

Some Common Confusions About Consent in Rape Cases

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Consent to sex matters because it can transform coitus from being among the most heinous of criminal offenses into sex that is of no concern at all to the criminal law. Unfortunately, the normative task of making the law of rape more just is commonly impaired by conceptual confusion about what “consent” means. Consent is both a single concept in law and a multitude of opposing and cross-cutting conceptions of which courts and commentators tend to be only dimly aware. Thus, consent can be a mental state on a woman’s part, an expression by her, or both; it can consist of facts about a woman’s mental state or expressive conduct that do not necessarily constitute a defense to rape, or only such facts as do constitute a defense to rape; and it can consist of facts about a woman’s mental state or expressive conduct, or a legal fiction of such facts. In so far as we are unaware of the ways in which this conceptual framework structures the way we think about consent, we risk confusing ourselves and others in undertaking to make the law of rape more just. Some examples are (1) confusion as to whether the defense of consent ought to be deemed to consist of a mental state on a woman’s part or an expression; (2) confusion about the relationship between consent to sexual intercourse and resistance to it; and (3) confusion about the relationship between force and non-consent.

I. COMMON CONFUSIONS ABOUT CONSENT

Consent arises in various forms in law. It arises in the law of contracts in the form of promises. It arises in property law in the form of assignments of interests. And it arises in torts and criminal law as defenses to wrongdoing. These are all instances of “consent,” and, as such, they share things in common. But they also contain differences—differences that can be framed in Hohfeldian terms:

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- A legal promise by a person, Bill, to another, Susan, creates a Hohfeldian “right” in Susan, that is, it creates in Bill an enforceable “duty” to Susan to act in a certain way.
- A legal assignment of a property interest by Bill to Susan creates a Hohfeldian “power” in Susan, that is, it vests Susan as possessor of the interest with the authority to change the legal relationships of others.
- In contrast, when a person, Bill, legally consents to conduct by another, Susan, that would otherwise constitute a tort or crime by Susan against Bill, Bill’s consent creates a Hohfeldian “privilege” in Susan. Susan’s privilege is not a right that Bill behave in a certain way in the future. Nor is it a power by which Susan may change the legal relationships of others. Rather, the privilege that Bill’s consent creates in Susan in torts and criminal law is the negation of a Hohfeldian duty that Susan would otherwise have to Bill: Bill’s consent negates a legally enforceable obligation that Susan would otherwise have to Bill to refrain from engaging in the conduct.¹

If I were able, I would analyze consent in all its forms. However, because consent in contracts and property differs significantly from consent in criminal law and torts, and because my expertise is confined to criminal law, I shall confine myself to addressing the privilege of consent in criminal cases and, specifically, in the area of criminal law in which it is most often litigated, i.e., rape cases.

As students of the law of rape, we care about the defense of consent because of the normative function it performs. Consent possesses what Heidi Hurd calls the normative “magic” to transform sexual intercourse from being conduct that is second only to murder in its heinousness into being conduct that is criminally innocuous.² Consent matters because to locate consent with respect to sexual intercourse is to locate the normative boundary between criminal rape and non-criminal sex. Unfortunately, when commentators and lawmakers undertake the normative task of distinguishing criminal rape and non-criminal sex, they sometimes stumble over something that is analytically anterior to their normative inquiry. They unwittingly stumble over what I call the “conceptual apparatus of consent”—that is, they unwittingly fail to negotiate the categories of thought by which we reason about consent. They mistakenly think of consent as solely a generic *concept*, when, in reality, the concept of consent in our popular and legal culture also encompasses three pairs of contrasting and cross-cutting *conceptions of consent*, each constituted by its own normative presuppositions. By overlooking

¹ See generally WESLEY HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1919).

² Heidi M. Hurd, *The Moral Magic of Consent*, in 2 *LEGAL THEORY* 121 (1996).

the existence of these competing conceptions of consent, and by conflating the nature or normative presuppositions of one conception of consent with another, they fail to think and speak clearly about how they mean to be distinguishing rape from sex.

My aim in this essay is analytical. Without taking a position myself on what distinguishes rape from sex, I hope to sharpen the tools of thought with which it is done. I will proceed in three parts: In Part II, I will try to identify the three pairs of contrasting conceptions of consent that underlie debates about consent. In Part III, I will examine the failure of commentators and lawmakers to understand the normative presuppositions of one of those pairs of contrasting conceptions, namely, the contrast between “consent” as subjective state of mind and “consent” as an objective expression. And in Part IV, I will examine two confusions that I believe result from conflating another pair of contrasting conceptions, namely, the contrast between “consent” as an empirical fact and “consent” as a legal judgment.

II. THREE PAIRS OF COMPETING CONCEPTIONS OF CONSENT

When we speak of “consent” as a defense to rape, we use a term that simultaneously refers to both a single generic concept and a multitude of specific conceptions (although we are not always clear either to ourselves or others as to which specific conception we have in mind). *Generically*, to “consent” to sexual intercourse in law is to acquiesce to the intercourse in some way, whether by virtue of doing so subjectively, objectively, or as a matter of law. *Specifically*, to “consent” to sexual intercourse in law is to acquiesce to it in one or more particular ways. The particular ways in which one consents to sexual intercourse range across three pairs of contrasting and cross-cutting conceptions of acquiescence.

A. “Factual” Consent versus “Legal” Consent

To say in law that a woman “consents” to sexual intercourse is ambiguous because “consent” has two contrasting meanings in law. The contrast is between a woman’s *factually* acquiescing to sexual intercourse and her *legally* acquiescing to it. A woman “factually” consents to sexual intercourse when, whether in mind or expression, she actually chooses sexual intercourse as that which she unconditionally desires for herself, as that which she prefers for herself under the circumstances in which she believes herself to be, or as that about which she is sufficiently indifferent to it as to be willing to leave its occurrence to others—without it necessarily being the case, however, that her choice itself constitutes a defense to rape. In contrast, a woman “legally” consents to sexual intercourse when she does or experiences anything—including but not limited to her actually choosing of sexual intercourse for herself—under such conditions as the jurisdiction at hand deems sufficient for her conduct or experience to constitute a defense to rape.

To illustrate the difference between factual and legal consent, consider the contrasting ways in which jurisdictions talk about the offense of statutory rape. Some jurisdictions say of underage girls that “their consent is no defense.” Other jurisdictions say of them that being underage, they are “too young to consent.” The legal effect of both statements is identical, but the two usages of “consent” are mutually exclusive. When a jurisdiction says that an underage girl’s “consent” is “no defense” to statutory rape, the jurisdiction is using “consent” factually: the jurisdiction is referring to the girl’s having actually chosen sexual intercourse for herself, without connoting, however, that the girl’s choice itself constitutes a defense to statutory rape. (Indeed, if the jurisdiction were using “consent” to refer to an actual choice of sexual intercourse that itself constituted a defense to statutory rape, the jurisdiction would be contradicting itself in stating that the girl’s consent is “no defense” to statutory rape.) In contrast, when a jurisdiction says that underage girls are “too young to consent,” the jurisdiction does not claim that underage girls are too young to desire sexual intercourse, or too young to choose it as that which they prefer under the circumstances, or even too young to be sufficiently indifferent as to be willing to leave its occurrence to others. Rather, the jurisdiction means that regardless of how they may go about choosing sexual intercourse for themselves, underage girls lack the competence that the jurisdictions deem necessary for their choices to constitute a defense to statutory rape.

