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## Unconditional Coercion and Positive Autonomy

Russell Christopher

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## UNCONDITIONAL COERCION AND POSITIVE AUTONOMY

RUSSELL CHRISTOPHER\*

Forcing or coercing victims to acquiesce to intercourse under adverse conditions that sufficiently undermine the voluntariness of their consent typically poses no conceptual problem for the law of rape. For example, a perpetrator obtaining intercourse by exerting physical force that overpowers the victim easily qualifies as rape by physical force. But the physical force need not even be actually exercised. Merely the credible threat of sufficient physical force, thus causing the fearful victim to submit to intercourse to avoid the threatened harm, also suffices. Either way, the resulting intercourse is clearly nonconsensual, unlawful, criminal rape.

When the perpetrator obtains intercourse by a threat, almost invariably the threat is conditional. The perpetrator threatens the victim with physical harm if the victim resists, or unless the victim acquiesces to, intercourse. The proposal conditions the physical harm on the victim's non-compliance. That is, the threat is in the form of an "intercourse or else" proposal. Threats of non-physical harm also may constitute rape—termed rape by coercion, or in the Model Penal Code's terms "Gross Sexual Imposition."<sup>1</sup> Though involving a non-physical harm, the threat is still conditional—"intercourse or else." More controversial is whether a proposal that offers a benefit, rather than threatening a harm, in order to obtain intercourse can be sufficiently coercive as to negate the victim's consent and qualify as rape. But either way, the proposal is still conditional. Rather than "intercourse or else some type of harm," the proposal is "intercourse or else no benefit." That is, the perpetrator conditions receipt of the benefit on the victim's compliance by engaging in intercourse.

But what if the harm or threat is unconditional? Can an unconditional harm or threat even be understood as coercive? If the harm or threatened harm occurs unconditionally—regardless of whether the victim engages in intercourse or not—how can the victim be said to have been coerced? If the

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\* Professor of Law, the University of Tulsa College of Law. I thank the conference panelists, participants, and editors at the Law Review for their helpful comments and suggestions.

1. MODEL PENAL CODE § 213.1(2)(a) (AM. LAW INST. 1985) (explaining the sexual offense as compelling submission to intercourse "by any threat that would prevent resistance by a [victim] of ordinary resolution").

harm occurs whether the victim engages in intercourse or not, can the harm have coerced or induced or caused the intercourse? If the victim does engage in intercourse is it thus necessarily consensual?

This Essay addresses the special challenge that a perpetrator's use of unconditional harm or unconditional threatened harm as the means to obtain a victim's acquiescence to intercourse poses for the law of rape. It first illustrates the conceptual difficulty by considering a case involving a defendant obtaining intercourse under the most brutal and horrific conditions imaginable. Though we might all find the defendant blameworthy and deserving the most severe punishment, explaining exactly how the defendant is legally guilty is less clear. The victim's acquiescence to intercourse in the face of these horrific circumstances—precisely because they are unconditional—renders it surprisingly difficult to explain conduct we intuitively feel must be non-consensual on the part of the victim.

After exploring whether this case and the special problem of unconditional harm or threatened harm may be explained under the various types of rape, the Essay considers the distinction between positive and negative sexual autonomy.<sup>2</sup> It canvases the extent to which our law seeks not merely to protect our negative autonomy—freedom from unwanted intercourse—but also strives to protect our positive sexual autonomy—freedom to engage in wanted intercourse. Our difficulty in crafting a satisfactory account of unconditional harm or threatened harm may be due to the interest accorded to a victim's positive autonomy. If we take positive autonomy seriously, unconditional harm or threatened harm poses a

