CRIM. LAW § 3-303 (2009). *See also* ALA. CODE § 13A-6-61 (1977); COLO. REV. STAT. § 18-3-402 (2004); FLA. STAT. ANN. § 794.011 (2002); HAW. REV. STAT. § 707-731 (2009); MISS. CODE ANN. § 97-3-95 (1998); NEV. REV. STAT. § 200.366 (2007); VT. STAT. tit. 13, § 3252 (2005).

83. *See* MD. ANN. CODE CRIM. LAW § 462 (2002) (prohibiting engaging in vaginal intercourse by force or threat of force against the will and without the consent of the other person), *repealed by* MD. CODE CRIM. LAW § 3-303 (2009).

84. *See Rusk*, 474 A.2d at 725.

85. *See, e.g.*, State v. Baby, 946 A.2d 463 (Md. 2008) (disregarding the issue of the complainant's willingness).

"against the will" connotes a subjective state of mind, such as not wanting to and unwilling to engage in the sexual acts. Using the "willingness" language as an element of the rape offense encompasses the complainant's subjective experience and perception regarding whether she wanted to engage the specific sexual act. In contrast, the legal phrase "consent to sex" has repeatedly been characterized as embodying an objective component.[86] This definition of consent suggests that an actual act is required.

This alternative reading suggests that the two phrases must be separate elements that define rape. The phrase "without consent" cannot simply replace the phrase "against her will." In its place, an additional element is required to similarly capture the victim's willingness to engage in a sexual act. Accepting the premise that these phrases are synonymous therefore has far-reaching implications. In the shift from the previous language, something is lost on the way. The judicial focus on the objective manifestations of consent has distracted us from considering the additional and much-needed aspect of consent, which is the subjective state of mind of the complainant's willingness. These current views mask the question whether the victim actually wanted the sexual acts to take place. The judicial reluctance to take into account the complainant's will results from the false premise that the phrases "without consent" and "against the will" are synonymous.

The judicial focus on the objective manifestations of consent is understandable, because a perpetrator cannot be guilty if the victim has failed to effectively communicate to him her unwillingness.[87] However, the fact that a person cannot be convicted, unless the evidence clearly demonstrates that the complainant manifested her subjective state of mind and her unwillingness to engage in sex, does not resolve the fundamental question of what consent means. Conceptually, consent must embody the complainant's subjective willingness; sexual acts are either wanted or not, and willingness to engage in sex with the perpetrator is either present or absent. There is no middle ground. Evaluating whether these were effectively expressed to the perpetrator is a different question that must be separately considered. The current construction of consent, therefore, misses the mark, by neglecting to address this subjective experience, and apply it accordingly. The failure to take into account the complainant's unwillingness is therefore one of

86. *See, e.g.*, State v. Koperski, 578 N.W. 2d 837, 844, 846-47 (1998) (emphasizing the objective element of consent).

87. *See, e.g.*, State v. Smith, 554 A.2d 713, 717 (Conn. 1989) (holding that although the actual state of mind of the actor in a criminal case may in many instances be the issue upon which culpability depends, a defendant is not chargeable with knowledge of the internal workings of the minds of others except to the extent that he should reasonably have gained such knowledge from his observations of their conduct).

the reasons for the flawed judicial understanding of consent.

The above analysis demonstrates that surprisingly, the seemingly anachronistic common law phrase "against the will" does a better job at capturing the additional component of subjective willingness compared with the more contemporary term "consent." Traditional common law, by requiring that the evidence establish both subjective unwillingness and actions refusing consent (physical resistance), achieved something that contemporary rape laws have failed to do.[88] Rape laws today have practically abandoned the subjective aspect of consent, as the following court decisions demonstrate.

2. Consent as Permission and Its Implications

While courts and legislatures have failed to articulate whether consent is an objective act or a subjective state of mind, rape law reform has primarily focused on searching for an objective legal standard to determine when consent to sexual relations is established. Acknowledging the shortcomings of the resistance standard, some jurisdictions have adopted the "affirmative permission" standard. In the landmark decision of *In re Interest of M.T.S.*, the New Jersey Supreme Court embraced this standard for determining consent.[89] The *M.T.S.* court held that the force or coercion requirement is met by establishing that the perpetrator did not obtain the complainant's affirmative permission to engage in sex with him.[90] The Court incorporated consent into the definition of physical force, by defining it as any amount of force in the absence of what a reasonable person would believe to be an

88. *See generally* KADISH ET AL., *supra* note 79 (explaining that common law required both subjective as well as objective indications of consent).

89. *In re* Interest of M.T.S., 609 A.2d 1266 (N.J. 1992).

90. *See id.* at 1276.

> The understanding of sexual assault as a criminal battery, albeit one with especially serious consequences, follows necessarily from the Legislature's decision to eliminate non-consent and resistance from the substantive definition of the offense. Under the new law, the victim no longer is required to resist and therefore need not have said or done anything in order for the sexual penetration to be unlawful. The alleged victim is not put on trial, and his or her responsive or defensive behavior is rendered immaterial. We are thus satisfied that an interpretation of the statutory crime of sexual assault to require physical force in addition to that entailed in an act of involuntary or unwanted sexual penetration would be fundamentally inconsistent with the legislative purpose to eliminate any consideration of whether the victim resisted or expressed non-consent.
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> *Id.*

affirmative and freely given permission.[91]

In theory, adopting a new standard that focuses on the affirmative expressions of consent carries a potential promise for a profound reform in rape law. However, the decision in *M.T.S.*, demonstrates that in practice, the hopeful concept of affirmative consent has evolved into an affirmative permission standard. The key question here is whether an affirmative consent standard and an affirmative permission standard are, in fact, similar, and if not what the practical implications are. The decision in *M.T.S.* merely assumes that permission and consent necessarily capture the same concepts. These terms are synonymous only if we accept the premise that consent means merely a permission-giving act. In contrast, if consent encompasses an additional component above and beyond mere permission, then "affirmative permission" does not equal affirmative consent. The latter view is correct since consent and permission are *not* synonymous. Moreover, transforming affirmative consent into an affirmative permission standard has arguably narrowed the meaning of consent as the limited term "permission" fails to capture the full meaning of genuine consent.

Little notice has been taken, in the aftermath to *M.T.S.*, of what the affirmative permission standard entails. The implications in those cases where consent is merely apparent, as well as the outcome of the practical gap between affirmative permission and affirmative consent, have not been considered. The affirmative permission standard has raised a scholarly debate on whether it should be the controlling legal standard to determine when consent is established.[92] The above debate has arguably distracted our attention from posing a key question: What are the implications of applying the current affirmative permission standard in court decisions? These issues have never been thoroughly challenged in *M.T.S.* itself or in subsequent decisions that followed. The result is that these decisions have not grasped the failure of the affirmative permission standard to offer a clear boundary between apparent permission, resulting in mere submission, and genuine consent, as the following case illustrates.

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91. *Id.*

92. *See, e.g.*, David Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 398 (2000) (arguing that affirmative permission which is expressed through behavior should suffice to establish the complainant's consent). *See also* Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1417-20 (2005) (arguing that reforms requiring affirmative permission, by words or conduct, do not go far enough). Anderson further contends that this approach relies on a man's ability to infer actual willingness from a woman's body language. *Id.* at 1417-19. Yet, studies indicate that men consistently misinterpret women's nonverbal behavior. *Id.* Anderson goes on to suggest that "[n]ot only must rape law abolish the force and resistance requirements, it must also abolish the non consent requirement . . . . In its place the law . . . would require only what conscientious and humane partners already have: a communicative exchange, before penetration occurs, about whether they want to engage in sexual intercourse."

B. *Apparent Consent in* State v. Baby

The landmark decision in *State v. Baby*,[93] a 2008 Maryland case, illustrates why the current judicial discourse on consent to sexual relations is flawed and misguided. To make this point, we must examine in detail the graphic description of the sequence of events in this case. The complainant, J.L., an 18-year-old college student, testified that she and her friend Lacey met Mike and Baby at a restaurant, and she agreed to give them a ride.[94] When Lacey left, J.L was left alone with both perpetrators.[95] She testified that they told her to park the car and took her cell phone.[96] According to J.L., both perpetrators attempted to have sex with her, and she found herself sitting in the back seat of the car with Baby removing her jeans and Mike sitting on her chest, attempting to place his penis in her mouth.[97] After telling them to stop, they moved J.L. around so that her body was in Baby's lap as he held her arms. Mike tried to insert his penis into her vagina but mistakenly inserted it into her rectum.[98] J.L. further testified that she was told she would not be able to leave until both men were done having sex with her.[99] While Mike attempted to have intercourse, Baby held her arms and inserted his fingers into her vagina.[100] At that point, Baby got out of the car, leaving Mike alone with J.L.[101] She then testified that Mike inserted his fingers and then his penis into her vagina.[102] After Mike finished having sex with her, he left the car.[103] Mike told Baby that he just had sex with her, then Baby got into the car and told J.L., "[I]t's my turn now."[104] J.L. testified that Baby said, "[A]re you going to let me hit it[?]" and "I don't want to rape you."[105] J.L. responded by saying that he could as long as he stopped when she told him to.[106] J.L. testified that he "got on top of me and . . . it hurt."[107] She testified that she "yelled stop, that it hurt."[108] According to J.L. "that's when he kept pushing it in[,] and I

93. *See generally* Baby v. State, 946 A.2d 463, 466-68 (Md. 2008) (articulating the factual background that stands at the basis of the holding).

94. *Id.* at 466.

95. *Id.*

96. *Id.*

97. *Id.* at 466-67.

98. *Id.* at 467.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

was pushing his knees to get [him] off me."[109]

According to Baby's testimony, neither he nor Mike touched J.L. before Baby got out of the car and left Mike and J.L. together.[110] Baby testified that when he came back into the car, he asked J.L. whether she was "going to let him hit that," and she said that he could as long as he stopped when she told him to, which he claimed he did right away.[111] Baby also said that when he told J.L., "I don't want to rape you," this was to confirm the permission he thought he had.[112]

The complainant's and defendant's accounts differ on two main points. First, the complainant testified that initially both perpetrators attempted to have sex with her at the same time, and that she explicitly told them to stop.[113] According to her testimony, they decided to have sex with her separately only after their attempts were unsuccessful.[114] Baby, in contrast, denied the joint sexual acts, claiming that neither he nor the other defendant attempted to have sex with the complainant while they were all together in the car.[115] Second, the complainant's and Baby's versions also diverge regarding the sequence of events that occurred after the complainant withdrew her permission. While the defendant claimed that he stopped right after she told him to, she claimed that he ignored her demand and continued the penetration.[116]

Surprisingly, the complainant's and defendant's accounts on the particular point of initial permission were similar.[117] They both agreed that the complainant initially gave verbal permission to the sexual act.[118] The only difference in their accounts on this point was why the permission was given. Under the complainant's account, she felt that she did not have any choice but to submit.[119] The defendant's version was that he understood the verbal permission to be consent to engage in sexual acts with him.[120]

The jury accepted the defendant's account that initial consent was given.[121] However, they concluded that as intercourse proceeded, the complainant withdrew her consent, and demanded that the defendant

109. *Id.*
110. *Id.* at 468.
111. *Id.* at 469-70.
112. *Id.* at 469.
113. *Id.* at 466-68.
114. *Id.* at 467.
115. *Id.* at 468-69.
116. *Id.* at 466-70.
117. *Id.* at 467, 469.
118. *Id.*
119. *Id.* at 467.
120. *Id.* at 468-69.
121. *Id.* at 472.

stop, which he did not.[122] These factual determinations framed the legal question accordingly: May a complainant who initially consented to sex withdraw her consent at a later point during the intercourse?[123] The trial court answered this question in the negative, but the appellate court reversed. It held that a complainant may withdraw her consent at any point throughout the intercourse.[124]

The crux of the argument here is to offer an alternative reading of this case. Rather than viewing *Baby* as a case demonstrating withdrawn consent, as it is currently viewed, let me suggest that consent was never obtained under the above circumstances. While the question of withdrawn consent during sexual intercourse raises several interesting issues, it is not the one focused on here because I read the facts of this case quite differently. Instead, this Article challenges the jury's fundamental premise that the sexual acts were consensual in the beginning but became nonconsensual after the complainant changed her mind.[125] Rather than viewing the facts through the lens of withdrawn consent, this Article contends that a more nuanced reading of the facts shows that the case is yet another example of nonconsensual sexual relations.

Under this alternative account, the legal issue in *Baby* was erroneously framed. Rather than asking whether a complainant may withdraw her consent once it has been offered, the proper question should have been whether the sexual acts between the complainant and the defendant truly consensual. The jury should have asked themselves some additional questions: Did the complainant express, at any point in the sexual encounter, her willingness to engage in the sexual acts? Most importantly, does verbal permission necessarily connote consent notwithstanding the underlying circumstances that indicate otherwise?

Nonetheless, the jury in *Baby* failed to consider these additional questions. Had it done so, the Article argues, the answers would have been in the negative. Under the circumstances, and in light of the backdrop against which permission was given, consent to sex was never given. This Article therefore contends that the jury got it wrong by misinterpreting the complainant's response to the perpetrator's coercive conduct.

This alternative reading begs the question: Should consent require a willingness in addition to permission? Interestingly, the prosecution's

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122. *See id.* at 471-72 (concluding that post-penetration withdrawal of consent negates initial consent for the purposes of sexual offense crimes, and when coupled with the other elements, may constitute the crime of rape).

