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RAPE IS NOT A CONTRACT: RECOGNIZING THE FUNDAMENTAL DIFFICULTIES IN APPLYING ECONOMIC THEORIES OF JURISPRUDENCE TO CRIMINAL SEXUAL ASSAULT

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I. INTRODUCTION

The American system of jurisprudence attempts, albeit imperfectly at times, to craft equitable resolutions for every wrong done to an individual or society. To be successful in such a lofty endeavor, it has historically been necessary to adhere to separate civil and criminal bodies of law. Only through this system can courts be afforded the whole panoply of consequences to address the participants, whether it be appropriate sentencing for criminal misconduct or appropriate damages to the prevailing civil party, with judicial capacity to weigh the specifics of every situation and to craft a resolution fitting of the facts.

Some legal scholars suggest elimination of the criminal aspect of law in favor of a civil system, perhaps expanded to include more punitive civil sanctions and, for some very compelling reasons, not the least of which is simplicity and recognition of the already-blurred line between the two legal systems.[1] While this concept is workable in theory, it fails in reality. Notions of subjective versus objective liability, wrongful acts versus harmful acts, punishment versus compensation, stigma and incarceration versus restitution and monetary damages, public versus private actors, and procedural and evidentiary standards are all important, yet distinct, components of these legal systems that have been developed because they engender appropriate and just results.[2]

"The abandonment of [a] clear dividing line in favor of a general assessment of the manifold and complex purposes that lie behind a court's action would create novel problems where now there are rarely any novel problems that could infect many different areas of the law."[3] Perhaps the greatest example of the differences

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[1] Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 783–84 (1997).

[2] *See generally id.*; Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992).

[3] Mann, *supra* note 2, at 1796 (quoting Hicks v. Feiock, 485 U.S. 624, 636–37 (1988)).

between criminal and civil law can be seen in the suggested application of contract law to the area of criminal sexual assault. An already complex area of law, criminal sexual assault would become only more complicated—and more ambiguous—by the application of contract law in its stead.

This Article introduces the concept of economic and utilitarian approaches to jurisprudence while, in turn, emphasizing the appropriateness of the civil-criminal law distinctions with a focus on the realistic impracticalities of applying contract law to criminal sexual assault.[4] While, in theory, contract law can be applied generally to several areas involving agreements—or lack thereof—to partake in sexual relations, the reality is that harmony is interrupted. This Article will first address the distinctions between criminal law and civil law, with a focus on contract law.[5] It will further analyze the intricacies of those distinctions, as is evident in notions of consent versus assent, capacity, enforceability, damages, and ambiguity.[6] Finally, this Article will underline the need for the two legal approaches through specific application of each to the marriage "contract."[7]

Part II of this Article addresses economic theories of jurisprudence, with an eye toward the distinctions, or lack thereof, between civil and criminal law vis-à-vis those theories.[8] Part III of this Article discusses the specific failures of those economic models with respect to their application to sexual assault.[9] More specifically, this Article comments upon the dichotomy of consent to sexual intercourses versus assent to contract, notions of capacity, and issues with enforceability (such as fraud, duress, and undue influence).[10] This Article also seeks to compare notions of damages between criminal sexual assault as compared to breach of contract.[11] Finally, the reality of the failure of economic models in this situation is driven home through a discussion of the ambiguities that arrive by an application of these jurisprudential theories, as uniquely demonstrated in the context of marriage.[12] In sum, favoring a contract-based approach to criminal sexual assault—and an assessment of its consensual or nonconsensual nature—would be akin to fitting a square peg into a round hole.

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[4] *See infra* notes 13–30, 31–45, 46–216 and accompanying text.

[5] *See infra* notes 31–45 and accompanying text.

[6] *See infra* notes 46–198 and accompanying text.

[7] *See infra* notes 199–216 and accompanying text.

[8] *See infra* notes 13–30 and accompanying text.

[9] *See infra* notes 31–45 and accompanying text.

[10] *See infra* notes 46–159 and accompanying text.

[11] *See infra* notes 160–77 and accompanying text.

[12] *See infra* notes 178–216 and accompanying text.

II. ECONOMIC THEORIES OF JURISPRUDENCE: A FAILURE TO RECOGNIZE THE NECESSARY DISTINCTION BETWEEN CIVIL LAW AND CRIMINAL LAW

Before one can advocate for or argue against a contract-based approach to evaluating sexual assault, one must understand that this approach has its underpinnings in economics and, specifically, utilitarian theories of jurisprudence.[13] Hence, a rudimentary instruction in those various theories is necessary.

An economic theory of jurisprudence applies economic principles to the practice of law, asserting that the tools of economic reasoning offer the best approach for a justified and consistent application of law.[14] More specifically, this theory views the law as "a social tool that promotes economic efficiency," and "that economic analysis and efficiency as an ideal can guide legal practice."[15] Utilitarianism, a subset of the economic theories of jurisprudence, suggests the possibility of controlling parties by placing costs on them in the civil law sphere, thereby eliminating (or reducing) the need for criminal sanctions.[16] Judge Posner put it this way:

> In cases where [civil] remedies are an adequate deterrent, because optimal [civil] damages, including any punitive damages, are within the ability to pay of the potential defendant, there is no need to invoke criminal penalties. . . . The criminal (= tortious) conduct probably will be deterred . . . . [C]riminal sanctions generally are reserved, as theory predicts, for cases where the [civil] remedy bumps up against a solvency limitation.[17]

Accordingly, those who subscribe to this philosophy shift traditional notions of law and instead, believe that the law exists to manipulate behavior in order "to achieve the greatest good."[18] This theory "bridge[s] the gap between criminal and civil law."[19] Under this philosophy, the idea is that "the more severe the sanction, the greater its deterrent effect."[20] Thus, the notion of compensating

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[13] *See* Robert D. Rachlin, *Growing Old with Judge Posner*, 29 VT. B.J. 20, 20 (2003); Peter J. Hammond, The Economics of Justice *and the Criterion of Wealth Maximization*, 91 YALE L.J. 1493, 1499–500 (1982) (reviewing RICHARD POSNER, THE ECONOMICS OF JUSTICE (1981)).

[14] Brian E. Butler, *Law and Economics*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, https://www.iep.utm.edu/law-econ/ (last visited Mar. 12, 2019); *see also* Rachlin, *supra* note 13, at 20; Hammond, *supra* note 13, at 1499–500.

[15] Butler, *supra* note 14.

[16] Mann, *supra* note 2, at 1846–47.

[17] *Id.* (third, fourth, and fifth alteration in original) (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 205 (3d ed. 1986)).

[18] *Id.* at 1845.

[19] *Id.*

[20] *Id.* (footnote omitted).

an already-injured party with monetary damages is replaced with the assertion that an obligation to pay serves as a preventive disincentive to causing injury.[21] This approach is indeed a fair one, and is embraced by many scholars as there is nothing inherently flawed by a social utility argument when it comes to the abolition of the criminal-civil law distinction.

No matter the exact economic or utilitarian theory to which one subscribes, and there are too many to mention here,[22] the application of contract law to sexual intercourse and assault stems from an economic approach to the study of law. The impact of such application has been noticed:

> In recent years economists have become very bold. Once primarily concerned with such mundane matters as how consumers allocate their budgets between food and clothing and whether a person should be charged to cross a bridge, they are now invading territories formerly regarded as outside the realm of their discipline—suicide, religion and ethics, marriage and family planning. An area ripe for further incursion is that niche of knowledge normally associated with the lawyer. Although little of this niche is intelligible to the uninitiated, including the economist, this has not inhibited economists from employing their tools to analyze problems of a legal nature. In the last decade over two hundred professional articles have appeared which apply economic analysis to topics such as property rights, liability rules, defective products, automobile accidents, crime control, jury conscription, breach of contract, the court system, contingent fees, and class action suits. Much of this literature is inaccessible to the average lawyer because it is technically sophisticated, interdisciplinary, or oriented towards doctrinal controversies.[23]

With an understanding of how this economic or utilitarian approach applies to the various bodies of law, scholars have long debated the distinctions between criminal and civil law, and whether those differences should be blended into a single approach to resolve societal issues of harm.[24]

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[21] *Id.* at 1845–46.

[22] Economic models include concepts such as various definitions of and approaches to efficiency, game theory, public choice theory, various methods of measuring utilitarianism, and behavioral economics. Butler, *supra* note 14.

[23] A. Mitchell Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655, 1655–56 (1974) (footnotes omitted). *See also id.* at 1656 n.4.

[24] *See, e.g., id.*; Mann, *supra* note 2.

The economic model relies on two interconnected principles: deterrence and efficiency.[25] Deterrence means preventing or limiting certain kinds of behavior. Criminal punishment (incarceration) is considered to serve a greater deterrent role than, say, monetary sanctions. Efficiency means behavior that improves the allocation of resources without making another person "worse off."[26] Under the economic model, nonmonetary sanctions (imprisonment) are considered optimal for deterring criminal behavior while monetary damages are optimal for tort breaches.[27] This conclusion is derived from the notion that there are different levels of efficiency for torts and crimes. By way of explanation, voluntary, compensated transactions are considered a more efficient method of allocating resources than involuntary ones, in large part because the transaction costs are lower for the former.[28] Accordingly, the purpose of criminal punishment is to prevent individuals from bypassing the marketplace (the system of voluntary exchanges) for forced exchanges that occur through criminal conduct.[29] Even still, tort law, with its privately enforced suits for monetary damages, cannot entirely deter the "bypassing" that occurs with crime. But, because the underlying tort activity is considered more "efficient" (because of its borderline voluntary nature and lower transaction costs) it requires less deterrence. The contrary is true with crimes. As a result, under this economic theory, society should be more motivated to deter criminal activity than tortious activity, as arguably it is not efficient whatsoever. The result is represented in the common phrase that "criminal law punishes while tort law prices."[30] And it is under this theory, and only under this theory, that a contract-rape comparison can be made. But even there, the comparison remains distinctly flawed when it comes to considerations of sexual assault, as economic models fail to recognize the fundamental and eternal differences in the two legal paradigms.

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[25] Monu Bedi, *Contract Breaches and the Criminal/Civil Divide: An* Inter-*Common Law Analysis*, 28 GA. ST. U. L. REV. 559, 582 (2012).

