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CONSENT & CAUSATION

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In criminal law, the doctrines surrounding sexual consent and proximate causation are both thought to reflect conclusions about individual autonomy. But these doctrines diverge in striking ways. In rape law, the choice to consent to sex is deemed sufficiently autonomous even when made in response to threats or coercion, when induced by fraudulent misrepresentations, or when produced by mental impairment. By contrast, the doctrine of proximate causation holds that a choice made in response to force, coercion, fraud, or mental impairment is insufficiently autonomous, and therefore an individual is not morally responsible for any resulting consequences. This divergence invites a crucial question: Does the law of proximate causation capture something important about individual autonomy that has been overlooked in the law of sexual consent? After all, sexual consent frequently plays a causal role in normatively desirable sexual encounters. Yet the structure of U.S. rape law elides any inquiry into causation. Might rape law be improved—might it better protect

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individual autonomy—by demanding that sexual consent be a proximate cause of sex itself?

This Article is the first to raise this question and undertake this inquiry. By juxtaposing consent and causation in criminal jurisprudence, it reveals an inconsistency in the understandings of autonomy that motivate those doctrines, shedding new light on longstanding criticisms of rape law. This Article then makes a preliminary case for reforming rape law by recasting sexual consent as a matter of proximate causation. It offers three grounds for doing so: First, philosophical accounts of sexual autonomy require an individual to be able to control the character and circumstances of sexual contact, a requirement that is only vindicated when consent causally contributes to sexual activity. Second, the best understanding of consent's exonerating role in sex is that consent alters another person's reasons for acting, a function that can only occur when consent causally motivates sexual behavior. Lastly, the leading accounts of when sex is normatively desirable rest on a conception of mutuality—that is, responsiveness to the other person's active consent. In short, this Article advances the novel claim that sexual activity is normatively desirable when it occurs because *it is consented to, not merely* whenever *it is consented to.*

The Article concludes by considering how rape laws may be reformed to leverage the normative insights just uncovered. It first examines the recent revisions to the sexual assault provisions of the Model Penal Code adopted by the American Law Institute in 2022. Those revisions, for the first time, included both requirements of causation and requirements of nonconsent. But the Model Penal Code's revisions hew too closely to traditional rape laws, ultimately failing to capture the broad spectrum of normatively undesirable sex that warrants criminalization. The Article instead reconfigures rape as primarily a result crime, prohibiting specific wrongful means of causing sexual intercourse and exonerating sex when consent is the proximate cause. A rape law structured around the causes of sexual intercourse may best capture our normative intuitions about why and when consent matters.

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INTRODUCTION

Consent is the primary legal mechanism used by the criminal law—rape law, in particular—to safeguard sexual autonomy.[1] However, American rape law has long been criticized for advancing a conception of consent that survives common means of subverting autonomy.[2] Judges

[1] See, e.g., Stuart P. Green, Criminalizing Sex: A Unified Liberal Theory 25 (2020); see also Alan Wertheimer, Consent to Sexual Relations 31 (2003) ("In effect, autonomy refers to the value that is to be protected, whereas consent refers to the means for protecting and promoting that value: we protect a person's autonomy by prohibiting actions to which she does not consent and empowering her to engage in actions to which she does consent." (emphasis omitted)); Luis E. Chiesa, Solving the Riddle of Rape-by-Deception, 35 Yale L. & Pol'y Rev. 407, 419 (2017) ("[C]onsent is the tool that law most commonly deploys in order to operationalize conceptions of freedom and autonomy."); Patricia J. Falk, Rape by Drugs: A Statutory Overview and Proposals for Reform, 44 Ariz. L. Rev. 131, 187 (2002) ("As many commentators have observed, the central value protected by sexual offense provisions is sexual autonomy or sexual integrity, the violation of which represents a unique, not readily comparable, type of harm to the victim." (footnotes omitted)).

[2] See, e.g., Patricia J. Falk, Rape by Fraud and Rape by Coercion, 64 Brook. L. Rev. 39, 162–68, 173–77 (1998) (detailing scholarly criticisms of rape law's treatment of sexual fraud and sexual coercion); see also Stephen J. Schulhofer, Unwanted Sex: The Culture of

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and juries have found valid consent to sexual intercourse in the face of deadly threats,[3] psychological coercion,[4] material fraud,[5] intoxication,[6] and mental impairment.[7] As Catharine MacKinnon has documented, "Consent as a legal standard in the law of sexual assault commonly exonerates sexual interactions that are one-sided, nonmutual, unwanted, nonvoluntary, nonreciprocal, constrained, compelled, and coerced."[8]

In another corner of criminal law, threats, coercion, fraud, intoxication, and impairment are thought to *so* significantly undermine autonomy that a person affected by them is deemed irresponsible—both morally and legally—for resulting consequences.[9] This is the law of proximate causation. Under a causation analysis, the criminal law rigorously interrogates whether a person's actions are sufficiently autonomous to render that person blameworthy for consequences that follow.[10] When a person's actions are not autonomous, it is often because their autonomy was infringed by some earlier-in-time blameworthy conduct by another, who now carries moral and legal responsibility.[11]

Juxtaposing consent and causation thus reveals a tension in the criminal law's depictions of individual autonomy—a tension that goes to the heart of what it means to bear moral and legal responsibility for sex. When the law asks whether someone is *responsible* for an act of sexual intercourse, it is best understood as asking a question about causation. After all, both legal and moral responsibility for an event typically follow from an

Intimidation and the Failure of Law 114–36 (1998) (critiquing rape law's treatment of coercive situations as consensual).

[3] See infra Subsection I.C.1.

[4] See infra Subsection I.C.1.

[5] See infra Subsection I.C.2.

[6] Coley v. State, 616 So. 2d 1017, 1023 (Fla. Dist. Ct. App. 1993) ("The prevailing view is that voluntary consumption of drugs or alcohol does not, without more, render consent involuntary."); State v. Sherrill, No. 71,253, 1995 WL 18253106, at *3–4 (Kan. Ct. App. June 9, 1995) (finding insufficient evidence that the complainant could not consent despite her testimony that "she had consumed a considerable amount of alcoholic liquor"). See generally infra Subsection I.C.3.

[7] See infra Subsection I.C.3.

[8] Catharine A. MacKinnon, Rape Redefined, 10 Harv. L. & Pol'y Rev. 431, 443 (2016).

[9] See infra Section II.B.

[10] See, e.g., Eric A. Johnson, Trust and the Limits of Trust: Rethinking the Doctrine of *Novus Actus Interveniens*, 2025 U. Ill. L. Rev. 743, 751–55; Guyora Binder & Luis Chiesa, The Puzzle of Inciting Suicide, 56 Am. Crim. L. Rev. 65, 99 (2019).

[11] See Michael S. Moore, The Metaphysics of Causal Intervention, 88 Calif. L. Rev. 827, 836 (2000) ("[I]f the defendant coercively supplies the motive for the intervenor's behavior, then that behavior does not break the causal chain between defendant's action and the harm.").

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inquiry into who caused the event to occur.[12] But when the law concludes that someone consented to an act of sexual intercourse, it also seemingly asserts something about that individual's moral and legal responsibility. An individual who consents to sex is expected to bear the consequences of that act of consent, for better or worse, without complaint.[13] Moreover, because consent operates to absolve other parties from legal responsibility for a sexual act, consent seemingly *intervenes* in the attribution of responsibility.[14]

These conclusions about moral and legal responsibility for sex are unproblematic when sex goes right. In paradigmatic consensual sexual interactions, sex presumptively happens *because* there was a prior act of consent. Thus, the law's conclusions about causal responsibility and its conclusions about consensual responsibility should align.

But when sex goes wrong—when consent is tainted by external factors, including force, coercion, fraud, intoxication, and mental impairment—the criminal law's causal conclusions diverge sharply from its conclusions about the validity of sexual consent. Consider the situation where sexual consent is fraudulently induced, such as when a doctor tells a patient that sexual intercourse is a necessary component of medical treatment.[15] The criminal law's causation doctrine would hold that the doctor, rather than the patient, should bear moral and legal responsibility for causing the sex.[16] But the criminal law's consent doctrine would hold that the consent is valid and enforceable,[17] rendering the sex noncriminal, and leaving the victim to bear the weight of any experienced harm.

Viewing sexual consent as one act in a chain of actions that results in sexual intercourse reveals a limitation in the structure of U.S. rape law. The typical rape statute in the United States makes sexual nonconsent an attendant circumstance—an extraneous fact that is not causally connected

[12] See Binder & Chiesa, supra note 10, at 70 (explaining that causation in criminal law is "little more than a normative attribution of responsibility for a result").

[13] See, e.g., Heidi M. Hurd, The Moral Magic of Consent, 2 Legal Theory 121, 123 (1996) ("[C]onsent defeats any rights on the part of others (including the person consenting) that the actor not do the wrong act.").

[14] See id. at 124 ("Whether it functions as a 'moral transformative' or as a 'stained permission,' consent derives its normative power from the fact that it alters the obligations and permissions that collectively determine the rightness of others' actions.").

[15] See, e.g., Boro v. Superior Ct., 210 Cal. Rptr. 122, 123 (Ct. App. 1985) (defendant posed as a doctor and convinced the victim that she needed to have sex with an anonymous donor in order to treat "a dangerous, highly infectious and perhaps fatal disease").

[16] See infra Subsection II.C.2.

[17] See infra Subsection I.C.2.

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to the essential conduct with which the defendant stands accused.[18] Because of this structural choice, sexual consent renders sexual intercourse noncriminal whenever it is present. External factors that bear on moral responsibility—force, coercion, fraud, and impairment among them—have little doctrinal significance in defining a particular sexual interaction as rape because causation is left out of the picture.[19]

This revelation invites two further questions, one normative and one doctrinal. Normatively, ought we demand that consent play a causal role in sexual interactions if it is to exonerate them? Stated differently, is the mere *presence* of legally valid consent morally transformative? Or is sex normatively desirable only when legally valid consent *causes* subsequent sexual acts? Assigning a causal role to sexual consent seemingly ensures that criminality maps onto our ordinary intuitions about who bears responsibility for a result. If rape law—like criminal law more generally—seeks to track moral responsibility (hence blameworthiness),[20] there are at least provisional arguments that causation should be required.[21]

Doctrinally, contrasting consent and causation invites inquiry into how to structure rape statutes to ensure that consent is causally efficacious. I have been down this road once before, postulating that a rape law modeled on human trafficking laws might profitably incorporate a causation requirement.[22] The recent reforms to the Model Penal Code also hint in this direction. Under the model language adopted at the 2022 annual meeting, at least some sexual assaults would require that sexual intercourse be caused by the defendant's use of force, deception, or

[18] The traditional common law definition of rape was "carnal knowledge of a woman forcibly and against her will." 4 William Blackstone, Commentaries *210. In this formulation, still relevant in roughly half of U.S. states, MacKinnon, supra note 8, at 437 & n.26, the element that the intercourse be nonconsensual (or "against her will") is an attendant circumstance, see, e.g., Susan Estrich, Rape, 95 Yale L.J. 1087, 1121 n.101 (1986). Attendant circumstances "refer to the objective situation that the law requires to exist, in addition to the defendant's act or any results that the act may cause." Model Penal Code § 5.01 cmt. at 301 n.9 (A.L.I., Official Draft and Revised Comments 1985).

[19] See infra Section I.C.

[20] Although there are of course varied justifications for the criminal law, many leading theorists agree that blameworthiness is or ought to be the centerpiece of our criminal system. See, e.g., Douglas Husak, "Broad" Culpability and the Retributivist Dream, 9 Ohio St. J. Crim. L. 449, 449 (2012); Michael Moore, Placing Blame: A General Theory of the Criminal Law 153–54 (1997); Larry Alexander & Kimberly Kessler Ferzan with Stephen Morse, Crime and Culpability: A Theory of Criminal Law 66–67 (2009).

[21] See infra Section III.A.

[22] Ben A. McJunkin, Rape as Indignity, 109 Corn. L. Rev. 385, 447 (2024).

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extortion (and therefore not caused by the complainant's consent).[23] However, the model language ultimately continues the trend of centering the *presence* and *validity* of consent, rather than its causal role in the encounter. Taking consent's causal role in sexual relations seriously would thus require revisions to rape law that go beyond the new Model Penal Code.

This Article proceeds in three Parts. Part I examines the current role of consent in U.S. rape law and its ostensible commitment to protecting individual sexual autonomy. This Part catalogues how consent has been found to be present and valid even in the face of threats, coercion, fraud, or mental impairment. Part II examines the doctrines of proximate and intervening causation, exploring these doctrines' philosophical grounding in individual autonomy. In contrast to Part I, this Part catalogues how threats, coercion, fraud, and mental impairment interrupt causation precisely because they so impair autonomy as to absolve individuals of moral and legal responsibility. In light of this juxtaposition, Part III constructs a normative argument that a proper understanding of autonomy requires that consent play a causal role in sexual intercourse if intercourse is to be normatively desirable. It then explores the consequences of this argument for rape law reformers: rape should not be understood as sex *in the absence* of consent, but rather as *causing* sex through specified, prohibited means other than consent, allowing sexual consent's doctrinal role to track its normative one.

I. CONSENT

Sexual consent is the touchstone for contemporary American rape law.[24] Although the crime of rape was historically limited to egregiously violent sexual intrusions,[25] the past half century has witnessed legal reforms that increasingly center the question of consent and comparatively de-emphasize or even eliminate the requirement of force or violence.[26] According to the American Law Institute, "31 [American] jurisdictions impose liability on the basis of nonconsent alone, without

[23] See Model Penal Code §§ 213.1–213.2, 213.4–213.5 (A.L.I., Tentative Draft No. 6, 2022).
[24] McJunkin, supra note 22, at 393–94.
[25] See Michelle J. Anderson, All-American Rape, 79 St. John's L. Rev. 625, 628 (2005).
[26] Donald Dripps, After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?, 41 Akron L. Rev. 957, 966–67 (2008).

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requiring any added showing of force."[27] As Deborah Tuerkheimer has observed, it is now "virtually axiomatic that nonconsensual sex is rape."[28]

Rape law's turn to consent goes hand-in-hand with a shift in the normative conceptualization of the offense. Historically, the common law of rape was best understood as a male-centered, property-based regime.[29] "It protected first a father's salable interest in his daughter's virginity, and later a husband's right to the exclusive violation of his wife."[30] Feminist legal scholarship has long criticized rape law's historical roots as merely "reinforcing the interests of males in controlling sexual access to females."[31]

Only since the second half of the twentieth century have rape law reforms begun to coalesce around the view that rape harms the sexual autonomy of the individual who is violated.[32] This shift not only centered consent, but also allowed for reforms that abolished the marital rape exemption, recognized male victims of rape, and excluded evidence of a claimant's past sexual experiences.[33] Some view rape law's turn to consent as a long-overdue recognition that women are indeed human.[34]

Yet the law in application has not always reflected rape law's grounding in sexual autonomy. Rape law scholars have long decried how sexual consent, as a legal concept, has often been treated as valid despite the presence of pressures or techniques that are otherwise understood to subvert autonomy. For example, in most U.S. states, "the paradigm case

[27] Model Penal Code § 213.2 cmt. 1 at 52–53 (A.L.I., Preliminary Draft No. 5, 2015).

[28] Deborah Tuerkheimer, Rape On and Off Campus, 65 Emory L.J. 1, 3 (2015).

[29] See Susan Brownmiller, Against Our Will: Men, Women and Rape 16–30 (1975).

[30] Ben A. McJunkin, Deconstructing Rape by Fraud, 28 Colum. J. Gender & L. 1, 37 (2014).

[31] Donald A. Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 Colum. L. Rev. 1780, 1780–81 (1992).

[32] See Ruthy Lowenstein Lazar, Epistemic Twilight Zone of Consent, 30 S. Cal. Interdisc. L.J. 461, 465–66 (2021) ("The reforms of the 1970s, 1980s and later, sparked by feminist movements, have changed rape laws to reflect the modern view of rape as a crime that harms the sexual autonomy of women." (footnote omitted)); see also Tatjana Hörnle, The Challenges of Designing Sexual Assault Law, 77 Current Legal Probs. 49, 54 (2024) ("Sexual autonomy as an individual right has only recently—beginning in the second half of the 20th century—been widely recognized.").

[33] See Jed Rubenfeld, The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy, 122 Yale L.J. 1372, 1392 (2013).

[34] Manon Garcia, The Joy of Consent: A Philosophy of Good Sex 12 (2023) ("The discourse of consent reflects women's liberation: historically, women haven't been considered autonomous people; the capacity to consent highlights the autonomy that women have gained."). See generally Catharine A. MacKinnon, Are Women Human? And Other International Dialogues 237–46 (2006) (using the titular question "are women human?" to evaluate, inter alia, formulations of rape under international law).

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of sexual harassment in which the supervisor forces the employee to have sex with him to avoid dismissal is probably not criminally punishable as rape or sexual assault of a serious nature."[35] Likewise, even material fraud, where a person's reliance is made explicit, is almost never found to vitiate sexual consent.[36]

This Part first traces consent's connection to individual autonomy, focusing primarily on the competing philosophical accounts of autonomy that purport to justify making consent rape law's beating heart. It then examines the structure of contemporary rape laws, highlighting how consent has long been constructed as an attendant circumstance—a fact of the world legally divorced from the defendant's conduct and motivations. This structure means that valid consent can be found to be present regardless of what the defendant did or why he did it. Lastly, this Part details how the structure of rape law has produced legal interpretations of consent that are ostensibly in tension with the presumed commitment to sexual autonomy. Even in jurisdictions that have seemingly embraced rape law's turn to autonomy, consent has proven resilient to common means of subverting autonomy.

A. Consent and Autonomy

Sexual consent is complicated.[37] Indeed, there are scholars who view crafting a more precise definition of consent as one of the most pressing challenges in rape law reform.[38] Peter Westen, the scholar best recognized for cataloguing the role of consent in the criminal law, has identified no fewer than seven distinct consent concepts that inform legal

[35] Martha Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 S. Cal. L. Rev. 777, 821 (1988); MacKinnon, supra note 8, at 443 ("Sex imposed by an employer on an employee by threats to someone's job, for example, is consensual sex in the criminal law . . . .").

[36] See, e.g., McJunkin, supra note 30, at 3, 10–11; Falk, supra note 2, at 70, 159–60.

[37] Hörnle, supra note 32, at 55 ("Consent is not a simple, ordinary term with a clear meaning and thus not much scope for interpretation."); Dripps, supra note 26, at 958 ("The turn to consent . . . is essentially lawless, because there is no determinate and widely-shared understanding of what constitutes consent.").

[38] See, e.g., Tuerkheimer, supra note 28, at 3.

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thinking.[39] Consent may be express or implied.[40] It may be a mental state or an overt action.[41] It may equally be found in begrudging acquiescence and enthusiastic embrace.[42]

Nor is sexual autonomy an uncontested concept.[43] Indeed, it may not even be a singular concept, so much as a collection of principles organized around some common themes.[44] Stephen Schulhofer, perhaps the scholar most committed to surfacing sexual autonomy in rape law, describes it as "the freedom of every person to decide whether and when to engage in sexual relations."[45] But of course that freedom is circumscribed by the need to respect the autonomy of others to make choices that might frustrate one's sexual desires.[46] And we must ask what it means to have "freedom" within the context of multitudinous social constraints.[47]

Despite the lack of conceptual clarity, sexual consent remains the primary mechanism through which the criminal law protects sexual autonomy.[48] Consent protects sexual autonomy by centering each person's choice of whether to engage in sexual conduct and under what conditions. For example, the Supreme Court of New Jersey has defended

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[39] See Kenneth W. Simons, The Conceptual Structure of Consent in Criminal Law, 9 Buff. Crim. L. Rev. 577, 579–82 (2006) (reviewing Peter Westen, The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct (2004) [hereinafter Westen, The Logic of Consent]) (depicting Westen's consent framework as including factual attitudinal consent, factual expressive consent, prescriptive attitudinal consent, prescriptive expressive consent, constructive consent, informed consent, and hypothetical consent). See generally Westen, The Logic of Consent, supra, at 4–10 (chronicling various ways in which the concept of consent may be deployed by legal actors).

[40] See Simons, supra note 39, at 588.

[41] See Green, supra note 1, at 26–28.

[42] MacKinnon, supra note 8, at 441.

[43] See, e.g., Dripps, supra note 31, at 1785 ("Autonomy is a spacious word, capable of containing a variety of philosophical implications."); see also Gerald Dworkin, The Theory and Practice of Autonomy 6 (1988) (explaining that autonomy "is used sometimes as an equivalent of liberty (positive or negative in Berlin's terminology), sometimes as equivalent to self-rule or sovereignty, sometimes as identical with freedom of the will").

[44] See Green, supra note 1, at 19–20 (suggesting that sexual autonomy might best be conceptualized as "a bundle of rights, liberties, privileges, powers, and immunities . . . organized around the idea of securing for its possessor various forms of sexual self-determination and self-realization").

[45] Schulhofer, supra note 2, at 99.

[46] Id.

[47] See generally Kathryn Abrams, From Autonomy to Agency: Feminist Perspectives on Self-Direction, 40 Wm. & Mary L. Rev. 805, 812–22 (1999) (demonstrating how the classical version of sexual autonomy fails to account for the myriad constraints and inequalities under which women live).

[48] See Wertheimer, supra note 1, at 31.

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the centrality of consent to rape law by emphasizing that consent guarantees each individual "the right not only to decide whether to engage in sexual contact with another, but also to control the circumstances and character of that contact."[49] Control over one's sexual decisions is at the heart of leading definitions of sexual autonomy.[50]

Most scholars who detail the connection between consent and autonomy focus overwhelmingly on what is sometimes termed "negative" autonomy.[51] Negative autonomy entails "the freedom to refuse to have sex with any one for any reason."[52] The standard account of the connection between consent and negative autonomy is as follows: an individual's sexual autonomy entails an obligation on all others to refrain from sexual contact with that individual, absent consent.[53] When an individual consents to a sexual act with another person, they waive this obligation, relieving the other person from the burden of restraint.[54] A person exercises their negative autonomy, therefore, by refusing to grant sexual consent except upon conditions that the person finds desirable.[55]

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[49] See State ex rel. M.T.S., 609 A.2d 1266, 1278 (N.J. 1992). Notably, the *M.T.S.* court interpreted consent explicitly as "affirmative and freely-given permission," id. at 1277, rather than the more common view that consent is a state of mind of acquiescence. For a more complete discussion of the *M.T.S.* court's construction of consent, see generally 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, 424–25 (1998).