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2. Negative sexual autonomy is freedom from unwanted sexual intercourse; positive sexual autonomy is freedom to engage in wanted sexual intercourse. Donald Dripps, a fellow symposium panelist who writes on consent in this issue, see Donald A. Dripps, *Due Process Overbreadth? The Void for Vagueness Doctrine, Fundamental Rights, and the Brewing Storm Over Undefined Consent in Sexual Assault Statutes*, 73 OKLA. L. REV. 121 (2020), is perhaps the first to articulate that distinction. 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, 1785 (1992). For other accounts recognizing the distinction, see JOAN MCGREGOR, *IS IT RAPE?: ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT SERIOUSLY* 111–12 (2005); STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW* x (1998) (“Respect for autonomy requires protecting our freedom to refuse sexual contact [negative autonomy], but it also requires protecting our freedom to seek emotional intimacy and sexual fulfillment with willing partners [positive autonomy].”); ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 125 (2003) (stressing the importance of both dimensions of sexual autonomy—positive and negative—be respected and facilitated).

challenge. Instead, if our sole concern is protection of negative autonomy, the problem is defanged. Thus, the problem of unconditional harm or threatened harm forces us to grapple with striking the right balance between protecting our positive and negative sexual autonomy, between punishing culpable offenders and not further victimizing victims.

### I. *The Challenge of California v. Hooker*

To illustrate acquiescence to intercourse obtained by unconditional harm or coercion, let us consider *California v. Hooker*.<sup>3</sup> The case features intercourse under unimaginably horrific and repugnant circumstances that would seemingly pose no problems in analyzing the victim's lack of consent and concluding that the perpetrator was guilty of rape. Despite our intuitions that the perpetrator surely deserves the most severe punishment available, the case does not easily fit within existing approaches to the law of rape.

In *Hooker*, a husband and wife kidnapped the adult victim at knifepoint and held her captive.<sup>4</sup> The victim was held naked, bound, gagged, blindfolded, and chained to a bed.<sup>5</sup> After several years of continuing captivity, the husband began having intercourse with the victim.<sup>6</sup> Undoubtedly, one would believe the horrendous conditions sufficiently undermined the victim's capacity to consent. While the court did in fact conclude that the victim's capacity to consent was undermined, it did so in a way different from how we normally think about force and threats undermining consent.<sup>7</sup>

Rape by physical force generally occurs in either (or both) of two ways: when the perpetrator exerts extrinsic force that overpowers an unwilling victim who is powerless to prevent the intercourse or when the perpetrator obtains intercourse with the victim by threatening extrinsic force.<sup>8</sup> Under the latter type, the perpetrator does not literally overpower the victim, but instead the victim reluctantly acquiesces via the coercion of the threat. Typically threats of force are conditional in nature. The recipient will be

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3. 244 Cal. Rptr. 337 (Ct. App. 1988) (depublished).

4. *Id.* at 338–39.

5. *Id.* at 339.

6. *Id.* at 340.

7. *See id.* at 345–46.

8. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 33.04[B][1][d], at 577 (6th ed. 2012) (“Forcible rape prosecutions may be based on a threat of serious force rather than its infliction.”).

physically harmed only on the condition that they do not submit to intercourse. If they do submit, they will not be harmed. The force is conditioned on noncompliance with the demand of intercourse.

But the rape in *Hooker* transpired through neither of these means. The husband did not obtain intercourse with the victim through extrinsic force that overpowered her; she was not physically helpless to prevent the intercourse. Nor did the husband obtain intercourse via a conditional threat. Either there was no threat, or the threat was unconditional. The horrific conditions of the victim's captivity were imposed on her regardless of whether she complied with any demands or submitted to intercourse. The husband never uttered an "intercourse or else . . ." threat. He did not threaten to make the conditions of the victim's captivity any worse if the victim did not submit to intercourse. Nor was there any evidence of an implicit or unspoken threat if the victim did not engage in intercourse.<sup>9</sup>

