

“When You’re a Star”: The Unnamed Wrong of Sexual Degradation

DANIEL MAGGEN*

The #MeToo movement is often criticized for its conflation of sexual assault, sexual harassment, and offensive but not legally actionable behavior. This objection is often accompanied by criticism of #MeToo’s failure to adhere to the legal paradigms that inform sexual assault and harassment, presumably setting back the efforts to advance them. Finally, the #MeToo movement is often faulted for its failure to accord those it accuses with the procedural safeguards of due process.

Responding to these objections, this Article claims that instead of viewing #MeToo only as an effort to make the prohibition of sexual assault and harassment more effectual, we should also understand it as the attempt to articulate the moral wrong of sexual degradation that has so far been hidden in the shadow of extant legal wrongs. In this, the Article claims, #MeToo is the continuation of the mutuality approach in legal scholarship, developed in response to a transactional shift that has taken hold of rape law.

This Article further argues that, in its evolution from a scholarly debate to a mass public discourse, the wrong of sexual degradation has taken on three distinct features. First, like sexual harassment, sexual degradation revolves around the communicative and intentional aspects of the harm rather than its tangible effects. Second, although sexual degradation subscribes to the mutuality paradigm’s condemnation of using nonsexual leverage against another individual’s sexual judgment, #MeToo tends to reserve condemnation to cases in which such leveraging takes place against the backdrop of domination, allowing the transgressor to use nonsexual eminence to trump the victim’s sexual judgment. Third, unlike the mutuality paradigm, #MeToo’s conception of sexual degradation commonly disregards sexual degradation that occurs as a result of relational domination, effectively creating a relational exemption.

* Visiting Fellow, Information Society Project, Yale Law School; Lecturer, Yale University. © 2021, Daniel Maggen. This Article benefited immensely in the various stages of its development from conversations with Gilad Abiri, Leora Bilsky, Leora Dahan Katz, William Eskridge, Jr., Beth Henzel, Paul Kahn, Al Klevorick, Daniel Markovitz, Amit Pundik, Samuel Scheffler, Reva Siegel, and Steven Wilf. I owe a debt of gratitude to the student in my “Making Criminals” seminar at Yale University for their thought-provoking discussion of some of the ideas appearing below. I also want to thank the editorial board of *The Georgetown Law Journal* for their fantastic work and in particular Celia Calano, Samuel Guggenheimer, Harry McAlevey, Adam Mitchell, and Rebecca Raskind for their excellent comments and suggestions. All remaining mistakes are my own.

TABLE OF CONTENTS

INTRODUCTION	582
I. THE ESTABLISHED LEGAL PARADIGMS	586
A. SEXUAL HARASSMENT AND SEX-BASED DISCRIMINATION	587
B. SEXUAL ASSAULT AND FORMAL CONSENT	592
II. RETHINKING #MeToo’s MESSAGE	598
A. OBJECTIONS TO #METOO	603
B. #METOO AND THE MUTUALITY PARADIGM	605
C. BEYOND ESTABLISHED DEFINITIONS	610
III. THE MEANING OF SEXUAL DEGRADATION	615
A. DEGRADATION AND THE LEVERAGING OF DOMINATION	617
B. THE COMMUNICATIVE NATURE OF DEGRADATION	618
C. DEGRADATION AS INADEQUATE VALUATION OF SEXUALITY	621
D. #MeToo’s RELATIONAL EXEMPTION	629
CONCLUSION	634

INTRODUCTION

“You know, I’m automatically attracted to beautiful [women]—I just start kissing them. It’s like a magnet. Just kiss. I don’t even wait. And when you’re a star, they let you do it. You can do anything. . . . Grab ’em by the pussy. You can do anything.”¹ The release of the tape containing these words, uttered by then-presidential candidate Donald Trump, proved to be a formative moment in the struggle against sexual violence. That Mr. Trump would be elected President of the United States despite these words and subsequent accusations of sexual misconduct triggered the eruption of long pent-up anger and frustration, galvanizing an almost unprecedented reaction and global reckoning often referred to with the hashtag #MeToo.²

1. *Transcript: Donald Trump’s Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html>.

2. As Part II discusses, the phrase #MeToo exploded into public consciousness in October 2017 when actor Alyssa Milano urged Twitter users to use this hashtag to share their personal experiences of sexual assault and harassment. *See* Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 4:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976 [<https://perma.cc/22XP-AAAC>]. This hashtag has since become synonymous with a growing social movement opposing sexual violence and gender inequality. However, the roots of this movement precede its naming; in large part, they can be traced back to the mass protest against Mr. Trump’s election. *See, e.g.*, Deborah L. Rhode, #MeToo:

But why were these *words* so consequential? Part of the reason, I suggest, concerns an oft-overlooked connection between the #MeToo movement and a yet-to-be-named wrong: *sexual degradation*. #MeToo is often celebrated for its liberating effect on the airing of sexual grievances, yet it also draws criticism—mainly in scholarly debates—for its misalignment with contemporary discussions of consent and sexual discrimination.³ Responding to this criticism, this Article suggests that we ought to understand the #MeToo revolution⁴ as an attempt to fill a normative void left by the categories of sexual assault and harassment.⁵ In this regard, this Article suggests, #MeToo is best understood as a continuation of a tradition in legal scholarship that identifies the harm of sexual wrongdoing in relation to a denial of the *mutuality* of positive sexuality.⁶

Growing out of the debate on rape law reform, the mutuality approach argues that the legal or moral definition of rape should not be tied to the absence of consent but instead deduced from the quintessential feature of positive sexuality, namely its mutual desirability.⁷ This view holds that sexuality plays an important part in the life of most adults—in their self-definition, their well-being, and their autonomy.⁸ It further argues that positive sexual interactions—meaning those that have a positive effect on their participants—are interactions that are mutually desirable, such that participants not only desire the sexual act but also desire it in a way that is intertwined with their desire that other participants desire it.⁹

Why Now? What Next?, 69 DUKE L.J. 377, 396–97 (2019) (connecting Mr. Trump’s election, despite these comments, to the rise of #MeToo); Barbara Kingsolver, Opinion, *#MeToo Isn’t Enough. Now Women Need to Get Ugly*, GUARDIAN (Jan. 16, 2018, 2:00 PM), <https://www.theguardian.com/commentisfree/2018/jan/16/metoo-women-daughters-harassment-powerful-men> (“Watching the election of a predator-in-chief seems to have popped the lid off the can.”); Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *Time Person of the Year 2017: The Silence Breakers*, TIME, <https://time.com/time-person-of-the-year-2017-silence-breakers/> [<https://perma.cc/KUQ3-6G9C>] (last visited Dec. 11, 2020) (connecting Mr. Trump’s comments to #MeToo).

3. See *infra* Section II.A.

4. On the revolutionary nature of #MeToo, see Monica Akhtar, *#MeToo: A Movement or a Moment?*, WASH. POST (Nov. 9, 2017, 10:56 AM), <https://www.washingtonpost.com/news/the-intersect/wp/2017/11/09/metoo-a-movement-or-a-moment>; Elizabeth Bruenig, Opinion, *The Aziz Ansari Debacle Proves It’s Time for a New Sexual Revolution*, WASH. POST (Jan. 16, 2018, 5:15 PM), https://www.washingtonpost.com/opinions/the-aziz-ansari-debacle-proves-its-time-for-a-new-sexual-revolution/2018/01/16/d4d5df94-fb01-11e7-a46b-a3614530bd87_story.html; and Kingsolver, *supra* note 2.

5. See, e.g., Allison C. Williams, *The #MeToo Movement: What We Have Learned and Where We Need to Go*, 81 TEX. B.J. 852, 852 (2018) (discussing #MeToo as an alternative to Title VII); Kat Stoeffel, *It Doesn’t Have to Be Rape to Suck*, N.Y. MAG.: THE CUT (Oct. 6, 2014), <https://www.thecut.com/2014/10/doesnt-have-to-be-rape-to-suck.html> (discussing the precursors to #MeToo in relation to the inadequacy of rape law).

6. For a similar connection, see Lindy West, Opinion, *Aziz, We Tried to Warn You*, N.Y. TIMES (Jan. 17, 2018), <https://www.nytimes.com/2018/01/17/opinion/aziz-ansari-metoo-sex.html> (discussing previous scholarship on affirmative consent).

7. See *infra* Section II.B.

8. See generally John Gardner, *The Opposite of Rape*, 38 OXFORD J. LEGAL STUD. 48 (2018) (discussing the mutuality paradigm as a challenger to the idea of consent).

9. See, e.g., Nicola Lacey, *Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law*, 11 CANADIAN J.L. & JURIS. 47, 65–66 (1998) (discussing mutuality as inherent to sexual desire).

Detrimental sexual contact, in contrast, is contact in which a person takes part without desiring it, even when participation is not coerced.¹⁰ Accordingly, the mutuality approach suggests that moving another person to engage in sexual contact they do not desire is often—though not always—to wrong them sexually.¹¹

The historical setting in which the mutuality paradigm developed has made the important insight it offers on the nature of sexual wrongdoing ancillary to the wrong of rape. However, this Article argues that the form that this insight took within the #MeToo movement is better understood as calling attention to the existence of an *independent* wrong of sexual degradation, reproaching certain forms of misconduct for reasons different from the ones informing the condemnation of nonconsensual sex. In this light, the appropriate response to Mr. Trump's words is not just disapproval of their implicit support of sexual violence but also a direct rebuttal of his assertion, in words and deeds that, "when you're a star, [women] let you do it."¹²

The failure to appreciate the novelty of #MeToo's message has led several authors who are sympathetic to its trajectory to criticize its disregard of hard-won progress in relation to sexual harassment and assault and accuse the movement of ushering in a return to retrograde views of female agency.¹³ However, although #MeToo allegations often converge with these established wrongs, the allegations' divergence from the paradigms that animate them can often be explained as the repudiation of a yet-to-be-clearly established wrong of sexual degradation located alongside sexual harassment and assault.¹⁴ Although discussions within the #MeToo movement seldom distinguish this separate wrong from sexual assault and harassment—and often blend the latter two—this Article nevertheless attempts to sketch three of sexual degradation's most evident features.

First, like sexual harassment, the wrong of sexual degradation is primarily *communicative*. Thus, what is offensive about such behavior is the message that it communicates, not the tangible consequences that it produces. Mr. Trump's comments are sexually degrading in this light not only because they condone sexual assault and suggest that he practiced it in the past but also because of the message they convey, namely that women are predisposed to trade sexual favors in exchange for material benefits or a simple brush with stardom.¹⁵ Admittedly,

10. See, e.g., John Gardner, *The Wrongness of Rape*, in OFFENCES AND DEFENCES 1, 16–18 (2007).

11. See, e.g., Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1459 (1993).

12. *Transcript: Donald Trump's Taped Comments About Women*, *supra* note 1.

13. See, e.g., Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 33 (2018); Bari Weiss, *Opinion, Aziz Ansari Is Guilty. Of Not Being a Mind Reader.*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html>.

14. See, e.g., Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1183–84 (2019); Fiona Chen, *Why the Aziz Ansari Story and Discussions of Grey Areas Are Central to the #MeToo Movement*, TECH (Jan. 25, 2018), <https://thetech.com/2018/01/25/me-too-aziz-ansari> [<https://perma.cc/G47Z-HLCR>].

15. In another part of the conversation, Mr. Trump describes how he (unsuccessfully) sought to motivate a woman sexually by taking her furniture shopping. See *Transcript: Donald Trump's Taped Comments About Women*, *supra* note 1.

these words are degrading in a highly generalized way, amplified primarily by the position of the person voicing them. In most instances associated with #MeToo, the degrading communication is much more immediate, taking communicative forms that range from catcalling to private sexual overtures.¹⁶

The second feature of sexual degradation concerns the substance of the communication. Degradation’s communicative form tells us that we should locate its harm not in the illicit sexual contact but in the interaction that surrounds it. Degradation also differs from the narrower wrong of nonconsensual sex in that the offender’s purpose is not to obtain sex but sexual submission and its correlate, domination. Although some forms of sexual degradation are the communicative equivalents of brute force—unwelcome intrusions into another’s sexual sphere—many of the behaviors at the center of #MeToo allegations concern the specific attempt to drive a wedge between the victim’s sexuality and sexual decisionmaking. Consonant with the message of the mutuality paradigm, #MeToo recognizes this forced disjunction, achieved by using nonsexual leverage to undermine the victim’s sexual judgment, as sexual degradation. Again, the degrading message of Mr. Trump’s words lies in his suggestion that he can use his wealth and dominance in the entertainment business to procure sexual access.

The third feature of #MeToo’s construction of sexual degradation—and where it seemingly parts ways with the mutuality approach—concerns its view on, or rather neglect of, intimate relational inequality. In focusing on degradation rather than on sexual assault, #MeToo expresses the belief that the formal meaning of “consent” fails to address all forms of sexual wrongdoing sufficiently; specifically, it suggests that the involvement of material inducements can be detrimental to positive sexuality even when it is formally voluntary.¹⁷ Although material inequality can taint intimate relationships and the sexual relations that take place within them, the #MeToo movement, at least in its most prominent manifestations, mostly ignores the potential for degradation posed by unequal intimate relationships and focuses instead on non-intimate power disparities within areas of life like the workplace, the academy, and political and religious activity.¹⁸

16. See, e.g., Erin Sheley, *A Broken Windows Theory of Sexual Assault Enforcement*, 108 J. CRIM. L. & CRIMINOLOGY 455, 476 (2018) (discussing the range of communicative offenses).

17. This, I suggest, helps explain #MeToo’s ambivalence toward sex work. See Samantha Cooney, ‘They Don’t Want to Include Women Like Me.’ *Sex Workers Say They’re Being Left Out of the #MeToo Movement*, TIME (Feb. 13, 2018, 11:09 AM), <https://time.com/5104951/sex-workers-me-too-movement>; Cara Curtis, *Erika Lust: #MeToo Left Sex Workers Behind*, NEXT WEB (July 8, 2019), <https://thenextweb.com/code-word/2019/07/08/the-metoo-movement-forgot-about-one-industry-sex-workers/> [<https://perma.cc/R7TH-JN7B>].

18. On those occasions when the #MeToo movement emerged in the context of intimate relationships, it primarily concerned cases of sexual assault and domestic abuse rather than the potential for sexual degradation within a relational context. For a recent example see Kirsten Chuba, *Amber Heard Reads Letter About Johnny Depp Abuse Allegations at #MeToo Anniversary Event*, VARIETY (Oct. 10, 2018, 8:08 AM), <https://variety.com/2018/scene/news/amber-heard-johnny-depp-open-letter-me-too-1202975127/> and Amber Heard, *Opinion, I Spoke Up Against Sexual Violence—and Faced Our Culture’s Wrath. That Has to Change.*, WASH. POST (Dec. 18, 2018, 5:58 PM), https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36_story.html.

Lastly, in contrast with established legal wrongs, #MeToo does not seem to conceive of sexual degradation as legally actionable, at least for the time being. #MeToo's nascent articulation of the wrong of sexual degradation is, at this stage, an attempt to bring it out from the shadows of sexual assault and harassment; the movement forcefully describes a normative oversight overlooked by the paradigms that inform these legally recognized harms. After the movement establishes as a matter of positive morality that people ought to approach the sexual domains of others on their own terms and the public better appreciates the meaning of this obligation, there might be room to start talking about making sexual degradation legally actionable. For now, however, the #MeToo movement seems content with seeking nonlegal redress for cases of sexual degradation.¹⁹

This Article pursues its argument as follows. Part I begins by surveying the existing wrongs of sexual assault and harassment and the paradigms of consent and discrimination that inform them. Part II discusses criticisms of the #MeToo movement for its departure from these established paradigms. It then argues that understanding #MeToo as a continuation of the mutuality paradigm through the creation of the new, nonlegal wrong of sexual degradation resolves these objections. Part III explores the three main features of sexual degradation that the #MeToo movement reveals. A brief conclusion summarizes the argument.

Ultimately, this Article argues that although the struggle to make sexual assault and harassment more consequential is an important feature of the #MeToo movement, seeing this focus as its sole message ignores its attempt to fundamentally reshape the very language of sexual wrongdoing by introducing a new vocabulary into the debate. Ignoring this important feature disregards much of what the proponents of #MeToo are saying and often does violence to their message by reconstructing it so that it fits into established categories of sexual wrongdoing and criticizing it when it fails to produce a perfect fit. Regardless of whether we agree with this message, we cannot fairly consider it unless we engage with it using the appropriate language.

I. THE ESTABLISHED LEGAL PARADIGMS

#MeToo is often discussed, and rightly so, in the context of the legal categories of sexual assault and harassment.²⁰ For those who identify #MeToo with the fight

19. This approach toward sexual degradation is distinct from #MeToo's stance toward the established wrongs of sexual harassment and assault and its struggle to produce more legal accountability in these domains. *See, e.g.*, Tuerkheimer, *supra* note 14, at 1150–51.

20. *See, e.g.*, L. Camille Hébert, *Is "MeToo" Only a Social Movement or a Legal Movement Too?*, 22 *EMP. RTS. & EMP. POL'Y J.* 321, 324 (2018) (discussing #MeToo as sexual harassment); Leslie Y. Garfield Tenzer, *#MeToo, Statutory Rape Laws, and the Persistence of Gender Stereotypes*, 2019 *UTAH L. REV.* 117, 117–18 (discussing #MeToo in relation to sexual assault and workplace equality); Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 *MINN. L. REV.* 229, 234 (2018) (discussing #MeToo in the context of sexual harassment).

against these wrongs,²¹ the movement’s main purpose is to make their legal condemnation more effective by increasing the number of reports of sexual misconduct, removing misconceptions about sexual wrongdoing, and mitigating the negative effects of procedural hurdles.²² For others, the purpose of #MeToo is to expand the legal definitions of sexual assault and harassment beyond their current narrow interpretations.²³ Indeed, for many, Harvey Weinstein’s recent convictions and the creation of the Time’s Up Legal Defense Fund to support the struggle against workplace sexual harassment are two of #MeToo’s main achievements.²⁴ All of these important goals certainly form a considerable part of #MeToo’s message, but they fail to capture the movement’s most generative aspects.

In addition to #MeToo’s struggles for equality, solidarity, and greater legal accountability for sexual assault and harassment, the movement is also an attempt to reshape the normative landscape of sexual wrongdoing by shedding light on the offensiveness and harmfulness of behavior that does not fall under existing legal categories. I refer to this behavior as sexual degradation. Like harassment, the wrong of degradation does not necessarily appear in the form of illicit sexual contact, though it can take the form of sexual advances. Degradation also does not necessarily involve consent-vitiating coercion, although it does revolve around the use of force to obtain sexual contact. To better understand how this wrong differs from existing legal categories and why this difference has given rise to serious but misplaced critiques of #MeToo, we must first briefly review the relevant features of sexual harassment and assault.

A. SEXUAL HARASSMENT AND SEX-BASED DISCRIMINATION

Although victims of workplace sexual harassment can, at times, seek other types of redress,²⁵ the form of legal recourse most commonly associated with a

21. See, e.g., Hébert, *supra* note 20, at 324–25; Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1585 (2018); Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time’s Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 47.

22. See, e.g., Tuerkheimer, *supra* note 14, at 1150–51 (discussing #MeToo’s promotion of sexual misconduct law); Catharine A. MacKinnon, *Opinion, #MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> (discussing #MeToo as removing barriers to ending sexual harassment).

23. See, e.g., Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 833 (2019) (discussing #MeToo as private action to change law); Chen, *supra* note 14 (discussing #MeToo as redefinition of sexual assault).

24. See, e.g., Stephane Fortado, *Commentary, Workplace Sexual Abuse, Labor and the #MeToo Movement*, 43 LAB. STUD. J. 241, 242 (2018); Deborah Tuerkheimer, *Opinion, I Spent Hours Talking to Victims. These Verdicts Will Give Them Hope.*, N.Y. TIMES (Feb. 24, 2020), <https://www.nytimes.com/2020/02/24/opinion/harvey-weinstein-guilty-verdict.html?referringSource=articleShare>.

25. See, e.g., *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1018–19 (10th Cir. 2001) (discussing battery and intentional infliction of emotional distress claims); *Skidmore v. Precision Printing & Packaging, Inc.*, 188 F.3d 606, 613–14 (5th Cir. 1999) (discussing the tort of intentional infliction of emotional distress); Hemel & Lund, *supra* note 21, at 1628–40 (discussing possible remedies for sexual harassment under corporate and securities law).