B. *“Attitudinal” Consent versus “Expressive” Consent*

In addition to the foregoing contrast between factual and legal consent, the generic concept of consent also ranges over a second pair of contrasting conceptions of consent. The second pair is based on contrasting ways in which a woman can actually choose sexual intercourse for herself. The contrast is between a woman’s *subjectively* choosing sexual intercourse and her *objectively* doing so. Thus, when commentators and lawmakers say that a woman has “consented” to sexual intercourse, they sometimes mean to refer to something the woman subjectively experienced on a first-person basis. They are referring to the mental or emotional *attitude* on the woman’s part of having actually chosen sexual intercourse for herself. The Canadian rape statute is an example. In making it an offense for a person to have sexual intercourse with another without the latter’s “consent,” the Canadian Parliament defines “consent” as a choice the latter person subjectively experiences—as opposed to a choice she objectively manifests.³

At other times, however, when commentators and lawmakers refer to a woman’s “consent” to sexual intercourse, they are referring not to something she feels, but to something she does. They are referring not to a subjective experience of choice, but to an objective *expression* of choice. Thus, in making it an offense

³ Regina v. Ewanchuk, [1999] 1 S.C.R. 330 (construing Criminal Code, R.S.C., ch. C-46, § 265(1)(a) (1992) (Can.)).

for an actor to have sexual intercourse with another person without the latter's "consent," the Minnesota legislature defines "consent" as consisting of "words or overt actions by a person indicating . . . agreement to perform a particular sexual act."⁴

C. *"Actual" Consent versus "Imputed" Consent*

Finally, the generic concept of consent ranges over still a third pair of contrasting conceptions of consent. The third pair consists of the contrast between *instances* of the kinds of actual consent, on the one hand, and *legal fictions* of such actual consent, on the other. Thus, when commentators and lawmakers say that a woman has "consented" to sexual intercourse, they sometimes mean to refer to one or more of the kind of actual choices of sexual intercourse that we have been discussing thus far. That is, they mean that the woman actually chose sexual intercourse for herself, regardless of whether she did so *attitudinally* or *expressively* (or both), and regardless of whether she did so *factually* (and, hence, in a way that does not itself constitute a defense to rape) or *legally* (and, hence, under such conditions of competence, knowledge, and freedom that the jurisdiction at hand deems sufficient to justify leaving the choice to her).

At other times, however, when commentators and lawmakers say that a woman has "consented" to sexual intercourse, they mean quite the opposite. They mean that although the woman did not actually choose sexual intercourse for herself, the law will treat her *as if* she did and, moreover, *as if* she did so under such conditions of competence, knowledge, and freedom as to entitle her partner to a defense to rape. That is, they mean that the law imputes such an actual choice to her, despite her having neither experienced nor manifested it. A good example is the so-called "marital rape exemption," which is still in effect in some jurisdictions, according to which a woman by virtue of marrying is deemed to consent to future sexual relations to which her husband may subject her. Another example is the rule in some jurisdictions to the effect that a woman who actually chooses to commence to have sexual intercourse and who does so under appropriate conditions of competence, knowledge, and freedom is deemed to continue to consent throughout its duration, regardless of the fact that she emphatically changes her mind in the very midst of it.

D. *Relationships between Contrasting Conceptions of Consent*

Each of these six conceptions of consent has its own distinct reference. However, events can arise to which the contrasting conceptions of a pair both apply. Thus, suppose that a woman wholeheartedly and voluntarily engages in sexual intercourse with her husband within a jurisdiction that adheres to the marital

⁴ MINN. STAT. § 609.341(4) (2000).

rape exemption. The jurisdiction could simultaneously say that she “actually” consented by choosing sexual intercourse for herself, and that she “imputedly” consented by virtue of marrying her husband.

Events can arise in which contrasting conceptions of “attitudinal” and “expressive” consent also apply. But such events must arise in an inter-jurisdictional context because no single jurisdiction can simultaneously define consent as an attitude as opposed to an expression *and* as an expression as opposed to an attitude. Suppose, therefore, that an inter-jurisdictional case arises between Canada, which defines consent as a subjective attitude, and Minnesota, which defines consent as an objective expression. Suppose further that the case involves a woman who, in mind as well as word and deed, wholeheartedly and voluntarily chooses to engage in sexual intercourse with her boyfriend. Both jurisdictions would say that she “consented” for purposes of the law of rape, though they would mean different things by it. Canada would mean that she subjectively consented in her mind, while Minnesota would mean that she objectively consented in word and deed.

The same is true of the contrasting conceptions of “factual” and “legal” consent. To illustrate, consider the contrasting ways in which Canadian and English statutes defined consent in the 1970s. Both statutes made it an offense for a person to have sexual intercourse with a woman without the latter’s “consent”; both statutes defined a woman’s consent as an actual rather than imputed choice of sexual intercourse on her part; and both statutes defined the choice as attitudinal rather than expressive.⁵ But the statutes differed in one respect—the Canadian statute used “consent” factually, while the English statute used “consent” legally:

Canadian Criminal Code Section 143⁶

A male person commits rape when he has sexual intercourse with a female person who is not his wife,

- a. without her consent, or
- b. with her consent if the consent
 - i. is extorted by threats or fear of bodily harm,
 - ii. is obtained by impersonating her husband, or
 - iii. is obtained by false and fraudulent representations as to the nature and quality of the act.

⁵ See *Regina v. Abraham*, [1977] 30 C.C.C. (2d) 332 (quoting *Rex v. Donovan*, [1934] 2 K.B. 498 (Eng. C.A.)); *Regina v. R.*, [1992] 1 A.C. 599 (Eng. C.A.), [1991] 4 All E.R. 481, [1991] 3 W.L.R. 767; *Regina v. Olugboja*, [1982] 1 Q.B. 320 (Eng. C.A.).

⁶ Criminal Code, R.S.C., ch. C-34, § 143 (1970) (Can.) (repealed 1980–81).

English Sexual Offences Act⁷

[A] man commits rape if he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it . . .

Now suppose that an inter-jurisdictional instance arose in which a woman subjectively chose to engage in sexual intercourse under conditions that both Canada and England regarded as sufficient to justify leaving the choice to her and, hence, to entitle her partner to a defense to rape. How would the two jurisdictions talk about a joint decision to exonerate the woman's partner of any charge of rape? England would say, the woman "consented"—and that would be all England would have to say, because England uses "consent" to refer to actual choices that occur under such conditions of competence, knowledge, and freedom as suffice, in England's judgment, to themselves constitute defenses to rape. In contrast, Canada would also say, the woman "consented." But that would *not* be all Canada would have to say, because Canada uses "consent" more narrowly than England. Canada uses consent in a factual sense to refer to actual choices that, though *necessary* to constitute defenses to rape, are *not sufficient*. "Consent" does not suffice by itself in Canada to constitute a defense, because given the way Canada uses "consent," a woman may "consent" and yet have been induced to do so by the kinds of threats or frauds that preclude her consent from constituting a defense. Accordingly, to account for its decision, Canada would have to say something that would be redundant in England—such as, for example, that the woman "validly" or "lawfully" or "voluntarily" consented.

E. Cross-Cutting Relationships Among Pairs of Conceptions

We have thus far analyzed the six conceptions of consent by examining events to which contrasting conceptions of a pair can both apply. We will now examine the extent to which *pairs* of conceptions (or members of them) cross-cut one another.

The most complete cross-cutting among pairs occurs with respect to the relationship between *actual* consent (from the actual/imputed pair) and the pair consisting of *attitudinal* and *expressive* consent. Every instance of actual consent is an instance of a subjective and/or objective choosing of sexual intercourse; and, hence, every instance of actual consent is also an instance of attitudinal consent, expressive consent, or both. By the same token, every instance of attitudinal or expressive consent is an instance of actual consent.

The cross-cutting relationship between *imputed* consent (from the actual/imputed pair) and *legal* consent (from the factual/legal pair) is less complete. Every instance of imputed consent is also an instance of legal consent

⁷ Sexual Offences (Amendment) Act, 1976, 24 & 25 Eliz. II, c. 82, § 1(1) (Eng.).

because imputed consent is a legal fiction, the purpose of which is to treat certain conduct or experiences on a woman's part as if they were identical to the kinds of instances of actual consent on her part that constitute defenses to rape. However, the converse is not the case. Not all instances of legal consent are also instances of imputed consent. On the contrary, as we shall see in a moment, most instances of legal consent consist of a subset for we have not yet coined a term: they consist of that subset of legal consent of which imputed consent is a legal fiction *of*.

The most complex cross-cutting relationships are between the pairs that consists of *factual* and *legal* consent, on the one hand, and *actual* consent, on the other. All instances of factual consent, whether they are attitudinal or expressive in nature, are also instances of actual consent because they all consist of instances in which people subjectively or objectively choose sexual intercourse for themselves. However, instances of legal consent are only sometimes instances of actual consent. Legal consent consists of two subsets: imputed consent and what I call "prescriptive consent." "Prescriptive consent," whether it is attitudinal or expressive in nature, is that of which imputed consent is a fiction—namely, instances of actual consent, whether attitudinal or expressive, that occur under such conditions of competence, knowledge, and freedom as suffice for the choices to themselves constitute defenses to rape.

