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SEXUAL CONSENT AS A COMMON LAW DOCTRINE

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I. INTRODUCTION

Currently, the common law is comprised of property, tort, and contract, but it once included criminal law.[1] In the United States, criminal law has become a

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† The views expressed in this Article are solely those of the author, and in no way reflect the views of the University of Wyoming College of Law, the Wyoming State Bar, the *Wyoming Law Review*, nor any of its members.

[1] *See, e.g.*, Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1 (1985).

creature of statute.[2] The common law crime of rape might be the most different from its statutory equivalent, as it required a showing of force and provided for spousal immunity.[3] These differences were codified in the late 20th century in the statutory offense of "sexual assault" or as amendments to "rape" statutes in other jurisdictions.[4]

Despite such differences, both the 18th century apologists of the common law crime and the 20th century framers of the modern offense argued that the law should protect consent.[5] For example, spousal immunity was once justified on the ground that women consent to marriage (at least theoretically), just as the legislative abolition of the spousal immunity defense was based on the fact that a spouse can withdraw consent.[6] Accordingly, sexual assault has come to be recognized as the quintessential crime with a consent defense.[7]

Despite general agreement that nonconsensual sex is the essence of sexual assault, scholars of the "sui generis" crime have struggled to articulate which circumstances invalidate consent, notably in such controversial areas as mental

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[2] *See* United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812) (holding that only legislation can create a federal crime). The authority of state courts to enforce or create common law crimes is limited. *See* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. (forthcoming 2019).

[3] *See, e.g.*, Lalenya Weintraub Siegel, Note, *The Marital Rape Exemption: Evolution to Extinction*, 34 CLEV. ST. L. REV. 351, 352–53, 352–53 nn.3–8 (1995) (noting that spousal immunity survives only in Ohio Rev. Code Ann. § 2907.02 (LexisNexis 2018) as a partial exemption to the abolition of the force requirement); *see also* Patricia J. Falk, *Husbands Who Drug and Rape Their Wives: The Injustice of the Marital Exemption in Ohio's Sexual Offenses*, 36 WOMEN'S RTS. L. REP. 265 (2015) (arguing that Ohio's failure to treat cases of drugging as forcible is unjust, despite its apparent basis in sound statutory interpretation).

[4] P. Bryden & Sonja Lengnick, *Criminal Law: Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1198 (1997). Twenty-two states have sexual assault statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1406 (2017); COLO. REV. STAT. § 18-3-402 (2018); N.J. STAT. ANN. § 2C:14-2 (2019); TEX. PENAL CODE ANN. § 22.011 (West 2017); WYO. STAT. ANN. § 6-2-302 (2018). Twenty-four states have rape statutes. *See, e.g.*, MASS. GEN. LAWS ch. 265, § 22 (2018); 18 PA. CONS. STAT. § 3121 (2018); VA. CODE ANN. § 18.2-61 (2018). While there is no consistent definition for either term, sexual assault more frequently includes all sexual acts, and sometimes second and fourth degree sexual assault includes all sexual contact. *See, e.g.*, ARK. CODE ANN. §§ 5-14-124 to -127 (2018) (requires authority figure); CONN. GEN. STAT. §§ 53a-70 to -71 (2018); HAW. REV. STAT. §§ 707-730 to -733 (2018); NEB. REV. STAT. §§ 28-319 to -320 (2018).

[5] *Compare* 4 WILLIAM BLACKSTONE, COMMENTARIES *213 (expressing pride in the common law's recognition of the inalienable right to withdraw consent), *with* Luis E. Chiesa, *Solving the Riddle of Rape-by Deception*, 35 YALE L. & POL'Y REV. 407, 440–42 (2017) (describing the move away from the common law's failure to protect consent).

[6] *Compare* MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629–30 (Robert Small ed., 1847)(1736) (discussing spousal consent to marriage justification), *with* Falk, *supra* note 3, at 288–89 (discussing revocability of spousal consent).

[7] *See, e.g.*, Carol Sanger, *Feminism and Disciplinarity: The Curl of the Petals*, 27 LOY. L.A. L. REV. 225, 258 (1993) (noting that law professors typically use it as such).

capacity, abuse of trust, and abuse of authority.[8] In contrast, the more stable body of contract law has proven susceptible to black letter principles.[9] Contract law has remained stable despite changing and variable commercial practices because it has been reduced to a broad, descriptive framework.[10] This Article endeavors to provide similar principles for sexual assault because consent does and should turn on the same concept as in contract law.[11] Contract law is well-equipped to answer one of sexual assault's thorniest doctrinal questions: whether assent amounts to valid consent.[12]

Part II of this Article first deconstructs critiques that sexual assault law does not consistently recognize circumstances invalidating consent, namely incapacity, fraud, and imbalances of power.[13] The first critique is that the many exceptions to statutory rape represent a failure to protect children who lack the capacity to consent.[14] The second critique is that sexual assault law does not or cannot recognize the power of fraud to invalidate consent in a principled manner.[15] The third critique suggests that sexual assault law does and should turn on abuse of power, instead of consent.[16] Part II argues that these critiques are based on invalid conceptions of consent.[17]

The threefold attack on consent regarding incapacity, fraud, and the abuse of power, should concern prosecutors, defendants, and legislatures. This Article

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[8] Robin L. West, *Legitimating the Illegitimate: A Comment on* Beyond Rape, 93 COLUM. L. REV. 1442, 1449 (1993) ("Rape is sui generis."); *Model Penal Code: Sexual Assault and Related Offenses*, AM. L. INST., https://www.ali.org/projects/show/sexual-assault-and-related-offenses/ (last visited February 9, 2019) [hereinafter *Sexual Assault and Related Offenses*] (video remarks of Stephen J. Schulhofer) (explaining that the otherwise successful Model Penal Code failed to provide a lasting definition of sexual assault because of controversy concerning when mental capacity, abuse of trust, and abuse of authority invalidate consent).

[9] *See* Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508 (1998); RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 327 (1995) ("[W]e could do as well with the Roman law of contract as we do with any modern system dedicated to the principle of freedom of contract."); *see also infra* notes 148–52 and accompanying text (discussing welfare justifications for contractual protection of consent).

[10] *See* Maggs, *supra* note 9, at 508 (explaining that the Restatement (Second) of Contracts, though rule-based, is abstract enough to avoid deviating from first principles); *see also* Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

[11] Sexual assault and breach of contract both turn on consent, although the former frames consent as a defense and the latter frames the absence of consent as a defense. *See infra* notes 167–68 and accompanying text.

[12] *See* ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS back cover (2003) (summarizing "the difficult question [as] whether 'yes' means 'yes.'").

[13] *See infra* notes 26–103 and accompanying text.

[14] *See infra* notes 34–50 and accompanying text.

[15] *See infra* notes 51–88 and accompanying text.

[16] *See infra* notes 89–103 and accompanying text.

[17] *See infra* notes 26–103 and accompanying text.

aims to provide them with a clear and uniform consent model that will stand the test of time. Part III applies contract doctrines to define consent consistently with current sexual assault law.[18] This part does so by introducing several novel insights, namely: (1) that the inconsistencies in the protection of incapacity can be reconciled by replacing capacity with the contractual concept of undue influence;[19] (2) that the doctrine of fraud in the factum represents a principled justification for the contours of the modern offense of sexual assault by fraud;[20] and (3) that the contractual standard of duress, along with the common law's treatment of monopoly power, demonstrate that criminal law's redress of power imbalances is conterminous with consent.[21]

Part IV addresses the advantages of the contractual model for the criminal justice system.[22] Specifically, a proper understanding of consent will provide the benefits of substantive justice, enhanced public cooperation, and a clearer jurisprudence.[23]

Part V summarizes this Article's insights about consent in the realm of criminal sexual assault and presents them in the form of a model code.[24] Such a code would have the dual merits of codifying paradigmatic cases of sexual wrongdoing while achieving the universality of a common law standard. Thus, this Article will frame sexual assault as a common law crime.[25]

II. INVALID CRITIQUES OF THE CURRENT LAW'S FAILURE TO CONSISTENTLY PROTECT CONSENT

Critiques of contractual consent as an adequate model of sexual assault law assert that the law fails to consistently recognize nonconsensual sexual acts in the following circumstances: (1) incapacity; (2) fraud; and (3) imbalances of power. The first of these arguments is that sexual assault law fails to embody the consent model because of the marital defense to certain kinds of statutory

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[18] *See infra* notes 104–43 and accompanying text.