[26] *Id.* at 582–83.

[27] *Id.* at 583.

[28] Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985).

[29] Judge Posner, the chief proponent of this argument, uses the example of coveting a neighbor's car:

> It is more efficient to negotiate with the neighbor for the car than simply taking it. Stealing the car cannot improve the allocation of resources, nor can it "move resources from a less to a more valuable employment" because the person taking the car is not willing to pay an agreed upon price. Moreover, if the perpetrator is allowed to take the car, she will expend resources to do so, which will increase the victim's incentive to expend resources to prevent the car from being taken. This activity will increase net expenditures, with no social benefit. So, stealing is inefficient, and it is in society's interest to deter it.

Bedi, *supra* note 25, at 576–77 (footnotes omitted).

[30] *See id.* at 563 (footnote omitted).

A. The General Failures of The Economic Models: Fundamental Differences In Civil Law And Criminal Law

Indeed, "[m]uch ink has been spilled on the civil/criminal distinction, and, in recent years, on its precipitous decline."[31] Yet, there are very real reasons to distinguish between civil and criminal law. Criminal law is different from civil law for a number of important reasons: criminal law has multiple procedural protections designed in part to signify the difference in kind to society, such as a trial by jury, proof beyond a reasonable doubt, the right to counsel, ex post facto protections, and regularization under the Eighth Amendment's requirements of standards for sentencing. Criminal law carries consequences such as the loss of critical civil rights and other societal costs upon conviction, such as the loss of benefits and the exclusion from multiple professions and jobs.[32]

Not only are there basic differences in due process concepts and constitutional rights attendant to criminal matters that are absent in their civil counterparts, but the basic notions of the burdens of proof and the culpable mental states of the actors are dramatically different as well.[33] A stronger concept of proximate cause is required to sustain a criminal conviction than would be needed to impose civil liability for an act.[34] For example, a more direct causal connection is needed for a person to be convicted in a criminal matter than for a tort.[35]

Further, in a civil case, the issues in dispute are private rights between private litigants. In a criminal case, the government is tasked with balancing the results of an infringement on societal rules and laws while safeguarding the rights of the accused in the process.[36]

> The criminal justice system protects broad societal interests in punishing individuals who violate statutory proscriptions against violent and otherwise especially deleterious behavior. The criminal, thus, inflicts an injury on the citizenry as a whole to be redressed with punitive sanctions, often including incarceration. Hence, a criminal case goes forward at the

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[31] Richard E. Myers, II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1376–77 (2008) (footnote omitted).

[32] *Id.*

[33] Mann, *supra* note 2, at 1811.

[34] State v. Uhler, 402 N.E.2d 556, 558 (Ohio Ct. Com. Pl. 1979).

[35] "A person legally responsible for his acts in a criminal court will generally be found to be liable in a civil court for injuries caused by the same criminal actions; however, the reverse is not always true." *Id.*

[36] Eatherton v. State, 810 P.2d 93, 98 (Wyo. 1991).

> direction of and in the name of the government, and the individual victims directly harmed cannot call off that prosecution. Conversely, the civil justice system largely aims to vindicate individual rights by providing mechanisms to remedy breaches of contractual arrangements and to award compensation for commercial wrongs and physical injuries. Civil law is concerned with compensatory relief, not punishment.[37]

Civil law protects individuals from being wronged by another. Criminal law protects society from being wronged. Society can be wronged when a criminal act harms a third-party, the actor, or society as a whole.[38] "Thus, society is not limited to a minimal protection of property and personal rights."[39] Additionally, "[w]hen criminal law is used to enforce civil law norms that are aspirational in character and deliberately soft-edged, the result may distort the civil law."[40]

Perhaps most importantly, society may aspire to higher goals with respect to accepted norms of behavior, and criminal law has a socializing role as a system of moral education.[41] What society concludes, at any given time, is that a socially acceptable "moral code" drives the enactment and modification of criminal laws.[42] As a result, "[c]riminal law exists to 'focus censure and blame' or to inflict punishment in a manner that maximizes stigma and censure," without notion of social utility or pricing that is associated with economic theories of jurisprudence.[43] It cannot be ignored that, at its most basic level, "[l]iability and sanction, without condemnation and without the sting of punishment" fails to

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[37] Mashaney v. Bd. of Indigents' Def. Servs., 313 P.3d 64, 85 (2013), *aff'd in part, rev'd in part*, 355 P.3d 667 (2015); *see also* Gail Heriot, *An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages*, 7 J. CONTEMP. LEGAL ISSUES 43, 47 (1996).

[38] Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 318 n.69 (1990).

[39] *Id.*

[40] John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1876 (1992).

[41] Ann T. Spence, Note, *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, 37 COLUM. J.L. & SOC. PROBS. 57, 75–78 (2003).

> "[A]ccording to moral education theory, punishment is not intended as a way of conditioning a human being to do what society wants her to do . . . ; rather, the theory maintains that punishment is intended as a way of teaching the wrongdoer that the action she did (or wants to do) is forbidden because it is morally wrong, and should not be done for that reason."

Id. at 77 (alterations in original) (footnote omitted).

[42] *Id.* at 76.

[43] Myers, *supra* note 31, at 1376.

fulfill the basic human need served by the infliction of deserved punishment, separate and apart from philosophical principles of right and good.[44]

The explanatory power of the economic and utilitarian models has been questioned by those focusing on the moral difference between torts or contracts and crimes. "Simply put, a crime's intentional nature makes it morally worse than the carelessness typified by tortious activity."[45] Thus, the real distinction between crimes and torts or contracts lies in the moral condemnation of the former but not the latter.

III. SEXUAL ASSAULT AS UNSUITED TO CONTRACT-BASED ECONOMIC THEORIES

Economic-based theories of jurisprudence are inherently complicated and intellectually challenging under any circumstance. They become more so when an effort is made at a reality-based application of those doctrines to the acts of criminal sexual assault. This section traces the difficulties presented by any attempt to apply economic principles to the crime of sexual assault, turning a keen eye towards notions of consent/assent, capacity, enforceability, and consequences.

Perhaps the biggest difficulty in this academic endeavor has been, and continues to be, distinguishing consensual sex with sexual assault under the law.[46] In an attempt to do so, "many scholars have used a contract analogy."[47] But the analogy does not necessitate the two concepts be the same.[48] Applying contract law to sexual assault[49] is unworkable in reality and demonstrates "'mechanical application of principles' that are ultimately 'illogically applied in the area of forcible sexual invasions.'"[50]

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[44] *See* Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 210–12 (1996).

[45] Bedi, *supra* note 25, at 559.

[46] Spence, *supra* note 41, at 57–58.

[47] *Id.* ("It has been noted that '[t]he 'contractual' nature of sexual relationships is hardly a novel concept.'").

[48] *Id.* at 58 n.3. Nevertheless, some theorists argue that sex is a contract. *See, e.g.*, Peter D. Feaver et al., *Sex as Contract: Abortion and Expanded Choice*, 4 STAN. L. & POL'Y REV. 211, 213, 218–19 (1992).

[49] The terms "rape" and "sexual assault" can sometimes be differentiated: Sexual assault covers a broader spectrum of offenses than rape does, some of which can be non-penetrative. In some states, the term sexual assault simply has replaced rape, and the terms are used interchangeably. However, in other states, rape requires use or threat of force whereas sexual assault simply means any intercourse with no consent. *See* Myka Held & Juliana McLaughlin, *Rape & Sexual Assault*, 15 GEO. J. GENDER & L. 155, 156–57 (2014).

[50] Carley R. Kranstuber, Comment, *Equality Is Not Enough: The Importance of the Due Process Clause in Redefining Consent to A Sexual Encounter*, 45 CAP. U. L. REV. 765, 787 (2017) (footnote omitted).

The reality is that contract law and criminal law are not analogous. For instance, contract law provides remedies to those who suffer breaches of a contractual promise, and such remedies are designed to make the "victim" whole.[51] "[C]riminal law does not have such symmetry."[52] The problem is that "[n]either rape nor sex can properly be called a contract. There is nothing binding about sex."[53] Additionally, the well-founded moral standards in criminal law remain a challenge when creating an analogy between contracts and sexual assault.[54] They occupy different legal domains. And, when the intricacies are considered, the two are incompatible and incomparable. The economic approaches to law assert that, on economic grounds, rape should perhaps be legalized (and punished under contractual doctrines) "if rapists would pay more to rape than victims would pay to avoid rape."[55] However,

> [t]hese examples can make believers in general theories seem fanatical; indeed, we might understand fanaticism in law and politics to consist precisely in the insistence on applying general principles to particular cases in which they produce palpable absurdity or palpable injustice. The point is not that exponents of any of these views cannot avoid the seemingly bizarre counterexample. It is instead that general theories usually do not make existing convictions about particular cases a constituent part of the method through which principles are constructed.[56]

Even Judge Posner, the leading proponent of economic theory, spent considerable time addressing the particular difficulties presented by any attempt to apply his principles to the crime of sexual assault:

> (2) Rape. Suppose a rapist derives extra pleasure from the coercive character of his act. Then there would be (it might seem) no market substitute for rape, suggesting that rape is not a pure coercive transfer and should not, on economic grounds, anyway, be punished criminally. But the argument would be weak:

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[51] Kari Hong, *A New Mens Rea for Rape: More Convictions and Less Punishment*, 55 AM. CRIM. L. REV. 259, 324 (2018).

[52] *Id.*

[53] Spence, *supra* note 41, at 75 (footnotes omitted).

[54] *Id.* at 75–78.

[55] Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 749–50 (1993) (footnote omitted).

[56] *Id.* at 750 (footnotes omitted).

(a) Because there are heavy penalties for rape, the rapes that take place—that have not been deterred—may indeed be weighted toward a form of rape for which there are no consensual substitutes; it does not follow that the rape that is deterred is generally of this character.

(b) Put differently, the prohibition against rape is to the marriage and sex "market" as the prohibition against theft is to explicit markets in goods and services.

(c) Given the economist's definition of "value," even if the rapist cannot find a consensual substitute (and one such substitute, prostitution, is itself illegal), it does not follow that he values the rape more than the victim disvalues it. *There is a difference between a coerced transaction that has no consensual substitute and one necessary to overcome the costs of consensual transactions; only the second can create wealth, and therefore be efficient*. Indeed, what the argument boils down to is that some rape is motivated in part or whole by the negative interdependence of the parties' utilities, and this, as I have argued in connection with crimes of passion, is no reason for considering the act efficient.