As illustrations of prescriptive consent, recall the English and Minnesota rape statutes. Both statutes make it an offense to have sexual intercourse with a person without the latter's "consent." Both use "consent" in a legal rather than a factual sense, because in contrast to Canada, the English and Minnesota statutes both regard "consent" as something that, if obtained, suffices in itself to constitute a defense to rape. Yet because neither statute imputes consent to women who have sexual intercourse, both define "consent" prescriptively. Thus, England defines a woman's consent as consisting of her subjectively choosing sexual intercourse under conditions of competence, knowledge, and freedom sufficient in England's judgment to justify leaving the choice to her. Minnesota defines a woman's consent as consisting of her expressing that she is choosing sexual intercourse under conditions sufficient in Minnesota's judgment to justify leaving the expressed choice to her.

III. CONFUSING THE NORMATIVE PRESUPPOSITIONS OF ATTITUDINAL WITH THOSE OF EXPRESSIVE CONSENT

Consent is one of a handful of concepts (along with freedom, equality, democracy, etc.) by which we organize our normative thinking. These concepts work because they are simultaneously capable of being both broadly generic and highly specific. Consent is broadly generic because it applies wherever any person in any way acquiesces to the project of another; yet consent is also specific because it also takes the form of normatively contrasting conceptions. Unfortunately, because we perceive this conceptual structure only darkly, we conflate one

contrasting conception of consent with another, confusing ourselves and others in our normative thinking about rape cases.

A good example, I think, is the notorious “condom” decision a few years ago by a grand jury in Austin, Texas, to dismiss a rape charge against an armed burglar who broke into a woman’s apartment and subjected her to sexual intercourse at knifepoint. The grand jury reasoned that by virtue of agreeing to submit to the man if he were willing to put on a condom, the woman “consented” to the sex. Women’s groups, being understandably outraged, condemned the grand jury for being morally perverse. Now it is possible that the grand jury was, indeed, a morally perverse body. But it seems unlikely. Austin, with its woman city manager and woman police chief, was a liberal city with one of the most sophisticated sexual assault programs in the country. And the district attorney later said that he regarded the grand jury as “actually . . . a pretty good group.”⁸ It is more likely that, rather than being morally perverse, the grand jury was simply confused—confused by the kind of “consent” it was being asked to examine. In asking the grand jury to determine whether the woman consented, the prosecutor was using “consent” in the same *legal* sense in which the aforementioned English rape statute uses “consent”—namely, to ask the grand jury to determine whether the woman chose sexual intercourse under conditions that, in the eyes of the state, justified leaving the decision to her. In contrast, the grand jury may have understood the prosecutor to be using “consent” in the same *factual* sense in which the aforementioned Canadian statute uses “consent”—namely, to ask whether the woman chose sexual intercourse as that which she preferred for herself under the circumstances in which she believed herself to be, even if her choice was the product of “threats or fear of bodily harm.”⁹ Indeed, if the latter had been what the prosecutor had asked, the grand jury would have been right to say the woman “consented,” because the woman most certainly did consent in that respect, both in mind as well as word.

I will focus here on another kind of normative confusion, namely, the difficulty that arises when commentators and lawmakers either overlook or misunderstand the normative significance of defining consent for purposes of the law of rape as *attitude* as opposed to an *expression*. We have seen that, as among jurisdictions in which a woman’s actual consent is a defense to rape, some jurisdictions define such actual consent as an attitude on her part (e.g., Canada, England), while other jurisdictions define it as an expression (e.g., Minnesota). With respect to most jurisdictions, however, it is impossible to say whether they choose to define actual consent in attitudinal as opposed to expressive terms (or vice versa) because when one looks, one finds only silence—silence that implies

⁸ *Jury Indicts Man in Rape Case He Says Condom Implied Consent*, DETROIT FREE PRESS, Oct. 28, 1992, at 3A; Ross E. Milroy, *Furor Over a Decision Not to Indict in a Rape Case*, N.Y. TIMES, Oct. 25, 1992, at 30; *No bill in Rape Case Prompts Outrage; Suspect Wore a Condom at Woman’s Request*, HOUSTON CHRON., Oct. 10, 1992, at 30A.

⁹ Criminal Code, R.S.C., ch. C-34, § 143(b)(i) (1970) (Can.) (repealed 1980–81).

that the jurisdictions are either oblivious to the normative differences between attitudinal and expressive consent or dismissive of them.

With respect to commentators, the problem is the opposite. Rather than overlooking the distinction between attitudinal and expressive consent, commentators focus on it intently. Some commentators take the position that from a normative standpoint, prescriptive consent is most emphatically a subjective choice, and not an objective expression of choice, and, hence, the law of rape ought to treat it as such.¹⁰ In contrast, other commentators argue that from a normative standpoint, consent is most emphatically a speech act and not a subjective state of mind, and the law of rape ought to treat it as such.¹¹ I believe that this dispute is misconceived, because it rests upon a fallacious assumption. It rests on the fallacy that there is a single, normatively correct answer to the question, “What is the criminal defense of consent to sexual intercourse—an attitude or an act?” For in reality, there are at least two normatively correct answers to the question, depending upon what jurisdictions regard as the purposes of punishment with respect to rape. Within jurisdictions that regard “rape” as a crime analogous to *attempted murder*, the punishment for which ought solely to be a function of an actor’s blameworthiness, consent ought to be defined as an objective expression on a woman’s part. In contrast, within jurisdictions that regard “rape” as a crime analogous to *murder*, the punishment for which ought *not* solely to be a function of an actor’s blameworthiness but ought also to reflect resulting harm, consent ought to be defined as a subjective attitude on a woman’s part.

To illustrate the relationship between a jurisdiction’s definition of “consent” and its purposes in punishing offenders, suppose that jurisdiction makes it an

¹⁰ See Hurd, *supra* note 2, at 126 (“[O]ne must conclude that consent is equivalent not to desire as such, but to the execution of a desire, namely, to choice.”); accord Larry Alexander, *The Moral Magic of Consent (II)*, in 2 LEGAL THEORY 165, 165–66 (1996) (“I agree [with Hurd] that consent . . . must be the exercise of will and, thus, a subjective mental state.”).

¹¹ See, e.g., Nathan Brett, Commentary, in LEGAL THEORY MEETS LEGAL PRACTICE, 253, 257 (Anne Bayefsky ed., 1998) (embracing a “performative account of consent”); Heidi Malm, *The Ontological Status of Consent and Its Implications for the Law of Rape*, in 2 LEGAL THEORY 147, 147 (1996) (“I think there are strong pragmatic reasons for thinking that ‘consent’ is best defined as the signification of a particular mental state, rather than as the mental state itself.”); Joan McGregor, *Force, Consent, and the Reasonable Woman*, in IN HARMS WAY: ESSAYS IN HONOR OF JOEL FEINBERG 231, 242 (Jules Coleman & Allen Buchanan eds., 1994) (“Consent is performative, it is something that an agent does.”); Emily Sherwin, *Infelicitous Sex*, in 2 LEGAL THEORY 209, 209–10 (1996) (“Consent is a social act . . . an act designed for the expression of a subjective choice.”); Lucinda Vandervort, *Mistake of Law and Sexual Assault: Consent and Mens Rea*, 2 CAN. J. OF WOMEN & L. 233, 267 (1987–88) (“The social act of consent consists of communication to another person, by means of verbal and non-verbal [behavior], of permission to perform one or more acts which that person would otherwise have a legal or non-legal obligation not to perform. Consenting, like promising, is thus performative.”); Alan Wertheimer, *What is Consent? And Is It Important?*, 3 BUFF. CRIM. L. REV. 557, 557 (2000) (“I shall argue [that] . . . consent is best understood as a performative or [as] action, not as a subjective phenomenon.”); see also ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 144–62 (2003).

offense for a person “to have sexual intercourse with a woman either without her consent or with her consent if she consents in fear of bodily harm.” Suppose further that courts within the jurisdiction have not yet decided whether the phrase “consenting in fear of bodily harm” refers to an objective *act* of acquiescing in fear of bodily harm or a subjective *attitude* of acquiescing in fear of bodily harm. Suppose, finally, that the two following cases arise, the first of which involves a woman who acquiesces in word but not in mind, the second of which involves a woman who consents in mind but not in word.