Another unusual feature of the case is that the victim factually consented to intercourse with the husband.<sup>10</sup> As Peter Westen explains, by rendering the victim a captive, the husband caused the victim "to acquiesce to sexual intercourse by unconditionally placing her in a position in which she preferred captivity *with* sexual intercourse to captivity *without* sexual intercourse[.]"<sup>11</sup> That is, the victim did not reluctantly submit to intercourse but rather affirmatively wanted, desired, and wished to engage in intercourse. The court held, and Westen agreed, that despite the victim desiring to engage in the intercourse, it was nonetheless rape.<sup>12</sup> The victim's factual consent was not legal consent. It was not legal consent in their view because the victim's factual consent was given when she was in a sufficiently adverse position.<sup>13</sup>

These three unusual features in *Hooker*—that there was factual consent by the victim, that the perpetrator did not exert extrinsic physical force to obtain intercourse, and that the perpetrator did not employ a conditional threat to coerce intercourse—make it conceptually challenging to satisfy the elements of rape by physical force. But these three features are easily accommodated by approaches to other types of rape: statutory rape or

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9. For the purposes of our analysis, let us assume that the victim did not believe that there was an implicit threat.

10. PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 184–85 (2004).

11. *Id.*

12. *Id.* at 184–85.

13. *Id.*

intercourse with an intoxicated victim.<sup>14</sup> In those types of rape, victims do not merely acquiesce but may affirmatively desire to engage in intercourse, but do so under conditions or circumstances that undermine consent.<sup>15</sup> Just as in *Hooker*, the victim prefers being intoxicated or underage *with* sexual intercourse to intoxication or being underage *without* intercourse. That a victim might factually consent to intercourse under those conditions or circumstances nonetheless does not constitute legal consent. Being intoxicated or underage renders one legally incapable of giving or incompetent to consent.<sup>16</sup>

But what might make the analysis in *Hooker* still different is the duration or pervasiveness of the condition or circumstances precluding legal consent. It is one thing for the law to speak, in a sense, to the intoxicated person as follows: “We understand that you want to have intercourse now while you are intoxicated, but we think that is an unwise choice and one that you might regret when sober.” In protecting the victim’s negative autonomy—freedom from unwanted intercourse—the harm to the victim’s positive autonomy is minimal. The victim need only wait until the next day to attain sobriety. Even for an underage person wanting to engage in intercourse, the constraint on positive autonomy is arguably not too oppressive. A fifteen-year-old may only have to wait a year to attain the age of consent.<sup>17</sup> But the victim in the *Hooker* case may be different.

Unlike an intoxicated or underage victim, the kidnapping victim was held captive for three years before she expressed a preference for intercourse. True, some thirteen-year-olds might wish to engage in intercourse and have to similarly wait three years before they can legally consent. But there is still a difference between the thirteen-year-old and the *Hooker* victim. The duration of the bar to the underage person’s legal capacity to consent is limited and certain. The bar to the victim in *Hooker* is open-ended and potentially indefinite. Moreover, the bar might serve a

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14. See, e.g., MCGREGOR, *supra* note 2, at 141 (“Consent is undermined by one of two general kinds of infelicities: first, internal conditions that affect the actor’s capacity to consent—being too young, asleep, unconscious, drunk, or high on drugs.”).

15. See *id.*

16. See *id.*

17. WERTHEIMER, *supra* note 2, at 224–25 (“If we say that minors are unable to give transformative consent while they are minors, we do not preclude sexual experience over the course of their lives. Minors get older. By contrast, to say that retarded females cannot give transformative consent is to deny them permanently the opportunity to legitimately experience intimacy and sexual pleasure. The cost of zealously protecting their negative autonomy is very high indeed.”) (footnote omitted).

greater hardship on adult victims compared to underage victims. Adult victims have already attained the legal age of consent and are accustomed to enjoying the capacity of legal consent. In contrast, underage victims are not barred from something that they have previously enjoyed or exercised.