123. *Id.* at 473.

124. *Id.* at 472-73, 486.

125. *Id.* at 471-72.

initial premise was that there was no consent to begin with.[126] The state argued that the complainant's reactions indicated only apparent consent and that no volitional consent was ever given.[127] However, the jury rejected this theory.[128] Why?

What led the jury to conclude that the complainant's submission to unwanted sexual demands qualified as consensual sex? Why did they believe that the complainant initially consented to the sexual acts when the underlying circumstances suggest that permission was only apparent? Moreover, why did they view the perpetrator's coercive conduct as permissible sexual conduct?

The answers to these questions point to the close links between the jury's misguided view on consent and the application of the affirmative permission standard. The notion of consent to sex as a permission-giving act figured prominently in the jury's understanding of what consent means in *Baby*, and it is precisely what led them to erroneously conclude that the sexual acts were consensual.[129] This type of verbal permission requires us to reconsider the practical implications of the affirmative permission standard, because the jury's belief that technical authorization of the sexual acts amount to legal consent to sexual relations is the direct result of applying this standard.[130]

The jury in *Baby* failed to grasp that verbal permission, in itself, does not qualify as genuine consent, because permission and consent are not synonymous. While permission captures only the objective aspect of authorizing the sexual act, consent is a broader concept that also embodies a subjective aspect, namely, willingness.

1. Apparent Consent Defined

The result of applying the affirmative permission standard in *Baby* is failing to notice that consent is often merely apparent. Legal scholars, as well as courts, have given the problem of apparent consent in rape cases scant attention.[131] The decision in *Baby* calls for a clear definition of the problem of apparent consent: permission or authorization to engage in

126. *Id.* at 466-68.

127. *See id.* at 473; *see also* Baby v. State, 916 A.2d 410, 421 (Md. 2007) (offering some insights on the prosecution's theory regarding the complainant's consent).

128. *See Baby*, 946 A.2d at 471-72.

129. *See id.*

130. *See id.*

131. Scholars address the problem of apparent consent in other contexts, particularly in the context of trafficking and prostitution. *See, e.g.*, Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 351 (2006) (arguing that the apparent consent to trafficking cannot be viewed as legally valid consent).

sexual acts, either by the complainant's express words or by her behavior, which is given for any reason other than the complainant's willingness.

Apparent consent is prevalent in cases in which permission, verbal or through behavior, is obtained. However, delving into *why* permission was given indicates that the reason is not willingness to engage in sexual acts. The affirmative permission standard leads us to the wrong questions. In those cases in which we suspect that consent is merely apparent, rather than asking whether permission to engage in sexual acts was given, the key question we must ask instead is this: Why was permission given? What were the reasons for giving permission? Focusing on consent as merely an act of permission, participation, or approval has distracted both the courts and commentators from asking these crucial questions.

To get a handle on the question of apparent consent, we must call into question the factors that prompted the complainant's apparent consent. The key question becomes whether the reason for giving permission is willing and wanting to engage in the sexual acts. If the answer is that permission was given for any other reason, then consent is not obtained since it is merely apparent. Consent is therefore genuine only if it is given because the complainant is willing and wanting to engage in sexual acts with the defendant.

Asking these questions might offer an important guideline in distinguishing between genuine consent and apparent permission. Articulating a series of circumstances and conditions under which consent is merely apparent, notwithstanding an ostensible verbal permission that might have been expressed, may do this. Many jurisdictions currently acknowledge factors such as submission by force, fear of violence, and threats to cause physical harm.[132] But this list of factors might be further expanded to include different types of fears of non-violent harms, and in particular, submission by reason of lack of any meaningful choices, or submission by reason of being placed in fear of non-physical harm. These circumstances also include submission by reason of abuse of power or authority, a problem the Article will address in more detail in the following part.

In evaluating the complainant's reasons for giving permission in *Baby*, we see that the reason is twofold. First, the lack of any meaningful alternative course of action, and second, the fear of harmful repercussions if permission is refused.[133] The decision sharpens the question of meaningful choices under coercive circumstances and

132. *See generally* SCHULHOFER, *supra* note 5, at 274-82 (discussing refusal of current law to acknowledge additional forms of sexual abuses beyond those that demonstrate physical harm or threats to use violence).

133. *See generally Baby*, 946 A.2d at 463.

conditions that fall short of force and violence.

The evidence in *Baby* shows that the complainant unwillingly submitted to the perpetrator's demands because she believed she had no other choice.[134] The complainant's testimony shifts our attention to the basic premise: To be legally effective, consent must be freely given. When asked by the prosecution whether she felt like she had a choice, the complainant answered, "Not really."[135] She also testified that she just did whatever they said, feeling that she had no other choice.[136] The complainant stated that both perpetrators explicitly told her that she would be free to leave only after they were done having sex with her.[137]

Consider the alternatives available to the complainant: Assuming she had the free choice and that she refused to give permission, what would have happened then? Most likely, the perpetrators would have forced her into submission. What are the chances that an 18-year-old girl would be able to overcome two 16-year-old males? The assumption that the complainant could realistically refuse permission is therefore significantly undermined. This conclusion casts a serious doubt on the reason given for her submission.

In addition, we must consider the effect of the complainant's fear of more harmful alternatives. One may ask: Fear of what? While the complainant's testimony did not accuse the defendant of threatening to harm her, the underlying circumstances would likely have led the complainant to fear for her personal freedom (after the perpetrators told her she would not be able to leave). When a victim is locked in a car at night in a secluded area with two male perpetrators who clearly indicate their desires to force sexual acts on her, her personal freedom is in jeopardy, and the fear that physical force might come into play is more than reasonable.

2. Myths and Stereotypes in the Permission Standard

The *Baby* decision illustrates that the affirmative permission standard enables the persistent infusion of myths and stereotypes into the judicial discourse. The problem of clearly defining consent goes much deeper than the question of which legal standard to employ to determine consent. A community's views as to what constitutes sexual consent, as well as mistaken beliefs in what qualifies as consent, continue to prove stronger than legal standards, because criminal cases are decided by a jury. Juries make decisions about culpability based on their personal, societal perceptions; the social norms they hold

134. *See id.* at 466-68.
135. *See id.* at 467.
136. *Id.*
137. *Id.*

regarding the boundaries between legitimate and illegitimate sexual practices; and how they define consent to sexual relations.[138] *Baby* thus is a vivid example in which the jury's perceptions resulted in mistakenly viewing apparent permission as valid consent, based precisely on relying on such myths and stereotypes. Myths and stereotypes about "appropriate" sexual behavior shape the community's understanding of sexual consent, and therefore directly affect a jury's perceptions.[139]

The affirmative permission standard allows the infusion of myths and stereotypes into the judicial discourse because under this standard, the complainant's demeanor plays a crucial role in determining whether she gave permission to the sexual acts.[140] Allowing implied consent, which might be inferred from the complainant's ambiguous behavior, and refusing to hold that only explicit and unequivocal words amount to consent prevents legal recognition of unwanted sexual intrusions.[141] One of the most prominent drawbacks when juries infer implied consent from the complainant's behavior rests on the problem of gender stereotyping and gender myths; acknowledging implied consent based on evaluating the complainant's demeanor is flawed precisely because it rests on such myths and stereotypes.[142]

Legal scholars have long identified the infusion of myths and stereotypes into rape laws. Michelle Anderson, for example, criticizes the affirmative permission standard on that ground, by arguing that it allows imputing "erotic innuendo and sexual intent where there is none," thereby construct[ing] consent out of stereotype and hopeful imagination."[143] David Archard addresses the same problem by emphasizing the role of myths of rape in shaping societal and judicial

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138. *See generally* Dan Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why in Acquaintance Rape*, 158 U. PA. L. REV. 729, 765 (2010) (discussing a study in which a mock-jury experiment demonstrated the juries' perceptions of facts concerning acquaintance rape. The study shows that the juries' personal worldview proved stronger than legal definitions of rape).

139. *See* Andrew E. Taslitz, *Forgetting Freud: The Courts' Fear of the Subconscious in Date Rape (and Other) Cases*, 16 B.U. PUB. INT'L L.J. 145, 155 (2007) ("Even the most well-meaning 'feminist' jurors may find that they have reasonable doubt about the . . . rape case . . . if the tale told fits cultural stories about 'sluttish' women").

140. *See* Anderson, *supra* note 92, at 1412-14.

141. *Id.* at 1413-14.

142. *See* R. v. Ewanchuk, S.C.R. 330, 1999, Carswell Alta 100, ¶ 97 (Justice L'Heureux-Dube of the Canadian Supreme Court addresses in detail the myths and stereotypes that are embodied in rape law, rejecting the notion of implied consent by holding that: "One cannot imply that once the complainant does not object to the massage in the context of a job interview, there is 'sufficient evidence' to support that the accused could honestly believe he had permission to initiate sexual contact . . . It would reflect the myth that women are presumptively sexually accessible until they resist.").

143. Anderson, *supra* note 92, at 1406.

perceptions.[144] Archard further addresses the judicial role in reinforcing the myth that some women invite and provoke being raped.[145]

The *Baby* decision offers an example of the ways in which these myths and stereotypes infiltrate both the judicial discourse about rape complainants' demeanor and juries' views on what qualifies as consent to sexual relations. Interestingly, the Court of Special Appeals mentioned in a footnote that although it cannot know precisely the thought process of the jurors,

> the evidence presented to the jury provided at least a rational inference that (1) Lacey sensed that a sexual encounter was contemplated by the two boys and chose to leave the trio; (2) that, although J.L. certainly did not relinquish her right to refuse appellant's sexual advances by climbing into the back seat of the car, by agreeing to remain with the two boys, she had abandoned the security provided by Lacey's presence; and (3) the earlier conversations about sex and appellant's production of three condoms should have been indicia of their intentions. All of the foregoing evidence was before the jury for its consideration in contradistinction to the State's theory that J.L., an eighteen-year-

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144. *See* DAVID ARCHARD, SEXUAL CONSENT 131 (1998) (discussing the effect of myths and stereotypes in current rape laws).

> Myths of rape include the view that women [fantasize] about being rape victims; that women mean "yes" even when they say "no"; that any woman could successfully resist a rapist if she really wished to; that the sexually experienced do not suffer harms when raped (or at least suffer lesser harms than the sexually "innocent"); that women often deserve to be raped on account of their conduct, dress, and demeanor; that rape by a stranger is worse than one by an acquaintance. Stereotypes of sexuality include the view of women as passive, disposed submissively to surrender to the sexual advances of active men, the view that sexual love consists in the "possession" by a man of a woman, and that heterosexual sexual activity is paradigmatically penetrative coitus.

Id.

145. *Id.* at 139.

> A crime is no less unwelcome or serious in its effects, or need it be any less deliberate or malicious in its commission, for occurring in circumstances which the complainant helped to [realize]. Yet judges who spoke of women "inviting" or "provoking" a rape would go on to cite such contributory behavior as a reason for regarding the rape as less grave or the rapist as less culpable. It adds judicial insult to criminal injury to be told that one is the part author of a crime one did not seek and which in consequence is supposed to be a lesser one.

Id.

> old college student, was tricked by two sixteen-year-old high school students.[146]

By this language, the Court insinuates, not so subtly, that when a complainant accompanied the defendants to a secluded area by her choice, abandoning the security of her friend who did not like the sexual suggestions and left the scene ahead of time, she knowingly exposed herself to certain risks flowing from her own behavior. The Court further makes an additional gendered perception stereotyping remark regarding the age difference between the parties. The Court alludes to the fact that the complainant was an allegedly experienced 18–year-old college student, while the perpetrators were 16-year-old high school "boys."[147] This remark implies that the young, inexperienced "boys" could not have sexually abused the older and supposedly more experienced "woman."

Revisiting these unsettling comments, silently buried in a footnote, requires us to question the gender-based myths and stereotypes that might be lurking in these statements. These disturbing views made by an appellate judge help reinforce the myth that the complainant invited and encouraged the sexual offense, thus her claims are less worthy of belief. The judge's rhetoric illustrates a case in which "judicial insult [is added] to criminal injury" by suggesting that the complainant in fact contributed by her own "risky" behavior to being raped and thus brought it on herself.[148] This view reinforces the myth that the complainant's contributory behavior lessens the guilt of the defendant.

3. Making Things Worse?

At first glance, adopting the affirmative permission standard has left us precisely where we were prior to its adoption: passive acquiescence in sexual demands is still viewed as consent to sex. Perhaps, though, the implications of the *Baby* decision might be even more far-reaching. The above conclusions may be taken a bit further, by suggesting an even bolder claim, namely, that the affirmative permission standard not only does not offer a better standard to determine when consent is established, but, in some cases, the standard might even result in making things worse. This might happen in cases with features similar to *Baby*'s, in which verbal permission is given, but the evidence suggests that it is merely apparent.

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146. *See* Baby v. State, 916 A.2d 410, 421 n.1 (Md. Ct. Spec. App. 2007).

147. *See id.*

148. *See, e.g.*, ARCHARD, *supra* note 144, at 139 ("[J]udicial insult is added to criminal injury.").