Terrorized Susan (In Word but not in Mind)¹²

Susan lives with an abusive boyfriend who regularly beats Susan with violence that has been escalating. On the day in question, the boyfriend begins to beat Susan about the face, but then uncustomarily stops and, while holding her by the hair, tells her she has a “choice.” “You can take the beating you deserve. Or you can avoid it by going outside, accosting a passerby, and doing your best to get him in the house and giving him oral sex. And, remember, I’ll be watching, and if I don’t think you’re trying hard enough, I’ll give you a beating you’ll never forget.” Susan, after futile begging, does as instructed: masking her fear, Susan cajoles a passerby into entering her house; and while Susan is being watched by her boyfriend from behind a door, she performs fellatio on the passerby. The boyfriend and passerby are thereafter both charged with rape, to which the passerby says in his defense, “I realize now that Susan submitted out of fear of bodily harm, and I feel terrible about it. But I had no idea at the time. I thought she was just coming on to me.”

Undercover Mark (In Mind but not in Word)¹³

Mark lives in a civil union with a former detective who knows how to inflict torture without leaving any marks. Mark’s partner tortures Mark until Mark submits to a form of sexual intercourse that Mark finds degrading; and, having forced Mark to submit, the former detective announces that he intends to do the same thing the following night. Mark immediately reports the assault to the police, but they tell him that local juries tend not to convict in such cases unless there is evidence of injuries or a videotape. Hearing the word “videotape,” Mark offers to go undercover by equipping the house with surveillance equipment. The prosecutor is initially reluctant, but she eventually agrees when Mark

¹² Cf. *People v. Burnham*, 176 Cal. App. 3d 1134 (1985). For an account of the *Burnham* trial, see *SAN DIEGO UNION-TRIB.*, Jan. 30, 1986, at B-17.

¹³ Cf. *New York v. Bink*, 444 N.Y.S.2d 237 (1981).

assures her that he will call for help if he wants it. When evening comes, the former detective orders Mark to submit. Mark cries and begs him not to force him to submit. But when Mark sees his partner seize the equipment he used the previous night to torture him, Mark tells his partner that he'll do anything rather than suffer such pain again. Mark considers calling the police but decides instead to go through with the sex, while pretending the entire time to be terrified. Mark's partner is charged with rape, to which he says in his defense, "Yes, I admit that I thought at the time that Mark was submitting for fear of bodily harm, but I now know that he was faking and only pretending to be in fear."

"Terrorized Susan" and "Undercover Mark" will each be decided differently, depending upon whether the courts of the jurisdiction interpret the statutory term "consent" to be a subjective attitude or an objective expression on a putative victim's part. If the courts hold consent to be an attitude, Susan's abusive boyfriend and the unwitting passerby will both be guilty of rape (unless the passerby has a separate defense of lack of *mens rea*), because Susan did not freely acquiesce in her mind. At the same time, Mark's partner will be guilty not of rape but of attempted rape, because although he *thought* Mark was acquiescing out of fear of bodily harm, Mark was not in fear at all. In contrast, if consent is held to be an expression, Susan's boyfriend and Mark's partner will both be guilty of rape because Susan communicated to the former and Mark communicated to the latter that each was terrified of being beaten; at the same time, the passerby will not be guilty of any offense of sexual assault because Susan successfully (albeit disingenuously) communicated to the passerby that she was freely acquiescing in their sexual intercourse.

To assess the normative force of the two interpretations, let us consider the normative functions they respectively perform. Defining consent as an *expression* serves two appropriate normative functions in criminal law—one with respect to accused actors, the other with respect to their putative victims. Defining consent as an expression has the virtue of making an actor's criminal responsibility a function of what he is capable of inferring his sexual partner's desires to be under the circumstances. An actor's criminal responsibility ought to be a function of what he is capable of inferring regarding the interests of others, because to blame a person is to attribute certain motivations to him regarding the interests of others (i.e., hatred, callousness, indifference or inadvertence). To punish a person for what he could not have known regarding his victim's desires (e.g., the passerby in Susan's case) is to attribute motivations of hatred or callousness, disregard, or carelessness to him that he did not possess. Defining consent as an expression also has the virtue of making an actor's criminal responsibility a function of his victim suffering a certain harm—namely, the dignitary harm that an actor inflicts upon a sexual partner by subjecting her to sexual intercourse that he infers or ought to infer she does not desire. An actor like the passerby in Susan's case does not inflict that dignitary harm if his sexual partner's expressions reasonably lead him

to believe that he is acting in accord with her wishes. He inflicts this dignitary harm upon her only if he subjects her to sexual intercourse in the absence of expressions that reasonably lead him to believe that he is acting in accord with her desires.

Based on the foregoing analysis of consent-as-expression, the practice of defining consent as an attitude seems normatively deficient because it fails to base an actor's blameworthiness upon what he is capable of inferring his partner's interests to be and upon whether he inflicts dignitary harm on her. And, indeed, *standing alone*, the practice of defining consent as an attitude *is* deficient because it not only acquits Mark's partner (who, while acting with a guilty mind, inflicted a dignitary harm upon Mark) but it convicts Susan's passerby. In reality, however, definitions of attitudinal consent do not stand alone, at least not in cases involving sexual intercourse by means of force. Rather, they are invariably accompanied by two other rules that negate the normative deficiencies described above: first, they are buttressed by prohibitions of *attempted* rape of which Mark's partner would be guilty; and second, they are accompanied by rules requiring *mens rea* under which the passerby would be acquitted. The combination causes consent-as-attitude to reproduce much the same effect as consent-as-expression.

Why, then, would a jurisdiction choose to define consent as an attitude? The answer is that, although defining consent as an attitude produces *much* the same effect as defining it as an expression, it does not produce the *identical* effect. The two approaches to consent differ in one significant respect: by defining consent as an attitude, a jurisdiction can grade sexual offenses as between "rape" and "attempted rape," depending upon whether or not victims suffer a further harm that we have not yet discussed—namely, primary harm that all rape statutes seek to prevent, regardless of their form. To identify that primary harm, consider the dignitary and primary harms underlying the offenses of "destruction of property" and "murder," respectively. An actor who maliciously destroys another's property inflicts a dignitary harm upon him, i.e., the dignitary harm of manifesting contempt for his victim's legitimate interest in possessing and enjoying his property. By the same token, an actor who murders inflicts a dignitary harm on his victim, i.e., the dignitary harm of manifesting contempt for another's life. However, the dignitary harm of murder is considerably greater than the dignitary harm of destruction of property because the *primary* harm that murder statutes seek to prevent, i.e., loss of life, is so much greater than the *primary* harm that destruction-of-property statutes seek to prevent, i.e., preserving property. The two dignitary harms differ in magnitude because, as dignitary harms, they are derivative of primary harms that themselves differ in magnitude.

Mark's partner and Susan's boyfriend both inflict the same dignitary harm on their victims, i.e., the dignitary harm of manifesting disregard for their victims' sexual autonomy. The dignitary harm Mark's partner and Susan's boyfriend inflict is commonly regarded to be less than the dignitary harm of murder and, yet, greater than the dignitary harm of malicious destruction of property; because the primary harm that rape statutes seek to prevent is commonly regarded as being a

harm that is less than loss of life and, yet, greater than loss of property. What, then, is the primary harm that rape statutes seek to prevent? It is harm that Susan's boyfriend and Mark's partner both *thought* they were inflicting but only Susan's boyfriend *succeeded* in inflicting. It is the harm a woman suffers when she is subjected to sexual intercourse without her having subjectively chosen it for herself under the conditions of competence, knowledge, and freedom of choice to which the jurisdiction at hand believes her to be entitled. Because the latter harm is a function of a victim's not having subjectively chosen sexual intercourse in certain ways, the decision to define consent as a subjective attitude is a decision to base the crime of rape on the occurrence of that harm.

