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**MEETING OF THE MINDS AND BODIES:
CONTRACT LAW AND THE MUTUALITY OF
SEXUAL EXCHANGES**

*Kelly Jo Popkin**

I. INTRODUCTION

To win this silent consent is to make use of all the violence permitted in love. To read it in the eyes, to see it in the ways in spite of the mouth's denial, that is the art of he who knows how to love. If he then completes his happiness, he is not brutal, he is decent. He does not insult chasteness; he respects it; he serves it. He leaves it the honor of still defending what it would have perhaps abandoned.¹

- Jean-Jacques Rousseau

In an era characterized by pervasive consumerism and sexual freedom, consent is given and accepted by a wide variety of individuals in an expansive assortment of situations. Ubiquitous in many modern interactions, consent authorizes exchanges that would otherwise be considered legally impermissible, transforming

* J.D. Candidate, 2017, Harvard Law School, B.A., 2011, Harvard College. I am immensely grateful to Professor Diane Rosenfeld and Professor Catherine MacKinnon for their incredibly enlightening, life-changing classes on feminism and gender-based violence. I would also like to thank my twin sister for her unwavering support and guidance.

¹ JEAN-JACQUES ROUSSEAU, POLITICS AND THE ARTS: LETTER TO M. D'ALEMBERT ON THE THEATRE 85 (Allan Bloom trans., Cornell Univ. Press 1960).

slavery into employment, theft into contract, and rape into sex.² Consent to sex and consent to contract share many superficial qualities—both occur as a private agreement between two parties, but must pass the standards of public scrutiny in a court of law.³ It is assumed that both sexual and contractual agreements are “premised on voluntariness, mutually beneficial offer and acceptance, and a lack of coercion in the interaction.”⁴ Though the law has modernized in an effort to mitigate the imbalances of power inherent in contractual arrangements, it has failed to craft a meaning of consent that fully acknowledges the power imbalances inherent in heterosexual relationships.⁵ In contract law, common problems of nonviolent coercion in the negotiation stage of contract, voiding agreements and invalidating consent in cases of duress, unconscionability, misrepresentation, and other situations involving unjust bargaining are often expressly addressed. Rape law adjudications, in contrast, typically require an exhibition of physical coercion and resistance and “is indifferent to whether the sexual transactions in which assault is claimed occurred at (what contract law calls) arm’s length.”⁶ Willfully blind to the nonphysical coercive elements present within the confines of the bedroom, American jurisprudence has established a damning precedent of *damnum absque injuria*⁷ for “many actions that most people would

² Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171, 195 (2013).

³ See James T. McHugh, *Interpreting the "Sexual Contract" in Pennsylvania: The Motivations and Legacy of Commonwealth of Pennsylvania v. Robert A. Berkowitz*, 60 ALB. L. REV. 1677, 1677 (1997) (“The ‘contractual’ nature of sexual relationships is hardly a novel concept.”).

⁴ Ann T. Spence, *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, 37 COLUM. J.L. & SOC. PROBS. 57, 72 (2003).

⁵ *Id.* at 74 (“While sexual mores and freedoms have changed, the law has not kept pace with social transformations that require a greater inquiry into fairness and the abuse of power in private agreements.”).

⁶ CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 243 (Harv. U. Press 2005).

⁷ *Damnum absque injuria* is a damage or injury suffered for which there is no recognizable harm in the legal sense. 4 SOUTH CAROLINA JURISPRUDENCE: ACTION § 18 (Charles E. Baker et al. eds., 2017) (“Where there has been no

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regard as clear instances of sexual abuse, [but] are simply not illegal.”⁸

With a narrow focus on only the most blatant forms of coercive behavior, rape law “may create over-inclusive social norms for sex” where nonphysical pressure and exploitative behavior is seen as “aggressive seduction” rather than forcible rape.⁹ Part II of this Note explores the legal safeguards against coercion in contract law as a way to expose the oversights in rape law and suggest a new theoretical approach to sexual consent. Part III of this Note investigates the deficiencies in this theoretical approach by exploring the limitations of contract doctrines and exposing the patriarchal foundations of contractual bargaining. Part IV proposes the use of contract law in campus rape adjudications as a way to heighten the scrutiny of consent by viewing sexual encounters through the totality of the circumstances and an understanding of campus cultural coercion. Part V provides a normative assertion regarding women’s desire in a world of rape culture, and recommends a new model of consent that reifies rather than erases female sexuality.

II. PUBLIC POLICY DOCTRINES AND THE CONTRACT OF CONSENT

For if women consent to changes so as to increase the happiness of others rather than to increase our own happiness, then the ethic of consent, applied even-handedly, may indeed increase the amount of happiness in the world, but women will not be the beneficiaries.¹⁰

violation of right, no recovery is permitted irrespective of the loss or damage the plaintiff sustained.”).

⁸ Duncan Kennedy, *Sexual Abuse, Sexy Dressing, and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1318 (1992).

⁹ Spence, *supra* note 4, at 66.

¹⁰ Robin West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L.J. 149, 160-61 (2000).