Hypothetically applying the affirmative permission standard in *State v. Smith*[149] suggests that the outcome in this case might have been different had this standard been applied. *Smith* is a 1989 Connecticut case that was decided three years prior to articulating the affirmative permission standard in *M.T.S.*[150] The defendant in *Smith* invited the complainant back to his apartment where he made sexual advances toward her.[151] Though the complainant repeatedly rejected his advances, the defendant persisted.[152] Testifying that she was scared, the complainant believed the defendant was determined to have sex with her and would hurt her if she resisted.[153] The complainant understood that her only choice was "to go along with it."[154] She further testified that after she decided to "give in," she tried to convince the defendant that she was not going to fight and was going to enjoy it.[155]

Comparing and contrasting *Smith* and *Baby* suggests striking similarities between these cases: the complainants decided to give in by submitting to unwanted sexual demands.[156] They both did so due to their belief that, under the circumstances, they did not have any alternative.[157] Furthermore, both complainants submitted under no explicit threat of harm to them if they failed to engage in sex with the perpetrators.[158] However, in both cases, the perpetrators clearly conveyed to the complainants the message that they had no other choice but to submit. While in *Baby*, the perpetrators told the complainant that she would not be able to leave until they were both done having sex with her;[159] in *Smith,* the perpetrator told the complainant that he could make it either harder or easier on her.[160] Most importantly, in both cases, the complainants verbally expressed permission to engage in the sexual act. In *Baby*, the complainant told the perpetrator that he could

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149. *See* State v. Smith, 554 A.2d 713, 713 (1989).
150. *Id.*
151. *Id.* at 714.
152. *Id.*
153. *Id.*

> At first I didn't know what to do. I did spit in his face and he didn't even take it seriously. Then I tried kicking him off, which was to no avail. He was way too big for me . . . . He told me he could make it hard on me or I could make it easy on myself, which I finally decided was probably my best bet.

Id.

154. *Id.*
155. *Id.*
156. *Id.*; Baby v. State, 916 A.2d 410, 467 (1989).
157. *Smith*, 554 A.2d at 714; *Baby*, 946 A.2d at 467.
158. *Smith*, 554 A.2d at 714; *Baby*, 946 A.2d at 467.
159. *Baby*, 946 A.2d at 467.
160. *Smith*, 554 A.2d at 714.

penetrate her so long as he stopped when she told him to.[161] In *Smith*, the complainant testified that she told the perpetrator that she "was going to go along with him and enjoy it."[162] Indeed, verbal permission to engage in the sexual acts was given in both cases. Yet, while in *Baby*, the jury found that the complainant initially consented to sex by giving a verbal permission to the defendant,[163] the *Smith* jury found that giving in and submitting to unwanted sexual demands failed to demonstrate consent.[164] Why then did similar facts result in contradictory holdings? Why was submission to unwanted sexual demands in one case viewed as consent while acquiescing in the other case resulted in determining that sex was non-consensual?

One possible explanation for this difference is that in *Smith* the jury understood the defendant's statement that he "'could make it hard' for her if she continued to resist" as a threat of physical injury.[165] These words were sufficient, in the jury's view, to meet the element of "compel[ling] another person to engage in sexual intercourse by the use of force . . . or by the threat of use of force . . . which reasonably causes such a person to fear physical injury" as defined by Connecticut rape law.[166] But the evidence in *Smith* shows that no explicit threat to physical harm was ever expressed in this case.[167] However, the jury accepted the complainant's account that she decided to submit to unwanted sexual acts since she felt that no other choice was available to her.[168] But why were the similar surrounding circumstances in *Baby* viewed differently? The jury in *Baby* had plenty of evidence from which to infer the complainant gave in to the perpetrators' sexual demands after being placed in fear of harm and based on her belief that she had no other choice but to submit after being told she would be free to leave only after consummation. The jury, however, explicitly refused to take that path.[169]

Why did the *Baby* jury conclude that the complainant communicated her consent to sex under these compelling circumstances? The explanation to the different outcomes might rest on applying the

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161. *Baby*, 946 A.2d at 467.

162. *Smith*, 554 A.2d at 714.

163. *Baby*, 946 A.2d at 471-72.

164. *Smith*, 554 A.2d at 718.

165. *Id.* at 714, 718.

166. The defendant was convicted under Title 53a-70: Sexual assault in the first degree, which was defined under Connecticut General Statues Annotated as: "when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person . . . which reasonably causes such person to fear physical injury to such person, . . ." *Id.*

167. *Smith*, 554 A.2d at 714.

168. *Id.*

169. *See* Baby v. State, 916 A.2d 410, 467 (1989).

affirmative permission standard. The *Baby* jury relied heavily on the fact that the complainant verbally authorized the sexual act.[170] Under the jury's account, and based on the affirmative permission standard, the act of verbal permission rendered the complainant's submission consensual sex. In *Smith*, however, the complainant gave the same verbal permission.[171] But here, the jury intuitively understood that permission was merely apparent, and refused to acknowledge this type of technical authorization under the compelling circumstances as consensual sex. The difference was that *Smith* was decided before the affirmative permission standard was adopted. Thus, it had not occurred to the jury that the apparent verbal permission given by the complainant may qualify as consent to sex. Had the affirmative permission standard been the controlling legal standard when *Smith* was decided, the same jury might have reached a different result.

Comparing and contrasting these cases suggests that not only does the affirmative permission standard fail to accomplish a significant reform in rape law, it might also harm complainants whose apparent verbal permission is erroneously viewed as communicating affirmative consent. Under this alternative reading, the affirmative permission standard significantly contributed to confusing the jury, by leading them to conclude that a technical act of verbal permission is sufficient to determine consent to sexual relations. This standard, therefore, resulted in masking the difference between apparent and genuine consent. Adopting the affirmative permission standard thus not only failed to result in a better standard, it made things worse, at least in certain cases.

The *Baby* decision thus illustrates the drawbacks to the affirmative permission standard as it is currently construed pursuant to the decision in *M.T.S.*, and requires that we re-evaluate its implications. This standard fails to offer an adequate legal criterion to determine when genuine consent is established, to acknowledge the harms that result from apparent permission, and to provide any substantive guidelines on where to draw the line between criminal conduct and legitimate sexual conduct. The unsettling view on consent in *Baby* demonstrates that developing an alternative consent standard that can distinguish between mere permission and genuine consent is a much–needed step.

C. *Toward a Modified Definition of Consent*

Having noted the shortcomings in current views on consent to sexual relations sharpens the need to articulate the necessary elements that define genuine consent. The problem lies not in an affirmative consent

170. *Id.* at 471-72.

171. *See id.* at 467, 471-72.

standard itself, but rather in the current understanding of consent, which depends heavily on narrowly interpreting consent merely as an objective act of permission–giving. The shift from a negative standard, such as verbal resistance, toward a positive standard, such as affirmative consent, is a welcome one. However, a robust application of a meaningful affirmative consent standard is still needed. This alternative standard draws on a modified definition of consent, which incorporates the following crucial components.

1. Mutuality

How should an ideal model of consent to sexual relations look? After cautiously articulating the outer boundaries of consent by removing the nonconsensual and problematic sexual relationships in which consent is questionable, Justice Kennedy, in *Lawrence,* offers his view: "two adults who, with full and mutual consent from each other, engaged in sexual practices."[172] *Lawrence* depicts an idealistic role model for consent to sexual relations, and applies it where consent was genuine; no one challenged the validity of this consent by claiming that the sexual relations were harmful in any way.[173] While in *Lawrence* itself, there was no complainant who claimed that sex was nonconsensual, we must look at its language to better capture what is wrong in the more complex cases where a complainant claims that genuine consent was missing. Looking at the idealized view of consent to sexual relations can help us gain important insights into what elements consent must incorporate.[174]

Lawrence's language draws our attention to the central idea of mutuality in sexual relationships. It reminds us that when considering criminalizing abusive relationships, we should always keep in mind

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

173. *See id.* at 564 (stating that "The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.).

174. *See generally* JOHN GARDNER, OFFENSES AND DEFENSES 24 (2007).

> The view defended here, by contrast, is not essentialist about sex. It only trades on the mere fact that an idealized view of sex-which we did not endorse and which indeed may not be endorsed vary widely nowadays-nevertheless still colours the social meaning of various actions, including, most notably, actions which appropriate and subvert that ideal.

Id. n.28. Gardner compares and contrasts his views on rape with the approach taken by Lois Pineau. Lois Pineau, *Date Rape: A Feminist Analysis*, 8 L. & PHIL. 217 (1989). Gardner argues that Pineau endorses a particular idealized view of sex and hence becomes what he calls essentialist. GARDNER, *supra*, at 24 n.28. Gardner however, merely suggests that the ideal view of sexual relations may color our understanding about what is acceptable and what is not. *See id.*

what typical sexual relationships between sexual partners look like. Revisiting cases such as *Baby* raises the following question: Do we normally view sexual relations as resulting from a permission-giving act? The answer is probably no. However, what we do envision is both parties making a mutual decision to engage in sexual relations with each other. The two must agree on what they are going to do. The ideas of mutuality and agreement stand at the core of normal sexual relations. The same ideas are also essential in cases in which the complainant submitted to unwanted sexual demands.[175]

Of course, we must acknowledge that many sexual relationships do not resemble this model. Capturing the underlying features of an ideal model for sexual relationships sharpens the role of a mutual agreement as a crucial component in any sexual relationship. It reminds us that this is one of the missing components from the previous discussion. A consideration of the surrounding circumstances in *Baby* illustrates that the complainant's apparent permission was not a result of the parties' mutual decision to engage in sex.[176]

In addition, requiring mutuality ensures the non-exploitative nature of the sexual relations. Incorporating the proposed components within a definition of consent would effectively secure the requirement that

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175. *Cf.* Chamallas, *supra* note 75, at 862; *see also* Pineau, *supra* note 174, at 236-39; Eva Feder Kittay, *AH! My Foolish Heart: A Reply to Alan Soble's "Antioch's 'Sexual Offenses Policy': A Philosophical Exploration*," 28 J. SOC. PHIL. 153 (1997); ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (Harvard Univ. Press 1993). The idea of incorporating mutuality in sexual relationships has been suggested before, mainly in proposals to add an additional requirement to the definition of consent, sometimes referred to as "consent plus" models. ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 135-39 (2003) (discussing previous proposals to add an additional component to the definition of consent and coining the term "consent plus" to address them). Many scholars pointed out that consent in itself is unable to draw a clear line between legitimate and illegal sexual conduct. *See, e.g.*, Martha Chamallas, *Consent, Equality and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 784 (1988) (positing that the notion of consent should be replaced by that of mutuality as the touchstone of acceptable sex: "Sex used for more external purposes such as financial gain, prestige or power is regarded as exploitative and immoral, regardless of whether the parties have engaged voluntarily in the encounter"). They therefore proposed an additional component to supplement consent, where something more than a mere token of acquiescence or even affirmation in the absence of coercion is required in order to render sexual contact legally permissible. *See* Vanessa E. Munro, *Constructing Consent: Legislative Freedom and Legitimizing the Constraint in the Expression Sexual Autonomy*, 41 AKRON L. REV. 923, 948 (2008). Predominantly, the ideas draw on the concepts of reciprocity, mutuality, equality, communication, or the absence of exploitation, alongside a token of valid consent. These proposals have been widely criticized. *See* WERTHEIMER, *supra* note 39, at 135-39 (characterizing these proposals as "consent plus" models and criticizing the strong reciprocity requirement). Wertheimer criticizes the "consent plus" models by arguing that these theories do not provide a refurbished model for consent, but rather overriding consent).

176. *See generally* Anderson, *supra* note 92, at 1425 (discussing the role of an agreement under a negotiation model).

sexual acts do not exploit complainants' limited choices. Moreover, mutual agreement is the ultimate safeguard of sexual integrity. Any rape law reform that attempts to provide stronger safeguards to promote a right to sexual integrity, as well as a right to remain free from sexual coercion, must take into account the mutuality notion in sexual relationships.[177] Yet, this feature is not embodied in the current affirmative permission standard.

2. Willingness

What else do we envision when thinking about typical sexual relationships? We normally think of sexual relations in terms of wanting, wishing, desiring, and willing, rather than using the permission or authorization language. As the *Baby* analysis demonstrates, the much-needed component currently missing from the definition of consent must incorporate the subjective aspect of consent, namely, the parties' willingness to engage in sexual acts with each other. While judicial rhetoric often states that consent incorporates both the subjective as well as the objective element, actual holdings of cases demonstrate that the objective aspect alone is taken into account.[178]

It is time to revisit the claim that unwanted sexual acts become synonymous with nonconsensual sexual acts. One necessary caveat to clarify this claim: The proposed construct advocated here suggests that unwanted sexual acts become synonymous with nonconsensual ones provided that the complainant's unwillingness to engage in sexual relations is objectively manifested to the perpetrator. This Article does not challenge the basic premise that to convict a perpetrator of a sexual offense, the complainant's lack of consent must be clearly and expressly manifested. However, this Article suggests that rather than requiring the complainant to demonstrate objective permission, she would be required to objectively express willingness. Thus, when she objectively manifests to the perpetrator her unwillingness, engaging in sexual activity becomes non-consensual.

The modified definition of consent acknowledges that the law should not uphold the distinction between unwanted and nonconsensual sex. Instead, it must adopt an understanding that equates wanting with consenting. When one party does not want to engage in sex with the other and does not express any willingness to do so, then sexual relations between them become not only unwanted but also non-consensual.