(d) As with my earlier discussion of crimes of passion, it is important not to take too narrow a view of market alternatives. Supposing it to be true that some rapists would not get as much pleasure from consensual sex, it does not follow that there are no other avenues of satisfaction open to them. It may be that instead of furtively stalking women they can obtain satisfactions from productive activities, that is, activities in which other people are compensated and thus derive benefits. This is an additional reason to think that the total wealth of society would be increased if rape could be completely repressed at a reasonable cost.

All this may seem to be a hopelessly labored elucidation of the obvious, that rape is a bad thing; but I think it useful to point out that economic analysis need not break down in the face of such apparently noneconomic phenomena as rape.[57]

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[57] Posner, *supra* note 28, at 1198–99 (emphasis added). *See also* Jason Scott Johnston, *Law, Economic, and Post-Realist Explanation*, 24 LAW & SOC'Y REV. 1217, 1241–42 (1990).

Judge Posner recognized the challenges in applying contract-based legal theories to sexual assault in that there are no market alternatives and no consensual substitutes for sexual assault. Suffice to say, sexual assault is a crime that the utilitarian or economic theories of jurisprudence simply cannot reconcile. Because sexual assault, like other violent crimes, involves more than a balancing of economies, such as the consideration of the emotional impacts of the acts, the notion of the social benefit is necessarily lost. That is so because economic models are reliant on the law's fiction of "the reasonable man." No such creature has ever existed. To pretend that an economic model "works" by reference to this nonexistent creature is to ignore very real and human reactions to violent crimes. Logic does not always prevail; mankind does not make decisions to commit crimes such as sexual assault based on a rational assessment of the situation, nor does mankind temper a reaction to violent crimes through the lens of logic. Certainly, such fictional constructs are necessary tools in understanding how things *should* work, even if that is not how things *do* work. "Seen as a prism through which to view human interaction, *homo œconomicus* is a useful guide to prediction. Useful, as long as we acknowledge that the construct is fictional."[58] That disconnect is even more apparent when looking at the elements of sexual assault vis-à-vis contract law in more detail.

B. Consent to Sexual Intercourse Versus Contractual Assent

Recognizing that the economic and utilitarian legal theories work only in theory, it remains appropriate to demonstrate how the act of sexual assault is particularly contrary to the application of contract law principles.

1. Defining Consent Versus Assent

"Consent is a critical concept for law. Private law often rests upon the ability of people to create binding changes of legal status, rights, and obligations."[59] Whether in the context of contract formation or contractual interpretation, courts utilize an objective approach, considering "what a reasonable man in the position of the other party would conclude his manifestations to mean."[60]

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[58] Rachlin, *supra* note 13, at 22. "*Homo œconomicus*" means:

> Economic man, or the rational agent depicted in economic models. Such an agent has consistent and stable preferences; he is entirely forward-looking, and pursues only his own self-interest. When given options he chooses the alternative with the highest expected utility for himself. It is controversial whether this figure is realistic, and if not, how much that matters to economic theory.

Homo economicus, THE OXFORD DICTIONARY OF PHILOSOPHY (2d ed. 2008).

[59] Jennifer A. Drobac & Oliver R. Goodenough, *Exposing the Myth of Consent*, 12 IND. HEALTH L. REV. 471, 472 (2015) (emphasis omitted).

[60] Roussalis v. Wyo. Med. Ctr., Inc., 4 P.3d 209, 231 (Wyo. 2000) (citation omitted); *see also* Birt v. Wells Fargo Home Mortg., Inc., 2003 WY 102, ¶ 16, 75 P.3d 640, 649 (Wyo. 2003).

> While it is essential that the mutual assent of the parties to the terms of a contract must be sufficiently definite to enable the court to ascertain what they are, nevertheless it is not necessary that each term be spelled out in minute detail. It is only that the essentials of the contract must have been agreed upon and be ascertainable. * * * The law does not favor the destruction of contracts on the ground of indefiniteness, and if it be feasible the court will so construe the agreement so as to carry into effect the reasonable intention of the parties if that can be ascertained.[61]

The Restatement (Second) of Contracts § 19 (1979) provides guidance in determining whether a contract exists, specifically with respect to the element of assent:

> (1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.
>
> (2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.
>
> (3) The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.[62]

Once there is a manifestation of assent to a valid offer, a binding contract is formed, assuming all other contractual requirements are in place.[63]

In comparison, consent to sexual intercourse is a "philosophical, psychological, and legal quagmire[.]"[64] Consensual sex has many definitions, seemingly synonymous in nature, such as sex that is desired, wanted, willing, or agreed-to. However, each definition may carry a vastly different interpretation, given the particular context in which it is used.[65] When defining consent as cooperation, some laws give the impression that the idea of acquiescence equates to consent

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[61] *Roussalis*, 4 P.3d at 231 (alteration in original) (citation omitted).

[62] *Birt*, ¶ 16, 75 P.3d at 649.

[63] 17A AM. JUR. 2D *Contracts* § 32.

[64] Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 421 (2016).

[65] *Id.* at 423–24 (footnote omitted).

throughout the entire sexual encounter.[66] Yet, "[c]onsent is an affirmative decision to engage in a sexual encounter, and both participants must be responsive and involved if either's actions or words are to be considered as consent."[67]

Unlike the objective theory of contracts, the more pressing definitional question is whether sexual consent is a mental state, an external performance, or both. When an actor's spoken words and manifested acts correspond to his or her internal state-of-mind, there is no real debate about consent, or lack thereof. On the other hand, a debate arises when the two do not coincide with one approach requiring a "consent transaction," involving both a sufficient internal mental state and external performance of that state.[68]

In addition to the expressive and attitudinal varieties of consent, there is also the second approach: legal consent. There is a substantial difference between a factual acquiescence, oftentimes via expressive or attitudinal affirmation, and what the law requires an individual to do under the circumstances.[69] Legal consent to an act exists when one does or experiences anything under such conditions as the jurisdiction would deem sufficient for one's conduct or experience to constitute consent.[70] Because of the potential difference between actual consent and what is only interpreted to be legal consent, the law of consent as applied to sexual intercourse is anything but clear. "However, consent theory and social contracts fail to distinguish consent from habitual acquiescence, assent, silent dissent, submission, or even forced admission, all of which are recognized as legal forms of consent."[71]

In sum, the notions of contractual assent and consent to sexual relations are unique in nature and based on entirely different values. Courts and scholars, influenced by economic analysis, tend to conceive of any given social problem as a problem in efficiency.[72] Economists define efficiency in two ways. First, under the Kaldor-Hicks approach, an efficient allocation of resources may be defined as one in which their value is maximized, with "value" being measured by how much an individual is willing to pay.[73] Second, under the Pareto model,

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[66] Note, *Acquaintance Rape and Degrees of Consent: "No" Means "No," but What Does "Yes" Mean?*, 117 HARV. L. REV. 2341, 2350–51 (2004).

[67] *Id.* at 2350.

[68] Gruber, *supra* note 64, at 423–24.

[69] Kranstuber, *supra* note 50, at 786.

[70] *Id.*

[71] *Id.* (footnote omitted).

[72] Ann Laquer Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 517 (1995).

[73] This method emphasizes the aggregate of values in society rather than their distribution. *Id.* at 524.

an allocation is efficient when it results from the exchange of resources in a voluntary, informed transaction.[74] Here, the Pareto philosophy relies upon two premises: (1) that individuals are always the best judges of their own utility; and (2) that interpersonal comparisons of utility are impossible in the absence of exchange.[75] Also, under the Pareto model, an "exchange" is not a valid indicator of consent unless it is completely voluntary and has no effects on anyone external to the exchange.[76]

It does not require a significant stretch of the imagination to conclude that these theories may work *in theory*—but they present an unrealistic dynamic. They require a buy-in belief of "pure" consent by an individual who is absolutely capable of making the best decision for his or her well-being at any given moment.[77] Decisions that are not the product of voluntary agreement will most likely generate "winners and losers." Because it is difficult to measure the impacts of those decisions on the affected individuals, it is hard to determine if there is any net improvement in social welfare, much less on a personal level for the "loser."[78] Thus, when we apply economic principles and

> [w]hen we elevate consent arguments to the level of social choice, the claim is not that each individual loser consents to his particular losses, but rather that individuals conceived of in a certain way—rational, with a particular attitude toward risk and a moral sense—would choose to apply the Kaldor-Hicks criterion. The individual losses that result from Kaldor-Hicks improvements would be justified because losers and winners consented ex ante to pursue policies with the risk that some would come out on the short end. The justification of particular losses is a matter of *fairness*, not *consent*. The principle of *consent* would apply to the justification of the institutions, the principle of *fairness* to individual losses.[79]

Stated another way, society, as a whole, may determine what behavior equates to consent—recognizing that, in any given situation, the result might be significant individual loss (sexual assault), but that the individual loss can

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[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] Pure consent represents the notion that no individual is influenced by internal or external factors that negatively or inappropriately affect decision-making that is in one's own best interests. *See* David S. Schwartz, *The Amorality of Consent*, 74 CALIF. L. REV. 2143, 2150 (1986).

[78] Estin, *supra* note 72, at 524.

[79] Jules Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's the Economics of Justice*, 34 STAN. L. REV. 1105, 1127 (1982).

be forgiven because society deemed that it would be so. What that does is pit individuals against each other for the sake of "societal goodness" with the individual's fingers crossed that he or she will not be the recipient of the loss. In theory, this approach may have merit; in reality, it leaves the loser with no recourse.

2. The Timing and Revocability of Consent/Assent

An argument can be made that consent to sexual intercourse must be contemporaneous to the physical act. Put another way, consent cannot and should not "be inferred from past consent or an existing sexual relationship."[80] To apply contractual principles to sexual assault scenarios would be to say that past intimacy or relationship status is indicative of present consent.[81] Further, the traditional view of sexual assault is that the act of penetration completes the offense.[82] Thus a lack of consent, or the withdrawal of consent, must occur before penetration. Stated otherwise, for sexual intercourse to be considered consensual, consent must precede penetration.[83] But it must be clear that in the context of sexual intercourse, as opposed to a contractual transaction, consent can be withdrawn at any time.[84]

> The idea of consent as ongoing cooperation suggests that lack of consent is the absence of that cooperation (passivity,

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[80] Gruber, *supra* note 64, at 437.