In keeping with the public policy of *parens patriae*,¹¹ the law interferes with private dealings in an effort to correct abuses of powers among bargaining parties. Doctrines restricting freedom of contract between individuals, therefore, arise from the social contract inherent between state and citizen. Just as “unadulterated freedom of contract” can result in the exploitation of weaker parties, so too can unadulterated sexual freedom “authorize and approve the abuse of power in private agreements.”¹² The common law of contracts has placed healthy limitations on contracting as a way to preserve the conditions of mutuality inherent in bargaining between free and autonomous parties.¹³ These limitations can also apply to sexual consent as a way to ensure fairness and mutuality in all sexual encounters. The mirror-image rule, for example, requires an unequivocal acceptance of the precise terms of the agreement in question.¹⁴ Any deviation from those terms can be considered a counter-offer, which must be consented to anew.¹⁵ Consent to sex should be revocable at any time, just as contract offers are revocable. An invitation to bargain in a contract does not necessarily signify an expectation to be bound, just as an acceptance to a “date” or “fraternity party” should not signify an obligation to “put out.”¹⁶ A “yes” to one sexual act should not indicate a “yes” to any

¹¹ Literally translated, *parens patriae* means “parent of the country,” BALLENTINE'S LAW DICTIONARY 911 (3d ed.1969). A state can be granted *parens patriae* standing to sue on behalf of its citizens should the general wellbeing of its citizens be at stake. See Romualdo P. Eclavea, LL.B., LL.M., *State's standing to sue on behalf of its citizens*, 42 A.L.R. FED. 23 (1979).

¹² Spence, *supra* note 4, at 74.

¹³ See Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 133 (2008) (“Because of its importance in the course of contract making, a lack of mutuality may render a contract void.”).

¹⁴ See S. WILLISTON, THE LAW OF CONTRACTS § 73 128 (Baker, Voorhis & Co., 1st ed. 1920).

¹⁵ Restatement (Second) of Contracts § 59 (Am. Law Inst. 1981) (“A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.”) See, e.g., *Normile v. Miller*, 326 N.E.2d 11 (1985).

¹⁶ See Restatement (Second) of Contracts § 26 (Am. Law Inst. 1981).

subsequent sexual act,¹⁷ and any new act must be renegotiated on fair and explicit terms.¹⁸

The conditions surrounding the exchange of consent to contract are crucial to analyzing the validity of an agreement. Though duress has traditionally centered on the presence of physical threats, the doctrine has “evolved to encompass more than mere physicality in recognition of the complexity of human interaction.”¹⁹ The law has expanded to recognize nonviolent threats involving money, litigation, or any other “use of power for illegitimate ends.”²⁰ Contractual duress accounts for the victim’s mental state in response to the threat,²¹ as opposed to criminal law’s emphasis on the *mens rea* of the accused in its determination of guilt.²² In so doing, criminal law demotes a survivor’s status to that of an aggrieved witness and “affirmatively reward[s] men with acquittals for not comprehending women’s point of view on sexual

¹⁷ See Restatement (Second) of Contracts § 33(3) (Am. Law Inst. 1981) (“The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.”).

¹⁸ For a model of consent that is exemplary of these ideals, see *Stanford Administrative Guide 1.7.3: Prohibited Sexual Conduct: Sexual Misconduct, Sexual Assault, Stalking and Relationship Violence*, <https://adminguide.stanford.edu/chapter-1/subchapter-7/policy-1-7-3#anchor-24465>.

¹⁹ Spence, *supra* note 4, at 79.

²⁰ See Restatement (Second) of Contracts § 175-76 (Am. Law Inst. 1981).

²¹ See 25 Am. Jur. 2d Duress and Undue Influence § 7 (“Duress is viewed with a subjective test which looks at the individual characteristics of the person allegedly influenced, and duress does not occur if the victim has a reasonable alternative to succumbing and fails to take advantage of it.”); see also Restatement (Second) of Contracts § 175 (Am. Law Inst. 1981); Putz v. Allie, 785 N.E.2d 577 (Ind. Ct. App. 2003); Gott v. First Midwest Bank of Dexter, 963 S.W.2d 432 (Mo. Ct. App. 1998); Holler v. Holler, 612 S.E.2d 469 (S.C. Ct. App. 2005).

²² Jeremy M. Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21 (2001) (describing the various *mens rea* requirements of state penal codes and the Model Penal Code).

encounters.”²³ Rape is thus considered a “cognizable injury from the viewpoint of the reasonable rapist. . . .”²⁴

Similar to duress in their purported aims, the doctrines of unconscionability and undue influence void agreements made between parties of widely disparate bargaining power, where an individual or group with greater sophistication, power, and/or resources intentionally misleads a weaker party lacking alternative recourse to the contract.²⁵ As applied to rape law, the doctrine of unconscionability may aid a factfinder in “determin[ing] whether the coercive behavior was accompanied by a criminal mental state, i.e., whether the alleged rapist intended to coerce the victim.”²⁶ As a legal theory, statutory rape recognizes the prevalence of emotional and psychological coercion in sex, yet draws a hard line on this doctrinal application by explicitly naming the sorts of relationships that would cause such an inducement (*e.g.* sex with minors, patients, etc.).²⁷ Though statutory rape laws protect weaker parties from coercion in such enumerated circumstances, rape law largely provides a *carte blanche* for relationships that do not fit into these statutes’ narrow purviews.²⁸ Contract law, by contrast, defines

²³ *Id.*, see Nancy Chi Cantalupa, *Title IX’s Civil Rights Approach and the Criminal Justice System: Enabling Separate but Coordinated Parallel Proceedings*, in *THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION AND RESPONSE* 125 (Sara Carrigan Wooten and Roland W. Mitchell eds., 2016).

²⁴ Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635, 654 (1983).

²⁵ Restatement (Second) of Contracts § 177 (Am. Law Inst. 1981).

²⁶ Spence, *supra* note 4, at 88.

²⁷ See, *e.g.*, Model Penal Code § 213.3.