Because of the open-ended and potentially life-long conditions rendering the *Hooker* victim incapable of legal consent, perhaps the better type of rape through which to understand *Hooker* is intercourse with a mentally disabled person. The mentally disabled are generally considered legally incapable of consent and thus intercourse with them is criminalized as rape.<sup>18</sup> And unlike being intoxicated or underage, the basis for the incompetence to legally consent is open-ended and potentially indefinite, as with the victim in *Hooker*.<sup>19</sup> Conceptually, the victim in *Hooker* might be more appropriately characterized as having a mental disability of sorts and was thus legally incapable of consenting, thereby rendering the intercourse rape. Rather than the mental disability being caused by internal processes in the brain, the mental disability of the victim in *Hooker* is caused by external circumstances—a sort of environmental or circumstantial mental disability.

But precisely because of the open-ended and potentially indefinite constraint on the capacity to consent, some courts and commentators suggest that mental disability should not bar the legal capacity to consent.<sup>20</sup> As Alan Wertheimer argues, to declare that the mentally ill “cannot give transformative consent is to deny them permanently the opportunity to

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18. See K.H. Larsen, Annotation, *Rape or Similar Offense Based on Intercourse with Woman Who Is Allegedly Mentally Deficient*, 31 A.L.R.3d 1227 (1970).

19. See *supra* note 17 and accompanying text.

20. See, e.g., *Adkins v. Virginia*, 457 S.E.2d 382, 387 (Va. Ct. App. 1995) (expressing concern that statutes protecting the mentally disabled from exploitation “must not be interpreted and applied in a manner that . . . would prohibit all mentally impaired or retarded persons from engaging in consensual sexual intercourse without having their partners commit a felony”) (citing *New Jersey v. Olivio*, 589 A.2d 597, 604 (N.J. 1991) (stressing “the importance of according the mentally handicapped their fundamental rights”)); MCGREGOR, *supra* note 2, at 155 (“Would we want to say that *all* mentally ill people cannot consent to sex? Wouldn’t such a sweeping rule unjustifiably deny all those with mental retardation and mental[] illness the right to sexual autonomy by not permitting them to affirmatively choose to have a sexual relationship?”); WERTHEIMER, *supra* note 2, at 224 (“[W]e have reason to be concerned to facilitate the positive autonomy of the retarded as well as to protect their negative autonomy.”); see also Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, 322 (“[M]ost mentally retarded individuals have the capacity to consent to sexual intercourse but . . . they should also be protected from harm.”).

legitimately experience intimacy and sexual pleasure. The cost of zealously protecting their negative autonomy is very high indeed.”<sup>21</sup>

The same consideration of the positive autonomy of the mentally disabled would equally apply to the victim in *Hooker*. Because declaring the victim in *Hooker* incapable of legal consent would create a permanent ban on her enjoying the fundamental right to and “important human good” of intercourse,<sup>22</sup> perhaps we should not declare the victim in *Hooker* legally incapable of consent. While doing so would protect her negative autonomy, it might too greatly constrain her positive autonomy.

One might object that three years is too short a period of time before foregoing (or relaxing) the protection of our negative autonomy. But after three years, it perhaps appeared to the victim in *Hooker* that her captivity would continue indefinitely. So, the question becomes at what point should the protection of an individual’s negative autonomy be relaxed? While there is no clear number of years or days where the protection of negative autonomy disappears, ignoring the importance of positive autonomy will eventually cause a harm of its own. In fact, at some point, the interest in positive autonomy may well outweigh our interest in negative autonomy.<sup>23</sup> Ultimately, it is at that point where factual consent under adverse conditions that have become institutionalized or normalized may constitute legal consent.

## II. Balancing Negative and Positive Autonomy

There still may be strong objections that our negative autonomy is an absolute value, too important to be subjected to a balancing test against positive autonomy.<sup>24</sup> However, our present laws reflect a balance between

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21. WERTHEIMER, *supra* note 2, at 225 (footnote omitted).

22. MCGREGOR, *supra* note 2, at 113; accord SCHULHOFER, *supra* note 2, at 277 (“[T]he right to seek intimacy is important, extremely so.”); see also *id.* at 163 (“[S]exual fulfillment is a legitimate and valued goal of marriage and other ongoing, intimate relationships.”).