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177. *See* Nicola Lacey, *Unspeakable Subjects, Impossible Rights: Sexuality, Integrity, and Criminal Law*, 11 CANADIAN J.L. & JURISPRUDENCE 47, 63 (1998) (discussing the right to sexual integrity in rape laws).

178. *See, e.g.*, State v. Baby, 946 A.2d 463, 467 (Md. 2008).

3. Rejecting Implied Consent

Taking the complainant's subjective state of mind seriously requires that her willingness must be explicitly communicated; it cannot be implied or imputed through her behavior. Considering whether a complainant actually wanted the sexual acts to take place demands that her willingness must be determined based on clear and unambiguous expressions. This is another missing element in the current understanding of consent. The affirmative permission standard is flawed because it enables consent to be inferred from the complainant's equivocal behavior. Given the difficulties stemming from determining how the perpetrator interpreted the complainant's behavior at the time of intercourse, and the problems that arise in evaluating a defendant's claim that he believed the complainant consented, a necessary approach would be to require express consent before intercourse.

A modified definition of consent must acknowledge that allowing implied consent contributes and reinforces gendered stereotypes. It enables the jury, as well as the judiciary, to rely on misguided perceptions of what types of behavior qualify as consent. This results in erroneously viewing apparent permission as consent. Rape complainants should rely on a judiciary free from stereotypes and gender-biased assumptions. Allowing the infiltration of judicial rhetoric where obsolete myths and stereotypes are reinforced violates a complainant's right not to have her behavior judged based on incorrect perceptions. Moreover, true reform can never be accomplished if the law enables consent to be determined based on ambiguous behavior. A modified definition of consent must therefore reject implied consent. The complainant's willingness should be clear through explicit and unequivocal language.[179]

IV. THE LINKS BETWEEN SEXUAL ABUSE OF POWER AND CONSENT DEFINITION

The previous analysis explored the overall definition of consent to sex and the broader implications that a modified definition of consent would have on regulating sexual misconduct in general. Armed with these insights, the following section moves from this general understanding of consent to the more specific consideration of this

179. *See generally* R. v. Ewanchuk, [1999] 1 S.C.R. 330 (Can.) (considering the definition of consent through the comparative law's lens shows that foreign judicial systems have already taken similar steps in that direction). The Canadian Supreme Court held in *Ewanchuk* that consent is a subjective state of mind, and the complainant's willingness is an inherent component in determining consent to sexual relationships. *Id.* It further held that consent cannot be implied from silence, passivity, or ambiguous behavior).

definition in particular cases. It revisits the problem of sexual abuse of power by applying the proposed definition of consent to these abuses.

This application exposes the links between sexual abuse of power and the modified definition of consent, in that consent is not obtained when submission to unwanted sex is induced by abuse of power. Sexual relations cannot be viewed as consensual whenever fears of harm, coercive pressure, and exploitation of imbalances in power prompt the complainant's acquiescence to the perpetrator's sexual demands. The nonconsensual sex element is a main feature that characterizes all sexual abuses of power in these settings, which demonstrates why they justify criminalization. These links further highlight the problem identified earlier of apparent consent to sexual relations induced by reasons other than willingness.

A. *Consent Not Obtained When Induced by Abuse of Power*

In professional and institutional settings, acquiescence to sexual activity is often coupled with no real evidence of willingness.[180] Reluctant submission is particularly prevalent when disparities in powers are exploited. Mere submission to unwanted sexual acts cannot and should not constitute consent in the legal sense. Why is consent not obtained under these circumstances? It is not obtained because engaging in sexual acts under circumstances that indicate exploitation of imbalances in powers does not demonstrate the complainant's willingness to engage in these acts. Consent is not obtained because submission is obtained through the perpetrator's one-sided abuse of power rather than through mutual agreement. Thus, the ostensible permission, which is affected heavily by fears, pressures, and constraints, cannot be viewed as consent.

The first reason that consent is not obtained when imbalances in power are exploited focuses on the complainant's state of mind and stems from the key features that define genuine consent; the complainant's willingness is missing whenever sexual abuse of power induces submission. The second reason that consent is not obtained in such a situation draws on the features of the perpetrator's conduct. A common feature of many sexual relations that occur in professional and institutional settings is that submission stems from the perpetrator's sexual abuse of power rather than from the complainant's consent. The abuse of power merely implicates the perpetrator's unilateral act and fails to consider whether the complainant wants and welcomes the

180. *See, e.g.*, Terri Nicholas v. Anthony Frank, 42 F.3d 503, 510 (9th Cir. 1994) (holding that: "Nothing is more destructive of human dignity than being forced to perform sexual acts against one's will"); *see also id.* at 513 (stating that Nicholas performed the sexual acts on her supervisor unwillingly).

sexual acts. These features do not characterize the notion of consent under its modified definition, namely, as an expression of willingness and a mutual decision-making process.

The connections between sexual abuse of power and the definition of consent are best illustrated by revisiting the U.S. Supreme Court's seminal sexual harassment decision in *Meritor v. Vinson*[181] and by comparing it to *Baby*.[182] In both cases consent was interpreted merely as a permission-giving act. However, *Baby* is not about sexual abuse of power stemming from professional and institutional relations, because none was present there.[183] Rather, the decision illustrates the implications of apparent consent in the absence of meaningful choices after the defendant had placed the complainant in fear of harm. *Meritor*, on the other hand, provides a paradigmatic example of sexual abuse of power stemming from professional relations. Here, the employee's supervisor exploited a disparity of power to coerce sexual acts on her.[184] Despite what appears to be an egregious rape case, criminal charges were not brought. The *Meritor* court viewed these sexual acts as consensual, albeit unwelcome, sexual relations.[185]

While *Meritor* and *Baby* might seem unrelated, both illustrate the flawed definition of consent. *Baby*'s narrow view on consent diverts our attention from grasping that consent was not obtained in *Meritor*; while verbal permission was given, the supervisor's coercive pressures were not acknowledged.[186] Closely examining *Meritor* demonstrates that consent was merely apparent because it was obtained by sexual abuse of power.[187] Viewing consent merely as a permission-giving act in *Baby* obfuscates that cases such as *Meritor* justify criminalization, because the circumstances in *Meritor* indicate that the sexual acts were not only unwelcome but also nonconsensual.

Cases such as *Baby* and *Meritor* thus represent different facets of the problem of apparent consent, namely, ostensible permission to sexual acts given because of a reason other than willingness. While in *Baby*, permission was obtained through placing the complainant in fear of harm by creating circumstances where she felt she had no choice but to

181. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

182. *See Baby*, 946 A.2d at 463.

183. *Meritor*; 477 U.S. at 59-60.

184. *See id.* at 64-65 (discussing the sequence of events that resulted in the victim's submission to unwanted sexual relations).

185. *See id.* at 65-67 (distinguishing between unwelcome and nonconsensual sexual relations). The Court itself addressed the criminal nature of the allegations by stating that: "Respondent's allegations in this case . . . include not only pervasive harassment but also criminal conduct of the most serious nature . . ." *Id.* at 67.

186. *See* SCHULHOFER, *supra* note 5, at 176 (noting that the Meritor court refused to hold that "sexual demands from a person in authority are inherently coercive").

187. *See Meritor*, 477 U.S. at 65-67.

submit; in *Meritor*, permission was similarly induced by abuse of power.[188] The result in both cases should have been that consent was not obtained. Instead, both courts viewed apparent permission as valid consent.

These cases beg the question: Rather than asking whether permission was given, should we ask *why* it was given? The key question here is not whether a complainant voluntarily participated in the sexual acts, but why she submitted to unwanted sexual demands. Whenever sexual relations occur under professional and institutional settings, we must look carefully at the factors that prompted the complainant's permission. If this investigation reveals that permission was obtained by any reason other than willingness, then the law must deem consent absent. In particular, if the complainant's permission was induced through the exploitation of the perpetrator's powerful position, then the legal conclusion must be that consent is not obtained.

These circumstances highlight the links between the definition of consent and sexual abuse of power. Acquiescence to unwanted sex resulting from abuse of power cannot be viewed as an expression of free will and therefore should not qualify as legal consent. This conclusion rests on the presumption that consent must be based on an individual's volition. Thus, the definition of consent must be modified to appreciate the power relationships between the parties and the effects of exploitation on making a volitional decision. Consent cannot be obtained when the circumstances indicate that there was such an abuse of the power disparity between the parties that the weaker party was not in a position to choose freely, because she perceives that withholding permission is not an option. Courts need to scrutinize whether the apparent permission is given with genuine volition. Whenever sexual abuse of power is established, the complainant's participation in the sexual acts is not a result of a decision made with free will but rather made due to the coercive pressures the perpetrator exerted over her.

Principles of sound public policy further support this position because the law should not distinguish between physically overwhelming the free will through violence and a non-physical overwhelming of the free will. The free will is equally overwhelmed by economic and professional threats as by the threat of physical violence. The law should not deem a complainant's decision made under such coercive pressures as a valid choice.[189]

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188. State v. Baby, 946 A.2d 463, 467 (Md. 2008).

189. *See, e.g.*, the Canadian court's holding in Ewanchuk (citing Saint-Laurent v. Hétu, [1994] R.J.Q. 69, 82 (Can.): "'Consent' is . . . stripped off its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even apparent agreement, of a deceived, unconscious or compelled will.").

The implications of applying a modified definition of consent to sexual abuse of power cases are straightforward. The fact that consent is not obtained when induced by sexual abuse of power justifies criminalizing sexual abuses of power in various professional and institutional settings. This conclusion draws on the fundamental premise for criminal regulation of sexuality, namely, that criminalization is justified only when nonconsensual sexual relations are established because of the harm they inflict on victims.[190]

Under the current understandings of consent, most sexual abuses of power are viewed as consensual because apparent permission is typically obtained. There are only limited circumstances in which the law deems absence of consent notwithstanding the complainant's ostensible permission.[191] These circumstances usually include the threat or use of physical force. This view obfuscates the fact that the driving force behind apparent permission in professional and institutional settings is often the perpetrator's exploitation of power, rather than the complainant's willingness.

The key implication of these problems is that sexual abuses of power are not only examples of unwanted sexual relations; they also demonstrate nonconsensual sexual relations, and should therefore be criminalized like other forms of nonconsensual sex. Criminalizing abuses of power may be accomplished only once the law adopts a modified definition of consent that concedes that sexual abuses of power demonstrate one form of nonconsensual sexual relations. Moreover, criminalization is not justified under any other approach that refuses to acknowledge that these cases amount to nonconsensual sex, because non-consent is the predicate for regulating sexual misconduct.

Based on the links between abuse of power and the notion of consent, this proposal suggests that the law articulates an additional circumstance—other than submission by reasons of physical force, explicit threats to harm, or placing a complainant in fear of non-physical harm—under which consent is deemed absent. The additional circumstance where consent is absent is submission due to the exploitation of authority, power, trust, and dependence. This construct adopts the premise that the law must find absence of consent not only when explicit threats to harm a complainant are established, but also when the exercise of authority through intimidation and coercive pressures results in submission to unwanted sex.

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190. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that harmless sexual conduct falls outside the scope of criminal regulation).

191. *See, e.g.*, Commonwealth v. Williams, 294 Pa. Super. 93, 439 A.2d 765, 767 (Pa. Super. 1982) (demonstrating verbal permission in light of threat of violence: after the defendant threatened to kill if she refused his sexual demands, the complainant told him that if he "wanted to proceed with this, to go ahead," because she did not want him to hurt her).

Capturing the common features shared by various forms of abuse of power therefore justifies adopting a single comprehensive model for criminalizing such abuses in professional and institutional settings. Viewing these abuses under the same doctrinal framework offers a powerful construct. It grants victims their right to sexual integrity and to remain free of sexual coercion in the same way the law typically grants protection to bodily integrity.

In contrast with previous reform proposals that consider criminalizing threats to harm based on invalidating the legal power and effectiveness of the victim's consent due to coercion,[192] the proposed construct does not call for such a step. Instead, it suggests that consent is not obtained when permission is induced by sexual abuse of power. This view does not demand adopting a separate provision that negates consent due to some defect, like coercion. The non-consent element is an inner feature built into the sexual abuse of power determination. This feature is particularly significant, because criminalizing abuses of power would not result in weakening complainants by treating them like incompetent victims whose consent is invalidated. Rather, it would strengthen complainants by granting them powerful rights.

The proposed construct does not distinguish conceptually between abuse of power by public officials and abuse of power by private actors, such as employers who own their business and thus act on their own behalf. The underlying feature that characterizes all forms of sexual abuse of power—nonconsensual sexual relations—is equally established, regardless of the characteristics of either the perpetrators or the complainants. In particular, consent is not obtained when submission is induced by sexual abuse of power when the perpetrator is a private employer, just as it is not obtained when the perpetrator is a public official who exercises formal authority.

The final implication is that, in contrast with previous reforms, criminalizing sexual abuse of competent adults, such as employees and students, does not solely rely on establishing threats to harm the victims.[193] Instead, whenever abuse of power induces the complainant's

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192. *See, e.g.*, WERTHEIMER, *supra* note 39, at 167.

> [T]he single most important factor in determining when proposals nullify the transformative power of consent on grounds of coercion is whether A proposes to make B worse off than her *moralized* baseline, whether A's "declared unilateral plan"—what A proposes to do if B does not accept A's proposal-would violate B's rights . . .

Id.