#MeToo allegation is Title VII of the Civil Rights Act of 1964.²⁶ Title VII prohibits discrimination in employment matters on the basis of “race, color, religion, sex, or national origin.”²⁷ Although Title VII is now synonymous with sexual harassment, it was not always obvious that Title VII prohibits it. Sexual discrimination claims initially constituted a considerable share of the complaints filed with the Equal Employment Opportunity Commission (EEOC)—the federal agency charged with enforcing Title VII—but workplace sexual harassment was not considered a form of discrimination by either the EEOC or the federal courts.²⁸ Until the late 1970s, both the EEOC and the courts saw sexual harassment as a quintessentially private and personal behavior that “happen[s] to occur” in a workplace setting “rather than a back alley”²⁹ but otherwise has “no relationship to the nature of the employment.”³⁰

One of the first significant departures from this approach was the 1977 case of *Barnes v. Costle*.³¹ Barnes, a female employee of the Environmental Protection Agency, refused the sexual advances of her male supervisor and subsequently lost her job.³² The district court dismissed her complaint of sex-based discrimination, holding that the discrimination was based not on her *sex* but on her refusal to *have sex* with her supervisor.³³ The D.C. Circuit reversed, ruling that Barnes’s dismissal was “based on . . . sex” within the meaning of Title VII because her employment became conditioned on a sexual demand that, given the presumed heterosexuality of the supervisor, would not be directed at a male employee.³⁴ Importantly, the court noted that the sexual content of the proposition was immaterial; discrimination occurred because “but for her gender she would not have been importuned.”³⁵

The link between workplace sexual harassment and sex-based discrimination gained formidable backing in 1979 with the publication of feminist scholar Catharine MacKinnon’s seminal book *Sexual Harassment of Working Women*, which soon became the theoretical foundation for much of sexual harassment law. In her book, MacKinnon distinguished between two ways in which sexual

26. See, e.g., Tristin K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 YALE L.J.F. 152, 153 (2018); Hébert, *supra* note 20, at 326; Tippet, *supra* note 20, at 237; Stephanie Russell-Kraft, *#MeToo Movement Brings Busy Times for Labor Lawyers*, BLOOMBERG L. (Dec. 18, 2017, 10:20 AM), <https://news.bloomberglaw.com/business-and-practice/metoo-movement-brings-busy-times-for-labor-lawyers>.

27. 42 U.S.C. § 2000e-2(a)(1) (2018).

28. See, e.g., Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029, 1029–30 (2015); Hemel & Lund, *supra* note 21, at 1598.

29. *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976).

30. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977).

31. 561 F.2d 983 (D.C. Cir. 1977).

32. *Id.* at 985.

33. See *Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974), *rev’d sub nom. Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

34. See *Barnes*, 561 F.2d at 989–90 (alteration in original); see also *Miller v. Bank of Am.*, 600 F.2d 211, 213 (9th Cir. 1979) (following a similar line of reasoning).

35. *Barnes*, 561 F.2d at 989 n.49.

harassment can constitute sex-based employment discrimination. First, she wrote, quid pro quo sexual propositions, such as the one implicitly made in *Barnes*, effectively condition their targets’ terms of employment on their sexual submission and therefore constitute discrimination given the discriminatory nature of heterosexual attraction.³⁶ Second, even in the absence of explicit sexual propositions, the creation of sexually hostile environments alters the conditions in which work is performed, which is also in response to the targets’ gender.³⁷ This dual understanding of sexual harassment was incorporated soon after the book’s publication into the EEOC’s 1980 guidelines, which for the first time, defined sexual harassment as a form of sex-based discrimination.³⁸ Significantly, these guidelines not only affirmed the *Barnes* quid pro quo reasoning but also recognized that “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” can be actionable under Title VII when they have “the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”³⁹

The federal courts quickly picked up on the EEOC’s guidelines on sexual harassment,⁴⁰ and in 1986, the Supreme Court in *Meritor Savings Bank, FSB v. Vinson* affirmed that sexual harassment in both its forms constitutes sex-based discrimination.⁴¹ In *Meritor*, the plaintiff was sexually propositioned by her male supervisor shortly after she began working as a bank teller.⁴² Although she initially refused, the plaintiff contended that she later acquiesced out of fear of losing her job. Over the course of the next few years, the supervisor repeatedly made demands for sexual favors, and they had intercourse forty or fifty times before the plaintiff formed a steady relationship with another man and broke off the sexual relationship with her supervisor. The plaintiff’s Title VII claim was initially denied by the district court on the ground that the sexual relationship was

36. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 32 (1979).

37. *See id.*

38. According to the EEOC guidelines:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (2020).

39. *Id.*

40. *See Katz v. Dole*, 709 F.2d 251, 254–55 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 902–03 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 942–46 (D.C. Cir. 1981).

41. 477 U.S. 57, 65–66, 73 (1986).

42. *Id.* at 60.

voluntary and therefore did not constitute sexual harassment.⁴³ The D.C. Circuit reversed,⁴⁴ and the Supreme Court affirmed, ruling that “sex-related conduct[’s]” voluntariness, “in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII” and stressing that, rather than consent, “[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”⁴⁵

When the issue of sexual harassment next arrived at the Supreme Court in 1993 in *Harris v. Forklift Systems, Inc.*, the question was how severe a hostile environment must be to give rise to an actionable sexual harassment claim under Title VII.⁴⁶ Seeking a “middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury,”⁴⁷ the Supreme Court ruled that, “[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive,” it can constitute sexual harassment.⁴⁸

At this point, academic writing once again affected the meaning of “sexual harassment.” Although the bridge connecting sexual harassment with Title VII’s proscription of sex-based discrimination had often been the discriminatory nature of sexual desire, Professor Vicki Schultz argued in her influential article *Reconceptualizing Sexual Harassment* that the focus on sexuality had subverted the true meaning of Title VII by eclipsing the many other forms in which sex-based workplace discrimination manifests.⁴⁹ Sexual desire, Schultz convincingly argued, explains part of the dynamics of discrimination, but the quintessence of discrimination is not sexuality but rather the substantive disparity in employment opportunities.⁵⁰ Instead of exclusively focusing on the harms of sexualized behavior, Schultz argued that sexual harassment, as an instance of discrimination, should be understood as encompassing all the ways in which gender roles and stereotypes hinder workplace equality.⁵¹ In an accompanying article, Schultz further argued that the overemphasis on sexuality had led corporations to combat

43. See *Vinson v. Taylor*, No. 78-1793, 1980 WL 100, at *7-8 (D.D.C. Feb. 26, 1980), *rev’d*, 753 F.2d 141 (D.C. Cir. 1985), *aff’d sub nom.* *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

44. *Vinson*, 753 F.2d at 152.

45. *Meritor*, 477 U.S. at 68.

46. 510 U.S. 17, 20 (1993).

47. *Id.* at 21.

48. *Id.* at 22.

49. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1686 (1998) [hereinafter Schultz, *Reconceptualizing Sexual Harassment*]. On the current applicability of this approach, see Martin J. Katz, *Reconsidering Attraction in Sexual Harassment*, 79 IND. L.J. 101, 102 (2004) and Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 18-19 (2018) [hereinafter Schultz, *Open Statement on Sexual Harassment*].

50. Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 49, at 1687; see Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do About It*, 29 T. JEFFERSON L. REV. 101, 102-03 (2006) (expanding upon the argument that sexual harassment is connected to inequities in employment opportunities).

51. See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 49, at 1687; see also Hébert, *supra* note 20, at 327 (making a similar argument).

workplace sexuality instead of inequality, resulting in attempts to create unhealthy “sexually sanitized” workplaces while neglecting all other forms of sex-based discrimination.⁵²

Soon after Schultz voiced her concerns about the sexual-desire paradigm, the Supreme Court adopted her view and signaled a reaffirmation of the discrimination paradigm. In *Oncale v. Sundowner Offshore Services, Inc.*, the male plaintiff, employed on an eight-man oil platform, alleged that he was subjected to humiliating sex-related actions by some of his male coworkers.⁵³ The Supreme Court held that Title VII does not exclude same-sex sexual harassment as long as the plaintiff demonstrates that it occurred “because of sex.”⁵⁴ The Court emphasized that sexual harassment need not be sexual in nature or motivated by sexual desire to constitute actionable discrimination on the basis of sex.⁵⁵ Conversely, the Court reaffirmed that not all forms of sexual harassment would necessarily constitute actionable discrimination on account of their sexual nature alone.⁵⁶ What matters, the Supreme Court insisted, is not that the offensive behavior is sexual but rather that it is discriminatory.⁵⁷

As it stands, Title VII sexual harassment claims seem to conflict with the kind of allegations that #MeToo commonly involves.⁵⁸ Admittedly, workplace discrimination is a major concern of #MeToo, as is gender inequality in general.⁵⁹ #MeToo allegations, however, go beyond Title VII harassment in two important ways. First, although much of the injurious interactions that #MeToo claims report take place in a workplace setting, this is not an inherent feature of the wrong they describe.⁶⁰ Second, although both Title VII and #MeToo ultimately

52. See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2064–65 (2003); see also Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 746 (1997) (arguing against the objection to all workplace sexual behavior).

53. 523 U.S. 75, 77 (1998).

54. *Id.* at 79–82.

55. *Id.* at 80.

56. *Id.* (“We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.”).

57. See, e.g., Schultz, *supra* note 13, at 28; Steven L. Willborn, *Taking Discrimination Seriously: Oncale and the Fate of Exceptionalism in Sexual Harassment Law*, 7 WM. & MARY BILL RTS. J. 677, 679–80 (1999); see also *Holman v. Indiana*, 211 F.3d 399, 401 (7th Cir. 2000) (upholding the dismissal of a Title VII claim against an “equal opportunity harasser”).

58. See *infra* notes 160–64 and accompanying text. Of course, the subject of discrimination is also an important issue taken up by #MeToo, alongside its treatment of sexual wrongdoing. See, e.g., Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html>.

59. See *infra* notes 118–37 and accompanying text.

60. Some of the most noteworthy examples concern the actions of Al Franken, Louis C.K., Aziz Ansari, and Harvey Weinstein toward female actors. See Heather Caygle, *Another Woman Says Franken Tried to Forcibly Kiss Her*, POLITICO (Dec. 6, 2017, 1:13 PM), <https://www.politico.com/story/2017/12/06/al-franken-accusation-sexual-harassment-2006-281049> [<https://perma.cc/PA67-X42Y>]; Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017, 10:47 AM), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>; Melena Ryzik, Cara Buckley & Jodi Kantor, *Louis C.K. Is Accused by 5*

boil down to inequality, they differ in their view on the relation between inequality and sexuality. As Schultz asserts, that Title VII harassment often appears in sexualized form is a nonessential attribute of the systematic problem of workplace inequality, and it is the more fundamental issue of inequality rather than its particular symptom of harassment that should be the center of attention in the struggle against sexual harassment. For #MeToo, in contrast, the translation of inequality into sexual form is paradigmatic of the wrong it denounces.⁶¹ This is not to say that #MeToo denies that inequality and discrimination are pervasive wrongs. Quite the contrary, a considerable part of its energy is devoted to the fight against them, partly through Title VII litigation and partly through more direct attempts to force employers to compensate male and female employees similarly.⁶² But in addition to these general efforts, #MeToo often also stands for the view that there is something so injurious in the harnessing of this inequality for sexual purposes to make it an independent cause for concern. I explore this argument below, after observing how it relates to the established legal category often applied to such claims, that of sexual assault.

B. SEXUAL ASSAULT AND FORMAL CONSENT

A similar tension characterizes #MeToo's treatment of sexual assault. Like sexual harassment, the legal meaning of sexual assault has undergone significant change in the past decades, often revolving around the crime of rape as a proxy for sexual violence more generally. In eighteenth-century common law courts, rape was the "ravishment of a woman forcibly and against her will," and its formal definition has remained much the same in the law books of many jurisdictions.⁶³ Despite the persistence of its formal definition, the eighteenth-century reason for condemning rape was markedly different from contemporary reasoning. In contrast to the currently pervasive ideas of sexual autonomy, the traditional prohibition on rape reflected the desire to regulate sexual relationships, keep sexuality within the confines of marital and procreative relationships, and protect men's proprietary interests in the sexuality of their wives and unmarried daughters.⁶⁴

Women of Sexual Misconduct, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html>; Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life*, BABE, <https://babe.net/2018/01/13/aziz-ansari-28355> [<https://perma.cc/D9NX-HQEB>] (last visited Dec. 20, 2020).

61. See *infra* Part III.A.

62. See, e.g., Vanessa Fuhrmans, *What #MeToo Has to Do with the Workplace Gender Gap*, WALL ST. J. (Oct. 23, 2018, 5:16 AM), <https://www.wsj.com/articles/what-metoo-has-to-do-with-the-workplace-gender-gap-1540267680>; Yuki Noguchi, *#MeToo Awareness Sharpens Focus on Pay Equity*, NPR (Mar. 8, 2019, 1:55 PM), <https://www.npr.org/2019/03/08/701169339/-metoo-awareness-sharpens-focus-on-pay-equity> [<https://perma.cc/9GXG-RN4S>].

63. 15 MODERN AMERICAN LAW: BLACKSTONE'S COMMENTARIES 80 (Henry Winthrop Ballantine ed., 1915) (providing a revised text of Blackstone's *Commentaries on the Laws of England*). For a survey of some contemporary interpretation of sexual offenses, see John F. Decker & Peter G. Baroni, "No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1083–119 (2011).

64. See, e.g., LORENNE M.G. CLARK & DEBRA J. LEWIS, RAPE: THE PRICE OF COERCIVE SEXUALITY 159–61 (1977) (discussing rape as an offense against the sexual property of men); Martha Chamallas,

Today, shifting social mores and important work by legal reformers have increasingly made the traditional view of rape, together with some of its most obvious vestiges such as the “utmost resistance” standard and the marital exemption, a thing of the past.⁶⁵ Rape and sexual assault are today believed to be odious on account of their injury to the victim’s sexual autonomy,⁶⁶ which though substantial disagreement exists, might be thought of as the ability to freely determine the extent of one’s sexual availability to others without intervention from the state or other people.⁶⁷

#MeToo’s message on sexual violence is grounded in the contemporary understanding of sexual assault as an attack against the victim’s sexual autonomy. However, as discussed below, #MeToo often expresses a view on what constitutes a wrongful infringement of autonomy that significantly differs from the established interpretations of the laws on sexual assault. This, as we shall see, is particularly true with respect to the presumed effect of material constraints and considerations on sexual autonomy.

To understand this divergence better, we must first address some of the pressing questions currently plaguing rape law. Even after the seismic shift that expunged the traditional view of rape law led to the creation of a panoply of sexual offenses that inherited the unitary definition of rape,⁶⁸ the dichotomous common law concepts of force and consent still pervade the legal discussion of sexual assault.⁶⁹ Considering the numerous ways in which different jurisdictions use these terms, as well as the resistance requirement that often mediates them,⁷⁰ it might be beneficial for this Article to translate these different provisions into the

Consent, Equality, and the Legal Control of Sexual Conduct, 61 S. CAL. L. REV. 777, 784–90 (1988) (discussing the traditional meaning of rape law); William N. Eskridge, Jr., *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47, 56–57 (1995) (arguing that the regulating principle of consent has been the protection of procreative marriage).

65. For a discussion of these changes, see, for example, Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 973–74; Chamallas, *supra* note 64, at 799; and Decker & Baroni, *supra* note 63, at 1101–19.

66. See, e.g., ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 135–40 (Gerald Postema ed., 2003); Gardner, *supra* note 8, at 59; Jean Hampton, *Defining Wrong and Defining Rape*, in A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE 118, 118 (Keith Burgess-Jackson ed., 1999).

67. See, e.g., MODEL PENAL CODE & COMMENTARIES § 213.1 cmt. 4 (1980) (“The law of rape protects the female’s freedom of choice and punishes unwanted and coerced intimacy.”); see also STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 99 (1998) (discussing sexual autonomy); 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) (discussing sexual autonomy as “the freedom to refuse to have sex with any one for any reason”); Lacey, *supra* note 9, at 52 (articulating the social value of sexual autonomy as the interest against which sexual wrongdoing is to be conceived).

68. Patricia Falk suggests that these new offenses “cluster around five organizational themes, provisions that outlaw sexual penetration or contact accomplished by: (1) abuse of trust, (2) abuse of authority, (3) fraud, (4) coercion, and (5) nonconsent.” Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 91 (1998).

69. See, e.g., Chamallas, *supra* note 64, at 794–95; Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQ. 335, 336 (2017).

70. For a comprehensive although slightly outdated survey, see generally Decker & Baroni, *supra* note 63.

single language of consent.⁷¹ Here, we can distinguish between two sets of questions, one set dealing with the conditions that vitiate or circumscribe consent and the other set seeking to determine what behavior signals consent or its absence.⁷² The main questions included in the latter set tend to revolve around the debate about which is preferable: the affirmative standard of consent, which dictates that anything short of an explicit “yes” is a sign of nonconsent,⁷³ or the negative standard, which suggests that only a verbal or nonverbal expression of reluctance constitutes nonconsent.⁷⁴ Although this discussion is of great importance to the law of sexual assault, its focus on the formal features of consent and whether it can be inferred from the victim’s behavior seems to be beside the point to #MeToo’s concern with the harmful effects of the *perpetrator’s* behavior.⁷⁵

The emphasis on these two sets of questions has turned discussions of consent into debates on the probative implications of various acts instead of an attempt to chart the extent of protection that sexual autonomy is due. For the first set of questions, we can distinguish between those circumstances in which the victim’s consent is *vitiated* by the offender’s coercion and those in which it is simply nonexistent, due either to the preexisting condition of the victim or the offender’s behavior.⁷⁶ The simplest example of the latter group of cases is the offender using brute force to *circumvent* the victim’s volition altogether by employing incapacitating or paralyzing force,⁷⁷ rendering the victim unconscious, or overcoming the victim’s resistance.⁷⁸ In other cases, the victim’s consent is irrelevant to the

71. For the centrality of consent, see, for example, David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 322 (2000) (“The concept of forcible rape is gradually being replaced by an array of offenses, not all of which involve force.”) and Stephen J. Schulhofer, *Consent: What It Means and Why It’s Time to Require It*, 47 U. PAC. L. REV. 665, 672 (2016) (“The criminal law picture, though more mixed, nonetheless indicates an unmistakable trend in favor of requiring consent.”). Even when statutes explicitly require proof of force, courts have at times applied a doctrine of constructive force to overcome this demand. See, e.g., *People v. Borak*, 301 N.E.2d 1, 4 (Ill. App. Ct. 1973) (interpreting force to include a surprise caused by fraud); *State v. Moorman*, 358 S.E.2d 502, 505–06 (N.C. 1987) (holding that the force requirement is met when the victim was asleep).

72. See, e.g., Schulhofer, *supra* note 69, at 343.

73. See, e.g., Scott A. Anderson, *Conceptualizing Rape as Coerced Sex*, 127 ETHICS 50, 67–68 (2016); Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 425, 429–30 (2016).

74. See, e.g., Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO ST. J. CRIM. L. 333, 353 (2004).

75. In this, #MeToo echoes MacKinnon’s view that “[l]ack of consent is redundant and should not be a separate element of the crime” of rape, suggesting instead that “[r]ape should be defined as sex by compulsion, of which physical force is one form.” CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 245 (1989). No doubt, the questions surrounding the formal features of consent are also of great probative importance by potentially assisting in determining what actually took place between the parties. Still, although an important strand of #MeToo deals with probative matters, there is a risk of its overarching message becoming obscured by them.

76. For a discussion of these two meanings, see, for example, Gruber, *supra* note 73, at 423–24 and Westen, *supra* note 74, at 334–35.

77. Given that an overwhelming share of victims of sexual wrongdoing are female and the perpetrators male, I use mostly gendered pronouns that reflect this proportion. For more discussion, see generally Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1261–65 (2011).

78. See, e.g., ALAN WERTHEIMER, *COERCION* 9 (Marshall Cohen ed., 1987); Kimberly Kessler Ferzan, *Consent and Coercion*, 50 ARIZ. ST. L.J. 951, 959 (2018); Westen, *supra* note 74, at 351.

meaning of the perpetrator’s actions because the victim is incapable of meaningfully forming it.⁷⁹ Therefore, even in jurisdictions in which proving nonconsent requires demonstrating the use of force, there is often an exception for when the victim is unconscious, paralyzed, or mentally impaired.⁸⁰ Similarly, in many jurisdictions, sexual contact with a person whose mental capacities are impaired by intoxication or drug use constitutes a sexual offense.⁸¹ By the same token, even though fraud does not commonly vitiate consent,⁸² most jurisdictions criminalize conduct that circumvents the victim’s consent by fraudulently concealing the sexual nature of the act or the identity of the actor.⁸³ Once again, there is little disagreement between #MeToo and the familiar debates on these questions because the kind of discussion that they involve is factual.

Where #MeToo’s unique perspective does come into play, as I argue later, is in those cases in which the offender *does* engage with the victim’s sexual judgment, raising the question (from the perspective of rape law) of whether the perpetrator affected the victim in a way that would render the victim’s judgment *legally* inconsequential.⁸⁴ Although physical force can be used by the perpetrator to subdue the victim, it can also be used to threaten the victim into acquiescence,

79. See, e.g., PETER WESTEN, *THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT* 35–36 (2004); Heidi M. Hurd, *Was the Frog Prince Sexually Molested?: A Review of Peter Westen’s The Logic of Consent*, 103 MICH. L. REV. 1329, 1336–37 (2005).