In sum, and contrary to what commentators claim, the choice between defining consent as an attitude and defining it as an expression is not a choice between defining it correctly and defining it wrongly. It is a policy choice that is appropriate for jurisdictions to make in their discretion. It is the choice between a policy of grading the offense of rape on the basis of the occurrence of the primary harm that all rape statutes seek to prevent, or the policy of defining the offense solely in terms of dignitary harms. The criminal law is rife with statutes based upon such policies. "Murder" is an offense that is predicated on the occurrence of the primary harm that all homicide statutes seek to prevent, i.e., loss of life. Thus, as among two actors who do everything they can to wrongfully kill, one of whom succeeds and the other of whom fails, only the actor who succeeds is guilty of murder, the other one being at most guilty of attempted murder. In contrast, "larceny" is an offense that is defined solely in terms of the dignitary harm that an actor inflicts by manifesting willingness to "take" and permanently "carry away" the property of another. Thus, as between two actors who both do everything they can to permanently deprive another of his property, one of whom succeeds and the other of whom fails, the offense of larceny is the same, regardless of the fact that only one succeeds in inflicting the primary harm that larceny statutes seek to prevent. The difference between defining consent as an attitude and defining it as an expression is the difference between modeling the offense of rape on murder or modeling it on larceny.

To be sure, commentators disagree sharply about the justice of basing criminal punishment on resulting harm. Some, including Andrew Ashworth,¹⁴ regard it as unjust, while others, including Antony Duff,¹⁵ regard it as just. Ashworth and Duff, whose positions highlight the controversy, argue essentially as follows:

¹⁴ See Andrew Ashworth, *Taking the Consequences*, in ACTION AND VALUE IN CRIMINAL LAW, 107 (Stephen Shute et al. eds., 1993); see also Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1993).

¹⁵ See ANTONY DUFF, CRIMINAL ATTEMPTS 334-47 (1996); see also MICHAEL S. MOORE, PLACING BLAME 193-247 (1997).

Andrew Ashworth

Premise 1: It is presumptively unjust for a state to cause an actor to suffer more than or less than what he morally deserves by virtue of his wrongdoing.

Premise 2: The maximum state-imposed suffering an actor morally deserves by virtue of his wrongdoing is exclusively a function of elements that constitute the offenses of attempt and risk-taking, namely, a criminal intent to engage in wrongful conduct plus a demonstrated willingness to act on that intent.

Premise 3: When a state augments an actor's suffering because of the harm his wrongdoing causes, the state either punishes him in excess of what he deserves by virtue of his criminal intent and willingness to act on it, or punishes those guilty of attempt and risk-taking less than they deserve, or both.

Conclusion: Therefore, it is presumptively unjust for a state to augment an actor's suffering because of the harm his wrongdoing causes.

Antony Duff

Premise 1: It is not unjust for a state to cause an actor to suffer what he morally deserves because of his wrongdoing.

Premise 2: The consequences of an actor's wrongdoing—that is, whether it luckily harms no one or unluckily causes harm—has moral import because it bears upon how people, including the state and wrongdoer himself, ought to respond to the wrongdoing and, specifically, whether they ought to feel genuine relief, on the one hand, or profound grief for the victim and full righteous anger toward the wrongdoer, on the other.

Premise 3: Whether an actor harms no one or causes harm *also* matters to the *amount of suffering* he morally deserves because of his wrongdoing.

Conclusion: Therefore, it is not unjust for the state to invoke the harm a wrongdoer causes in order to augment his suffering beyond what he deserves by virtue of his criminal intent and demonstrated willingness to act on it.

Ashworth and Duff both proceed from strong premises. Thus, Ashworth is correct, I believe, that the maximum suffering an actor morally deserves for his wrongdoing is exclusively a function of the elements that constitute criminal attempts and criminal risk-taking, namely, criminal intent and willingness to act on it. And, hence, Ashworth is also correct that by augmenting the punishment of harm-based offenses, the state either punishes harm-based offenses more than they deserve or punishes attempts and risk-taking offenses less than they deserve. At

the same time, however, I believe Duff is also correct that the occurrence of harm matters morally to how the state, and wrongdoers themselves, ought to regard and respond to wrongdoing and its victims.

Unfortunately, Ashworth and Duff both make further moves that undermine their respective conclusions. Duff assumes in Premise 3 that because resulting harm has moral bearing upon how the state ought to regard and respond to wrongdoers and their victims, resulting harm also has moral bearing upon how much state-imposed suffering wrongdoers deserve. Resulting harm *does* have moral bearing, but not upon the levels of punishment wrongdoers deserve. (Indeed, if harm had moral bearing on desert, then every jurisdiction that follows the Model Penal Code in punishing certain inchoate crimes at the same level as harm-based crimes would be inconsistent with desert). Harm has moral bearing because it rightly evokes feelings of grief, loss, and compassion for victims of wrongdoing, just as it rightly evokes anger toward wrongdoers. For that reason, while harm does not alter the state-imposed suffering wrongdoers deserve by virtue of their criminal intent and willingness to act on it, it can rightly affect the amount of suffering the state is motivated to impose on offenders within the range of what they deserve, because it can rightly motivate the state to impose the full measure of suffering wrongdoers deserve, rather than to grant them undeserved leniency. By the same token, when harm fails to occur, the state rightly feels less grief, less loss, less engagement and less righteous anger than if harm occurred. For that reason, as Plato observed long ago, the absence of harm can rightly leave the state feeling less motivated to give wrongdoers the full measure of suffering they deserve and more inclined to register its relief by granting them a measure of supererogatory leniency.¹⁶

Ashworth, in turn, is too quick to assume in Premise 1 that it is presumptively unjust for the state to give those who are guilty of criminal attempt and criminal risk-taking less punishment than they deserve. Whether it is presumptively unjust depends upon whether it is appropriate for a state to withhold the full punishment a wrongdoer deserves when, because his wrongdoing luckily turns out to be harmless, the state is rightly less engaged and, hence, politically disposed to “let it go.” I should think that that is a policy regarding criminal responsibility for each state to decide for itself. A jurisdiction may decide to follow the Model Penal Code’s policy on attempts and attach no weight to resulting harm. Or, alternatively, it may choose to do what Plato felt a state is obliged to do, namely, to acknowledge the fact that it feels less grief, less loss, less righteous anger and less political engagement when harm fails to occur and, hence, less political desire to impose the full measure of suffering that wrongdoers may personally deserve. A state that adopts the former policy will be inclined to define consent as an expression. A state that adopts the latter policy will be inclined to define consent as an attitude.

¹⁶ PLATO, *Laws* 9.876–9.877, in *THE COLLECTED DIALOGUES OF PLATO* 1225, 1434–36 (Edith Hamilton & Huntington Cairns eds., Lane Cooper et al. trans., 1963).

IV. CONFUSING THE FEATURES OF FACTUAL CONSENT WITH THE FEATURES OF PRESCRIPTIVE CONSENT

Factual consent and prescriptive consent share a feature in common: they both consist, in whole or in part, of something that is empirical in nature, namely, instances of actual consent. A person actually consents to sexual intercourse (whether in mind, word, or deed) when she actually chooses sexual intercourse (whether in mind, word or deed) as that which she unconditionally desires for herself, as that which she prefers for herself under the circumstances in which she believes herself to be, or as that about which she is sufficiently indifferent to it as to be willing to leave its occurrence to others. Actual consent is empirical in nature because it is a question of fact, not a question of policy, whether a person has actually made such a choice for herself.

The difference between factual consent and prescriptive consent is that while factual consent is *constituted* by instances of actual consent, prescriptive consent merely *includes* instances of actual consent. To prescriptively consent to sexual intercourse, a woman must actually consent to it, to be sure. But she must also do something else that is normative in nature: she must actually consent to it under such conditions of competence, knowledge, and freedom that the jurisdiction at hand deems normatively sufficient to justify leaving the matter to her.

Courts and commentators commonly approach contested issues of prescriptive consent as if they consisted solely of empirical issues characteristic of factual consent. I will address two such confusions in this section: (A) confusions regarding the relationship of prescriptive consent to “resistance”; and (B) confusions regarding the relationship between prescriptive consent and “force.”