193. *See, e.g.*, SCHULHOFER, *supra* note 5, at 283 (distinguishing between victims who are legally confined, incompetent, or minor victims and other victims not in these circumstances. Criminalizing sexual abuse in the latter case relies solely on establishing threats to harm. *See id.*

submission to unwanted sex, the perpetrator's act should be criminalized. This holds notwithstanding the specific means and techniques used to obtain the submission. Exposing the links between abuse of power and consent demonstrates that inducing submission through exploitation of power extends above and beyond threats to harm. Placing a victim in fear of potential harm by creating a pressured environment in professional and institutional settings is sufficient to induce unwanted submission.

B. *Legislative and Judicial Endeavors to Expand Criminalization*

This analysis calls for examining the links between sexual abuse of power and the definition of consent in one particular case which has not yet been recognized as criminal conduct: sexual abuse of power in the workplace. Scholars and courts alike have generally failed to acknowledge that coerced sex in the workplace is example of sexual abuse of power, and as such, should be criminalized. Instead, they have treated coerced sexual acts in this setting merely as civil sexual harassment.[194]

Viewing various abuses of power on a coercion continuum reveals that an employee's submission to sexual acts with her supervisor and employer may seem, at first glance, the least coercive of relations, and criminalizing them may seem the most problematic. After all, the complainants are competent adults whose ability to make free choices regarding their sexual relations is ostensibly unlimited. It is precisely because these types of relations have been traditionally viewed as the least appropriate candidates for criminalization that we must pay special attention not only to the coercive features that characterize them, but also to the essential similarities that they share with other forms of abuse of power. To better capture these features, let me start with two examples, which have already acknowledged that coerced sexual relations in the workplace amount to criminal conduct, and thus justify criminalization.

Model Criminal Statute for Sexual Offenses, § 202, subsection (c)(5): consent is not freely given when the actor obtains the victim's consent by threatening to inflict harm).

194. *See generally* Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998). Although these scholars differ in their understanding of the harm caused by sexual harassment, they share some core features; they focus on gender group-based harms, and shift the focus away from the sexual and the personal aspects of the harassing conduct, and in particular from each criminal aspects. *See also* Buchhandler-Raphael, *supra* note 42 (criticizing the failure of current law to criminalize coerced submission in the workplace and in an academic setting).

1. Federal Law

Federal law indirectly criminalizes one form of coerced sexual relations in the workplace. It does so when public officials, such as state actors, exploit their official power to deprive individuals of their right to remain free of sexual assault.[195] Criminalization under federal law does not rest directly on a separate provision that prohibits sexual abuse of power. Rather, criminalization draws on section 242 of the U.S. Code: a general constitutional-type provision that criminalizes the violation of constitutionally protected rights.[196] In *United States v. Lanier*, the U.S. Supreme Court considered criminalizing the sexual offenses perpetrated by a state judge against several employees of the court.[197] Lanier abused his power by sexually assaulting, in his chambers, court employees, employee applicants, and litigants over whom he had jurisdiction.[198] Five women detailed similar accounts of sexual abuse of power by the judge: they claimed that he threatened them with loss of child custody and employment if they did not submit to his sexual demands.[199] The complainants in *Lanier* were not only litigants before the abusive judge but also employees of the court over whom the judge exercised professional authority.[200]

The district court convicted Lanier of unconstitutional deprivation of his victims' liberty rights without due process.[201] The Sixth Circuit overturned the conviction, holding that although Lanier's conduct was wrong, no prior case had placed him on notice that sexual assault by a state judge would constitute a violation of the broadly worded federal statute.[202] The Supreme Court reversed and remanded, holding that the Sixth Circuit had used an "unnecessarily high" standard to determine that Lanier lacked sufficient notice that his conduct violated the right to remain free from sexual assault.[203] The Court held that the same notice standard applies to both civil and criminal cases.[204] The Court also

195. *See* 18 U.S.C. § 242 (1996), which provides: "Whoever, under color of any law, statute, ordinance, regulation or custom willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . ."

196. *Id.*

197. United States v. Lanier, 520 U.S. 259, 261-62 (1997).

198. *Id.* at 261.

199. *Id.*; *see also* DARCY O' BRIEN, POWER TO HURT 504-16 (Harper Paperbacks 1997) (1995); Darcy O' Brien, *Court: Is Rape by a Judge a Federal Crime?*, 17 NAT'L L.J., A10 (1995).

200. *Lanier*, 520 U.S. at 261.

201. United States v. Lanier, 33 F. 3d 639, 645, 666 (6th Cir. 1994) (affirming the judgment of the district court).

202. United States v. Lanier, 73 F.3d 1380, 1384 (6th Cir. 1996).

203. *See Lanier*, 520 U.S. at 270.

204. *Id.* at 270-71 (confirming that § 1983 precedent may be used to establish that a

rejected Lanier's arguments, which it deemed to be "plainly without merit," including his contention that section 242 cannot be applied to incidents "outside of a custodial setting."[205]

The *Lanier* decision sets the stage for criminalizing sexual abuse of power of employees by their employers, namely, state actors who hold positions of authority over them. Its core significance, for the purposes of this Article's analysis, rests on conceding that the exploitation of power in the workplace may amount to criminal conduct. It opens a door to acknowledging additional forms of sexual abuse of power in the workplace as justifying criminalization.[206] Under current views, criminalizing sexual abuse of power in the workplace is an exception: in contrast with other cases, in which coerced sexual relations in the workplace are typically viewed as civil sexual harassment, the sexual acts in the *Lanier* case are criminalized. Adopting the criminal law's lens in the workplace offers a novel approach which is typically rejected in this context. This innovative view calls for considering the expansion of this framework to include additional abuses of power in the workplace.

However, this reading of *Lanier* is not the prevalent view. The scholarship analyzing the *Lanier* decision typically focuses on its constitutional aspects, namely, interpreting sexual assault by a state actor as a potential violation of a constitutionally protected right to bodily integrity.[207] Moreover, the scholarship analyzing the sexual

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constitutional right is clearly established for purposes of criminal liability under § 242).

205. *See id.* at 1223, 1228 n.7 (rejecting *Lanier*'s arguments).

206. The Supreme Court has only set the stage for recognizing this type of sexual abuse as a constitutional violation, namely, a deprivation of the right to remain free from sexual assault without due process. The Supreme Court did not hold in this case that sexual assault of employees and litigants by a judge amount to a constitutional violation. The Court has only provided the guidelines, but not a practical conclusion on the constitutional issue, because it remanded the case to the Sixth Circuit and did not apply the very standard it set. *See id.* at 272. Lanier's flight precluded the Sixth Circuit from applying on remand the standard set by the Supreme Court. *See* United States v. Lanier, 123 F.3d 945, 946 (6th Cir. 1997) (stating that the court entered an order requiring the former judge to surrender himself to the U.S. Marshal, which he failed to do). However, several circuits have held that sexual assault by a public official amounts to deprivation of the constitutional right to liberty. *See, e.g.*, Rogers v. City of Little Rock, 152 F. 3d 790 (8th Cir. 1998) (a police officer who stopped the complainant for a broken tail light, followed her home to locate the needed articles, and then raped her. The Eighth Circuit held that Rogers's conduct amounted to a substantive due process violation, because the officer's actions violated the victim's right to bodily integrity.); United States. v. Giordano, 260 F. Supp. 2d 477 (D. Conn. 2002) (denying a motion to dismiss in the case of a former city mayor charged with depriving two children of rights and privileges secured by the constitution, including the right to be free from sexual abuse).

207. *See, e.g.*, Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CAL. L. REV. 765, 776 (2002) (addressing the constitutional aspects of the *Lanier* decision in particular with respect to viewing the judge's conduct as violating individual's right to bodily integrity).

abuse of power by judges, who are state actors, typically focuses on judges inappropriately exercising their judicial power over litigants who appear before the court.[208] This view may have caused the appellate court to overlook that some of the judge's victims were employees of the court, and that he was their supervisor. Thus, the additional context in which this abuse occurred was overlooked. The further implications of the *Lanier* decision on sexual abuses in the workplace have never been thoroughly considered.

These views have distracted us from considering whether criminalization may expand to include other forms of abuse of power in professional and institutional settings, including in private workplaces. This Article proposes that *Lanier* may offer the doctrinal basis for expanding the scope of an abuse of power model to the workplace setting beyond the circumstances in which the perpetrator is a state actor who abuses an official authority. This view is based on acknowledging that similar coercive pressures are exercised by powerful employers or supervisors in various professional and institutional settings over dependent employees, thus justifying the adoption of a similar criminal prohibition.

2. Military Law

The U.S. military provides additional support for expanding criminal regulation to include coerced sexual relations in a workplace. The military justice system has recently taken a significant legislative step in the direction of criminalizing sexual abuse of power, where exploiting disparities in power, position, and rank induces submission.[209] An amendment to the Uniform Code of Military Justice (UCMJ) incorporates the abuse of power model in its criminal provisions.[210] The UCMJ Amendment distinguishes between rape and sexual assault; the latter includes in its definition engaging in a sexual act by "threatening or placing that other person in fear."[211] The phrase "threatening or placing that other person in fear" is defined as: "a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to a lesser degree of harm than death, grievous bodily harm or kidnapping."[212] The provision further specifies what type of harm it

208. *Id.*

209. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136 (2005) [hereinafter UCMJ Amendment] (proscribing rape sexual assault, and other sexual misconduct).

210. *Id.* § 920(t)(7)(B)(iii).

211. *Id.* § 920(c)(1)(A).

212. *Id.* § 920(t)(7)(A).

encompasses, including a threat "through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person."[213] The UCMJ Amendment also defines consent as "words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. . . . [L]ack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force or placing another person in fear does not constitute consent."[214]

This provision concedes that passive acquiescence, when prompted by the dominance presented by the perpetrator's superior rank and position, may constitute sexual coercion. The imbalances in powers play a significant role under this account. Acknowledging that a threat "through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person"[215] justifies criminalization, the provision provides an innovative approach. It eliminates the dubious, yet common distinction between a threat, such as firing or demotion, which is often considered as coercive, and an offer to provide a benefit in exchange for sex, such as promotion, which is typically not considered as coercive.[216]

The UCMJ Amendment also attempts to extend the criminal prohibitions above and beyond explicit threats to inflict nonphysical harm, albeit unsuccessfully. It proscribes both actual threatening, as well as placing a person in fear of a harm less than physical injury.[217] The phrase "placing in fear" is substantially broader than the narrow "threatening" language. Using the "placing in fear" language thus acknowledges that coercive pressures stemming from the relations between military commanders and soldiers also includes additional forms of coercive impositions. It concedes that the coercive atmosphere induced by the disparities in professional positions results in placing a victim in fear of potential harm, which, in turn, induces submission to unwanted sex. The reform, however, suffers from a significant shortcoming. While it seems that the provision attempts to criminalize sexual abuse of power above and beyond threats to harm, in practice,

213. *Id.* § 920(t)(7)(B)(iii).

214. *Id.* § 920(t)(14).

215. *Id.* § 920(t)(7)(B)(iii).

216. *See* SCHULHOFER, *supra* note 5, at 166 (contrasting offers and threats, and arguing that "an offer to provide financial benefits in return for sex normally is not coercive if the woman won't put her rights at risk by turning the proposal down"). *See also* WERTHEIMER, *supra* note 39, at 167 (arguing that the most important factor in determining whether a proposal is coercive is whether the perpetrator proposes to make the victim worse off than her moralized baseline). If the answer is in the positive, then the proposal is coercive. *Id.* If, however, he proposes to make her better off, compared to her moralized baseline, the offer is not coercive. *Id.*

217. UCMJ Amendment, *supra* note 209, §§ 920(a)(3), 920(c)(1)(A), 920(t)(7)(B).

this attempt succeeded only partially, because the wording itself merely covers actual threats. Therefore, placing a victim in fear must be established through the use of a threat. Any additional forms of illegitimate coercive inducements, which fall short of threats, therefore remain outside the scope of criminal regulation.[218]

Despite this drawback, the UCMJ Amendment offers a potentially comprehensive construct that relies heavily on an abuse of power model. The innovative ideas it attempts to incorporate might provide practical implications when considering extending similar reasoning above and beyond the military context. The core significance of the UCMJ Amendment lies in acknowledging that sexual abuses of power in a workplace context, such as in the military, justify criminalization when disparities in position are exploited to induce passive acquiescence of subordinates.

Further, the military justice system adopts a contemporary definition of what consent to sex is by requiring "words or overt acts indicating a freely given agreement."[219] The term "agreement" connotes a mutual decision that both parties make together, as opposed to a one-sided submission. It concedes that consent is not obtained when submission is induced by abuse of power. This construct thus offers some innovative views on the links between a modified definition of consent and the role of sexual abuse of power in the coercion inquiry. It supports adopting a similar model that would criminalize sexual abuses of power in additional professional and institutional settings, including other workplaces, provided that it clarifies that the "placing in fear" requirement may be demonstrated by other forms of coercive pressures, beyond threats to harm. Developing a similar theory to include such additional settings is thus a main agenda for future reform, a goal that this Article takes up in the fourth part.

3. Criminalization in Privately-Owned Workplaces

To consider criminalization in additional professional and institutional settings, let us compare *Lanier*'s facts with another criminal case that demonstrates an unsuccessful attempt to broaden the abuse of power model to the workplace. Recently, in *State v. DiPetrillo*,[220] two courts examined the theory of applying a criminal prohibition based on adopting an abuse of power model, but reached different outcomes.[221]

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218. *See id.* § 920(t)(6) (providing that placing in fear is obtained only through threats).