80. See ARK. CODE ANN. § 5-14-103(a)(2) (West 2020); CAL. PENAL CODE § 261(a)(1) (West 2020); CONN. GEN. STAT. ANN. § 53a-70(a) (West 2020); IDAHO CODE ANN. § 18-6101(3) (West 2020); 720 ILL. COMP. STAT. ANN. 5/11-1.20(a)(2) (West 2016); IND. CODE ANN. § 35-42-4-1(a)(2)–(3) (West 2020); KAN. STAT. ANN. § 21-5503(a)(1)(B)–(a)(2) (West 2020); KY. REV. STAT. ANN. § 510.050(1)(b) (West 2020); LA. STAT. ANN. § 14:42.1(A)(2) (2020); ME. REV. STAT. ANN. tit. 17-A, § 253.2.D (2020); MD. CODE ANN., CRIM. LAW § 3-304(a)(2) (West 2020); MICH. COMP. LAWS ANN. § 750.520d(1)(c) (West 2020); MINN. STAT. ANN. § 609.343.1(e)(ii) (West 2020); MISS. CODE ANN. § 97-3-65(4)(a) (West 2020); N.J. STAT. ANN. § 2C:14-2(7) (West 2020); N.M. STAT. ANN. § 30-9-10.A(4) (West 2020); N.C. GEN. STAT. ANN. § 14-27.22(a)(2) (West 2020); N.D. CENT. CODE ANN. § 12.1-20-07.1(b)–(c) (West 2019); OHIO REV. CODE ANN. § 2907.02(A)(1)(a), (c) (West 2020); 11 R.I. GEN. LAWS ANN. § 11-37-2(1) (West 2020); S.C. CODE ANN. § 16-3-652(1)(c) (2020); S.D. CODIFIED LAWS § 22-22-7.2 (2020); VA. CODE ANN. § 18.2-61(A) (West 2020); W. VA. CODE ANN. § 61-8B-2(c) (West 2020); WYO. STAT. ANN. § 6-2-303(a)(iii) (West 2020). *But see* State v. Elias, No. 39139, 2013 WL 3480737, at *7–8 (Idaho Ct. App. July 12, 2013) (holding that a defendant who digitally penetrated a sleeping woman was not guilty of forcible penetration by use of a foreign object); State v. Wine, No. 2-12-01, 2012 WL 2371396, at *15 (Ohio Ct. App. June 25, 2012) (holding that the digital penetration of a sleeping woman did not meet the force requirement); Commonwealth v. Thompson, 2 Pa. D. & C.4th 632, 652 (Ct. Com. Pl. 1989) (rejecting the proposition that the defendant’s vaginal penetration of his sleeping twelve-year-old daughter involved force).

81. In most jurisdictions where there is a force requirement, however, this is only so when the defendant surreptitiously caused the victim’s impaired state. See Michal Buchhandler-Raphael, *The Conundrum of Voluntary Intoxication and Sex*, 82 BROOK. L. REV. 1031, 1033 (2017); Falk, *supra* note 68, at 135.

82. See SCHULHOFER, *supra* note 67, at 152; WERTHEIMER, *supra* note 66, at 195–96; Chamallas, *supra* note 64, at 831; Decker & Baroni, *supra* note 63, at 1133.

83. For discussion of this distinction, see, for example, WESTEN, *supra* note 79, at 195–201; Falk, *supra* note 68, at 50–65; and Jocelyne A. Scutt, *Fraud and Consent in Rape: Comprehension of the Nature and Character of the Act and Its Moral Implications*, 18 CRIM. L.Q. 312, 319 (1976).

84. See, e.g., WESTEN, *supra* note 79, at 44–47.

vitiating the victim's reluctant consent.⁸⁵ Although this effect is often obvious in the case of physical force, for rape law it is often much less so with regard to other forms of duress, at least in the eyes of many legal decisionmakers.⁸⁶ In most cases, hardly anything other than physical threats is viewed as a sufficiently serious form of duress.⁸⁷ A familiar reason given for the reluctance to go beyond physical threats is the difficulty of drawing sufficiently bright lines that distinguish illicit, nonphysical threats from acceptable albeit exploitative offers that are commonly believed to leave consent intact.⁸⁸ Even when the law proscribes nonphysical duress, this line-drawing concern often makes prosecutors extremely reluctant to bring charges against people who obtained sexual acquiescence by coercive means other than by physical threats, and when charges are filed, courts and juries are reluctant to convict.⁸⁹

In an attempt to expand the list of consent-vitiating inducements beyond physical threats, several scholars have suggested analogizing sexual coercion to the ways in which law conceptualizes other illicit ways of eliciting another's reluctant cooperation with regard to the exchange of material interests, such as blackmail, robbery, and fraud.⁹⁰ This transactional understanding of consent proposes viewing sexuality as akin to material commodities, and it assigns to the law the task of ensuring that its exchange conforms to the formal liberty that governs the free market.⁹¹ Professor Donald Dripps therefore suggests a commodity approach to sexuality that posits that "sexual cooperation is a service much like any other, which individuals have a right to offer for compensation, or not, as they choose.

85. See Westen, *supra* note 74, at 351–52 (discussing the different meanings of the use of force).

86. See, e.g., LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 270–71 (1998); Deborah Tuerkheimer, *Rape on and off Campus*, 65 EMORY L.J. 1, 4 (2015).

87. See Bryden, *supra* note 71, at 361; Keith Burgess-Jackson, *A Theory of Rape*, in *A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE*, *supra* note 66, at 92, 95; Patricia J. Falk, *Husbands Who Drug and Rape Their Wives: The Injustice of the Marital Exemption in Ohio's Sexual Offenses*, 36 WOMEN'S RTS. L. REP. 265, 286 (2015).

88. See, e.g., SCHULHOFER, *supra* note 67, at 138 ("One common instinct is that once we move beyond the realm of direct threats, notions of coercion become too elusive and contestable to support formal legal intervention."); WERTHEIMER, *supra* note 66, at 198–99 (discussing the challenge of line-drawing).

89. See, e.g., *Commonwealth v. Mlinarich*, 498 A.2d 395, 402 (Pa. Super. Ct. 1985) (making a slippery slope argument to explain the reluctance to extend rape convictions to nonforcible acts); Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 975 (2008) (arguing that prosecutors are reluctant to prosecute such crimes).

90. See, e.g., Dripps, *supra* note 67, at 1791 ("All human cooperation, sexual and otherwise, is caused by unequal, and from the individual standpoint, arbitrary, pressures. . . . [S]exual transactions are not unique in this regard; on the contrary, they are typical."); Mark Dsouza, *Undermining Prima Facie Consent in the Criminal Law*, 33 LAW & PHIL. 489, 520–21 (2014) (connecting the question of consent to contract law); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1093 (1986) (likening rape to the civil wrongs of extortion and fraud).

91. Margaret Radin describes this view as "universal commodification." See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1859–70 (1987); see also Laina Y. Bay-Cheng & Rebecca K. Eliseo-Arras, *The Making of Unwanted Sex: Gendered and Neoliberal Norms in College Women's Unwanted Sexual Experiences*, 45 J. SEX RES. 386, 395 (2008) (demonstrating the effects of the transactional view of consent on the shaping of sexual behavior). *But see* West, *supra* note 11, at 1449–51 (critiquing the view that sex is a commodity).

Consequently, sexual autonomy means freedom from illegitimate pressures to provide this particular service.”⁹²

Whether the transactional approach is a feasible way of expanding the scope of coercive means that fall within the definition of rape is debatable. Pursuing this line of argument ultimately leads Dripps to suggest utilizing the Commerce Clause to turn rape into a federal crime, thus imposing a more expansive definition of rape on the reluctant public.⁹³ #MeToo, however, suggests that, in its emphasis on transactional autonomy, the sex-qua-commodity approach disregards those cases in which assent results from the imposition of material constraints on sexual autonomy.⁹⁴ The proponents of the transactional approach often admit that there is no logical reason to restrict actionable coercion to physical force alone; still, efforts to reform the laws of sexual assault along the lines of the transactional approach often include this distinction.⁹⁵ Thus, as Professor Stephen Schulhofer admits, the proposal for reforming the Model Penal Code would not only refrain from proscribing a sexual relationship “between a wealthy older man and an economically vulnerable young mother, or between a popular athlete and an insecure student on campus,” but also stop short of condemning “the implicit pressure that can arise, even without direct or indirect threats, in interaction between a supervisor and a subordinate at work, between a public defender and the accused.”⁹⁶

Although such “implicit pressure” strikes #MeToo as a clear violation of the victim’s sexual autonomy, the proponents of the transactional approach remind us that, in nonsexual settings, such pressure is often believed to be beyond reproach, if not outright laudable.⁹⁷ Though we may think of it as inappropriate in the sexual domain, the transactional approach holds that this is only because we fail to recognize the value of sexuality as a commodity—as David Bryden writes, “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?”⁹⁸ Indeed, the transactional approach may take us as far as the paradigm of consent can take us. #MeToo, as we shall now see, stands for the realization that the transactional approach is simply not enough—that commodification leaves out too much of import and may altogether misconstrue the very things that make sexual autonomy worth protecting.

92. Dripps, *supra* note 67, at 1786 (footnote omitted).

93. Donald A. Dripps, *Why Rape Should Be a Federal Crime*, 60 WM. & MARY L. REV. 1685, 1689, 1725–26 (2019).

94. As Schulhofer puts it, “[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.” Schulhofer, *supra* note 69, at 345.

95. See, e.g., West, *supra* note 11, at 1450–51.

96. Schulhofer, *supra* note 69, at 346–47.

97. See, e.g., RICHARD A. POSNER, *SEX AND REASON* 384–95 (1992); Dripps, *supra* note 67, at 1791–92.

98. Bryden, *supra* note 71, at 445.

II. RETHINKING #MeToo's MESSAGE

#MeToo is often debated in the context of the legal discussion on sexual harassment and assault, a field of action that awarded to #MeToo some of its most tangible success but also made it the target of scathing criticism—including from commentators who share #MeToo's interest in promoting these legal causes but disagree with its ostensible disrespect to established legal categories, which are themselves the products of laborious legal battles.⁹⁹ In this Part, I argue that it would be more appropriate to understand those parts of #MeToo that seem to conflict with established legal norms as an invitation to adopt a new paradigm of sexual wrongdoing occupying a nonlegal space alongside existing paradigms.¹⁰⁰

Admittedly, it is almost impossible to assert #MeToo's message clearly. #MeToo can perhaps be best described as a highly effective shorthand for the variety of ways in which activists, journalists, public figures, and ordinary people have sought, since roughly the beginning of the twenty-first century, to share and propagate their stories of experiencing sexual wrongdoing and to protest public and legal disregard of these experiences.¹⁰¹ Although the contemporary appearance of #MeToo, hashtag and all, is inseparable from the advent of social media, as a comprehensive social movement, it is inseparable not only from its 2006 inception but also from influential public advocacy movements such as SlutWalk and the 2017 Women's March.¹⁰²

Since its inception, #MeToo often revolved around the power of words: their ability to harm and denigrate but also to heal, show solidarity, and bring about change. In 2006, activist Tarana Burke first used the phrase “me too” as a way to express solidarity with other survivors of sexual harassment and assault.¹⁰³ In 2011, Canadian activists Heather Jarvis and Sonya Barnett responded to Toronto police constable Michael Sanguinetti's comment that “women should avoid dressing like sluts in order not to be victimized” by turning to social media to organize a public protest under the heading *SlutWalk*, which quickly swelled into a global movement with reoccurring protests in more than seventy cities around the world.¹⁰⁴ The 2016 release of Mr. Trump's comments and his election despite

99. See, e.g., Schultz, *supra* note 13.

100. See, e.g., Rhode, *supra* note 2, at 380.

101. See, e.g., Zacharek et al., *supra* note 2 (“Actors and writers and journalists and dishwashers and fruit pickers alike: they'd had enough. What had manifested as shame exploded into outrage. Fear became fury. This was the great unleashing that turned the #MeToo hashtag into a rallying cry.”).

102. See, e.g., Ashwini Tambe, *Reckoning with the Silences of #MeToo*, 44 FEMINIST STUD. 197, 198 (2018).

103. See, e.g., Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>; Abby Ohlheiser, *The Woman Behind 'Me Too' Knew the Power of the Phrase When She Created It—10 Years Ago*, WASH. POST (Oct. 19, 2017, 8:38 AM), <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago>.

104. See, e.g., Tram Nguyen, *From SlutWalks to SuicideGirls: Feminist Resistance in the Third Wave and Postfeminist Era*, 41 WOMEN'S STUD. Q. 157, 159 (2013); Andrea O'Reilly, *Slut Pride: A Tribute to SlutWalk Toronto*, 38 FEMINIST STUD. 245, 245–46 (2012); Katha Pollitt, *Talk the Talk, Walk*

them led to the early 2017 Women’s March, which comprised some of the largest demonstrations in U.S. history and in which many participants wore “pussy hats” to protest his words.¹⁰⁵

#MeToo is also about calling attention to the ways in which power, influence, and fame facilitate sexual exploitation and the insistence that such misuse of power can no longer be tolerated. In 2014, multiple rape allegations against comedian Bill Cosby began circulating, culminating in his 2018 conviction on three counts of aggravated indecent assault.¹⁰⁶ In July 2016, Fox Chairman and CEO Roger Ailes was ousted from the network after his sexual misconduct there was exposed;¹⁰⁷ he was followed by host Bill O’Reilly in April 2017.¹⁰⁸ In 2016, former USA Gymnastics national team doctor Larry Nassar was accused of numerous sexual assaults.¹⁰⁹ He ultimately pleaded guilty, leading in 2018 to many of his victims giving public victim statements in court.¹¹⁰ The year 2017 also saw the viral circulation of software engineer Susan Fowler’s blog post in which she described the sexually hostile environment at Uber;¹¹¹ this ultimately led to the ouster of its CEO.¹¹² Then, in October 2017, the *New York Times* and the *New Yorker* published the pieces that exposed the sexual assault and harassment accusations against producer Harvey Weinstein.¹¹³

the SlutWalk, NATION (June 28, 2011), <https://www.thenation.com/article/archive/talk-talk-walk-slutwalk>.

105. See, e.g., Rhode, *supra* note 2; Anemona Hartocollis & Yamiche Alcindor, *Women’s March Highlights as Huge Crowds Protest Trump: ‘We’re Not Going Away,’* N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/us/womens-march.html>; Zacharek et al., *supra* note 2.

106. See, e.g., Carly Mallenbaum, Patrick Ryan & Maria Puente, *A Complete List of the 60 Bill Cosby Accusers and Their Reactions to His Prison Sentence*, USA TODAY (Sept. 26, 2018, 11:27 AM), <https://www.usatoday.com/story/life/people/2018/04/27/bill-cosby-full-list-accusers/555144002>.

107. See John Koblin, Emily Steel & Jim Rutenberg, *Roger Ailes Leaves Fox News, and Rupert Murdoch Steps In*, N.Y. TIMES (July 21, 2016), <https://www.nytimes.com/2016/07/22/business/media/roger-ailes-fox-news.html?module=Promotron®ion=Body&action=click&pgtype=article>.

108. See Emily Steel & Michael S. Schmidt, *Bill O’Reilly Is Forced Out at Fox News*, N.Y. TIMES (Apr. 19, 2017), <https://www.nytimes.com/2017/04/19/business/media/bill-oreilly-fox-news-allegations.html>.

109. See Brit McCandless, *On 60 Minutes, Former Gymnasts Allege Sexual Abuse*, CBS NEWS (Feb. 19, 2017), <https://www.cbsnews.com/news/on-60-minutes-former-gymnasts-allege-sexual-abuse> [<https://perma.cc/ER9B-59JU>].

110. See Scott Cacciola & Victor Mather, *Larry Nassar Sentencing: ‘I Just Signed Your Death Warrant,’* N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/sports/larry-nassar-sentencing.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>.

111. Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber*, SUSAN FOWLER: BLOG (Feb. 19, 2017), <https://www.susanfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber> [<https://perma.cc/72EW-6BTH>]; see also Maya Kosoff, *The Toxic Backlash of Silicon Valley’s Boys’ Club*, VANITY FAIR (Dec. 7, 2017), <https://www.vanityfair.com/news/2017/12/the-toxic-backlash-of-silicon-valleys-boys-club> (describing Fowler’s blog post and the subsequent events at Uber).

112. See Mike Isaac, *Uber Founder Travis Kalanick Resigns as C.E.O.*, N.Y. TIMES (June 21, 2017), <https://www.nytimes.com/2017/06/21/technology/uber-ceo-travis-kalanick.html>.

113. See Farrow, *supra* note 60; Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>.

Several days after the Weinstein story broke, actor Alyssa Milano shared a picture of a text on her Twitter account that read, “Me too. Suggested by a friend: ‘If all the women who have been sexually harassed or assaulted wrote “Me too.” as a status, we might give people a sense of the magnitude of the problem,’” adding “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.”¹¹⁴ Hundreds of thousands of people used the hashtag #MeToo to share their experiences, which ranged from rape to inappropriate sexual overtures, cat-calls, and other sexually offensive communications.¹¹⁵

Although the viral spread of Milano’s tweet gave a name and sense of direction to #MeToo, the movement continued to respond to sexual wrongdoing beyond expressions of solidarity through the sharing of private stories. As #MeToo’s growth was mediated by its appearance in more centralized forums of public media, its message remained focused on the behavior of powerful men, often categorized according to the industry and institutions in which they wielded their power.¹¹⁶ Special attention was given, perhaps naturally, by the media to its own housecleaning;¹¹⁷ particular attention was given to an online document that sought to share information about “Shitty Media Men,” with allegations ranging from aggressive flirting to harassment and sexual violence.¹¹⁸ Similar accusations likewise tended to cluster in different spheres, including academia,¹¹⁹

114. Milano, *supra* note 2.

115. See Akhtar, *supra* note 4; Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979>; Abby Ohlheiser, *#MeToo Made the Scale of Sexual Abuse Go Viral. But Is It Asking Too Much of Survivors?*, WASH. POST (Oct. 16, 2017, 5:27 PM), <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/16/metoo-made-the-scale-of-sexual-abuse-go-viral-but-is-it-asking-too-much-of-survivors>.

116. See Dan Corey, *A Growing List of Men Accused of Sexual Misconduct Since Weinstein*, NBC NEWS (Jan. 10, 2018, 4:34 PM), <https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546> [<https://perma.cc/VV67-REDY>].

117. See Jill Disis, *The Media Men Who Have Been Accused of Sexual Misconduct*, CNN BUS. (Nov. 30, 2017, 10:21 AM), <https://money.cnn.com/2017/11/29/media/media-men-accused-of-sexual-misconduct/index.html> [<https://perma.cc/5N64-HNJ2>]; Ellen Gabler, Jim Rutenberg, Michael M. Grynbaum & Rachel Abrams, *NBC Fires Matt Lauer, the Face of ‘Today.’* N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/business/media/nbc-matt-lauer.html>; Patrick Hipes, *NPR’s ‘On Point’ Radio Host Tom Ashbrook Fired*, DEADLINE (Feb. 14, 2018, 2:34 PM), <https://deadline.com/2018/02/tom-ashbrook-on-point-host-fired-npr-wbur-boston-university-1202288818> [<https://perma.cc/6VC4-J7JW>]; John Koblin & Michael M. Grynbaum, *Charlie Rose Fired by CBS and PBS After Harassment Allegations*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/business/media/charlie-rose-fired-cbs.html>; Mike Snider, *NPR News Chief Michael Oreskes Resigns After Sexual Harassment Accusations*, USA TODAY (Nov. 1, 2017, 5:10 PM), <https://www.usatoday.com/story/money/media/2017/11/01/npr-news-chief-michael-oreskes-resigns-after-sexual-harassment-accusations/821405001>.

118. See Jaclyn Peiser, *How a Crowdsourced List Set Off Months of #MeToo Debate*, N.Y. TIMES (Feb. 3, 2018), <https://www.nytimes.com/2018/02/03/business/media/media-men-list.html>; Doree Shafrir, *What to Do with “Shitty Media Men”?*, BUZZFEED NEWS (Oct. 12, 2017, 12:48 AM), <https://www.buzzfeednews.com/article/doree/what-to-do-with-shitty-media-men> [<https://perma.cc/GQ29-4Q49>].

119. See Lango Deen, *#Metoo: Impacts of Sexual Harassment in Science, Technology, Engineering, and Math (STEM) Academia*, WOMEN COLOR MAG., Spring 2018, at 36, 37–38; Nick Anderson, *Academia’s #MeToo Moment: Women Accuse Professors of Sexual Misconduct*, WASH. POST (May 10, 2018, 5:00 AM), https://www.washingtonpost.com/local/education/academias-metoo-moment-women-accuse-professors-of-sexual-misconduct/2018/05/10/474102de-2631-11e8-874b-d517e912f125_story.html; Vivian Wang,

advertising,¹²⁰ agriculture,¹²¹ entertainment,¹²² fashion,¹²³ the food industry,¹²⁴ government,¹²⁵ manufacturing,¹²⁶ the military,¹²⁷ religion,¹²⁸ sports,¹²⁹ and tech.¹³⁰

At Columbia, Three Women, 30 Years and a Pattern of Harassment, N.Y. TIMES (Dec. 8, 2017), <https://www.nytimes.com/2017/12/08/nyregion/columbia-university-sexual-harassment-three-decades.html>.

120. See Amelia Harmish, *Advertising’s #MeToo Movement Picks Up Speed*, REFINERY29 (Mar. 13, 2018, 5:35 PM), <https://www.refinery29.com/en-us/2018/03/193440/times-up-advertising-female-advertising-executives-sexual-harassment> [https://perma.cc/JA7H-SHZU].

121. See Editorial, *700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017, 11:11 AM), <https://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault>.