[50] See, e.g., Schulhofer, supra note 2, at 99 (contending that sexual autonomy includes both "the right to decide on the kind of life one wishes to live and the kinds of activities one wishes to pursue" as well as "the right to safeguard and exclude, the freedom to refuse to have sex with any person at any time, for any reason or for no reason at all").

[51] See, e.g., Dripps, supra note 31, at 1785; Hörnle, supra note 32, at 52 ("Negative autonomy is pivotal in cases involving two people with conflicting rights: if one person invokes defensive rights, the other's claim to positive sexual autonomy is outweighed.").

[52] Dripps, supra note 31, at 1785; see also Mary Childs, Sexual Autonomy and Law, 64 Mod. L. Rev. 309, 310 (2001) (book review) ("Currently the law offers greater protection to the first [negative] aspect of sexual autonomy than to the latter [positive], because of the way it approaches consent.").

[53] Wertheimer, supra note 1, at 3 ("We respect an agent's negative autonomy when we say that it is legally or morally impermissible for others to have sexual relations with her that do not reflect her competent, informed, and voluntary consent."); Schulhofer, supra note 2, at 111 ("Even without making threats that restrict the exercise of free choice, an individual violates a woman's autonomy when he engages in sexual conduct without ensuring that he has her valid consent.").

[54] Vera Bergelson, Sex and Sensibility: The Meaning of Sexual Consent, *in* Sexual Assault: Law Reform in a Comparative Perspective 33, 33–34 (Tatjana Hörnle ed., 2023).

[55] Green, supra note 1, at 20 ("Having sexual autonomy means the prima facie right not only to decide whether to engage in such activities but also to decide whom one will engage in them with, where and when one will do so, and on what conditions.").

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When the law criminalizes nonconsensual sex, it treats the violation of negative autonomy as a serious wrong.

Within the context of negative autonomy, the most pressing questions surround the effect of external influences on a person's consent.[56] Schulhofer claims that "[f]ully autonomous choice requires mental capacity, awareness of the available options, adequate information, and freedom from outside interference with the process of choice."[57] In a similar vein, Westen contends that normatively effective consent requires the consenter to have "competence, knowledge, freedom, and motivation."[58] External influences, such as coercion, deception, or intoxication, can impinge on these conditions of consent's validity, sometimes more, sometimes less, threatening negative autonomy. As scholars have noted, these pressures vary not only in the degree of their imposition, but also in their very nature, leaving difficult legal questions to legislatures and courts.[59]

Other scholars contend that the criminal law should accommodate "positive" autonomy alongside negative autonomy.[60] "Positive" sexual autonomy is typically understood to encompass "the freedom to engage in wanted sex."[61] For the law to enhance positive sexual autonomy, it typically must remove obstacles to a person's using their body sexually.[62]

[56] See Wertheimer, supra note 1, at 3 ("To the extent that we seek to protect an agent's negative autonomy, we should set high standards for what qualifies as valid consent.").

[57] Schulhofer, supra note 2, at 111.

[58] Westen, The Logic of Consent, supra note 39, at 6–7; see also Peter Westen, Some Common Confusions About Consent in Rape Cases, 2 Ohio St. J. Crim. L. 333, 349 (2004) [hereinafter Westen, Some Common Confusions] ("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."). Stuart Green likewise claims that "[c]onsent is said to have prescriptive force in morality and law only if it is made voluntarily, knowingly, and competently." Green, supra note 1, at 28 (emphasis omitted).

[59] See Dripps, supra note 31, at 1788 ("In the rape context, we must grade the pressures to have sex according to their legitimacy—from those pressures to have sex that are perfectly moral, to those that are immoral but not criminal, to those that are criminal, to those that constitute crimes of the most serious sort.").

[60] See, e.g., Russell Christopher, Unconditional Coercion and Positive Autonomy, 73 Okla. L. Rev. 159, 165–68 (2020).

[61] Childs, supra note 52, at 322–23. For other accounts of positive autonomy, see Schulhofer, supra note 2, at 99; Wertheimer, supra note 1, at 3, 125; Green, supra note 1, at 21–22; Hörnle, supra note 32, at 51.

[62] As one example, laws criminalizing prostitution arguably inhibit positive autonomy. See Hörnle, supra note 32, at 70.

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This might mean, inter alia, finding valid consent in some situations of vulnerability, dependency, or even impairment.[63] To scholars in this camp, a blanket prohibition on sex under these circumstances would arguably maximize negative autonomy at too great an expense to positive autonomy.[64]

Quill Kukla (writing as Rebecca Kukla), for instance, contends that "[p]ositive bodily agency is as much a component of autonomy as is negative freedom from unwanted bodily intrusion."[65] They therefore suggest that the law must protect and recognize "all configurations of consensual sexual and romantic relationships."[66] By insulating consensual conduct from criminality, the law arguably advances positive autonomy insofar as it permits sex that is freely chosen.[67] But scholars interested in considering positive sexual autonomy alongside negative autonomy acknowledge that rape laws must be structured "so that the negative and positive aspects of sexual autonomy are balanced."[68]

Some skeptics of consent—of whom there are many[69]—observe that consent may be distracting from the goal of good sex,[70] which may reflect a different view of what sexual autonomy encompasses.[71] "Consent, including completely autonomous, unmanipulated consent, is never going to be sufficient to make sex go well—we can consent to all sorts of lousy sex, including demeaning, boring, alienated, and unpleasantly painful or otherwise harmful sex."[72] Consent merely ensures that sex is not

[63] See Wertheimer, supra note 1, at 3 ("[S]etting high standards for what qualifies as valid consent may encroach on the agent's ability to realize her own goals and desires.").

[64] After all, some people do desire to engage in sexual acts despite vulnerability, dependency, or impairment. See, e.g., Michal Buchhandler-Raphael, The Conundrum of Voluntary Intoxication and Sex, 82 Brook. L. Rev. 1031, 1038 (2017) (explaining that "intoxicated individuals do not lose their right to choose to engage in desired sex").

[65] Rebecca Kukla, That's What She Said: The Language of Sexual Negotiation, 129 Ethics 70, 71 (2018).

[66] Id. at 97.

[67] See Bergelson, supra note 54, at 34 ("[B]y consenting to having sex with Adam, Eve not only relieves the state of its obligation to protect her, Eve demands that the state not intervene ([e.g.,] by punishing Adam) in this consensual transaction because such intervention would violate both Adam's and Eve's autonomy." (emphasis omitted)).

[68] Hörnle, supra note 32, at 73.

[69] For a non-exhaustive survey, see McJunkin, supra note 22, at 425–31.

[70] Garcia, supra note 34, at 13 ("[T]he rise of consent has made it a target of criticisms, as opponents decry it as worse than useless—indeed, harmful to those who want to have freer and more egalitarian sex and love.").

[71] Cf. Joseph Raz, The Morality of Freedom 408 (1986) (contending that autonomy is important as "a constituent element of the good life").

[72] Kukla, supra note 65, at 72 (footnote omitted).

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wrongful on the singular ground that it is nonconsensual; it ensures nothing about whether that sex is harmless, egalitarian, fulfilling, or dignified.[73]

Recognizing this concern, a number of feminist scholars have attempted to "refurbish" sexual consent, contending that it is not merely approval or acquiescence, but that it instead should require something like subjective welcomeness, or maybe even mutual desire.[74] Although these scholars ground their arguments in the normative value of equality rather than autonomy,[75] their call for a world "in which free and equal individuals can mutually commit themselves or assume obligations"[76] echoes many of the philosophical descriptions of autonomy just discussed. And their prescriptions for consent match many of the preconditions for sexual autonomy offered by other philosophers: "Under the refurbished version of consent, consent is not considered freely given if secured through physical force, economic pressure, or deception."[77]

Despite the variety of approaches to thinking about the issue, the connection between sexual consent and sexual autonomy seems to be an inescapable component of contemporary rape law's philosophical justifications. Treating all nonconsensual sex as rape, as criminal statutes increasingly do, arguably protects individuals' negative sexual autonomy. But important questions remain. Which external impingements on autonomy should be viewed as serious enough to invalidate consent? Does the need to accommodate positive autonomy counsel in favor of fewer restrictions on consent? And is consent—"refurbished" or otherwise—even the right tool for protecting autonomy?

B. The Structure of Consent in Rape Law

If contemporary rape law now uses consent as a mechanism to protect the value of individual autonomy, it has not always done so.[78] Even as

[73] Bergelson, supra note 54, at 34 ("Consent alone does not magically eliminate harms, hurts, indignity, or exploitation.").

[74] See, e.g., Chamallas, supra note 35, at 783–84, 814; Vanessa E. Munro, Concerning Consent: Standards of Permissibility in Sexual Relations, 25 Oxford J. Legal Stud. 335, 343–45 (2005) (book review).

[75] See, e.g., Chamallas, supra note 35, at 783–84.

[76] Carole Pateman, Women and Consent, 8 Pol. Theory 149, 164 (1980).

[77] Chamallas, supra note 35, at 814.

[78] Anne M. Coughlin, Sex and Guilt, 84 Va. L. Rev. 1, 6 (1998) ("[I]t seems clear that the official purposes of rape law [historically]—and, surely, there were and are many theoretical

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late as the mid-1980s, rape was primarily conceived of, both socially and legally, as a violent attack by a stranger with a deadly weapon.[79] The violence of the encounter was at the forefront. The victim's autonomy—that freedom to control sexual access to one's own body—was largely out of the picture.[80]

However, consent, or more specifically *nonconsent*, was still central to rape law. At common law, rape was defined as "carnal knowledge of a woman forcibly and against her will."[81] Historically, "against her will" referred to proof that the victim had been unwilling. Nonconsent was proven through a victim's physical resistance to an aggressor's attempt to initiate sexual intercourse.[82] Hitting, kicking, scratching, biting, screaming out, and running away have all been found to express nonconsent,[83] whereas an explicit verbal refusal was traditionally insufficient.[84] As Michelle Anderson has documented, rape law thus "required a physical fight on two parts": "It required the victim to put up physical resistance against a sexual attack, and it required a rapist to

and practical justifications for the rape prohibition—did not include the protection of sexual autonomy.").

[79] See Estrich, supra note 18, at 1092 ("At one end of the spectrum is the 'real' rape, what I will call the traditional rape: A stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse.").

[80] Id. at 1122 ("[T]he purpose of the consent rule is not to protect female autonomy and freedom of choice, but to assure men the broadest sexual access to women."). Stephen Schulhofer's *Unwanted Sex*, published in 1998, is often credited with bringing sexual autonomy to the forefront of the academic conceptualization of the crime of rape, which itself has typically been more progressive than the legal realities of the crime. See generally Schulhofer, supra note 2 (arguing that the law should both elevate the right of sexual autonomy and grant it similar protections to those of other fundamental rights).

[81] Blackstone, supra note 18, at *210.

[82] Michelle J. Anderson, Reviving Resistance in Rape Law, 1998 U. Ill. L. Rev. 953, 962.

[83] See People v. Norrington, 202 P. 932, 935 (Cal. Dist. Ct. App. 1921) ("For the purpose of reaching the conclusions announced in some of these cases it is necessary to assume that, in the first place, a man has a right to approach a woman, lay hold on her person, take indecent liberties with her, and that, unless she 'kicks, bites, scratches and screams' to the 'utmost of her power and ability,' she will be deemed to have consented, and indeed to have invited the familiarity." (citation omitted)). Troublingly, even many of these forms of resistance have been considered insufficient to manifest nonconsent when additional resistance may have been possible. See, e.g., State v. Hoffman, 280 N.W. 357, 360 (Wis. 1938) (holding that complainant's resistance fell "far short" of the standard to establish nonconsent despite the fact that she ran from defendant and tried to kick him).

[84] See, e.g., State v. Baker, 192 P.2d 839, 841–42 (Wash. 1948) (recounting a jury instruction that explained that "the consent of the woman, however reluctantly given, or if accompanied by mere verbal refusal at any time during the intercourse, prevents the act from becoming rape"); Anderson, supra note 82, at 992 (explaining that "verbal resistance was simply inadequate to prove anything").

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overcome the victim's physical resistance with force."[85] Nonconsent was important to demonstrate that the rape victim was not to blame for her own violation.[86] Rape victims were viewed skeptically, and prosecutors carried the heavy burden of demonstrating that the complainant was not somehow complicit in the encounter.[87] Clear evidence of resistance was necessary to exonerate the complainant from any imputed responsibility.[88] For a variety of reasons, largely traceable to the cultural disapproval and criminalization of even consensual nonmarital sex, the issue of consent quite purposely "put the rape complainant on trial, together with the man she accused."[89]

Under this regime, sexual consent was effectively a background condition that pertained until nonconsent was adequately manifested, rather than something that a party to the sexual interaction thinks or does. It would have been nonsensical to talk about consent as a *cause* of intercourse because consent was ever-present in the absence of resistance. Over time, the requirement that nonconsent be manifested as physical resistance has been obviated.[90] The "no means no" movement of the 1980s and 1990s succeeded in recognizing that clear, unambiguous verbal resistance should suffice to prove nonconsent.[91] This reform did not change the basic fact, however, that consent to sexual intercourse was

[85] Anderson, supra note 25, at 628.

[86] Coughlin, supra note 78, at 27–28.

[87] See id. at 8, 27–28. Often this skepticism is traced to the cautionary warning of Sir Matthew Hale that rape is "an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, [though] never so innocent." 1 Matthew Hale, The History of the Pleas of the Crown 635 (George Wilson ed., London, Sollom Emlyn new ed. 1778).

[88] Wayne R. LaFave, Criminal Law 892 (5th ed. 2010) ("The penetration also had to be against the will of the victim, and the need to establish such nonconsent often necessitated proof of the victim's continued physical resistance to the man's advances or a showing of force or threats to such a degree as to make such resistance unavailing."). As one well-known jurist put it, a woman "must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person by a stranger or an unwelcomed friend." State v. Rusk, 424 A.2d 720, 733 (Md. 1981) (Cole, J., dissenting).

[89] Coughlin, supra note 78, at 28.

[90] See, e.g., State v. Jones, 299 P.3d 219, 227 (Idaho 2013) ("[W]e hold the statute does not require that rape victims resist to their utmost physical ability and that verbal resistance is sufficient resistance to substantiate a charge of forcible rape.").

[91] See Kimberly Kessler Ferzan, Consent, Culpability, and the Law of Rape, 13 Ohio St. J. Crim. L. 397, 417 (2016).

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presumed to be present and valid unless and until the complainant took sufficient action to overcome that presumption.[92]

In the traditional formulation of the crime, then, rape could be parsed into three essential elements: "(i) a specified act, i.e., 'carnal knowledge,' (ii) brought about by a specified means of imposition, i.e., 'forcibly,' and (iii) in circumstances where the woman had a particular state of mind concerning the perpetration of that act by those means, i.e., 'against her will.' "[93] As this delineation makes clear, the element of nonconsent—"against her will"—is best understood as an attendant "circumstance" that attends the perpetrator's conduct. That is, at the time that the perpetrator engaged in his conduct (sexual intercourse by force), it also had to be true that the victim expressed her nonconsent. Notably, "[t]he conjunction [of force and nonconsent] means that no matter how much force is used to obtain it, consent can still occur."[94]

Over the last half century, the requirement that rape be "forcible" has been omitted or de-emphasized in many U.S. jurisdictions as rape law has been reframed around the protection of sexual autonomy.[95] But the structure of consent in rape law has remained unchanged. A typical rape or sexual assault statute may now simply define the crime, as Arizona does, as "sexual intercourse or oral sexual contact with any person without consent of such person."[96] Nonconsent remains an attendant circumstance, albeit a particularly important one, that is structurally divorced from the defendant's conduct (which, in this instance, would simply be engaging in sexual intercourse).

Within the criminal law literature, relatively little attention is paid to attendant circumstances of crimes. For example, the Model Penal Code specifically defines the "conduct" elements of a crime,[97] but does not clearly define an "attendant circumstance," despite the distinct role that this category of element plays in determining issues of culpability

[92] Some scholars continue to defend this position on the ground that criminal law should be narrower, clearer, and more restrained than morality. See, e.g., Hörnle, supra note 32, at 60–61.

[93] LaFave, supra note 88, at 891.

[94] Dripps, supra note 31, at 1792–93.

[95] See, e.g., Aya Gruber, Consent Confusion, 38 Cardozo L. Rev. 415, 421–23 (2016).

[96] Ariz. Rev. Stat. Ann. § 13-1406 (2025).

[97] Model Penal Code § 1.13(5) (A.L.I., Proposed Official Draft 1962) (defining "conduct" to mean "an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions").

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elsewhere in the Code.[98] The comments accompanying the Model Penal Code mention only that circumstances "refer to the objective situation that the law requires to exist, in addition to the defendant's act or any results that the act may cause."[99]

The attendant circumstance of nonconsent in rape law is thus a bit of an anomaly. It is the sole dividing line between desired, lauded, perhaps even constitutionally protected behavior[100] and serious criminality. If consent ensures autonomy, and if infringement of autonomy is the primary harm against which rape law now protects, it should be surprising that the "touchstone" of rape law is structured as an attendant circumstance, rather than something a criminal defendant does or causes.

This structural choice is not without consequences. Rape has long been criticized as unique among crimes for the way in which the trial process focuses on the thoughts and behavior of complainants rather than defendants.[101] To be sure, some of this is an historical artifact.[102] But some of this is also due to the fact that rape laws—and particularly contemporary rape laws—pair a conduct element (sexual intercourse) that is commonly undisputed with an attendant circumstance (nonconsent) that is hotly contested.[103] And because nonconsent is understood as a mere circumstance, disconnected from the defendant's actions, the

[98] As Paul Robinson and Jane Grall have observed, "[T]o act 'purposely' with respect to 'conduct' or in causing 'a result,' an actor must have such elements as his conscious object; but to act 'purposely' with respect to 'an attendant circumstance,' an actor need only be aware of such circumstance or hope that it exists." Paul H. Robinson & Jane A. Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 Stan. L. Rev. 681, 707 (1983) (footnote omitted).

[99] Kit Kinports, *Rosemond*, Mens Rea, and the Elements of Complicity, 52 S.D. L. Rev. 133, 157–58 (2015) (quoting Model Penal Code § 5.01 cmt. at 301 n.9 (A.L.I., Official Draft and Revised Comments 1985)); see also R.A. Duff, The Circumstances of an Attempt, 50 Cambridge L.J. 100, 104 (1991) (observing that circumstances "exist *independently* of the action, and provide the context in which it is done").

[100] See Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[101] See, e.g., Vivian Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1, 12–22 (1977); Brownmiller, supra note 29, at 372–73; McJunkin, supra note 22, at 395–404.

[102] See Coughlin, supra note 78, at 27–30.

[103] See David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 Minn. L. Rev. 529, 545, 554, 578 (1994) (suggesting that the most common defense in acquaintance rape cases is consent, where "the accused admits the act of intercourse"); Margo Kaplan, Rape Beyond Crime, 66 Duke L.J. 1045, 1059–60 (2017) ("'Acquaintance rape' cases, for example, which occur when the defendant knows the victim, are the most common type of rape in the United States.").

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structure of rape law also largely obscures inquiry into many constraints on the complainant's choice whether to consent in the first instance.[104]

But there is another consequence of this anomaly that warrants interrogation. Because consent, legally, is structured as an attendant circumstance, it exonerates a sexual interaction *whenever* it is present, regardless of what role it plays in the interaction. As Eric Johnson has explained, one of the defining features of attendant circumstances is that they "hinge only on 'whether something happened—not why or how it happened.'"[105] Thus, sex in the presence of consent just is not rape. The consent need not have any necessary connection to the other elements of the crime, including to the sexual intercourse. We may profitably query whether this is correct: Does the mere presence of consent hold the kind of "moral magic" that insulates a defendant from rape liability?[106] In a later Section, I challenge this premise directly.[107] For now, I simply want to highlight the relationship between rape law's structure—nonconsent in rape law as an attendant circumstance—and consent's operation—consent is deemed morally and legally transformative whenever it is found to be present, regardless of whether it motivated the intercourse.

The next Section takes this observation a step further, examining examples of rape law's structure in action. Because consent exonerates a sexual interaction whenever it is present, a central question for rape law jurisprudence is when and under what circumstances a given expression of consent is valid. The answer to this question may be surprising to those who view rape law as instrumental in protecting autonomy; in practice, valid consent has been found in some of the most despairing circumstances, including in the face of threats and coercion, under the influence of fraud, or influenced by mental impairment. The jurisprudence of consent thus diverges markedly from the high aspirations of so many philosophical accounts of sexual autonomy.

C. Conditions of Valid Consent

As rape law has evolved, the leading edge of rape law reform has shifted. The key question is no longer whether nonconsensual sex should

[104] MacKinnon, supra note 8, at 441–42.

[105] Eric A. Johnson, Does Criminal Law Matter? Thoughts on *Dean v. United States* and *Flores-Figueroa v. United States*, 8 Ohio St. J. Crim. L. 123, 148 (2010).

[106] See generally Hurd, supra note 13 (contending that the "moral magic" of consent inheres in the presence of a particular mental state in the consenter).

[107] See infra Subsection III.A.2.

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be criminalized in the absence of force (a question most jurisdictions have answered in the affirmative),[108] but rather what the necessary conditions are to render an expression of consent valid.[109] Peter Westen would describe this as a question of "prescriptive" consent. Under Westen's framework, "factual consent" includes all instances where a person inwardly or outwardly expresses agreement to a particular event or outcome,[110] whereas prescriptive consent includes only those instances of factual consent that should be legally enforceable because they occur under the right conditions.[111]

As Stephen Schulhofer has framed it, "The issue we are fighting over today is the same one that has been unresolved since the 1960s: what things other than physical violence make consent inauthentic?"[112] Put differently, under what circumstances should an expressed "yes" be no longer legally and morally transformative? According to Schulhofer,

> [T]he major disagreement on this issue is between those who want the list to be very short—limited to things that are almost as coercive as physical violence—and on the other side, those who want that list to include many or all the other circumstances that limit a completely free choice.[113]

Dominant accounts of autonomy consider a large swath of external constraints potentially invalidating.[114] Luis Chiesa has identified at least three "dimensions" of autonomy that emerge from scholarly consensus: "non-coercion, competency, and information."[115] Coercion includes threats, both physical and psychological, as well as techniques like "emotional and social isolation."[116] The absence of coercion—sometimes simply termed "freedom"[117]—is widely recognized as an essential

[108] Model Penal Code § 213.2 cmt. 1 at 52–53 (A.L.I., Preliminary Draft No. 5, 2015).
[109] Samuel W. Buell, Culpability and Modern Crime, 103 Geo. L.J. 547, 570 (2015) ("A challenge for the important project of reforming the law of sexual assault is to formulate doctrine that specifies the nature of invalid consent.").
[110] See Westen, The Logic of Consent, supra note 39, at 4–5.
[111] Id. at 6–7.
[112] Stephen J. Schulhofer, Reforming the Law of Rape, 35 Law & Ineq. 335, 345 (2017).
[113] Id.
[114] Jonathan Knutzen, The Trouble with Formal Views of Autonomy, 18 J. Ethics & Soc. Phil. 173, 175 (2020) (noting that formal views of autonomy require "that the formation of preferences occurs in the absence of coercion, manipulation, domination, and so on").
[115] Chiesa, supra note 1, at 422.
[116] See id.
[117] Id. at 421–22.