[81] *Id.*

[82] Note, *supra* note 66, at 2348.

> The traditional view of rape is that the act of penetration completes the offense; therefore, the elements establishing an act of sexual intercourse as rape—lack of consent and use of force—must occur before the act of penetration. A number of current statutory definitions of "sexual intercourse" support this idea. Under these statutes, penetration becomes the critical moment—the defining moment—of rape, thereby bifurcating rape into acts that occur prior to penetration and acts that occur after penetration. This means that for sexual intercourse to be considered consensual, consent must precede penetration. Conversely, consent that has been granted must be withdrawn prior to penetration. This seemingly straightforward position is complicated by the fact that courts regard verbal statements and nonverbal behavior—specifically, acts of intimacy—as expressions of consent. Clearly, the statement "let's have sex" or "I want to have sex with you" indicates consent to intercourse. And this consent can be withdrawn—according to the traditional view—at any time prior to penetration. However, to the extent that the case law also infers consent to intercourse from a person's willingness to engage in sexually intimate acts prior to intercourse, the law effectively requires a revocation of consent to intercourse in situations in which consent may not have been granted.

Id. at 2348–50.

[83] *Id.* at 2348.

[84] *Id.* at 2349.

> acquiescence) rather than an affirmative revocation of consent. This suggestion indicates that revocation of consent is not *required*. Although practically, some expression of nonconsent would be necessary to indicate lack of interest in further sexual intimacy on a particular occasion, at the very least, "consent as cooperation" rejects the idea that this expression of nonconsent is the revocation of previously granted consent to intercourse.[85]

On the other hand, it is well-established that the time of the acceptance in a contractual setting results in a binding contract.[86] Further, once contractual assent is communicated, it is binding and the parties have a legally enforceable contract (assuming all other elements are met). The parties can contract for future performance, not just contemporaneous conduct.[87] If either the offeror or the offeree were to withdraw from the established contract at that point, consequences would ensue. This mutual assent is a critical component of contract law:

> When assent is ambiguous, there usually is no contract. One purpose for requiring such assent is to ensure respect for the autonomy of the parties to the contract; imposing terms on people to which they did not explicitly agree can be perceived as paternalism. In contrast, rape law has placed the burden of ambiguity on the silent party, and thus silence has meant assent to sex. Ironically, some defend this status quo in rape law because they believe that placing the burden on women to expressly decline sex defends their right to sexual autonomy.[88]

Applying notions of contractual assent to consent in sexual assault may equate *past* consent with acceptance of *future* sexual acts and allow *past* consent to stand in times of *future* diminished capacity. A hypothetical is more illustrative:

> *S* seeks novel forms of intimacy with her husband *A* and challenges *A* to see if he can have intercourse with her while she is sleeping. In this scenario, *A* would have a defense to charges of sexual assault based on *S*'s prospective consent, even

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[85] *Id.* at 2350.

[86] 2 WILLISTON ON CONTRACTS § 6:61 (4th ed. 2018) (time of formation of contract).

[87] Thomas D. Barton, *Improving Contracts Through Expanding Perspectives of Understanding*, 52 CAL. W. L. REV. 33, 37 n.7 (2015) ("A promise about future conduct is what distinguishes a contract from an immediate sale or service transaction.").

[88] Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J. L. & GENDER 447, 451 (2005) (footnotes omitted).

> though *A*'s conduct occurred at a time when *S* was incapable of contemporaneous consent.[89]

This theory has already been debunked in the context of consent (or lack thereof) to medical treatment: "A patient's consent to the collection of his or her blood for laboratory testing does not connote consent to donate blood. Nor does past consent imply present or future consent."[90] Why, then, would other encounters, especially those involving sexual intercourse be any different? Just because a person chose to consent to sex before does not make that person "even marginally more likely to consent to additional sexual affairs."[91] In that way, even viewed under the lens of contract law, every sexual encounter is a distinct contract, entirely unrelated to any prior or subsequent contracts. Logic dictates the sound conclusion that contract-based notions of custom, industry practice, and the "norm" simply do not apply to sexual intercourse. Further, in considering the existence of consent, it necessarily follows that one must have the ability to consent to the contract, or conduct, at issue.

C. Contractual Capacity

To form a contract, both parties thereto must have the capacity to contract.[92] A contracting party is competent if, at the time of executing the agreement, he or she has sufficient mental capacity to understand the nature of the transaction and agrees to its provisions. All persons are presumed to have the capacity to contract.[93] Recognizing the contrary, under the common law, a contract is void if a party lacks the requisite mental capacity at the time of contracting.[94] Generally speaking, a person who manifests assent to a transaction has full legal capacity to incur contractual duties unless he or she is a minor (infant), intoxicated, or mentally incompetent.[95]

1. Minors

In *People v. Tobias*, the California Supreme Court addressed the question of whether a minor who "consents" to an incestuous relationship constitutes an

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[89] Jonathan Witmer-Rich, *It's Good to Be Autonomous: Prospective Consent, Retrospective Consent, and the Foundation of Consent in the Criminal Law*, 5 CRIM. L. & PHIL. 377, 384–85 (2011) (internal quotations omitted) (footnote omitted).

[90] People v. Lee, 93 N.E.3d 512, 518 (Ill. App. Ct. 2017) (Hyman, J., specially concurring).

[91] Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and A New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 89 (2002) (footnote omitted).

[92] 17A AM. JUR. 2D *Contracts* § 27.

[93] *Id.*

[94] *Id.*

[95] *Id.*

accomplice to the crime.[96] The court held that a minor who engages in a "sexual relationship with an adult is a *victim*, not a perpetrator," regardless of the child's consent.[97] Because minors are unable to legally consent to sexual intercourse, they cannot be criminally liable for incest.[98] Indeed, statutory rape laws are premised on the idea that a minor, due solely to the minor's age, cannot legally consent to sexual intercourse under any circumstances.[99]

Yet, an application of contract theory to criminal sexual assault cases can undermine this notion by equating adolescent *assent* with adolescent *consent*.[100] Adolescent assent in the medical context requires an associated parental consent, while the same is not required in a sexual relationship.[101] Similarly, adolescent assent does not require a "threshold level of capacity" that is required in consent.[102] "Similar to consent by a minor under contract law, assent is voidable by the minor."[103]

Still, carving a distinct difference between capacity of a minor to contract and to consent to sexual intercourse may well be appropriate. Recognizing a minor's capacity to consent to sexual intercourse suggests that, by having sexual experience, the minor becomes less vulnerable to coercion, and in essence, gains the capacity to consent to sex.[104] While the argument may have some value in theory, it is an area that requires case-by-case assessment on an individualized level. "An infant is often mentally competent in fact to understand the force

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[96] 21 P.3d 758, 759 (Cal. 2001).

[97] *Id.*

[98] *Id.* at 767.

[99] Erin K. Jackson, *Addressing the Inconsistency Between Statutory Rape Laws and Underage Marriage: Abolishing Early Marriage and Removing the Spousal Exemption to Statutory Rape*, 85 UMKC L. REV. 343, 345 (2017).

[100] Jennifer Ann Drobac, *Wake Up and Smell the Starbucks Coffee: How* Doe v. Starbucks *Confirms the End of "The Age of Consent" in California and Perhaps Beyond*, 33 B.C. J. L. & SOC. JUST. 1, 41–43 (2013).

[101] Drobac, *supra* note 100, at 41–42; *see also* Jones v. State, 640 So. 2d 1084, 1089 (Fla. 1994); Jackson, *supra* note 99, at 345. Adolescent assent recognizes that children, ages thirteen through seventeen, are often able to form opinions and make decisions that are either beneficial or detrimental, depending on the context. The development of this notion suggests that adolescents should be consulted and permitted to voice their opinions. Adolescent assent arises in many contexts, from assent to medical research and participation in medical studies to engagement in mutual sexual relations. *See* Christine Grady et al., *Assent in Research: The Voices of Adolescents*, 54 J. ADOLESCENT HEALTH 515 (2014).

[102] Drobac, *supra* note 100, at 41–42; *see also Jones*, 640 So. 2d at 1089; (Fla. 1994); Jackson, *supra* note 99, at 345.

[103] Drobac, *supra* note 100, at 41–42; *see also Jones*, 640 So. 2d at 1089; (Fla. 1994); Jackson, *supra* note 99, at 345.

[104] Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 35 (1994).

of her bargain, but it is the policy of the law to protect the minor."[105] Thus, an application of contract law ignores the unique nature of sexual assault, wherein society is called upon to harmonize mutually exclusive goals of protecting individuals against private oppression (the sexual assault) versus state oppression (restricting personal autonomy and the ability to make decisions regarding sexual activities).[106]

2. Intoxicated Individuals

In contract law, capacity is a requirement of every valid contract, and intoxication may negate the existence of capacity, and thus the existence of a valid contract. "A completely intoxicated person is generally placed on the same footing with persons of unsound mind."[107] When intoxication renders one incapable of consent, that individual lacks capacity to contract.[108]

> The rule of law applicable to such cases is thoroughly established. It is not every case of drunkenness that will defeat a contract executed by an intoxicated man. A completely intoxicated person is generally placed upon the same footing as persons of unsound mind, since one deprived of reason and understanding by drunkenness is, for the time, as unable to consent to the terms of a contract as a person who lacks mental capacity by reason of insanity or idiocy. There is, however, a marked distinction between cases of complete intoxication and cases of partial intoxication. A person who at the time of making a contract is completely intoxicated may avoid the contract notwithstanding the fact that his intoxicated condition may have been caused by his voluntary act and not by the contrivance of a party to the contract. But to permit a person only partially intoxicated to avoid his contract would enable one to make drunkenness a cloak for fraud, since a party may be partially intoxicated without being completely incapacitated to contract; and this fact has impelled the courts to define the degree of intoxication which will be a ground for avoiding a contract. The degree of intoxication necessary to avoid a contract has been

[105] 5 WILLISTON ON CONTRACTS § 10:3 (4th ed. 2018). Society has determined that, given the chance that a minor is incapable of consent, a bright-line rule applies: Minors cannot consent. This rule protects both minors and adults by establishing clear expectations, as opposed to requiring individuals to determine a minor's ability to consent on a case-by-case, child-by-child basis. *Id.*

[106] Oberman, *supra* note 104, at 34–36.