122. See Corey, *supra* note 116; Ryzik et al., *supra* note 60; Marlow Stern, ‘*Russell Simmons Is Just the Beginning*’: *Music Industry Braces for #MeToo Impact*, DAILY BEAST (Dec. 15, 2017, 4:35 PM), <https://www.thedailybeast.com/russell-simmons-is-just-the-beginning-music-industry-braces-for-metoo-impact> [https://perma.cc/26HT-93YN].

123. See Vanessa Friedman & Elizabeth Paton, ‘*Terry Richardson Is Just the Tip of the Iceberg*,’ N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/style/terry-richardson-sexual-harassment-fashion-photographers.html>; Emilia Petrarca, *Fashion’s #MeToo Movement Is Loudest on Instagram: Models Are Sharing Devastating Stories of Abuse in DMs.*, N.Y. MAG.: THE CUT (Apr. 5, 2018), <https://www.thecut.com/2018/04/fashions-me-too-movement-instagram-sexual-harassment.html>.

124. See Maura Judkis & Emily Heil, *Rape in the Storage Room. Groping at the Bar. Why Is the Restaurant Industry So Terrible for Women?*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/lifestyle/food/rape-in-the-storage-room-groping-at-the-bar-why-is-the-restaurant-industry-so-terrible-for-women/2017/11/17/54a1d0f2-c993-11e7-b0cf-7689a9f2d84e_story.html; Alejandra Reyes-Velarde & Ruben Vives, *In Nationwide Protest, McDonald’s Workers Allege Culture of Sexual Harassment Has Gone Unchecked for Years*, L.A. TIMES (Sept. 18, 2018, 4:50 PM), <https://www.latimes.com/local/lanow/la-me-ln-mcdonalds-strike-20180918-story.html>; Kim Severson, *After the Apologies, Restaurants Struggle to Change*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/dining/restaurants-sexual-harassment.html>.

125. See Dan Corey, *Here’s a List of Political Figures Accused of Sexual Misconduct*, NBC NEWS (Dec. 16, 2017, 5:08 PM), <https://www.nbcnews.com/storyline/sexual-misconduct/here-s-list-political-figures-accused-sexual-misconduct-n827821> [https://perma.cc/CPX2-PC9N]; Joel Ebert, *Sexual Harassment Troubles Mount in Statehouses Around the Country*, USA TODAY (Nov. 20, 2017, 5:31 PM), <https://www.usatoday.com/story/news/nation-now/2017/11/20/sexual-harassment-statehouses/882874001>; Greg Price, *Revenge of #MeToo? How Sexual Assault, Child Molestation Claims Destroyed Roy Moore in Alabama*, NEWSWEEK (Dec. 13, 2017, 8:13 AM), <https://www.newsweek.com/metoo-alabama-women-vote-jones-746591>; Matt Zapposky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html.

126. See Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html>.

127. See Dave Philipps, *Inquiry Opens into How a Network of Marines Shared Illicit Images of Female Peers*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/inquiry-opens-into-how-30000-marines-shared-illicit-images-of-female-peers.html>.

128. See Alex Johnson, *#MeToo Goes to Church: Southern Baptists Face a Reckoning over Treatment of Women*, NBC NEWS (June 8, 2018, 1:26 PM), <https://www.nbcnews.com/storyline/sexual-misconduct/metoo-goes-church-southern-baptists-face-reckoning-over-treatment-women-n880216> [https://perma.cc/D5U4-T5KQ].

129. See Juliet Macur, *The ‘Me Too’ Movement Inevitably Spills into Sports*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/sports/olympics/mckayla-maroney-me-too.html>.

130. See Alyssa Newcomb, *#MeToo: Sexual Harassment Rallying Cry Hits Silicon Valley*, NBC NEWS (Oct. 23, 2017, 3:30 PM), <https://www.nbcnews.com/tech/tech-news/metoo-sexual-harassment-rallying-cry-hits-silicon-valley-n813271> [https://perma.cc/4VRQ-YX4S].

Although an important faction of #MeToo is geared toward legal action—of particular import is the initiative aimed at facilitating legal redress in cases of sexual harassment¹³¹—much of #MeToo’s presence is in the form of public exposure and condemnation of sexual misdeeds. In most of these cases, #MeToo operates through the divestiture of power, demanding that a person who has used the power that he possesses to harm others sexually be stripped of this power.¹³² In Weinstein’s case, the power and influence that he wielded were inseparable from his use of it to gain sexual access to his victims and prevent them from pursuing legal redress; this made him the quintessential type of wrongdoer whom #MeToo seeks to dethrone.

Other cases, where power was less obvious or less clearly used, often triggered intense debates within the #MeToo movement. One such case was that of Senator Al Franken, who was forced by his Democratic colleagues to resign after he was accused of inappropriately touching and kissing women, mostly before he became an elected official.¹³³ Another case concerned comedian Aziz Ansari and a woman who used the alias “Grace.” As the article that published the story portrayed their interaction—and Ansari did not seek to put forward a competing narrative—the two went out on a date after meeting at a party, after which they returned to Ansari’s apartment, where he aggressively and repeatedly propositioned Grace for sexual contact.¹³⁴ Although Grace remained reluctant throughout, they each performed oral sex on the other.¹³⁵ After repelling additional sexual overtures, Grace voiced her discomfort with the situation more emphatically, and Ansari expressed his sympathy but returned to making advances shortly thereafter.¹³⁶ At that point Grace expressed her anger at him even more clearly and left the apartment.¹³⁷ Although there is no consensus on whether this story ought to have been included in the #MeToo narrative, most questions, as discussed below, converged on whether the incident involved legally condemnable sexual violence. Yet from the internal perspective of #MeToo, the real questions raised by this incident concerned the kind of power, if any, Ansari wielded over Grace and whether his misuse of it warranted his power being taken away from him. I return to this point after first exploring some of the external critiques that #MeToo provoked.

131. See Buckley, *supra* note 58.

132. See, e.g., Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37, 38 (arguing that #MeToo enforces an evolving social norm according to which sexual misconduct disqualifies a person from holding a position of power).

133. See Caygle, *supra* note 60; Jane Mayer, *The Case of Al Franken*, NEW YORKER (July 22, 2019), <https://www.newyorker.com/magazine/2019/07/29/the-case-of-al-franken> (discussing the regrets that some of the Democratic lawmakers had following the case).

134. Way, *supra* note 60.

135. *Id.*

136. *Id.*

137. *Id.*

A. OBJECTIONS TO #METOO

Objections to #MeToo appeared soon after the magnitude of its effects became evident. As #MeToo allegations produced more and more public and legal consequences, four criticisms have been often put forth in response. For some, #MeToo allegations are characteristically spurious, part of a massive witch hunt fueled by feminist misandry.¹³⁸ Others, who are only slightly less unsympathetic to the suffering that gives rise to #MeToo allegations, criticize it for seeking to rob interpersonal relations of a cherished degree of sexual promiscuity.¹³⁹ The most familiar formulation of this objection is the public letter responding to the rise of #MeToo from over one hundred notable French women, who bemoaned #MeToo’s attack on sexual freedom.¹⁴⁰ Other critics, genuinely sympathetic to the effort to right the wrongs of sexual misconduct, worry that #MeToo’s forceful ambition and broad reach are bound to provoke some sort of backlash and thus squander the opportunity to make lasting progress in the ongoing struggle against all forms of sexual wrongdoing.¹⁴¹

A fourth line of criticism that is most pertinent to the legal treatment of #MeToo protests its failure to conform to the established paradigms of sexual wrongdoing and its disregard of legal factfinding procedures.¹⁴² Along with being concerned about due process, some are dismayed by #MeToo’s ostensible failure to uphold the distinctions between criminal and noncriminal behavior and between different forms of criminal wrongdoing.¹⁴³ In this vein, author Laura Kipnis tweeted that “[a] guy sticking his hand up an unwilling woman’s skirt in a bar is an asshole, not a predator. Rhetorical escalation is not exactly what’s needed at the moment. Nor failed

138. See Gwilym Mumford, *Michael Haneke: #MeToo Has Led to a Witch Hunt ‘Coloured by a Hatred of Men,’* GUARDIAN (Feb. 12, 2018, 6:28 AM), <https://www.theguardian.com/film/2018/feb/12/michael-haneke-metoo-witch-hunt-coloured-hatred-men>; Alexandra Pollard, *Terry Gilliam: ‘I’m Tired of White Men Being Blamed for Everything Wrong with the World,’* INDEPENDENT (Jan. 4, 2020, 9:03 AM), <https://www.independent.co.uk/arts-entertainment/films/features/terry-gilliam-interview-harvey-weinstein-victims-metoo-race-a9269136.html>.

139. See, e.g., Sarah K. Burgess, *Between the Desire for Law and the Law of Desire: #MeToo and the Cost of Telling the Truth Today*, 51 PHIL. & RHETORIC 342, 345 (2018) (discussing this argument as laid out in a letter published in *Le Monde* in January 2018).

140. See Valeriya Safronova, *Catherine Deneuve and Others Denounce the #MeToo Movement*, N.Y. TIMES (Jan. 9, 2018), <https://www.nytimes.com/2018/01/09/movies/catherine-deneuve-and-others-denounce-the-metoo-movement.html>.

141. See, e.g., Nellie Bowles, *A Reckoning on Sexual Misconduct? Absolutely. But How Harsh, Women Ask.*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/business/sexual-harassment-debates.html>; Caitlin Flanagan, *The Conversation #MeToo Needs to Have*, ATLANTIC (Jan. 29, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-right-conversation-for-metoo/551732>.

142. See, e.g., Burgess, *supra* note 139, at 344.

143. See, e.g., Tuerkheimer, *supra* note 14, at 1191 (“Without upgrading the complaint channels that activate the law of sexual misconduct, most reporting will continue to bypass formal mechanisms of process and accountability, to the detriment of both accusers and accused.” (footnote omitted)); Daphne Merkin, *Opinion, Publicly, We Say #MeToo. Privately, We Have Misgivings.*, N.Y. TIMES (Jan. 5, 2018), <https://www.nytimes.com/2018/01/05/opinion/golden-globes-metoo.html> (“In our current climate, to be accused is to be convicted. Due process is nowhere to be found.”).

distinction making.”¹⁴⁴ Other prominent figures likewise encourage more caution and nuance in the distinction between jerks and those who deserve the kind of condemnation that #MeToo allegations involve.¹⁴⁵ Some of these worries are anchored in strategic considerations, with people worrying about #MeToo’s momentum unless it keeps its focus on traditional forms of wrongdoing.¹⁴⁶ As Professor Deborah Rhode writes of the treatment of Al Franken, for instance, “if we lose the capacity to draw those distinctions, we risk alienating the constituency that needs convincing. . . . [T]he rage that is driving #MeToo, if unchecked, could undermine it as well.”¹⁴⁷

For others sharing this line of argument, #MeToo’s insufficiently attentive treatment of the paradigms of consent and sexual discrimination jeopardizes the hard-won progress that these paradigms represent and risks derailing the ongoing struggle against sexual violence and harassment. Discussing the SlutWalk movement, Professor Deborah Tuerkheimer laments its underdeveloped view of consent and cautioned against treating it in mostly negative terms.¹⁴⁸ In a somewhat similar fashion, columnist Bari Weiss warns that the condemnatory reactions to Aziz Ansari’s behavior evince “new yet deeply retrograde ideas about what constitutes consent—and what constitutes sexual violence.”¹⁴⁹ “The insidious attempt by some women to criminalize awkward, gross and entitled sex,” Weiss argues, “takes women back to the days of smelling salts and fainting couches.”¹⁵⁰

A different concern for #MeToo’s legal integrity, still within the same vein of criticism, regards its treatment of sexual harassment.¹⁵¹ As Professor Schultz observes, #MeToo tends to conflate sexually motivated misconduct with workplace sexual harassment in a way that risks drowning out the essential connection between harassment and discrimination.¹⁵² Although #MeToo frequently uses the term “sexual harassment” and often deals with forms of behavior that would constitute Title VII harassment, Schultz notes that the movement exhibits a clear focus on “specifically sexual forms of harassment and abuse, including sexual assault, and not on broader patterns of sexism and discrimination.”¹⁵³ This almost

144. Laura Kipnis (@laurakipnis), TWITTER (Dec. 21, 2017, 12:30 PM), <https://twitter.com/laurakipnis/status/943896465943953408?lang=en> [<https://perma.cc/V754-MWEY>]. Although Kipnis later walked back her substantive contention, she doubled down on the importance of line-drawing. See Laura Kipnis, *Has #MeToo Gone Too Far, or Not Far Enough? The Answer Is Both*, GUARDIAN (Jan. 13, 2018, 2:00 AM) [hereinafter Kipnis, *Has #MeToo Gone Too Far, or Not Far Enough?*], <https://www.theguardian.com/commentisfree/2018/jan/13/has-me-too-catherine-deneuve-laura-kipnis>.

145. See, e.g., Bowles, *supra* note 141.

146. See, e.g., Flanagan, *supra* note 141.

147. Rhode, *supra* note 2, at 414.

148. Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1456, 1476 (2014).

149. See Weiss, *supra* note 13.

150. *Id.*

151. See, e.g., Schultz, *Open Statement on Sexual Harassment*, *supra* note 49, at 17–18.

152. See Schultz, *supra* note 13, at 31–32.

153. *Id.* at 31; accord Schultz, *Open Statement on Sexual Harassment*, *supra* note 49, at 20 (“Recent reports have focused mostly on unwanted sexual advances, including serious sexual assaults.”).

exclusive emphasis on sexually motivated forms of harassment, Schultz warns, “likens workplace sexual harassment to sexual assault and rape—not to other forms of sex-based harassment and discrimination, as the legal definition does.”¹⁵⁴ Despite the decades-long predominance of the discrimination paradigm in the legal arena, Schultz cautions that most #MeToo allegations and media outlets that echo them seem to adhere to a narrower definition of harassment centered around “unwanted sexual overtures or other specifically sexual forms of abuse.”¹⁵⁵ As Schultz warns, “This purely sexual lens represents a step backward, not forward.”¹⁵⁶

B. #METOO AND THE MUTUALITY PARADIGM

The concerns shared by those who voice criticisms of the fourth kind, noting the frequent misalignment between #MeToo’s messages and existing legal norms, should indeed worry people who care about the broader struggle against all forms of sexual misconduct—but only if we understand #MeToo to be offering a *competing* account of sexual assault and harassment.

Against these concerns, I argue below that putting #MeToo into a broader theoretical context can help us see it as an attempt to *complement* established legal categories by shedding light on a form of wrongdoing that exists in a normative void currently overshadowed by sexual assault and harassment. From this viewpoint, #MeToo, rather than subverting or diluting the discrimination and consent paradigms, sketches a new wrong, still unnamed and with its theoretical basis underdeveloped.¹⁵⁷ To put it in actor Salma Hayek’s words, “We are finally becoming conscious of a vice that has been socially accepted and has insulted and humiliated millions of girls like me, for in every woman there is a girl.”¹⁵⁸ Furthermore, against the entrenched legal paradigms of discrimination and consent, #MeToo’s attempt to articulate a new form of sexual wrongdoing should be understood not necessarily in legal terms but rather as a primordial effort to flesh out the contours of a pervasive yet condemnable form of behavior and explain why it is intensely objectionable even if it does not merit legal condemnation.¹⁵⁹

154. Schultz, *supra* note 13, at 32.

155. *Id.* at 31; accord Schultz, *Open Statement on Sexual Harassment*, *supra* note 49, at 22 (“Harassment policies, trainings, and reforms should cover all conduct that demeans, intimidates, excludes, undermines, or otherwise treats people differently because of sex, rather than focusing narrowly on unwanted sexual advances and other sexual behaviors.”).

156. Schultz, *supra* note 13.

157. See, e.g., Tuerkheimer, *supra* note 14, at 1181–82 (“By sharing their accounts of abuse, women lay bare not just the ubiquity of conduct already defined as sexual violation, but also the violative nature of behaviors not yet perceived as problematic.”).

158. Salma Hayek, Opinion, *Salma Hayek: Harvey Weinstein Is My Monster Too*, N.Y. TIMES (Dec. 13, 2017), <https://www.nytimes.com/2017/12/13/opinion/salma-hayek-weinstein.html?searchResultPosition=2>.

159. For the pervasiveness of various forms of undesired sexual contact, see generally Sarah A. Vannier & Lucia F. O’Sullivan, *Sex Without Desire: Characteristics of Occasions of Sexual Compliance in Young Adults’ Committed Relationships*, 47 J. SEX RES. 429 (2010).

To view #MeToo in this light is to see its message as the direct continuation of the works of feminist scholars who have long sought to turn our attention to the limits of the consent paradigm, particularly in its transactional interpretation, and to its disregard of forms of behavior that are injurious to sexual autonomy and well-being. Consent, they argue, takes its meaning from a world in which individuals stand opposite one another, doing things to each other and taking things away from the other;¹⁶⁰ they insist that that world is not the world of human sexuality.¹⁶¹ “Sex,” they remind us, “is something you do together, not something you do to someone else.”¹⁶² These ideas, I argue, implicitly and explicitly animate much of #MeToo’s attempt to reshape the meaning of sexual wrongdoing. More importantly, it provides #MeToo with an answer to the often-overlooked question of *why* sexual degradation is wrong.

The roots of the mutuality approach can be found in the early days of the dispute over the fundamental meaning of rape. Although the argument was ultimately settled in favor of the consent paradigm, several prominent feminist authors insisted in the 1970s that the idea of consent disregards pervasive power inequalities and therefore licenses compulsory sexual relations as long as they do not involve overt physical coercion.¹⁶³ What nevertheless distinguishes the more immediate origins of #MeToo from this earlier stance is the location of the disagreement: although the early generation of writers opposed the reliance on consent in the legal definition of rape and sought to substitute it with differing constructions of rape’s wrongness, later authors mostly accepted the consent paradigm as their point of departure but argued that it fails to cover all forms of sexual wrongdoing, specifically injurious forms of consented-to sex.¹⁶⁴

One of the first to articulate this new approach to sexual wrongdoing was Professor Martha Chamallas, who described it as an egalitarian stance that can be set apart from the liberal view on consent that preceded it. Unlike the liberal approach, Chamallas suggests that “[t]he paramount goal of the egalitarian view is to afford women the power to form and maintain noncoercive sexual relationships, both within and outside of marriage.”¹⁶⁵ Coercion, in this emerging view, is not condemned solely for its propensity to vitiate consent but also more broadly as an attribute of injurious, exploitative sexual relations.¹⁶⁶

160. See, e.g., Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL’Y REV. 431, 441 (2016) (“Like one wing flapping, consent analysis focuses endlessly on [the passive recipient]—what she has in her mind or lets someone ‘do to’ her body.”).

161. See, e.g., Gardner, *supra* note 10, at 1, 17.

162. Tuerkheimer, *supra* note 148, at 1476 (multiple capitalizations altered).

163. See, e.g., MACKINNON, *supra* note 75, at 172–74, 245 (discussing the inadequacy and redundancy of the liberal paradigm of consent). For a general overview of this stance, see SCHULHOFER, *supra* note 67, at 31–32.

164. See, e.g., Tuerkheimer, *supra* note 148, at 1490; Robin West, *Law’s Emotions*, 19 RICH. J.L. & PUB. INT. 339, 349 (2016); West, *supra* note 11.

165. Chamallas, *supra* note 64, at 783.

166. See, e.g., *id.* at 783–84.

The egalitarian approach, Chamallas admits, represents a more openly moral and political endeavor to protect a positive view of sexuality, certainly so when compared to the liberal equation of consent with a purely formal notion of agency.¹⁶⁷ For Chamallas, this new direction views *mutuality* as the minimal condition of acceptable sexuality, distinguishing benign and exploitative sexual relations.¹⁶⁸ Mutually desirable sexual relations, Chamallas argues, are those in which “both parties have as their objective only sexual pleasure or emotional intimacy.”¹⁶⁹ Positive sexual relations in this light are “a reciprocal activity in which each party’s gratification is highly dependent on the other’s response.”¹⁷⁰ This meaning of mutuality is not some lofty sexual ideal but is—from this viewpoint—the real meaning of *wanted* sex, of which consent is but a poor imitation. As MacKinnon reminds us, “In social reality, the crucible of meaning, sex that is actually desired or wanted or welcomed is never termed consensual.”¹⁷¹ However, MacKinnon adds, “It does not need to be; its mutuality is written all over it in enthusiasm. Consenting is not what women do when they want to be having sex. Sex women want is never described by them or anyone else as consensual.”¹⁷² Accordingly, wrongful sexual behavior is premised in this paradigm on the conditions that negate mutuality, meaning those that transform sex into *instrumental* conduct: “Sex used for more external purposes, such as financial gain, prestige, or power, is regarded as exploitive and immoral, regardless of whether the parties have engaged voluntarily in the encounter.”¹⁷³

Legal scholar Susan Estrich suggests a similar approach with regard to sexual harassment and the “unwelcomeness requirement” that it involves.¹⁷⁴ For Estrich, “Unwelcomeness has emerged as the doctrinal stepchild of the rape standards of consent and resistance, and shares virtually all of their problems.”¹⁷⁵ Like consent, Estrich suggests, the unwelcomeness doctrine acts not as a rule to protect sexual autonomy but as a way of safeguarding a broad category of “typical and acceptable” sexual relations in the workplace.¹⁷⁶ She argues that it would be better to accept that “there is no such thing as truly ‘welcome’ sex between a male boss and a female employee who needs her job.”¹⁷⁷ “[C]an free will exist in the face of coercion?” Estrich asks.¹⁷⁸ “With a gun to my head, would you even ask about philanthropy?”¹⁷⁹

167. *See id.*

168. *See id.* at 784, 815.