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component of autonomy.[118] Competency involves "the capacity for exercising minimal rationality and the absence of debilitating mental illness."[119] A person who lacks basic competency is not capable of self-governance in the way demanded by autonomy.[120] Lastly, "[c]onduct also needs to be sufficiently informed in order to qualify as autonomous."[121]

Chiesa's three dimensions neatly reveal the shortcomings of consent doctrine. This Section surveys the jurisprudence of sexual consent along these three dimensions to demonstrate that the concept of consent in rape law is surprisingly resilient in the face of impediments to autonomy. It reveals that the law in practice currently sides with those who would hold expressed consent valid in all but the most extreme circumstances—even those circumstances that are often understood as quintessentially impairing individual autonomy.[122] "Current law typically makes no distinction between consent which flows from mutual desire and consent induced by coercion, fraud, or exploitation of power imbalances."[123] All too frequently, sexual consent given in response to threats, induced by fraud, or influenced by mental impairment is upheld by courts as valid, precluding rape liability for sexual impositions.[124] Put differently, direct impediments to autonomy do not suffice to invalidate consent in practice, even though consent purports to protect autonomy in theory.

1. Force and Coercion

The criminal law canon is filled with cases where illegitimate pressures—including threats of harm; or intellectual, emotional, or economic coercion—were employed to lawfully procure sex from an unwilling party. But because rape has for so long required both force and nonconsent, it can be hard to tease out the differences between a finding

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[118] See, e.g., Wertheimer, supra note 1, at 3 (suggesting that autonomous consent must be "voluntary"); Schulhofer, supra note 2, at 111 (suggesting that fully autonomous choice must be free from outside interference).

[119] Chiesa, supra note 1, at 422–23.

[120] See id. at 420–21 (explaining the importance of the capacity for self-governance to conceptions of autonomy).

[121] Id. at 423.

[122] Donald Dripps argues that this divergence stems, at least partly, from a divide between elite opinion, which "values sexual autonomy," and popular opinion, "as reflected in jury verdicts," which views sexual autonomy suspiciously. Dripps, supra note 26, at 958.

[123] Childs, supra note 52, at 310.

[124] These are obviously not the only impediments to autonomy that the criminal law might care about. See Hörnle, supra note 32, at 70 (evaluating rape law's approach to the "sexual exploitation of socially dependent people," such as employees).

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of valid consent and a finding of an absence of force. Consider the following examples: A high school principal in Montana threatened to block a student from graduating if she did not agree to have sexual intercourse with him.[125] A child's guardian in Pennsylvania threatened to send the child to a juvenile detention center if she did not cave to his sexual demands.[126] An abusive ex-boyfriend in North Carolina told his ex that he would "'fix' her face" if she denied him the "right" to have sex with her one last time.[127] As our textbooks and treatises routinely remind us, these cases and so many cases like them are not rape.[128]

Despite the fact that in each of the above cases the victim ultimately acquiesced to the sex acts, the respective courts spent little time, if any, evaluating the validity of the victim's expression of consent.[129] Instead, these cases were more easily dispensed with as instances where sufficient force was lacking.[130] This is because the physical force that served as the *sine qua non* of rape at common law was aberrant, violent, and often deadly.[131] Sex obtained by lesser forms of threats or coercion simply did not rise to this standard.[132] As a result, it did not matter to the case outcome whether we consider these as instances of valid or invalid consent.

But as rape law has begun to move away from a force requirement, a deeper understanding of when threats and coercion invalidate consent is needed. A look at the cases that have begun to undertake this effort immediately reveals the limitations of consent as a concept. Even in cases where a defendant deployed serious violence to procure sex, factfinders are apt to find valid consent on the part of the victim. In his work teasing out the differences between the presence of force and the absence of

[125] State v. Thompson, 792 P.2d 1103, 1104 (Mont. 1990).

[126] Commonwealth v. Mlinarich, 542 A.2d 1335, 1337 (Pa. 1988) (plurality opinion).

[127] State v. Alston, 312 S.E.2d 470, 472 (N.C. 1984).

[128] See Sanford H. Kadish, Stephen J. Schulhofer & Rachel E. Barkow, Criminal Law and Its Processes: Cases and Materials 355–58 (9th ed. 2012).

[129] See *Mlinarich*, 542 A.2d at 1341 ("[S]he was left with a choice and therefore the submission was a result of a deliberate choice and was not an involuntary act."). But see *Alston*, 312 S.E.2d at 475 (concluding that the State had produced substantial evidence that the sexual intercourse was against the victim's will).

[130] *Thompson*, 792 P.2d at 1106; *Mlinarich*, 542 A.2d at 1342; *Alston*, 312 S.E.2d at 476.

[131] Anderson, supra note 25, at 628 ("Instead of criminalizing rape, [the law] has criminalized the extrinsic, violent assault: a bloody brawl with the goal of obtaining sex.").

[132] For more recent examples of this phenomenon, see Yates v. Commonwealth, 430 S.W.3d 883, 892–93 (Ky. 2014) (threat to report underage victim's adult boyfriend to the police did not constitute "forcible compulsion").

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consent, Donald Dripps reported on "the notorious case of *State v. Lord*," where a jury imputed consent to a woman who was wearing provocative attire, despite the fact that the defendant had held the woman at knifepoint to secure her sexual submission.[133] Although this outcome may seem surprising today, it is consistent with the findings of David Bryden about rape cases in the late twentieth century. Bryden states, "At least until recently, jurors' biases against imprudent, norm-violating women have been a major obstacle to convictions in acquaintance-rape cases even when the man allegedly used considerable force."[134]

Or consider the famous case of the Texas man who broke into a woman's apartment at 3:00 AM and held her at knifepoint, demanding sex.[135] The woman pleaded with her assailant to at least wear a condom.[136] When he did not have a condom, she provided one.[137] He then had intercourse with her for roughly an hour before leaving.[138] On these facts, the grand jury declined to indict. One juror publicly commented that the "woman's act of [providing a condom] might have implied her consent."[139] Indeed, most scholars who have studied the case conclude that the jury must have interpreted the offering of a condom as implicit (and valid!) consent to sexual intercourse with the knife-wielding stranger.[140]

It would be easy to say that these cases are simply outliers—that it would be unwise to premise a law reform project on atypical cases, no

[133] Dripps, supra note 31, at 1793–94. The victim was apparently wearing "a green tanktop and a white, lacy miniskirt with no underwear." Nancy E. Snow, Evaluating Rape Shield Laws: Why the Law Continues to Fail Rape Victims, *in* A Most Detestable Crime: New Philosophical Essays on Rape 245, 249 (Keith Burgess-Jackson ed., 1999). See generally Jury Acquits Man of Rape, Cites Woman's Clothing, S. Fla. Sun Sentinel, https://www.sun-sentinel.com/1989/10/05/jury-acquits-man-of-rape-cites-womans-clothing/ (last updated Sep. 25, 2021, at 21:28 ET) (describing the verdict in *State v. Lord*).

[134] David P. Bryden, Redefining Rape, 3 Buff. Crim. L. Rev. 317, 425 (2000).

[135] Carla M. da Luz & Pamela C. Weckerly, The Texas 'Condom-Rape' Case: Caution Construed as Consent, 3 UCLA Women's L.J. 95, 96 (1993).

[136] Id.

[137] Id.

[138] Id.

[139] Id. at 97 (quoting 2nd Jury to Hear Condom Rape Case, St. Petersburg Times, https://www.tampabay.com/archive/1992/10/25/2nd-jury-to-hear-condom-rape-case/ (last updated Oct. 12, 2005)).

[140] Id. A second grand jury eventually indicted the assailant, and he was sentenced to forty years' incarceration. Rapist Who Agreed to Use Condom Gets 40 Years, N.Y. Times (May 15, 1993), https://www.nytimes.com/1993/05/15/us/rapist-who-agreed-to-use-condom-gets-40-years.html.

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matter how egregious.[141] It is perhaps easier still to say that these cases would obviously come out differently today, as meaningful consent increasingly becomes a part of the fabric of social discourse surrounding sex.[142] I include these two examples not to suggest that they are common or likely to be replicated, but rather to demonstrate how the structure of rape law—in particular, the framing of consent as an attendant circumstance—silos the crucial question of sexual consent from the essential context of the defendant's wrongdoing. When consent is simply a circumstance that either is or is not present, unconnected to anything the defendant did (indeed, unconnected even from the sex act), it can be found in even the most despairing circumstances.

But there is also reason to suspect that legal perspectives on consent have not evolved as far as reformers would hope. Just three years ago in Kansas, a woman convened her own grand jury after prosecutors refused to bring charges against her alleged rapist.[143] The woman claimed that she was engaged in consensual sex when her partner began slapping and strangling her.[144] She began to lose consciousness and feared that she was going to die.[145] She was not able to verbally withdraw her consent because she was being choked.[146] The grand jury declined to indict the man.[147] Although it is impossible to know precisely why the grand jury declined to indict, an expert who commented on the case explained that the public is often looking for victims who scream or fight back.[148] The implication is that jurors may have viewed the sex as consensual notwithstanding the unexpected and unconsented-to presence of physical violence.

Similarly, in Utah last year, a woman went public with her allegations after prosecutors declined to bring charges against the man she says raped

[141] See, e.g., Bryden, supra note 134, at 477–78 (arguing that scholarly proposals for rape law over-rely on aberrant case outcomes that may not reflect common practice).

[142] See McJunkin, supra note 22, at 404–08 (documenting the social prevalence of so-called consent culture).

[143] Margaret Stafford, Grand Jury Called by Kansas Woman Returns No Rape Charges, AP News (Nov. 3, 2021, at 18:12 ET), https://apnews.com/article/kansas-sexual-assault-mcphers on-f6508fab65bf89bf76c7c79a4a9e7859 [https://perma.cc/W9X6-T6HZ]. Six states, including Kansas, allow their citizens to convene a grand jury by petition. Id.

[144] Id.

[145] Id.

[146] Id.

[147] Id.

[148] Id.

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her.[149] According to the woman, "a tattoo artist named 'Steve' invited her over to hang out, pressured her to drink, then bound her wrists and ankles with electrical tape and raped her."[150] The woman immediately reported the incident to police, who collected DNA and documented her injuries with photos.[151] "Steve" (an alias) turned out to be a convicted sex offender.[152] Despite the use of physical force, the pressures to consume alcohol, and the existence of forensic evidence, prosecutors explained that they declined to pursue the case because "there is insufficient evidence for us to prove the lack of consent."[153]

It is not just juries and prosecutors reaching these decisions. *United States v. Bright*, a case before the U.S. Court of Appeals for the Armed Forces, involved a drill sergeant who pressured a young trainee into repeated sexual encounters using threats of discipline.[154] According to the testimony of the trainee, the defendant Bright threatened to take away her base leave, implying that she would "spend eight months at Bravo [the base] locked down."[155] If the trainee did not return Bright's phone calls, Bright would tell the entire company that the trainee had "messed up" and would make them all do push-ups as punishment.[156] At trial, the trainee testified that Bright had an "angry side" and that he explicitly stated that she "should be scared of him."[157] Even though the trainee had expressly communicated to Bright that she did not want a sexual relationship, she acquiesced to the threats by meeting Bright at an off-base hotel on at least four occasions.[158]

On these facts, Bright was convicted of rape by the trial court.[159] However, the court of appeals reversed the judgment, finding that the evidence was legally insufficient to convict.[160] Specifically, the appellate court concluded that no reasonable jury could find a lack of consent, in

[149] Daniella Rivera & Keira Fairmont, The Challenge of Consent: Utah's Rape Law & Low Prosecution Rate, KSLTV.com (May 12, 2023, at 17:09 ET), https://ksltv.com/545226/the-challenge-of-consent-utahs-rape-law-low-prosecution-rate/ [https://perma.cc/TJ27-ZURM].
[150] Id.
[151] Id.
[152] Id.
[153] Id. (internal quotation marks omitted).
[154] United States v. Bright, 66 M.J. 359, 359, 362 (C.A.A.F. 2008).
[155] Id. at 360.
[156] Id. at 362.
[157] Id.
[158] Id. at 360–61.
[159] Id. at 360.
[160] Id. at 366.

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part because the trainee had voluntarily met Bright at the hotel.[161] Neither the threats of discipline, the implication of violence, the authority that Bright held over his trainee, or even her overt expressions of unwillingness were enough to invalidate the implication of consent that attended her acquiescence to his demands.

Although these case outcomes are at odds with most philosophical accounts of autonomy, they might not be out of step culturally. As Samuel Pillsbury has documented, "Surveys of young men indicate that engaging in unwanted sexual contact is common and that when men admit to using force against women partners to gain sex, they do not generally consider it rape."[162] Catharine MacKinnon has explained this phenomenon well.[163] Among acquaintances, sexual coercion is far more likely to be chalked up to "bad sex" or "bad romance" than to be considered a serious crime.[164]

2. Fraud

No area of law more clearly reflects the divergence between consent doctrine and individual autonomy than rape law's sexual fraud jurisprudence.[165] Nearly every meaningful theory of autonomy contends that autonomous action must be sufficiently informed[166] or at least free from intentional deception.[167] Some contemporary scholars have argued that *every* material deception should invalidate sexual consent.[168] Those

[161] See id.

[162] Samuel H. Pillsbury, Crimes Against the Heart: Recognizing the Wrongs of Forced Sex, 35 Loy. L.A. L. Rev. 845, 868–69 (2002) (citing Mary P. Koss, Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education, *in* Rape and Society: Readings on the Problem of Sexual Assault 35, 35, 45–46 (Patricia Searles & Ronald J. Berger eds., 1995)).

[163] MacKinnon, supra note 8, at 465 ("Under unequal conditions, many women acquiesce in or tolerate sex they cannot as a practical matter avoid or evade. Many initiate sex to stop other abuse and do their best to make it sexy so it will end quickly. That does not make the sex wanted. It certainly does not make it equal. It does make it legally consensual in most jurisdictions.").

[164] Pillsbury, supra note 162, at 846.

[165] But see Chiesa, supra note 1, at 442–43 (contending that there is no divergence because rape law only protects one dimension of autonomy, specifically the absence of coercion, and does not seek to protect informed consent).

[166] See Vera Bergelson, Sex, Lies and Law: Rethinking Rape-by-Fraud, *in* Legal Perspectives on State Power: Consent and Control 152, 156–57 (Chris Ashford, Alan Reed & Nicola Wake eds., 2016); Chiesa, supra note 1, at 423.

[167] See Gregory Klass, The Law of Deception: A Research Agenda, 89 U. Colo. L. Rev. 707, 715 (2018).

[168] See, e.g., Tom Dougherty, Sex, Lies, and Consent, 123 Ethics 717, 719 (2013); McJunkin, supra note 30, at 45–46.

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who subscribe to this view "assume that sexual autonomy entitles people to stipulate whatever preconditions matter to them."[169] But even scholars who advocate for some restraint in this area of rape law tend to agree that at least some material deceptions should render consent invalid.[170]

Yet rape law has long treated a wide variety of sexual frauds as permissible.[171] In fact, Jed Rubenfeld once claimed that rape law's commitment to protecting sexual deception is so well entrenched that theorists would be better served by jettisoning autonomy than by trying to reform rape law.[172] Early common law courts simply concluded that sexual consent procured by fraud was always valid, precluding rape prosecutions for sexual frauds.[173] In one of the earliest English prosecutions of sexual fraud, the court explained that the law must distinguish between compelled sex, which would be abhorrent when experienced, and deceptively induced sex, where the victim was merely "beguil[ed] . . . into consent and co-operation."[174]

Over time, common law courts began to recognize some sexual deceptions as rape, but "only under unusual, highly limited circumstances."[175] Most courts adopted a distinction between fraud about the fundamental act (so-called "fraud in the factum" or "fraud in fact") and fraud about matters that may have motivated the act (so-called "fraud in the inducement").[176] Fraud in the factum, we are told, vitiates consent.[177] Traditionally, fraud in the factum has been limited to two

[169] Hörnle, supra note 32, at 66.

[170] See Estrich, supra note 18, at 1120 (contending that rape law should "prohibit fraud to secure sex to the same extent we prohibit fraud to secure money"); Wertheimer, supra note 1, at 213–14.

[171] McJunkin, supra note 30, at 3.

[172] Rubenfeld, supra note 33, at 1423.

[173] See, e.g., Whittaker v. State, 7 N.W. 431, 433 (Wis. 1880) ("We are satisfied that it is never proper or safe to instruct the jury in any case that the crime of rape may be committed with the consent of the woman, *however obtained* . . . ." (emphasis added)); Commonwealth v. Childs, 2 Pitts. 391, 395 (Pa. O. & T. 1863) ("No amount of persuasion or solicitation however improper, no amount of deception or even fraud however villainous or outrageous, will make illicit intercourse constitute rape, where the woman, induced or persuaded, consents to the act."). Because the traditional definition of rape also required the element of physical force, early common law courts made clear that fraud is not a substitute for force. See, e.g., Don Moran v. People, 25 Mich. 356, 364 (1872) ("[T]he idea of force cannot be thus left out and ignored, nor can such fraud be allowed to supply its place, though it would doubtless supply, and satisfy, all the other terms of the definition . . . .").

[174] R v. Jackson (1822) 168 Eng. Rep. 911, 911; Russ. & Ry. 487, 487.

[175] Schulhofer, supra note 2, at 152.

[176] See, e.g., Wertheimer, supra note 1, at 195–96 (emphasis omitted).

[177] R v. Linekar [1995] 3 All ER 69 EWCA (Crim) at 69.

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paradigmatic frauds: "medical misrepresentation and spousal impersonation."[178] By contrast, fraud in the inducement—that is, *all other fraud*—is not taken seriously in criminal jurisprudence. The U.S. Court of Military Appeals once described sexual frauds in the inducement as nothing more than "general knavery," even though the category includes material deceptions about topics as central to sexual decision-making as marital status, intentions to marry, and even financial compensation.[179]

The most well-known case of fraud in the inducement is *Boro v. Superior Court*, a case before the Court of Appeals of California.[180] The facts of *Boro* are heartbreaking. The complainant received a phone call from the defendant, who was falsely posing as a doctor from a local hospital.[181] The defendant told the complainant that "he had the results of her blood test and that she had contracted a dangerous, highly infectious and perhaps fatal disease."[182] The doctor suggested a treatment option that involved "intercourse with an anonymous donor who had been injected with a serum which would cure the disease."[183] The complainant agreed to meet the "donor" at a nearby hotel, where she paid a $1,000 "down payment" for her treatment, and engaged in the intercourse.[184] As the court noted, "At the time of penetration, it was [the complainant's] belief that she would die unless she consented to sexual intercourse with the defendant."[185] Despite the egregious nature of the fraud, and the fear of death it instilled in the complainant, the California court concluded that the fraud was "merely to some collateral matter (fraud in the inducement)"[186]—the complainant had understood the "nature of the act" and therefore validly consented to intercourse.[187]

Although *Boro* is now an older case, the Supreme Court of Iowa recently reaffirmed its central distinction between fraud in the factum and fraud in the inducement. That court found valid consent, precluding rape liability, in the case of a program supervisor who had abused young boys

[178] See Rubenfeld, supra note 33, at 1398.
[179] See United States v. Booker, 25 M.J. 114, 116 (C.M.A. 1987).
[180] 210 Cal. Rptr. 122, 122 (Ct. App. 1985).
[181] Id. at 123.
[182] Id.
[183] Id.
[184] Id.
[185] Id.
[186] Id. at 124 (quoting Rollin M. Perkins & Ronald N. Boyce, Criminal Law 1079 (3d ed. 1982)).
[187] See id. at 126.

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under his care under the guise of medical treatment.[188] As explained by the court, the defendant "would take boys into a private room and touch their genitals, saying he was checking for bruises, scratches, hernias, and testicular cancer."[189] His victims claimed that the nature of their program made it "almost impossible" to refuse a supervisor's requests.[190] Nevertheless, the defendant's rape conviction was reversed on the ground that the defendant's fraud was insufficient to vitiate the boys' consent.[191] Although the defendant had lied about the purpose of the sexual contact, the court found determinative that the boys had been "touched in the exact manner they expected," rendering the deception mere fraud in the inducement.[192]

Even more recently, the Court of Appeals of California found valid consent in the case of a defendant who had impersonated the complainant's boyfriend.[193] According to the prosecution, the eighteen-year-old complainant had attended a party with her boyfriend, where she consumed three to five beers.[194] When the complainant returned home well after midnight, she fell asleep with her boyfriend in bed next to her.[195] At some point in the night, the boyfriend left the bed and the defendant—an acquaintance who had been hanging out with friends in the complainant's living room—entered the complainant's bedroom.[196] The complainant testified that "she woke up to the sensation of having sex."[197] Although she initially believed that she was having sex with her boyfriend, she quickly realized it was the defendant and began to cry, yell, and push him away.[198] California's rape statute, which had been revised since *Boro*, indicated that rape occurs when a victim is "not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact."[199] Despite that broad statutory language, and despite acknowledging that finding rape on these facts

[188] State v. Bolsinger, 709 N.W.2d 560, 562, 564 (Iowa 2006).
[189] Id. at 562.
[190] Id.
[191] Id. at 564.
[192] Id.
[193] People v. Morales, 150 Cal. Rptr. 3d 920, 922 (Ct. App. 2013).
[194] Id.
[195] Id.
[196] Id. at 922–23.
[197] Id. at 923.
[198] Id.
[199] Cal. Penal Code § 261(a)(4)(C) (West 2025).

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would be a "reasonable interpretation" of that language,[200] the appeals court invoked the classic factum/inducement distinction to conclude that impersonating a woman's boyfriend is not a criminal sexual offense in California.[201]

It is nearly impossible to square rape law's sexual fraud jurisprudence with a robust commitment to sexual autonomy.[202] The forms of deception just detailed so significantly impinge autonomy that it can be hard to characterize the victims as having made informed choices, let alone as having "the freedom . . . to decide whether and when to engage in sexual relations."[203] The complainant in *Boro* consented under fear for her life.[204] The children in Iowa consented to a medical exam by an authority figure whom they had no power to refuse.[205] The teenager in California was literally asleep when the defendant impersonated her boyfriend.[206] Yet courts interpret these circumstances—and so many more like them[207]—as instances of valid sexual consent.