23. SCHULHOFER, *supra* note 2, at 237 (acknowledging that overprotection of negative autonomy may impair our positive autonomy—it will “bear too heavily on legitimate claims to privacy and sexual freedom”); *id.* at 272 (noting that sufficient protection of negative autonomy by a verbal consent rule may nonetheless impose “the cost [on our positive autonomy] of imposing a degree of formality and artificiality on human interactions in which spontaneity is especially important”); *id.* at 277 (supplying several examples where overprotection of negative autonomy impermissibly undermined positive autonomy).

24. Negative autonomy might well be the comparatively greater concern of the criminal law. MCGREGOR, *supra* note 2, at 112 (“The criminal law exists to protect negative sexual autonomy . . .”). Nonetheless, positive autonomy should be promoted or not interfered with

the two forms of sexual autonomy.<sup>25</sup> For example, we do not criminalize *all* intercourse undertaken when merely *some* alcohol has been consumed. But if negative autonomy were our only concern, then a rule criminalizing such conduct would provide better protection. Instead, we only criminalize intercourse when the victim is *sufficiently* intoxicated. True, such a rule weakens the protection of our negative autonomy as compared to an absolute ban on intercourse after even slight consumption of alcohol, but we view our present rule as preferable because it gives due regard for our positive autonomy. To illustrate this rule, consider Wertheimer's following thought experiment:<sup>26</sup> We can go to either of two different parties, each of which has different rules pertaining to alcohol and intercourse. Party 1 forbids any party guest engaging in intercourse that night after touching even a drop of alcohol. Party 2 comports with our present rule that allows consent to intercourse if the victim is not sufficiently intoxicated. Wertheimer conjectures, and reports anecdotal evidence, that few would prefer attending Party 1.<sup>27</sup>

Statutory rape law also reflects a balance between the two types of autonomy. Given that some studies suggest that adolescent brains do not become fully mature until the age of twenty-five,<sup>28</sup> if we were only interested in protecting negative autonomy, we might extend the protection of our statutory rape laws to the age of twenty-five. That we do not seek such maximal protection of our negative autonomy suggests that positive autonomy also has some value. On that basis, the optimal age of consent reflects an appropriate balance between protecting our negative and positive autonomy.

Even the ethical regulation of lawyers and clients having intercourse with each other reflects the attempt to strike the right balance between the

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unless it would violate someone's negative autonomy. *Id.* at 111–12 (“[P]ositive liberties are limited only by the sovereign right of others to refuse consent. Arguably, the state should not block the pursuit of positive sexual autonomy except where the exercising of power violates another's negative sexual autonomy.”).

25. SCHULHOFER, *supra* note 2, at 15 (“A workable notion of sexual autonomy [incorporating both positive and negative dimensions] appears to require compromises and ‘balancing’ . . .”).

26. WERTHEIMER, *supra* note 2, at 252.

27. *Id.* at 252–53.

28. Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 451 (2013), <https://doi.org/10.2147/NDT.S39776> (“It is well established that the brain undergoes a ‘rewiring’ process that is not complete until approximately 25 years of age.”) (footnote omitted).

two types of autonomy.<sup>29</sup> If we were only concerned with protecting clients' negative sexual autonomy, we might have a rule absolutely prohibiting intercourse with a client. Because this would too greatly infringe our positive autonomy, we allow it under some circumstances. First, while lawyers must not commence a sexual relationship with a pre-existing client, lawyers may commence a representation of a client with whom the lawyer has a pre-existing (and still ongoing) sexual relationship.<sup>30</sup> Second, lawyers in a firm may commence sexual relationships with their law partners' clients.<sup>31</sup> Third, when the client is an organization, lawyers may commence sexual relationships with some employees of that organizational client.<sup>32</sup> Despite diminishing the protection of clients' negative autonomy, these rules advance both clients' and lawyers' positive autonomy. That we do not adopt an absolute rule banning all of those interactions suggests that the law does seek to protect and advance positive autonomy as well. The law strives to attain the optimal balance between negative and positive autonomy.