219. *Id.* § 920(t)(14).

220. *See* State v. DiPetrillo, 922 A.2d 124, 126, 136 (R.I. 2007).

221. *Id.* at 126, 136 (defendant was convicted, following a bench trial in the Superior Court of Providence County, of first degree sexual assault and second degree sexual assault).

In *DiPetrillo*, the complainant, "Jane," a nineteen-year-old college student, was employed by the defendant as a draftsperson in his private business.[222] One afternoon, the defendant asked the complainant to stay late to assist in a project.[223] Rather than begin working, the defendant suggested they run some errands.[224] He picked up take-out food, bought beer, and stopped at his house to change clothes.[225] According to the complainant, the defendant gave her four cans of beer, which she drank, then grabbed her by the wrist, pulled her onto his lap, and began kissing her.[226] At first, she did not resist and kissed him back, but then she protested, telling him "we can't do this."[227] She also testified that the defendant physically moved her from his lap onto the chair, and touched her breast.[228] She testified that she was scared, tried to avoid the kissing, and repeatedly told the defendant to stop, attempting to push his hands away, but to no avail.[229] She further testified that he continued the assault by penetrating her vagina with one of his fingers.[230] Scared and in shock, she attempted to walk away, but he forcibly held her while he masturbated.[231] The defendant's defense was consent.[232] He recounted the same series of events but insisted that "Jane" willingly participated in the sexual acts.[233]

DiPetrillo was prosecuted for second-degree sexual assault, which is defined in Rhode Island as engaging "in sexual contact . . . [when t]he accused uses force or coercion."[234] Following a four-day bench trial, the court found the defendant guilty.[235] The trial court held that force or coercion includes also implicit threats to inflict harm, and the prosecution did not need to prove that the defendant actually or by words spoken expressly threatened his victim, because a threat may be implied as well as express.[236] The victim need not have actually heard any threatening words in order for her to have reasonably been in fear of

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Defendant appealed to the Rhode Island Supreme Court, which rejected the legal basis for the trial court's holding and remanded the case to reconsider the facts in accordance with the Supreme Court's ruling. *Id.* at 136, 140.

222. *Id.* at 126.
223. *Id.* at 127.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.* at 128.
233. *Id.*
234. *Id.* at 131 n.5.
235. *Id.* at 128.
236. *Id.*

her assailant.[237] The trial court further held that force or coercion may also consist of the imposition of psychological pressure upon a person who is vulnerable and susceptible to such pressure.[238] It also held that a command issued by someone in a position of authority need not be accompanied by an explicit threat in order for such a command to be effectively and inherently coercive.[239] The trial court held that the defendant was able to overbear the will of the complainant either by the authority that he represented, or by a modicum of physical force.[240]

While the trial court convicted DiPetrillo, expanding the abuse of power model to the workplace setting; the Rhode Island Supreme Court reversed, expressly rejecting this theory.[241] The Rhode Island Supreme Court held that it was unwilling to extend the abuse of power model to the workplace context, namely, the similar construct that is adopted when a police officer abuses his power to induce a suspect's unwanted sexual submission, such as in *State v. Burke*, cannot apply for sexual abuse of power in the workplace.[242]

The contrasting views in *Lanier* and *DiPetrillo* prompt the questions: What accounts for the different outcomes? Why is sexual abuse of power in the workplace viewed as criminal conduct in one case but not in the other? Furthermore, is this different legal treatment justified? At first glance, the cases seem to share similar features; the sexual acts in both cases did not occur in a custodial setting, but rather in a workplace setting, and both cases involve a supervisor's and employer's sexual abuse of power over competent victims who ostensibly had alternative courses of action and the potential choices to refuse the sexual demands.

There is, however, a salient difference between these cases. In *Lanier*, the perpetrator—a state judge—was authorized to exercise professional power over his employees. Likewise, the official authority element is a prominent feature in the military prohibition. In contrast, in *DiPetrillo*, the perpetrator was the employer himself, an owner of his private business. He was not authorized by any institution or organization to exercise power over his employees. Another difference is that in *Lanier*, the perpetrator used explicit threats to harm his employees if they refused to give in to his sexual demands, while in *DiPetrillo*, the perpetrator did not issue any threats. Moreover,

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237. *Id.*

238. *Id.*

239. *Id.* at 128-29.

240. *Id.* at 134.

241. *Id.* at 135 (citing State v. Burke, 522 A.2d 725, 728 (R.I. 1987)). In *Burke*, a police officer coerced sex on a hitchhiker. The Rhode Island Supreme Court held in *DiPetrillo* that the court was "not willing to extend the *Burke* analysis of implied threats to the facts in this case, in which the implied threat arose solely in the context of an employment relationship."

242. *Id.*

DiPetrillo did not offer any "rewards" in exchange for sexual compliance. He did, however, exploit his position of power by using coercive pressures, which placed his employee in fear of harm.

Revisiting *DiPetrillo* demonstrates that official authorization to enforce obedience plays a crucial role that explains the contrasting views with *Lanier* as well as with the military law. The trial court in *DiPetrillo* was willing to concede that the exercise of power by the employer extends above and beyond threats to harm. By explicitly rejecting the threat-based construct as the sole basis for criminalizing the employer's conduct, the trial judge was willing to expand the abuse of power framework to the employment context, and in particular, to a case in which the employer is the owner of a private company and is not authorized by anybody to exercise power.[243] The Rhode Island Supreme Court, however, refused to extend the same reasoning adopted in cases where official power to enforce obedience is exploited—such as when a police officer abuses his power to obtain submission from suspects—to competent adults whose legal status is not that of confinement.[244] Under this court's holding, a police officer abusing his or her exercise of official authority over suspects justifies criminalization, while a private employer abusing their power over employees does not.[245]

C. *Rejecting the Lack of Choices—Difficult Choices Distinction*

The above position is premised on the common distinction between a victim's lack of choices, on the one hand, and difficult choices, on the other. This distinction typically stands at the core of refusal to expand the scope of criminal regulation to competent adults, particularly in the workplace and in the academic setting.[246] Under this account, coercive pressures overwhelm a victim's free will only when placing her in a position where she has no other choice but to submit to unwanted sexual acts. In contrast, when a victim has alternative courses of action to choose from, but the choice is difficult in light of the unpleasant and undesirable outcome, her free will is not overwhelmed and her choice is deemed a valid one.[247]

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243. United States v. Lanier, 520 U.S. 259, 261 (1997).

244. *DiPetrillo*, 922 A.2d at 126-27.

245. *See id.* at 134, 135 (citing and drawing comparisons to *Burke*).

246. *See, e.g.*, SCHULHOFER, *supra* note 5, at 281 (suggesting that despite the undoubted dangers of sexual relations between parties of unequal power, criminal sanctions are out of place in most consensual sexual relationships between supervisors and subordinates or between teachers and students).

247. *See, e.g.*, State v. Thompson, 792 P.2d 1103, 1105-06 (Mont. 1990). *See also* Commonwealth v. Mlinarich, 542 A.2d 1335, 1341 (Pa. 1988) (drawing on a choice-based distinction, these courts viewed the victims as having made a difficult choice rather than enduring the harmful alternatives).

The proposal advanced in this Article rejects this distinction by offering a comprehensive model that would enable criminalizing various forms of abuses stemming from professional and institutional settings, including those in which the victims are competent adults, such as in the workplace and in an academic setting. The proposal's premise is that the choice-based distinction is inherently flawed. First, the question of choices must rest on a legal rather than empirical evaluation. It thus encompasses what the law regards as legally valid choices. Rather than inquiring whether any theoretical choices are available, the key questions are whether these choices are practical under the compelling circumstances the victim is facing, as well as whether the law should uphold these as valid choices. Second, the choice-based distinction fails to evaluate the victim's subjective experience. The victim's vantage point better captures the question of which practical choices were actually available to her when the perpetrator exercised coercive pressures.

Not long ago, common social perceptions, as well as the legal system, failed to grasp why a battered woman often stays with her abuser.[248] Drawing on the question of choices, the premise was that a competent adult has alternative courses of action. But in the context of domestic violence, this narrow view has changed; contemporary law acknowledges that a battered woman's choices are limited by economic and psychological considerations.[249] A battered woman often believes that she has no option but to stay with her abusive spouse. The reasons for not leaving typically include fear of retaliation and of various types of harm, such as financial hardship.[250] Thus, domestic violence law today not only concedes that a battered woman's choices must be evaluated based on her subjective perception and vantage point, but also understands the need for a legal—rather than empirical—inquiry.[251]

A similar view regarding victims' choices may equally apply in the context of abuse of power over victims who are competent adults and who are not in custody. The question of whether an employee has an alternative course of action must be evaluated based on her vantage

248. *See generally* LENORE E. WALKER, THE BATTERED WOMAN 18-31 (1979) (discussing the myths concerning battering). For a judicial opinion that draws extensively on the work by Walker, see, e.g., State v. Kelly, 478 A.2d 364 (N.J. 1984)).

249. *See, e.g.*, Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 279-85 (1985) (providing an account that explains why battered women stay with abusive spouses).

250. *See generally* ALYCE D. LAVIOLETTE & OLA W. BARNETT, IT COULD HAPPEN TO ANYONE: WHY BATTERED WOMEN STAY 53-54 (Sage Publications, Inc. 2000) (articulating factors contributing to a victim's decision to stay).

251. *See* Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 83-87 (1987) (explaining why the liberal focus on choices is misdirected).

point. In light of economic, professional, and institutional constraints, an employee often feels that no practical choices are available to her. Her decision to submit under these compelling circumstances should not be upheld by the law as a valid choice. Competent adults' sexual choices may also be constrained to the point that prevents them from exercising their free will. A "choice" to submit under professional and institutional coercive pressures should not be viewed differently than a "choice" to submit under the threat of a gun pointed to one's head.

The underlying result of drawing on the choice-based distinction as demarcating the boundary between criminal coercion and permissible seduction is that it diverts our attention from capturing the nature of many sexual abuses of power. This distinction also results in paying scant attention to many other harmful sexual abuses, above and beyond the cases where free will is physically overwhelmed or legally constrained. The distinction fails to capture the essential feature that characterizes all forms of professional and institutional relations in which sexual abuse of power, authority, trust, and dependence induce the victim's submission. In such a situation, perpetrators exploit the existing power disparities to coerce submission by subjugating the victims' free will to the perpetrator's advantage. The choice-based distinction fails to draw the line between coercive abuse of power and legitimate conduct, and cannot justify a differential treatment for different victims of sexual abuse of power. Thus, it must be rejected altogether.

V. A PROPOSAL FOR A SEXUAL ABUSE OF POWER MODEL

Which types of illegitimate pressures should the definition of sexual coercion include, and how far may the definition of authority extend for applying an abuse of power model? Criminal law generally does not find coercion or invalidate consent in adult relationships strongly influenced by power, authority, and trust.[252] The key question is whether an abuse of power model may expand to include additional forms of coercive pressure and intimidation, such as those typically present in professional and institutional settings, expanding a definition of coercion beyond those circumstances that are currently recognized as justifying criminalization.

252. *See generally* SCHULHOFER, *supra* note 5, at 168-253 (discussing coercive pressures stemming from various professional and institutional relations and suggesting that criminal law typically refuses to criminalize them. Instead, he argues that these abuses should generally be regulated under civil laws).

A. *Expanding the Abuse of Power Model to Additional Settings*

The proposal's goal is to establish a clear boundary between coercive and legitimate sexual conduct in professional and institutional settings. It calls for developing some practical guidelines that would criminalize the abuse of institutional authority or economic duress in professional settings, but would not criminalize submission in private settings that is influenced by emotional demands or social pressure. Previous proposals to expand the definition of coercion have failed in articulating this legal boundary.[253] This Article suggests that the reasons for this failure rest mainly in neglecting to explain the significance of the abuse element, and to emphasize that only pressures stemming from professional and institutional relations, as opposed to private relations, may be criminalized.

Considering such expansion calls for addressing a twofold question. First, beyond explicit threats to harm, should these coercive pressures incorporate additional means of intimidation and fear if the sexual demands are refused, and when the victims are competent adults such as employees and students? Second, should an abuse of power model incorporate additional forms of influencing and controlling victims' decisions beyond the formal capacity to exercise authority over them?

The abuse of power model offers a potentially broad doctrinal framework that enables criminalizing various forms of coercive pressures stemming from professional and institutional settings. However, its full potential has not yet materialized, as current laws typically refuse to expand this model to cover additional forms of coercion, thus leaving many abuses of power outside the scope of criminal regulation.[254] The proposed model is premised on the

253. *Id.* at 82-98 (criticizing reform proposals that focus on expanding the definition of force).

254. *See* ROSEMARIE TONG, WOMEN, SEX AND THE LAW 111 (1984) (discussing a 1978 proposed Virginia State Senate Bill). This bill specifies that a person who uses a position of authority to accomplish sexual penetration or contact is guilty of sexual assault (rape) in one degree or another. The bill defines "position of authority" quite broadly as:

> Any relationship in which the actor appears to the victim to have a status which implies the right of the actor to expect or demand obedience, acquiescence or submission on the part of the victim. Authority or appearance of authority may be established by, but not limited to, evidence of the relative ages, maturity or occupations of the victim and actor; the blood or household relationship of the actor to the victim; or the actor's position of trust relative to the victim such as that involved in the support, care, comfort, discipline, custody, education or counseling of the victim.