[19] *See infra* notes 109–18 and accompanying text. Undue influence is an act of persuasion that is unfair in view of the relationship between the parties. RESTATEMENT (SECOND) OF CONTRACTS § 177 (AM. LAW INST. 1981).

[20] *See infra* notes 119–31 and accompanying text. Fraud in the factum is a fraud as to the essential nature of the transaction. 7 ARTHUR L. CORBIN ET AL., CORBIN ON CONTRACTS § 28.22 (2017).

[21] *See infra* notes 132–43 and accompanying text.

[22] *See infra* notes 144–69 and accompanying text.

[23] *See infra* notes 148–52 and accompanying text (explaining the benefits of substantive justice); *infra* notes 153–61 and accompanying text (explaining the benefits of public cooperation); *infra* notes 162–69 and accompanying text (explaining the benefits of clearer jurisprudence).

[24] *See infra* notes 170–83 and accompanying text.

[25] *See infra* notes 170–83 and accompanying text.

rape.[26] The apparent exception can be reconciled by reconceiving these crimes as nonconsensual because of undue influence, rather than incapacity.[27]

Inversely, the second argument takes an apparent exception to fraud protection as a flaw with the consent model.[28] While sexual assault law applies to fraud in the factum, it does not protect against fraud in the inducement, as in the case of a fraudulent offer of consideration for sex.[29] A growing trend in criminal scholarship considers the fraud in the factum doctrine meaningless, concluding that sexual assault law fails to protect consent generally.[30]

Finally, some authors have directly attacked the consent model by arguing that, regardless of consent, abuses of power are and ought to be considered sexual assault.[31] Accordingly, they argue that the best way to model sexual assault law would turn on abuse of power rather than consent.[32] Because sexual harassment is a type of abuse of power, the abuse of power model would eliminate the distinction between sexual harassment and sexual assault. This part of the Article will explain why the consent model can offer a better accounting of what the law recognizes as sexual assault than abuse of power.[33]

A. Apparent Exceptions to Incapacity Protection

Since the 13th century, statutes have deemed children below a certain age incapable of consenting to sex as a matter of law.[34] As its name would suggest, statutory rape is based on a legislative rule, rather than an individualized inquiry into the child's capacity.[35] Because not all children develop at the same rate, an age-based rule can result in convictions where the child had the subjective

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[26] *See infra* notes 34–50 and accompanying text. Broadly speaking, what these offenses have in common are that they: (1) specifically apply to teenagers; (2) can only be committed by a person with relative age or authority; (3) irrebuttably deem the act nonconsensual; and (4) have a spousal immunity defense. *Id.*

[27] *See infra* notes 109–18 and accompanying text. Undue influence is an act of persuasion that is unfair in view of the relationship between the parties. RESTATEMENT (SECOND) OF CONTRACTS § 177 (AM. LAW INST. 1981).

[28] *See infra* notes 51–88 and accompanying text.

[29] *See, e.g.*, *infra* notes 51–55 and accompanying text.

[30] *See infra* notes 51–88 and accompanying text.

[31] *See infra* notes 89–103 and accompanying text.

[32] *See infra* notes 89–103 and accompanying text.

[33] *See infra* notes 89–103 and accompanying text.

[34] *See* CAROLYN E. COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 10 (2004); 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, 344–45 (2017).

[35] *See* RICHARD POSNER, SEX AND REASON 402 (1992).

capacity to consent in fact but not in law, and in acquittals where the child, though above the age of consent and expressing willingness, could not consent.[36] However, to protect infants as a whole, the age of consent is codified. Precisely because infants lack the capacity to consent, the law places the risk of liability on adults, precluding a mistake-of-age defense.[37] Strict liability as to the age of consent is the only way to prevent adults from having sex with children who misrepresent their capacity.[38]

Because of its bright-line simplicity, statutory rape is a natural starting point for addressing the adequacy of sexual assault law in terms of consent. Despite this simplicity, critics point to a number of apparent inconsistencies in the treatment of capacity, both in support of age-difference statutes and against the marital exception.[39] The answer to reconciling these inconsistencies may be to adopt a new theory within the consent model, replacing incapacity with undue influence, which would turn on: (1) the vulnerability of a person who has the capacity to consent but who is still a child; and (2) abuse of that vulnerability by an adult.[40]

Turning to the age-difference exception, while children below a certain age can never consent to sex, a host of sexual assault statutes prescribe special rules for older children.[41] The archetypical exception, sometimes called a "Romeo and Juliet law," allows older children to consent to intercourse with a peer in-age without criminal liability.[42] Other laws allow older children to have sex with adults generally, but deem an act nonconsensual when the adult is an authority figure.[43] While a child's choice of sexual partner does not determine mental

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[36] *See id.*

[37] Ordinarily, under the mens rea requirements of criminal law, mistake as to the fact of consent is a defense. State v. Jadowski, 2004 WI 68, 272 Wis. 2d 418, 680 N.W.2d 810, 817 (Wisc. 2004).

[38] *Contra* Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as A Defense to Statutory Rape*, 101 NW. U. L. REV. 75 (2007) (questioning the fairness of punishing adults for an act to which they did not consent).

[39] *See infra* notes 42–45 and accompanying text.

[40] *See infra* notes 109–18 and accompanying text.

[41] *See infra* notes 42–43, 45.

[42] *See* Danielle Flynn, *All the Kids Are Doing It: The Unconstitutionality of Enforcing Statutory Rape Laws Against Children & Teenagers*, 47 NEW ENG. L. REV. 681, 687–91 (2013).

[43] *See, e.g.*, ALASKA STAT. §§ 11.41.434–.440 (2018) (sexual abuse of a minor); *id.* § 11.41.470 (definitions); FLA. STAT. § 794.011 (2018); IND. CODE § 35-42-4-9 (2019); IOWA CODE § 709.4 (2018); KY. REV. STAT. ANN. § 510.060 (LexisNexis 2018) (rape of minor); *id.* § 510.110 (sexual abuse); MD. CODE ANN., CRIM. LAW § 3-308 (LexisNexis 2018); WYO. STAT. ANN. § 6-2-303 (2018) (second degree sexual assault); *id.* § 6-2-301 (authority defined); *id.* § 6-2-314 (sexual abuse of a minor).

capacity to consent, the ability of an adult to exploit youthful vulnerability is essential to undue influence.[44]

Spousal immunity is another apparent exception to incapacity protection for children old enough to marry.[45] Marriage is also an exception to many student-teacher statutes.[46] The undue influence model can also reconcile this defense with consent because, unlike incapacity, undue influence depends on the relationship between the parties and can be overcome by independent advice.[47] In this case, the independent advice comes through the requirement that children cannot marry without parental consent or judicial approval.[48]

Accordingly, the exceptions to statutory rape of older children are not exceptions to the contractual consent model if the act is considered nonconsensual by reason of undue influence rather than incapacity.[49] However, inconsistency in another area of sexual assault law, fraud, has cast doubt on whether sexual assault turns on consent.[50]

B. Reconstructing the Doctrine of Sexual Assault by Fraud in the Factum

No current topic has engendered more controversy as to whether sexual assault consistently covers nonconsensual conduct than the crime of sexual assault

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[44] *See* 7 CORBIN ET AL., *supra* note 20, § 2810 (defining the elements of undue influence as the use of a dominant position against a subservient party); Ann T. Spence, *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, 37 COLUM. J.L. & SOC. PROBS. 57, 84 (2003) (suggesting an undue influence interpretation of statutes concerning authority figures).