A. *Prescriptive Consent and “Resistance”*

Courts and commentators like to tell a certain story about the role of resistance in rape cases. The story goes something like this:

A Commonplace Tale about Resistance

In the old days, the law required, as a condition for convicting men of rape, that women “resist to the utmost,” even to the point of death or grievous bodily injury. Resistance requirements are based upon men’s fears that women will consent to sexual intercourse or, at least, appear to consent, and yet later maintain that they did not; and, therefore, resistance requirements are designed to provide objective evidence to actors and courts that who claim not to have consented were telling the truth. The rape reform movement of the 1970s, in the name of taking women at their word, set out to eradicate resistance requirements, and it largely succeeded. Although some jurisdictions still retain mild forms of resistance requirements, the utmost resistance rule has been abolished

everywhere, and jurisdictions are more and more abolishing resistance requirements altogether.¹⁷

The Commonplace Tale is widespread, and yet every part of it is false. No Anglo-American jurisdiction has ever required, as a condition for a man's being guilty of rape, that a woman resist to the point of death or grievous bodily injury. Resistance requirements are not evidentiary rules designed to provide evidence to actors and courts that women who claim not to have consented are telling the truth. The utmost-resistance requirement has not been abolished, nor could it sensibly be abolished. No jurisdiction has truly eliminated resistance requirements, nor could any jurisdiction do so.

The fallacies of the Commonplace Tale are not normative in origin—that is, they are not the consequence of certain normative views as to what counts, or ought to count, as rape. One can possess all the normative views of those who tell the Tale without committing its fallacies. Rather, the fallacies are conceptual in origin. They are the product of misunderstanding the relationship between actual consent to sexual intercourse, on the one hand, and the various kinds of freedom that jurisdictions may require to transform such actual consent into prescriptive consent to sexual intercourse, on the other.

Requirements and prohibitions of resistance are both inherent in the freedoms that jurisdictions prescribe to transform actual consent into prescriptive consent. There are two mutually exclusive kinds of wrongful force by which actors subject women to sexual intercourse against their will: (1) overwhelming physical strength; and (2) threats. An actor achieves sexual intercourse by means of “overwhelming physical strength” when, like a collegiate wrestler, he uses superior muscle power and physical adroitness to subdue his counterpart, despite her doing everything she physically can to prevent it—the difference, of course, being that collegiate wrestlers welcome the risk of being pinned to the mat despite their doing

¹⁷ See, e.g., Joan McGregor, *Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes*, in 2 LEGAL THEORY 175 (1996):

Historically, rape was defined as “carnal knowledge of a woman forcibly and against her will” The result was that to prove “forcibly” and “against her will,” the courts . . . required victim resistance, expressed first as “utmost resistance.” This requirement reflected the view that it was better for a woman to die than to be “dishonored.”

Id. at 176–77. Robin West, *A Comment on Consent, Sex, and Rape*, in 2 LEGAL THEORY 233, 277 (1996) (“To be a rape victim, one had to be so vigilant about protecting one’s honor that one would truly fight to the death to protect it.”); see also *People v. Barnes*, 721 P.2d 110, 117–20 (Cal. 1986); *In the Interest of M.T.S.*, 609 A.2d 1266 (N.J. 1992); Michele Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953–68; Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1101, 1131 (1986); Robert Rickett, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680, 689 (1966); Susan Schwartz, *An Argument for the Elimination of the Resistance Requirement for the Definition of Rape*, 6 LOY. L.A. L. REV. 567, 569–70 (1983); Lucy Reed Harris, Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 626 (1976); Pamela Lakes Wood, Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. J. CRIM. L. 335, 346 (1973).

everything they can within the rules to prevent it, while women typically do not welcome being subdued and sexually penetrated despite their doing everything they physically can to prevent it. It is characteristic of overwhelming physical strength that when actors use it to achieve sexual intercourse, they do so without enlisting acts of will or cooperation on the part of their sexual partners. In contrast, when an actor achieves sexual intercourse by means of threats, he does so precisely by actively enlisting the will or cooperation of his victim. Rather than subduing her by means of overwhelming physical strength, he induces her to submit by confronting her with an alternative that is sufficiently grim in her eyes as to induce her to submit to sexual intercourse rather than face it.

Every jurisdiction makes it an offense to elicit sexual intercourse by means of overwhelming physical strength, at least in cases in which the woman does not welcome the risk of being forcibly subdued and penetrated. Every jurisdiction also makes it an offense to elicit sexual intercourse by means of certain threats, though jurisdictions differ as to the kinds of threats they prohibit as means for eliciting sexual intercourse. Thus, all jurisdictions prohibit threats of death, grievous bodily injury, or extreme pain; some jurisdictions go further and prohibit threats of any bodily injury; some go even further and prohibit threats that would “prevent resistance by a woman of ordinary resolution.”¹⁸ Yet no jurisdiction goes so far as to make it a crime to induce a woman to submit to sexual intercourse by threatening, say, to destroy a bauble of hers of trivial value or to stop inviting her to social events.

Requirements that a woman resist an actor’s pressure on her to submit to sexual intercourse—and, indeed, that a woman resist to the utmost—are logically corollaries of statutory regimes in which an actor is guilty of sexual intercourse by means of force if and only if he induces a woman to submit by means of overwhelming physical strength or wrongful threats. To illustrate, suppose that a jurisdiction makes it an offense to elicit sexual intercourse by means of (i) overwhelming physical strength, or (ii) threats of death, bodily harm, extreme pain, or overwhelming physical strength. Suppose further that the following three cases arise:

The Wrestler. A 280-pound wrestler, whom Megan used to date and who Megan believes would never beat her or badly hurt her, suddenly pins her to the ground and, while using his superior weight and strength to hold her down, sexually penetrates her, despite her drawing upon every ounce of her strength to push him off.

The Threatener. A next-door neighbor of Rachel drops by to borrow sugar and, while there, suddenly grabs Rachel by the arm and, holding his face close to hers, threatens to “beat the shit” out of her

¹⁸ MODEL PENAL CODE § 213.1(2)(a) (1985).

unless she performs fellatio on him. Rachel pleads with him to let her alone, but when he grabs a rolling pin as if to hit her, she reluctantly submits, feeling she has no other alternative to being badly beaten or killed.

The Manipulator. A young man is making out with his girlfriend, Lisa, in her college dorm room when he starts to pull down her underwear in order to have intercourse with her. Lisa pushes his hand away several times, but she eventually desists and reluctantly lets him have his way because she is afraid that if she persists, he may give her slap across the face, curse her, and stomp out, just as he did the last time.

Megan, in her tussle with the wrestler, resisted to the utmost and became a victim of what the statute defines as “rape.” In actuality, however, the relationship between Megan’s resistance and her becoming a victim of rape under the statute is stronger than that. Megan was a victim of what the statute defines as rape *because* she resisted to the utmost: she was a victim of rape under the statute because her assailant resorted to a kind of force, i.e., overwhelming physical strength, that is *defined* as the muscle power and physical adroitness needed to overcome all a woman is physically able to do to thwart sexual intercourse. In contrast, if Megan (like Lisa) had *refrained* from doing all she could to thwart her partner—that is, if Megan had not resisted to the utmost but had submitted because of fear of the alternatives—Megan would not have been a victim of rape by means of overwhelming physical strength because she would not have been someone of whom it could be said, “She did everything she physically could to thwart him, but he overwhelmed her with superior muscle power.” She would at most have been a victim of rape by means of wrongful threats.

Rachel, in dealing with her neighbor’s wrongful threats, was also a victim of what the statute defines as rape without having resisted. In actuality, however, the relationship between Rachel’s non-resistance and her being a victim of what the statute defines as rape is stronger than that. In so far as the statute makes it a crime to elicit sexual intercourse from a woman by threatening her with death or grievous bodily injury, the statute does not require, and, logically, it *cannot require*, that Rachel resist, because by resisting, she would bring upon herself the very thing the statute says she does not have to suffer as a consequence of refusing to submit to sexual intercourse—namely, death or grievous bodily injury. In contrast, if Rachel (like Lisa) had not feared death or grievous bodily injury at her partner’s hands—that is, if Rachel had submitted to sexual intercourse because of a fear of something else such as being given a slap across the face or cursed—she would have not have been a victim of what the statute defines as rape. She would not have been a victim of what the statute defines as rape because she had an option by which she could have escaped both sexual intercourse and the alternatives of death, grievous bodily injury, extreme pain and the application of overwhelming physical strength from which the statute seeks protects her—namely, the option of taking

the consequences of being given a slap and cursed. In that respect, the statute does two things: (1) it negates one species of resistance requirement, i.e., the supposed requirement that a woman resist at the cost of death, grievous bodily injury, extreme pain, or the application of overwhelming physical strength; and (2) it contains another species of resistance requirement, i.e., the requirement that before a woman will be heard to allege rape, she must resort to options she believes she possesses by which she can avoid both sexual intercourse and the alternative consequences from which the statute seeks to protect her.