169. *Id.* at 784.

170. *Id.* at 840; *see also* Gardner, *supra* note 8, at 59 (noting that reciprocity is necessary for enjoyment).

171. MacKinnon, *supra* note 160, at 450.

172. *Id.*

173. Chamallas, *supra* note 64, at 784.

174. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 830 (1991).

175. *Id.* at 827.

176. *Id.* at 827, 831.

177. *Id.* at 831.

178. *Id.*

179. *Id.*

One of the most influential and consistent advocates of the mutuality approach has been Professor Robin West, who has dug deeper than anyone else into the meaning and nature of consented-to-yet-harmful sexual relations. As a formal legal standard, West argues, consented-to sex is far from being synonymous with wanted sex, and unwanted sex can pose great harm to the one undergoing it even when it is legally consensual.¹⁸⁰ “[T]he party who does not physically desire, does not emotionally welcome, and does not take pleasure in sex,” West writes, “has sometimes been harmed by that sex by virtue of its unwelcomeness,” and “the harm is serious enough that we need to attend to it.”¹⁸¹ Aside from abiding by the formal condition of consent, West avers that sexual contact must also be

mutually welcomed for it to be moral, for it to be ethical, for it to be truly in your interest, for it to be aligned with your own dignity, for it not to sap your strength, for it to be consistent with your own worth, and yes, for it to bolster rather than undermine your social and political equality.¹⁸²

Not all undesired sexual relations are of this harmful nature.¹⁸³ As West acknowledges, it is not uncommon for people to accept or even welcome sexual contact that they do not genuinely desire without it being harmful to them in any way, and some of it certainly coincides with their sexual well-being.¹⁸⁴ West writes,

A woman might, on occasion, rather watch television, read, or sleep but agree to sex she doesn’t particularly desire, because she loves her partner, because she’s accustomed to trade-offs of this sort that benefit both, because she doesn’t feel it as a burden, because she knows that her lack of desire may give way to desire, and so on.¹⁸⁵

Such acquiescence is hardly condemnable, “[b]ut that some undesired sex is harmless hardly means that it all is.”¹⁸⁶

For West, what singles out certain forms of undesired sexual relations as deserving condemnation is the harm that they cause to the agential integrity of the one conceding to them. As West suggests, the experience of unwanted sexual contact, even when it is not physically coerced in a consent-vitiating way, threatens to alienate those subjected to it from their body and social surroundings.¹⁸⁷

180. Robin West, *Consensual Sexual Dysphoria: A Challenge for Campus Life*, 66 J. LEGAL EDUC. 804, 808 (2017).

181. *Id.* at 806.

182. *Id.* at 808.

183. See, e.g., Charlene L. Muehlenhard & Zoë D. Peterson, *Wanting and Not Wanting Sex: The Missing Discourse of Ambivalence*, 15 FEMINISM & PSYCHOL. 15, 17 (2005) (discussing the multiple dimensions along which sex can be wanted or unwanted).

184. See Robin West, *Sex, Law, and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 221, 238 (Franklin G. Miller & Alan Wertheimer eds., 2010).

185. *Id.*

186. *Id.*

187. See West, *supra* note 180.

Being in a position in which one is contemplating a sexual interaction in which she is strongly disinterested drives a wedge between the rational self that prefers the sex to an even less desirable outcome and the hedonic part of oneself that is motivated by emotions and personal desire.¹⁸⁸ The experience of undesired sex is that of the triumph of the rational over the personal: “The pained, subjective, feeling self, in other words, gets the blunt end of the stick.”¹⁸⁹

This form of alienation from one’s hedonic self, which West refers to as “sexual dysphoria,” is a denial of the special place of sexuality in our emotional lives and in our image of ourselves as individuals.¹⁹⁰ “It is,” West writes, “an alienation from one’s own physical and sexual desires, pains, and pleasures as a distinctive guide to one’s own sexual self-interest and well-being.”¹⁹¹ The harms of this denial are not only emotional or psychological but also political, shutting down a woman’s “capacity to imagine more meaningful forms [of] intimacy or work or social intercourse” and reducing her “instincts and desire for social, sexual, and commercial connection with others, to a series of permissions borne of precious little but shrunken visions, sour grapes, and material necessity.”¹⁹²

In the face of these damages, West asserts that “we may need to cease thinking in terms of consent as the defining line between not only rape and sex, but also between good and bad noncriminal sex.”¹⁹³ Doing so involves, she suggests, asking “which of our sexual practices are legitimate means of obtaining sex and which are not.”¹⁹⁴ Several authors have taken up this challenge, describing various ways of marking the line between acceptable and condemnable ways of obtaining sex.¹⁹⁵ #MeToo, I believe, should be seen, at least in part, as an attempt to answer this very question.

188. See West, *supra* note 184, at 237–38.

189. West, *supra* note 180, at 811; see also JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 63 (2006) (arguing that sexual harms “cut women off from themselves; make it impossible for them to align desire, pleasure, and action; unmoor them in liberal individualism”).

190. West, *supra* note 180, at 812 (“[A] woman who consents to sex she does not want and from which she derives no pleasure is willing away her self-sovereignty in a profoundly physical and illiberal sense: She is committing her body to the satiation of the desires and the fulfillment of the preferences of someone else.”).

191. *Id.* at 811.

192. West, *supra* note 164, at 350.

193. West, *supra* note 11.

194. *Id.*

195. For Professor Michelle Anderson, the harm brought about by sexual contact that is not mutually desirable should be translated into the requirement that the sex be preceded not only by formal consent but also by a form of negotiation between the parties that gives equal voice to their reciprocal desires and interests. See Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1421–27 (2005). For a similar argument, see Ian Ayres & Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599, 601–03 (2005). Forming her argument in a similar fashion, Professor Kimberly Kessler Ferzan puts forward a theory of sexual estoppel, suggesting that certain forms of illicit pressure should prevent the wrongdoer from engaging in sexual contact with an individual who consents as a result of such pressure even when it does not formally vitiate the consent. See Ferzan, *supra* note 78, at 1005–07; see also DIANA E. H. RUSSELL, *RAPE IN MARRIAGE* 47–49 (2d ed. 1990) (discussing the tension between the legal definition of rape and the experience of unwanted sex); SCHULHOFER, *supra* note 67, at 52

C. BEYOND ESTABLISHED DEFINITIONS

Although these proposals and others like them have yet to alter fundamentally the legal meaning of sexual wrongdoing, which is still very much tilted toward the consent paradigm, #MeToo's message often makes more sense when viewed as the recognition of a new form of sexual wrongdoing, best described along the lines suggested by the mutuality paradigm. As feminist author Jessica Valenti tweeted, "part of what women are saying right now is that what the culture considers 'normal' sexual encounters are not working for us, and oftentimes [are] harmful."¹⁹⁶ Or, as journalist Kat Stoeffel more pointedly writes, "Now women are speaking up about situations that fall outside the conventional definition of rape but nonetheless reflect a gender power dynamic that leaves women sexually vulnerable."¹⁹⁷ Stoeffel adds, "[I]t seems like every time someone explains that women and men do not always meet for sex on equal footing, the conversation collapses into a black-and-white debate of Was It Rape . . ."¹⁹⁸ Indeed, more often than not, #MeToo's efforts to outline the new normal are not an attempt to redefine the meaning of sexual assault or harassment but to acknowledge their limited reach and settle a new, currently extralegal space between the extant norms.¹⁹⁹

Rather than object to #MeToo's disregard for the important role of the consent and discrimination paradigms or view it as an attempt to alter them fundamentally, I argue that we would do better to locate #MeToo's message in the underdeveloped normative landscape that exists outside these paradigms, animated by the idea of mutuality. Criticizing #MeToo for lumping together different forms of misconduct would be, in this sense, beside the point—because central to its message is the insistence that despite their belonging to different legal categories, "romantic overtures by bosses, catcalls from strangers and sexual assault" pose a common threat.²⁰⁰ #MeToo is not, in this sense, driven by the desire to match an appropriate penal response to deserved and recognized legal wrongs but rather by

("Women sometimes submit to sexual encounters because of subtle mixtures of physical intimidation, unstated threats, psychological demands, and the pressures of male status and authority."); Anderson, *supra* note 73, at 64–66 (arguing that "allow[ing] acquiescence to serve as consent would be a very troubling standard"); Estrich, *supra* note 90 (arguing for a standard that "prohibit[s] claims and threats to secure sex that would be prohibited by extortion law and fraud or false pretenses law"); West, *supra* note 184 (arguing that coerced or "undesired" sex can create harm).

196. Caitlin Flanagan, *The Humiliation of Aziz Ansari*, ATLANTIC (Jan. 14, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541> (quoting Valenti's now-deleted tweet); Rebecca Ruiz, *Talking About #MeToo on Social Media Is Hard, but We Shouldn't Stop Trying*, MASHABLE (Jan. 16, 2018), <https://mashable.com/2018/01/16/aziz-ansari-me-too-social-media> [<https://perma.cc/RW6U-6CW8>] (same).

197. Stoeffel, *supra* note 5.

198. *Id.*

199. See, e.g., Green, *supra* note 26, at 154; Murray, *supra* note 23; Joan C. Williams, Jodi Short, Margot Brooks, Hilary Hardcastle, Tiffanie Ellis & Rayna Saron, *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139, 152.

200. Ohlheiser, *supra* note 115; see Akhtar, *supra* note 4 (noting that survivors' experiences "range from catcalling and groping to assault and rape").

the insistence that unwanted invasions into another’s sexual domain are unacceptable regardless of whether they fit into an existing legal category.²⁰¹

Key to this notion is the idea, central to the #MeToo movement, that sexual wrongdoing exists on a continuum of wrongful invasions, some coinciding with the wrongs of sexual assault and harassment and some existing outside of them.²⁰² For Burke, “Sexual violence happens on a spectrum so accountability has to happen on a spectrum.”²⁰³ Some people say, Burke notes, that “[t]here’s sexual harassment over here and you shouldn’t conflate it with rape’ . . . Which is true; those are two very different things.”²⁰⁴ However, she insists that these offenses are “on the same spectrum,” adding that “[s]exual harassment is like the gateway drug. It’s the entry point. ‘Nothing happens, so let’s go a little bit further.’”²⁰⁵ Similarly, Milano insists that “[t]here are different stages of cancer. Some more treatable than others. But it’s still cancer.”²⁰⁶ “Sexual harassment, misconduct, assault and violence is a systemic disease. The tumor is being cut out right now with no anesthesia. Please send flowers. #MeToo.”²⁰⁷ Voicing the same sentiment, Senator Kirsten Gillibrand remarked that “[w]hen we start having to talk about the differences between sexual assault and sexual harassment and unwanted groping, we are having the wrong conversation,” adding that “[w]e need to draw a line in the sand and say none of it is okay, none of it is acceptable.”²⁰⁸ Actor Amber Tamblyn uses similar words, writing that “[t]he only way to enforce seismic, cultural change in the way men relate to women is to draw a line deep in the sand and say: This is what we will no longer tolerate.”²⁰⁹ She adds: “The punishment for harassment is you disappear. The punishment for rape is you disappear. The punishment for masturbation in front of us is you disappear. The punishment for coercion is you disappear.”²¹⁰

Tying these views together is a conception of sexual wrongdoing qua degradation, analogous to the mutuality paradigm. Defending the decision to clump together in the now-offline “Shitty Media Men” database allegations that range from “‘flirting’ and ‘weird lunch dates’ to accusations of rape, assault, stalking,

201. See, e.g., Tuerkheimer, *supra* note 14, at 1182; MacKinnon, *supra* note 22.

202. See, e.g., Hemel & Lund, *supra* note 21, at 1596.

203. Emma Brockes, *#MeToo Founder Tarana Burke: ‘You Have to Use Your Privilege to Serve Other People,’* GUARDIAN (Jan. 15, 2018, 12:57 AM), <https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault> (quoting Tarana Burke).

204. *Id.* (quoting Tarana Burke).

205. *Id.* (quoting Tarana Burke).

206. Alyssa Milano (@Alyssa_Milano), TWITTER (Dec. 15, 2017, 8:23 PM), https://twitter.com/Alyssa_Milano/status/941841252516900864 [<https://perma.cc/C2KY-UQ3U>].

207. Alyssa Milano (@Alyssa_Milano), TWITTER (Dec. 15, 2017, 8:26 PM), https://twitter.com/Alyssa_Milano/status/941842010540982273 [<https://perma.cc/D33E-MUUF>] (emoji omitted).

208. Ruth Marcus, Opinion, *Was Al Franken’s Punishment Fair?*, WASH. POST (Dec. 7, 2017), https://www.washingtonpost.com/opinions/was-al-frankens-punishment-fair/2017/12/07/6296f580-db99-11e7-a841-2066faf731ef_story.html (quoting Senator Kirsten Gillibrand).

209. Amber Tamblyn, Opinion, *Amber Tamblyn: I’m Not Ready for the Redemption of Men*, N.Y. TIMES (Nov. 30, 2017), <https://www.nytimes.com/2017/11/30/opinion/im-not-ready-for-the-redemption-of-men.html>.

210. *Id.*

harassment, and physical violence,” author Doree Shafrir argues that “[w]hat these things have in common is that they remind women, particularly vulnerable women, that they are not in power.”²¹¹ Likewise, Tuerkheimer suggests that #MeToo’s panoramic view of wrongdoing “does not collapse categories of misconduct, nor does it equate their varying levels of harm and culpability. What it does is connect the sexist, often misogynistic, strands that run through sexual violation from its most to its least extreme.”²¹²

To say that the notion of sexual wrongdoing is no longer dominated by the extant paradigms of consent and discrimination is to fundamentally alter the normative landscape in which people interact. Indeed, as comedian Lindy West writes, “It may feel like the rules shifted overnight, and what your dad called the thrill of the chase is now what some people are calling assault.”²¹³ Although this change has been long in the making, its magnitude inevitably raises the question of whether condemnation of this new-found wrong should take legal form. There can be many reasons for and against the use of criminal justice,²¹⁴ but the #MeToo movement, for the time being, seems to focus on the precursory task of naming this wrong and shaming those who are guilty of it without going as far as calling for the assignment of legal blame.²¹⁵

This is not without good reason; indeed, most proponents of the mutuality approach consider nonmutual sex to be a *moral* rather than a criminal wrong.²¹⁶ One reason for this preference is that the means that are used to obtain sex that is undesired but not formally coerced tend to be less tangible than the forms of coercion involved with rape or the observable behavior that constitutes harassment.²¹⁷ A second reason is that, in contrast to the relatively limited arsenal of coercion, degradation is more open-ended, eluding the kind of precise definition that is required by criminal statutes.²¹⁸ Even in the case of sexual assault, legal decisionmakers are often already reluctant to go beyond incidents that involve the use or threat of physical

211. Shafrir, *supra* note 118.

212. Tuerkheimer, *supra* note 14, at 1182.

213. West, *supra* note 6.

214. Whether to use the criminal justice system is not always an obvious decision even with regard to sexual assault. See Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 235 (2015). But see Kari Hong, *A New Mens Rea for Rape: More Convictions and Less Punishment*, 55 AM. CRIM. L. REV. 259, 260–61 (2018) (arguing in favor of holding a larger number of offenders accountable).

215. See, e.g., Burgess, *supra* note 139, at 346 (“For advocates of the movement, #MeToo operates in extralegal spaces to define and negotiate what the laws of desire should be.”).

216. See, e.g., RUSSELL, *supra* note 195; Anderson, *supra* note 73, at 64–65; Estrich, *supra* note 90; West, *supra* note 184.

217. West therefore suggests that only undesired sex that is “objectively (and convincingly) harmful . . . should be the predicate for legal recourse.” Robin L. West, *Law’s Nobility*, 17 YALE J.L. & FEMINISM 385, 456 (2005).

218. See, e.g., Chamallas, *supra* note 64, at 823 (“[I]t is difficult to draft a precise statute that captures the many unacceptable forms of economic and psychological coercion without prohibiting what many perceive as less culpable conduct.”).

force.²¹⁹ Even where legislative reforms have led to the criminalization of nonphysical coercion, criminal punishment has been rare.²²⁰

A third reason is that, beyond the difficulty of clearly defining and demonstrating sexual wrongdoing that does not involve a clear violation of the scope of the victim’s consent, criminal law is often believed to be an inappropriate way of condemning such transgressions.²²¹ For some, despite the gravity of criminal sanctions, criminal law must strive to advance the protection of sexual autonomy as a way of provoking the kind of societal change that would give effect to unutilized prohibitions.²²² Still, others note that reforms along these lines risk assigning criminal blame to people for actions that are commonly believed not to be blameworthy.²²³ Attempting to affect entrenched norms through criminal reform is often ineffectual because new laws are interpreted in conformance with preexisting social conventions.²²⁴ As a result, the human costs of educating the public through criminal law are too often disproportionately borne by those “least like the law’s promulgators,” risking the exacerbation of an already biased and excessively punitive criminal law system.²²⁵

#MeToo has had a profound impact on this debate, both by changing the public opinions that charge the debate with meaning and by preparing the ground for impactful legal proceedings.²²⁶ But aside from a handful of celebrated cases, many voices within the #MeToo movement have distanced themselves from the legal debate, focusing instead on affecting society first and only then, if ever,

219. See, e.g., SCHULHOFER, *supra* note 67, at 9–11, 104–05; Chamallas, *supra* note 64, at 823; Dripps, *supra* note 89; Angela P. Harris, *Forcible Rape, Date Rape, and Communicative Sexuality: A Legal Perspective*, in DATE RAPE: FEMINISM, PHILOSOPHY, AND THE LAW 51, 56–59 (Leslie Francis ed., 1996).

220. See, e.g., Alena Allen, *Rape Messaging*, 87 FORDHAM L. REV. 1033, 1036 (2018); Anderson, *supra* note 73, at 51; Hong, *supra* note 214, at 259; Sheley, *supra* note 16, at 459–65.

221. See, e.g., SUSAN ESTRICH, REAL RAPE 101–03 (1987); Chamallas, *supra* note 64, at 830.

222. See, e.g., Dripps, *supra* note 93, at 1690 (“Effectively enforcing even the narrow definition of rape as penetration by forcible compulsion requires a legal, and thus social, battle of attrition.”); *id.* at 1691; Estrich, *supra* note 174, at 839 (“[T]he legal rule should say to all women, even if it cannot make good its assurance in every case, that they are protected from sexual blackmail.”); *id.* at 841. This was also the approach of a preliminary draft of the *Model Penal Code: Sexual Assault and Related Offenses*, although this view was met with significant criticism and was ultimately rejected. See STEPHEN J. SCHULHOFER & ERIN MURPHY, MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES: REPORTERS’ MEMORANDUM 15 (Tentative Draft No. 2, 2016).

223. See, e.g., Douglas N. Husak & George C. Thomas III, *Date Rape, Social Convention, and Reasonable Mistakes*, 11 LAW & PHIL. 95, 113–14 (1992).

224. See, e.g., Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 623 (2000); Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2121–22 (1996).

225. Kevin Cole, *Better Sex Through Criminal Law: Proxy Crimes, Covert Negligence, and Other Difficulties of “Affirmative Consent” in the ALI’s Draft Sexual Assault Provisions*, 53 SAN DIEGO L. REV. 507, 530 (2016).

226. Harvey Weinstein’s case seems most consequential, leading to his 2020 conviction for rape and sexual abuse. See Colin Dwyer & Vanessa Romo, *Harvey Weinstein Found Guilty of Rape, Sexual Abuse in Mixed Verdict*, NPR (Feb. 24, 2020, 12:10 PM), <https://www.npr.org/2020/02/24/805258433/harvey-weinstein-found-guilty-of-rape-but-acquitted-of-most-sexual-assault-charge> [https://perma.cc/FVV6-LN7F].

changing the law.²²⁷ #MeToo is better viewed not as an attempt to redefine legal paradigms but rather as an attempt to disengage from the legal meaning of sexual wrongdoing and shed light on a form of moral wrongdoing that is currently hidden from view.²²⁸ In this regard, #MeToo acknowledges that “[w]e ought to be able to have conversations about how people treat each other, and the terms of sexual negotiations, without a conclusion that the crime is rape.”²²⁹

In an attempt to break free from the stifling effects of legal definitions, this significant strand within the #MeToo movement has expressed itself in terms that favor *nonlegal* responses and sanctions—from public shaming to boycotts, protests, and occasional dismissals.²³⁰ Although such sanctions are devoid (for better or for worse) of the procedural protections accorded by criminal proceedings, they are nonetheless viewed as a fitting balance between the accused’s enjoyment of the presumption of innocence and the accuser’s interest in having his or her account vindicated.²³¹ In response to the common accusation that such extralegal justice is a witch hunt, the proponents of #MeToo often remind us that the sanctions that the movement metes out are a far cry from burning the accused at the stake.²³² Furthermore, given the public nature of most of the prominent #MeToo allegations—a feature to which I return in Section III.C—the kind of public sanctions that they involve express a form of judgment that is appropriate to the alleged behavior. As columnist Ana Marie Cox notes,

The standards of evidence necessary to decide you don’t want to go see someone’s movie, or laugh at his jokes, or watch him read the news while you get dressed, or elect him to the Senate are not the same as the ones required to put such men in prison.²³³

Despite there being a continuum of sexual wrongs, to say that the use of legal means of redress is categorically justified by sexual assault and harassment but not by sexual degradation does not, therefore, imply that the latter represents a

227. See, e.g., Chen, *supra* note 14 (“For now, our focus should be on socially transforming the way we understand sexual violence.”). *But see* Murray, *supra* note 23, at 873 (“[T]he #MeToo movement’s actions are not simply about usurping the state’s regulatory role and imposing consequences on those who have failed to comply with the movement’s understanding of appropriate sexual conduct. Instead, the larger goal is to persuade the state to adopt this vision of appropriate sex and sexuality and use it to undergird more progressive and egalitarian laws and policies.”).