3. Mental Impairment

The final area where consent doctrine tends to ratify sexual intercourse despite notable impingements on individual sexual autonomy is the area of mental impairment. Nearly all scholars who study autonomy agree that autonomous choice requires a minimum level of capacity or competence.[208] Among courts, there is particular concern that impaired individuals are more susceptible to persuasion, pressure, trickery, and coercion.[209] In this area, however, both courts and scholars also express

[200] *Morales*, 150 Cal. Rptr. 3d at 928.

[201] Id. at 927–29.

[202] Rubenfeld, supra note 33, at 1408 ("At a minimum, an autonomy-based rape law should see rape whenever, to quote Israel's Supreme Court, someone 'does not tell the truth regarding matters critical to a reasonable [person], and as a result of his misrepresentation [that person] has sexual relations with him.'" (alterations in original) (citation omitted)); McJunkin, supra note 30, at 8 ("[D]eceptions that materially influence the decision to engage in sex undermine autonomy in very serious ways.").

[203] Schulhofer, supra note 2, at 99.

[204] Boro v. Superior Ct., 210 Cal. Rptr. 122, 123 (Ct. App. 1985).

[205] State v. Bolsinger, 709 N.W.2d 560, 562 (Iowa 2006).

[206] *Morales*, 150 Cal Rptr. 3d at 922–23.

[207] See generally Falk, supra note 2 (cataloging cases of sexual deception).

[208] See, e.g., Schulhofer, supra note 2, at 111; Wertheimer, supra note 1, at 3; Chiesa, supra note 1, at 422–23; Hörnle, supra note 32, at 67.

[209] See Deborah W. Denno, Sexuality, Rape, and Mental Retardation, 1997 U. Ill. L. Rev. 315, 357 n.267 (collecting cases).

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fears that an impaired person's *positive* sexual autonomy might be diminished by invalidating consent too readily.[210] This Subsection primarily examines impairment caused by mental disability, though it also briefly discusses impairment caused by intoxication and impairment caused by age. It demonstrates how courts often find valid consent in circumstances where sexual autonomy is quite obviously impacted.

With respect to mental disability, courts have long held that some individuals are so impaired as to be incapable of consenting, though the specific tests of capacity to consent vary.[211] The Court of Appeals of Kansas has offered a fairly typical example of the capacity standard: "If an individual can comprehend the sexual nature of the proposed act, can understand he or she has the right to refuse to participate, and possesses a rudimentary grasp of the possible results arising from participation in the act, he or she has the capacity to consent."[212] In practice, few individuals would be found incapable of consenting under this standard, despite many possessing impairments that significantly impact their ability to exercise sexual autonomy.[213]

The Supreme Court of Oregon, sitting en banc, found insufficient evidence of a lack of consent in a case where the defendant was accused of sexually abusing his own daughter.[214] At trial, a psychologist testified that the complainant's IQ scores "placed her in the mild to moderate mental retardation range" and that "her scope of functioning socially has been pretty much what you would get with a preadolescent."[215] The psychologist went on to explain the extent of the complainant's incapacity:

> [T]his is an individual, again, whose intellectual functioning, when you compare her to the population in general, is at or below the first percent. It tells me that she's unable to work in any capacity because of how low

[210] For courts, see, e.g., United States v. James, 810 F.3d 674, 683 (9th Cir. 2016). For commentators, see, e.g., Alexander A. Boni-Saenz, Sexuality and Incapacity, 76 Ohio St. L.J. 1201, 1213–23, 1253 (2015); Joseph J. Fischel & Hilary R. O'Connell, Disabling Consent, or Reconstructing Sexual Autonomy, 30 Colum. J. Gender & L. 428, 430 (2015).

[211] See Denno, supra note 209, at 344–46 (surveying approaches).

[212] State v. Ice, 997 P.2d 737, 740 (Kan. Ct. App. 2000).

[213] See People v. Easley, 364 N.E.2d 1328, 1331 (N.Y. 1977) ("Even mental retardation does not mean that an individual is incapable of consenting as a matter of law. The requisite degree of intelligence necessary to give consent may be found to exist in a person of very limited intellect.").

[214] State v. Reed, 118 P.3d 791, 792 (Or. 2005).

[215] Id. at 795.

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> her intellectual capabilities are. Even in a sheltered workshop capacity, she's so impaired that she can't function.[216]

The Supreme Court of Oregon found this testimony insufficient to prove the defendant's guilt because it did not "either directly or inferentially" address whether the complainant was incapable of consenting.[217] According to the court, testimony about the complainant's low intelligence, lack of social functioning, and inability to work simply could not support a "permissible inference" about "her understanding of sexual relations or her ability to make choices about having sexual relations with others."[218]

The Court of Appeals of Kansas rejected the prosecution's theory of incapacity for a rape complainant who suffered from premature birth, low birth weight, hydrocephalus, and a series of brain infections.[219] The seventeen-year-old complainant had an IQ of approximately sixty-five, and a psychiatrist placed her mental age "at around [eight] or [nine] years old, with a commensurate ability to understand social situations and make judgments based upon her understanding."[220] Note that, had the complainant been *actually* eight or nine years old, her incapacity to consent would have been conclusively established by statute.[221] But the court found that, since the complainant could answer a number of direct questions about the consequences of sex, she was not sufficiently incapacitated by her mental impairment.[222]

More recently, the Court of Appeals of Oregon concluded that there was insufficient evidence of an incapacity to consent when dealing with a twenty-eight-year-old complainant who, due to fetal alcohol syndrome and viral pneumonia, had scar tissue in her brain that impaired her functioning.[223] The complainant had an IQ of sixty-two and, according to the court, could not "live alone, shop for herself, or manage her own

[216] Id. (alteration in original).
[217] Id.
[218] Id.
[219] State v. Ice, 997 P.2d 737, 738, 740 (Kan. Ct. App. 2000).
[220] Id. at 738–39.
[221] The rape statute at issue in the case defines rape to include "sexual intercourse with a child who is under [fourteen] years of age." Kan. Stat. Ann. § 21-3502(a)(2) (West 2000) (current version at Kan. Stat. Ann. § 21-5503(a)(3) (West 2025)); *Ice*, 997 P.2d at 739.
[222] *Ice*, 997 P.2d at 738, 740.
[223] State v. Wallace, 517 P.3d 323, 326 (Or. Ct. App. 2022), *aff'd in part*, *rev'd in part*, 561 P.3d 602, 620 (Or. 2024).

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transportation or finances."[224] The evidence at trial indicated that she had "an optimistic view of people and [was] at a heightened risk to be taken advantage of."[225] Despite evidence that the defendant had "manipulated [the complainant] and [taken] advantage of her vulnerability," such as lying about his own age and falsely promising her marriage,[226] and despite evidence that the complainant "had a limited and simplistic understanding of what sexual activity was" (indeed, that she "might not have understood that [the] defendant's conduct toward her was 'sex,' per se"),[227] the appeals court reversed the defendant's conviction on the grounds that no reasonable juror could have found an incapacity to consent on these facts.[228]

We might contrast the holdings about mental disability with the widespread understanding of a minor's incapacity to consent. Courts have routinely explained, in language that largely mirrors that of the incapacity standard for mental impairment, that "minors cannot appreciate the nature and consequences of, and therefore lack the ability to consent to, sexual activity."[229] But the age of consent in the United States is typically far higher than the mental age of disabled people who are deemed capable of consenting. The cases above involved people with mental age as low as eight.

Even youth, however, is not always sufficient evidence of incapacity. Multiple courts have concluded that age alone does not constitute a mental impairment that would render consent ineffective. In 2001, the Supreme Court of Hawai`i held that there was "legally insufficient evidence to establish ineffective consent" where the defendant had been convicted of repeatedly assaulting a fourteen-year-old girl.[230] Like other states' statutes, the Hawai`i statute provided that consent may be ineffective "by reason of *youth*, mental disease, disorder, or defect" when the complainant is "unable to make a reasonable judgment as to the nature or

[224] Id.
[225] Id.
[226] Id. at 327.
[227] Id. at 330–31 (emphasis omitted).
[228] Id. at 326, 331.
[229] N. Sec. Ins. Co. v. Perron, 777 A.2d 151, 160 (Vt. 2001); see also State v. Jadowski, 2004 WI 68, ¶ 24, 272 Wis. 2d 418, 431, 680 N.W.2d 810, 817 ("The [statutory rape] statute is based on a policy determination by the legislature that persons under the age of sixteen are not competent to consent to sexual contact or sexual intercourse."); People v. Giardino, 98 Cal. Rptr. 2d 315, 324 n.6 (Ct. App. 2000) (noting "the statutory presumption that a person under 18 years of age is incapable of giving legal consent").
[230] State v. Jones, 29 P.3d 351, 372 (Haw. 2001).

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harmfulness of the conduct alleged."[231] But the court concluded that evidence of the complainant's young age and sexual inexperience was not enough to establish that she was unable to effectively consent.[232] Likewise, in 2023, the Court of Criminal Appeals of Texas held that a girl as young as fourteen did not, by virtue of her youth, meet the requirement for a mental defect that might render consent ineffective.[233] Comparing youth to evidence of a low IQ, the court explained that ineffective consent requires additional, specific evidence that a complainant "could not appraise or resist the act."[234]

Intoxication cases demonstrate the level of mental impairment that courts require to support rape convictions. Many states do not have a standalone provision criminalizing sex with a voluntarily intoxicated person.[235] Rather, prosecutions are grounded on the same statutes that govern other mental defects; an intoxicated person's consent is invalid only if they are *so* intoxicated as to be considered incapacitated.[236] As Michal Buchhandler-Raphael explains, "Under incapacity-to-consent statutes, consent to intercourse cannot be obtained if a person lacks the capacity to engage in a decision-making process; therefore a victim's incapacitation negates the element of consent, showing that the intercourse was nonconsensual."[237] State standards vary, but the level of intoxication necessary to incapacitate a person is typically quite extreme.[238]

Because marginal cases are rarely prosecuted,[239] the level of intoxication necessary to render someone incapacitated may be best seen in cases of rape convictions, rather than acquittals. The following cases are illustrative. A twenty-two-year-old complainant drank wine, tequila, and multiple cocktails over the course of an evening.[240] She had little

[231] Haw. Rev. Stat. Ann. § 702-235(2) (West 2025) (emphasis added).
[232] *Jones*, 29 P.3d at 372.
[233] Delarosa v. State, 677 S.W.3d 668, 672, 680 (Tex. Crim. App. 2023).
[234] Id. at 680.
[235] Buchhandler-Raphael, supra note 64, at 1033.
[236] Id.
[237] Id. at 1055.
[238] For example, California courts consider victims incapacitated when they are no longer capable of exercising "reasonable judgment" regarding whether to consent. People v. Giardino, 98 Cal. Rptr. 2d 315, 324 (Ct. App. 2000). In Massachusetts, courts consider victims incapacitated only when they are "so impaired as to be incapable of consenting." Commonwealth v. Blache, 880 N.E.2d 736, 743 (Mass. 2008).
[239] Buchhandler-Raphael, supra note 64, at 1057–58.
[240] People v. Lewis, 318 Cal. Rptr. 3d 898, 901–02 (Ct. App. 2024).

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memory of the night's events.[241] Sometime after midnight, she was cut off by the bartender because she was "swerving" and "leaning on the bar."[242] On the way home, she was intermittently passing in and out of consciousness.[243] An expert at trial estimated that her blood alcohol content at the time of intercourse was 0.35%, more than four times the legal limit to drive, and likely compounded by Xanax in her system.[244]

A nineteen-year-old college student drank between two and four cups of vodka at a house party.[245] The last thing she remembered is sitting on the porch.[246] At some point, she was taken to a club and then to a hotel around 3:00 AM.[247] During the drive to the hotel, the complainant fell asleep.[248] At the hotel, she was observed "not walking real straight."[249] After she was subjected to intercourse, she fell unconscious and would not wake up.[250] She was taken to a hospital where she was treated for acute alcohol intoxication.[251]

A fourteen-year-old complainant drank an unspecified amount of tequila and wine coolers at the defendant's trailer.[252] She eventually threw up on her clothes and then fell asleep on the sofa.[253] She was awakened by the defendant pulling down her shorts.[254] She managed to tell the defendant "no" and "stop" but did not otherwise resist.[255]

In each of these cases, an appellate court concluded that a reasonable jury could find the complainant incapacitated.[256] It is notable that in each case, the complainant had fallen asleep or unconscious. One complainant got visibly sick, two blacked out and lost their memory of the evening, and one was treated at a hospital. These cases, and the many others like them, reveal the extreme level of mental impairment needed to

[241] Id. at 901.
[242] Id. at 902.
[243] Id. at 903.
[244] Id. at 905.
[245] Arroyo v. State, 903 S.E.2d 712, 715 (Ga. Ct. App. 2024).
[246] Id.
[247] Id.
[248] Id.
[249] Id.
[250] Id. at 716.
[251] Id.
[252] State v. Clouatre, 2012-0407, p. 2 (La. App. 1 Cir. 11/14/12), 110 So. 3d 1094, 1096.
[253] Id. at 1096–97.
[254] Id. at 1097.
[255] Id.
[256] People v. Lewis, 318 Cal. Rptr. 3d 898, 905–06 (Ct. App. 2024); *Arroyo*, 903 S.E.2d at 719; *Clouatre*, 10 So. 3d at 1100.

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demonstrate that a person is unable to consent. These are not cases where people simply make choices while intoxicated that they would not have made when sober—what Kevin Cole refers to as the problem of "*inauthentic* consent"[257]—but cases where the people involved can hardly be understood to have made a choice at all.

The foregoing Part makes evident how consent jurisprudence deviates from philosophical accounts of negative sexual autonomy. If autonomy demands that sexual decisions are made under circumstances of freedom, knowledge, and competence, consent in law is found in circumstances of deadly threats, overwhelming coercion, material fraud, and mental impairment. Autonomy is largely out of the picture.

II. CAUSATION

Like consent, causation has a long and circuitous history in criminal law. Early criminal law primarily punished trespassory violations of persons or property—i.e., those with a direct connection between act and injury.[258] A detailed understanding of causation was unnecessary because the link between act and harm was unquestionable. But over time the criminal law broadened to include responsibility for more attenuated harms.[259] By the time Oliver Wendell Holmes wrote *The Common Law*, all wrongdoing could be reconceptualized as culpably causing harm.[260] Now, it can be fairly said that "most criminal law problems" involve causation, at least in a broad sense.[261]

Causation in criminal law diverges from causation in the sciences, however.[262] This is because criminal causation involves an imputation of moral, and ultimately legal, responsibility.[263] In this way, causation in law is fundamentally normative in a way that scientific causation need not be.[264] The normative aspects of legal causation have led to the

[257] Kevin Cole, Sex and the Single Malt Girl: How Voluntary Intoxication Affects Consent, 78 Mont. L. Rev. 155, 155 (2017). Cole notes that "[f]rom an autonomy standpoint, a woman's intoxicated decisions may not square with what she regards as her true self." Id. at 160.

[258] See, e.g., Binder & Chiesa, supra note 10, at 86–88.

[259] Id. at 87–88.

[260] See O.W. Holmes, Jr., The Common Law 77–129 (Boston, Little, Brown, & Co. 1881).

[261] Paul K. Ryu, Causation in Criminal Law, 106 U. Pa. L. Rev. 773, 774 (1958).

[262] See id. at 775–76.

[263] See generally Hans Kelsen, Causality and Imputation, 61 Ethics 1 (1950) (introducing the distinction between scientific causation and legal imputation).

[264] See Guyora Binder, Making the Best of Felony Murder, 91 B.U. L. Rev. 403, 483 (2011).

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development of complex, and sometimes competing, doctrines that each attempt to allocate responsibility justly.[265]

This Part provides an overview of the state of causation in U.S. criminal law. In particular, it highlights the connection between the doctrines of causation and the theories of human autonomy that animate them. Causation is thought to reflect autonomy insofar as it assigns moral responsibility to the consequences of freely chosen human actions, a stance intimately related to the assumption of free will. This Part then surveys case law on intervening human action as a superseding cause to demonstrate the impact of force, fraud, and mental impairment on assessments of autonomy. It demonstrates just how sharply causation doctrine diverges from consent doctrine on similar facts, despite both doctrines' ostensible commitment to autonomy.

A. Causation in U.S. Law

In the United States, criminal law distinguishes between two distinct kinds of causes. "Factual" cause, sometimes called "direct cause," "but-for cause," or "cause in fact," refers to any condition that is strictly necessary to a given result.[266] Results commonly have multiple factual causes. To borrow a well-known example,[267] the factual causes of a fire may include someone striking a match, but would also include a fuel source (e.g., wood) and an oxygen-rich environment.[268] As the above example illustrates, identifying the factual causes of a result provides little information about how to allocate moral responsibility (i.e., blame) among those causes, since each factual cause is equally necessary to the result. In criminal law, factual cause is often used as a way to *absolve* an actor of moral (hence legal) responsibility; if an actor's conduct was not

[265] See Eric A. Johnson, Dividing Risks: Toward a Determinate Test of Proximate Cause, 2021 U. Ill. L. Rev. 925, 927–30.

[266] See LaFave, supra note 88, at 353.

[267] See, e.g., H.L.A. Hart & Tony Honoré, Causation in the Law 11 (2d ed. 1985).

[268] Cf. Johnson, supra note 265, at 960 ("For example, though we might be tempted to say that a smoker's disposal of a cigarette butt was 'sufficient by itself' to cause the resulting forest fire, on closer examination we find that the fire actually depended on a number of conditions as well: the presence of oxygen in the air, for instance, and of combustible materials on the forest floor.").

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a factual cause—the result would have occurred anyway—then the conduct carries no responsibility for the result.[269]

In contrast to factual cause, a result's "proximate" cause (sometimes called "legal" cause) is thought to be the source of both moral and legal responsibility for a result.[270] "A factual cause is a proximate cause when its causal relevance is either of sufficient strength or bears the right relation to the harm to engender legal responsibility."[271] Setting aside certain rare exceptions,[272] results are deemed to have only a single proximate cause.

Criminal law scholars have long debated both the value of identifying a proximate cause[273] and the correct framework for deciding which factual cause should carry moral responsibility.[274] To return to our example of setting a fire, it is likely widely agreed that an actor striking a match in the presence of both fuel and oxygen is the proximate cause—and that the actor should therefore be responsible for the resulting fire. But criminal law scholars would be divided on why this cause is appropriately identified as proximate.[275]

A classic school of thought for identifying proximate causes contends that proximity in causation simply means that "too many new causes must not intervene between the human act and the result under consideration."[276] This is a kind of legal formalism. It treats the question of proximate cause as an objective inquiry describing observable facts

[269] See Burrage v. United States, 571 U.S. 204, 218–19 (2014) (reversing a criminal conviction where there was insufficient evidence that the defendant's conduct was a but-for cause of the victim's death).

[270] See, e.g., Michael S. Moore, Causation and Responsibility: An Essay in Law, Morals, and Metaphysics 33 (2009) (contending that causation "matters morally" because causing harm is "much more blameworthy" than merely acting culpably, but harmlessly).

[271] Joshua Knobe & Scott Shapiro, Proximate Cause Explained: An Essay in Experimental Jurisprudence, 88 U. Chi. L. Rev. 165, 173 (2021).

[272] It is widely accepted that when two independent causes are both sufficient for a result, and hence neither cause is strictly necessary, both causes may be deemed to be proximate. See, e.g., LaFave, supra note 88, at 354 & nn. 14–15.

[273] For example, John Stuart Mill criticized those who sought to distinguish between factual and proximate causes; he contended that the "real [c]ause" of any event is just the "set of antecedents" that constitute but-for causes. John Stuart Mill, A System of Logic, Ratiocinative and Inductive 197 (New York City, Harper & Bros. 1846). On Mill's view, no single but-for cause carried more normative responsibility for the result than any other. Id. at 197–98.

[274] See Johnson, supra note 265, at 932–37.

[275] See id.

[276] Joseph H. Beale, The Proximate Consequences of an Act, 33 Harv. L. Rev. 633, 643 (1920).

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about the world.[277] Even setting aside the open question of how many intervening causes are "too many," formalism about proximate cause has been criticized as "complicated," "ambiguous," and "arbitrary."[278]

At the other end of the spectrum, some legal realists contend that identifying a proximate cause simply conveys a predetermined conclusion about moral or legal responsibility. For instance, in 1929, Leon Green asserted that "the inquiry while stated in what seems to be terms of *cause* is in fact whether the defendant should be held responsible."[279] To defend this contention, legal realists have noted that proximate causation seems to expand or contract depending on the underlying wrongfulness of the defendant's conduct: "[T]he intentional wrongfulness, and still more the criminality, which, as characteristics of the defendant's act, tend to lengthen the reach of legal cause, as characteristics of the intervening action tend to shorten it."[280]

In a recent article, Joshua Knobe and Scott Shapiro deployed experimental jurisprudence to try to mediate the debate between legal formalists and legal realists over proximate causation.[281] What they discovered is that the observations of both legal formalists and legal realists are partially vindicated. Folk intuition about causation follows from a moral judgment, but not a judgment about whether responsibility should be allocated (as realists contend). Rather, folk assessments of causation follow from a judgment about whether an actor's conduct violates relevant norms.[282] For this reason, as the realists observed, "[p]roximate causation judgments show a telltale correlation with moral judgments: an action is more likely to be considered the proximate cause of harm the more wrong it is thought to be."[283] But that judgment then informs an assessment of causation that more resembles the inquiry

[277] See Knobe & Shapiro, supra note 271, at 167, 174 (describing Beale's legal formalism with respect to proximate causation).

[278] Henry W. Edgerton, Legal Cause (pt. 1), 72 U. Pa. L. Rev. 211, 223 (1924).

[279] Leon Green, Are There Dependable Rules of Causation?, 77 U. Pa. L. Rev. 601, 605 (1929); see also id. at 626 ("The phraseology of causation . . . has served but one useful function, and that has been to give the judges a dependable way out of difficult situations when they have made up their minds but either do not know how, or else do not take the time, to articulate their conclusions on a rational basis.").

[280] Henry W. Edgerton, Legal Cause (pt. 2), 72 U. Pa. L. Rev. 343, 364 (1924) (footnote omitted).

[281] Knobe & Shapiro, supra note 271, at 169.

[282] Id. at 200.