To be sure, one can rightly criticize a rape statute that fails to protect women like Lisa who submit to sexual intercourse for fear of being given a slap. But it is misleading to frame the criticism as a grievance about “resistance” requirements themselves because it is not a grievance about resistance requirements in general. It is a grievance about the particular way in which the statute defines wrongful threats and, hence, a particular resistance requirement. It cannot be a grievance about resistance requirements in general because resistance requirements are corollaries of wrongful threats. To illustrate, suppose that the statute is amended to make it an offense to elicit sexual intercourse by threats of death, grievous bodily injury, the application of overwhelming physical strength or *moderate* pain, including the pain of being slapped. Suppose, too, that the following event arises:

The Curser. Stella is making out with her boyfriend when he starts to pull down her underwear in order to have intercourse with her. Stella pushes his hand away several times, but she eventually desists and reluctantly lets him have his way because, though she knows he would never strike her, she is afraid that if she persists, he may curse her and stomp out, just as he did the last time.

Stella is not a victim of rape under the statute, because although the statute has eliminated one resistance requirement, it has retained another. The statute has eliminated the rule that before a woman will be heard to allege rape, she must resist and put up with being slapped if she believes that by doing so, she can simultaneously avoid both sexual intercourse and the alternatives from which the statute seeks to protect her. But the statute has retained the rule that before a woman will be heard to allege rape, she must resist and put up with being cursed, if she believes that by doing so she will be able to simultaneously avoid both sexual intercourse and the alternatives from which the statute seeks to protect her.

Now it might be thought that a rule to the effect that “No means no” would change this, but it would not. Analytically, “No means no” is just another rule, albeit in prophylactic form, that makes it a crime to elicit sexual intercourse by means of certain threats; and, hence, like all such rules, “No means no” does *not* require some kinds of resistance on a woman’s part and, yet, *does* require others. “No means no” makes it a crime to elicit sexual intercourse from a woman either while she is saying “no” or after she says “no,” unless and until she changes her mind. As such, “No means no” implicitly makes it a crime to elicit sexual

intercourse from a woman by implicitly threatening her with having to do anything beyond saying “no” to avoid it. It follows, therefore, that a woman who says “no” and does not change her mind is not required to mount any further resistance as a condition for convicting a man who thereafter has sexual intercourse with her. Yet it also follows that a woman is not a victim of rape under the rule unless she at least mounts the resistance of saying “no.”

B. *Prescriptive Consent and “Force”*

Courts and commentators are also confused about the conceptual relationship between prescriptive consent and force. To introduce the confusion, let us return for a moment to the Commonplace Tale. I have discussed most of the fallacious claims that constitute the Commonplace Tale, but I have not yet addressed the claim that resistance rules are evidentiary rather than substantive in nature. The latter is the claim that, rather than altering the substantive meaning of “consent,” resistance rules are designed to maintain existing definitions of consent while providing evidence to actors and courts that women who claim not to have consented are telling the truth.

We have seen that, contrary to the Commonplace Tale, resistance requirements are, indeed, substantive in nature because they are substantive correlatives of substantive definitions of overwhelming physical strength and wrongful threats. Why, then, do courts and commentators maintain the opposite? The answer, I think, is that they are conceptually confused about prescriptive consent in cases in which a woman *feels coerced* by the pressure of circumstances to acquiesce to sexual intercourse. Courts and commentators mistakenly think that whether a woman prescriptively consents to sexual intercourse under the pressure of circumstances is a question of what she *really* wants under the circumstances.¹⁹ They then reason that women who resist sexual intercourse do *not* really want to engage in it. Having thus concluded that women who resist sexual intercourse do not prescriptively consent to it, they, therefore, conclude that when jurisdictions require resistance, jurisdictions must be requiring resistance for evidentiary reasons that are independent of women’s non-consent.

The mistake that courts and commentators make is in thinking that, with respect to women who feel coerced to acquiesce to sexual intercourse, prescriptive consent is a function of what the women *really* want. It is a mistake because, when a woman reluctantly acquiesces to sexual intercourse under the pressure of circumstances, she typically wants *two* things: she really wants to engage in sexual intercourse because she really prefers the sexual intercourse to the alternatives she believes she would otherwise face if she refused (otherwise she would not be

¹⁹ See Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 429 (1998) (“The bottom line [in rape cases] ultimately is the same: did the female want the intimacy to occur at this time or not?”).

acquiescing); and, yet at the same time, the woman really does not want to engage in sexual intercourse because she would not be acquiescing were the pressure of circumstances not what they are. The controlling issue in such cases, therefore, is not a factual question as to whether the women really want to have sex when they acquiesce under the pressure of circumstances—because they both do and do not—but a normative question as to whether in choosing sexual intercourse for themselves, they do so with the freedom the statute at hand regards as sufficient to leave the decision to them. Once one answers the latter question, one also knows what kinds of resistance they are and are not required to mount.

To illustrate, recall Stella who felt forced to go along with her boyfriend's desire for sexual intercourse rather than be cursed. Did Stella really want to have sexual intercourse with her boyfriend? She did and she did not. She did not want to have sexual intercourse with her boyfriend when she was pushing his hands away from her underwear, because at that moment, she preferred physical resistance to sexual intercourse. Nor did she want it at the very moment of sexual intercourse, because she would not have gone along with him then if she had not been afraid of being cursed. Yet she also *did* want it at the very moment of sexual intercourse, because at that moment she preferred sexual intercourse to the alternative of being cursed. The legally-interesting question in Stella's case is not whether she *actually consented* to sexual intercourse in the context of feeling coerced—because, given that she decided to submit, she clearly did—but whether she *prescriptively* consented. The answer to the latter question has nothing to do with what Stella was thinking or what she expressed herself to be thinking. It has to do with the kinds of freedom the jurisdiction at hand believes women ought to possess for purposes of their sexual integrity.

Conceptual mistakes about prescriptive consent and force are not confined to isolated discussions of resistance. They arise whenever authorities discuss the most basic terms for defining rape. Authorities differ widely on how “rape” ought to be defined. Thus, some commentators and states take the position that rape ought to be defined in terms of “non-consent” rather than “force.”²⁰ Others take the contrary position that rape ought to be defined in terms of “force” rather than not “non-consent.”²¹ Still other commentators take the position that rape ought to

²⁰ For states that define rape in terms of non-consent rather than force, see KAN. STAT. ANN. § 21-3502 (2000); MONT. CODE ANN. § 45-5-502(1) (1995); UTAH CODE ANN. § 76-5-402 (2001); WIS. STAT. § 940.225 (2000). For commentators who argue that rape should be defined in terms of non-consent rather than force, see STEPHEN SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 11, 32–33 (1998); Estrich, *supra* note 17, at 1095–96; Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 158 (1992).

²¹ For states that define rape in terms of force rather than non-consent, see ARK. CODE ANN. § 5-14-103(a)(1)(A) (Michie 2003) (“compulsion”); D.C. CODE ANN. § 22-3002(a)(1)–(2) (2001); IDAHO CODE § 18-6101(3) (Michie 2004) (“force or violence”); IND. CODE § 35-42-4-1(1) (2001); N.J. STAT. ANN. § 2C:14-2c(1) (West 2001) (“physical force or coercion”); OHIO REV. CODE ANN. § 2907.02(a)(2) (Anderson 2004); OKLA. STAT. tit. 21, § 1111(a)(3) (2000); S.D. CODIFIED LAWS § 22-22-1(2) (Michie 2001). For commentators who argue that rape should be defined in terms of force rather than non-consent, see CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE

be defined in terms of “non-consent” or “force.”²² I believe that this debate is a manifestation of conceptual confusion. Any criminal regulation of rape that is presently stated in terms of “non-consent” can be stated interchangeably in terms of “force,” and vice versa, though stating it in terms of “non-consent” is conceptually less circuitous. Rather than support the entirety of the foregoing assertion, however, I will focus here on a selection of claims that are sometimes made to the contrary.