[107] *Intoxication as ground for avoiding contract*, 36 A.L.R. 619 art. I (2019).

[108] *Id.*

> variously stated by the courts, but there is little difference in their conclusions.[109]

Similarly, consent to sex becomes an issue when the parties are intoxicated. And in the context of sexual assault this consideration must be viewed both in terms of intoxication of the perpetrator and of the victim. Intoxication can affect an ability to consent; likewise, it can affect an ability to interpret lack of consent. "[A] severely intoxicated man may be honestly mistaken as to a woman's consent to engage in sex[.]"[110] That intoxicated man "assumes the risk of liability for conduct that he would not have engaged in if sober, which includes the risk of committing rape-by-intoxication."[111]

The difficulty is, and always has been, evaluating the level of intoxication and its effect on the intoxicated party. "The level of incapacity at the time of the encounter may be difficult to assess because the incapacitating condition wears off, often before incapacity can be evaluated."[112] Also concerning is the fact that many rape-by-intoxication cases occur as a result of voluntary or mutual intoxication, which can serve to the disadvantage of either or both parties.[113]

Scholars have struggled with how to deal with these issues. But, one cannot assert that, by simply avoiding intoxication, which may have prevented the sexual assault, the victim is responsible for the sexual assault.[114] Contrast that conclusion with one posited by the economic theorists as follows:

> the fact that women frequently become intoxicated voluntarily and have sex shows that a nontrivial percentage of them must value intoxicated sex . . . . [T]he effects of alcohol on capacity are sufficiently well known that many of these women must realize when they decide to become intoxicated that they will make intoxicated decisions about sex that they might not have made if sober. Accordingly, . . . we should regard the consent of the voluntarily intoxicated as effective . . . . [I]f the harm of unwanted sex is great enough, then that would be a reason to adopt a different rule even if the vast majority of intoxicated

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[109] Glenn v. Martin, 200 S.W. 456, 456–57 (Ky. Ct. App. 1918) (citations omitted).

[110] Valerie M. Ryan, Comment, *Intoxicating Encounters: Allocating Responsibility in the Law of Rape*, 40 CAL. W. L. REV. 407, 427 (2004).

[111] *Id.*

[112] Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201, 1219 n.95 (2015) (citation omitted).

[113] *Id.* (citation omitted).

[114] Ryan, *supra* note 110, at 426.

> sex is desired *ex ante*. But in most cases, the consequences of sex are fleeting—unlike getting a tattoo, which . . . may require contemporaneous sober consent.[115]

In sum, the suggestion is that unwanted sexual intercourse subjected to as a result of voluntary intoxication is less traumatic than a permanent tattoo. That theory may suffice under contract law where the contract can be rescinded, but it fails under criminal law because, once completed, sexual intercourse cannot be revoked.

3. Incompetent Individuals

Again, in the realm of capacity, a contract executed by an incompetent individual is either void or voidable, depending upon the circumstances.[116]

> [M]ental weakness alone is generally not sufficient to justify setting aside a contract; rather, the test is whether, at the time of the transaction, the alleged incompetent party was so deprived of her mental faculties as to be wholly unable to understand or comprehend the nature and consequences of the transaction (the majority cognitive test); or, under the Restatement Second formulation, whether the alleged incompetent is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of her condition (the minority affective test).[117]

Contractual capacity is assessed at the moment of the execution of a legal instrument.[118] Applying notions of incompetence to sexual relations is exceedingly difficult under notions of personal autonomy and entirely unique of contract-based considerations:

> While most researchers agree that at least a portion of the mildly [mentally incompetent] population is able to give informed sexual consent, some professionals within the [intellectual disability] field disagree over whether severely or even profoundly [intellectually disabled] individuals can always be deemed incompetent. On the one hand, a general study concerning the ability of [intellectually disabled] individuals to consent in a

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[115] Kevin Cole, *Sex and the Single Malt Girl: How Voluntary Intoxication Affects Consent*, 78 MONT. L. REV. 155, 163 (2017) (footnotes omitted).

[116] 5 WILLISTON ON CONTRACTS § 10:3.

[117] *Id.* (footnote omitted).

[118] *Id.*

> number of areas besides sex, such as the capacity to consent to surgery, found that those with moderate [intellectual disabilities] were seldom judged to be capable, regardless of the consent issue involved . . . . On the other hand, some researchers caution that "to ask a severely or profoundly [intellectually disabled] person to identify and appreciate the subtle distinctions [between sexual expression and abuse] is simply asking too much."[119]

"Consent to a sexual act requires the exercise of intelligence based upon knowledge of the consequences, significance, and moral quality of the act."[120] Mental incompetence can result in a blurring of the understanding of the choice between assent to the sexual act and resistance to it.[121] Apart from cold contract-based considerations, it is appropriate to also consider society's measure of the moral quality of a sexual act, "and thus, assess the victim's ability to appreciate that fact; the victim's personal moral behavior or sense of values, however, is not to enter into the equation as distinct from an awareness of the prevailing moral code."[122]

Accordingly, application of contractual capacity encompasses not only notions of an individual's pure ability to consent to the act but, when viewed through the lens of criminal law, also considers society's moral compass.

D. Contractual Concepts of Fraud, Duress, and Undue Influence: Unnecessary in the Modern Criminal Sexual Assault Context

Proponents of the contract-sexual assault comparison have argued that contract principles of duress, unconscionability, undue influence, and other contract principles can and should be applied to criminal sexual assault.[123]

1. Fraud

The concept behind the defense of fraud is that the defrauded party has not assented to the agreement since the fraudulent conduct precludes the requisite mutual assent.[124] "Fraudulent inducement is an elementary concept in the law of

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[119] Elizabeth J. Reed, Note, *Criminal Law and the Capacity of Mentally Retarded Persons to Consent to Sexual Activity*, 83 VA. L. REV. 799, 820 (1997) (alterations added to correct dated and potentially offensive language).

[120] 35A N.Y. JUR. 2D CRIMINAL LAW: PRINCIPLES AND OFFENSES § 599.

[121] *Id.* (footnote omitted).

[122] *Id.* (footnote omitted).

[123] Spence, *supra* note 41, at 58–59.

[124] Megan R. Comport, Comment, *Enforcing Contractual Waivers of a Claim for Fraud in the Inducement*, 37 SANTA CLARA L. REV. 1031, 1031 (1997).

contracts and is intended to shield a party from liability in a contract action only when another party has procured the alleged contract wrongfully."[125]

2. Duress

The word duress is both vague and ambiguous. Duress is vague because, although courts generally agree upon its meaning at its core, its meaning blurs at the edges. The term is ambiguous because it is subject to more than one meaning.

One court, quoting the original Restatement of Contracts, defined duress as:

> (a) any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition, or
>
> (b) any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.[126]

Duress is essentially a defect in the contract formation process, which ultimately results in that contract being unenforceable.[127] Traditionally, duress required an illegal threat, which often manifested in the form of threatening physical harm, physical injury, or the wrongful withholding of goods.[128] Under modern contract principles, the threat does not need to be illegal, but can instead be one that is simply improper.[129] Ultimately the duress doctrine can be viewed as containing three aspects: the coercer's illegitimate behavior, the absence of free will of the aggrieved party, and the unfairness of the contract.[130] When all three are present, a contract may not be enforceable by the innocent party.

3. Undue Influence

Finally, the defense of undue influence can be implicated when a power imbalance exists between the contracting parties, either because of an unfair and dominating persuasion employed by one party against the other or because the

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[125] 26 WILLISTON ON CONTRACTS § 69:1 (4th ed. 2018) (footnote omitted).

[126] 28 *id.* § 71:4 (footnote omitted) (defining duress).

[127] JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS § 9.2 (5th ed. 2003).

[128] Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J. L. & GENDER 171, 178 (2013).

[129] *Id.*

[130] *Id.* at 177–85.

parties' pre-contractual relationship leads the victim to assume that the other "will not act in a manner inconsistent with his welfare."[131] Consequentially,

> [i]f a party in whom another reposes confidence misuses that confidence to gain an advantage while the other has been made to feel that the party in question will not act against its welfare, the transaction is the result of undue influence. The influence must be such that the victim acts in a way contrary to its own best interest and thus in a fashion in which it would not have operated but for the undue influence. Undue influence is equivalent to that which constrains the will or destroys the free agency of the person and substitutes in its place the will of another.[132]

Supplementary support in comprehending how undue influence is applied can be found in the commentary to the Second Restatement, which specifies factors that should be considered in applying the notion.[133] These factors include "the unfairness of the resulting bargain, the unavailability of independent advice, and the susceptibility of the person persuaded."[134]

4. Effects on Enforceability

Of course, in the contractual context, fraud, duress, mistake, or an unconscionable bargain will vitiate a contract.[135] Thus, if fraud, duress, or undue influence are found, the contract is void or voidable.[136] That conclusion logically follows given that, when looking to whether contracts should be enforced and parties protected, one must look to whether the parties acted voluntarily or fully informed, and whether the bargaining process was fair.[137] In order to avoid fraudulently created contracts, traditionally, a party was not bound when he did not act voluntarily, when he was tricked into assenting, or when his assent

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[131] RESTATEMENT (SECOND) OF CONTRACTS § 177 (AM. LAW INST. 2019). The precise definition is as follows: "unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare." *Id.*

[132] 28 WILLISTON ON CONTRACTS § 71:50 (footnotes omitted).

[133] RESTATEMENT (SECOND) OF CONTRACTS § 177 cmt. b. The comment goes on to say that these factors alone are not controlling. *Id.*

[134] *Id.*

[135] Kendrick v. Barker, 15 P.3d 734, 740 (Wyo. 2001); State v. Meyers, 799 N.W.2d 132, 145 (Iowa 2011).

[136] *See* 26 WILLISTON ON CONTRACTS § 69:4 (effect of fraud as rendering transaction voidable or void).