Similarly, most employers do not prohibit any and all intercourse between employees. Though such a rule would surely protect negative autonomy, it would too greatly infringe upon those employees' positive autonomy. This is especially true given the high incidence of marriages and committed relationships resulting from people that meet in the workplace.<sup>33</sup> Striving to strike the right balance between negative and positive autonomy, it is more typical that relationships between superiors and subordinates are prohibited.<sup>34</sup> But intercourse between employees at the same level and

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29. See MODEL RULES OF PROF'L CONDUCT r. 1.8(j) (AM. BAR ASS'N 2011) ("A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.").

30. *Id.*

31. *Id.* r. 1.8(k) (exempting Rule 1.8(j) from the general rule imputing conflicts of any lawyer in a firm to all lawyers in that firm).

32. See *id.* r. 1.8(j) cmt. [19] ("When the client is an organization, paragraph (j) of the Rule prohibits a lawyer for the organization (whether inside or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.").

33. Lindsay Dodgson, *The Psychological Reasons Why You Fall in Love with Your Colleagues*, BUS. INSIDER (May 29, 2018, 9:17 AM), <https://www.businessinsider.com/psychology-of-office-romances-2018-5> (citing a study that shows "22% of people meet their actual romantic partner at work").

34. See, e.g., Shelley Frost, *Romantic Relationships in the Workplace*, CHRON: SMALL BUS., <https://smallbusiness.chron.com/romantic-relationships-workplace-11804.html> (last visited May 13, 2020) (noting that supervisor-subordinate relationships pose "the biggest

presumably between those employees who are married to each other (regardless of their respective levels) is permitted.

Because rape law and our regulation of intercourse recognizes the value of positive autonomy and attempts to maintain the appropriate balance between negative and positive autonomy, what constitutes consent is itself a balance between negative and positive autonomy. That a victim says “Yes” to the prospect of intercourse or affirmatively desires it does not necessarily constitute legal consent. A person’s factual consent to intercourse if underage or sufficiently intoxicated, for example, does not constitute legal consent.<sup>35</sup> Considerations of negative autonomy outweigh an interest in positive autonomy and bar a person’s factual consent from being legal consent. In these cases, protecting negative autonomy transforms factual consent into legal non-consent.

Something similarly transformative may occur when our interest in positive autonomy becomes sufficiently high or outweighs negative autonomy. When negative autonomy outweighs positive autonomy, factual consent may nonetheless be legal non-consent. But when positive autonomy outweighs negative, what would be legal non-consent from the perspective of negative autonomy may well be legal consent.

### III. *Less Conventional Explanations of Hooker*

The conventional types of rape—by physical force, by conditional threat of physical force, and intercourse with a person legally incompetent to consent—fail to explain *Hooker*. This section attempts to understand *Hooker* through less conventional approaches.

First, let us consider intercourse under dire circumstances or socioeconomic adversity. For example, suppose that “*B*’s child will die unless she receives expensive surgery for which the state will not pay. *A*, a millionaire proposes to pay for the surgery if *B* will agree to become his mistress.”<sup>36</sup> We might say that the dire circumstances compel *B* to acquiesce, thereby undermining the voluntariness of her consent. Similarly, on that basis, the victim in *Hooker* also does not consent.

There are two problems in explaining *Hooker* through the above “dire circumstances” approach. First, the above example is inapposite to *Hooker*.

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potential conflict” but that same-level relationships have “less potential for conflict or feelings of unfair treatment with other employees”).

35. See *supra* notes 13–17 and accompanying text.

36. WERTHEIMER, *supra* note 2, at 128.

The above example involves a conditional proposal—*A* will pay for the surgery to *B*'s child and prevent *B*'s death only on the condition that *B* becomes *A*'s mistress. However, as discussed above, the coercion in *Hooker* is unconditional. One might claim that it is the dire circumstances and not the conditional proposal that compels *B*'s acquiescence. But the dire circumstances alone—if there were no proposal from *A* to pay for *B*'s child's surgery and save *B*'s life—would surely not compel *B* to do anything with *A*.