[45] *See, e.g.*, DEL. CODE ANN. tit. 11, § 770 (2019); KY. REV. STAT. ANN. § 510.020 (LexisNexis 2018); LA. STAT. ANN. § 14:80 (2018); N.H. REV. STAT. ANN. § 632-a (2018); S.D. CODIFIED LAWS § 22-22-7 (2019); VT. STAT. ANN. 13, § 3253 (2018); W. VA. CODE § 61-8B-3 (2018). Because marriage does not change a person's mental capacity, one author considers the marital exception to statutory rape tantamount to legalized sexual assault. Jackson, *supra* note 34, at 344–45, 370–72.

[46] *See* ARK. CODE ANN. § 5-14-124 (2018); GA. CODE ANN. § 16-6-5.1 (2018); KAN. STAT. ANN. § 21-5512 (2018); LA. STAT. ANN. § 14:81.4 (2018); ME. REV. STAT. ANN. tit. 17-A, §§ 253–54, 255-A, 260 (2017); MICH. COMP. LAWS §§ 750.520d, .520e (LexisNexis 2018); MISS. CODE. ANN. § 43-47-18 (2019); NEV. REV. STAT. §§ 201.540–.550 (2018); N.M. STAT. ANN. § 30-9-11 (2018); N.C. GEN. STAT. § 14-27.32 (2018); S.C. CODE ANN. § 16-3-755 (2018); WASH. REV. CODE §§ 9A.44.093, .096 (2018); WIS. STAT. § 948.095 (2018).

[47] *See* 7 CORBIN ET AL., *supra* note 20, § 28.10 (defining undue influence); *see also*, *e.g.*, Modonese v. Delac Estate, [2011] B.C.S.C. 82, ¶ 121–23 (Can. B.C.) (noting that independent counsel can overcome undue influence in a testament).

[48] *See* Jackson, *supra* note 34, at 351–52 n.47 (listing statutes requiring parental consent for marriage). *See also*, *e.g.*, Bellotti v. Baird, 443 U.S. 622, 637 n.16 (1979) (noting that parents can consent on behalf of their children).

[49] *See supra* notes 34–48 and accompanying text.

[50] *See infra* notes 51–88 and accompanying text.

by fraud.[51] While all nonconsensual touching is battery, including touching for which assent was induced by a material fraud, sexual assault law only recognizes fraud in the factum.[52] Contrasted against the opposing concept of fraud in the inducement, fraud in the factum refers to misrepresentation of an act's essential nature, rather than its collateral consequences.[53] In sexual assault law, the two areas of deception considered essential for purposes of fraud in the factum are: (1) misrepresenting the actor's identity; and (2) misrepresenting that the act has a professional, rather than sexual, purpose.[54] A growing trend in criminal law scholarship considers the difference between essential and collateral misrepresentation meaningless, and therefore finds the state of the law to be inconsistent with consent.[55] Accordingly, a better explanation of fraud in the factum is needed to provide an adequate model of consent in sexual assault.

The first critique of fraud in the factum is that misrepresenting the actor's identity or the act's purpose are themselves the only significant examples of material fraud.[56] The problem with the first critique is that there are many other examples of material fraud.[57] Inversely, the second critique is that, because other examples of fraud in the inducement cause greater harm, the doctrine is unprincipled.[58] The flaw with the second critique is that the crime of sexual assault depends on the sexual nature of the act itself rather than the gravity of the harm caused by a nonconsensual act.[59] Finally, a third critique looks at the apparent inconsistencies with fraud in the factum to argue that, unlike contract law, sexual assault law can never find a consistent definition of consent.[60] The issue with the third critique is that, regardless of which area of law is more flawed in practice, both sexual assault law and contract law share the same fundamental goal of accurately defining consent.[61]

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[51] *See* Chiesa, *supra* note 5, at 459–61; Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013); Tom Dougherty, *No Way Around Consent: A Reply to Rubenfeld on "Rape-by-Deception,"* 123 YALE L.J. ONLINE 321, 328–29, 332–33 (2013); Patricia J. Falk, *Not Logic, but Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-by-Fraud*, 123 YALE L.J. ONLINE 353, 354–56 (2013) [hereinafter Falk, *Not Logic, but Experience*]; Kiel Brennan-Marquez, *A Quite Principled Conceit: A Response to Jed Rubenfeld*, The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy, 122 YALE L.J. 1372, 1375–76 (2013); Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1, 4 (2015).

[52] *See* Rubenfeld, *supra* note 51, at 1397–1401.

[53] 7 CORBIN ET AL., *supra* note 20, § 28.22.

[54] *See* Falk, *Not Logic, but Experience*, *supra* note 51, at 357–58.

[55] *See supra* note 51.

[56] *See infra* notes 62–64 and accompanying text.

[57] *See infra* notes 62–64 and accompanying text.

[58] *See infra* notes 65–80 and accompanying text.

[59] *See infra* note 72 and accompanying text.

[60] *See infra* notes 81–86 and accompanying text.

[61] *See infra* notes 81–86 and accompanying text.

The first argument for abandoning fraud in the factum is that it would be simpler and more consistent to describe sexual assault as encompassing all fraudulently induced consent because identity and professional-purpose misrepresentation are the two most significant material frauds.[62] However, not only are there other material frauds, but some may be even more harmful.[63] For example, at least one person has argued that impersonating a celebrity to obtain a sexual act from a fan *may* cause less harm than misrepresenting serious romantic intentions, fertility, sexually transmitted diseases, and prophylactics of the same.[64]

Thus, the second argument against fraud in the factum is not based on its redundancy, but rather its inconsistency.[65] This argument follows from breaking-down the distinction between essential and collateral misrepresentation, which supposedly turns on an arbitrary choice on how to describe the act consented to.[66] In other words, when there is fraud in the inducement, there is no consent to the combined act of sex plus collateral fact.[67] However far from being arbitrary, the decision whether consent, if any, applies to a sexual act is inherently required by the definition of sexual assault.[68]

Furthermore, the decision whether consent applies to a sexual act cannot be avoided by providing a narrower or broader description of the subject act.[69]

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[62] *See* Yung, *supra* note 51, at 13; Falk, *Not Logic, but Experience*, *supra* note 51, at 365–68; POSNER, *supra* note 35, at 392–93 (explaining why fraud in the inducement may be less harmful).

[63] *See* notes 62–64 and accompanying text.

[64] *See* Chiesa, *supra* note 5, at 459–61.

[65] *See infra* notes 66–68 and accompanying text.

[66] *See* WERTHEIMER, *supra* note 12, at 206.

[67] *Id.*

[68] California, the District of Columbia, Maine, Maryland, North Carolina, North Dakota, and Vermont use "sexual acts," as the actus reus of the offense while Illinois, New York, and Ohio use "sexual conduct." *See* CAL. PENAL CODE § 261 (Deering 2018); D.C. CODE § 22-3002 (2018); 720 ILL. COMP. STAT. 5/11-1.20 (LexisNexis 2018); ME. REV. STAT. ANN. tit. 17-A, § 253 (2017); MD. CODE ANN., CRIM. LAW § 3-303 (LexisNexis 2018); N.Y. PENAL LAW § 130.35 (McKinney 2019); N.C. GEN. STAT. § 14-27.21 (2018); N.D. CENT. CODE §§ 12.1-20-03 to -04 (2019); OHIO REV. CODE ANN. § 2907.02 (LexisNexis 2018); VT. STAT. ANN. tit 13, § 3252 (2018). Additionally, Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Washington, and West Virginia, Wisconsin, and Wyoming use "sexual contact," typically for a lesser offense. *See* ALA. CODE § 13A-6-66 (2018); COLO. REV. STAT. § 18-3-404 (2018); DEL. CODE ANN. tit. 11, § 767 (2019); KY. REV. STAT. ANN. § 510.110 (LexisNexis 2018); ME. REV. STAT. ANN. tit. 17-A, § 255-A (LexisNexis 2019); MINN. STAT. §§ 609.342–.3451 (2019); MO. REV. STAT. § 566.100 (2018); N.Y. PENAL LAW §§ 130.52, .65 (McKinney 2019); N.C. GEN. STAT. § 14-27.33 (2018); N.D. CENT. CODE §§ 12.1-20-03 to -04 (2019); OR. REV. STAT. §§ 163.415 to .425 (2018); S.D. CODIFIED LAWS §§ 22-22-7.1, -7.4 (2019); TENN. CODE ANN. §§ 39-13-501, -505 (2018); WASH. REV. CODE §§ 9A.44.010, 100 (2018); W. VA. CODE § 61-8B-7 (2018); WYO. STAT. ANN. §§ 6-2-301, 303 (2019).