[283] Id. at 205.

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favored by formalists, acting as a premise for a later judgment about whether an actor should be held responsible.[284]

What Knobe and Shapiro's work helps us to understand is that "proximate causation" primarily describes a method for allocating causal responsibility among various factual causes. "[A] theory of proximate causation is a theory of causal selection—it selects which of the indefinitely many events that causally contributes to the production of some harm counts as *the* cause."[285] The jurisprudence of causation reflects how courts have engaged in this causal selection process—especially in the doctrines of intervening and superseding causes, discussed below—in order to make the required legal judgments of blame and liability.[286] To identify some conduct as a proximate cause, then, is to reach a conclusion about its moral valence *relative to competing factual causes*, as a "necessary condition for holding one of the parties responsible."[287]

B. Causation and Autonomy

The causal selection process of proximate causation is intimately tied to philosophical views on human autonomy. In philosophy, autonomy is understood to be responsibility-entailing. According to Jonathan Knutzen, the "basic assumption" in philosophical accounts of autonomy is that "[a]n autonomous agent is responsible for her choices and actions insofar as they issue from relevant autonomy-supporting capacities and circumstances."[288] In other words, in the absence of external, autonomy-undermining influences, such as fraud or coercion, it is fair to hold someone responsible for the consequences of their actions. This connection between autonomy and responsibility, whether implicit or explicit, is widespread in the literature.[289]

In law, causation provides the link between autonomous conduct and responsibility for harm that surfaces in these more general discussions of autonomy. That is, individual autonomy is protected by ensuring that

[284] Id. at 235.
[285] Id. at 206.
[286] Id. at 214–29, 234–35.
[287] Id. at 235.
[288] Knutzen, supra note 114, at 179.
[289] See, e.g., Dworkin, supra note 43, at 20; Ronald Dworkin, Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom 224 (1993); Marilyn Friedman, Autonomy, Gender, Politics 21–22 (2003).

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people are legally responsible only for harms that they have caused.[290] Moreover, legal responsibility is understood to follow from causing harm in direct proportion to autonomy: "The more [an actor] knows about the potential consequences of her considered conduct, the freer she is to make an unencumbered choice, the more she is responsible and blameworthy for the wrongful harms that ensue."[291]

In the 1980s, Sanford Kadish couched this concept in terms of the criminal law's foundational focus on expressing blame.[292] He stated that "it is enough . . . to observe that the view of persons as responsible and autonomous agents is a central feature of the concept of blame; that without this concept of responsibility, moral judgment loses its essential character."[293] Kadish explained that, in matters of causation, the law treats a person as "total sovereign over his own actions."[294] By attributing the connection between causation and blame to self-sovereignty, Kadish evoked one of the philosophical cornerstones of individual autonomy.[295]

But there is also a second way in which human autonomy is intimately linked to proximate causation, one that is more directly visible in causation jurisprudence. This is the doctrine of intervening causation. In both criminal law and tort law, an "intervening" cause is a factual cause of the ultimate result that occurred sometime after the action of the defendant that is in question.[296] Some intervening causes are deemed "superseding," which simply means that the intervening cause extinguishes causal responsibility for an earlier-in-time factual cause.[297] As Michael Moore once wrote, "Causal chains may be sharply broken and not merely gradually diminished. The intervening causes responsible for such breaks may be of three kinds: deliberate human interventions,

[290] See Richard W. Wright, Causation in Tort Law, 73 Calif. L. Rev. 1735, 1827 (1985).

[291] Bailey Kuklin, Constructing Autonomy, 9 N.Y.U. J.L. & Liberty 375, 383 (2015).

[292] Sanford H. Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 Calif. L. Rev. 323, 329–30 (1985).

[293] Id. at 331.

[294] Id. at 330.

[295] See Richard H. Fallon, Jr., Two Senses of Autonomy, 46 Stan. L. Rev. 875, 878 (1994) ("In the Kantian tradition, autonomy signifies freedom of the will from causal determinism. In the work of many theorists, the spirit of Kant suffuses ascriptions of autonomy, and freedom of the will undergirds the sovereign prerogative to make decisions for oneself and to act accordingly." (footnotes omitted)).

[296] See Moore, supra note 11, at 831 ("Intervening-cause doctrines are needed only in that subset of cases where something unusual intervenes between defendant's action and his victim's harm.").

[297] See, e.g., Binder & Chiesa, supra note 10, at 80.

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freakishly abnormal natural events, and subsequent preemptive causes."[298]

The most classic example of a superseding cause is autonomous human action. American criminal law has a long history of treating another person's intervening conduct as a superseding cause.[299] Under the *novus actus interveniens* doctrine, "later voluntary human action 'displaces the relevance of prior conduct by others and provides a new foundation for causal responsibility.' "[300] Glanville Williams attributes this doctrine, like causal responsibility generally,[301] to the principle of autonomy: "Only the later actor, the doer of the act that intervenes between the first act and the result, the final wielder of human autonomy in the matter, bears responsibility . . . for the result that ensues."[302] Other scholars have traced the doctrine of *novus actus interveniens* directly to the philosophy of Immanuel Kant, which centered the autonomy of human agents as a basis for moral responsibility.[303]

But to operate as a superseding cause, the relevant act must indeed be autonomous. According to Williams, *novus actus interveniens* requires that the actor "has reached responsible years, is of sound mind, has full knowledge of what he is doing, and is not acting under intimidation or other pressure or stress resulting from the defendant's conduct."[304] Joshua Dressler states that an intervening human action will be a superseding cause when it is "free, deliberate, and informed."[305] And although many leading scholars of causation have asserted in seemingly unequivocal terms that human action is *never* caused, even these scholars admit

[298] Michael S. Moore, Causation and Responsibility, 16 Soc. Phil. & Pol'y 1, 44 (1999).

[299] Binder & Chiesa, supra note 10, at 85.

[300] Jody Armour, Nigga Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law, 12 Ohio St. J. Crim. L. 9, 50 (2014) (quoting Sanford H. Kadish et al., Criminal Law and Its Processes: Cases and Materials 529 (8th ed. 2007)).

[301] Glanville Williams, *Finis* for *Novus Actus*?, 48 Cambridge L.J. 391, 391 (1989).

[302] Id.

[303] See, e.g., Ryu, supra note 261, at 782 ("[T]he doctrine that a voluntary human agent interrupts causation was influenced by . . . Kant's view that man's voluntary action always starts a new chain of causation and can never be the effect of the latter.").

[304] Williams, supra note 301, at 392.

[305] Joshua Dressler, Understanding Criminal Law 195 (7th ed. 2015) (quoting Hart & Honoré, supra note 267, at 326). According to Dressler, this standard is "consistent with the retributive principle that accords special significance to the free-will actions of human agents." Id.

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exceptions in cases of threats, coercion, and fraud.[306] In other words, the conditions necessary for a subsequent human action to be a superseding cause are the same conditions usually articulated for autonomy more generally: freedom, knowledge, and competence.[307]

Where these conditions are not met, the subsequent act does not supersede, and the original actor's causal responsibility for the result is not extinguished. Imagine the following case: "[W]here *A* asks *B* to use a cell phone to call a certain number, and *B* does so, not knowing that the call will trigger an explosion, *A* caused *B*'s act (and thus caused the explosion) because *B* acted without knowledge of the relevant circumstances."[308] Or imagine any case of duress, where *A* compels *B* to act through threats of serious, immediate harm.[309] Or any case where *A* exploits *B*'s lack of capacity, as in the classic case of the "innocent agent."[310] Under each of these scenarios, *B*'s conduct would not be considered sufficiently autonomous to intervene; hence, the moral and legal responsibility for causing harm rests with *A*.

Combining the doctrine of intervening human causes with Knobe and Shapiro's observation that proximate cause is a matter of "causal selection"[311] reveals that relative autonomy is one of the key moral assessments that factfinders must make in allocating responsibility among competing factual causes. In the absence of true autonomy—when autonomy is impinged by threats, coercion, fraud, or mental impairment—courts and commentators nearly universally conclude that the less-than-autonomous person cannot be selected as *the* cause of harm, particularly when there is a more autonomous alternative party to blame. I examine cases along these lines in the next Section.

[306] See, e.g., Hart & Honoré, supra note 267, at 388 ("Only when an instigator uses threats, lies, or authority to induce the principal to commit a crime can he reasonably be said to 'cause' the principal so to act.").

[307] See supra text accompanying notes 114–21.

[308] Kadish et al., supra note 128, at 592.

[309] See, e.g., Parnell v. State, 912 S.W.2d 422, 423–24 (Ark. 1996); Morrisey v. State, 620 A.2d 207, 211 (Del. 1993); State v. Thomas, 619 S.W.2d 513, 514 (Tenn. 1981).

[310] See, e.g., McAlevy v. Commonwealth, 605 S.E.2d 283, 285–86 (Va. Ct. App. 2004), *aff'd per curiam*, 620 S.E.2d 758 (Va. 2005); People v. Mutchler, 140 N.E. 820, 822–23 (Ill. 1923); Johnson v. State, 38 So. 182, 183 (Ala. 1905).

[311] Knobe & Shapiro, supra note 271, at 206.

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C. Conditions of Causation

If autonomy is a centerpiece of causation doctrine (and intervening causation doctrine specifically) then courts must grapple with the conditions of valid causation, much in the way that they grapple with the conditions of valid consent. This Section examines cases where courts do just that. My goal in this Section is specifically to contrast the legal treatment of consent, which is frequently found valid despite serious impingements upon individual autonomy,[312] and the legal treatment of causation, which is often found lacking where autonomy is impinged to a relatively slighter degree.

To best undertake this comparison, the most relevant set of cases should involve subsequent intervening acts by a defendant's putative victim since, much like rape cases, they involve a choice that allocates responsibility for harm between the party impairing autonomy and the party whose autonomy is impaired. To this end, prosecutions for causing suicide are particularly illustrative because they involve a victim contributing to bringing about a result also desired by the defendant. Moreover, cases of causing suicide most directly test the criminal law's commitment to autonomy; as Guyora Binder and Luis Chiesa note, "It is hard to imagine a choice more fundamental to autonomy than the decision to live or die."[313]

To establish a baseline, let me begin with the classic case of Jack Kevorkian. Kevorkian was responsible for aiding the suicide of an estimated 130 chronically ill individuals.[314] In 1994, Kevorkian was prosecuted and convicted for the murder of two of these individuals based on his providing the (rather elaborate) means for their suicides.[315] The Michigan Supreme Court reversed the murder convictions on the ground that it was the victims themselves who had autonomously performed the final act necessary to cause their deaths.[316]

The lesson of the *Kevorkian* case is clear: "One who successfully urges or assists another to commit suicide is not guilty of murder, at least so long as the deceased was mentally responsible and not forced or

[312] See supra Section I.C.
[313] Binder & Chiesa, supra note 10, at 69.
[314] See Ross Douthat, Opinion, Dr. Kevorkian's Victims, N.Y. Times (June 5, 2011), https://www.nytimes.com/2011/06/06/opinion/06douthat.html.
[315] People v. Kevorkian, 527 N.W.2d 714, 718 (Mich. 1994).
[316] Id. at 738–39.

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deceived."[317] But the caveat looms large. As this Section demonstrates, when a person is coerced or deceived, or when a person's mental impairment is exploited, the law of causation places the blame on the person facilitating the suicide. Some states even do this statutorily.[318]

The conditions of intervening causation can thus be contrasted with the conditions for valid consent in rape law to highlight how these two areas of law treat exercises of autonomy differently. Specifically, in the law of intervening causation, fraud, force, psychological coercion, and reduced capability are all held to diminish autonomy in a way that reduces the intervenor's responsibility for subsequent results. By contrast, in rape law, as shown above, the existence of fraud, force, psychological coercion, or even reduced capability is sometimes insufficient to render an expression of consent invalid.

1. Force and Coercion

Cases of forced suicide are unusual in the United States.[319] But early reporters have documented a number of cases where a person's use of force against another motivated the latter's subsequent acts that directly produced death. For instance, where a victim died in fleeing a violent attack, the Supreme Court of Georgia declared it "a too well established principle of law to require any discussion whatever" that the attacker could be liable for causing the death.[320] In a similar case arising out of the District of Columbia, an appellate court explained that "the defendant was guilty of murder . . . if, in seeking to escape his violent assault upon her, the deceased had a well-grounded belief that the defendant intended to take her life or inflict further serious bodily injury upon her, and so believing inadvertently fell into the canal and was drowned."[321]

[317] Kadish et al., supra note 128, at 590.

[318] See, e.g., Conn. Gen. Stat. § 53a-54a (2025) (defining murder to include intentionally causing a suicide by force, duress, or deception). The Model Penal Code is in accord. Model Penal Code Section 210.5(1) would criminalize "causing suicide" as a form of criminal homicide, when caused by "force, duress or deception," perhaps in recognition that these methods directly undermine the victim's autonomy in choosing whether or not to live. See Model Penal Code § 210.5(1) (A.L.I. 1962). Note that Section 210.5(1) should be contrasted with statutes independently criminalizing "aiding or soliciting suicide," an independent offense that does not require causation. See, e.g., id. § 210.5(2).

[319] There is some suggestion that forced suicide may occur as a substitute for honor killings in other countries. See UN Probes Turkey 'Forced Suicide,' BBC News (May 24, 2006, at 10:30 GMT), http://news.bbc.co.uk/2/hi/europe/5010892.stm [https://perma.cc/EM3E-2SP5].

[320] Thornton v. State, 33 S.E. 673, 675 (Ga. 1899).

[321] Norman v. United States, 20 App. D.C. 494, 499 (1902).

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A high-profile prosecution from the 1930s extended this line of precedent to intentional suicides. In *Stephenson v. State*, the defendant Stephenson, aided by several accomplices, abducted and brutally raped a young woman inside the private room of a train car.[322] After the attack, Stephenson and his companions took the woman to a hotel room, where she was allowed a chaperoned trip to a drugstore ostensibly to buy makeup to cover her wounds.[323] At the store, the woman managed to purchase mercury bichloride, a toxic substance used to clean wounds.[324] When she returned to the hotel, she swallowed six tablets of the substance, resulting in her death.[325] Stephenson was convicted of murder, on the theory that his attack caused the victim's subsequent suicide.[326] The Supreme Court of Indiana upheld the conviction, explaining that Stephenson's "control and dominion over the deceased was absolute and complete."[327] The court explained that both the physical and the mental wounds inflicted by Stephenson on the victim rendered her "mentally irresponsible" at the time of her suicide.[328]

In 1951, the Supreme Court of New Jersey upheld the murder conviction for a defendant who had ordered his wife to jump into a river where she drowned.[329] In *State v. Myers*, the evidence at trial indicated that the wife had recently left the defendant and had been seen accompanying two men into a tavern near the river.[330] The defendant confronted her at the tavern and, once outside, began aggressively beating her with both open hands and closed fists.[331] When they approached the river, the defendant told his wife to jump in the river or else he would push her in.[332] She complied and drowned in the icy water.[333] The prosecution "proceeded on the theory that the deceased's jumping into the river was caused by the defendant's assaults and threats of physical

[322] 179 N.E. 633, 635 (Ind. 1932) (per curiam).

[323] See Jacob Roberts, Coffins in a Bottle, Distillations Mag. (Apr. 3, 2015), https://www.sciencehistory.org/stories/magazine/coffins-in-a-bottle/ [https://perma.cc/SNM6-MTEF].

[324] Id.

[325] Id.

[326] *Stephenson*, 179 N.E. at 635, 637.

[327] Id. at 649.

[328] Id.

[329] State v. Myers, 81 A.2d 710, 712 (N.J. 1951).

[330] Id. at 712–13.

[331] Id. at 713.

[332] Id.

[333] Id.

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violence."[334] In evaluating the sufficiency of the evidence, the supreme court quoted Wharton's classic treatise on criminal law for the proposition that "[h]e, therefore, who causes another, under influence of fright, to run into the river, from which drowning ensues, is responsible for the death."[335] The court's rhetoric in upholding the conviction emphasizes the dire choice the victim faced:

> The violent onslaughts, the numerous applications of force, the physical dragging by her hair or neck across the boulevard, plus the frightening threats, had reduced her to a groveling, pleading bit of abject humanity begging for mercy and humbly seeking a cessation of the repeated violence applied.
>
> She was cornered between her assailant and the river, with no means of escape except past him. The terror created by his course of conduct forced her to select what she seemingly thought was the lesser of two evils in following his repeated command.[336]

Against this backdrop, I would invite you to consider again the Texas rape case involving the knife-wielding stranger who broke into a woman's apartment with the intent to rape her.[337] Like the victims in *Stephenson* and *Myers*, the Texas victim seemingly made a choice between two evils when she acquiesced to the sex on the condition that her assailant wear a condom. By analogy to the cases above, U.S. criminal law should hold that the *cause* of the sex was the attacker's use of physical violence; the woman's consent was not a superseding cause. But, as should now be clear, that question plays no role in allocating criminal responsibility for rape. Rather, the central issue for the grand jury was the presence or absence of valid consent—a question with much different consequences for individual autonomy.

2. Fraud

Cases of deceptively induced suicides are especially rare.[338] Although the Model Penal Code and several state statutes specifically prohibit

[334] Id. at 714.
[335] Id. at 715 (quoting Francis Wharton, Wharton's Criminal Law § 206 (12th ed. 1932)).
[336] Id. at 716–17.
[337] See supra text accompanying notes 135–40.
[338] A law review note in 1986 could locate "[n]o case of deception sufficient to cause suicide." Catherine D. Shaffer, Note, Criminal Liability for Assisting Suicide, 86 Colum. L. Rev. 348, 365 (1986).

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causing suicide by means of deception,[339] these statutes are rarely invoked.[340] As such, the causation analysis is somewhat less clear-cut in cases of deception than in cases of force or mental incapacity. Nevertheless, at least a few cases that have confronted deception in conjunction with suicide hint that courts are willing to find a defendant criminally responsible.

In an early case arising out of Arkansas, the state's highest court affirmed a murder conviction for a defendant who posed as a spiritual "medium" in order to encourage his victims' suicide.[341] The evidence adduced at trial showed that the defendant had overseen a suicide pact among three individuals who considered themselves "spiritualists" and who often relied on the defendant to lead their séances.[342] During one of the meetings, the defendant claimed to have a message from one couple's deceased son, asking for them "to come over on the other side."[343] On the afternoon of the suicides, the couple deeded all of their real estate to the defendant.[344] The defendant provided the victims with a fatal dose of morphine, which they used to take their own lives.[345] The court upheld the defendant's conviction for murder, under a statute that criminalized deliberately aiding suicide.[346]

In 2024, the Court of Criminal Appeals of Tennessee confronted a case of homicide liability for induced suicide that directly raised the issue of causation.[347] The victim and defendant had met on the website Omegle when the defendant was in his early twenties and the victim was between thirteen and fourteen.[348] The two "bonded over their mutual suicidal ideations" and began a roughly six-year on-again, off-again virtual

[339] Model Penal Code § 210.5(1) (A.L.I. 1962); Conn. Gen. Stat. § 53a-54a(a) (2025); Ind. Code § 35-42-1-2 (2025); Me. Stat. tit. 17-A, § 201(1)(C) (2025).

[340] For an argument that these statutes are too narrow and that a broader standard of liability is needed, see Sue Woolf Brenner, Undue Influence in the Criminal Law: A Proposed Analysis of the Criminal Offense of "Causing Suicide," 47 Alb. L. Rev. 62, 93–95 (1982).

[341] Farrell v. State, 163 S.W. 768, 769 (Ark. 1914). A witness for the prosecution testified that the defendant had admitted he did not believe in spiritualism and was pretending to believe in it. Id. at 770.

[342] Id. at 771.

[343] Id. at 769–71.

[344] Id. at 771.

[345] Id.

[346] Id. at 770.

[347] State v. Berkebile, No. E2022-01700-CCA-R3-CD, 2024 WL 2881089 (Tenn. Crim. App. June 7, 2024).

[348] Id. at *1.

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relationship that was marked by sexual "suicide play" over video calls.[349] According to the court, the relationship was defined by the defendant's "control over and manipulation of the victim."[350] Throughout the relationship, the defendant urged the victim to "end" herself while he watched, for his sexual gratification.[351] On the day of the victim's death, she offered to play Russian roulette blindfolded on a video call with the defendant, so that the defendant could choose whether she lived or died.[352] The victim specifically said, "I trust you not to actually kill me . . . . But to enjoy the trust and power [you'd] be holding . . . ."[353] Although there is no record of precisely what transpired during the subsequent video call, the victim died of a gunshot wound to her head.[354] When grappling with the issue of proximate cause for the victim's death, the appellate court explained that the defendant "convinc[ed] the already-suicidal victim to engage in Russian roulette where the victim either was blindfolded or closed her eyes, thereby amplifying the danger of an already highly dangerous activity."[355] In concluding that the defendant's actions were the proximate cause of death, the court also emphasized how the victim, on numerous occasions, informed the defendant that she did not actually want to die.[356]

In a case that distinguished the Kevorkian prosecutions, discussed above, the Court of Appeals of Michigan concluded that a doctor could be found guilty of murder where he had prescribed "huge quantities of medicine unrelated to any rational medical treatment" that resulted in a fatal overdose.[357] Although the victim had voluntarily ingested the drugs, the court noted that, unlike Kevorkian's victims, this victim was not making an informed decision: the "defendant was not helping [the victim] to commit suicide but was providing her with drugs that she apparently believed would *improve* her health."[358] The victim's choice to ingest the drugs, at the defendant's direction, was therefore not the kind of

[349] Id.
[350] Id.
[351] Id. at *1–6.
[352] Id. at *6–7. The court explained that the victim's gun would show where the bullet was in the chamber, meaning that, without a blindfold, both the victim and defendant would know whether a pull of the trigger would be fatal. Id. at *11.
[353] Id. at *7–8.
[354] Id.
[355] Id. at *11.
[356] Id.
[357] People v. Stiller, 617 N.W.2d 697, 701–02 (Mich. Ct. App. 2000).
[358] Id. at 702.

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autonomous action that would have absolved the defendant of causal responsibility.

It is particularly instructive to contrast the above case with rape cases like *Boro*, where the victim had been deceived into consenting to sexual intercourse by the lie that the sex served some medical purpose.[359] In both the cases of deceptively induced sex and in the case of the fatal overdose, the subsequent acts of the victim (consent to sexual intercourse on the one hand, ingestion of dangerous drugs on the other) occurred exclusively because the victims had been deceived into believing that their act had legitimate medical benefits. The victims all experienced an impairment of autonomy. But where rape law holds that consent is valid notwithstanding impairments to autonomy, causation law takes those impairments to autonomy seriously, rightly placing moral and legal blame on the deceiver.