Second, a number of commentators find it at least plausible that dire circumstances and adverse or unjust social circumstances that would normally obviate voluntary consent may nevertheless allow a finding of consent so as to protect positive autonomy.<sup>37</sup> The choices such victims make should be respected. Denying the victim's choice as valid and consensual might well make the victim's already difficult plight even worse.<sup>38</sup> Similarly, we might well view the victim in *Hooker* as consenting. That protects her positive autonomy and does not make her already horrific plight any worse. As a result, the dire circumstances approach also does not supply a clear basis to explain *Hooker*.

Another less conventional approach is from Peter Westen. Westen contrasts wrongful threats (which are conditional in nature) from “‘wrongful oppression’, which is unconditional in nature.”<sup>39</sup> Westen provides the following account:

‘[W]rongful oppression’ exerts pressure upon *S*, not by causing *S* to believe that she can prevent her position from worsening by acquiescing to *x*, but rather by causing *S* to believe that her position is such that given the circumstances in which she finds herself, engaging in *x* is preferable to the alternative of forgoing *x*.<sup>40</sup>

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37. SCHULHOFER, *supra* note 2, at 107; WERTHEIMER, *supra* note 2, at 128 (“We may grant that poor women do not have enough options and that society has been unjust to them in not extending more options, while nonetheless respecting and honoring the choices they actually make in reduced circumstances.”) (quoting Martha C. Nussbaum, “*Whether from Reason or Prejudice*”: *Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693, 721 (1998)).

38. SCHULHOFER, *supra* note 2, at 107.

39. WESTEN, *supra* note 10, at 184.

40. *Id.*

A victim's (or *S*'s) consent to intercourse is negated by wrongful oppression when a perpetrator reduces *S* to a worse position than the criminal offense of rape "allows a person to reduce *S* as a basis for inducing her to acquiesce to *x* . . . [and] *S* prefers to acquiesce to *x* rather than not."<sup>41</sup> Westen applies this to *Hooker* as follows:

[The defendant caused the victim] to acquiesce to sexual intercourse by unconditionally placing her in a position in which she preferred captivity *with* sexual intercourse to captivity *without* sexual intercourse—a position that was worse than the position in which the California offense of rape allows a man to place a woman as a basis upon which to elicit acquiescence to sexual intercourse with himself or another.<sup>42</sup>

Though not relying on conditional coercion, Westen's approach would suffer from the other problems besetting the dire circumstances approach. It would insufficiently value and protect the victim's positive autonomy. As Schulhofer notes, denying the victim's choice under dire circumstances as valid and consensual may make the victim's horrific plight even worse.<sup>43</sup> It may victimize victims twice—first by the horrific conditions and then second by effectively eliminating the means by which they choose to ameliorate their horrific conditions.

Yet another less conventional approach is the view that consensual intercourse between men and women is nearly impossible. Catharine MacKinnon and others argue that the combined conditions of gender discrimination and socioeconomic inequities in our present society may preclude the possibility of consent between men and women.<sup>44</sup> Under this

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41. *Id.*

42. *Id.* at 185.