[69] *See infra* notes 70–72 and accompanying text.

Physical penetration is a narrower definition of the act, but reliance on such an alternative test for fraud would require treating, for example, penetrative medical treatment performed with a reckless failure to obtain informed consent the same as concealing a sexual purpose.[70] Such an approach may be contrary to law as most states prohibiting nonconsensual "sexual contact" further define the actus reus with respect to a "sexual purpose."[71] Moreover, such a narrow definition would not align with the psychological harm caused by an involuntary sexual act, which is what sets sexual assault apart as a more serious offense than battery.[72]

Conversely, a broader definition of the actus reus of sexual assault would include collateral facts such that the inquiry becomes whether the assailant misrepresented an undesirable act as a desirable act.[73] The problem with attempting to state sexual assault in such general terms, whether *any* act was induced by material fraud, is exactly that.[74] Accordingly, fraud in the factum turns on the same inquiry as any case of sexual assault: whether consent was given to a sexual act.[75]

Even though sexual assault requires a definition of the sexual act, some scholars have suggested abandoning the fraud in the factum doctrine by opening sexual assault to include sexual acts that are candidly represented as sexual and are induced by a material misrepresentation of collateral facts, such as fertility or infection.[76] However, the psychological harm suffered by such acts may be

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[70] *Cf., e.g.*, Duncan v. Scottsdale Med. Imaging, Ltd., 70 P.3d 435, 439 (2003) (explaining negligence liability for physicians who fail to obtain informed consent).

[71] *See* FLA. STAT. § 794.011(1)(h) (2018) ("[S]exual battery does not include an act done for a bona fide medical purpose."); OHIO REV. CODE ANN. § 2907.01 (LexisNexis 2018) (defining "sexual contact" with respect to a sexual purpose); OR. REV. STAT. §§ 163.452–.454 (2018); 11 R.I. GEN. LAWS § 1-37-1 (2019); S.C. CODE ANN. § 16-3-651 (2018) (excluding acts performed with a medical purpose from the definition of "sexual contact"); S.D. CODIFIED LAWS § 22-22-7.1 (2019); TENN. CODE ANN. § 39-13-501 (2018) (defining "sexual contact" with respect to a sexual purpose); UTAH CODE ANN. § 76-5-404 (LexisNexis 2018) (defining "forcible sexual abuse" with respect to a sexual purpose); WASH. REV. CODE § 9A.44.010 (2018) (defining "sexual contact" with respect to a sexual purpose); W. VA. CODE § 61-8B-1 (2019) (defining "sexual contact" with respect to a sexual purpose); WIS. STAT. § 940.225 (2017); WYO. STAT. ANN. § 6-2-301 (2018).

[72] Yung, *supra* note 51, at 4–5 (explaining that unique, psychological harm sets sexual assault apart from other violent crimes).

[73] *See infra* notes 74–75 and accompanying text.

[74] As with narrowing sexual assault to penetration, broadening sexual assault to any act would fail to align with the statutory purpose of punishing sexual acts. *See supra* notes 69–72 and accompanying text.

[75] *See supra* notes 73–74 and accompanying text.

[76] *See* Katherine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221 (2015) (proposing a tort for fraud in the inducement); Dougherty, *supra* note 51, at 328–29, 332–33 (proposing a lesser offense for fraud in the inducement); Alexandra Brodsky, *'Rape-Adjacent': Imagining Legal Responses to Nonconsensual Condom Removal*, 2 COLUM. J. GENDER. & L. 183 (2017); *contra* SUSAN ESTRICH, REAL RAPE 102 (1987) ("The 'force' or 'coercion' that negates consent ought to be defined to include . . . misrepresentations of material fact.").

distinguished from the experience of a nonconsensual sexual act.[77] These scholars tacitly admit as much in accepting that fraud in the inducement should constitute a lesser offense than sexual assault.[78] The lesser offenses are often included as battery or as a more specific offense aimed at the collateral harm.[79]

Despite the soundness of the factum doctrine, Professor Corey Rayburn Yung has used its apparent weaknesses to assert that sexual assault cannot turn on a principled definition of consent in the same way that contract law does.[80] Professor Yung writes that consent cannot be distilled to abstract principles because the law results from multifaceted, real-world compromises.[81] However, this general problem with legal theories is consistent with a principled, descriptive model.[82] Further arguing that sexual assault law is uniquely ad hoc, Professor Yung asserts that sexual consent must involve simple rules by which criminals can predictably be held accountable without a written record.[83] This is incompatible with borrowing definitions of consent from contract law, Professor Yung asserts, lest the criminal law produce absurd results such as requiring notarization before every sexual act.[84] This half-jesting conclusion perpetuates a century-old misconception of contract law as a body of formalities rather than principles.[85] Contract law does not require writings except for under the statute of frauds, which, as its name suggests, has more to do with preventing perjury than defining

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[77] *See* POSNER, *supra* note 35, at 392–93 (contrasting fraud in the factum as "disgusting as well as humiliating, rather than merely humiliating as in the case of the [more] common [collateral] misrepresentations"); Falk, *Not Logic, but Experience*, *supra* note 51, at 361.

[78] *See supra* note 77.

[79] *See HIV and STD Criminal Laws*, CTR. FOR DISEASE CONTROL, https://www.cdc.gov/hiv/policies/law/states/exposure.html (last updated Nov. 30, 2018) (noting that concealing a sexually transmitted disease can be prosecuted as reckless endangerment and attempted murder). The harm of concealing fertility, while recoverable, has not been treated as severely as it could be in order to serve the interests of the child. *See* Anne M. Payne, Annotation, *Sexual Partner's Tort Liability to Other Partner for Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control Resulting in Pregnancy*, 2 A.L.R. 301 § 7 (1992); Michelle Oberman, *Sex, Lies, and the Duty to Disclose*, 47 ARIZ. L. REV. 871, 891–92 & nn.110–15 (2005) (listing cases of liability for special damages from misrepresentation). Fraud in the inducement is generally tortious, if not criminal. *See* Jane E. Larson, "*Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 404 n.133 (1993) (listing cases of recovery for reliance on sexual promises); RESTATEMENT (SECOND) OF TORTS § 530 cmt. c (AM. LAW INST. 1977) (liability for reliance on unenforceable promise).

[80] *See* Yung, *supra* note 51, at 4 ("Ultimately, Rubenfeld's errors leading him to his disastrous conclusion highlight the need for a clearer articulation of rape law foundations.").

[81] *Id.* at 5, 14–15.

[82] *See id.* at 28–29.

[83] *Id.* at 11–12.

[84] *Id.*

[85] *See, e.g.*, Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV., no. 2, 2007, at 206, 237–40 (first restatement); Maggs, *supra* note 9, at 508 (second restatement).

consent.[86] In fact, the contract standard of fraud is based on a fact-specific inquiry into the parties' justified expectations of disclosure.[87]

C. Failure to Account for Power Imbalances

Giving up the project of defining consent and sexual assault harmoniously, Professors Bucchandler-Raphael and Schneebaum have instead proposed adopting an abuse of power theory.[88] Under the abuse of power model, a sexual act constitutes sexual assault when it is induced by an abuse of power, notwithstanding consent.[89] The first argument for the abuse of power model is that there is no other way to justify a number of sexual assault statutes that do not appear to have a consent defense.[90] However, these statutes lack a consent defense because they apply to nonconsensual situations. The second argument is that the absence of consent is repetitive of any finding of an abuse of power.[91] However, coercion is not the only way to abuse power. Power may also be abused in order to provide a consensual benefit.