[137] Melvin A. Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 MICH. L. REV. 1413, 1415–16 (2009).

was unfairly procured.[138] "One induced to enter into a transaction by undue influence or duress has the same power of avoidance and the same remedies and defenses that one has in the case of fraud or mistake."[139] As a result, fraud in the inducement, or creation, of the contract renders any apparent assent to the agreement nonexistent.[140]

> The court may refuse the discretionary relief of specific performance on account of undue influence or duress even though the requisites for the affirmative remedies of reformation or of rescission are not present.
>
> So, too, equity will grant appropriate relief by way of a decree for cancellation, or to vacate a conveyance, transfer, or satisfaction of judgment and the like which has been procured by undue influence or duress.[141]

The academics seeking to extend these doctrines to apply them to situations of nonconsensual sexual intercourse rely, at times, on the belief that they assist in refining the definition of force to include emotional and psychological factors, aiding in understanding whether there has been an equal agreement to sexual relations, and providing a guide for conceptualizing the important freedom of each individual to consent to sexual intercourse.[142]

5. The Legal Response to an Imperfect Criminal Law Approach to "Rape"

This belief was understandable, even laudable, during a time when sexual intercourse was not considered sexual assault without proof of force, actual or constructive, evidenced by words or conduct of the defendant. This was "so even though the intercourse may have occurred without the actual consent and against the actual will of the alleged victim."[143] Under the traditional definition of the

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[138] Hao Jiang, *Freedom to Mislead: The Fictitious Freedom to Contract Around Fraud Under Delaware Law*, 13 N.Y.U. J.L. & BUS. 393, 397 (2017).

[139] 28 WILLISTON ON CONTRACTS § 71:62 (footnote omitted).

[140] Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1399 n.136 (2013).

[141] 28 WILLISTON ON CONTRACTS § 71:62 (footnotes omitted).

[142] State v. Meyers, 799 N.W.2d 132, 145 (Iowa 2011); *see also* James T. McHugh, *Interpreting the "Sexual Contract" in Pennsylvania: The Motivations and Legacy of* Commonwealth of Pennsylvania v. Robert A. Berkowitz, 60 ALB. L. REV. 1677, 1686 (1997); Spence, *supra* note 41, at 57*;* Susan Estrich, *Rape,* 95 YALE L.J. 1087, 1120 (1986).

[143] Goldberg v. State, 395 A.2d 1213, 1219-20 (Md. Ct. Spec. App. 1979). *But see* Janet E. Findlater, *Reexamining the Law of Rape*, 86 MICH. L. REV. 1356, 1360 (1988). "What sense can one make of this paradox: The victim was not forced to have sexual intercourse, but she had sexual intercourse against her will and without her consent?" *Id.* (commenting on *Goldberg*).

crime of rape, making no express provision for rape-by-fraud or impersonation, fraud did not vitiate or retract consent or supply the requisite force.[144]

> For more than a century, courts, legislatures, and legal commentators struggled with the question of whether sexual assault could occur without the use of force; in other words, by and through the use of fraud, duress, undue influence, or other deception. In 1986, Professor Susan Estrich suggested that rape law should "prohibit fraud to secure sex to the same extent we prohibit fraud to secure money, and prohibit extortion to secure sex to the same extent we prohibit extortion to secure money."[145]

But times, indeed, have changed. Legislatures, legal commentators, and courts now recognize that sexual assault may occur even without the application (or threat) of physical force.[146] In response to decades of calls for reform, legislatures have been enacting a comprehensive array of criminal statutes outlawing multiple forms of sexual offenses committed by fraudulent or coercive means.[147] Courts, too, have come to recognize that:

> The outrage upon the [victim], and the injury to society, is just as great in these cases as if actual force had been employed; and [courts] have been unable to satisfy ourselves that the act can be said to be any less against the will of the [victim] when [his or] her consent is obtained by fraud, than when it is extorted by threats or force.[148]

Though perhaps slower than some may desire, the system worked as intended. As society came to understand that nonconsensual intercourse (e.g., rape or sexual assault) could be realized in a variety of settings, the laws changed in response.[149] Earlier movements changed two of the historical elements of rape: sexual intercourse (limited to vaginal penetration) and a female victim not married to the

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[144] *Rape by fraud or impersonation*, 91 A.L.R. 2d 591 art. II, § 4 (2019); *see* Don Moran v. People, 25 Mich. 356 (1872) (holding that rape by fraud or impersonation might be a punishable crime, were it not for the words "by force," or "forcibly" contained in the applicable definition of rape, statutory or otherwise; *see also* People v. Bartow, 1 Wheeler Cr. 378 (N.Y. 1823); Walter v. People, 50 Barb. 144 (N.Y. Gen. Term 1867); R v. Williams, (1923) 1 KB 340 (Eng.); State v. Oshiro, 696 P.2d 846 (Haw. Ct. App. 1985).

[145] Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 44–45 (1998) (footnotes omitted) (citing Susan Estrich, *supra* note 142, at 1120 (1986)); *see also id.* 44–45 n.3–7.

[146] *See generally id.* at 44–45.

[147] *Id.* at 91.

[148] *Id.* at 44, 44 n.2 (citing People v. Crosswell, 13 Mich. 427, 437 (1865)); *see also* Pomeroy v. State, 94 Ind. 96, 102 (1883) (quoting *Crosswell*).

[149] Falk, *supra* note 145, at 45.

defendant.[150] The trend continued with statutory changes recognizing multiple forms of sexual penetration and contact, gender-neutral language to cover perpetrators and victims, and elimination of the marital exemption.[151] Finally, reform mandated even more extensive changes, such as amendments to resistance and corroboration requirements, rape shield laws, reformation of suspicion-engendering jury instructions, and changes in the terms used to describe sexual crimes (e.g., references to sexual assault rather than rape).[152]

While the changes may not be perfect, or even complete, the appropriate response is not the adoption and application of civil contract law. Rather, if needed, legislatures should replace the independent crime of sexual assault with a variety of statutory offenses that would more clearly and more justly define criminal liability for culpable conduct aimed at causing other individuals to engage in sexual acts.[153] Indeed, many states have already done so.[154] Every state has at least one relevant criminal provision, and many have civil statutes and disciplinary rules covering similar behavior, although these are beyond the scope of the present analysis.[155]

Now, generally speaking, five categories of crimes address such matters: (1) those who abuse positions of trust; (2) those who abuse positions of authority to secure sexual compliance; (3) crimes that specifically outlaw the use of fraud or deception; (4) crimes that substitute coercion and other types of nonphysical pressures for the force requirement; and (5) crimes that prohibit nonconsensual intercourse without reference to force, fraud, or coercion.[156] These new statutory enactments cluster around five organizational themes that outlaw sexual penetration or contact accomplished by abuse of trust, abuse of authority, fraud, coercion, and nonconsent.

The first category, abuse of trust, carves out for special treatment defined groups of potential offenders who abuse positions of trust and have access to vulnerable victims (e.g., medical personnel). The second category prohibits sexual conduct when the criminal actor abuses a position of authority over a victim (e.g., a prison guard). The third group specifically outlaws the use of fraud or deception in securing sexual compliance, such as disguising one's appearance to trick the victim into believing the intercourse was with another. The fourth

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[150] *Id.* at 90.

[151] *Id.*

[152] *Id.* at 90–91.

[153] Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1780 (1992).

[154] *Id.* at 1783.

[155] Falk, *supra* note 145, at 89 n.265 (detailing numerous statutory schemes of various states).

[156] *Id.* at 47.

substitutes coercion or other types of nonphysical pressure for the traditional requirement of physical force, as may occur in situations of verbal threats or extortion. Finally, the fifth class simply punishes nonconsensual intercourse without reference to force, fraud, or coercion.[157]

This fifth and final approach is preferable to that of a blind application of contract law that fails to recognize the nuances of the act of sexual assault. More specifically, an economic theorist may assert that obtaining intercourse by impersonation or fraud lays the foundation for a defense to statutory rape in that the adult-defendant may assert a contract-based defense of "fraud" on his contention of an honest and reasonable mistake-of-age, particularly given any efforts by the juvenile-victim to appear "of age."[158] This defense goes beyond the statutory provisions that already appropriately address notions of mistake-of-age.[159] What becomes apparent is that contract law principles may have unintended consequences, meaning now the perpetrator of the sexual assault (the of-age individual) may be entitled to wage a civil lawsuit against the under-age victim based on the minor's "deceitful appearance" as being of the age of majority. The result turns the notion of sexual assault on its head.

E. Damages for Breach of Contract or Withdrawal of Consent?

Harkening back to the basics of the economic theory of jurisprudence, one must realize that wealth maximization is at the theory's core. In fact, law and economics scholars present the wealth maximization theory (WMT) as an alternative system "that promises to solve many of [society's] problems."[160] By defining wealth as "the value in dollars or dollar equivalents . . . of everything in society," WMT claims to solve a historical inability to measure, compare, and maximize utility.[161] Under this economic approach, "by cashing out units of happiness in exchange for units of wealth, consequentialists (and courts) are (finally) able to rest legal analysis on firm theoretical and practical grounds by straightforwardly holding that actions that increase society's wealth should be allowed, while those that reduce it should be forbidden."[162] Hence, logically extended, a sexual assault can be compensated—or prevented—by the notion of the potential for significant economic penalties.

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[157] *Id.*

[158] Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75, 110 (2007).

[159] *Id.*

[160] Marco J. Jimenez, *The Value of a Promise: A Utilitarian Approach to Contract Law Remedies*, 56 UCLA L. REV. 59, 89–90 (2008).

[161] *Id.* at 90 (omission in original).

[162] *Id.*

But, the reality is that criminal law is not like contract law. "Contract law aspires and provides remedies to breached contracts that are designed to make the parties whole."[163] For example, imagine a contract between *A* and *B*, wherein *A* is to produce twenty widgets in a particular manner and then ship the widgets to *B*. Now, imagine that four widgets were not made in the manner provided for in the contract.[164] The result is that *A* would be in breach of the contract, and *B*'s remedy is either for *A* to provide four widgets that meet the contract's specifications or for *A* to pay *B* for the value of four widgets.[165]

As illustrated by the hypothetical, the remedy (or "punishment") for a breach of contract is monetary damages or, on occasion, specific performance.[166] However, the punishment (or "remedy") for criminal sexual assault is incarceration, probation, or other punitive sanctions.[167] The former are means to compensate an injured party, most generally through compensatory damages,[168] whereas the latter are rarely awarded in tort actions,[169] much less contract-based torts.[170] The latter are means to address the four-pronged purposes of criminal sentencing: punishment, deterrence, treatment/rehabilitation, and retribution.[171]

The punishment meted out by criminal laws to those who violate them is not commensurate to the breach of the victim's well-being, which may never feel healed, nor is it sufficient for the violation of public safety such that society should simply forgive the conduct.[172] There is no such connection or capacity for criminal law to do these things, nor should it be the sole goal of criminal courts to tend only to the well-being of victims without a consideration of the other laudable goals of sentencing, which include punishment, deterrence, treatment/

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[163] Hong, *supra* note 51, at 324.