²⁸ While rape prosecutions generally require a showing of force or lack of consent, the majority of jurisdictions presume that a minor is incapable of consenting to sexual activity. See Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 *B.U. L. REV.* 295, 309 (2006). (“[S]tatutory rape is unlawful sexual intercourse with a person under a specified age, who, because of that age, is presumed incapable of consenting to the sexual activity. Unlike rape, where the primary focus is on sexual intercourse accomplished against the will of the victim, the crime of statutory rape is premised on a different rationale. . . . the sexual activity is conclusively presumed unlawful because the underage partner does not have the capacity to consent to such activity.”) (citations

coercion in a more open-ended fashion, with a more generalized focus on the dynamic between the two negotiating parties rather than minimum age or other specific attributes of one or more of the parties.²⁹ Undue influence, for example, is simply the “unfair persuasion of a party who is under the *domination* of the person exercising the persuasion.”³⁰ The presence of unfair domination and submission would be general enough to void consent to many sexual encounters that currently fall within the *damnum absque injuria* of sexual assault.

Perhaps the most egregious oversight in rape law also happens to be one of the most thoroughly regulated improper bargaining methods in contract law – namely, fraudulent inducement through misrepresentation. The common law voids contracts in cases where a guilty party misrepresents an assertion with the intention to mislead the unknowing party into signing a contract.³¹ The guilty party need not even be fully certain of the assertion’s falsity, so long as it is material to the inducement and

omitted). See also Joshua Mark Fried, *Forcing the Issue: An Analysis of the Various Standards of Forcible Compulsion in Rape*, 23 PEPP. L. REV. 1277 (1996) (“[E]ven though most states have statutorily abolished the resistance requirement, many courts still expect a victim to demonstrate passive resistance when confronted with a sexual assault.”).

²⁹ See, generally e.g. *Odorizzi v. Bloomfield Sch. Dist.*, 246 Cal. App. 2d 123 (Ct. App. 1966) (holding that school board had unduly influenced a teacher in requesting him to sign a resignation contract after he had gone 40 hours without sleeping after a false arrest and unfounded accusations of criminal homosexual activity); *Jones v. Star Credit Corp.*, 298 N.Y.S. 2d 264 (N.Y. Sup. Ct. 1969) (holding that the sale of a freezer valued at \$300 to individuals on welfare for over \$1,000 is unconscionable); *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co.*, 584 P.2d 15 (Alaska 1978) (holding that construction company accepted much lower payment for services rendered due to their impending bankruptcy).

³⁰ Restatement (Second) of Contracts § 177 (Am. Law Inst. 1981)(emphasis added).

³¹ See e.g. *Hill v. Jones*, 725 P.2d 1115 (Ariz. Ct. App. 1986) (holding that deliberate obfuscation of termite infestation rendered sale of house void); *Duick v. Toyota Motor Sales, U.S.A., Inc.*, 131 Cal. Rptr. 3d 514, 519 (Cal. App. Dep’t Super Ct. 2011)(holding that the terms and conditions of an interactive web page did not adequately inform user that she would be subject to an internet prank).

conveyed with confidence.³² Fraudulent inducement of sex, by contrast, is considered an acceptable technique of seduction.³³ Monetary transactions receive greater protections than sexual exchanges because our body of jurisprudence prioritizes monetary loss among businessmen over a woman's loss of bodily integrity.³⁴ Because bodily property is a right "that is fundamental to American citizenship,"³⁵ of arguably greater importance than the right to contract, one can only assume that a woman's sexual integrity does not fall within the ambit of Locke's famous formulation: "every Man has a Property in his own Person."³⁶

III. THE SOCIAL CONTRACT IS GENDER NEUTRAL

"If men are to be the masters of families they must have sexual access to women's bodies, but the access cannot be a matter of mutual agreement because women's and men's bodies do not have the same political meaning."³⁷

On the surface, the aforementioned principles seem to be tools applicable to a legal analysis of sexual consent. However, an examination of the etiology of contract law exposes the limitations of its doctrinal applications. Freedom of contract is guaranteed by the Contracts Clause of the Constitution³⁸ and reflects the United States' *laissez-faire* approach to private economic dealings.³⁹ The exchange of property is safeguarded by the due process clause⁴⁰ and

³² Restatement (Second) of Contracts § 162 (1)(b) (Am. Law Inst. 1981).

³³ Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1120 (1986).

³⁴ *Id.* at 1121.

³⁵ Alexandra Wald, *What's Rightfully Ours: Toward a Property Theory of Rape*, 30 COLUM. J.L. & SOC. PROBS. 459, 474 (1997).

³⁶ JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 27 (1690).

³⁷ CAROLE PATEMAN, THE SEXUAL CONTRACT 100 (1988).

³⁸ U.S. CONST. art. I, § 10, cl. 1.

³⁹ *See, e.g.*, *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400 (1983).

⁴⁰ *See Knapp v. Smethurst*, 779 A.2d 970, 985 (Md. Ct. Spec. App. 2001) (asserting the existence of both substantive and procedural due process claims premised on the deprivation of a property interest).

the exchange of personal services is similarly protected under the Thirteenth Amendment's prohibition of involuntary servitude.⁴¹ Freedom of contract is a negative liberty, providing individuals with the freedom *from* governmental deprivation of the rights of life, liberty and property.⁴² As a concept, freedom of contract assumes at its nexus that all individuals enjoy remotely comparable levels of autonomy and should therefore bargain freely without draconian governmental intervention. In short, it assumes that all people are seen as individuals in the eyes of the law, rather than as property or as living extensions of their male counterparts. To maintain this semblance of personal liberty and equality within the public sphere, each individual party to a contract must in turn recognize the other as an autonomous property owner, because "[w]ithout this recognition others will appear to the individual as mere (potential) property, not owners of property."⁴³

This critical assumption is informed by social contract theory writ large, with equality rooted in the inalienable natural rights inherent in all persons. Every man is "absolute lord of his own person and possessions, equal to the greatest, and subject to no body."⁴⁴ To ensure and preserve these rights with certitude, "the inhabitants of the state of nature exchange the insecurities of natural freedom for equal, civil freedom which is protected by the state."⁴⁵ Individuals submit to the state in the original contract, relinquishing some freedom so as not to unduly trammel on the freedom of others. The political fiction of universal freedom establishes societal submission to state domination, while concurrently assuring

⁴¹ Ann K. Wooster, Annotation, *Application of Section 1 of 13th Amendment to United States Constitution, U.S. Const. Amend. XIII, § 1, Prohibiting Slavery and Involuntary Servitude -- Labor Required by Law or Force Not as Punishment for Crime*, 88 A.L.R.6th 203, 15 (2013) ("[A]ny effort by the employer to force the employee to remain in the employer's service and work out the balance claimed to be due after the time when the employee may legally terminate employment constitutes involuntary servitude in violation of Section 1 of the 13th Amendment.").