The abuse of power model fails as a replacement for consent because it fails to support several paradigmatic cases of sexual assault conviction.[92] Proponents of the abuse of power model assert that the consent model fails to justify certain sexual assault statutes, such as those that prohibit relationships in custody, where there the act is irrebuttably deemed nonconsensual.[93] However, the prohibition of custodial relationships can be easily justified on the grounds that the abuse of power makes the act nonconsensual.[94] As in the examples of statutory rape and undue influence, a statutory presumption may provide the most accurate

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[86] *See* Act for Prevention of Frauds and Perjuries 1677, 29 Chas. 2 c. 3 (Eng.) (stating in particular the policy of providing stable title to land).

[87] *See* RESTATEMENT (SECOND) OF CONTRACTS § 169 (AM. LAW INST. 1981) (when reliance is not justified); *id.* § 161 (when disclosure is required); U.C.C. § 2-201 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 1977) ("The only term which must appear [in the writing] is the quantity term . . . ."); PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 44–45 (1965) (describing the spectrum of good faith based on market expectations).

[88] *See* Michal Buchhandler-Raphael, *Sexual Abuse of Power*, 21 U. FLA. J.L. & PUB. POL'Y 77 (2010) [hereinafter Buchhandler-Raphael, *Sexual Abuse of Power*]; Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147 (2011) [hereinafter *The Failure of Consent*]; Galia Schneebaum, *What Is Wrong With Sex In Authority Relations? A Study in Law and Social Theory*, 105 J. CRIM. L. & CRIMINOLOGY 345 (2015).

[89] *See* Buchhandler-Raphael, *Sexual Abuse of Power*, *supra* note 88, at 132.

[90] *See infra* notes 94–98 and accompanying text.

[91] *See infra* notes 99–103 and accompanying text.

[92] *See infra* note 103 and accompanying text.

[93] *See* Buchhandler-Raphael, *Sexual Abuse of Power*, *supra* note 88, at 79; Schneebaum, *supra* note 88, at 346–47.

[94] *See infra* notes 132–43 and accompanying text.

determination of consent.[95] Likewise, the abuse of power model is not immune from the need for inflexible statutory presumptions.[96]

After reasoning that some instances of abuse of power are consensual but deserving of punishment, Professor Buchhandler-Raphael makes the inverse argument that all abuses of power are indeed nonconsensual.[97] Accordingly, she asserts that the "redundant" concept of sexual consent is not worth defining since a simpler and more accurate definition of sexual assault would be as a sexual abuse of power.[98] However, Professors Bucchandler-Raphael's and Schneebaum's definition of sexual assault is itself repetitive of existing sexual harassment law, and is both over and under inclusive of sexual assault.[99] The definition is over inclusive because abuses of power not involving custody or threats can be consensual, the classic case being acceptance of a bribe.[100] The definition is underinclusive because not all nonconsensual sexual acts are induced by an abuse of power, for instances in cases of force, unconsciousness, or impersonation.[101]

III. THE CONTRACTUAL MODEL OF CONSENT

Contractual consent, or the lack thereof, is necessary for a sexual assault conviction despite the doctrinal challenges regarding capacity, fraud, and the abuse of power.[102] First, the contract doctrine of undue influence is better suited to address the exploitation of older children while respecting their capacity to

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[95] *See supra* notes 34–50 and accompanying text (describing statutory rape and related offenses); *contra* Buchhandler-Raphael, *Sexual Abuse of Power*, *supra* note 88, at 132 (criticizing the legal presumptions inherent in defining consent).

[96] *See* Buchhandler-Raphael, *Sexual Abuse of Power*, *supra* note 88, at 132 (noting that the offense would have to be limited to abuses of official, but not personal, relationships).

[97] *See* Buchhandler-Raphael, *The Failure of Consent*, *supra* note 88, at 204, 215.

[98] *See id.*

[99] Professor Schneebaum asserts that protecting professional spaces is a broader project than sexual harassment, which requires injury and serves the limited purpose of protecting "socially disadvantaged groups from discrimination." Schneebaum, *supra* note 88, at 354 n.52. However, sexual harassment can potentially take the form of an unlawful benefit and is not restricted to female victims. *See, e.g.*, Tenge v. Phillips Modern Ag Co., 446 F.3d 903, 908–09 (8th Cir. 2006) (observing that widespread sexual favoritism can amount to a hostile work environment); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT, 2 n.3 (March 19, 1990), https://www.eeoc.gov/eeoc/publications/upload/currentissues.pdf (noting that men may be victims and women may be harassers).

[100] *See* Schneebaum, *supra* note 88, at 385 (noting that the abuse of power model does not alter the legal standard for consent); *id.* at 383–84 (suggesting that relevant inquiries into consent can include who initiated the act, in what context the act was initiated, and how many times the act was initiated).

[101] *See id.* at 383 n.182 (conceding that a theory of coercion is outside scope of abuse of power model).

[102] *See infra* notes 105–43 and accompanying text.

consent.[103] Second, the doctrine of fraud in the factum can distinguish between misrepresenting an act's essentially sexual purpose and its collateral consequences.[104] Third, blanket prohibitions on sexual acts in custody are consistent with consent because custody is an inherently coercive environment where one person has a monopoly on another's choices.[105] This part will progress in the same order as Part II, starting with examples of incapacity and its reorganization within the consent model before progressing to fraud and abuse of power and their importance for the consent model's overall authority.[106]

A. The Apparent Exceptions to Incapacity are Examples of Undue Influence

For decades, courts have recognized a role for undue influence in sentencing the sexual assailants of children, even without legislative endorsement of the doctrine.[107] Today, about half of state legislatures recognize that children who may otherwise have the factual capacity to consent cannot legally consent to sexual acts with authority figures and older adults.[108] While these statutes have been criticized for allowing exceptions that seem irrelevant to capacity, such as marriage, these results can be reconciled with the both the contours of the offense and the contractual model of consent by treating them as cases of undue influence.[109]

Undue influence is the best way to describe a genus of offenses that: (1) specifically apply to teenagers; (2) can only be committed by a person with relative age or authority; (3) irrebuttably deem the act nonconsensual; and (4) have a spousal immunity defense.[110] Point one concerns the fact that teenagers have the capacity to consent but are still more vulnerable than adults.[111] Point two relates to the fact that someone who lacks such vulnerability can exploit it.[112] Point three relates to the fact that, like traditional statutory rape based on incapacity, the statutory regime protects the vulnerable by deeming the

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[103] *See infra* notes 109–18 and accompanying text.

[104] *See infra* notes 119–31 and accompanying text.

[105] *See infra* notes 132–43 and accompanying text.

[106] *See infra* notes 109–43 and accompanying text.

[107] *See* State v. Meyers, 799 N.W.2d 132, 144–47 (Iowa 2011); Powe v. State, 597 So. 2d 721 (Ala. 1991); State v. St. Amant, 536 A.2d 897, 900–01 (R.I. 1988); Commonwealth v. Rhodes, 510 A.2d 1217, 1226 (Pa. 1986); *cf.* ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 4 (1981) ("The terminology of philosophical art is coercive: arguments are *powerful* and best when they are *knockdown*, arguments *force* you to a conclusion, if you believe the premisses [sic] you *have to* or *must* believe the conclusion. Some arguments do not carry much *punch*, and so forth.").

[108] *See supra* note 43.

[109] *See supra* notes 34–50 and accompanying text.

[110] *See supra* notes 34–50 and accompanying text.

[111] *See supra* notes 34–50 and accompanying text.

[112] *See supra* notes 34–50 and accompanying text.

act nonconsensual.[113] Finally, point four relates to the foregoing three elements of undue influence because child marriage, where permitted, requires the approval of a parent or judge who is neither vulnerable nor exploited.[114] Accordingly, once the doctrine of undue influence is properly understood, the offenses governing older children are fully harmonious with consent.[115] The same can also be said for defining consent in another type of sexual assault offense: fraud.[116]

B. Sexual Assault Law Embodies the Doctrine of Fraud in the Factum

In contract law, fraud in the factum occurs when a party misrepresents the essence or existence of a contract.[117] Unlike fraud in the inducement, fraud in the factum makes contracts void rather than voidable, meaning that the defrauded party maintains an absolute right in the object of the contract.[118] Consent in sexual assault turns on fraud in the factum, requiring disclosure of the sexual purpose of an act with a particular person.[119]

Two scenarios illustrate the principle in sexual assault. The first case illustrates a sexual purpose that is manifested to a professional, and the second scenario illustrates a sexual purpose that is concealed by a professional.[120] The first scenario is fraud in the inducement and the second scenario is fraud in the factum. In both scenarios, as in contract law, a professional relationship transforms the elements of fraud.[121]

For example, sex work is a natural topic of consideration for delineating sexual consent.[122] Courts have found that a bad faith promise to pay a sex worker is fraud in the inducement because payment is a collateral fact while the sexual nature of the act is known.[123] As with other fraud in the inducement cases, the

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[113] *See supra* notes 34–50 and accompanying text.