43. SCHULHOFER, *supra* note 2, at 107.

44. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 174 (1989) [hereinafter MACKINNON, FEMINIST THEORY] ("[R]ape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance.") (footnote omitted); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 86–87 (1987) ("[Conventionally, we] distinguish sharply between rape . . . and intercourse . . . ; sexual harassment . . . and normal, ordinary sexual initiation . . . . What women experience does not so clearly distinguish the normal, everyday things from those abuses from which they have been defined by distinction. . . . [S]exuality in exactly these normal forms often *does* violate us."); Robin West, *A Comment on Consent, Sex, and Rape*, 2 LEGAL THEORY 233, 241 (1996) ("[MacKinnon expresses concern that] large categories of women (wives, girlfriends, prostitutes, promiscuous girls, women of color, women who

view, the privileged position of men and the inequitable position of women renders intercourse with men inherently coercive to women. These scholars maintain that women simply cannot, or generally do not, genuinely consent to intercourse with men.<sup>45</sup> Even in a marriage, or perhaps especially within a marriage, women cannot genuinely consent to intercourse with men. To these scholars, the institution of marriage is viewed as essentially a legalized form of coercive prostitution. Therefore, because of economic and gender inequities in our society, women are forced to marry in order to secure economic security. Wives trade intercourse for economic security; husbands trade economic security for intercourse.<sup>46</sup>

If nearly all intercourse between men and women is nonconsensual due to gender and economic inequities, then *a fortiori* the intercourse in *Hooker* between kidnapper and captive is nonconsensual. *Hooker* is merely an extreme example of the inherently coercive relations between men and women throughout our society, even in seemingly loving and committed marriages and long-term relationships. If true, then the inherent coerciveness of heterosexuality in our society does provide a basis to explain the result in *Hooker*.

To an even greater degree than Westen's account, the above approach of MacKinnon and others perhaps too greatly diminishes our positive autonomy. True, by treating nearly all heterosexual intercourse as nonconsensual and thus rape, it protects our negative autonomy exceedingly well. But it not only violates our positive autonomy, it nearly completely eliminates it.

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don't fight back, women who are sexually desirable) are depicted and understood as having, in effect, no right or entitlement to the physical security or integrity of their own bodies against violent sexual assault."); *see also id.* at 242 ("Catharine MacKinnon's most powerful and most important insight, to date, is simply that violence and the threat of it, in such a world [i.e., our world], underscore *all* heterosexuality; violence becomes central to the nature of sex.").

45. ANDREA DWORKIN, INTERCOURSE 125–26 (1987) ("[M]en have social, economic, political, and physical power over women[, and] all men have some kinds of power over all women . . ."); MACKINNON, FEMINIST THEORY, *supra* note 44, at 173 (viewing "sexuality as a social sphere of male power to which forced sex is paradigmatic").

46. *Cf.* David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 445 (2000) ("Of course, men often 'use their economic superiority to gain sexual advantages,' but women often use their sexual superiority to gain economic advantages. So who is the extortionist?").

*Conclusion*

As opposed to conditional coercion, the unconditional imposition of horrific circumstances poses a difficult conceptual challenge for modern understandings of consent and the law of rape. Though imposition of unconditional coercion might intuitively demand that we regard the victim's consent negated and the perpetrator be punished, conventional approaches to the law of rape, premised on coercion being conditional, struggle to establish any resulting intercourse as nonconsensual. Is conditionality inherent in the very nature of coercion? If the horrific circumstances are to be imposed regardless of whether the victim acquiesces to intercourse, in what way did the horrific circumstances induce the acquiescence? Some less conventional approaches perhaps can account for unconditional coercion negating consent. But they may do so at too great a cost. While protecting our negative autonomy, they violate our positive autonomy. Denying a victim's choice as valid and consensual when made under unconditional horrific circumstances may make the victim's already difficult plight even worse. By perhaps precluding victims' only way to somewhat ameliorate the horrific circumstances, the victims may be victimized twice—first by the perpetrator's imposition of horrific circumstances and second by the diminution of their positive autonomy. But recognizing and honoring victims' positive autonomy is intuitively unpalatable by allowing very culpable and blameworthy rapists to go unpunished. How the law of rape should treat unconditional coercion poses a dilemma of difficult trade-offs between negative and positive autonomy as well as between giving culpable rapists their just deserts and victims' rights. Should we let the blameworthy rapist go unpunished so as to not further victimize the victim? Or should we sacrifice the victim's interests so as to give culpable rapists their just deserts?