It must be noted that criminal liability for deceptively induced suicide under a causation framework remains limited by prosecutorial discretion. In 2006, Missouri prosecutors declined to charge Lori Drew, a woman in her forties who had created a fake MySpace profile in order to bully a teenage classmate of her daughter. Drew posed as a sixteen-year-old boy, "Josh Evans," in order to contact the thirteen-year-old victim.[360] Posing as Josh, Drew initially befriended the victim before turning on her. In one of Josh's final messages, Drew told the victim that "the world would be a better place without you."[361] The victim killed herself soon afterwards. Although both the deception and bullying might be thought to impact the autonomy of the victim's decision to commit suicide, prosecutors chose not to charge Drew with a homicide for "causing" the suicide.[362]

3. Mental Impairment

Unlike force and deception, mental impairment is not specifically referenced in statutes criminalizing causing suicide.[363] Nevertheless, scholars considering the impact of mental impairment on causation tend to sweep broadly with their proclamations. For example, Michael Moore

[359] See supra text accompanying notes 180–87.

[360] Bobbie Johnson, Judge Overturns Guilty Verdict in MySpace Suicide Case, The Guardian (July 2, 2009, at 15:50 ET), https://www.theguardian.com/technology/blog/2009/jul/02/lori-drew-myspace-acquitted [https://perma.cc/M45P-FTJR].

[361] Id.

[362] Id.

[363] See sources cited supra note 339.

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has stated that "[t]he insane, those diminished in mental capacity due to mental disease, drugs, or alcohol, and the very young all lack the kinds of capacity that would enable their choices to qualify as intervening causes."[364] And these broad proclamations seem to be borne out in the case law. Courts faced with even minor mental impairments often treat the resulting suicide as less than fully autonomous.

Consider the recent, high-profile case of Michelle Carter.[365] Carter was convicted of involuntary manslaughter in Massachusetts for sending text messages and making phone calls encouraging her teenage boyfriend to take his own life.[366] The boyfriend, Conrad Roy, had been treated for depression and frequently expressed his desire to commit suicide.[367] Carter encouraged Roy's suicidal ideation and at times chastised him when he appeared to have a change of heart.[368] On the day Roy committed suicide by pumping carbon monoxide into his truck, he had a phone call with Carter where she encouraged him to go through with it.[369] In a text message to a friend, she explained: "[His] death is my fault like honestly I could have stopped him I was on the phone with him and he got out of the [truck] because it was working and he got scared and I f— told him to get back in . . . ."[370]

The case spawned two appeals to the Supreme Judicial Court of Massachusetts. On the first appeal, testing the sufficiency of the evidence before the grand jury, the court addressed the issue of causation—a necessary component of the manslaughter conviction. The court rejected the argument that Roy's choice to complete his suicide attempt was a superseding cause.[371] It explained that "the Commonwealth's evidence here shows that the defendant fully understood and took advantage of the victim's fragility."[372] In light of Roy's "already delicate mental state,"

[364] Moore, supra note 11, at 843.
[365] See Erin Moriarty, Death by Text: The Case Against Michelle Carter, CBS News (June 16, 2017, at 22:18 ET), https://www.cbsnews.com/news/death-by-text-the-case-against-michelle-carter [https://perma.cc/2KT5-EQLQ].
[366] Id.; Commonwealth v. Carter, 52 N.E.3d 1054, 1056–57, 1064–65 (Mass. 2016).
[367] Moriarty, supra note 365.
[368] Id.
[369] Id.
[370] Dan Glaun, 'Honestly I Could Have Stopped Him;' Friend of Michelle Carter Testifies About Texts Received After Suicide of Conrad Roy, Mass Live (June 7, 2017, at 18:00 ET), https://www.masslive.com/news/2017/06/michelle_carter_trial_breakout.html [https://perma.cc/8JCE-3PC4].
[371] *Carter I*, 52 N.E.3d at 1063.
[372] Id. at 1063 n.15.

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and against the background of "previous constant pressure the defendant had put on the victim," the court found Carter's final directive to get back in the truck to be "coercive."[373] As the court explained, "[T]he defendant's verbal conduct overwhelmed whatever willpower the eighteen year old victim had to cope with his depression."[374]

On the second appeal, this time testing the sufficiency of the evidence at trial, the court elaborated on causation.[375] It explained that "legal causation in the context of suicide is an incredibly complex inquiry."[376] Nevertheless, it found sufficient evidence to conclude that Carter, not Roy, had caused Roy's death. Once again, the court concluded that the defendant overpowered the victim's will with her actions.[377] It described Roy as a "vulnerable, confused, mentally ill, eighteen year old victim."[378] And it claimed that Roy, "in this weakened state," "was badgered back into the gas-infused truck by the defendant."[379] Together, the Carter cases illustrate just how seriously causation doctrine treats the impingement of autonomy due to mental impairment. The highest court in Massachusetts highlighted not only Roy's depression, but also subtly noted his immaturity at age eighteen, and even his insecurities,[380] as reasons why his actions were not sufficiently autonomous to be a superseding cause.

The Carter verdict stands on firm ground in Massachusetts, where a much older opinion by the Supreme Judicial Court had reached a similar conclusion in a case involving the combination of mental illness and intoxication.[381] There, the defendant, during an argument, had threatened to divorce his wife.[382] The wife—"who was mentally instable and had previously attempted suicide"[383]—responded by begging him to stay and by threatening suicide.[384] According to the court, the defendant, "instead of trying to bring her to her senses, taunted her, told her where the gun was, loaded it for her, saw that the safety was off, and told her the means

[373] Id. at 1063.
[374] Id. at 1064.
[375] Commonwealth v. Carter (*Carter II*), 115 N.E.3d 559, 567–69 (Mass. 2019).
[376] Id. at 568.
[377] Id.
[378] Id.
[379] Id.
[380] See *Carter I*, 52 N.E.3d 1054, 1064 (Mass. 2016).
[381] Persampieri v. Commonwealth, 175 N.E.2d 387, 389 (Mass. 1961).
[382] Id.
[383] Binder & Chiesa, supra note 10, at 76.
[384] *Persampieri*, 175 N.E.2d at 389.

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by which she could pull the trigger."[385] She shot herself and died the following day.[386] While this court did not explicitly discuss the matter of intervening causation, it both upheld the defendant's manslaughter conviction—of which causation is again a necessary element—and emphasized that the wife "was emotionally disturbed" and "had been drinking" to explain why her suicide was one of the "possible consequences of his conduct."[387]

A similar case occurred in New York. There, the defendant met the seventeen-year-old victim and invited him back to the defendant's apartment.[388] The victim, who had recently broken up with his girlfriend, had been drinking heavily and repeatedly expressed suicidal thoughts.[389] The defendant provided the victim with additional alcohol and "challenged him several times" to kill himself.[390] Eventually the defendant produced a rifle and several bullets and instructed the victim to "put the gun in his mouth and blow his head off."[391] The victim immediately followed these instructions.[392] In reviewing this evidence, the Court of Appeals of New York concluded that the defendant's conduct was a "sufficiently direct cause" of the victim's death to impose liability for murder.[393] Noting that the victim "had been drinking heavily and was in an extremely depressed and suicidal state," the court specifically rejected the claim that the victim's conduct in loading the rifle and pulling the trigger was a superseding cause.[394]

Each of these cases involve mental impairment owing to emotional instability or depression, two of the three involved some amount of intoxication, and two of the three involved underage victims. The causation jurisprudence takes these impairments seriously, concluding that the victim's behavior was insufficiently autonomous to be a superseding cause. By contrast, rape law jurisprudence struggles with mental impairments. An expression of consent is rarely invalidated, even

[385] Id. at 390.
[386] Id. at 389.
[387] Id. at 390.
[388] People v. Duffy, 595 N.E.2d 814, 814 (N.Y. 1992).
[389] Id. at 814–15.
[390] Id. at 815.
[391] Id.
[392] Id.
[393] Id. at 816.
[394] Id.

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in the face of extensive disability, immaturity, or severe intoxication.[395] These two lines of jurisprudence therefore reflect divergent views on what it means to be sufficiently autonomous to carry the burden of legal responsibility for one's actions. In short, consent and causation, though philosophically similar in their motivations, are in tension in practice.

III. CAUSING CONSENT

The foregoing analysis reveals that the criminal law's proximate causation doctrines treat many situations as insufficiently autonomous even when rape law's consent doctrines would treat them as an enforceable expression of sexual autonomy. Put more simply, rape law would find valid consent (and hence absolve an actor of criminal responsibility) in various circumstances—force, fraud, and mental incapacity among them—where the law simultaneously denies that the act of consenting *caused* the resulting sex. The question then arises whether proximate cause doctrine captures something important about individual autonomy that is missing from our consent doctrine.[396] If so, can this omission be remedied by adding a causation requirement to rape law?

This Part begins with a normative examination of the causal role of consent in desirable sexual interactions, concluding that consent ought to be causal. Arguably, the cause of intercourse is of normative significance. While the traditional formulation of the crime of rape treats sexual intercourse as *conduct* rather than a *result*, the traditional emphasis on physical force seems to indicate that the means of producing intercourse are relevant to questions of criminality. Further, it appears normatively desirable that consent perform this causal role. The so-called "moral magic" of consent may be due not to consent's mere presence in sexual interactions, but rather to consent's role in *motivating* sexual interactions. This Part provisionally concludes that consent renders sex prima facie non-wrongful only when it causally motivates the parties' actions.

This Part then examines how rape law could be reformed to leverage the normative insights just uncovered. It first looks at the recent revisions to the sexual assault provisions of the Model Penal Code adopted by the American Law Institute in 2022. Those revisions redefined the crime of

[395] See supra Subsection I.C.3.

[396] But see Childs, supra note 52, at 311 (arguing that sexual autonomy may be distinct from other kinds of autonomy because of sex's centrality to personhood).

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sexual assault (the recent revision does not use the term "rape") to include for the first time both requirements of causation and requirements of nonconsent. But the structure of the Model Penal Code continues to center the presence of valid consent in sexual interactions. In short, these reforms, though well-intentioned and unquestionably an improvement over the previous version of the Code, may fail to remedy the problem identified in Part I above. In contrast, this Part proposes reconfiguring rape as a result crime, prohibiting specific wrongful means of causing sexual intercourse. A rape law structured around the causes of sexual intercourse may best capture our normative intuitions about why and when consent matters.

A. The Normative Case for Consent as Causation

As we have seen, the traditional framing of sexual consent assigns no weight to its causal role in sexual encounters. Should rape law care whether consent causes sex? Let us begin with the notion of factual, or "but-for" cause. On the traditional view, sexual intercourse is permissible (or at least noncriminal) whenever both parties have consented, even where the sexual intercourse would have happened in the absence of one party's consent. Stated differently, the traditional view does not require that the sexual intercourse occur *because of* both parties' consent, even in the thin sense of factual causation; it only requires that the sexual intercourse occur *contemporaneous with* both parties' consent.

The following Subsections expose why the traditional view is shortsighted. Sexual autonomy is not respected unless one's choices have the power to cause (or prevent) a sexual interaction. This suggests that it is normatively desirable for consent to serve as a factual cause of sex. But I am inclined to take this analysis a step further and suggest that, in normatively desirable sexual interactions, the consent of all parties ought to also be the proximate cause of the resulting sex. This requirement not only comports with certain philosophical understandings of why consent matters (what I call consent as reason-giving), but it also best reflects our shared understandings about what is good about sex when it goes right.

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1. Sexual Autonomy and Factual Cause

Sexual consent and sexual autonomy are not coextensive.[397] Sexual autonomy is thought to encompass the right to control sexual access to one's body.[398] Sexual consent, by contrast, is merely a mechanism for protecting autonomy.[399] Consent ostensibly protects autonomy by allowing an individual to set the conditions upon which sexual access to one's body may be granted. Because of the structure of rape law, it is often assumed, without investigation, that the presence of valid consent means that one's autonomy has been respected.[400]

But what happens to sexual autonomy when consent plays no causal role in a given sexual interaction? This Subsection begins that inquiry by exploring how leading theories of sexual autonomy would view those somewhat counterintuitive cases where consent, though present, was not even a factual cause of sexual intercourse. That is, those cases where all parties consent, but where one party was determined to proceed even if consent had been absent. We must acknowledge that at least some people some of the time may be willing to proceed with sex irrespective of whether their partner consents, and thus the existence of a party's consent does not solely answer the question of whether consent caused the resulting sex. As this Subsection demonstrates, leading theories of sexual autonomy would recognize that autonomy is *disrespected* when a party's consent is not a factual cause.

Let me begin by stating the obvious: where sexual intercourse occurs without a party's consent, then consent is obviously not a cause (factual or otherwise) of the resultant sex. This means that our prevailing understanding of rape—sexual intercourse without consent—already captures *only* instances where sexual consent does not play any causal role. The question remaining is whether other instances where consent similarly plays no causal role should be understood as equally violative of sexual autonomy as what we currently recognize as rape.

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[397] See Wertheimer, supra note 1, at 31–32; Fischel & O'Connell, supra note 210, at 439.

[398] See, e.g., Rubenfeld, supra note 33, at 1417–18.

[399] Wertheimer, supra note 1, at 31.

[400] See, e.g., Schulhofer, supra note 2, at 280 ("What decent protection of sexual autonomy requires is . . . a recognition that sexual intimacy must always be preceded by the affirmative, freely given permission of both parties.").

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The leading *legal* theory of sexual autonomy is that offered by Stephen Schulhofer.[401] Schulhofer's autonomy is often reduced to a mere freedom of choice (free in that the choice is uncoerced and unconstrained).[402] For Schulhofer, sexual autonomy is "every person's right to control the boundaries of his or her own sexual experience"[403] or the "right to determine the boundaries of our own sexual lives."[404] The emphasis here is on *control* or *determination*. A person who consents to an interaction is not in control of that interaction unless the act of consenting plays some motivating role in causing the sexual activities that follow.

Recall the case of the Texas woman who was accosted by a knife-wielding stranger in her own apartment.[405] I would invite you to imagine a counterfactual scenario where the woman does not request that her attacker wear a condom—the act that was interpreted by the grand jury as an expression of consent. I think it is fair to assume that, in this counterfactual scenario, the attacker would have proceeded to engage in sexual intercourse with the woman notwithstanding her lack of consent. It is unlikely that a person would break into a stranger's home, threaten them with a knife, demand sexual intercourse, and then give up on their endeavor when sexual consent is not readily forthcoming. If this is correct, our counterfactual reveals that, in this case, the existence of consent was not even a factual "but-for" cause of the sexual intercourse that resulted.

In what sense is this woman's autonomy respected? In what sense was she in control of the boundaries of her own sexual experience, as Schulhofer would demand? If her choice to consent is utterly irrelevant to the sexual acts that followed, I struggle to understand how the presence of her consent ensures respect for her autonomy, at least in the sense that Schulhofer contends.[406] What she has is the illusion of control, and

[401] See generally id. at 99–113 (articulating a theory of sexual autonomy as a legal entitlement).

[402] See, e.g., Galia Schneebaum, What Is Wrong with Sex in Authority Relations? A Study in Law and Social Theory, 105 J. Crim. L. & Criminology 345, 363 (2015) (suggesting that Schulhofer, in certain contexts, equates autonomy, consent, and "freedom of choice"); Nadia B. Soree, Show and Tell, Seek and Find: A Balanced Approach to Defining a Fourth Amendment Search and the Lessons of Rape Reform, 43 Seton Hall L. Rev. 127, 181 (2013) (equating Schulhofer's account of autonomy with the "ability to freely choose").

[403] Schulhofer, supra note 2, at 15.

[404] Id. at 16.

[405] See supra text accompanying notes 135–40.

[406] Some will undoubtedly claim that the failure to respect autonomy comes in treating the woman's consent as valid in the first instance, rather than in the absence of factual causation.

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perhaps that illusion reduces her subjective distress—i.e., her experienced harm. But if rape law is intended to fully protect autonomy, it must take seriously harms that are not experienced as well.[407]

An alternative theory of sexual autonomy is offered by Joseph Fischel and Hilary O'Connell. They author an account of sexual autonomy as "the *capability to codetermine sexual relations*."[408] Codetermination offers a relational approach to sexual autonomy.[409] The crux of codetermination is that each person has the capability to "plan the existence, directions, and trajectories of their sexual relations."[410] As they explain, "Codetermination need not require equal abilities, education, experience, income, strength, and so forth between or among sexual agents."[411] In this respect, codetermination overlaps with feminist accounts of sexual decision-making that center "agency," rather than autonomy.[412]

In Fischel and O'Connell's work, they specifically call out relationships of vulnerability and dependence as those in which a person may be "unduly impeded from codetermining" the relationship.[413] That is, sexual autonomy is sufficiently infringed—to the point of requiring the intervention of the criminal law—when a person loses the capability to direct their own sexual life with their sexual partners.[414] We can recast this in causal terms: if a person's sexual decisions are not at least a factual cause of their sexual relationships—the relationships are not motivated or directed by their decisions, but rather are dominated by their partners—then the person is deprived of sexual autonomy.

Consider again the recent Oregon case involving a young woman's mental impairment.[415] The twenty-eight-year-old woman had an IQ of

But this is the problem of constrained agency: so long as a person "chose the sex over the force," it may be hard to see an absence of consent, see Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction, 93 Colum. L. Rev. 374, 418 (1993), though it may be easy to see the lack of causation.

[407] This should be obvious when we think about the rape of unconscious individuals, who do not subjectively experience the ordeal. See John Gardner & Stephen Shute, The Wrongness of Rape, *in* 4 Oxford Essays in Jurisprudence 193, 196–97 (Jeremy Horder ed., 2000).

[408] Fischel & O'Connell, supra note 210, at 467.

[409] Id. at 472.

[410] Id. at 471.

[411] Id.

[412] See, e.g., Deborah Tuerkheimer, Sex Without Consent, 123 Yale L.J. Online 335, 337–41 (2013).

[413] Fischel & O'Connell, supra note 210, at 493, 498.

[414] Id.

[415] State v. Wallace, 517 P.3d 323 (Or. Ct. App. 2022), *aff'd in part*, *rev'd in part*, 561 P.3d 602 (Or. 2024).

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sixty-two and was incapable of most daily tasks.[416] She had sexual intercourse with a fifty-year-old man who had lied to her and convinced her that he was only thirty.[417] During intercourse, the defendant had "pinned" her down, refused to stop when she expressed her discomfort, and covered her mouth when she started screaming.[418] Because the relevant legal inquiry was about whether she had the capacity to consent, the state appellate court considered whether her "passive acquiescence" evidenced that she "did not understand that the activity initiated by [the] defendant was sexual in nature."[419] Had the legal inquiry instead turned on whether the complainant's act of consenting caused the intercourse, the fact that the defendant seemed determined to proceed despite the complainant's wishes would have been determinative. I think it obvious that the complainant did not "codetermine" the encounter.

In this Subsection, I considered whether leading theories of sexual autonomy could meaningfully distinguish between nonconsensual sex and sex where consent, though present, was not a factual cause. I consider these the easy cases if the goal of rape law is to protect sexual autonomy; constrained acquiescence to a sexual act that will happen in any event is simply not consistent with the kind of control or self-determination that renders autonomy worth protecting in the first instance. In the next Subsection, I consider whether the leading theories of consent support the further conclusion that consent should be a *proximate*, not merely factual, cause in permissible sexual encounters.

2. Consent as Reason-Giving

Scholars who theorize about consent are commonly divided into two theoretical camps based on their understanding of *what* consent is ontologically and *why* it carries moral force.[420] For some scholars, consent is primarily an internal mechanism—a person consents when their personal preferences are so arranged as to not object to the acts that follow.[421] We can call these scholars "subjectivists." For example, Larry

[416] Id. at 326.
[417] Id. at 327–28.
[418] Id. at 328.
[419] Id. at 330–31.
[420] E.g., Peter Westen, Some Common Confusions, supra note 58, at 342.
[421] See, e.g., Hurd, supra note 13, at 125–26 (arguing that consent is best conceived of as "the execution of a desire"—in other words, a choice—or a purposive mental state similar to the concept of specific intent in the criminal law); Larry Alexander, The Moral Magic of Consent (II), 2 Legal Theory 165, 165–66 (1996) (agreeing with Professor Hurd that consent

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Alexander is a subjectivist. He contends that "consent, to be an expression of autonomy, must be the exercise of will and, thus, a subjective mental state."[422]

On the subjectivist account, consent operates like a waiver. Alexander explains that "when one consents to what would otherwise be a boundary-crossing act of another, one chooses to forgo or waive one's moral objection to the boundary crossing."[423] The waiver model of consent best explains the structure of U.S. rape law: if consent is a waiver of objection, then the mere presence of consent as an attendant circumstance has normative significance, at least with respect to the right of the consenter to complain.

I have previously suggested that some consensual sexual conduct, on the subjectivist account, might be best conceptualized as harmless wrongdoing.[424] Because a consenting party does not subjectively object to a sex act, they do not *experience* that act, when it occurs, as objectionable; hence, they arguably do not experience the act as harmful.[425] But one party's subjective consent does not affect the wrongful character of another party's conduct. When sexual consent is induced by fraud, for example, we might rightly consider the fraud wrongful while also acknowledging that the deceived party did not subjectively experience harm.[426]

is a subjective mental state, but arguing that it is best conceived of not as an intention that the other person engage in the sexual conduct in question, but rather as a conscious waiving of any moral objection to that sexual conduct); Douglas Husak, The Complete Guide to Consent to Sex: Alan Wertheimer's *Consent to Sexual Relations*, 25 Law & Phil. 267, 275 (2006) (book review) (noting that consent is a subjective mental state that, when present, should render sexual intercourse not culpably harmful).

[422] Alexander, supra note 421, at 165.

[423] Id. at 166.

[424] See McJunkin, supra note 22, at 449. Peter Westen has made a similar argument, analogizing rape in the presence of subjective consent to the crime of attempted murder—a crime punishable solely as a function of the defendant's blameworthiness rather than as a function of any harm they have caused. Westen, Some Common Confusions, supra note 58, at 342.

[425] See Roseanna Sommers, Commonsense Consent, 129 Yale L.J. 2232, 2288 (2020) (explaining the debate over the "experiential view" of rape).

[426] Note also that consenting to an act only removes one reason why that act may not be harmful. A person who is deceived about their reasons for sex or about important details of the person they engaged in sex with may prove to be profoundly harmed upon discovery of the truth, even if they did not experience the sex act as harmful at the time. See McJunkin, supra note 30, at 18 (citing Wertheimer, supra note 1, at 194).