228. See, e.g., Murray, *supra* note 23, at 833–34.

229. Ferzan, *supra* note 78, at 1007.

230. See, e.g., Murray, *supra* note 23 (“[T]he #MeToo movement, in circumventing extant legal remedies and pursuing redress and reform through private means, calls on private actors—not the state—to mete out proper consequences for sexual harassment and sexual assault.”). This is in line with Chamallas’s prediction that, “in the legal effort to discourage exploitive sex, civil sanctions of an indirect nature will be used with more frequency than direct criminal prohibitions.” Chamallas, *supra* note 64, at 843.

231. See, e.g., Tuerkheimer, *supra* note 14, at 1176, 1179–81.

232. See, e.g., Tamblyn, *supra* note 209.

233. Ana Marie Cox, *Al Franken Isn’t Being Denied Due Process. None of These Famous Men Are.*, WASH. POST (Dec. 7, 2017, 6:00 AM), <https://www.washingtonpost.com/news/posteverything/wp/2017/12/07/al-franken-isnt-being-denied-due-process-none-of-these-famous-men-are>.

lesser degree of severity or harm.²³⁴ Different wrongs deserve appropriate condemnatory responses commensurate with their negative effect on socially cherished values.²³⁵ As discussed below, symbolic divestiture is often a fitting response to sexual degradation, even in the absence of the hard treatment that criminal punishment commonly involves.²³⁶

III. THE MEANING OF SEXUAL DEGRADATION

I argue above that in addition to trying to make the legal categories of sexual assault and harassment more effectual, #MeToo also implicitly seeks to fill the normative void circumscribed by the paths charted by these established wrongs, directing our attention to their inability to give voice to a distinct form of human suffering. It does so, I suggest, not to claim a legal wrong but rather to set us off on a course eventually leading to legal consequences, but only after the virtues and demerits of the ideas put forward by this movement are fleshed out and examined in the moral realm of public opinion.

At present, this distinct effort is devoid of clear language to describe its main tenets, which significantly impedes the discussion.²³⁷ The absence of clear terms to connect #MeToo with the form of suffering of which the mutuality paradigm speaks is not just a matter of branding. As discussed above, #MeToo’s failure to elucidate its distinct path has often led even sympathetic critics to fault it for its ostensible conflation of existing legal categories and for its failure to adhere to the paradigms of consent and discrimination. This Part of the Article, therefore, seeks to flesh out some of the main features of the distinct form of wrongdoing that #MeToo speaks of and to portray how this wrong relates to the adjacent categories of sexual assault and harassment.

Although the advent of #MeToo is hardly the first step taken toward the recognition of this wrong, it marks a crucial development in that wrong’s evolution beyond scholarly discussion to mass circulation in the realm of public thoughts and ideas. Most advantageously, the critical mass of cases that has emerged through the #MeToo movement has provided the first opportunity to explore the contours of this approach on its own terms, without inhibiting references to sexual assault and harassment. That the mutuality approach has thus far developed in the shadow of legal debates has severely limited our ability to discuss mutuality as a freestanding moral paradigm, particularly given the immense rhetorical clout

234. As some authors have noted, the prevalence of sexual degradation often paves the way to more tangible sexual wrongs. *See, e.g.*, Sheley, *supra* note 16; West, *supra* note 180.

235. *See, e.g.*, Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 596 (1996).

236. *See, e.g.*, Daniel Maggen, *Conventions and Convictions: A Valiative Theory of Punishment*, 2020 UTAH L. REV. 235, 275–77.

237. *See, e.g.*, Tuerkheimer, *supra* note 14, at 1183 (“Even the appropriate vernacular to describe the encounter with Ansari was confusing.”); West, *supra* note 217, at 447 (“When it happens at work or at school, it is called sexual harassment and it is sometimes actionable; when on the street, its [sic] called sex hassling and almost never actionable. We don’t have a phrase for what to call it when it happens at home. That doesn’t mean it doesn’t happen.”).

of the consent paradigm.²³⁸ As Ferzan notes, “[H]aving decided that coercion undermines consent, and sex without consent is rape, we seem to have no mechanism to bypass this conclusion.”²³⁹ For this reason, although Chamallas is well aware of the challenge of introducing new language into the debate, she still addresses the vernacular of mutuality as a “refurbished” concept of consent.²⁴⁰ There is no doubt that if the mutuality paradigm is to fulfill its pioneering purpose, it requires further elaboration and more exact labeling, a process aided by observing the ways in which the paradigm has been implicitly and explicitly picked up and developed by the #MeToo movement.

Centering the discussion on this distinct form of wrongdoing requires novel terminology to separate it from extant categories, a challenge that has long plagued the mutuality approach. Different authors since Chamallas have suggested different ways of approaching this rhetorical, definitional challenge. For some, the appropriate term to describe this form of misbehavior is sexual *compulsion*—the creation of a situation in which assent to sexual contact is the only viable option for the victim.²⁴¹ The language of compulsion, however, goes little beyond the existing terminology of coercion, mostly because the shared purpose of both is to delineate the cases in which the victim’s consent was denied. Another suggested term is sexual *objectification*, which denotes the wrongdoer’s denial of the victim’s agency.²⁴² However, as Professor Martha Nussbaum notes, even positive and autonomy-enhancing sexual contact is inherently objectifying because of its use of bodily organs as objects.²⁴³ Other authors speak of sexual *exploitation* as a wrong surpassing the consent paradigm’s protection of formal agency.²⁴⁴ Like objectification, however, sexual exploitation is not necessarily incongruent with acceptable and even positive sexual relations.²⁴⁵ Although exploitation denotes the use of various sources of leverage to bypass the target’s autonomous judgment, sexuality is inherently rife with judgment-subduing mechanisms, such as leveraging the “exploiter’s” physical attractiveness or natural charm or, in less positive yet still potentially acceptable cases, the target’s loneliness, fears, or low self-esteem.²⁴⁶ In other words, sometimes we value

238. See, e.g., Eskridge, Jr., *supra* note 64, at 53; West, *supra* note 164.

239. Ferzan, *supra* note 78, at 1007.

240. See Chamallas, *supra* note 64, at 815.

241. See, e.g., SCHULHOFER, *supra* note 67, at 134–35; Bryden, *supra* note 71, at 440.

242. See, e.g., Chamallas, *supra* note 64, at 840–41; Gardner, *supra* note 10, at 1, 22; Tuerkheimer, *supra* note 86, at 42.

243. See MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 213–23 (1999).

244. See, e.g., KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* 84–85 (1995); ANDRA MEDEA & KATHLEEN THOMPSON, *AGAINST RAPE* 43–45 (1975); Chamallas, *supra* note 64, at 843; Ferzan, *supra* note 78, at 961; MacKinnon, *supra* note 160, at 436.

245. See, e.g., Gruber, *supra* note 73, at 425 (discussing the shortcoming of the language of exploitation).

246. See, e.g., Jeffrie G. Murphy, *Some Ruminations on Women, Violence, and the Criminal Law*, in *IN HARM’S WAY: ESSAYS IN HONOR OF JOEL FEINBERG* 209, 218–19 (Jules L. Coleman & Allen Buchanan eds., 1994); Michael Plaxton, *Nussbaum on Sexual Instrumentalization*, 10 *CRIM. L. & PHIL.* 1, 4 (2016).

sexuality, despite or even because of its objectifying and exploitative nature, as a freestanding domain that is sometimes at odds with our “rational” best interests.

In the pages below I offer a terminology that can help us move forward in the formulation of the wrong that the mutuality approach speaks of, a formulation that the #MeToo movement has brought to light. Naturally, the terms themselves are inconsequential, but they are a necessary step toward the articulation of a familiar phenomenon that so far has been lost in its translation to existing legal categories. This articulation, I further argue, can help us better recognize its contours and relation to the wrongs of sexual harassment and assault.

A. DEGRADATION AND THE LEVERAGING OF DOMINATION

It is perhaps impossible to develop a unitary concept that could singlehandedly capture the essence of what the mutuality paradigm seeks to denounce. That it is a mistake to seek a single unitary explanation for this phenomenon is also possible; indeed, it is often suggested that the paradigm of consent is counterproductive precisely because of its promise to deliver an unequivocal definition of sexual wrongdoing.²⁴⁷ Instead of a clear definition, this Article offers a trajectory centered around the language of sexual degradation as the opposite of mutuality and buttressed by #MeToo’s efforts to reshape the normative landscape of sexual wrongdoing.

Degradation, I argue, wrongs its victim by assigning insufficient value to his or her sexuality: by subjecting the victim’s sexual judgment to nonsexual considerations, the wrongdoer imposes on the victim a denial of sexuality’s distinct role as a source of self-affirmation.²⁴⁸ In many senses, this idea, animating much of the #MeToo sentiment as well as the mutuality paradigm, resonates with political philosopher Michael Walzer’s notion of *tyranny*, the leveraging of dominance an actor enjoys in one sphere of action against another, unrelated sphere.²⁴⁹ For Walzer, the market, academy, and politics, to name a few, are distinct spheres of judgment that exhibit their own internal logic.²⁵⁰ A just society, Walzer maintains, is measured according to its ability to keep these spheres separate, thus preventing the power dynamics of one sphere from interfering with the independent operation of others.²⁵¹ Despite obvious differences, #MeToo seems to exhibit the same insistence on the insulation of the sexual sphere from external interferences,

247. See, e.g., Eskridge, Jr., *supra* note 64, at 54–55 (“Consent is not a simple volitional category, as it is typically treated. Instead, the issue of legal consent is inherently concerned with legal status and social policy.”); Gruber, *supra* note 73, at 426 (“[T]he language of consent can preclude open political debate on, for example, the permissibility of grudging, hasty, or even undesired sex”); Westen, *supra* note 74, at 334 (discussing the hidden “conceptual apparatus of consent”).

248. This idea is further developed in Maggen, *supra* note 236, at 263–71. For a similar argument, see SAMUEL SCHEFFLER, *The Normativity of Tradition*, in *EQUALITY AND TRADITION: QUESTIONS OF VALUE IN MORAL AND POLITICAL THEORY* 287, 326 (2010).

249. See generally MICHAEL WALZER, *Spheres of Justice: A Defense of Pluralism and Equality* (1983).

250. See *id.* at 3–20.

251. See *id.* at 17–20.

protecting those who wish to exercise sexual judgment from the dominance that other individuals enjoy in nonsexual domains.²⁵²

The leveraging of nonsexual dominance to determine another person's sexual judgment is, on this account, a form of sexual degradation due to its disregard of the intrinsic value that sexuality can hold for that individual.²⁵³ Analogizing to Walzer's terms, a man who leverages his nonsexual dominance and casts it onto another's sexual domain is putting himself in a tyrannical position over his victim.²⁵⁴ Such transgression, MacKinnon similarly observes, "seems less an ordinary act of sexual desire directed toward the wrong person than an expression of dominance laced with impersonal contempt, the habit of getting what one wants, and the perception (usually accurate) that the situation can be safely exploited in this way—all expressed sexually."²⁵⁵ By disregarding the victim's ability to keep his or her sexual domain free of nonsexual interferences, the wrongdoer not only diminishes the value of sexuality in general but also exercises a unique form of control over the victim that is amplified by the primacy of the sexual domain in most people's lives.²⁵⁶ Although such domination appears in sexual form, its purpose is the assertion of superiority over the victim;²⁵⁷ it is, as MacKinnon writes, "dominance eroticized," expressing the transgressor's "desire and belief that the woman is there for them, however they may choose to define that."²⁵⁸

What precisely sexual degradation entails is a question that requires further development and discussion that tracks how this independent wrong develops in public and moral discourse. We can, however, already take stock of three features that underscore #MeToo's conception of this wrong: it is *communicative*, *valuative*, and *relational*. Below, I examine how these attributes can shape our understanding of the wrong of degradation.

B. THE COMMUNICATIVE NATURE OF DEGRADATION

When we talk of sexual assault, the image that immediately comes to mind involves inappropriate *physical* contact and the invasion of another's bodily

252. See, e.g., Chamallas, *supra* note 64, at 840–42.

253. This is true regardless of whether that individual indeed holds his or her sexuality in such regard. As Radin writes, "[T]he existence of some commodified sexual interactions will contaminate or infiltrate everyone's sexuality so that all sexual relationships will become commodified." Radin, *supra* note 91, at 1913; see also Gardner, *supra* note 10, at 1, 22 (discussing the harmful effects of sexual objectification on asexual individuals); James Slater, *Public Goods and Criminalisation*, 29 DENNING L.J. 68, 81–82 (2017) (discussing the general public good of sexual integrity).

254. See, e.g., Franke, *supra* note 52, at 745 ("[S]exual harassment is best understood as the expression, in sexual terms, of power, privilege, or dominance.").

255. MACKINNON, *supra* note 36, at 162.

256. See, e.g., ANTHONY F. BOGAERT, UNDERSTANDING ASEXUALITY 41 (2012) (suggesting that only about one percent of the population can be defined as asexual); Bob Watt, *The Story of Rape: Wrongdoing and the Emotional Imagination*, 26 DENNING L.J. 46, 56 (2014) ("It is our common experience that sexual intercourse is the most highly emotionally coloured of our everyday actions.").

257. See, e.g., Hampton, *supra* note 66, at 123–26 (offering a Kantian theory of rape); MacKinnon, *supra* note 160, at 436 (suggesting that rape is not about autonomy and internal psychology but about inequality and "leveraged external conditions").

258. MACKINNON, *supra* note 36, at 162 (emphasis omitted).

integrity.²⁵⁹ In contrast, sexual degradation, as it appears in the #MeToo discourse, is closer to sexual harassment in that it is essentially communicative rather than necessarily physical. It concerns, as philosopher Nicola Lacey puts it, the symbolic domain that our commitment to sexual autonomy and integrity serves.²⁶⁰ In other words, as with sexual harassment, the harm of degradation is manifested in the offender’s treatment of his or her target and the message of superiority that it contains, whether it is expressed in words or actions and regardless of whether it produces a negative effect.²⁶¹

Observing the communicative facet of sexual degradation helps explain #MeToo’s tendency to fuse sexual assault and harassment, two ways in which words *and* actions can sexually degrade another, albeit in varying degrees. Accordingly, although oftentimes an act of sexual degradation will also constitute a form of assault, harassment, or both, it may be purely communicative. A fitting example of such degrading behavior is Mr. Trump’s offensive words and the public reaction to them. As *Time* magazine suggested in its selection of the Silence Breakers—the leaders and participants of #MeToo—as the 2017 Person of the Year,

That Donald Trump could express himself that way and still be elected President is part of what stoked the rage that fueled the Women’s March the day after his Inauguration. It’s why women seized on that crude word as the emblem of the protest that dwarfed Trump’s Inauguration crowd size.²⁶²

Although these words were followed by accusations that Trump had, indeed, acted in the despicable way that he suggested was possible for a man of his stardom, his words drew as much rage as the allegations, if not more, with the dissonance between his words and his election prompting the eventual rise of #MeToo.²⁶³ What was offensive about his words was not (just) their support of sexual violence and harassment but their degrading message: the suggestion that women suspend their better sexual judgment in exchange for a brush with stardom and the material benefits that can ensue from it.

259. See, e.g., David Dolinko, *Some Thoughts About Retributivism*, 101 *ETHICS* 537, 552 (1991) (“A rapist deserves punishment not because he has communicated his belief that he is of greater value than his victim but because he has done so by raping her.”); Ferzan, *supra* note 78, at 972 (“[I]t seems hard to say that one person’s oral advocacy is the sort of behavior that limits another person’s options in a truly choice undermining way.”).

260. See Lacey, *supra* note 9, at 66. The move from the physical to the symbolic reflects a broader view of sexuality that is detached from its biological origins. The origins of this image, William Eskridge, Jr. suggests, and the notion that the “verbal and physical drama” that surrounds the physical act “is what makes sex ‘sexy,’” can be traced back to the inclusion of gay sexuality in public discourse. Eskridge, Jr., *supra* note 64, at 63.

261. See, e.g., Franke, *supra* note 52 (discussing how sexual harassment claims are typically analyzed as disparate treatment cases); L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 *U. KAN. L. REV.* 341, 345 (2005).

262. Zacharek et al., *supra* note 2.

263. See, e.g., Rhode, *supra* note 2.

A similar attitude pervades one of the precursors of the #MeToo movement, the SlutWalk movement.²⁶⁴ These mass protests against rape culture were at times met with feminist critiques of their ostensibly counterproductive attempt to appropriate the derogative meaning of the word *slut* and their underdeveloped articulation of consent.²⁶⁵ Tuerkheimer, who is sympathetic to SlutWalk's message, notes that "[p]recisely because of the normative claims at stake, it is striking that SlutWalk targets rape *culture* alone, leaving law and legal theory outside the bounds of protest," and argues that "[t]his omission reflects a profound underestimation of the role of law."²⁶⁶ In the face of such criticism, it is important, however, to remember that the wrongful behavior to which SlutWalk responded was not sexual violence as such but rather the police constable's *words* blaming women for the sexual violence that they endure.²⁶⁷ Although SlutWalk is also a protest against sexual violence, its immediate message—and the reason for its name—is a protest against a mode of expression that is believed to be victimizing *in its own right*.²⁶⁸ Like the Women's March's use of pussy hats to focus attention on Mr. Trump's words, the message of the SlutWalk movement and its choice of words and attire bring to the forefront the communicative aspects of sexual wrongdoing. The movement protests rape *culture*—meaning the degrading message that rape is somehow acceptable—not just the physical act of rape.

Another of #MeToo's focal points that demonstrates its communicative notion of sexuality and sexual wrongdoing is exemplified by the much-debated interaction between Grace and comedian Aziz Ansari. The publication of the incident and the reactions that it evoked quickly evolved into a heated argument, mostly phrased in the language of consent and the issue of whether Ansari's behavior had any relation to the crime of rape.²⁶⁹ This framing of the question, as several commentators noted, mostly misses the point of #MeToo.²⁷⁰ The wrong Grace claims to have suffered was not nonconsensual sexual contact but rather *the degrading message* embodied by Ansari's advances.²⁷¹ Explaining why she experienced Ansari's behavior as offensive and harmful, Grace texted her friend during her ride home: "I had to say no a lot. He wanted sex. He wanted to get me

264. See, e.g., Nguyen, *supra* note 104; Pollitt, *supra* note 104.

265. See, e.g., Kathy Miriam, *Feminism, Neoliberalism, and SlutWalk*, 38 FEMINIST STUD. 262, 265–66 (2012); Gail Dines & Wendy J Murphy, *SlutWalk Is Not Sexual Liberation*, GUARDIAN (May 8, 2011, 1:34 PM), <https://www.theguardian.com/commentisfree/2011/may/08/slutwalk-not-sexual-liberation>.

266. Tuerkheimer, *supra* note 148, at 1456 (footnotes omitted).

267. See, e.g., O'Reilly, *supra* note 104, at 245.

268. See, e.g., Nguyen, *supra* note 104.

269. See, e.g., Flanagan, *supra* note 196; Weiss, *supra* note 13.

270. See, e.g., Zosia Bielski, *The Next Frontier in Consent: Better Sex*, GLOBE & MAIL (Can.) (Jan. 22, 2018), <https://www.theglobeandmail.com/life/relationships/the-next-frontier-in-consent-better-sex/article37681221>; Chen, *supra* note 14; Jaclyn Friedman, *I'm a Sexual Consent Educator. Here's What's Missing in the Aziz Ansari Conversation.*, VOX (Jan. 19, 2018, 9:30 AM), <https://www.vox.com/first-person/2018/1/19/16907246/sexual-consent-educator-aziz-ansari> [<https://perma.cc/5U4Q-LYN6>].

271. See, e.g., Anna North, *The Aziz Ansari Story Is Ordinary. That's Why We Have to Talk About It.*, VOX (Jan. 16, 2018, 10:10 AM), <https://www.vox.com/identities/2018/1/16/16894722/aziz-ansari-grace-babe-me-too> [<https://perma.cc/7C8T-J3PY>].

drunk and then fuck me.”²⁷² Similarly, in a later text exchange with Ansari, she expressed her resentment by writing that he “ignored clear non-verbal cues; [he] kept going with advances,” later telling *Babe* that she was “debating if this was an awkward sexual experience or sexual assault.”²⁷³ It would seem that what bothered and offended Grace was not so much the possibility of sexual contact with Ansari but rather the way that he treated her to obtain sexual contact, communicating a message no different than Mr. Trump’s: that he believed that her sexual decisions would be dominated by his stardom.