[114] *See supra* notes 34–50 and accompanying text.

[115] *See supra* notes 34–50 and accompanying text.

[116] *See infra* notes 119–31 and accompanying text.

[117] 7 CORBIN ET AL., *supra* note 20, § 28.22.

[118] *Id.*

[119] *See supra* notes 51–88 and accompanying text.

[120] *Compare infra* notes 124–26 and accompanying text, *with infra* notes 127–29 and accompanying text.

[121] *See supra* note 88 and accompanying text.

[122] *See infra* notes 125–29.

[123] Regina v. Petrozzi, [1987] 13 B.C.L.R. 2d. 273 (Can. B.C.); R v. Linekar [1995] 3 All ER 69 (appeal taken from Eng.). The Canadian Supreme Court later overruled *Petrozzi* as a matter of statutory interpretation, recognizing fraud as a "significant risk of serious bodily harm" (i.e., failure to disclose a sexually transmitted disease). *See* Regina v. Cuerrier, [1998] 2 S.C.R. 371 (Can.). The outcome of *Cuerrier* can be reached by the parallel approach of treating disease exposure as an equally serious crime of violence instead. *See supra* note 80 and accompanying text. In contrast to

defendants could have been prosecuted under crimes remedying the collateral harm instead.[124]

In contrast, a growing number of sexual assault statutes criminalize the act of misrepresenting a sexual purpose as a professional, psychiatric purpose.[125] Like fraud in the inducement, such a misrepresentation can be characterized as a promise that a sexual act will somehow improve the patient's situation.[126] However, when made by a psychiatric professional, especially in a formal setting, such a promise is tantamount to misrepresenting the act as medical treatment.[127]

Some states construe fraud in the factum as inclusive of all impersonation and professional-purpose misrepresentation without any specific legislative guidance.[128] A number of states purport to abandon fraud in the factum only to reach the same result based on less sound methodology.[129] In any case, consensus on which cases to prosecute is more easily done than said. The same also goes for abuses of power, which inspire the most fundamental theoretical disagreements about consent.

C. The Common Law Recognizes Power Imbalances as Coercive

The treatment of sexual assault in situations involving power is important because such situations have been used to question the adequacy of consent, or lack thereof, as an element of sexual assault.[130] To the contrary, the consent model provides the most exact theory to regulate power imbalances. Specifically, the contract definition of coercion is "an improper threat . . . that leaves the victim no reasonable alternative . . . ."[131] "Improper" is a slightly broader concept than illegal.[132] Thus, what is improper can depend on the power (and corresponding duty not to abuse it) of the person making the threat. For example,

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meretricious relations, marriage is sometimes recognized as the only enforceable sexual contract, and thus divorce remedies may turn on fraud in the inducement. *See* STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 157 (1998); Neal v. Neal, 873 P.2d 871, 876–77 (Idaho 1994) ("[F]raud or misrepresentation vitiates . . . consent.").

[124] *See* 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, 1802 n.69 (1992) (explaining theft of services).

[125] *See* Falk, *Not Logic, but Experience*, *supra* note 51, at 357–58 nn.23–29.

[126] *See supra* notes 65–80 and accompanying text.

[127] *See* WERTHEIMER, *supra* note 12, at 230.

[128] *See* Falk, *Not Logic, but Experience*, *supra* note 51, at 357–58.

[129] *Id.*; Christopher & Christopher, *supra* note 38, at 86–89.

[130] *See supra* notes 89–103 and accompanying text.

[131] RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. LAW INST. 1981).

[132] *See id.* § 176.

an offer that discriminates against the recipient is considered a coercive threat when the offeror has monopoly power.[133] By the same principle, civil rights law prohibits discrimination by the common law equivalent of regulated monopolies: common carriers.[134]

Custodial sexual assault demonstrates the monopoly principle because no threat is required and assent is no defense.[135] While other areas of sexual assault involving incapacity and undue influence do not require a threat or consider assent relevant either, custodial sexual assault is distinguishable because it applies to adults who are not inherently vulnerable, but rather coerced by the fact that they are in custody.[136] First, an offer of a sexual act becomes an improper threat when it creates a discriminatory conflict of interest for a custodian with monopoly power.[137] Second, custody leaves no reasonable alternative because prisoners do not have access to a remedy before being coerced.[138]

Thus, treating custodial relations as categorically criminal is consistent with the contract doctrine of duress by physical compulsion, which treats consent for which there was no alternative at all as void ab initio.[139] Taking the comparison

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[133] *See* FRIEDRICK A. HAYEK, THE CONSTITUTION OF LIBERTY 136–37 (1960).

[134] *See* Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241 (2014) (explaining how civil rights law fits antitrust theory under the common law principles regulating the powers and corresponding duties of common carriers with monopoly power).

[135] *See* ALASKA STAT. § 11.41.427 (2018); ARIZ. REV. STAT. ANN. §§ 13-1412 to -1419 (2019); ARK. CODE ANN. §§ 5-14-124 to -127 (2019); CAL. PENAL CODE § 261 (Deering 2018) (including sexual acts "accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest or deport" as rape); COLO. REV. STAT. §§ 18-3-402, -404 (2018); *id.* § 18-7-701; CONN. GEN. STAT. §§ 53a-71, -73a (2018); FLA. STAT. § 794.011 (2018); GA. CODE ANN. § 16-6-5.1 (2017); HAW. REV. STAT. §§ 707-731–32 (2017); 720 ILL. COMP. STAT. 5/11-9.2 (2016); IOWA CODE § 709.16 (2017); KAN. STAT. ANN. § 21-5512 (2017); KY. REV. STAT. ANN. §§ 510.060, .120 (2017); LA. STAT. ANN. § 14:134.1 (2017); MASS. GEN. LAWS ch. 268, § 21A (2017); MO. REV. STAT. § 566.145 (2017); NEB. REV. STAT. § 28-322.02 (2018); NEV. REV. STAT. § 212.188 (2017); N.D. CENT. CODE § 12.1-20-07 (2017); OHIO REV. CODE ANN. § 2907.3 (2017); OKLA. STAT. tit. 21, § 1111 (2017); OR. REV. STAT. §§ 163.452–54 (2017); tit. 11 R.I. GEN. LAWS § 11-25-24 (2016); S.D. CODIFIED LAWS §§ 22-22-7.6, 24-1-26.1 (2017); TENN. CODE ANN. § 39-16-408 (2017); TEX. PENAL CODE ANN. § 39.04 (2015); UTAH CODE ANN. § 76-5-412 (West 2017); VA. CODE ANN. § 18.2-64.2 (2018); WASH REV. CODE §§ 9A.44.160–.170 (2017).

[136] *See infra* notes 139–40.

[137] *See* SCHULHOFER, *supra* note 123, at 147 (explaining that even a true offer implicitly signals to both recipients and nonparties alike that the offeror has breached the duty of nondiscrimination).

[138] *See Habeas Corpus: Requirement of Exhaustion of State Remedies Before Issuance of Writ Limited to State of Detention*, 1963 DUKE L.J. 374; RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. b., illus. 1 (AM. LAW INST. 1981) (providing that the absence of market alternatives to the breaching party's performance may leave litigation inadequate "if the threat involves, for instance, the seizure of property, the use of oppressive tactics, or the possibility of emotional consequences").