⁴² See generally THE FALL AND RISE OF FREEDOM OF CONTRACT (F.H. Buckley ed., 1999).

⁴³ PATEMAN, *supra* note 37, at 56.

⁴⁴ JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 123 (1690).

⁴⁵ PATEMAN, *supra* note 37, at 2.

individual autonomy and equality. The social contract inculcates the sense of personal liberty necessary to preserve actual contractual relations, which so often involve “an exchange of obedience for protection”—the “civil mastery” and “civil subordination” between two unequal parties.⁴⁶

As Carole Pateman catalogues in *The Sexual Contract*, earlier contractarians carved women out of the social contract by “insist[ing] that men’s rights over women has a natural basis.” Contract theorists naturalize the subjection of women in society because it would otherwise jeopardize the political fiction of universal freedom and individual autonomy necessary to sustain the original contract. Contemporary contractarians no longer assert man’s natural dominance, and instead “subsume feminine beings under the apparently universal, sexually neuter category of ‘individual.’”⁴⁷ If women were truly seen as individuals, however, then the freedom of contract enjoyed in the public sphere would be “extended into the private sphere, [and] inequalities of status between men and women. . . [would] disappear.”⁴⁸ The natural sexual contract of domination and subordination between man and woman is not based on equality and autonomy, yet this sexual contract is nonetheless rendered legitimate because it exists within the private sphere. The fictitious “individual” of modern-day contract is merely a man in gender-neutral clothing, and women are forced to either conform to the standards of bargaining on the androcentric terms of the public sphere or else attempt to remove themselves from public life entirely.⁴⁹ The insidiously patriarchal bargaining practices of gender-neutral consumerism are unavoidable, however, affecting the product design and cost of anything from razors to antidepressants.⁵⁰

⁴⁶ PATEMAN, *supra* note 37, at 7.

⁴⁷ PATEMAN, *supra* note 37, at 42.

⁴⁸ PATEMAN, *supra* note 37, at 167.

⁴⁹ *See generally*, JEAN BETHKE ELSTAIN, PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT, (1981).

⁵⁰ NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, FROM CRADLE TO CANE: THE COST OF BEING A FEMALE CONSUMER (2015), <http://www1.nyc.gov/assets/dca/downloads/pdf/partners/Study-of-Gender-Pricing-in-NYC.pdf>; INSTITUTE OF MEDICINE (US) COMMITTEE ON

Pateman describes the sexual contract as the dark and often unacknowledged underbelly of the original contract. In contracting together to establish a new social order, men rebelled against the feudal power structures rooted in paternal birthright. With all men on equal ground, they establish a “civil fraternity,” binding them together in a sexual contract which ensures both “men’s political rights over women” and “orderly access by men to women’s bodies.”⁵¹ The “fraternal patriarchy” enables men to otherwise indulge in the self-driven values of equality and liberty without risking the disunity that would result from a more competitive sexual environment.⁵² The social contract thus relies completely on the cohesive and coordinated front of male domination stemming from the sexual contract. With the rallying cry of “Liberty, Equality and *Fraternity*” women are barred from the public family of brothers and relegated to the natural family of the home, privatized and shielded from state intervention.⁵³ If they do desire recognition in the public sphere, women “must acknowledge the political fiction and speak the language even as the terms of the original pact exclude them from the fraternal conversation.”⁵⁴ They are faced

WOMEN'S HEALTH RESEARCH, WOMEN'S HEALTH RESEARCH: PROGRESS, PITFALLS, AND PROMISE (2010), https://www.ncbi.nlm.nih.gov/books/NBK210136/pdf/Bookshelf_NBK210136.pdf; INSTITUTE OF MEDICINE (US) COMMITTEE ON WOMEN'S HEALTH RESEARCH, WOMEN'S HEALTH RESEARCH: PROGRESS, PITFALLS, AND PROMISE (2010), https://www.ncbi.nlm.nih.gov/books/NBK210136/pdf/Bookshelf_NBK210136.pdf. (“Women make up just over half the US population and should not be considered a special, minority population, but rather an equal gender whose health needs require equal research efforts as those for men.”); Londa Schiebinger, *Women's Health and Clinical Trials*, 112 J. CLINICAL INVESTIGATION 973, 975 (2003); *but see* Marianne N. Prout & Susan S. Fish, *Participation of Women in Clinical Trials of Drug Therapies: A Context for the Controversies*, MEDSCAPE, http://www.medscape.com/viewarticle/408956_2 (last visited Mar. 13, 2017).

⁵¹ PATEMAN, *supra* note 37, at 2.

⁵² Stefani Engelstein, *Civic Attachments & Sibling Attractions: The Shadow of Fraternity*, GOETHE YEARBOOK, 18, at 205, 206 (2011).

⁵³ *Id.* at 207.