Consider first the argument that defining rape in terms of “force” is normatively deficient. Robin West states the argument in representative fashion, using the example of a professor who pressures a student into sexual intercourse by threatening the student with an undeserved low grade:

[Consider] sex that is concededly nonconsensual, but is not . . . forced. [W]hatever falls into this category is, according to still-standard definitions of rape found in most states’ rape law, fully legal [One example] is sex obtained through some sort of coercion A woman who has sex with a professor in order to guarantee that she will receive the grade she earned in his course has been coerced into sex, which again may concededly be nonconsensual, but she has not been forced, and was therefore not raped.²³

The core of West’s argument lies in what West means in saying that the hypothetical student’s decision to submit to sex with her professor can be “conceded” to be nonconsensual. West means that although the student made a deliberate decision to submit to sexual intercourse, her submission can be “conceded” to be something she did not really want, in that she *would have refused it if she had not been threatened with an unfair grade*. The fallacy in the argument is the assumption that the student’s counterfactual wishes, i.e., what she would have chosen if the circumstances as she wished they had been, control whether she legally consented to doing what she deliberately did. The counterfactual wishes of a person who actually chooses sexual intercourse as the best she can do for herself under the circumstances—and who does so under conditions of freedom that the jurisdiction at hand regards as sufficient to enable her to take responsibility for her

245 (1989) (arguing that “rape should be defined as sex by compulsion, of which physical force is one form”); Catharine MacKinnon, *Feminism, Marxism, Method of the State*, 8 SIGNS 635, 650–55 (1983); Robin West, *Legitimizing the Illegitimate: A Comment on Rape*, 93 COLUM. L. REV. 1442, 1459 (1993).

²² For a state that defines rape in terms of non-consent or force, see IOWA CODE § 709.1(1) (2003) (“Any sex act between persons is sexual abuse by either of the persons when the act is performed with the other person in any of the following circumstances: The act is done by force or against the will of the other.”). For commentators who argue that rape ought to be defined in terms of non-consent or force, see McGregor, *supra* note 17, at 189–203; West, *supra* note 17, at 243–46.

²³ West, *supra* note 17, at 239–40.

choice—are wholly immaterial. What matters is that she actually chooses sexual intercourse under conditions that the jurisdiction at hand regards as free of wrongful force. That is what prescriptive consent to sexual intercourse *is*.

To be sure, perhaps jurisdictions *should* treat threats such as the professor's as instances of wrongful "force" for purposes of sexual assault.²⁴ If they do, sexual intercourse induced by such threats becomes intercourse *both* by wrongful force *and* without legal consent. If they do not, however, sexual intercourse remains intercourse *without* wrongful force and thus *with* legal consent. For, again, that is what it means for a person to prescriptively consent to sexual intercourse in the context of unwanted pressure: it means she deliberately submitted to sexual intercourse as a result of pressures that she wishes were not present but that the jurisdiction does not regard as wrongful means for inducing acquiescence to sexual intercourse. Contrary to what West maintains, one cannot meaningfully say of a person who reluctantly acquiesces to sexual intercourse in the face of unwanted pressures, "She is *not* a victim of sexual intercourse by wrongful force, but she *is* a victim of sexual intercourse without prescriptive consent."²⁵

Now consider the contrary argument, that defining rape in terms of "non-consent" is normatively deficient. Catharine MacKinnon and Robin West both argue that an actor's mere use of force to achieve sexual intercourse ought to render him guilty of rape, regardless of whether the woman consents to the intercourse.²⁶ This criticism comes in two distinct forms, but both rest on a common fallacy—the fallacy that defining rape solely in terms of non-consent fails to protect women from pressures from which they ought to be free. West argues that in so far as consent is a defense to sexual intercourse by means of force, it exonerates an actor who so frightens his victim with threats of death or mayhem that she fearfully "consents" to sexual intercourse rather than risk being killed:

[T]he recent and notorious Texas case, in which a woman was found to have consented to sex with a man who held a knife at her throat because she pleaded with him to use a condom to avoid the risk of AIDS, was such a case: There was undeniable force, but her rational, articulated attempt to minimize harm to herself demonstrated her desire to

²⁴ SCHULHOFER, *supra* note 20, at 197.

²⁵ For courts that commit this fallacy, see *North Carolina v. Alston*, 312 S.E.2d 470, 475–76 (N.C. 1984) (dictum); *Regina v. Olugboja*, [1982] 1 QB 320 (Eng. C.A.). To be sure, it is not a contradiction for a court to grade sexual offenses by defining a more serious offense as sexual intercourse by force and without prescriptive consent, while defining the lesser as sexual intercourse without prescriptive consent alone, provided that it is understood that the force that is needed to taint consent for purposes of the higher offense (say, threats of physical harm) is different from the lesser force that may suffice to taint consent for lesser offenses (say, force that overcomes a "no"). See 18 PA. CONST. STAT. §§ 3121(a)(1), 3124.1 (2001).

²⁶ See MACKINNON, *supra* note 21, at 245; West, *supra* note 17, at 244.

acquiesce, rather than risk great harm by fighting, and hence demonstrated her consent.²⁷

Unfortunately, West makes the same legal mistake as the Austin, Texas, grand jury whose refusal to indict the “condom rapist” was later overturned: West erroneously assumes that when a jurisdiction makes it a criminal offense to have sexual intercourse by without “consent,” the jurisdiction is using “consent” to refer to *factual consent*, regardless of the threats by which it is elicited. In reality, when jurisdictions make it a crime, without more, to have sexual intercourse without “consent,” they are using “consent” in a legal sense to refer to something she does or experiences—including actually choosing sexual intercourse for herself—that occurs under such conditions as the jurisdiction deems sufficient for the sexual intercourse not to be a wrong to her. Otherwise, they would be taking the unprecedented position that an actor who beats and maims a woman until she yields, saying, “Just do what you want, but please don’t hurt me any more,” commits no sexual offense.

MacKinnon’s argument against consent is more substantial. MacKinnon argues that in so far as consent is a defense to pressures to engage in sexual intercourse, consent legitimates a “sado-masochistic” model of sexual intercourse.²⁸ MacKinnon believes that by making “consent” a defense, the law legitimates sexual intercourse that is the product of social, economic, and political pressures that cause women to choose sexual intercourse when it is contrary to their interests and, worse yet, to cause women to regard the accompanying pressures as acceptable and even desirable.²⁹ The fallacy in this argument does not lie in MacKinnon’s conception of the conditions under which women choose sexual intercourse. Rather, it lies in her conception of legal consent. Suppose for a moment that MacKinnon convinces lawmakers that they ought to protect women from certain pressures to engage in sexual intercourse that women are now socialized to regard as acceptable and even desirable. Suppose, further, that lawmakers wish to codify that protection in a traditional way—that is, by prohibiting actors from subjecting women to sexual intercourse without their “consent.” There is nothing in the nature of prescriptive consent that prevents lawmakers from doing so. On the contrary, in order to prescriptively consent, a woman’s acquiescence to sexual intercourse must be sufficiently free, informed, and competent to enable her to take responsibility in the eyes of the law for her choice. A woman’s choice is not “free” if it is the product of pressures that, in the judgment of the jurisdiction at hand, unconditionally taint it, that is, pressures that taint her choice even in the event that she welcomes them.³⁰

²⁷ West, *supra* note 17, at 238.

²⁸ MACKINNON, *supra* note 21, at 172.

²⁹ See CATHARINE MACKINNON, *SEX EQUALITY: RAPE* 769, 779, 817–18, 839–40, 885–87 (2001).

³⁰ *Cf.* Regina v. Brown, [1993] 2 All E.R. 73 (H.L.) (Eng).

To be sure, MacKinnon realizes that jurisdictions today refuse to treat general social pressures on women as sufficient to invalidate the sexual acquiescence of women who welcome the pressures. However, that is a feature not of the concept of consent itself, but of the particular conceptions of consent that jurisdictions currently embrace. No legal change can be won under any banner—whether under the banner of “force” or “non-consent”—without first persuading jurisdictions to alter their understanding of the kinds of pressure on women that are wrongful. Once a jurisdiction is persuaded to change its norms, the norms can be fully codified in terms of consent.

V. CONCLUSION

Analysis of the meaning of consent in rape cases is both difficult and preliminary. Like all analysis, analysis of consent is difficult because the very categories of thought that we bring to bear in analyzing our confusions are themselves the source of our confusions. Yet such analysis is also preliminary because it is a mere tool in service of the ultimate task of determining when sexual intercourse is, and when it is not, a wrong from which women should be protected.