[139] Assent induced by physical compulsion is not only voidable, but void. RESTATEMENT (SECOND) OF CONTRACTS § 174.

to physical compulsion a step further, it bears noting that, despite the seemingly unusual application of antitrust theory to sexual assault, deeming custodial relations coercive is consistent with historical sexual assault doctrine.[140] For example, courts have found police officers guilty of sexually assaulting an arrestee through "implied threats," even under statutes recognizing force as the only kind of coercion.[141]

IV. ADVANTAGES OF THE COMMON LAW APPROACH

Acknowledging and refining the nonconsensual essence of sexual assault will provide both direct and indirect benefits.[142] Most directly, both punishing nonconsensual acts and permitting consensual acts serve the first principle of utilitarian morality.[143] Further, insofar as people value their utility, they will be motivated to enforce a sexual assault statute that properly defines consent.[144] Finally, most indirectly, the benefits of defining of consent extend to the common law as a whole.[145]

A. Substantive Justice

Legal economists measure utility using consent by relying on the presumption that people consent to transactions that make them better off.[146] Applying this reasoning to sexual assault, a sound construction of consent will deter harmful acts without curtailing sexual freedom.[147]

Deterring nonconsensual acts benefits society. Even if a criminal's utility were greater than the harm, requiring consent would not prevent a bargain where the surplus utility is redistributed.[148] Moreover, punishing such acts committed with

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[140] *See infra* note 143.

[141] *See* State v. Burke, 522 A.2d 725, 734 (R.I. 1987); Way v. United States, 982 A.2d 1135, 1137 (D.C. 2009); State v. Bright, 916 P.2d 922 (Wash. 1996); Sherman v. State Dep't of Pub. Safety, 190 A.3d 148, 186 (Del. 2018); MODEL PENAL CODE § 213.4(8) (AM. LAW INST. 1962).

[142] *See infra* notes 145–69 and accompanying text.

[143] *See infra* notes 148–52 and accompanying text.

[144] *See infra* notes 153–61 and accompanying text.

[145] *See infra* notes 162–69 and accompanying text.

[146] *See, e.g.*, David M. Driesen, *Contract Law's Inefficiency*, 6 VA. L. & BUS. REV. 301, 304–05, 306 n.15 (2012) (explaining the "attractively consensual" normative justification for contract law in welfare economics since consensual transactions are strong Pareto optimal); Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 4 (1960) (observing that it will be profitable to strike a utility enhancing bargain, regardless of where the parties' rights lie).

[147] WERTHEIMER, *supra* note 12, at 124–25 (defining the value of sexual consent in terms of the first principle of allowing mutually beneficial interactions).

[148] *See* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195–97 (1985) (characterizing crimes as "market bypassing" where transaction costs are low).

a criminal mens rea benefits society because, unlike productive risk taking, it is impossible to over-deter intentional wrongdoing.[149] Thus, a proper definition of sexual consent serves the first normative principle of promoting social utility. Furthermore, the constitution may require sex crimes to serve this principle.[150]

B. Public Cooperation

Since people value their utility, it is unsurprising that there is a strong community consensus regarding the blameworthiness of the modern equivalents of the common-law crimes.[151] This consensus around nonconsensual crimes promotes engagement with the criminal justice system, which requires cooperation from witnesses, jurors, police officers, prosecutors, judges, victims, and potential offenders in order to convict and deter.[152] Inversely, modern offenses prohibiting consensual conduct have higher rates of jury nullification.[153]

Public cooperation has also fallen in cases that prohibit consensual sexual conduct.[154] Thus, proponents of replacing the consent theory of sexual assault with the abuse of power model must concede that the proposal would only work if community standards were first changed.[155] The issue remains sensitive today, as the low reporting rate for sexual assault suggests low certainty regarding the ability of the criminal justice system to punish the offenses it prohibits.[156]

Regardless of how community standards change, a clearer definition of consent would promote the enforcement of sexual assault.[157] Expansions of the

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[149] *Id.* (describing crimes as purely coercive transactions); Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1561–62 (1999) (noting that intentional wrongdoings cannot be over-deterred).

[150] *See, e.g.*, J. Richard Broughton, *The Criminalization of Consensual Adult Sex After* Lawrence, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 125, 142–43 (2014) (exploring how types of sexual assault can be argued to have a rational basis in consent).

[151] Paul H. Robinson and Robert Kurzban find a statistically significant correlation among Americans' ordinal ranking of crimes and that "empirical desert" as the best cardinal predictor of sentencing. Paul H. Robinson & Robert Kurzban, *Concordance & Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1871–73, 187–88, 195–96 (2007). The same may be true internationally. *See* Julian V. Roberts & Loretta J. Stalans, *Crime, Criminal Justice, and Public Opinion, in* THE HANDBOOK OF CRIME AND PUNISHMENT 42 (Michael Tonry ed., 1998).

[152] *See* Paul H. Robinson et al., *Empirical Desert, Individual Prevention, and Limiting Retribution: A Reply*, 17 NEW CRIM. L. REV. 312, 315 (2014).

[153] *See* Paul D. Butler, *Race-Based Jury Nullification: Case-in-Chief*, 30 J. MARSHALL L. REV. 911, 918 (1997) (discussing drug and alcohol prohibition and voluntary euthanasia).

[154] *See* SCHULHOFER, *supra* note 123, at 253 ("As the code of medical ethics [banning all sexual relations with patient] illustrate, the risk of an overly broad ban is not just that it may chill legitimate relationships but that most practitioners will think it isn't intended literally.").

[155] *See* Buchhandler-Raphael, *Sexual Abuse of Power*, *supra* note 88, at 178, 179 n.186.

[156] *See* KC JOHNSON & STUART TAYLOR, JR., THE CAMPUS RAPE FRENZY 47 (2017).

[157] *See infra* notes 160–61 and accompanying text.

scope of the criminal law have generally succeeded when their justification relates to the values behind traditional offenses.[158] In particular, the overhaul of the scope of sexual assault in the late 20th century was premised on prohibiting more nonconsensual conduct.[159]

C. Unifying the Common Law

For scholars of legal interpretivism, the ultimate goal of jurisprudence is to understand the law as a seamless web by filling gaps between apparently disparate areas of law.[160] According to this model of jurisprudence, the surest path to advancing the law towards more just outcomes is to provide "the best justification of our legal practices as a whole" that is consistent with primary sources.[161] Thus, the American Law Institute takes special pride in, for example, unifying tort and contract law to create the Products Liability Restatement.[162]

As one of the most authoritative secondary sources, the Restatements of the Law, especially in the area of contracts, are aimed to provide judges the confidence to rule based on the relatively few legally recognized fundamental principles in cases where binding authority is silent, inconsistent, or outdated.[163] To bring a principled definition of consent to sexual assault is to achieve this aim in a new area of law and, in particular, an area of law where judges have great latitude to construe sexual assault statutes that do not go into greater specificity than "consent."[164]

A definition of consent that applies to such different actions as sexual assault and breach of contract will serve interpretivist goals across the common law. In contract, a defendant is held strictly liable for money damages based on a failure

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[158] Paul H. Robertson, *Criminalizing Tensions: Empirical Desert, Changing Norms, and Rape Reform*, *in* THE STRUCTURES OF THE CRIMINAL LAW 198, 202 (R.A. Duff et al. eds., 2011) (listing drunk driving, domestic abuse, and intellectual property infringement as examples).

[159] *See supra* notes 3–6 and accompanying text.

[160] Thom Brooks, *Between Natural Law and Legal Positivism: Dworkin and Hegel on Legal Theory,* 23 GA. STATE U. L. REV. 513, 533–38 (2007). Such a unified concept of law dates at least to the time of Aristotle. Ryan Patrick Alford, *How Do You Trim the Seamless Web? Considering the Unintended Consequences of Pedagogical Alterations*, 77 U. CIN. L. REV. 1273, 1275–76 (2009).

[161] Brooks, *supra* note 160, at 539. One of the best examples may be Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972), which combined tort and property along the axes of legal and equitable remedies and entitlement to either a plaintiff or a defendant.