⁵⁴ PATEMAN, *supra* note 37, at 221.

with the impossible task of overcoming their subordinate status, yet the gender-neutral language of contract theory requires women to “become replicas of men.”⁵⁵

Gender-neutralized free bargaining forms the backbone of the fraternal patriarchy. Paradoxically, this backbone is reinforced by aspects of contract doctrine that would appear to protect women from unfair dealings. At first blush, doctrines such as duress and unconscionability seem to be products of state paternalism.⁵⁶ Indeed, the values behind these doctrines jeopardize the *laissez-faire* treatment of contract because they call into question the nature of consent, and, by extension, the presumptions of individual liberty and autonomy that sustain the social contract. Though scholars have actively criticized these doctrines as symbols of the death of the freedom of contract,⁵⁷ courts will only apply them in “rare and extreme cases.”⁵⁸ These doctrines therefore uphold a guise of fairness and justice, while ignoring the many cases where consenting adults contracted in less than fair circumstances. In spite of these doctrines, which have social welfare at their root, contract law does not stray far from what critical legal scholars named the “exchange theory of value,” videlicet, “if the contract was ‘free’ then all parties *must*, by definition, have gained.”⁵⁹

Duress, for example, requires a finding of a threat that “leaves the victim with no alternative,” *i.e.*, an objective analysis of one’s feasible options rather than a subjective analysis of the specific party’s actual willingness to form the contract.⁶⁰ The objective test for duress assumes “the moral premise that a person should be bound only by contracts he took upon himself willingly,” but then falls short of its purported aims by also assuming that all individuals are acting on the basis of his or her own free will.⁶¹

⁵⁵ PATEMAN, *supra* note 37, at 188.

⁵⁶ Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983).

⁵⁷ Gan, *supra* note 2, at 182.

⁵⁸ *See, e.g.*, GRANT GILMORE, *THE DEATH OF CONTRACT* (Ronald K. Collins ed., Ohio State Univ. Press 2d ed. 1995).

⁵⁹ ROBIN WEST, *CARING FOR JUSTICE* 152 (1997).

⁶⁰ Gan, *supra* note 2, at 181.

⁶¹ Gan, *supra* note 2, at 182.

Contract law relies on the purported fairness of objectivity and the universality of individualism, whitewashing, and neutering all potential bargainers with the stroke of a very broad brush. With the exchange theory of value, there is, “no loser in a market economy, where one invariably consents to only what one wants and one only wants what will benefit one.”⁶² This assumption is particularly problematic and counterproductive when applied to consent in a sexual context, because “the injury in rape lies in the meaning of the act to its victims, but the standard for its criminality lies in the meaning of the same act to the assailants.”⁶³ Although “few women are in a position to refuse unwanted sexual initiatives,” the contractual ethics of consent translates an act of capitulation into an enthusiastic mutual exchange.⁶⁴ Furthermore, the threats deemed serious enough to warrant a finding of duress are typically physical or economic in nature, rather than sexual or emotional. If a reasonable man is unlikely to sustain the injury, then the threat of such an injury is rendered illegitimate.⁶⁵ Accordingly, the objective analysis of duress is yet another example of modern-day contract law’s sham of gender neutrality. As MacKinnon affirms, “[w]hose subjectivity becomes the objectivity of ‘what happened’ is a matter of social meaning, that is, it has been a matter of sexual politics.”⁶⁶

Paternalistic contract doctrines fail not only on a subjective level, but also on a macro level, in failing to take into account the societal pressures of gender expectations and other issues stemming from systemic hetero-patriarchal oppression. The doctrine of unconscionability, for example, measures disparities in bargaining power through the calculus of formal rather than substantive equality, assuming equality across gender, race, and socioeconomic

⁶² WEST, *supra* note 58, at 10.

⁶³ MACKINNON, *supra* note 6, at 652.

⁶⁴ Catherine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS, 515, 532 (1982) (“Given a system of consensual ethics, consensual sexual harms (like consensual market harms) simply disappear, or are rendered oxymoronic, where “consent” is in essence the source of value.”).

⁶⁵ Gan, *supra* note 2, at 192.

⁶⁶ MacKinnon, *supra* note 24, at 654.

lines and accounting for power imbalances in only the most egregious of cases.⁶⁷

IV. **CASE STUDY: CAMPUS RAPE ADJUDICATIONS**

“Perhaps it is time to challenge the public system that places self-interested autonomy at its heart and makes consent a key indicator of when that autonomy has been invaded.”⁶⁸

The question remains whether doctrines of duress, unconscionability, and other restrictions to freedom of contract can be expanded to acknowledge the unequal bargaining power between men and women and the socially-enforced imbalances inherent in all exchanges. The problem may lie in the foundational values of autonomy and self-interest of the social contract, from which all other contracts stem. Though it is impossible to change the history of contract law’s patriarchal roots, it may be possible to craft an “enlightened contract law” that is mindful of its own historicity. Enlightened contract law can expand the protections already provided against undue influence, duress, unconscionability, and misrepresentation by indoctrinating an understanding of the systemic inequality within its legal system. The theory of sexual consent provides the perfect platform for this legal experiment. As previously described, sexual consent and contractual consent share many commonalities.⁶⁹ Because heterosexual consent implicates the complexities of gender-based societal pressures, the “enlightened” contract doctrines can be tested within a legal framework wherein the existence of systemic inequality is glaringly obvious.

Campus rape adjudications can be a starting point for this new experiment in public policy. Though institutions of higher learning are free to structure the nuances of their school codes and

⁶⁷ Gan, *supra* note 2, at 196; *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. Cir. 1964).

⁶⁸ Jane Harris Aiken, *Intimate Violence and the Problem of Consent*, 48 S.C. L. REV. 615, 639 (1997).