Responding to the story’s publication, columnist Caitlin Flanagan criticized both its author and Grace for what she believed to be an intentionally humiliating response to insensitive but otherwise innocuous behavior.²⁷⁴ More importantly, Flanagan alleged that those who propagated the story had set back the struggle against sexual violence by portraying young women like Grace as incapable of more assertively finding their way out of sticky situations.²⁷⁵ “Apparently,” Flanagan wrote, “there is a whole country full of young women who don’t know how to call a cab.”²⁷⁶ Regardless of the merits of Flanagan’s substantive judgment of Ansari’s behavior, the latter criticism simply misses the point of Grace’s allegations. Grace did not fault Ansari for sexually imposing himself on her; what she complained of was what she experienced as a degrading communication of his belief that he was somehow *entitled* to have sex with her. To put it differently, what was allegedly wrong was not Ansari’s attempt to impose himself on her, but his apparent belief—expressed in action—that he *did not need to* impose himself, since her sexual judgment was predetermined by his status.²⁷⁷

C. DEGRADATION AS INADEQUATE VALUATION OF SEXUALITY

As discussed above, a second feature of #MeToo’s approach to sexual wrongdoing, and where it most closely adheres to the mutuality paradigm, is its rejection of the universality of the consent paradigm in favor of a valuative paradigm informed by the *distinctiveness* of sexuality. The requirement of mutuality—the demand that the actor pays adequate respect to his partner’s absence of sexual desire—does not come at the expense of the consent paradigm; it does, however, purport to tell us that there is more to sexual wrongdoing than unconsented-to sex. As supporters of #MeToo argue, consent “is the lowest bar there is. After that, we need to talk about sexual pleasure and good sex—sex that you actually

272. Way, *supra* note 60.

273. *Id.*

274. See Flanagan, *supra* note 196.

275. See *id.* A similar view was voiced by Weiss, *supra* note 13.

276. Flanagan, *supra* note 196.

277. See, e.g., Chen, *supra* note 14 (arguing that Grace felt “disrespected and violated for having all of her signals and statements of discomfort towards sex ignored”); Friedman, *supra* note 270 (“What’s much more likely is that he didn’t care how she felt one way or the other and treated her boundaries as a challenge. Either way, his alleged behavior was dehumanizing.”).

want to have.”²⁷⁸ #MeToo effectively tells us that beyond the category of behaviors that constitute sexual violence stretches a vast domain of potential sexual degradations—behaviors that fail to meet a minimal threshold of attentiveness to another’s sexual desire.

Although consent is often thought of as synonymous with the protection of personal autonomy, #MeToo stands for the realization that autonomy comes in different forms, and its assertion requires not only formal noninterference but also certain forms of cooperation with others.²⁷⁹ Instead of the consent paradigm’s exclusive emphasis on formal voluntariness, the mutuality approach demands that individuals adhere to sexuality’s intrinsic logic when acting on the sexual domain of others.²⁸⁰ In this view, to affect others sexually in ways that disregard the internal logic of sexuality is a form of sexual degradation.²⁸¹ The struggle against sexual degradation does not, as some suggest, seek to regulate sexual desire itself;²⁸² it does, however, seek to ensure that sexual actions and expressions are within the boundaries dictated by sexuality.²⁸³ An awkward or sleazy come-on in a nightclub, it tells us, is different from a catcall on the street or an employer’s sexual advance in that the boorish but acceptable advance is meant to be understood as an appeal to the target’s sexual judgment.²⁸⁴ It is hard to imagine that the catcaller believes that his target will be sexually aroused by his words or gestures—the whole purpose of these actions is to allow *him* to sexually express himself, with the unwilling target serving as a passive canvas for his message. Likewise, although an employer might be genuinely interested in appealing to an employee’s sexual judgment, hoping and believing that the employee is as interested in a sexual relationship as he or she is, the employer cannot honestly disregard the high probability that the employee will interpret any sexual advance as mainly couched in material, nonsexual considerations, given the nature of their workplace relationship.

There are three components to the valuative view of sexuality as it shapes the wrong of degradation: first, that sexuality is a unique domain; second, that its uniqueness mandates a distinct form of respect; and third, that such respect proscribes the attempt to motivate another sexually without regard to the other person’s sexual desires. With respect to the first of these components, the insistence that sexuality is a distinct field of human action is an obvious feature of #MeToo:

278. Bielski, *supra* note 270 (quoting sex and emotional-literacy educator Karen B. K. Chan).

279. As Jennifer Nedelsky, who similarly explores these Kantian themes, writes, “[T]here are no human beings in the absence of relations with others. We take our being in part from those relations.” Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 *YALE J.L. & FEMINISM* 7, 9 (1989).

280. As Gardner writes, “[T]he intention of the parties to a sexual encounter normally extends not only to what each has to gain separately from the encounter with the other, but also to the way in which it will be gained, viz by encountering the other as a sexual partner.” Gardner, *supra* note 8, at 54.

281. *See, e.g.*, West, *supra* note 180, at 814.

282. *See, e.g.*, Safronova, *supra* note 140.

283. *See, e.g.*, Burgess, *supra* note 139.

284. *See, e.g.*, Kipnis, *Has #MeToo Gone Too Far, or Not Far Enough?*, *supra* note 144.

it seems that little sense could be made of many of its central demands without reference to that distinctiveness. For #MeToo, the realization that interactions that take place in the sexual domain require heightened attentiveness to degradation stems from basic social and psychological facts.²⁸⁵ Similarly, that sexuality is a unique domain of human behavior, and thus that the evaluation of actions that affect it should not be equated with the adjudication of nonsexual behavior, has long been a message of the mutuality approach, voiced mostly in the context of sexual violence and harassment.²⁸⁶ As West writes in this regard, “Rape is sui generis. It is not accurately captured by any analogy, no matter how clever or elaborate. It is a primal experience to which other events might be meaningfully analogized But rape itself cannot be reduced to other painful experiences.”²⁸⁷ The sexual domain, #MeToo likewise asserts, is “so intimate and personal that more harm can be done than in most social situations,” and “given that heightened capacity for harm, we should expect people to operate with greater conscientiousness, concern and care in that domain than in others.”²⁸⁸

The second component suggests that the unique respect that the value of sexuality merits is a direct consequence of its status as a domain of value—meaning a field of action through which individuals express and act out their personhoods—and of sexuality’s valuative primacy.²⁸⁹ Values, in this view, are communicative instruments of individual self-assertion, relatable only in the valuative language in which they are framed.²⁹⁰ Respecting something qua value therefore involves distinguishing it from other fields of action and addressing it on its own terms.²⁹¹ As philosopher Elizabeth Anderson writes, this idea is inherent in the notion of

285. See, e.g., Tambe, *supra* note 102, at 201 (arguing that “readers conflate sex and selfhood—many people see any experience of sexual coercion as eroding a woman’s core sense of self”).

286. See, e.g., Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 346 (2014) (describing sexuality as “a prominent religion of contemporary U.S. society”).

287. West, *supra* note 11, at 1449.

288. Bruenig, *supra* note 4.

289. See, e.g., SAMUEL SCHEFFLER, *The Good of Toleration*, in EQUALITY AND TRADITION: QUESTIONS OF VALUE IN MORAL AND POLITICAL THEORY, *supra* note 248, at 312, 326; Maggen, *supra* note 236, at 263–71.

290. As Samuel Scheffler observes, valuation considerably assists us in treating ourselves as free, continuous beings, providing “continuity amid the flux and contingency of daily experience” as these values “help to stabilize our selves.” SCHEFFLER, *supra* note 289; accord Barbara Herman, *Pluralism and the Community of Moral Judgment*, in TOLERATION: AN ELUSIVE VIRTUE 60, 63–64 (David Heyd ed., 1996).

291. Additional reasons for engaging domains of value on their own terms can be drawn, once again, from the idea of political legitimacy. One such reason, already discussed, is Walzer’s argument against the tyranny of intersphere dominance. See *supra* notes 249–54 and accompanying text. Another can be made by analogy to H. L. A. Hart’s notion of the *internal perspective* of the law. Legal interactions, Hart notes, commonly involve a degree of coercion; what distinguishes a legitimate legal order from the gunman’s command is the former’s framing of the order in terms that appeal to the designated target’s sense of legal legitimacy. Although both commands are ultimately backed by the threat of force, only the state’s command is legitimized by its appeal to the internal logic of law. See H. L. A. HART, *THE CONCEPT OF LAW* 20–25 (1961). For a reading of Hart that is of particular importance to this Article’s argument, see generally David Gray Carlson, *Hart avec Kant: On the Inseparability of Law and Morality*, 1 WASH. U. JURIS. REV. 21 (2009).

value; she insists that for something “to be valued appropriately, its production, exchange, and enjoyment must be removed from market norms and embedded in a different set of social relationships.”²⁹²

In a similar vein, #MeToo’s belief that the uniqueness of sexuality places a unique burden on others resonates with a view that has been long argued by feminist authors in response to the consent paradigm’s espousal of the belief in universal commensurability.²⁹³ This view, feminist authors argue, simply fails to reflect common intuitions on the incommensurable value of sexuality. As Professor Margaret Radin writes, “[W]e tend to think that nuts and bolts are pretty much the ‘same’ whether commodified or not, whereas love, friendship, and sexuality are very ‘different.’”²⁹⁴ The domain of sexuality, in this view, is a primary, if not unmatched, medium of self-expression, so that its translation into other valuative media can result only in a significant loss of meaning.²⁹⁵ More importantly, the unique place and symbolism of sexuality make the individual’s sense of self uniquely susceptible to harms of a sexual nature.²⁹⁶ As West argues, to fail to recognize this unique susceptibility and the loss of valuative meaning inherent in the translation of sexual judgments into nonsexual rationality is tantamount to the subordination of a woman’s sexual self to her purely rational self, which alienates her from her sexual experiences and emotions.²⁹⁷

Finally, the third component suggests that appropriately valuing sexual judgments entails protecting the domain of sexuality from those who wish to explicitly or implicitly impose on other people the belief that sexual considerations are commensurate with nonsexual ones. This idea marks sexuality as particularly

292. Elizabeth S. Anderson, *Is Women’s Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 73 (1990).

293. See, e.g., Gardner, *supra* note 8, at 59 (“Sex is different from all of these things . . . in ways that make it profoundly misleading to evaluate any of them, including sex, only on the single axis of consent.”); Gruber, *supra* note 73, at 417 (discussing the difference between sexual and contractual consent); Shari Motro, *Scholarship Against Desire*, 27 YALE J.L. & HUMAN. 115, 134 (2015) (“Is sex special? In my own experience yes, it is.”).

294. Radin, *supra* note 91, at 1912.

295. See, e.g., HIRSHMAN & LARSON, *supra* note 86, at 291; Emens, *supra* note 286; Eskridge, Jr., *supra* note 64, at 60.

296. See, e.g., Watt, *supra* note 256, at 47 (“The reason that rape is so much worse is purely and simply because of the emotional significance of sexual activity.”).

297. See West, *supra* note 180. Nothing in #MeToo seems to suggest that its singling out of sexuality reflects a belief in its inherent worth, drawn from some biological or spiritual reason. As a central human value, sexuality differs from other values mainly in its proximity to personal identity; it is, therefore, a central mode of action through which individuals can act out their view of themselves—although it is not necessarily the only such mode. See, e.g., Nedelsky, *supra* note 279, at 12 (“If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships—with parents, teachers, friends, loved ones—that provide the support and guidance necessary for the development and experience of autonomy.”). That sexuality is one of many valuative ways in which individuals actualize their personhoods does not diminish its claim for distinctiveness. Many fields of action may be distinct in that they demand that actors exhibit a specific attitude; sexuality is not alone in its demand that actors follow self-referential logic. More than anything else, #MeToo reflects the belief that sexuality gives rise to a particularly pressing claim of distinctiveness or, as Radin puts it, to a belief that “trying to keep society free of commodified love, friendship, and sexuality morally matters more than trying to keep it free of commodified nuts and bolts.” Radin, *supra* note 91, at 1912.

susceptible to motivational distinctions. As Gardner argues, sexuality is not simply the collection of ways in which individuals pursue sexual pleasure and satisfaction but is primarily about the *intentions* that they hold while doing so.²⁹⁸ In this view, positive sexuality is characterized by each participant intending the sexual interaction to be

a joint pursuit and not just a pursuit in common, that the pleasure and satisfaction be achieved by each having the like intention that the pleasure and satisfaction be achieved by each having the like intention that the pleasure and satisfaction be achieved by each having the like intention . . . and so on.²⁹⁹

Chamallas likewise suggests that positive sexuality is “sexual conduct in which both parties have as their objective only sexual pleasure or emotional intimacy.”³⁰⁰ “Good sex,” she continues, “is noninstrumental conduct. Sex used for more external purposes, such as financial gain, prestige, or power, is regarded as exploitive and immoral, regardless of whether the parties have engaged voluntarily in the encounter.”³⁰¹

Consent and discrimination are, in this view, appropriate paradigms for gauging the wrongness of sexual assault and harassment, but they fail to address the wrong of sexual degradation. The values that these paradigms protect—freedom and equality—lie at the foundation of our legal system, but they are too formal to appreciate genuinely the personal and emotional value of sexuality.³⁰² As a universally applicable standard, consent is meant to treat sexual and nonsexual interactions with the same level of scrutiny; this makes it incapable of responding to the wrong of sexual degradation. Likewise, many forms of offensive workplace behaviors, #MeToo tells us, are wrongful only in light of their sexuality;³⁰³ notwithstanding questions of discrimination and consent, “people are entitled to show up to work and be treated as colleagues, not as sexual targets or opportunities.”³⁰⁴ Consent and discrimination’s reliance on abstract terms renders these paradigms incapable of adequately addressing the harm caused to the person when another seeks to dismiss the autonomy of that person’s sexual judgment by subordinating it to nonsexual considerations. Where established legal categories seek to impose commensurability, treating actors on the single axis of rational and formal autonomy, degradation speaks to the importance of separation and balance among the many facets of the self.

The separation between sexual and nonsexual domains of action is not, however, an end in itself, at least not so as long as we understand sexuality as a

298. Gardner, *supra* note 8, at 54.

299. *Id.* (ellipsis in original).

300. Chamallas, *supra* note 64, at 784.

301. *Id.*; accord West, *supra* note 217, at 457.

See, e.g., Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L.J. 149, 159–61 (2000).

303. See, e.g., Estrich, *supra* note 174, at 820.

304. Williams et al., *supra* note 199.

medium of self-assertion. Sexual themes can be part of many aspects of our lives: we study sex and incorporate it into our art and culture, and it can even be part of our work environment without being degrading.³⁰⁵ Degradation, as discussed here, concerns the sexual *judgment* of individuals, meaning their decisions regarding whether to engage with others in sexual interactions. A boss who discusses sexual practices with an employee will often be interpreted as expressing sexual desires, but this is not necessarily so if they are discussing the publication of erotic literature. A sexual joke can be harmless or degrading depending on the way in which it represents sexual judgment: it can be gross but not degrading. The infamous photograph of Al Franken placing his hands over the breasts of sleeping Leeann Tweeden is accordingly degrading not because it is sexual or assaultive—it might be said that the flak jacket she is wearing protected Tweeden from the physical aspects of the sexual assault—but because the message that it communicates is Franken’s disrespect for Tweeden’s sexual judgment.³⁰⁶ Like Mr. Trump’s words, Franken’s action is condemnable for expressing the belief that sexual judgment can be suppressed by the brute force of stardom.

The use of force against a sleeping person in this photo expresses by itself the disregard of Tweeden’s sexual judgment, but that disregard is exacerbated by Franken’s nonsexual dominance over her based on his relative eminence in the entertainment business, at least compared to hers. The degradation manifested in this dynamic can similarly explain the reactions to comedian Louis C.K.’s habit of masturbating in the presence of young female comedians.³⁰⁷ On this account, what was wrong about his behavior was not that it constituted sexual assault (in some of the reported cases, it was voluntary, and in others, it took place during telephone conversations) or workplace sexual harassment, but that it was sexually degrading—not only because of the sexual intrusion but primarily because of the disparity in influence and eminence between him and the women. As fellow comedian Sarah Silverman attested, she was subjected to this behavior by C.K. but did not find it degrading.³⁰⁸ She said, “We are peers. We are equals,” adding that “[i]t’s not analogous to the other women that are talking about what he did to them. He could offer me nothing. We were only just friends.”³⁰⁹ C.K.’s behavior was at times involuntarily imposed on others and is condemnable for that reason alone; but it is also condemnable, #MeToo tells us, even in some instances when he received formal “permission” for his actions—namely, those in which his

305. It is a separate question, however, whether sexualized behavior in the workplace is prone to constitute harassment as such. *See, e.g.*, Schultz, *supra* note 52, at 2078–79.

306. “I felt violated,” Tweeden later wrote, “Embarrassed. Belittled. Humiliated.” Leeann Tweeden, *Senator Al Franken Kissed and Groped Me Without My Consent, and There’s Nothing Funny About It*, KABC, <https://www.kabc.com/2017/11/16/leeann-tweeden-on-senator-al-franken> (last visited Jan. 5, 2021).

307. *See* Ryzik et al., *supra* note 60.

308. *See* Lanre Bakare, *Sarah Silverman Apologises After Louis CK Masturbation Comments*, GUARDIAN (Oct. 23, 2018, 6:11 AM), <https://www.theguardian.com/tv-and-radio/2018/oct/23/sarah-silverman-apologises-after-louis-ck-masturbation-comments>.

309. *Id.*

interest in his audience’s participation reflected an implicit appeal to the potential nonsexual consequences of refusal rather than an earnest belief that members of his targeted audience were sexually interested in their roles as observers of the sexual act.

Similar reasoning underlies the reactions to Weinstein’s behavior. Though part of his behavior constituted sexual assault and sexual harassment, which led to criminal proceedings and harassment settlements, much of it was meant to leverage his domination as an influential producer to obtain his victim’s formal consent to sexual contact. The *New York Times* story that brought his behavior to light began by describing an incident involving young actor Ashley Judd: Weinstein asked her to give him a massage or watch him shower.³¹⁰ Judd told the *Times* that she remembers thinking, “How do I get out of the room as fast as possible without alienating Harvey Weinstein?”³¹¹ Although Weinstein was not her employer and did not impose himself on Judd, this incident is often presented as one of #MeToo’s focal points.³¹² Some believe that this focus is because of #MeToo’s bias toward celebrity victims, but the disproportionate attention that this incident received can also be explained by it being paradigmatic of the unique wrong of degradation.³¹³

What is particularly objectionable in the above cases, as well as in many others put forward by the #MeToo movement, is that the crossing of borders between the sexual and nonsexual was accompanied by a disparity in nonsexual power, allowing the transgressors to transform their nonsexual domination into sexual inducements and leverage.³¹⁴ Even though mutuality is typically anathema to cases in which nonsexual considerations mix with sexual ones,³¹⁵ #MeToo, reserving admonishment for those cases in which the reason for the transgression is the domination that one party enjoys in the nonsexual domain, opposes “encounters in which money, power, prestige, or financial or physical security is

310. Kantor & Twohey, *supra* note 113.

311. *Id.*

312. The U.S. Court of Appeals for the Ninth Circuit recently ruled that the relationship between Weinstein and Judd was substantially similar to relationships covered by Section 51.9 of the California Civil Code, so their interaction potentially constituted sexual harassment under the Code. *See* Judd v. Weinstein, 967 F.3d 952, 959 (9th Cir. 2020). The Section has also changed by adding directors and producers to the list of those liable for sexual harassment. *See* CAL. CIV. CODE § 51.9(a)(1)(H) (West 2020).

313. For a similar incident that received much attention, see Hayek, *supra* note 158.

314. *See, e.g.*, MacKinnon, *supra* note 22.

315. As Chamallas puts it,

In determining the mutuality of sexual encounters, it is critical to evaluate the nature of the inducements to sex operating in each particular context. If the parties’ goal is thought to be sexual pleasure or emotional intimacy, the encounter is unlikely to be viewed as so clearly exploitative as to warrant legal prohibition.