[164] *Id.*

[165] *Id.*

[166] Steven Shavell, *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, 84 TEX. L. REV. 831, 831 (2006).

[167] *See* WYO. STAT. ANN. § 6-2-306 (2018).

[168] *See, e.g.*, Annie Kerrick, *Justice is More than Jail: Civil Legal Needs of Sexual Assault Victims*, 57 ADVOCATE 38, 40 (2014) (alluding to the multiple avenues in which attorneys and the legal system can help victims after they have been subjected to sexual assault).

[169] Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 965 (2007) ("The bottom line is that from the perspective of the tort system overall, punitive damages have been rare and there does not seem to be any risk of them becoming less rare, even had there been no tort reform.").

[170] William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 629 (1999) ("The majority of American jurisdictions do not allow punitive damages for breach of contract unless the breach constitutes an independent tort.").

[171] Cohee v. State, 2005 WY 50, ¶¶ 20–22, 110 P.3d 267, 274 (Wyo. 2005).

[172] Hong, *supra* note 51, at 324–25.

rehabilitation, and retribution/incapacitation.[173] Indeed, criminal sentencing is much larger than notions of penalizing the perpetrator. Instead, concepts of restorative justice touch upon the ultimate goals of the rehabilitation of offenders through reconciliation with victims and the community at large. This notion may not be reachable in the sexual assault context, but it is representative of the larger purposes of criminal sentencing for the long-term benefit of society. Taken to its logical extreme, a withdrawal of consent, once given, would require the now-nonconsenting party to pay for the change of heart and mind. Worse yet, specific performance would equate to forced sexual intercourse in the event of a breach of contract. Certainly, these contract-based notions of compensation are absurd in this context. Even if one were to assume that compensation, of either the victim or the perpetrator, was something that could ever be warranted, the notion of valuation is another issue.

> Liability rules represent only an approximation of the value of the object to its original owner and willingness to pay such an approximate value is no indication that it is worth more to the thief than to the owner. In other words, quite apart from the expense of arriving collectively at such an objective valuation, it is no guarantee of the economic efficiency of the transfer. If this is so with property, it is all the more so with bodily integrity, and we would not presume collectively and objectively to value the cost of a rape to the victim against the benefit to the rapist even if economic efficiency is our sole motive. Indeed, when we approach bodily integrity we are getting close to areas where we do not let the entitlement be sold at all and where economic efficiency enters in, if at all, in a more complex way. But even where the items taken or destroyed are things we do allow to be sold, we will not without special reasons impose an objective selling price on the vendor.[174]

Again, cerebral thinking allows one to acknowledge the theory of an economic or contract-based approach to sexual assault. However, reality does not agree. An example may provide the best explanation:

> An individual is convicted of attempted rape. The range of acceptable punishments for attempted rape is two to twenty years. Let us also assume that this crime was committed in a state or county where it was known that a very low percentage of rape or attempted rape victims took actions against their perpetrators

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[173] *Id.* at 311–12 n.283.

[174] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1125–26 (1972) (footnote omitted).

> and pursued criminal charges. In this regard, a very low percentage of people committing rape or attempted rape end up being charged with the crime, and an even lower percentage will be found guilty and sentenced to a term of imprisonment. In light of this low rate, a very high level of punishment may be required to create sufficiently strong incentives that will convince potential rapists that they should not commit the crime. Simple economic calculations support this statement. If there is a 10% chance of being found guilty and an expected jail time of five years, then the expected harm to the rapist is a six-month jail sentence. On the other hand, if the expected jail time is twenty years, the expected harm is a two-year sentence. According to simple law and economic principles, the higher expected harm will create greater incentives not to commit the crime. Given this information, the judge decides to award twenty years in an attempt to demonstrate to the community that one found guilty of attempted rape will face twenty years imprisonment. This decision to sentence one found guilty of rape or attempted rape to the highest possible prison term, according to the law and economics theory previously mentioned, creates stronger incentives not to commit rapes, and therefore serves as a deterrent, the other main goal of utilitarianism. This example demonstrates limiting retributivism's appeal to deterrence.[175]

Suffice to say, this hypothetical supports the notion of a case-by-case assessment for criminal penalties rather than, as its author would urge, a detached application of economic law. It defies reason to believe that one would be deterred by the logic of such economics. "Of course, the decision to commit crime will generally not be a conscious and explicit weighing of costs and benefits, just as the purchase of a candy bar does not usually involve an explicit quantification of the benefits and costs."[176]

By performing a case-by-case assessment, "the judge can determine the most appropriate range of punishment in line with the defendant's culpability and moral blameworthiness, and the severity of the crime."[177] Due to notions of inability to

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[175] Matthew Haist, Comment, *Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?*, 99 J. CRIM. L. & CRIMINOLOGY 789, 806–07 (2009) (footnotes omitted).

[176] David S. Abrams, *The Imprisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 916 (2013).

[177] Haist, *supra* note 175, at 807 (footnote omitted); *see also id.* at 806–08.

value and an inappropriateness of generalizations, let alone the inappropriateness of such an attempt, contract law remedies simply are unsuitable in the realm of criminal sexual assault.

F. Ambiguity Created by Contract Law's Application to Criminal Sexual Assault

Challenges for vagueness[178] and an application of the rule of lenity[179] abound in the criminal arena, and for good reason, as these doctrines protect constitutional notions of due process.

> One aspect of the constitutional concept of due process of law is represented in the void for vagueness doctrine. The doctrine applies when a regulatory provision is so vague that it does not fairly notify affected persons of the conduct which the provision would sanction. The classic formulation of the void for vagueness doctrine is as follows: "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."As another court put it, the enactment must "supply (1) a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) explicit standards for those who apply it."[180]

Criminal defendants—nay, all citizens—are entitled to advanced warning, through unambiguous statutes, to the illegality of their conduct. In this way, society hopes to prevent criminal conduct. The vagueness doctrine of the United States Constitution requires that, in order to satisfy the Due Process Clause, "a criminal statute [must] state explicitly and definitely what acts are prohibited, so as to provide fair warning and preclude arbitrary enforcement."[181]

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[178] *See* Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 266–67 (2010) ("Although many early vagueness cases involved challenges to economic regulations, from its infancy, the void for vagueness doctrine has also been applied to criminal laws.").

[179] *See* Zachary Price, *The Rule of Lenity as A Rule of Structure*, 72 FORDHAM L. REV. 885, 886–87 (2004) ("A better justification for the rule of lenity may be found in its role in structuring the processes of criminal lawmaking and law enforcement. Whereas the conventional rationales have focused on the perspective of criminal defendants, seeking to guarantee them fair warning and political access, my analysis will shift to the perspective of voters, emphasizing lenity's role in advancing the democratic accountability of criminal justice.").

[180] 1 KENNETH A. MANASTER & DANIEL P. SELMI, STATE ENVIRONMENTAL LAW § 5:16 (2017) (footnotes omitted) (quoting Central States Tire Recycling of Neb., LLC v. State, 687 N.W.2d 681, 688 (Neb. 2004)); *see also id.* § 5:16 n.1; Armijo v. State, 678 P.2d 864, 868 (1984).

[181] *Vagueness Doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Meanwhile, the rule of lenity requires a court to examine a statute's text to determine whether the statute is ambiguous.[182] "If there is sufficient ambiguity, the statute is construed narrowly, in favor of the defendant," as required by the rule of lenity.[183] This rule puts the due process principle of fair notice into practice, protecting people from liability for crimes they could not have known were crimes.[184]

> [C]ourts have historically "refused to apply" vague laws "under the rule that penal statutes should be construed strictly." Yet "no one contends that the rule of lenity should apply in the civil context" where property rights, but not personal liberty, are at stake. The usual explanation for the differential application of the rule of lenity is that the court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." . . . [C]ourts have reasoned the rule of lenity need not apply to "an indefinite civil statute" like it does to a criminal one because it is "a more serious matter to deprive a man of his liberty on a prosecution based upon a vague and indefinite statute than to deprive him of a property right alone."[185]

Juxtaposing criminal procedures in place to protect society from an unjust application of a criminal law statute with contract law, which is governed not only by statutes (think Uniform Commercial Code) but also hundreds of years of common law, results in unparalleled confusion. For example, the ambiguity of legal standards remains a challenge to an analogy between contract and criminal law.[186] In criminal sexual assault law, a threat is measured solely through an objective lens, while contract law uses both objective and subjective measurements of a threat.[187] "Early contract cases stated that the threat was to be measured from the victim's perspective."[188] One early case stated that

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[182] *Rule of Lenity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[183] Note, *Wisconsin Supreme Court Applies Sexual Assault Statute to Attempted Sexual Intercourse with A Corpse:* State v. Grunke*, 752 N.W.2d 769 (Wis. 2008)*, 122 HARV. L. REV. 1780, 1785 (2009) (footnote omitted).

[184] Joel S. Nolette, *Towards an Administrative Rule of Lenity: Restoring the Constitutional Congress by Reforming Statutory Interpretation*, 19 FEDERALIST SOC'Y REV. 16, 24–26 (2018).

[185] *Id.* at 24 (footnotes omitted) (quoting, *e.g.*, Johnson v. United States, 135 S. Ct. 2551, 2568 (2015) (Thomas, J., concurring); Sash v. Zenk, 439 F.3d 61, 65 (2d. Cir. 2006); Gen. Const. Co. v. Connally, 3 F.2d 666, 667 (W.D. Okla. 1924)); *see also id.* at 24–25 nn.101–04.

[186] Spence, *supra* note 41, at 77.

[187] *Id.* at 80–81.