⁶⁹ *See*, Section I, *supra*.

policies, they must remain in compliance with Title IX in order to retain governmental funding.⁷⁰ Enacted under Congress's Spending Clause, Title IX is essentially a contract with the government wherein schools are provided with yearly funding in assurance of equal access to education for all students.⁷¹ As a contract, Title IX "positions schools as partners of OCR [the Office of Civil Rights] in the enforcement of Title IX and not merely entities controlled by OCR." Part of this enforcement entails adequate investigation and response to sexual assault, rape, and other instances of gender-based violence on campus.⁷² In promulgating policies of sexual consent, universities may be informed by the principles of "enlightened" contract doctrine, which would use the doctrines associated with unfair bargaining to analyze the existence of power imbalances in sexual encounters on campus. For example, campus adjudicators can weigh evidence of consent (or lack thereof) against circumstantial evidence such as age, access to social settings, the use of alcohol, and other forms of coercive pressure. It is undeniable that a first semester freshman woman has fewer friends, access to resources, and life experience than other students on campus.⁷³

⁷⁰ See, e.g. *Dear Colleague Letter*, D.O.E. OFFICE OF CIVIL RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (Mar. 26, 2017) ("Title IX does not require a recipient to adopt a policy specifically prohibiting sexual harassment or sexual violence. . . . however, a recipient's general policy . . . would violate Title IX if, because of the lack of a specific policy, students are unaware of what kind of conduct constitutes sexual harassment. . . .").

⁷¹ See e.g., *Jackson v. Birmingham Bd. Of Educ.* 125 S. Ct 1497, 1508-1509 (2005) ("When Congress enacts legislation under its spending power, that legislation is "in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."). See also *Schaer v. Brandeis Univ.*, 735 N.E.2d 373 (Mass. 2000); *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

⁷² Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, *BYU EDUC. & L.J.* 143, 153 (2013).

⁷³ The period between fall semester and Thanksgiving, known as the "red zone", are when freshman women are most at risk for sexual assault. See *The Red Zone*, WEST VIRGINIA STUDENTS' CENTER OF HEALTH, https://well.wvu.edu/articles/the_red_zone (Apr. 26, 2017) ("[T]here are more sexual assaults on U.S. college campuses during this time than at any

Hypothetically, if she brings a case against the quarterback of the football team or a member of a fraternity, campus adjudicators should weigh the accused's testimony against the evidence of a coercive environment, in light of the totality of the circumstances.⁷⁴ Because Title IX provides civil remedies rather than criminal penalties, the standards of contract law can be used to analyze consent without jeopardizing the due process rights of the respondent. The burden of proof may weigh more heavily on the respondent. However, the punitive measures resulting from campus adjudications (an expulsion at worst) pale in comparison to a conviction of rape in a criminal proceeding.

As a proceeding involving civil rights and civil remedies, campus adjudications can use the legal theories surrounding unfair bargaining as a way to protect weaker parties in sexual exchanges.⁷⁵ Rather than adhering to criminal law's rebuttable presumption that a defendant is innocent until proven guilty, these civil adjudications can assume the natural power imbalances in all sexual exchanges as

other time during the school year. Freshmen women are especially vulnerable to sexual assault during this time.")

⁷⁴ The National Bureau of Economic Research released a report in December 2015 detailing the links between party culture, football, and rape. For a summary of their findings. See Maxwell Strachan, *Reported Rapes Go Through The Roof On Game Day At Big Football Schools*, HUFFINGTON POST, http://www.huffingtonpost.com/entry/college-football-rape_5685a429e4b014efe0da7ae0?utm_hp_ref=college (Jan. 1, 2016) ("Reports of college-aged offenders raping college-aged victims rise by 58 percent on the day of home football games. . . Rapes reported by victims ages 17-24 increase by 28 percent on days when there are football games at Football Bowl Subdivision schools.").

⁷⁵ For example, campus adjudicators can engage in relevant fact-finding to determine whether a group of senior fraternity brothers asserted undue influence on a freshman woman. Factfinders can gather evidence that the frat member used their place of power and privilege to persuade the victim into a back room of a party, where she felt threatened into performing unwanted sexual activity. Or a campus adjudication can find duress in a case where a woman willingly engages in foreplay with a partner, yet feels compelled to consent to sex after he threatens her. See Restatement (Second) of Contracts § 13.10 (Am. Law Inst. 1981); see also Restatement (Second) of Contracts § 13.9 (Am. Law Inst. 1981)

a constant factor to be considered as part of the totality of circumstances surrounding an accusation of rape. In recognizing the inherently unconscionable nature of such exchanges, campus adjudicators can establish a rebuttable presumption of non-consent on behalf of the complainant and undue influence on behalf of the accused.⁷⁶

V. THE PROBLEM OF COMMODIFICATION

“Sex itself is not liberating for women. Neither is more sex . . . The question is, what sexuality shall women be liberated to enjoy?”⁷⁷

While these doctrinal applications may generate a more robust understanding of the complexities of sexual consent, the market terminology and consumerist rhetoric inherent within these theories draw problematic parallels between desire and monetary exchange. When consent to sex is analyzed using the same terms of art as assent to contract, jurisprudence may tacitly approve of the commodification of women’s bodies. This essentially leads to the harmful yet common notion that women provide their bodily integrity for men’s sexual gratification in exchange for money,

⁷⁶ Rebuttable presumptions are controversial in a criminal law context because it reverses the presumption of innocence long ingrained within our criminal justice system. Rebuttable presumptions do exist in the criminal law of other countries, however, and can serve as a model for campus sexual assault adjudication policies. *See, e.g.* Sexual Offenses Act, 2003, c. 42, § 75 (Eng.): “[T]he complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.”

Establishing a rebuttable presumption of guilt in campus adjudications should not affect the presumptive protections of criminal rape proceedings because they occur within a civil rights, rather than criminal, context.