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In criminal law theory, harmless wrongdoing is typically considered conduct unsuitable for criminalization.[427] But there is an exception for conduct that, though harmless in some instances, tends to cause harm in the aggregate.[428] This means that the presence of subjective consent in some instances should not preclude a criminal response if the wrongful behavior of another is of a kind that tends to produce harmful consequences in other instances. In this respect, rape law's valorization of consent is misguided—consent need not preclude criminalization of otherwise wrongful conduct.

Moreover, just as subjective consent does not ensure that another person's conduct is not wrongful, subjective consent also does not ensure that another person's conduct is not harmful *to the consenting party*. For years, Robin West has critiqued the claim that the mere presence of consent renders sexual activity harmless. She suggests that liberal legal scholars have engaged in a rhetorical campaign of "legitimation" to insulate consensual activity from legal regulation: "Liberal legal scholars typically, if not invariably, urge not only that consensual sex should not be criminal, but also that legal regulation of any sort, including the imposition of civil sanctions, and perhaps nonlegal community disapprobation or political critique likewise, is uncalled for."[429] The liberal call for deregulation rests on the assumption that any consensual transaction must be welfare-enhancing for the parties involved in the transaction.[430] But West's research reveals the inaccuracy of this assumption. As West ably demonstrates, "[C]onsensual sex, when it is

[427] See generally 4 Joel Feinberg, The Moral Limits of the Criminal Law: Harmless Wrongdoing (1988).

[428] See R.A. Duff, Harms and Wrongs, 5 Buff. Crim. L. Rev. 13, 16 n.14 (2001) ("Since the Harm Principle posits the prevention of harm as the proper aim of the criminal law, it sanctions the criminalization of dangerous as well as actually harmful conduct.").

[429] Robin West, Sex, Law, and Consent, *in* The Ethics of Consent: Theory and Practice 221, 222 (Franklin Miller & Alan Wertheimer eds., 2009).

[430] Id. at 223. Despite identifying the harms of consensual sex, West endorses the presence of consent as the appropriate line between criminal and noncriminal sexual intercourse. She does so because she contends that there are distinctive harms to having one's will overridden by another who is indifferent to consent:

> The physical invasion of the self and body, the interruption and denial of sovereignty over one's physical boundaries that the invasion entails, the fear of death foremost in the mind of the victim, the sure knowledge that one's will is irrelevant, the immediate and total reduction of one's self to an inanimate being for use by another, and the sustenance of multiple injuries, both vaginal and nonvaginal, internal and external—all of this, simultaneously experienced, typify and constitute the experience.

Id. at 227.

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unwanted and unwelcome, often carries harms to the personhood, autonomy, integrity, and identity of the person who consents to it—and . . . these harms are unreckoned by law and more or less unnoticed by the rest of us."[431]

Thus, the subjectivist account, which best explains the structure of U.S. rape law, does not ensure that sexual consent precludes either wrongdoing or harm. And harmful wrongdoing is properly the subject matter of criminal law.[432] This means that the subjectivist account does not justify a rape law that centers the mere presence of consent as the line between criminal and noncriminal sex.

In contrast to subjectivists, "performativists" contend that consent is morally transformative only to the extent that it alters another person's *reasons* for acting.[433] Alan Wertheimer is among those in the performativist camp. He explains that the central question of consent is not what "consent *is*" ontologically, but what version of consent "renders it permissible for A to engage in sexual relations with B."[434] He explains, "It is possible, I suppose, that B's mental state would be sufficient to cancel *B's* right to complain if A proceeds (although I think it does not), but it is hard to see how it could affect what A is entitled to do."[435] Put differently, if consent operates against a background norm of physical noninterference, as most theorists agree is the case, then one person's subjective consent (not outwardly communicated) cannot give other persons any reason to transgress that background norm.[436] Only communicated consent can do that.

We might think of the objectivist account as demanding that consent be reason-giving.[437] That is, communicated consent can change one

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[431] Id. at 224.

[432] See generally 1 Joel Feinberg, The Moral Limits of the Criminal Law: Harm to Others 26 (1984) (arguing that wrongfully harming others justifies the intervention of the criminal law).

[433] See, e.g., Alan Wertheimer, What is Consent? And Is It Important?, 3 Buff. Crim. L. Rev. 557, 568 (2000) (arguing that a person "acts wrongly" if they decide to proceed with sex before their partner has outwardly tokened consent).

[434] Id.

[435] Id.

[436] See Hörnle, supra note 32, at 59 ("Mental states are not accessible to others and thus cannot play a crucial role in guiding conduct.").

[437] Vera Bergelson, The Meaning of Consent, 12 Ohio St. J. Crim. L. 171, 176 (2014) ("For [performativists], consent is relevant mainly because it changes the perpetrator's reasons for action; i.e. for them, the essence of the crime is not the violation of rights of an individual victim but rather the perpetrator's moral and political transgression.").

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party's reasons for acting, which in turn alter the culpability of that party. Even leading subjectivists concede this reason-giving function of communicated consent. Heidi Hurd, for example, admits that a person who proceeds with sexual intercourse in the absence of communicated consent "may be culpable for so doing, because he has no good reason to suppose that she is a consenting partner."[438]

In order to be morally transformative, however, it is not enough that reason-giving consent *provide* reasons for actions; it must actually *motivate* the choices of another. This is the process by which consent renders another's behavior not wrongful: the actor must be acting for the right reasons. It is therefore not enough that performative consent is extant, as the structure of contemporary rape laws emphasizes. Consent must be causal insofar as consent is among the actor's primary reasons for acting. A person who acts with disregard for consent remains culpable.[439]

Thus, the objectivist account of consent provides the principal argument in favor of a causation requirement: sexual contact is non-wrongful when it is motivated by the consent of the other party. Stated differently, sexual contact that occurs *because of* one party's consent is normatively permissible in a way that sexual contact that is *indifferent* to consent is not. The objectivist account of consent also renders a proximate cause requirement in law eminently sensible because it demands that consent is an overt action in the chain of actions that result in sexual conduct.

In the next Subsection, I take this argument a step further. I consider not only the conditions under which sexual conduct is morally permissible but also the conditions under which it is normatively desirable. Here, too, a causation requirement emerges as distinguishing desirable sex from undesirable sex.

3. Teamwork, Mutuality, and the Positive Conception of Sex

Thus far, I have explored the relationship between consent and causation by considering whether sex is wrongful when consent is not the

[438] Hurd, supra note 13, at 137. Despite Hurd acknowledging the actor's culpability, she would not call this rape if the other party consented subjectively, as a state of mind. Id. This further evidences that the primary ground of disagreement between subjectivists and performativists is whether the criminal law—or perhaps rape law, specifically—ought to punish wrongdoing in the absence of acute harm to the victim.

[439] See Bergelson, supra note 437, at 176.

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cause of sexual intercourse. But we might also approach this relationship by taking the opposite tack. As John Gardner has suggested, a deeper understanding of what is outrageous about rape can be obtained by first advancing a "positive conception" of good sex—of what it is that makes sexual interactions normatively desirable.[440]

According to Gardner, the "familiar picture" of good sex is, inter alia, "a loving and giving and mutually respectful and engaged interaction."[441] Specifically, Gardner posits good sex as a form of *teamwork*.[442] "In the case of good penetrative sex, still remaining for simplicity with the same heterosexual case, the activity as a whole is not something that is done by one partner to the other, nor, strictly speaking, by each to the other, but rather by both together."[443]

If good sex is a form of teamwork, as Gardner suggests, a proximate causation requirement for consent may be essential to permit consent to produce good sex. Gardner's definition of teamwork depends crucially—like the performativist account of consent—on each party's reasons for acting. According to Gardner, teamwork requires that each involved party have "the intention that *the team* be the one to achieve the common goal."[444] With respect to sex, teamwork thus requires, at the very least, that each party have an intention to participate in a sex act only on the condition that each other party has consented to the activity and shares this intention. For it is only through all parties' consent that sex has the potential to become a team activity, rather than something "done by one partner to the other."[445] Put differently, good sex appears to require, at a bare minimum, that each party's consent be a cause of the resulting sex.[446]

[440] See John Gardner, The Opposite of Rape, 38 Oxford J. Legal Stud. 48, 48–50 (2018) (quoting Nicola Lacey, Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law, *in* Unspeakable Subjects: Feminist Essays in Legal and Social Theory 98, 117 (1998)). Although I use the phrase "normatively desirable" here, I will note that Gardner's inquiry is explicitly limited to what he deems the "humanly good" (in contrast with the "morally good"). Id. at 51 (emphasis omitted). In this respect, although I build upon Gardner's work, my goal in this Article may extend beyond his.

[441] Id. at 49.

[442] Id. at 54.

[443] Id. at 56.

[444] Id. at 53.

[445] Id. at 56.

[446] I wish to emphasize the phrase "at a bare minimum" in this sentence, for even this requirement of causation still leaves us far from Gardner's ideal of sex being done "*with* somebody" rather than "*to* anybody." Id. My point here is only that consent's role as a cause of sex appears to be a necessary, if not nearly sufficient, requirement of the type of good sex that Gardner envisions.

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Although Gardner does not explicitly contemplate this causation requirement, it emerges again when he explains how rape "inverts" good sex.[447] Gardner contends that rape, unlike good sex, fundamentally involves "disregard" for a partner's lack of consent.[448] If this disregard reflects an inversion of good sex, then good sex must necessarily involve *regard* for a partner's consent. In other words, good sex requires that each partner treat the presence or absence of another's consent as a determining motivation for acting. Indeed, Gardner says as much elsewhere in defining the wrongness of rape.[449] Such regard for consent can easily be recast in the language of proximate causation: good sex only occurs where each party chooses to proceed *because of* each other party's consent.

Gardner is not alone. Over the past four decades, a number of legal scholars have called for rape law to embrace a goal of "mutuality."[450] For example, Martha Chamallas has famously advanced an "ideal of sexual conduct based not just on consent, but on mutuality."[451] Mutuality, for Chamallas, seems to require "a view of sex as a reciprocal activity in which each party's gratification is highly dependent on the other's response."[452] Similarly, Lois Pineau has suggested that mutuality in sex is achieved when "each person's interest in continuing is contingent upon the other person wishing to do so too, and each person's interest is as much fueled by the other's interest as it is by her own."[453] Mutuality in sex has been lauded by legal scholars as reflecting a positive conception of normative desirability rather than as a minimum requirement of non-wrongful or non-harmful sex.[454]

[447] Id. at 49.

[448] Id.

[449] Gardner & Shute, supra note 407, at 206 ("How, then, can consent make all the difference between the paradigmatic use of a person (rape) and the paradigmatic treating of a person as a person which is the opposite of that use (sexual intercourse)? One suggestion is that only a subject can consent, and so, by being astute to another's consent, someone who has sexual intercourse with that other is not treating that other any more *merely* as a means, and hence is not objectifying her.").

[450] See Chamallas, supra note 35, at 835–43; Lois Pineau, Date Rape: A Feminist Analysis, 8 Law & Phil. 217, 236 (1989); William N. Eskridge, Jr., The Many Faces of Sexual Consent, 37 Wm. & Mary L. Rev. 47, 62 (1995).

[451] Chamallas, supra note 35, at 836.

[452] Id. at 840.

[453] Pineau, supra note 450, at 236.

[454] See, e.g., Chamallas, supra note 35, at 835–36.

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Although mutuality is typically put forth as an alternative to consent's paradigm of pursuit and permission,[455] mutuality may in fact give us a path toward better understanding consent's causal function. As seen above, those who value mutuality typically praise sex where each party is motivated by the other party's interests and desires. This would seem to require, at a minimum, that each party's consent proximately cause the other person to act. Moreover, combining mutuality or teamwork with the objectivist requirement that consent be adequately communicated opens new possibilities for sexual negotiation in normatively desirable encounters.[456]

Taken together, the foregoing offers a preliminary argument for adding a causation requirement to consent in rape law. Sexual contact in which consent is present, but plays no causal role, is indistinguishable from rape on an autonomy account. A performativist account of consent best explains the morally transformative power of consent, but only when consent causes a person to act. And a positive conception of normatively desirable sex would embrace only consent that proximately causes sex to occur. In the next Section, I attempt to translate this causation requirement into a workable statutory standard, beginning with reforms that could bring the Model Penal Code's consent and causation requirements into harmony.

B. Codifying Causation

Rather than asking whether valid consent is or is not present in a sexual interaction, as our contemporary rape laws do, we should instead be asking what *caused* the sexual interaction. If consent was the cause of sexual conduct, we may rightly conclude that there was no harmful wrongdoing, and therefore the conduct is presumptively not criminal. By contrast, a sexual interaction where consent is not the cause should be viewed with suspicion and further investigated for the presence of wrongdoing.

We can—and this Article provides reason to believe that we should—structure our rape laws to center this essential causal question. In this Section, I first examine the recent revisions to the Model Penal Code's

[455] See, e.g., Michelle J. Anderson, Negotiating Sex, 78 S. Cal. L. Rev. 1401, 1408–09 (2005).

[456] See Anderson, supra note 25, at 643–44 ("Communication is a mechanism of treating one's partner as fully human, as a separate and valuable person with his or her own desires and needs.").

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sexual assault provisions, which introduced, for the first time, considerations of causation, but which also continued to define nonconsent as an attendant circumstance. I explain some limitations of this approach. A more effective way to center causation may be to sideline the question of consent altogether. Rape law should be structured to center forms of wrongdoing that tend to cause harmful sex, allowing consent to be considered, if at all, as a superseding cause rather than as an essential element of the crime.

1. The Model Penal Code's Misstep

The Model Penal Code, first adopted in 1962, was largely ahead of its time.[457] Unfortunately, the 1962 Code's provision on rape was surprisingly dated. It limited rape to cases of vaginal or anal intercourse with male offenders and female victims.[458] It explicitly permitted marital rape.[459] And it made no mention of sexual consent or causation. Instead, the paradigmatic rape was effectuated only when an offender "compels" his victim to "submit" using force or threats of serious violence.[460] This requirement effectively precluded the possibility of consent (a willing partner would presumably not physically resist) and obviated the need for an inquiry into causation (the necessity of physical violence guaranteed that the offender's conduct was the proximate cause of the resulting sexual intercourse).

It took sixty years for the Model Penal Code's sexual assault provisions to be modernized.[461] In the process, members of the American Law

[457] See Stephen J. Schulhofer, Criminal Justice, Local Democracy, and Constitutional Rights, 111 Mich. L. Rev. 1045, 1063 (2013) (book review) (noting that, among other things, the Model Penal Code "eliminated criminal punishment for sodomy, adultery, fornication, and consensual same-sex adult relationships").

[458] Model Penal Code § 213.1(1) (A.L.I. 1962).

[459] Id. (defining rape as involving, inter alia, "[a] male who has sexual intercourse with a female not his wife").

[460] Id. § 213.1(1)(a).

[461] The proposal to revise the Model Penal Code's sexual offense provisions was approved by the American Law Institute's membership in May 2012. Model Penal Code: Sexual Assault and Related Offenses, Reporters' Memorandum (A.L.I., Discussion Draft 2013). It took ten years of work for the membership to reach approval on the new provisions. See Ira Ellman, Following Delays, American Law Institute Gives Final Approval to Model Penal Code Revisions Regarding Sex Offense Registries, Mitchell Hamline Sch. of L.: Sex Offense Litig. & Pol'y Res. Ctr. (June 3, 2022), https://mitchellhamline.edu/sex-offense-litigation-policy/2022/06/03/following-delays-american-law-institute-gives-final-approval-to-model-penal-code-revisions-regarding-sex-offense-registries/ [https://perma.cc/9K8P-KNH9] (indicating that final approval was granted on May 18, 2022).

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Institute engaged in seemingly intractable, and at times very public,[462] debates about everything from the nature of consent to the scope of physical force to the grading of sexual frauds.[463] The revised Model Penal Code now divides sexual assault into no fewer than six distinct crimes separately covering a range of conduct including assault by force, fraud, and extortion.[464]

The centerpiece of the 2022 revisions was the introduction of a nonconsent requirement as an attendant circumstance. For five of the six forms of sexual assault recognized by the Model Penal Code, the Code now required that the relevant sexual conduct be "without effective consent."[465] The sixth provision requires that "the other person does not consent to that act."[466] In this way, the revised Model Penal Code followed the traditional approach to consent taken by the common law,[467] despite attempting to offer a clearer definition of what consent is and a more definitive statement of when it is legally ineffective.[468]

Curiously, the revised Model Penal Code also introduced causation into many of these sexual assault provisions. But it did so as one of the essential criteria for rendering consent ineffective. Take, for example, Section 213.1(1), the most serious form of sexual assault prohibited by the Code. It is structured as follows:

> *Sexual Assault by Aggravated Physical Force or Restraint.* An actor is guilty of Sexual Assault by Aggravated Physical Force or Restraint when:
>
> (a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and
>
> (b) the act is without effective consent because:

[462] See Michelle J. Anderson & Deborah Tuerkheimer, Opinion, The Thinking About Consent Has Evolved Drastically. This Code May Turn the Clock Back., N.Y. Times (May 16, 2022), https://www.nytimes.com/2022/05/16/opinion/metoo-sexual-assault-consent.html.

[463] See Model Penal Code: Sexual Assault and Related Offenses, Reporters' Memorandum (A.L.I., Tentative Draft No. 1, 2014).

[464] See Model Penal Code §§ 213.1–213.6 (A.L.I., Tentative Draft No. 6, 2022).

[465] See id. §§ 213.1–213.5.

[466] Id. § 213.6(1)(b).

[467] See supra Section I.B.

[468] See Model Penal Code § 213.0(2)(e)(i) (A.L.I., Tentative Draft No. 6, 2022) (defining consent as "a person's willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact").

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(i) the actor uses or explicitly or implicitly threatens to use aggravated physical force or restraint against anyone; and

(ii) the actor's use of or threat to use aggravated physical force or restraint causes the other person to submit to or perform the act of sexual penetration or oral sex; and

(c) the actor acts knowingly with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).[469]

So constructed, Section 213.1(1) requires two material elements—sexual conduct and the lack of "effective consent"—and prescribes a mens rea for those elements. But the provision also provides that effective consent is lacking in part because the sexual conduct was *caused by* aggravated physical force or restraint. So the revised Model Penal Code necessitates inquiry into the proximate causes of sex acts as part of its definition of sexual assault. Four sexual assault provisions within the revised Code are structured this way.[470]

On the one hand, this is a promising development. The revised Model Penal Code appears to have recognized that the question of causation is relevant to the moral and legal significance of an expression of sexual consent. Under Section 213.1(1), a person would be guilty of sexual assault, for instance, if they procured consent to sex by threatening the consenter with serious physical harm. The consent would not be the proximate cause of any resulting sex acts, and, by definition, the sex acts would be "without effective consent."[471]

On the other hand, the Model Penal Code's choice to continue to center consent as an attendant circumstance, rather than centering causation, has subtle consequences that raise questions about the effectiveness of the Code's provisions to capture the full spectrum of blameworthy sexual conduct. To start, consider the Model Penal Code's catch-all sexual assault provision, Section 213.6. That provision is intended to capture sexual assaults that do not meet the more specific criteria—such as aggravated physical force or specific deceptions—required by the preceding provisions. Because the Model Penal Code's drafters chose to

[469] Id. § 213.1(1).
[470] Id. §§ 213.1–213.2, 213.4–213.5.
[471] Id. § 213.1(1)(b). Although, as demonstrated previously, the presence of force has not always been interpreted as inconsistent with legally valid consent, see supra Subsection I.C.1, the revised Model Penal Code stipulates that consent is ineffective under these circumstances. Model Penal Code § 213.0(2)(e)(iii) (A.L.I., Tentative Draft No. 6, 2022).

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frame sexual assault around the *existence* of consent, rather than its causal role in the encounter, Section 213.6 broadly criminalizes sexual penetration and oral sex where "the other person does not consent to that act."[472] There is no element of causation.

In practice, this catch-all provision is likely to be relatively toothless. As detailed above, courts have often found valid sexual consent in despairing circumstances, including many captured by the Model Penal Code's more specific provisions. While the drafters of the Model Penal Code took great pains to define sexual consent in a way that reflects more modern understandings of its nature, the definition still leaves ample room for factfinders to impute willingness to sexual assault victims. In short, the revised Model Penal Code does not depart enough from the traditional understandings of consent, and as a result our current jurisprudence on consent is likely to continue to inform outcomes in sexual assault cases. Courts will continue to find valid consent in all but the most egregious circumstances and continue to exonerate wrongful behavior that is the true cause of sexual intercourse.

If the Model Penal Code's new catch-all provision is insufficiently revolutionary, its specific provisions may in fact be *too* revolutionary. The revised Article 213 articulates five circumstances—two categories of physical force, specific vulnerabilities or incapacities, specific forms of extortion, and specific forms of deception—where consent is, by definition, invalid.[473] Undoubtedly knowing that courts have long found valid consent in many of the circumstances specified by these provisions, the drafters of the revised Model Penal Code simply declared, by dint of a definitional stipulation, that these circumstances preclude "the free exercise of consent" and therefore render consent ineffective.[474]

My concern is that, by defining these circumstances as cases of ineffective consent, rather than merely cases where something other than consent is the proximate cause of the sexual act, the Model Penal Code's new provisions will be less likely to be adopted by legislators who are accustomed to thinking of consent in such circumstances as valid and enforceable. Given that four of these provisions already contain a causation requirement, it was unnecessary to add a stipulation that consent under such circumstances is deemed ineffective. And it is contrary to

[472] Model Penal Code § 213.6 (A.L.I., Tentative Draft No. 6, 2022).
[473] Id. §§ 213.1–213.5.
[474] Id. § 213.0(2)(e)(iii).

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many states' sexual consent jurisprudence[475] as well as popular understandings of consent. When given a choice to center either consent or causation in the definition of sexual assault, the Model Penal Code's choice to center consent may prove to be an impediment to adoption.[476]

A further concern is that the Model Penal Code's specific provisions do not capture the full extent of wrongdoing that causes sex. Although broader than existing rape law in most states, the provisions do not reach forms of fraud, coercion, or exploitation long sought to be recognized by rape law reformers.[477] The shortcomings of these provisions may very well stem from the fact that the Model Penal Code's drafters were attempting to articulate situations where consent is legally ineffective, rather than situations where wrongful behavior, whether or not invalidating consent, was the proximate cause of sexual intercourse. Here, centering consent in the construction of the law may have misled the drafters themselves.