[188] *Id.* at 81 (footnote omitted).

> [p]ersons of a "weak or cowardly nature" are the very ones that need protection. The courageous can usually protect themselves. Capricious and timid persons are generally the ones that are influenced by threats, and it would be a great injustice to permit them to be robbed by the unscrupulous because they are so unfortunately constituted.[189]

Beginning with the above-stated notions of protecting the weak, contract law muddies the waters even further: The introduction of the duty of good faith in the Uniform Commercial Code now also suggests a measurement from the threat-maker's perspective.[190] And, some argue that subjective intent should be "measured objectively through the wider lens of the 'totality of the circumstances.'"[191] The result is a debate as to the best perspective by which to measure the existence of a rape, which serves only to create confusion. The debate naturally raises questions as to whether the perpetrator of a sexual assault is to be judged upon objective or subjective criteria and, if subjective, then whose? The result is a situation where, under contract-based principles, a determination of the happening of a sexual assault is based on context. The ambiguity thus created is unfair to the perpetrator and the victim alike.

Further, in contract law, pending disputes are governed by rules of interpretation that have been crafted over centuries of precedent.[192] These contractual axioms or, "rules of interpretation," have assumed a controlling significance in the results of contract-based disputes: Because one interprets a contract (and its terms) against the drafter, the party who drafted the contract will always lose when the contract is called into controversy.[193] In contract law, when faced with an ambiguous contract, or term, courts construe the ambiguity against the party responsible for its provision in the contract.[194] "This canon of construction, known as *contra proferentem*, 'provides that '[i]n choosing among the reasonable meanings of a promise or agreement . . . that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.'"[195] This rule makes sense considering that the contract's

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[189] Parmentier v. Pater, 9 P. 59, 63–64 (Or. 1885).

[190] *See* MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 69–73 (4th ed. 2001) (describing the problem of distinguishing between legitimate contracts and extortion).

[191] Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 316 (1999).

[192] *See generally* GREGORY KLASS, INTERPRETATION AND CONSTRUCTION IN CONTRACT LAW (2018).

[193] Patrick H. Martin, *Unbundling the Executive Right: A Guide to Interpretation of the Power to Lease and Develop Oil and Gas Interests*, 37 NAT. RESOURCES J. 311, 337–38 (1997).

[194] Nolette, *supra* note 184, at 26.

[195] *Id.*; *see also id.* at 26 n.125.

author is advantageously positioned to determine the language of the contract and "fairness requires as a matter of law that the bigger piece of the contract 'pie' not go to the slicer."[196]

But who "drafts" the sexual intercourse contract? The result of an application of contract law to sexual assault necessarily lends to greater ambiguity that does a disservice both to the perpetrator and the victim of sexual assault. Accordingly, should one traverse the path of applying contract law to sexual assault cases, the Due Process Clause may so interfere as to render statutes void for vagueness or to abolish the rule of lenity.

Sexual assault is already an area of criminal law fraught with claims of confusion and ambiguity.[197] According to one commentator, criminal sexual assault reform demands that "the kaleidoscope of intimate discourse—passion, emotional turmoil, entreaties, flirtation, provocation, demureness—must give way to cool-headed contractual sex."[198] To muddy the waters with notions of statutory and common-law contract application would serve only to worsen an already hotly debated topic.

IV. THE COMPARISON PROVES TRUE: THE COMPLEXITY OF THE MARRIAGE CONTRACT

The complexity of consent to sex versus assent to a contract has resulted in inconsistent, and likely unforeseen, results. For example, with the permission of a parent or judge, a minor girl can marry her adult partner. Thus, minors may consent to marriage through parental or judicial consent before they are legally old enough to consent to sex.[199] This result remains despite strides made in overcoming the marital-rape exemption.

> Another common law origin which was a building-block in the foundation for the marital rape exemption was the idea that a husband owned his wife as chattel. Since a husband could not take what he already owned, a husband was no more capable of raping his wife than an owner was of stealing his own property. Since women were regarded as property, the common law treated rape not as a crime against women, but rather as a violation of

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[196] David S. Miller, Note, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 COLUM. L. REV. 1849, 1852 (1988).

[197] Baker, *supra* note 88, at 451–52.

[198] *Id.* at 451 (footnote omitted).

[199] Jackson, *supra* note 99, at 345.

> a man's property interest. The rape laws were concerned with protecting a husband's property interest in his wife's fidelity, and a father's interest in his daughter's virginity.[200]

"The notion of women as property, however, was founded on premises which are no longer prevalent in American society and which have strongly been rejected."[201] And yet, proponents of the rape-contract comparison must recognize that the historical view of marriage as a contract was precisely what supported the marital-rape exemption.[202]

> An unsupported, extrajudicial statement made by British jurist, Sir Matthew Hale gave birth to the marital rape exemption at common law when he declared "[b]ut the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[203]

This statement and its basis in contract law traditionally have been accepted as the foundation for spousal immunity.[204]

> The most common rationale for the marital rape exemption is Hale's notion that a marriage constitutes a contract. The terms of this contract include a wife's irrevocable consent to have sexual intercourse with her husband, whenever he wishes. This has fostered the notion that a husband has a "marital right" to sexual intercourse. According to the theory of implied consent, marital rape can never occur because all sexual contact within a marriage is assumed to be consensual.[205]

Indeed, it has always been recognized that marital contracts, and its attendant "obligations," are not equivalent to non-marital contractual relationships and obligations.[206] One significant difference between the two is that the state is an

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[200] Lalenya Weintraub Siegel, Note, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 356 (1995) (footnotes omitted).

[201] *Id.* at 357 (footnote omitted).

[202] Jaye Sitton, Comment, *Old Wine in New Bottles: The "Marital" Rape Allowance*, 72 N.C. L. REV. 261, 265 (1993).

[203] Siegel, *supra* note 200, at 353 (footnote omitted).

[204] Sitton, *supra* note 202, at 265 ("The historical view of marriage as a contract has likewise been viewed as supporting the marital rape exemption.").

[205] Siegel, *supra* note 200, at 354 (footnotes omitted).

[206] MORRIS PLOSCOWE, SEX AND THE LAW 3 (1951); Pisciotta v. Buccino, 91 A.2d 629, 630–31 (N.J. Super. Ct. App. Div. 1952); Lindquist v. Lindquist, 20 A.2d 325 (N.J. 1941).

interested party in the former but not the latter.[207] Traditionally, a marriage contract was irrevocable, and sexual intercourse with one's husband was an obligation under it. This was because the marital contract recognized sex as "an established right," so spousal rape was simply the "exercise of a contractual right."[208] Thus, as is apparent with the marital-rape exemption, an application of contract law principles to this area would constitute a return to the archaic societal notions of treating humans as property, a concept long since rejected in virtually every aspect of civilized society.[209]

However, one may just as easily conclude that a matrimonial contract is not a valid contract at all. "[I]ts provisions are unwritten, its penalties unspecified, and the terms of the contract are typically unknown to the 'contracting' parties. Prospective spouses are neither informed of the terms of the contract nor are they allowed any options about these terms."[210] Two further arguments discredit the contract theory: first, under contract law, private parties generally are not permitted to use self-help methods to remedy a contract breach.[211] Second, the remedy for breach of contract for personal services is not specific performance.[212] "Personal services are unique, and contract law does not require a person to perform against her will."[213] Hence, even if it were to be accepted that a spouse breached the marital contract by not having sexual intercourse with the other spouse, the latter should not be permitted to enforce the contract by physically forcing the former to have sexual intercourse. The fact that the matrimonial "contract" does not resemble a true contract at all is one of the strongest legal arguments for the outright rejection of spousal immunity.[214] An economic analysis treats marriage merely as the "structure" within which rational individuals negotiate self-interested agreements concerning sexual relations (and more).[215] Marriage is much more than merely a contract.[216] While it involves personal and societal notions of commitment, sacrifice, support, and dedication—all of which could be recognized in a contractual context—it is also intricately intertwined with love, personal choice, and subjective emotions—concepts far from the objective theory of contracts.

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[207] *Id.*

[208] Sitton, *supra* note 202, at 265 (footnotes omitted).

[209] Siegel, *supra* note 200, at 357.

[210] *Id.* at 356 (alteration in original) (footnote omitted).

[211] *Id.*

[212] *Id.*

[213] *Id.* (footnote omitted).

[214] *Id.*

[215] Estin, *supra* note 72, at 517.

[216] 55 C.J.S. *Marriage* § 1 (2019).

V. CONCLUSION

Application of an economic-based approach, reminiscent of contract law, to criminal sexual assault fails for several reasons.[217] The economic models hinge on the notions of efficiency and maximized utility, but the personal choices of consensual sexual relations involve much more than a purely analytical, wealth-based decision for which there is no universal norm.[218] Although economics provides a vocabulary for describing many of the factors that complicate these models in the real world, a careful analysis of these problems highlights the enormous practical constraints on any system of human relations, including consensual sexual ones.[219] A contract-based approach to sexual relations depends on criteria that are not based on efficiency, as contract law never bridges the gap between economic theory and the many complex realities of consensual sexual relations, let alone nonconsensual sexual relations.

Given the comparisons and contrasts between contract law, under prevailing economic theories, and criminal law, specifically as applied to sexual assault, these areas of law have no place being compared and synthesized in determining how to equate, determine, and remedy whether sexual assault has occurred. "Rape is necessarily and essentially an act of . . . self-aggrandizement, while sexual communion mutually entered into connotes and communicates love, respect and a gift of physical pleasure."[220] As a result, the laws surrounding sexual assault are unique in nature, and are certainly separate and distinct from a strict application of contract law. Examining the law of contracts and the law of sexual assault inherently infers that the two dichotomies do not create a cohesive pair. To construe the two principles together would be to disservice the law and to muddle vastly divergent concepts of what it is to offer, accept, reject, or withdraw an agreement.

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[217] Estin, *supra* note 72, at 596–97.

[218] *But see id.*

[219] *Id.*

[220] State v. Smith, 372 A.2d 386, 389–90 (N.J. Essex County Ct. 1977), *aff'd*, 404 A.2d 331 (N.J. Super. App. Div. 1979), *rev'd*, 426 A.2d 38 (N.J. 1981); *see also* Kranstuber, *supra* note 50, at 787–88.