⁷⁷ CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW*, 93-102, 95 (Harv. U. Press 1987) (quoting Susan Sontag).

power, protection, or anything aside from their own sexual desires.⁷⁸ Attaching contract doctrines to analyses of consent may assist in the erasure of female sexuality so long as sex is something done *for* men *to* women rather than *for* both parties. When sex is framed as an exchange of services for goods, rather than an interaction fueled by mutual desire, female passivity and male aggression are perpetuated and heterosexuality remains “the linchpin of gender inequality.”⁷⁹

MacKinnon defines a woman as “a being who identifies and is identified as one whose sexuality exists for someone else, who is socially male.”⁸⁰ Without a working model of female desire, the contract of consent resembles a unilateral rather than bilateral contract. It is as if women are perpetual offerors, forced to accept the “male direction of sexual expression, as if male initiative itself were what we want, as if it were that which turns us on.”⁸¹ The sexual contract solidifies men’s access to women’s bodies, and inscribes the unilateral contract of sex onto the bodies of all women. Women are forced to tacitly offer up their bodies to men, who accept the offer through sexual performance.⁸² The offer of a unilateral contract cannot be revoked once performance begins, trapping women within an exchange they never necessarily desired.⁸³ This metaphorical “offer” is made real when placed into context: only recently have states begun to recognize post-penetration rape and the revocation of consent.⁸⁴ As “walking embodiments of men’s projected needs,” women are presumed to advertise their “offer” to

⁷⁸ Alexandra Wald, *What’s Rightfully Ours: Toward a Property Theory of Rape*, 30 COLUM. J.L. & SOC. PROBS. 459, 484-86 (1997).

⁷⁹ MACKINNON, *supra* note 6, at 533.

⁸⁰ MACKINNON, *supra* note 6, at 533.

⁸¹ MACKINNON, *supra* note 77, at 95.

⁸² MACKINNON, *supra* note 6, at 534.

⁸³ *See, e.g.* Petterson v. Pattberg, 161 N.E. 428, 430 (N.Y. 1928); Cook v. Coldwell Banker, 967 S.W.2d 654, 657 (Mo. 1998).

⁸⁴ *See* Mary Huff, *The "New" Withdrawal of Consent Standard in Maryland Rape Law: A Year After Baby v. State*, 5 MOD. AM. 145 (2009); *State v. Baby*, 946 A.2d 463, 486 (Md. 2008); *see* S. 505, 2015 GEN. ASSEMB., REG. SESS. (N.C.2015),

<http://www.ncleg.net/Applications/BillLookUp/LoadBillDocument.aspx?SessionCode=2015&DocNum=1812&SeqNum=0>.

the world and, therefore, waiving the need for verbal communication by implying consent through their mere existence.

The premises behind the aforementioned doctrines of contract law can be expanded to provide protections from coercion for sex, but only so long as women can define their sexuality on their own terms.⁸⁵ Rape law adjudications focus on unwanted penetration, reifying the androcentric definition of intercourse rather than a female-driven concept of sexual injury.⁸⁶ Just as men define rape, so too do they define what is not rape. Consequently, our society has “few metaphors for sexual desire and passion that are not also metaphors for violence, power, and irresponsibility.”⁸⁷ Aggressive seduction and passive capitulation are the sexual themes generated by these definitions: men are taught from an early age that should “automatically “know” when a woman is aroused and willing to become sexually involved [without] asking for permission or clarification.”⁸⁸

Without communication, sexual encounters are implied-in-fact contracts inferred from the non-verbal conduct of the parties involved and informed by the extemporaneous circumstances of common sexual “scripts.”⁸⁹ Many women and men choose the familiarity of these standard forms over the discomforts of

⁸⁵ For evidence and analysis of various forms of female sexuality suppression, *see generally*, Roy F. Baumeister and Jean M. Twenge, *Cultural Suppression of Female Sexuality*, 6 REV. OF GEN. PSYCHOL. 166, 169 (2002).

⁸⁶ CATHARINE A. MACKINNON, *Rape: On Coercion and Consent*, TOWARD A FEMINIST THEORY OF THE STATE 171, 172 (Harv. U. Press 1989) (“[T]he crime of rape centers on penetration. The law to protect women’s sexuality from forcible violation and expropriation defines that protection in male genital terms.”).

⁸⁷ Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, “Just What Part of No Don’t You Understand?”, 2 TEX. J. WOMEN & L. 41, 55 (1993).

⁸⁸ MICHAEL A. MESSNER & MARK STEVENS, *Scoring Without Consent*, in OUT OF PLAY: CRITICAL ESSAYS ON GENDER AND SPORT 107, 118 (State University of New York Press 2007).

⁸⁹ For more on the theory of sexual scripts and rape law, *see* Kennedy, *supra*, note 8, at 1318. *See also* John H. Gagnon, *The Explicit and Implicit Use of the Scripting Perspective in Sex Research*, 1 ANNUAL REVIEW OF SEX RESEARCH 1, 143 (1990).

venturing into unknown territories, because with communication and intimacy comes the dangers of vulnerability and rejection.⁹⁰ There can be no *consensus ad idem* without an explicit understanding of what both parties expect and desire.⁹¹ “As a culture, we may not know what healthy, non-dominant, pleasurable, caring and responsible sex would look and feel like any more than someone who has never known freedom from oppression would know what freedom looks and feels like.”⁹² So long as men continue to define how female sexuality should manifest, explicit and honest communication is a necessary step to ensure mutual assent to a sexual encounter. Tacit assumption of consent and presumption of desire likens sex to a contract of adhesion—with boilerplate language that appears nonnegotiable and inescapable for both men and women alike.⁹³

⁹⁰ See N. Tatiana Masters et. al, *Sexual scripts among young heterosexually active men and women: Continuity and change*, in NIH PUBLIC ACCESS 1, 1, 14 (2013) (Through interviews with young adults, authors found three common methods of interacting with sexual scripts. (1) Conforming, i.e., gender scripts for sexual behavior overlapped with tradition norms. (2) Exception-finding, where traditional sexual scripts are accepted, but participants allowed themselves to deviate from these norms on occasion. (3) Transforming, where participants made their own sexual scripts without regard to cultural sexual conformity. The study found that “[c]hanging sexual scripts can potentially contribute to decreased gender inequity in the sexual realm and to increased opportunities for sexual satisfaction, safety, and wellbeing, particularly for women, but for men as well.”).