Chamallas, *supra* note 64, at 838; *see also* Estrich, *supra* note 174, at 832 (arguing that trading sex for a nonsexual benefit in the workplace does not afford protection); Franke, *supra* note 52, at 747 (“Sexual conduct in the workplace has a special sting for women, not because our sensibilities render us particularly vulnerable to sex, but because the conduct literally sexualizes us.”).

traded for sexual pleasure or intimacy.”³¹⁶ By focusing most of its attention on the behavior of powerful figures and their misuse of their domination to *squash* their target’s sexual judgment, #MeToo offers a definitive take on the mutuality paradigm, emphasizing what might otherwise be overlooked in its portrayal of sexual degradation.³¹⁷ As MacKinnon, who always saw sexual wrongdoing in terms of power rather than consent or mutuality,³¹⁸ accordingly writes, #MeToo’s mobilization has not only been about eroding the procedural barriers to the struggle against sexual assault and harassment but also—mostly—against the “dynamics of inequality [that] have preserved the system in which the more power a man has, the more sexual access he can get away with compelling.”³¹⁹

According to this view, using one’s economic, political, academic, or spiritual domination over another to motivate them sexually may leave their volition unscathed, but as long as doing so is unaccompanied by an appeal to their sexual desires or interests, this action is a form of sexual degradation.³²⁰ At times, there can be a fine line between using one’s nonsexual domination to arouse another sexually and using it to trump their sexual judgment. Human sexuality is a complex set of emotions, and it would be naive to assume that most sexual interactions are free of all nonsexual considerations. In line with Walzer’s notion of tyranny, what is condemnable about sexual degradation is not the attempt to boost one’s sexual attractiveness with nonsexual additives but the *substitution* of considerations imported from a domain in which the transgressor enjoys a superior position for another’s sexual judgment.³²¹ From Trump’s comments to Ansari’s aggressive advances, such behavior is condemnable because it expresses the belief that nonsexual superiority can allow those who possess it to circumvent the sexual judgment of others through conversion into their preferred venue.³²²

On a side note, just as #MeToo’s condemnation of nonsexual “trump cards”—the use of nonsexual dominance to override another’s sexual judgment—clarifies its treatment of the above cases, it also helps explain the difficulties that the

316. Chamallas, *supra* note 64, at 840–41.

317. See, e.g., Burgess, *supra* note 139, at 347 (“[T]he laws of desire are meant to prevent the conflation of desire with power, demonstrating how desire, when chosen or accepted, operates in a field free from coercion, abuse, and violence.”).

318. See West, *supra* note 217, at 447.

319. MacKinnon, *supra* note 22.

320. See, e.g., Gardner, *supra* note 10, at 1, 16 (“Rape is terrifying and humiliating even when unaccompanied by further affronts, because the sheer use of a person, and in that sense the objectification of a person, is a denial of their personhood. It is literally dehumanizing.”).

321. Estrich, *supra* note 174, at 832 (“[W]hatever other preferences and penalties may be traded in the workplace for jobs or promotions, sex should not be one of them.”); *id.* at 835 (“Bosses need not flaunt their power in order to exercise it. A ‘request’ from a superior carries with it a different message than one from an equal.”).

322. See, e.g., MacKinnon, *supra* note 36, at 1 (“Sexual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another.”).

movement faces with regard to sex workers.³²³ It also, however, allows #MeToo to take a more nuanced approach than the mutuality paradigm’s more unequivocal rejection of paid-for sex.³²⁴ Even when it is formally consensual, the mutuality approach tells us, paid-for sex is objectionable for being inherently coercive by virtue of the valuative substitution on which it is premised.³²⁵ Although the #MeToo movement seems to accept this point, the special attention it accords to cases that involve the leveraging of domination seems to suggest that it does not necessarily object equally to all forms of sex work, instead distinguishing sexual “workplaces” that are egalitarian from those that involve a “leverageable” disparity in domination.³²⁶ Both instances would produce sex that is not mutually desirable, but #MeToo seems to suggest that only the latter deserves public condemnation as sexually degrading.

D. #METOO’S RELATIONAL EXEMPTION

A third feature of sexual degradation, which exhibits more meaningful divergence from the mutuality paradigm, is discernible from #MeToo’s relative failure to address nonmutually desired sex that results from *relational* considerations. As both the proponents and the critics of the mutuality paradigm insist, many occasions of consented-to-but-unwanted sex take place against the backdrop of intimate relationships,³²⁷ in myriad forms, some bordering on the abusive and others commonly seen as positive.³²⁸ The paradigmatic scenario that is often used to illuminate this category of cases and the difficulties that it raises is the young man who threatens to end his romantic relationship with his girlfriend unless they have sex.³²⁹ Acknowledging the complexity of such interactions, proponents of

323. See Cooney, *supra* note 17; see also Alanna Vagianos, *Janet Mock: Sex Workers’ Rights Must Be Part of the Women’s March*, HUFFINGTON POST (Jan. 18, 2017, 11:36 AM), https://www.huffpost.com/entry/janet-mock-sex-workers-rights-must-be-part-of-the-womens-march_n_587f798ae4b01cdc64c8a16d [<https://perma.cc/3G64-8RGN>] (discussing the exclusion of sex workers’ rights from the Women’s March agenda).

324. See Chamallas, *supra* note 64, at 820.

325. See, e.g., ROSEMARIE TONG, WOMEN, SEX, AND THE LAW 10–13 (1984) (discussing the degrading effects of pornography); Chamallas, *supra* note 64, at 820; Janet Radcliffe Richards, *Consent with Inducements: The Case of Body Parts and Services*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE, *supra* note 184, at 281, 299–300.

326. For comparable views, see, for example, JULIA O’CONNELL DAVIDSON, PROSTITUTION, POWER AND FREEDOM 9–10 (1998); HIRSHMAN & LARSON, *supra* note 86, at 288–94; TONG, *supra* note 325, at 60–61; and Kate Millett, *Prostitution: A Quartet for Female Voices*, in WOMAN IN SEXIST SOCIETY: STUDIES IN POWER AND POWERLESSNESS 60, 64 (Vivian Gornick & Barbara K. Moran eds., 1971).

327. See, e.g., F. Scott Christopher & Susan Sprecher, *Sexuality in Marriage, Dating, and Other Relationships: A Decade Review*, 62 J. MARRIAGE & FAM. 999, 1010 (2000); Lucia F. O’Sullivan & Elizabeth Rice Allgeier, *Feigning Sexual Desire: Consenting to Unwanted Sexual Activity in Heterosexual Dating Relationships*, 35 J. SEX RES. 234, 234 (1998).

328. See, e.g., RUSSELL, *supra* note 195, at 76–77, 80–83; Kathleen C. Basile, *Rape by Acquiescence: The Ways in Which Women “Give In” to Unwanted Sex with Their Husbands*, 5 VIOLENCE AGAINST WOMEN 1036, 1039–47 (1999); Motro, *supra* note 293, at 133; Charlene L. Muehlenhard & Jennifer L. Schrag, *Nonviolent Sexual Coercion*, in ACQUAINTANCE RAPE: THE HIDDEN CRIME 115, 122–23 (Andrea Parrot & Laurie Bechhofer eds., 1991).

329. See, e.g., Chamallas, *supra* note 64, at 837–38; Husak & Thomas III, *supra* note 223, at 119; Muehlenhard & Schrag, *supra* note 328, at 119.

the mutuality paradigm nonetheless insist that sex that results from relational considerations should not necessarily be exempt from scrutiny for this reason alone;³³⁰ against the consent paradigm's false promise of formal delineation, the distinction between those cases that merit censure and those that do not, they suggest, is avowedly political, determined by the kind of society that we want to live in and by what kinds of inducements to sex we are willing to accept.³³¹

In the range of answers given to this question, the stance of radical feminism insists on the most comprehensive condemnation of sex that results from nonsexual considerations, including those that arise from relational dominance, and denounces, because of the inequality alone, sexual relations that take place in unequal relationships, regardless of whether they are subjectively experienced as undesirable.³³² Relational intimacy, in this view, does not diminish the offensiveness of sex that occurs under conditions of inequality but is rather a façade obfuscating the power inequalities and commodification that facilitate sexual exploitation. Unequal sexual relations, in the radical view, are essentially indistinguishable from formally nonconsensual sex, even when false consciousness leads the victims to experience it as welcome.³³³

The moderate variant of the mutuality paradigm suggests that although unconsented-to sex and unwelcome sex are both objectionable, only unconsented-to sex should constitute the *criminal* offense of rape—consented-to-but-undesired sex is left to the moral scrutiny of social reprobation.³³⁴ Furthermore, the moderate approach mostly discounts the radical concern with false consciousness, instead taking the felt experience of unwelcome sex and not objective inequality to be the gravamen of sexual wrongdoing, particularly when it comes to relational settings.³³⁵ As a result, the moderate approach suggests that not all forms of undesired sex are necessarily condemnable for that reason alone. As West readily admits, when a person assents to otherwise undesired sexual contact “for friendship, for love, as a favor, to cement trust, or to express gratitude,”

330. See, e.g., Eskridge, Jr., *supra* note 64, at 54–55 (discussing the complex nature of consent); Gruber, *supra* note 73, at 425–26 (suggesting that this complexity mandates an open debate on the permissibility of various sexual considerations and inducements).

331. See, e.g., MACKINNON, *supra* note 75; see also SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 384–85 (1993) (discussing how the difference between rape and mutual intercourse revolves around gender norms); CLARK & LEWIS, *supra* note 64, at 164 (suggesting a shift from consent to the impermissibility of coercion); Estrich, *supra* note 90, at 1095 (discussing the difficulties in legally defining rape due to societal views of sex).

332. Catharine MacKinnon famously suggested that “[p]erhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance.” MACKINNON, *supra* note 75, at 174 (footnote omitted).

333. See, e.g., MEDEA & THOMPSON, *supra* note 244 (arguing that extreme inequality can equate intercourse with rape); Mercedes Durán, Miguel Moya & Jesús L. Megías, *It's His Right, It's Her Duty: Benevolent Sexism and the Justification of Traditional Sexual Roles*, 48 J. SEX RES. 470, 477 (2011); Emily A. Impett & Letitia A. Peplau, *Sexual Compliance: Gender, Motivational, and Relationship Perspectives*, 40 J. SEX RES. 87, 95 (2003).

334. See, e.g., Chamallas, *supra* note 64, at 838; West, *supra* note 11.

335. See, e.g., Chamallas, *supra* note 64, at 838; West, *supra* note 217, at 444.

doing so will not commonly be a cause for concern.³³⁶ When we have sex in these situations, West writes, “we don’t want it, but we welcome it anyway, as a part of a relationship that is in its whole constructive, healthy, and pleasing.”³³⁷

It seems quite natural for West to cite relationships as the common context in which otherwise undesired sex can become a welcome and pleasing experience.³³⁸ Although not all relationships are synonymous with mutuality, the moderate approach does take for granted the notion of an inherent connection between relational intimacy and the value of positive sexuality. In this view, the ability to create intimacy between people within a sexual relationship is often the very reason that the value of sexuality is singled out.³³⁹ As Radin writes, one of the reasons that sex is incommensurable with commodifiable goods is that “[n]oncommodified sex ideally diminishes separateness; it is conceived of as a union because it is ideally a sharing of selves.”³⁴⁰ For many other authors, relationships likewise form the broader context from which the value of sexuality draws its meaning.³⁴¹ Still others suggest that the negative effect on the victim’s ability to form and maintain intimate relationships constitutes the harm of sexual wrongdoing.³⁴² Finally, as Professors Laura Rosenbury and Jennifer Rothman argue, even the Supreme Court views relational intimacy as the end informing the protection of sexual autonomy.³⁴³

It is important, however, to observe that even for the moderate approach, the connection between sexuality and relational intimacy does not make relational considerations synonymous with mutuality. Even the most egalitarian and loving relationships are often laced with material, psychological, and physical dependencies, involving minute asymmetries and complex divisions of labor.³⁴⁴ At the extreme, relationships can become entirely transactional, trading support for

336. West, *supra* note 184, at 239.

337. *Id.*; see also Gruber, *supra* note 73, at 426 (citing a study finding that in some settings unwanted sex between college students “actually produces positive outcomes”).

338. See, e.g., DAVID ARCHARD, *SEXUAL CONSENT* 21 (1998) (discussing the relational value that sex adds to relationships).

339. As Deborah Tuerkheimer notes, “Just as sexual violation occurs in the setting of relationships so, too, does wanted sex.” Tuerkheimer, *supra* note 148, at 1471 (footnote omitted).

340. Radin, *supra* note 91, at 1908.

341. Bryden, *supra* note 71, at 463 (noting that sex “is desired partly, at times, as an episode in a larger enterprise, such as marriage”); Joseph J. Fischel & Hilary R. O’Connell, *Disabling Consent, or Reconstructing Sexual Autonomy*, 30 COLUM. J. GENDER & L. 428, 472 (2016) (“([S]ometimes) excepting masturbation, what is sexual is relationally determined between or among parties.”); Plaxton, *supra* note 246, at 11–12 (discussing the importance of the relational context).

342. See Millett, *supra* note 326, at 60, 121.

343. As Justice Kennedy wrote in *Lawrence v. Texas*, “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.” 539 U.S. 558, 567 (2003); see also Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 827 (2010) (“The choice to which Justice Kennedy refers is not the choice to engage in sexual conduct; instead it is the choice to enter a relationship that has the potential to become emotionally intimate and, ideally, long-lived.”).

344. See, e.g., Gardner, *supra* note 8, at 55; Motro, *supra* note 293, at 132.

sexual and other services.³⁴⁵ Most relationships exist somewhere between the transactional and fully egalitarian, tasking the moderate approach with delineating cases in which the appeal to relational considerations under conditions of inequality become instances of condemnable unwelcome sex. Consequently, although the moderate approach often identifies undesired-yet-welcome sex with intimacy, it still recognizes that on many occasions undesired sex within a relationship is just as offensive as that which takes place outside of one, if not more so.³⁴⁶

#MeToo, however, seems to take an additional step away from both the radical and the moderate approach by implicitly assuming that *all* sexual contact that results from relational considerations is beyond censure. In its focus on nonrelational settings—such as the workplace, educational and spiritual institutions, professional interactions, and the like—the #MeToo movement implicitly suggests that relational inducements are characteristically internal to the sexual domain and therefore do not constitute sexual degradation, even when they involve a substantial degree of inequality.³⁴⁷ To be fair, as was already suggested, #MeToo movement's course is, given its decentralized nature, most often the general media's reaction to the multitude of allegations that #MeToo involves, which creates a filtering effect that may have a considerable impact on the treatment of intra-relational degradation. Given the pervasiveness of unwanted sex, it seems safe to assume that, for the majority of individuals who use this hashtag, the wrong that they experienced was of a private, perhaps even relational, nature. #MeToo's narrative, however, is often shaped not by the multitude of private cases but by those incidents that most strongly resonate throughout traditional and social media, commonly focusing on cases that either involve public figures or affect entire industries.³⁴⁸ "From Hollywood to sports to politics," this narrative commonly reads, "powerful men stand accused of abusing their power to intimidate, coerce and physically force women into compliance."³⁴⁹ In contrast, the public narrative deals with private cases regarding visible and discernible public sectors.³⁵⁰ With this public filter in place, #MeToo appears to be a

345. See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976) ("The courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services."). At some point, such relationships can no longer be regarded as intimate. 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, 347 (2015).

346. See, e.g., RUSSELL, *supra* note 195, at 73–86 (observing the continuum of sexual relations); West, *supra* note 180, at 813 (discussing the dangers that abusive relationships pose to one's "sense of physical integrity, autonomy, [and] self-sovereignty").

347. A similar approach is taken by Dripps in his response to West's theory of mutuality. See Donald A. Dripps, *More on Distinguishing Sex, Sexual Expropriation, and Sexual Assault: A Reply to Professor West*, 93 COLUM. L. REV. 1460, 1467 (1993).

348. See Schultz, *supra* note 13, at 31.

349. Lynn Rosenthal, Opinion, *#MeToo Stories Won't End Until We Focus on Prevention*, HILL (Nov. 28, 2017, 8:20 AM), <https://thehill.com/opinion/education/362009-campus-safety-is-next-for-the-metoo-movement> [<https://perma.cc/BD7M-X3U8>].

350. See *supra* notes 119–30.

movement that is mostly uninterested in things that occur within the confines of intimate relationships; it instead focuses on the more obvious leveraging of non-sexual (read nonrelational) domination.

For some, #MeToo’s oversight of relational dominance is a conservative restraint that must be removed before any genuine progress can be made.³⁵¹ As Barbara Kingsolver writes, “The #MeToo movement can’t bring justice to a culture so habituated to misogyny that we can’t even fathom parity, and women still dread losing the power we’ve been taught to use best: our charm.”³⁵² For others, #MeToo’s romanticized view of relationships leads it to find coercion where there is none. These critics see the Ansari incident as a cautionary tale about #MeToo’s Pollyannaish vision of relationships and the rage that its proponents exhibit when faced with less than perfect relational interactions. As Flanagan writes of Grace and those who identify with her, “She wanted affection, kindness, attention. Perhaps she hoped to maybe even become the famous man’s girlfriend. He wasn’t interested. What she felt afterward—rejected yet another time, by yet another man—was regret.”³⁵³ Bari Weiss similarly criticizes those who see sexual wrongdoing in such “lousy romantic encounters” that ought to be written off as “bad sex” instead of condemned as serious sexual wrongs.³⁵⁴ It would, however, be more accurate to suggest that, from the perspective of #MeToo, this incident stood out precisely because it was *not* simply another iteration of unwanted sexual contact in a relationship marked by inequality. Instead, condemnation here seems to reflect the belief that Ansari sought to circumvent the relational setting sought by Grace by directly connecting his stardom with her sexual judgment. Weiss seems to recognize this point yet denies that Ansari possesses the kind of dominance that would allow him to coerce Grace: “Yes, Mr. Ansari is a wealthy celebrity with a Netflix show. But he had no actual power over the woman—professionally or otherwise.”³⁵⁵ This objection mischaracterizes the wrong of sexual degradation. Grace did not claim that she was raped or otherwise coerced by Ansari; she claimed only that his treatment of her was degrading. For this wrong, it does not matter whether Ansari actually had enough power or influence to employ effective nonsexual leverage; as with Mr. Trump and the catcaller, the harm of degradation ensues from the implicit message in the wrongdoer’s words and actions: their target’s sexual judgment is beside the point.

351. See, e.g., Green, *supra* note 26, at 154 (arguing that #MeToo’s narrow view dampens calls for systemic reform); Schultz, *supra* note 13, at 31 (“[I]t seems clear that most of the ensuing #MeToo posts focused on specifically sexual forms of harassment and abuse, including sexual assault, and not on broader patterns of sexism and discrimination.”).

352. Kingsolver, *supra* note 2.

353. Flanagan, *supra* note 196.

354. Weiss, *supra* note 13.

355. *Id.*

CONCLUSION

I argue above that the #MeToo movement represents the transformation of the mutuality paradigm, developed in legal scholarship in response to the transactional paradigm in rape law, into public debate. In this transformation, the mutuality paradigm evolved into a yet-to-be-named wrong of sexual degradation, so far eclipsed by the established legal wrongs of sexual assault and harassment.

Sexual degradation, I argue, is similar to sexual harassment in that it focuses on the communicative and intentional aspects of the harm rather than on its tangible effects. Harassment, however, is wrong for its perpetuation of inequality, using words in a way that discriminates on the basis of sex, often with the underlying purpose of preserving gender disparity in the workforce. In contrast, the harm of sexual degradation is caused by inequality, but its nature is much less tangible, representing an attack on the victim's sense of personhood and dignity. Unlike sexual harassment, which is ultimately about discrimination, sexual degradation is thoroughly sexual, revolving around the *unique* meaning that sexuality has in most people's lives.

Sexual degradation is also distinguishable from sexual assault. Although the very idea of sexual assault is grounded in the distinctiveness of sexuality, distinguishing it from other forms of assault, the consent paradigm that anchors contemporary sexual assault law commonly revolves around the formal question of whether overpowering coercion has prevented the victim from exercising meaningful sexual autonomy.

Sexual degradation, in contrast, does not necessarily come in the form of overpowering force; indeed, it often appears in the form of an implicit suggestion that no force is necessary to subdue the victim's sexual judgment in light of the wrongdoer's nonsexual superiority. "When you're a star," the wrongdoer tells his listening victims, you are entitled to expect sexual submission, just as you can expect your wealth and fame to provide you with other commodities.

The Women's March that erupted in response to Mr. Trump's election signaled, through pussy hats, that this attitude is no longer acceptable. #MeToo has further developed this condemnation by focusing on calling out specific instances in which nonsexual leverage was used, successfully or not, to subordinate a person's sexual judgment to another's nonsexual dominance. Although such degradation is often accompanied by sexual harassment and assault, #MeToo has brought to light the pain that degradation causes in itself, even when it does not result in undesired sexual contact, and certainly when it does.

The condemnation of sexual degradation represents a significant change to our sexual mores. The idea that stardom and other forms of dominance bring with them sexual entitlements is deeply entrenched and is only now beginning to change. #MeToo has in part heralded this change and has in part charted the contours of what is now unacceptable behavior. Unfortunately, it has often done so in a way that has failed to recognize or to insist on the distinction between this novel message and established legal norms. This has often ensnared #MeToo in difficult, probative questions that are currently better left to the legal rules regulating

sexual assault and harassment proceedings. This is a natural but unfortunate consequence of #MeToo’s exponential development and of the absence of a clear terminology to describe the wrongs of which the movement speaks.

Focusing on the distinct features of sexual degradation can help the #MeToo movement push forward in the fight against sexual wrongdoing. For as long as sexual degradation remains too ill-defined to become the subject of legal condemnation, we must focus our efforts on countering its most pronounced feature—the illicit use of dominance. Divesting the dominance of those who have abused their powers and disregarded their victims’ sexual judgments is certainly an appropriate response, but the public legitimacy of such divestment depends on our ability to establish the connection between the act of degradation and this fitting response. If, at some point in the future, we begin to acknowledge sexual degradation as a serious moral wrong, we will then be faced with the difficult questions of whether and how it should be given legal meaning.