Id. This application in the case of abuse of power by a physician is unambiguous, while applying the same provision in the context of sexual relations between a professor and his

assumption that conceptually there is no substantive difference between the various forms of sexual abuse of power, authority, trust, and dependence that occur under professional and institutional relations. The model would allow criminalizing various forms of abuse of power within different types of professional and institutional relations, including those currently not recognized as amounting to criminal conduct, such as in the workplace and in an academic setting.

The thrust of the proposal draws on broadening the abuse of power model to include various situations in which perpetrators exploit their power, authority, trust, and dependence to dominate and influence victims' decisions by inducing their submission to unwanted sexual demands and by subjugating their wills to those of the perpetrators. The core feature that justifies criminalization is that whenever coercive pressures stemming from professional and institutional relations result in apparent permission and unwanted submission to sexual acts, consent is not obtained.

B. *The Elements of the Offense*

The proposed prohibition defines sexual coercion to include pressures and impositions that often characterize sexual relations in professional and institutional settings. Its focal point lies in determining what type of conduct meets the definition of sexual abuse of power. This inquiry is based on articulating two core elements that define the offense: the first is the position differentials between the parties, and the second is the exploitation of these imbalances to induce sexual submission.

1. Imbalances in Powers in Professional and Institutional Relationships

The core predicate for criminalization under the proposal rests on the effects of power, authority, influence, dominance, and trust in professional and institutional relations in which power disparities between the parties are most noticeable. In these cases, the sexual relations arise out of "power dependency" relations.[255] These are particularly common in sexual relations that take place in institutional and professional settings. Thus, in these types of relations, the definition of authority must expand to incorporate additional forms of influence and dominance. Two main features characterize these relations: position

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student constitutes an ambiguous circumstance. *Id.*

255. *See generally* Phyllis Coleman, *Sex in Power Dependency Relationships: Taking Unfair Advantage of the "Fair" Sex*, 53 ALB. L. REV. 95 (1988). Coleman first coined the term "power dependency" relationships. She further argues that power dependency relations suggest that the sexual relations are exploitative. *Id.*

imbalances and disparities in power between the parties, and the victims' dependence on the perpetrators, which leads to their unique vulnerability.

This type of vulnerability, however, is situational and socially constructed; it lies in the organizational and structural features that characterize professional and institutional settings, and not in the victims' personal characteristics and weaknesses. Rather than weakening complainants by portraying them as helpless victims, criminalization would strengthen complainants by granting them powerful rights, including the right to sexual integrity and to remain free from sexual coercion.

Furthermore, professional, institutional, and economic vulnerability is gender-neutral. The model concedes that power may be equally abused across gender lines. Victims of sexual abuse of power may also be males who are situated in disadvantageous positions that make them vulnerable to abuse. Indeed, as the *Showalter v. Allison Reed Group, Inc.* case illustrates, male as well as female victims fall prey to sexual abuse of economic and professional disparities.[256] In this case, the sexually abused victim was a male, whose manager took advantage of his economic vulnerability to coerce sex from him.[257] Moreover, power may also be abused by a female perpetrator under circumstances in which she holds power over a dependent victim, such as a prison guard who abuses a male inmate.[258] The Department of Justice's recent survey on sexual abuse of power in juvenile confinement facilities supports this claim, revealing that "approximately 95% of youth [victims] reporting staff sexual misconduct said they had been victimized by female staff."[259] Thus, the proposal advanced here places the overall notion of "power"—rather than gender inequality—at the center of the coercion inquiry by contending that determining sexual abuse often depends on who holds the powerful position in a certain situation.[260]

Under the proposal, coercion may also consist of imposing economic or professional pressure. The law must recognize that a command by someone in a position of authority need not be accompanied by any threats for it to be effectively and inherently coercive. This framework acknowledges the justifications for criminalizing sexual abuse of power

256. 767 F. Supp. 1205 (D.R.I. 1991), *aff'd sub. nom.* Phetosomphone v. Allison Reed Group, Inc., 984 F.2d 4 (1st Cir. 1993).

257. *See id.* at 1207 (providing an example of an abuse of power of a vulnerable male by his superior. The victim here was economically dependent on the medical insurance the employer provided for his sick son.).

258. *See, e.g.*, SEXUAL VICTIMIZATION, *supra* note 1 (finding that 95% of the victims reported that they were sexually abused by female prison guards).

259. *Id.*

260. *See* CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 246-48 (2005) (placing gender inequalities at the basis of the expansion of the definition of coercion).

in professional and institutional settings, regardless of whether explicit threats are established. It further acknowledges that a coercive atmosphere and unbearable pressures can equally induce the submission of victims who are dominated by powerful perpetrators, notwithstanding the question of official authority to enforce obedience.

Expanding the sexual abuse of power model calls for answering a preliminary question: What type of conduct meets the definition of "exercising authority under disparate powers"? In other words, how far may the definition of power extend beyond the official authority to enforce obedience? The answer lies in expanding the definition of the term "authority" to incorporate additional forms of power, trust, dependence, and influence in relations that indicate stark disparities in positions between the parties.

The term "authority" can be either narrowly or more broadly construed. Considered narrowly, it is defined as the power or the right to enforce obedience.[261] This is a restrictive interpretation that encompasses only the legal right to command obedience on certain types of victims. Under this account, authority necessarily denotes a right to issue orders and to enforce their obedience. This definition would only cover official authority, such as the one possessed by a military commander, a police officer, or a prison guard, and not the authority by an employer over his employee, or the authority exercised by a professor over his student.

Two main limitations apply under this restrictive definition. One is perpetrator-oriented, that is, to exercise official power over his victims, the perpetrator must be authorized by a state, city, or another official institution. When there is no legal authorization, such as when the perpetrator is the owner of a private business, he cannot exercise authority over his employees. The abuse of authority model therefore would not apply in *DiPetrillo*, where the employer is the owner of a company and is not legally authorized to exercise power over his employee.[262] The second limitation is victim-oriented: a victim must be legally placed under the official authority of the perpetrator. This typically happens when a victim is legally confined and his personal liberty significantly limited, such as in the case of suspects, inmates, soldiers, or others in custodial settings.[263] In contrast, employee and student status is not that of confinement, and they are not officially

261. *See, e.g.*, R. v. Matheson, 1999 Carswell Ont. 1080, 23 C.R. (5th) 269 ¶ 103 (discussing the various interpretations of the term authority. In this case a psychologist was accused of sexual assault of his patients after having a seemingly consensual sexual relations with them, based on the theory that he abused his authority to obtain their submission).

262. *See* State v. DiPetrillo, 922 A.2d 124, 126 (R.I. 2007) (discussing that authority in the narrow sense was lacking here since the defendant was the owner of his private business).

263. These settings might include, for example, hospitalized patients in mental institutions.

placed under the perpetrator's control. Unlike the previous category, employees and students ostensibly have the free choice to refuse demands by simply leaving the abusive setting.

More broadly, however, "authority" may be defined to incorporate the unofficial and informal power to influence the decisions and actions of others who are dependent on the perpetrators.[264] This nuanced definition acknowledges that authority may be exercised in different forms, and is not necessarily limited to the official commanding the power, but rather extends beyond the legal capacity to enforce obedience. Under this account, authority stems from the perpetrator's role in relation to the victim. It is not limited to only the perpetrator's exercise of a legal right over the victim, but also includes the power to dominate and influence the victim's behavior. The key predicate for applying this construct is that stark disparities in positions between the parties result in the perpetrator's unique capacity to control and affect the victim's behavior. These disparities in power are often present in professional and institutional relations.

This proposed definition of authority within certain institutional and professional settings does not conflict with the common understanding of the term. Neither the term "power" nor "authority" is necessarily limited to the legal right to enforce obedience. What is relevant is whether the particular relations between the parties have vested the perpetrator with the ability to control the lives of dependent victims in such a manner as to be able to extract their ostensible permission to unwanted sex.

The workplace provides an example of where the capacity to influence and control employees' actions might be established. The first feature that characterizes these cases includes stark power disparities between the parties and an imbalance in the relative positions they hold. In such a situation, the perpetrator is an employer or a supervisor who can control and affect the employee's position at the workplace, by making either beneficial or detrimental decisions that affect her professional future. The employee is placed in a significantly weaker and less advantageous position because her professional future depends on the perpetrator. The imbalances in power include both disparities in professional positions as well as economic disparities. The second feature common in these cases is dependency. Under the above circumstances, the employee is dependent on the perpetrator's actions and decisions. The fact that the employee's professional future depends

264. *See, e.g.*, People v. Reid, 233 Mich. App. 457, 468-73 (1999) (holding that the defendant placed himself in a position over the complainant, as the defendant had told the complainant's father that he had been a counselor at a church, and that there was evidence that he used this position of authority to coerce the complainant to submit to the sexual acts).

on the perpetrator places her in a particularly vulnerable position, which is inherently prone to exploitation.

The proposal would expand the criminal prohibition to include competent adults when the circumstances indicate that their dependence, trust, and professional and economic vulnerability resulted in subjugating their free will to that of the powerful perpetrator, and ultimately lead them to submit to unwanted sexual demands. Expanding the definition of "authority" beyond its official and formal aspects enables criminalizing a variety of coercive pressures stemming from professional and institutional relations, in particular in the workplace and in academic settings.

Adopting this definition of authority demonstrates that criminalizing sexual abuse of power is equally justified both in public as well as private workplaces. It does not draw on the question of formal authorization, but rather on the type of influence the perpetrator exercises over the victim. Even when a private employer is not authorized to exercise power over his employee, he is often able to control her actions. This ability to affect the victim's choices stems from the power dependency relations between the parties, and it is not necessarily limited to cases where the perpetrator holds official authority. This feature demonstrates why the *Lanier* and the *DiPetrillo* cases justify criminalization equally: in both cases, sexual abuse of power, authority, trust, and dependence results in submission to the perpetrators' unwanted sexual demands after the perpetrators were effectively able to subjugate the victims' will to their own personal desires.[265]

2. The Exploitation and Abuse Element

The proposal to expand the sexual abuse of power model is based on adopting two steps to determine whether the elements of the criminal prohibition are met: establishing imbalances in power between the parties, and a separate proof of exploitation. The significance of this double-pronged inquiry rests on the mere presence of disparate positions between the parties being insufficient on its own merit to justify criminalization. Other rape law reforms have failed to articulate the exploitation element, viewing the mere potential for exploitation in sexual relationships as enough to justify criminalization.[266] These

265. The term "subjugate" is discussed in the Michigan case, *People v. Buyssee*, No. 04-011598-01, 2008 WL 2596341, at *6 (Mich. Ct. App. July 1, 2008). "Subjugate is defined: 1. to bring under complete control or subjection; conquer; master. 2. to make submissive or subservient; enslave. *Id.* (quoting RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (1995)).

266. *See, e.g.*, MACKINNON, *supra* note 260 (arguing that inequalities in power result in abuse of this power without separately articulating the abuse element).

proposals fail to provide a clear boundary between illegitimate sexual conduct and legitimate sexual relationships. For example, Pennsylvania law fails to elaborate on the core significance of the abuse element while expanding the definition of coercion.[267] Including psychological, moral, and intellectual coercion, and acknowledging the role of position differentials are important steps, but they are insufficient. A nuanced and more practical abuse of power model must articulate the perpetrator's ability to influence the victim's actions by demonstrating the exploitation element.

In contrast, the model presented in this Article suggests that sexual relationships between people of disparate power should not be viewed as exploitative per se, as there is no preliminary presumption regarding the exploitative nature of the sexual relations based merely on the imbalances in positions between the parties. Instead, the abuse of power inquiry separately examines two steps. First, whenever we suspect that exploitation of power disparities induced submission to unwanted sexual activity, we should ask whether the complainant was in a position to make a free choice. Under circumstances where there is a marked imbalance in the respective powers of the parties, a strong suspicion arises that the victim's vulnerable position might have diminished her ability to make a meaningful choice. But this step is merely the point of departure in meeting the elements of the prohibition, because vulnerability and dependence are, in themselves, insufficient for determining exploitation.[268] The second step requires that we separately establish that the complainant's reluctance to engage in sexual activity was overwhelmed by the perpetrator's exploitation of the above circumstances. The combined effect of both the disparities in power and the exploitative nature of the relationship precludes the possibility of consent under these circumstances.

C. *Circumstances that Tend to Indicate Exploitation*

In many sexual relations that occur in professional and institutional settings, suspicion of exploitation often arises based on an intuitive "we

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267. *See, e.g.*, 18 PA. CONS. STAT. § 3121(a) (expanding the definition of coercion to include psychological, moral, and intellectual coercion without articulating the exploitation element). *See also* Commonwealth v. Rhodes, 510 A.2d 1217, 1220 (Pa. Commw. Ct. 1986) (defendant engaged in sexual acts with an eight-year-old girl); Commonwealth v. Smolko, 666 A.2d 672, 674 n.3 (Pa. Super. Ct. 1995) (trying a case where the victim who was handicapped and unable to talk was sexually abused by his caregiver, a male nurse).