[162] Geoffrey C. Hazard, Jr., *Symposium on the American Law Institute: Process, Partisanship, and the Restatements of Law: The American Law Institute is Alive and Well*, 26 HOFSTRA L. REV. 661, 663 (1998).

[163] Adams, *supra* note 85, at 237 n.179.

[164] *See supra* note 130 and accompanying text.

to fulfill a promise.[165] In contrast, the remedy for most felonies is imprisonment based on an act committed with a culpable state of mind.[166] Accordingly, the benefits of a sound definition of consent are not limited by distinctions between act or omission, between remedies, or between states of mind.[167]

V. A MODEL COMMON LAW STATUTE

Generally, nonconsensual sex is already criminal.[168] Whether or not criminal statutes explicitly define sexual assault with respect to consent or in terms of what are, by definition, consent-defeating acts (such as coercion or fraud), the statutes are still necessarily premised on consent and reach the same result.[169] The following model statute will define sexual assault as a nonconsensual sexual act and provide details in the style of the consent defenses from contract law. It is not meant to provide the most granular exposition of consent.[170] Rather, like the Restatements, it is aimed to create the most precise elucidation of general principles.

Sexual Assault in the First Degree[171]

A person commits sexual assault when the actor, with general intent, performs a sexual act upon another person, without consent.[172]

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[165] *See, e.g.*, Robert E. Scott, *In (Partial) Defense of Strict Liability in Contract*, 107 MICH. L. REV. 1381 (2009).

[166] *See, e.g.*, MODEL PENAL CODE § 2.01 (AM. LAW INST. 1962) (defining actus reus); *id.* § 2.02 (defining mens rea); Christopher & Christopher, *supra* note 38, at 114–15 (discussing the exception to mens rea for statutory rape).

[167] Both property and criminal law invoke remedies in kind, while both tort and contract law typically result in monetary damages. *See, e.g.*, Calabresi & Melamed, *supra* note 161, at 1115–27 (discussing property, tort, and criminal remedies); *supra* note 166 and accompanying text (discussing contract remedies). Similarly, both property and contract law have causes of action sounding in are strict liability, while tort and criminal causes of action typically require a culpable state of mind. *See, e.g.*, Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850) (finding tort negligence); Stewart E. Sterk, *Strict Liability and Negligence in Property Theory*, 160 U. PENN. L. REV. 2129 (2012) (discussing strict liability in property); MODEL PENAL CODE § 2.02 (defining criminal culpability); Thomas W. Taylor, *Contracts—Meeting of the Minds and U.C.C. § 2-204*, 46 N.C. L. REV. 637, 638 (1968) (discussing state of mind in contract law). Moreover, the apparent exception of strict products liability torts to tort law's negligence requirement was originally conceived as a contract theory of breach of warranty theory sounding in contract. *See, e.g.*, Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 464 (Cal. 1944) (Taynor, J. concurring).

[168] *See supra* notes 104–43 and accompanying text.

[169] *See* Buchhandler-Raphael, *Sexual Abuse of Power*, *supra* note 88, at 82.

[170] In fact, such common law reasonableness standards in criminal law have been held void for vagueness. *See* State v. Stanko, 974 P. 2d 1132 (Mont. 1998).

[171] Sexual assault in the second degree might require the lesser actus reus of sexual contact, rather than a sexual act. *See supra* note 4 and accompanying text.

[172] This section provision serves to illustrate that no other more specific actus reus is needed than a nonconsensual sexual act. General intent could can be replaced with a modern criminal mens

(a) If conduct that appears to be a manifestation of assent by that other person is compelled by duress, the act is without that person's consent.[173]

(i) Administering to that other person, without the consent of that person, a drug, intoxicant, or other similar substance, which thereby substantially impairs the ability of that other person to appraise or control that person's conduct, is an act of physical duress.[174]

(ii) If that other person's manifestation of assent is induced by an improper threat by the actor, and that person is left with no reasonable alternative, the act is without that person's consent.[175]

(A) An abuse of power constitutes an improper threat.[176]

(B) A sexual act performed upon a person in the actor's real or apparent custody is an improper threat that leaves the other person with no reasonable alternative.

(b) If the other person has no legal capacity to consent, the act is without that person's consent.[177]

(i) A person who is unconscious or helpless has no legal capacity to consent.[178]

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rea standard. *See, e.g.*, Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 909 (1939) (discussing general intent as the threshold of criminal liability at common law). The Model Penal Code defines recklessness as consciously disregarding a substantial and unjustifiable risk. MODEL PENAL CODE § 5.08.

[173] *See* RESTATEMENT (SECOND) OF CONTRACTS § 174 (AM. LAW INST. 1981).

[174] *See* Trigg v. State, 759 So. 2d 448, 451 (2000) ("[R]endering her unconscious with drugs . . . require[s] . . . force."). The definition of intoxication used in this model statute quotes Article 120 of the UCMJ. *See* 10 U.S.C. § 920 (2012).

[175] *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 175; *see also id.* § 176.

[176] *Cf. id.* § 176 ("A threat is improper if . . . what is threatened is otherwise a use of power for illegitimate ends.").

[177] *Cf. id.* § 12 (defining undue influence).

[178] *See* Michal Buchhandler-Raphael, *The Conundrum of Voluntary Intoxication and Sex*, 82 BROOKLYN L. REV. 1031, 1050 (2017) (noting that the majority rule for intoxication is the "physically helpless" standard).

(ii) A person who is below the age of consent has no legal capacity to consent.[179]

(iii) Mistake of age is not a defense to the offense described in paragraph (b).

(c) If conduct that appears to be a manifestation of assent by that other person is induced by the actor's undue influence, the act is without that person's consent.[180] The manifestation of assent is deemed to be induced by undue influence if:

(i) The other person is between the age of consent and the age of majority; and

(ii) The other person is not married to the actor, and:

(A) The actor is more than four (4) years older than the other person; or

(B) The actor is in a position of authority over the other person.

(d) If conduct that appears to be a manifestation of assent is induced by fraud in the factum, the act is without that person's consent.

(i) A fraudulent representation that the actor is another person constitutes fraud in the factum.

(ii) A fraudulent representation that the sexual act serves a professional purpose constitutes fraud in the factum.[181]

VI. CONCLUSION

Framework or model building has two shortcomings. The first is that models can be mistaken for the total view of phenomena, like legal relationships, which are too complex to be painted in any one picture. The second is that models generate boxes into

[179] Ultimately the age of consent must be legislatively determined. *See supra* notes 34–38 and accompanying text. This provision is using the age of consent as a placeholder for that determination rather than imposing a flexible standard.

[180] *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 177.

[181] *Cf., e.g.*, 10 U.S.C. § 920(b)(1) (2012).

> which one then feels compelled to force situations which do not truly fit.[182]

Consent is the traditional common-law framework for assessing utility, whether in contract or sexual assault, or in other areas of law as well.[183] Recognizing this conceptual unity is important for the criminal justice system to inspire confidence.[184]

Despite frustration with the history of consent, the apparently inconsistent treatments of consent is reconcilable and, in fact, serves to illuminate the principles of both criminal and contract law.[185] While conditions of undue influence, fraud, and abuse of power are unsettled in sexual assault scholarship, they are bedrock principles of contract law.[186] Accordingly, contract law provides a model of consent to which sexual assault law should and does aspire.[187] While there will always be hard cases, contract law provides the best framework for adjudicating consent.[188]

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[182] Calabresi & Melamed, *supra* note 161, at 1127–28.

[183] *See supra* notes 148–52 and accompanying text (discussing consent and utility); *supra* notes 162–69 and accompanying text (exploring other areas of law).

[184] *See supra* notes 162–69 and accompanying text (explaining conceptual unity); *supra* notes 153–61 and accompanying text (addressing effective enforcement).

[185] *See supra* notes 65–80 and accompanying text.

[186] *See supra* notes 26–103 and accompanying text (explaining the unsettled sexual consent scholarship); *supra* notes 104–43 (explaining sexual assault law in terms of consent); *supra* notes 144–69 (providing model legislation for sexual consent in contractual terms).

[187] *See supra* notes 26–183.

[188] *See supra* notes 104–69 and accompanying text.