Consider fraud. Section 213.5 prohibits sexual acts that are induced by either of two specific deceptions: either a false representation "that the act had diagnostic, curative, or preventive medical properties"[478] or a false representation "that the actor was someone else who was personally known to that person."[479] While this provision covers the two most common schemes to fraudulently procure sexual consent,[480] these are far from the only deceptions that threaten sexual autonomy. Indeed, if we take seriously the idea that sexual autonomy encompasses "the right not only to decide whether to engage in sexual contact with another, but also to control the circumstances and character of that contact,"[481] we might rightly think that many more fraudulent misrepresentations ought to be included.

Why does the Model Penal Code limit fraud liability to such an extent? Recall that the American Law Institute members viewed their task as

[475] See supra Section I.C.

[476] Centering causation would be less radical to the extent that it does not upset a state's jurisprudence about either the circumstances in which consent is valid or the circumstances under which the law may hold a person responsible for causing harm.

[477] See, e.g., Estrich, supra note 18, at 1120 ("I am suggesting that we do something that is actually quite easy—prohibit fraud to secure sex to the same extent we prohibit fraud to secure money, and prohibit extortion to secure sex to the same extent we prohibit extortion to secure money.").

[478] Model Penal Code § 213.5(1)(b)(i) (A.L.I., Tentative Draft No. 6, 2022).

[479] Id. § 213.5(1)(b)(ii).

[480] See McJunkin, supra note 30, at 9–15.

[481] State ex rel. M.T.S., 609 A.2d 1266, 1278 (N.J. 1992).

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identifying only cases where sexual consent should be deemed legally ineffective. And commentators have struggled for many years with the contention that fraudulently induced consent should *ever* be considered legally ineffective.[482] A close examination of the legal scholarship on this topic reveals pervasive fears that young men will be aggressively prosecuted for an insincere "I love you."[483] Indeed, recent work in experimental philosophy has demonstrated that this view is widely shared among the public—consent induced by fraudulent representations is valid consent.[484]

Had the American Law Institute members centered causation instead of consent in their conceptualization of sexual assault, this provision would likely not be so restrained. This is because criminal law's proximate cause jurisprudence makes no distinction between the content of misrepresentations when determining their causal character. An intentional or knowing fraudulent misrepresentation that foreseeably causes another person to consent carries moral responsibility for any resulting harms. On a causation analysis, it makes no difference whether the consent is labeled valid or invalid, effective or ineffective.

Or consider nonphysical coercion. The revised Model Penal Code would punish sexual contact caused by threats that would motivate "someone of ordinary resolution in that person's situation."[485] This is essentially a repackaging of the 1962 Model Penal Code's prohibition on threats that "would prevent resistance by a woman of ordinary resolution."[486] Sixty years of experience with this language in jurisdictions that were influenced by the Model Penal Code reveal its limitations.

First, multiple courts have concluded that this language is not satisfied where the coercion primarily emanates from the defendant's authority over the victim. For instance, in 2005, an Ohio appellate court reversed a conviction for sexual battery where a doctor ordered his patient to lay on

[482] See, e.g., Richard A. Posner, Sex and Reason 392–93 (1992).

[483] See Russell L. Christopher & Kathryn H. Christopher, Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape, 101 Nw. U. L. Rev. 75, 89 (2007) ("Obtaining intercourse by false representations of 'I love you,' 'I'll respect you in the morning,' or 'I only want to be with you,' is dismissed as endemic to the illusions that courtship and romance often foster and as insufficiently serious to be deemed rape.").

[484] Sommers, supra note 425, at 2281–83 (showing that surveyed individuals found sex-by-deception to be wrongful, but not worth punishing).

[485] Model Penal Code § 213.4(1)(b)(iii) (A.L.I., Tentative Draft No. 6, 2022).

[486] Model Penal Code § 213.1(2)(a) (A.L.I. 1962).

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an examination table and to remove her pants.[487] He then inserted his finger "inside the folds of her vagina" and attempted to kiss her.[488] Although it is clear that the defendant's authority as a doctor *caused* the victim to comply with his directives, facilitating the assault, the court "fail[ed] to see how any reasonable fact-finder could conclude that the means of coercion [the defendant] used in this case would prevent resistance by a person of ordinary resolution."[489]

Similarly, in 2020, a U.S. District Court dismissed a case against a forty-five-year-old defendant who exploited his preexisting relationship with a sixteen-year-old high school student to pressure her into sexual conduct.[490] The erstwhile victim testified that she had known the defendant for years and that he "was her 'uncle, friend, mentor' and even a 'father-like figure.'"[491] Rather than examining whether the defendant wrongfully exploited his position of trust and authority to *cause* the sexual relationship,[492] the court simply concluded that "there is no independent evidence of coercion" outside of the parties' ages and relationship.[493]

Secondly, in analogous circumstances, courts have concluded that individuals particularly vulnerable to coercion no longer represent a person of ordinary resolution.[494] For example, a person in an abusive relationship who suffers from PTSD due to the history of abuse could easily be dismissed as "especially sensitive" and therefore unrepresentative of a person of ordinary firmness.[495] Or a juvenile who is

[487] State v. Bajaj, 2005-Ohio-2931, ¶¶ 2–7 (7th Dist.).

[488] Id. ¶ 7.

[489] Id. ¶ 45. In large part, the court felt compelled to this conclusion by prior precedent from the Supreme Court of Ohio that concluded the statute did not apply to a high school teacher who initiated a sexual relationship with one of his students. See State v. Noggle, 615 N.E.2d 1040, 1041–42 (Ohio 1993).

[490] Peterson v. Ruppright, 452 F. Supp. 3d 735, 739 (N.D. Ohio 2020).

[491] Id. at 741.

[492] For an account of how rape law could accommodate sexual abuses of power, see generally Michal Buchhandler-Raphael, The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power, 18 Mich. J. Gender & L. 147, 151–54 (2011).

[493] *Peterson*, 452 F. Supp. 3d at 741.

[494] See State v. B.H., 870 A.2d 273, 290 (N.J. 2005) ("The idiosyncratic fact that the defendant may be susceptible to the demands of her abuser because she suffers from battered woman syndrome becomes irrelevant [in assessing the response of a] person of reasonable firmness . . . ."); State v. Heinemann, 920 A.2d 278, 293 (Conn. 2007) ("The jury's evaluation of a defendant's response to the threat, applying the standard of the 'person of reasonable firmness,' presupposes an ordinary person without serious mental and emotional defects." (quoting State v. Van Dyke, 825 A.2d 1163, 1172 (N.J. Super. Ct. App. Div. 2003))).

[495] Cf. Moreno v. State, 605 S.W.3d 475, 477 (Tex. Crim. App. 2020) (rejecting evidence of PTSD as irrelevant to the response of "a person of reasonable firmness").

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being extorted by an adult might not be permitted to argue that their immaturity and vulnerability to pressure explains why they caved to sexual demands.[496]

These concerns disappear when rape law is instead structured around causation. Under a causation analysis, an individual's particular vulnerability to coercion *increases* the likelihood that coercion will be seen as the proximate cause of resultant harms, rather than serving as an excuse to dismiss them.[497] Under a causation analysis, an individual's relationship to, and authority over, another person is directly relevant to who bears causal responsibility for the consequences of their interactions.[498]

In sum, the Model Penal Code reforms, while a huge improvement over the 1962 Code, missed a key opportunity. Though introducing a first-of-its-kind causation requirement into the law of sexual assault, the Code's drafters couched that requirement as a matter of "effective consent." The result is a Code that is at times alternatingly ineffectual (to the extent it hews closely to existing consent jurisprudence), overly ambitious (to the extent it upends common understandings of consent), and inconsistent with a faithful application of causation doctrine (to the extent it narrowly proscribes the wrongdoing that counts as sexual assault). The next Subsection imagines where the Model Penal Code could have gone, and where rape law might well go once we more broadly recognize the role of causation in assigning moral responsibility in matters of sex.

2. A Causal Rape Law

Outside of the realm of sexual offenses, criminal prohibitions that center causation are familiar.[499] Consider, for example, the Model Penal Code's homicide provisions. Criminal homicide occurs whenever a person with a culpable mens rea "causes the death of another human being."[500] Causation is the exclusive component of the actus reus; once

[496] Cf. *Heinemann*, 920 A.2d at 294, 296–98 (rejecting claim that sixteen-year-old's age was relevant to response of "a person of reasonable firmness").

[497] Cf. Eubanks v. State, 894 S.E.2d 27, 41–42 (Ga. 2023) (holding that developmentally disabled victim's particular vulnerabilities were relevant to whether the defendant's conduct was the proximate cause of harm).

[498] Cf. *Carter II*, 115 N.E.3d 559, 567–69 (Mass. 2019) (finding proximate cause where the defendant's relationship to victim played a part in her ability to overcome victim's will).

[499] Ryu, supra note 261, at 774.

[500] Model Penal Code § 210.1(1) (A.L.I. 1962).

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the causal connection between the defendant's conduct and the victim's death is adequately proved, the harm has been established.

Similarly, rape law could easily be defined by what causes sexual intercourse with another person. Unlike homicide, however, this would require some inquiry into specific wrongful means of causing sex.[501] If sex is presumptively non-wrongful when the consent of each party is the proximate cause, we can approach this question by considering *what else* might compete with consent to be the proximate cause of a given sexual encounter.

This inquiry, too, is familiar to rape law scholars. Robin West proposed this approach to rape law over three decades ago, when she noted that "[w]e might very profitably ask not which sexual practices are consensual or not, but rather which of our sexual practices are legitimate means of obtaining sex and which are not."[502] Mary Childs has made a similar observation: "To make consent *simpliciter* the boundary between criminal and legal sex is [to] approach the question from the wrong angle, because it means ignoring the real normative question of whether the means used to secure consent or submission are acceptable."[503] And Donald Dripps once proposed a supplementary crime of "sexual expropriation," covering situations in which a person "obtained sex culpably but nonviolently."[504]

Emphasizing the wrongful means of causing sexual intercourse is also consistent with the best contemporary understandings of causation. Recall Joshua Knobe and Scott Shapiro's contributions to the earlier discussion of proximate cause. They found that, in cases where at least two behaviors are necessary to a result, the more wrongful behavior is more commonly understood as being *the* cause.[505] For example, in a case of deceptively induced consent, we might conclude that the sex would not occur in the absence of either the consent or the deception, but the deception is more causal because it is more wrongful. We see this finding play out in our causation jurisprudence, where the presence of deception renders

[501] Presumably, causing the death of another human being is always worthy of state intervention; causing another person to engage in sexual intercourse might or might not be, depending on whether it is the product of wrongful behavior.

[502] Robin L. West, Legitimating the Illegitimate: A Comment on *Beyond Rape*, 93 Colum. L. Rev. 1442, 1459 (1993).

[503] Childs, supra note 52, at 313.

[504] Dripps, supra note 31, at 1801.

[505] See Knobe & Shapiro, supra note 271, at 184–85.

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subsequent acts, such as consent, insufficiently autonomous to supersede.[506]

Here, the Model Penal Code's new provisions provide a good—if overly narrow—starting point. In broad strokes, the Model Penal Code prohibits procuring sex by force,[507] by nonphysical coercion,[508] by fraud,[509] or by exploitation of mental incapacity or other vulnerability.[510] These are essentially the same impediments to sexual autonomy that justify the switch from a consent-based rape law to a causation-based one.[511] Depending on your perspective, there may be other wrongful means of procuring sex that deserve criminalization.[512] We need not resolve the particulars of this debate here. It is enough to conclude that the structure of any proposed rape law be defined in terms of some wrongful means that caused the resultant sex act.[513]

The outcome of this approach is that consent is effectively sidelined in the elemental structure of rape. This may be for the best. Consent notoriously shifts the focus of rape prosecutions to the thoughts and actions of the victim; a rape law defined by specific wrongful means of causing sex would shift that focus back to the conduct of the accused.[514] On this model, consent becomes relevant, if at all, only when it is a superseding cause. Perhaps the closest analogy is to the Model Penal Code's provision criminalizing "[c]ausing suicide" by force, duress, or deception,[515] in which consent of the deceased may be relevant only so long as it is sufficiently disconnected from the defendant's wrongdoing as to be an autonomous superseding cause.

The obvious concern with defining rape in this manner is the fear of excessive criminalization. Over the last decade, criminal law scholars

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[506] See supra Subsection II.C.2.

[507] Model Penal Code § 213.1 (A.L.I., Tentative Draft No. 6, 2022) (criminalizing sex caused by aggravated physical force or restraint); id. § 213.2 (criminalizing sex caused by physical force or restraint).

[508] Id. § 213.4 (criminalizing sex caused by extortion).

[509] Id. § 213.5 (criminalizing sex caused by specific deceptions).

[510] Id. § 213.3 (criminalizing sex with a person who is sleeping, unconscious, physically unable to communicate, or surreptitiously drugged).

[511] See supra Section I.C.

[512] See MacKinnon, supra note 8, at 474 (proposing to define rape as "a physical invasion of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability").

[513] For a model statute structured this way, see McJunkin, supra note 22, at 447–48.

[514] See id. at 448–49.

[515] Model Penal Code § 210.5(1) (A.L.I. 1962).

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have increasingly called for the shrinking or abolition of our carceral systems, often motivated by evidence of their extreme dysfunction and fundamental unfairness in operation.[516] The trenchant work of Aya Gruber, in particular, has laid aim at sex offenses as not warranting an exception to this trend,[517] notwithstanding the widespread belief that sex crimes are underreported and underprosecuted.[518]

I am sympathetic to the concern of excessive criminalization. However, I believe that criminalization—the task of identifying wrongdoing that warrants some social sanction[519]—can be distinguished from adjudication and punishment. Elsewhere, I have openly considered what rape law may look like if paired with a process of restorative or transformative justice, rather than traditional adjudication and incarceration.[520] For the purposes of this Article, I also profess to be agnostic about whether the crimes proposed above should be labeled in any particular way (as "rape" or "sexual assault" or "sexual misconduct") or graded in any particular way (as felonies or misdemeanors). My aim here is to provisionally suggest that a causal rape law is both possible and desirable, in terms of capturing what is wrongful about sex that goes badly. There remains much work to be done with respect to implementing such a rape law in a manner consistent with the dictates of justice.

Some may also argue that the all-or-nothing nature of proximate cause is insufficiently capacious to capture the full picture of normative responsibility in matters of sex. For example, one may believe that a defendant bears *some* causal responsibility for deploying certain means of procuring sex, such as force, fraud, or coercion, while simultaneously believing that the complainant *also* bears causal responsibility for consenting to sex even in response to those means. As Guyora Binder and Luis Chiesa have explained in a different context, "American criminal law doctrine is ill-equipped to accommodate the intuition that two or more

[516] Benjamin Levin, Criminal Law Exceptionalism, 108 Va. L. Rev. 1381, 1396–1401 (2022).

[517] See generally Aya Gruber, Sex Exceptionalism in Criminal Law, 75 Stan. L. Rev. 755 (2023) (arguing that sexual offenses should not be treated as categorically distinct from other crimes).

[518] See Aya Gruber, Rape, Feminism, and the War on Crime, 84 Wash. L. Rev. 581, 585 (2009).

[519] See generally R.A. Duff, The Realm of Criminal Law (2018) (offering a normative theory on which kinds of conduct should be subject to criminal sanction).

[520] McJunkin, supra note 22, at 460–62.

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actors are partially responsible for bringing about legally relevant harm."[521]

Here, I must admit that proximate cause is an imperfect legal tool, as so many legal tools necessarily must be. Above, I have suggested that consent renders sexual conduct non-wrongful, if at all, only when it is (1) a but-for cause of sex, and (2) sufficiently motivating that an actor can be said to be responding to right reasons. This is admittedly not identical to the legal concept of proximate cause—especially proximate cause in those jurisdictions that lean heavily into "foreseeability" as the measure of causation. But I think that, of the legal tools available, a proximate cause requirement most closely approximates those features of consent that exonerate sexual conduct.

I also believe that thinking about rape in terms of causation has advantages for understanding some of rape law's lingering puzzles. Consider the Supreme Court of New Jersey's well-known decision in *State ex rel. M.T.S.*[522] There, the court interpreted the state's rape statute as requiring "no more force than necessary to accomplish [penetration]" despite the fact that sexual intercourse and "physical force or coercion" were distinct elements of the crime.[523] Moreover, the court decided that sexual penetration was by force whenever it occurred "without the affirmative and freely-given permission of the victim."[524] This, despite the fact that the New Jersey statute was entirely silent on the topic of consent.[525]

The *M.T.S.* decision has been a longstanding target of criminal law scholars.[526] David Bryden called the case "easy to criticize."[527] Some see it as a case of prohibited judicial activism—a court announcing new law that is directly contrary to the text adopted by the legislature.[528]

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[521] Binder & Chiesa, supra note 10, at 80. For an account of how the criminal law ought to be reformed to better accommodate comparative responsibility of defendants and victims, see generally Vera Bergelson, Victims' Rights and Victims' Wrongs: Comparative Liability in Criminal Law (2009).

[522] 609 A.2d 1266 (N.J. 1992).

[523] Id. at 1267.

[524] Id. at 1277.

[525] See id. at 1269.

[526] See, e.g., Recent Case, *State ex rel. M.T.S.*, 609 A.2d 1266 (N.J. 1992), 106 Harv. L. Rev. 969, 974 (1993) ("The *M.T.S.* court's strained statutory interpretation, and its injustice to M.T.S. in not remanding, may ultimately hurt more than help the feminist law reform movement.").

[527] See Bryden, supra note 134, at 397.

[528] See, e.g., Dressler, supra note 49, at 422–23.

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But I think there is a different way to look at *M.T.S.* If we asked what *caused* the sexual intercourse in that case, the answer has to be physical force. The trial court found that there was no consent to penetration, so that could not be a cause. The case did not involve deception or extortionate threats or any other wrongdoing that may have compelled the victim to cooperate in causing the sexual intercourse. Instead, the intercourse occurred precisely because the defendant had applied enough physical pressure to accomplish vaginal penetration. So when the statute demanded that "sexual intercourse *by* force" be punished, the *M.T.S.* court arguably gets it right.[529]

A similar appeal to causation might explain why the common law's requirement of physical force was obviated in cases of unconscious victims. Despite most common law cases interpreting "force" as some amount of extraneous violence beyond the force inherent in sexual penetration, no showing of extraneous violence was historically needed when a victim was unconscious.[530] This exception was defended on the ground that force was "implied" when the victim cannot physically resist.[531] Discussing the necessity of violence in response to resistance implicates consideration of the *causes* of penetration. When a victim is resisting, sexual penetration is caused by the application of additional physical force that overcomes the resistance—the additional force is necessary to cause the result. When a victim is unable to resist, sexual penetration is caused by the physical force inherent in the penetration itself—extraneous violence is not necessary and therefore not legally required.

Courts have also waived the force requirement in cases of deception "in the factum."[532] As with unconsciousness, this exception to the force requirement is sometimes explained by the fact that victims of serious deception would not be capable of resisting (because, for example, they

[529] Note that, while I think the court may have reached the right outcome in the case, I think the court may have been wrong in its broader proclamation that any penetration in the absence of affirmative consent is necessarily forcible. Penetration can be caused by a number of alternatives to force that I think rape law ought to distinguish among, including deception, psychological coercion, and exploitation of mental impairment.

[530] See, e.g., Commonwealth v. Burke, 105 Mass. 376, 379 (1870); Harvey v. State, 14 S.W. 645, 646 (Ark. 1890); Brown v. State, 76 S.E. 379, 379 (Ga. 1912).

[531] State v. Moorman, 358 S.E.2d 502, 505 (N.C. 1987).

[532] See LaFave, supra note 88, at 907–08.

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would not be on notice that they were even having sex).[533] In situations where there can be no resistance, extraneous violence is once again rendered unnecessary to accomplish the sexual intercourse. The cause of the intercourse is the wrongful fraud, and that is sufficient for criminal liability even in the absence of additional violence. Note that this explanation has *not* traditionally extended to cases of fraud in the inducement because resistance was still expected of women who knew they were engaging in nonmarital relations (no matter what else they had been defrauded about).[534] Where resistance is expected, the failure to resist—historically equated with consent in rape law—is the cause of the intercourse, not the fraud.

Thus, rape law may *already* be thinking about the crime in terms of wrongful causes, at least in some limited (and subtextual) circumstances. My proposal is to surface this thinking statutorily and to bring it to bear on our understanding of rape more generally. Doing so may very well explain two longstanding exceptions to the force requirement and one famous, and perhaps unjustly maligned, court case that sought to move rape law forward. More importantly, explicitly engaging with the causes of sexual intercourse may better protect individual sexual autonomy than has rape law's emphasis on the presence or absence of consent. Causation doctrine is better suited for this role doctrinally, and causation principles best capture consent's normative force in the cases where it may be relevant to an attribution of responsibility.

CONCLUSION

American rape law has made a mess of consent. Sexual consent is often found to be valid despite the presence of powerful external influences, including force or violence, psychological coercion, material fraud, and mental impairment. Consent's resiliency to external influences in legal practice is at odds with leading philosophical accounts of consent, which are typically framed as a matter of protecting individual autonomy. This Article demonstrates that consent's resiliency to external influences is also at odds with a related legal doctrine that is itself framed around individual autonomy—namely, the criminal law doctrine of causation. In

[533] See McJunkin, supra note 30, at 34 ("Deception about the occurrence of sex itself, as in the common-law medical treatment cases, removes the target of conquest from the sexual context that is necessary to ensure resistance.").

[534] Cf. Coughlin, supra note 78, at 26–30, 38–39 (explaining the historical duress defense to criminal liability for nonmarital intercourse).

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causation doctrine, a person's choice to engage in a course of conduct is deemed insufficiently autonomous when impacted by the very external factors which consent supposedly survives: force, coercion, fraud, and impairment.

The contrast of consent and causation invites further inquiry into consent's normative power. Specifically, I offer here a provisional argument for the view that consent to sex is normatively transformative only when it is the proximate cause of the sex itself. If I am correct, rape law would benefit from statutory reforms that directly center this causal inquiry. Surprisingly, the most effective way to do so may be to omit consent from rape law entirely; defining rape as causing sexual intercourse by specific other wrongful means allows consent to surface only where it bears directly on the issue of causation.

There is work left to be done. This Article sets the stage for a robust statutory reform project that serves as an alternative to the recent revisions of the Model Penal Code. It will require a theory of when causing sex is wrongful—I have already supplied one[535]—and careful drafting to avoid the pitfalls of overcriminalization. It will require legislative judgments regarding grading and philosophical judgments regarding when impairments to autonomy should diminish moral and legal responsibility. Most importantly, it will require unwinding the social and legal elevation of consent *simpliciter* as the normative dividing line in matters of sex.

[535] See McJunkin, supra note 22, at 447–48.