268. *See, e.g.*, People v. Knapp, 244 Mich. App. 361, 369, 624 N.W.2d 227 (2001) (the defendant, a Reiki instructor, was convicted of sexual contact with one of his students, after the prosecution established that not only he was in a position of authority over the victim but also that he abused and exploited this authority and the victim's vulnerability to coerce the victim to submit).

know it when we see it" approach.[269] However, identifying several conditions that point to exploitation can serve as a supporting tool. Targeting these factors is significant to the coercion inquiry because they are common features that are typically present in many situations involving sexual abuse of power.

1. The Type of Relations

Sexual relations that occur in professional and institutional settings are typically characterized by gross disparities in power between the parties, therefore providing a prominent factor in the abuse inquiry. Striking differences between the perpetrator's and complainant's positions—professionally, institutionally, or economically—create the potential for exploitation of this power. Often, the greater the disparities in power, the higher the incidence of abuse.

Economic differentials are especially salient in the workplace. They represent the other side of the power coin, since the superiors' relative strength and power directly stem from their economic superiority. Consequently, the complainant's disadvantageous position creates an inherent economic vulnerability.

However, the type of relations only raises a strong suspicion that the abuse element might be established. Actual exploitation might be proven only once additional factors add up to these power imbalances. Therefore, proving actual abuse in a particular case rests on the combined effect of the type of relations with the additional factors articulated below.

2. Divergence from Expected and Acceptable Norms

Proof of a departure from community norms is a common feature typically established in many sexual abuses of power. A strong indication for exploitation is established whenever the perpetrator's conduct deviates from the professional or institutional role he is expected to perform.[270] Sexual relations occurring under professional and institutional settings often illustrate such behavior. Establishing the perpetrator's departure from adequate norms of professional and institutional conduct calls for comparing and contrasting the expected

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269. This approach is often employed in the context of pornography. It was first used when referring to obscenity by Justice Potter Stewart in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

270. *See, e.g.*, People v. Regts, 219 Mich. App. 294, 296, 555 N.W.2d 896 (holding that defendant's actions, as victim's psychotherapist, in manipulating therapy sessions to establish relationships that would permit his sexual advances to be accepted without protest constituted coercision, thus subjugating the victim into submitting to his sexual advances against her free will).

and acceptable norms with the conduct that is demonstrated in a particular case, when we suspect that the perpetrator exploited his position to induce the complainant's submission.

An example of divergence from expected community standards is demonstrated in the context of the workplace. When a superior engages in conduct of a sexual nature, he fulfills his own private urges at the expense of the institution he is paid to represent. Such a departure from acceptable norms in the workplace is more apparent when the perpetrator is authorized by some institution and organization to exercise professional power over employees. Here, exploitation is often twofold; in addition to exploiting the vulnerability of the individual employee, engaging in sexual conduct at work might also result in loss of the public's trust in the institution itself. Recall that the decision in *Lawrence* explicitly excluded from the scope of the constitutional protection cases that involve both an injury to a person and abuse of an institution.[271] A plausible reading of this exclusion suggests that such exploitation of professional power might also amount to abuse of an institution by damaging its reputation and integrity.[272]

However, a similar divergence is equally established when the perpetrator is a private employer, such as the owner of a company. An employer who exploits his professional role to obtain sex from an employee deviates from acceptable standards of conduct in the workplace. The divergence is often illustrated when an employer engages an employee in extra-curricular activities during or after working hours as a pretext for sex. Typical examples include drinking alcoholic beverages while at work and using work-related excuses to lure the employee to the employer's home. Conduct that indicates persistent attempts to move from the workplace to a private setting further supports the abuse element.[273] The academic context provides another example for such a divergence. Engaging in sex with students exceeds the scope of a professor's mandate: it neither fosters the educational paradigm nor serves an educational goal.

The divergence from acceptable norms is closely linked to the defendant's mens rea; to find a defendant guilty of a sexual assault, the prosecution must establish his knowledge of the complainant's lack of

271. *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003).

272. I am aware that my reading of *Lawrence*'s "abuse of an institution" language is not the common understanding of this term. The common reading suggests that the court alludes to the abuse of marriage as an institution. However, when considering the abuse element that characterizes many abuses of power in professional and institutional relations, this additional aspect of abuse is also a plausible reading that might support an abuse of power model.

273. *See, e.g.*, State v. DiPetrillo, 922 A.2d 124, 127-28 (R.I. 2007) (illustrating such a departure from professional conduct: in the pretext of the need to stay late to assist him in a project, the perpetrator took the employee to run some errands, stopped by his house to change clothes, and gave her four cans of beer).

consent (or alternatively, being reckless or willfully blind to it).[274] Under the proposed prohibition, the jury would have to decide whether the defendant's conduct illustrates a gross deviation from acceptable conduct, which inducing a complainant's submission through sexual abuse of power clearly demonstrates. Outside the context of abuse of power in professional and institutional relations, a defense of mistake of fact often removes culpability for those who honestly, but mistakenly, believed that the complainant consented, provided that they took reasonable steps to ascertain her willingness.[275] Such a defense, however, would not be available to a defendant who abused his power to induce unwanted submission.[276] The underlying premise justifying the proposed model is that a complainant is unable to effectively communicate her unwillingness when coercive pressures are exerted on her. Raising a defense of mistake as to the complainant's consent in light of the circumstances that indicate sexual abuse of power is thus implausible. It would circumvent the prohibition's reasoning and defeat its purpose. The divergence factor thus plays a crucial role in the sexual abuse of power inquiry because it establishes the defendant's mens rea.

The departure from acceptable norms of conduct is sometimes not enough to prove exploitation. However, the exploitation element is established when such departure is added to other factors that indicate the perpetrator's abusive behavior.[277] The combined effect of these features further establishes a coercive environment. These include the complainants' account, narrative, and experiences regarding the nature of the sexual relations, such as the complainants' fear and intimidation.

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274. *See, e.g.*, State v. Smith, 210 Conn. 132, 141, 554 A.2d 713 (1989) (holding that the state must prove either an actual awareness on the part of the defendant that the complainant had not consented or a reckless disregard of her non-consenting status).

275. *See, e.g.*, State v. Koperski, 578 N.W.2d 837, 846, 848 (Neb. 1998) (concluding that the accused belief of consent was objectively reasonable, and that his requested instruction on the defense of mistake should have been given).

276. *Cf.* UCMJ Amendment, *supra* note 209, subsection (15) defines mistake of fact as to consent to mean that

> the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.

277. *See* Buchhandler-Raphael, *supra* note 42, manuscript at 51-55 (discussing conditions that indicate the abuse element).

Two common features that often characterize victims' response to sexual assaults are repetitive and persistent demands and "frozen fright," a psychological response that renders the victim almost physically paralyzed and therefore unable to resist and protest the assault.[278] Finally, several other complainants who claim that the same perpetrator coerced them into unwanted sexual acts might also serve as a powerful indication to establish the abuse element.

D. *Policy Considerations and Prosecutorial Discretion*

In past decades, evolving social norms about sexuality and gender have led to significant reform in rape law. This Article argues that the interaction of legal reforms and societal norms can work the other way as well, with criminal law helping to bring about changes in social norms. The law functions by both articulating which sexual practices amount to criminal conduct and defining what qualifies as consent. The model advanced here offers an opportunity to use criminal law to accomplish a profound change in societal perceptions about the boundaries between legitimate and illegitimate sexual practices.

The proposal must take into account at least one limitation: criminal law can be an effective tool in changing norms, but legislation alone does not suffice. The law cannot solve all the problems that result in sexual abuses of power. However, it is crucial that the law recognizes and responds to these problems. While criminal prosecution may provide only a limited solution, the more important task is to prevent the harm before it occurs. Prevention may be done mainly through non-legal techniques, such as education and raising public awareness about the importance of meaningful consent to sex. Raising public awareness includes the need to be proactive in promoting the idea of sexual relations as one of mutual agreement and willingness. Moreover, education requires that the community confront the problem and not ignore it. The second aspect of education involves training law enforcement on how to respond to sexual abuses of power and making clear that this conduct not only involves unwanted sexual acts, but also nonconsensual sexual acts that amount to criminal offenses.

The significance of using these non-legal techniques in addition to changing legal provisions lies in the fact that, under our criminal justice system, criminal cases are decided by a jury. Juries make decisions about culpability based on the social norms they hold regarding the boundaries between legitimate and illegitimate sexual practices, and on how they define consent to sex.[279] The decision in *Baby* reveals that the

278. *See, e.g.*, People v. Iniguez, 872 P. 2d 1183, 1185 (Cal. 1994) (considering psychological testimony that the victim was paralyzed by fright).

279. *See generally* Kahan, *supra* note 138.

jury's perceptions resulted in mistakenly viewing apparent permission as valid consent.[280] It demonstrates that legal change is not accomplished until societal perceptions are changed accordingly.

Considering the ever-evolving societal norms reveals the crucial role that prosecutorial discretion plays in shaping these norms and in bringing about social changes. Prosecutors do so by deciding which cases to bring criminal charges on. Therefore, the problem of sexual abuse of power goes much deeper than the need to amend rape law provisions. The problem involves not only changing the law itself, but also requires a similar change in prosecutorial discretion about which cases to prosecute. Prosecutors are the ones who decide which sexual misconducts deserve to be outlawed, rendering the remaining cases legitimate sexual practices.[281]

Broadly worded rape laws in some jurisdictions theoretically enable prosecuting various forms of sexual abuse of power in professional and institutional settings.[282] However, it is the prosecutorial discretion that significantly limits the potential use of these provisions. By refraining from pursuing criminal charges in those subtle instances of sexual abuse of power, such as those occurring in the workplace and in academic settings, prosecutors narrow the scope of these seemingly expansive provisions.

This Article shows that prosecutors typically pursue criminal charges only in egregious and transparent sexual abuses of power. They choose to forgo criminal charges where subtle, more ambiguous abuses of power occur, because the criminal justice system places such cases at the margins. We must critically examine the policy considerations that underline this prosecutorial discretion and evaluate whether these choices should be upheld. In contrast with the typical reluctance to pursue the more controversial sexual abuses, cases such as *Baby* and *DiPetrillo* demonstrate rare examples of brave and innovative prosecutorial discretion.[283] In these cases, prosecutors chose to pursue

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280. *See* Baby v. State, 946 A.2d 463, 471-72 (Md. 2008).

281. *See* Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Asssault?*, 41 AKRON L. REV. 957, 959 (2008) (positing that jury trial is an exotic department from plea bargaining and in plea bargaining prosecutors have plenary discretion to select charges to the extent that in effect, criminal liability is determined by prosecutors).

282. *See, e.g.*, the expansion of the definition of sexual coercion in Pennsylvania and in New Jersey. Pennsylvania defines "forcible compulsion" to incorporate: "Compulsion by use of physical, intellectual, moral, emotional, or psychological force, either express or implied . . ." *See* 18 PA. CONST. STAT. ANN. § 3101 (2003); New Jersey defines sexual coercion to also include threats that cause substantial harm to someone's reputation, financial condition or career. N.J. STAT. §§ 2c:13-5(a)(7) (2005). However, criminal charges in these jurisdictions are not brought regarding coerced sexual acts in the workplace and in an academic setting.

283. *See generally* State v. Baby, 946 A.2d 463, 465 (Md. 2008); State v. DiPetrillo, 922 A.2d 124, 126 (R.I. 2007).

criminal charges in circumstances that are typically not viewed as justifying criminalization. Indeed, social changes can be achieved only through innovative thinking. But societal perceptions evolve gradually and, in both cases, the prosecution's underlying theory was rejected. However, this type of prosecutorial discretion offers a significant contribution to raising public awareness to the problems targeted here, and in time, may also result in legal changes.

VI. CONCLUSION

In today's post-*Lawrence* era, the right to sexual autonomy in relationships that take place between consenting adults in private settings prevails over criminal regulation, and justifiably so. When consensual sexual relationships are involved, favoring the positive side of sexual autonomy—the right to engage in sexual relations with whomever one chooses—is both warranted and necessary. A primary goal of this Article has been to focus on the negative side. It argues that when nonconsensual sexual relations are demonstrated, the positive aspect of sexual autonomy must yield to two additional, yet not fully recognized, fundamental rights: The right to remain free from sexual coercion, and the right to enjoy sexual integrity. The crux of this Article is that sexual abuses of power in professional and institutional settings provide an example of such nonconsensual sex. When genuine consent is lacking, a balancing-act between one individual's right to engage in sex and another's right to avoid it requires that the right to avoid sex prevails over the competing autonomy value.

This Article has taken a robust step in this direction by arguing that sexual abuses of power, stemming from professional and institutional relationships, demonstrate a harmful and wrongful conduct that justifies criminalization. The analysis offered here has illustrated that these different misconducts share some distinctive features: submission to unwanted sexual demands is obtained through sexual abuse of power, authority, trust, and dependence. Moreover, consent to sexual relations is lacking when apparent permission is induced by fears and coercive pressures. The Article has proposed a model that acknowledges these features and thus equally justifies criminalizing various forms of sexual abuse of power. This model is able to cover the subtle cases that typically lie outside the central core of criminal sexual misconduct, but are nonetheless equally harmful.

In the hope that criminalizing various forms of abuse of power will help reduce abusive sexual practices in professional and institutional settings. A goal of doing so is to help create a world in which all individuals, both male and female, are afforded powerful rights of

protection from unwanted sex. The time is ripe for promoting such a social change through this Article's proposed legal reform.