⁹¹ See *Balt. & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923) (An agreement “implied in fact” is “founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.”).

⁹² See Henderson, *supra* note 87, at 55.

⁹³ See e.g., *Fanning v. Fritz’s Pontiac-Cadillac-Buick, Inc.*, 472 S.E.2d 242, 245 (S.C. 1996) (exemplifying unconscionability resulting from a contract of adhesion. These standardized contracts establish an “absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.”). I venture to argue, however, that the standardized sexual script of male domination and female submission is so toxic and pervasive as to be damaging for both men and women’s sexualities alike. See JACKSON KATZ, *THE MACHO PARADOX: WHY*

The original social contract establishes the ideals of autonomy and self-reliance, perpetuated by the “good faith and fair dealings” of actual contracts within the free market. As a contract between the government and institutions of higher learning, Title IX establishes the ideals of gender equality and access to educational opportunities within a campus environment. Just as free market contracts embody the values envisioned by the original contractarians, so too must the contracts of sexual consent among students embody the values that Title IX legislation seeks to foster and preserve. Accordingly, consent between students should exemplify the intentions of Title IX at its core—the standards of gender equity, bodily integrity, and equal opportunity for all.

VI. CONCLUSION

The line between sex and rape is drawn by society and rules of society are run by men. The victim is any individual who can be overpowered, both symbolically and physically.

All aggressors share a common trait and that is one of power, whether established by their physical strength, age, authority, status, or any other attribute that may put them in a coercive position over another individual. Age appears to be the only aspect of sexual assault adjudication that takes into account the coercive power dynamic between the rapist and his victim. When the victim is below the age of consent, it is understood that she cannot sufficiently and appropriately agree to sexual activity. With Romeo and Juliet provisions, certain jurisdictions reveal the “equality” premise for these laws as less of a condemnation of underage sex, and more of an acknowledgment of a minor’s comparative financial, legal, intellectual, and social inequality as compared to an adult. Once women reach the age of consent in their jurisdiction, they are no longer afforded an equality analysis in the eyes of the court or society writ large. Rather arbitrarily, women are somehow risen to the status of “consenting” adults, fully free, unencumbered, and

SOME MEN HURT WOMEN AND HOW ALL MEN CAN HELP (3d ed., Sourcebooks, Inc. 2006).

sexually liberated to choose when they want to have sex and with whom.

Unlike contract law, few sexual assault laws exist that protect each party from dangerously unequal bargaining power. Unlike consent to contract, consent to sex can be induced by fraud or duress without legal repercussions. There need not be mutuality in the sexual exchange, or any nominal consideration for her acceptance. Because the gender construction of heterosexual activity is centered around a man's understanding of sex, he tends to define when the sex begins and inevitably when it ends from his own perspective. The court implies that violent, physical force and resistance are the only ways by which coercive sexual behavior can be considered criminal. It appears that women are walking embodiments of "yes," perpetually and tacitly offering their bodies to men unless they are loudly and violently resisted.

As described, consent to sex is rarely questioned or invalidated in the face of inequality, in spite of the undeniable power imbalance in many, if not most, sexual activities. Even in affirmative consent jurisdictions such as California, sexual assault laws fail to reflect the many ways in which an individual can be pressured into acquiescing to sex they do not want to have. *Consensual* does not imply *sensual*, and often implies compulsion. Sexual assault laws proffer a societal understanding of sexuality that ignores the substantive inequalities that establish the conditions within which rape has thrived. In a true libertarian fashion, sex between two adults is considered a private agreement that individuals are free to pursue, accept, or decline. Victims of coercive sexual behavior who nevertheless "consented" are seen to have consented as a colorless, genderless, and otherwise "universal" individual. They are understood to have consented irrespective of any characteristics that would have put them in a literal and figurative position beneath that of a heterosexual man.

Political theorists such as Hobbes and Locke assert that members of society tacitly submit and subordinate themselves to the state in the form of the "social contract," relinquishing some of their natural freedoms so as not to impinge on the freedoms of other men. Alternatively, as Carol Pateman suggests in *The Sexual Contract*, women were never privy to this original contract. With the advent of formal equality, however, these historically subordinated classes

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of individuals were forced to accept the androcentric social contract with its assumption that all individuals had the autonomy and privilege to assert themselves and interact on equal terms. Sexual consent is an offshoot of the fallacious “free market” myth, and is merely used as a justification for tactics of coercion that fortify existing sexual political structures. Without laws that recognize the lived realities of inequality, to provide consent will mean to concede to, rather than welcome, the sexual advances of another.

Title IX campus sexual assault adjudications should supplement their consent analyses with a holistic understanding of gender inequality, notions of masculinity, and other macropolitical aspects that tend to manifest on communal, micropolitical, and individual levels. In so doing, adjudicators can move past the assumption that “yes” *always* means “yes” even in an unequal world. To ignore the existence of duress, fraud, undue influence, and other examples of coercion in a sexual exchange, rape law only further entrenches the social hierarchies that are established and perpetuated by sexual violence.