

# WOMEN'S SEXUAL AGENCY AND THE LAW OF RAPE IN THE 21ST CENTURY

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## ABSTRACT

This is an article about sex and rape and the messy determinations of consent that mark the boundary between the two. More specifically, the article evaluates the modern baseline presumption of non-consent in sexual encounters in light of different theories of sexuality (feminism on the one hand and sex positivism/queer theory on the other) and in light of how sexuality manifests itself in the lives of contemporary young people. We analyze sexting, media imagery and hook-up culture to find that neither feminism nor sex-positivism provide an accurate account of contemporary sexuality, but neither theory gets it all wrong either. The gendered scripts that troubled feminists continue to govern many casual sexual encounters. What has changed is the extent to which women embrace their own sexual agency and their clear rejection of 2nd wave feminism's messages with regard to gender and sexual objectification. Empirical work confirms that the sexual encounters that many young women participate in could be classified as rape under the modern legal presumption of non-consent, but most women reject classifying what happens as rape. Their belief in their own agency allows women to construct away their injury. This suggests that nonconsensual sex may not be or is not perceived by its victims to be as injurious as some feminists suspected, but it also means that sex positivists need not worry about over-detering sex. Women who don't feel injured, don't bring rape charges. Moreover, our analysis shows that despite, or perhaps because of, women's celebration of their own sexual objectification, a great deal of unwanted sex happens, whether consented to or not. This means that while the presumption against consent may not have much effect, it likely does little harm, and if it deters anything it likely deters unwanted sex, whether consented to or not.

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When two people have intercourse consensually, what happens is sex. When there is not mutual consent, what happens is rape. This is a paper about sex and rape and the messy determinations of consent that mark the boundary between the two. Determining consent has assumed center stage in the legal endeavor to criminalize rape. As all who are versed in the problem of rape convictions know, determining consent is complicated. Consent is rarely defined in rape statutes and even if it is, the definition usually begs as many questions as does the term consent itself (Committee on Standard Jury Instructions, Criminal, of the Superior Court of Los Angeles County, California, 2013).<sup>1</sup>

The focus on consent in rape law is fairly recent. Although lack of consent was always a conceptual part of the crime of rape (Spohn, 1999, p. 122), prior to the 1970s, there was a little need to focus on consent because lack of consent could be inferred from the use of force (a traditional element of rape), or consent could be inferred from prevalent taboos against any sort of promiscuous behavior on the woman's part. Rape reform work in the 1970s–1990s upended this traditional treatment of consent. In most states, force was eliminated as a necessary element of rape. Victims' sexual histories were declared irrelevant as a matter of evidence law. Forensic science all but eliminated mistaken identity as a defense to rape. Properly collected DNA evidence now provides definitive evidence of sexual activity tied to a particular person. With such evidence, the only defense left to one charged with rape is consent.

In the 1980s, influenced by feminist writing about sex, rape reformers tried to upend rape law's traditional approach to consent by inverting the baseline from which jurors were asked to determine consent. Instead of presuming consent unless the prosecution established beyond a reasonable doubt that the victim did not consent, reformers argued that, absent evidence of consent, jurors should presume rape.

Twenty-five years have passed since states moved toward a baseline of no consent. During that time, a rich body of sex positive literature has called into question the vision of sex that inspired the shift to nonconsent. Coupled with this literature is an evident shift in sexual norms as depicted in contemporary media. These factors, along with studies documenting the apparent failure of rape reform to ease the road to conviction in acquaintance rape cases, suggest a need to reevaluate the law's presumptions regarding nonconsent as they apply to the distinction between rape and sex.

This paper takes up the challenge of reconsidering the legal understanding of rape in the early 21st century. More precisely, this paper considers the legitimacy of using a baseline presumption of no consent in policing the line between rape and sex. The section "Modern Rape Reform" describes the modern trajectory of rape reform including the feminist outcry over the prevalence of rape, the move to eliminate the force requirement, the adoption of evidence rules intended to minimize negative stereotypes associated with women's sexual behavior, and the evolution to a presumption of "no consent" in rape cases.

The no consent presumption – or baseline – relied on insights from what is now commonly referred to as second wave feminism (Harris, 1990).<sup>2</sup> Within the legal academy, second wave feminism includes both the dominance feminism work of Catharine MacKinnon and the cultural feminism of Robin West. Second wave feminist theory provided a blistering attack on the sexual norms and social scripts that governed sexual behavior at the genesis of the modern rape reform movement. This theory, with its focus on gender, objectification and power, informed reformers' understanding of sexuality and thus their conceptualization of rape. The section "The Second Wave Feminist Account" explains how the dominance feminist view of women as sexually objectified by men supports a presumption that the absence of evidence of consent should be interpreted as rape. The cultural feminist view of sex likewise supports this presumption of no consent, as it views sex as both a source of pleasure and terror for women, who often acquiesce to sex under conditions in which the sex is very unlikely to be meaningful or pleasant.

Second wave feminism no longer commands the academic or popular influence that it did when the baseline of no consent first surfaced, though. Second wave accounts of sexuality gave way to – or were perhaps pushed aside by – very different theories of gender, objectification, and power. Sex Positivism and much of Queer Theory<sup>3</sup> describe paradigms of sexuality in which sex is far more liberating, women are far more active and sexual

objectification is far less pernicious. At a theoretical level, these views of sex make it much harder to support a presumption of no consent. The section “Queer Theory and Pro-Sex Feminist” explores the critical tensions between these different theoretical views of sexuality, particularly as they apply to questions of consent.

The section “Sex Narratives” does not take sides in any debate between feminism and queer theory. Our concern is with the present law of rape. The section “Contemporary Sexual Norms and Practice” therefore turns to the contemporary world of sex – at least straight sex, analyzing modern cultural images and projections of women’s sexuality, and evaluating if and how those cultural images are internalized in contemporary heterosexual practices.<sup>4</sup> Focusing on young, mostly middle class, women, we describe the world of sexting and hook-ups to discern how young people, particularly young women, perceive and experience sex.

In the section “Mapping the Theory onto Reality,” we evaluate how the theories of sexuality explored in the section “Sex Narratives” map onto the sex experienced by women in the section “Contemporary Sexual Norms and Practice.” Several conclusions and questions emerge. Contemporary media images suggest, and an emerging body of research confirms, that young women portray and perceive themselves as having significant sexual agency. Ironically, the same studies find that in practice, women rarely exercise that agency during sexual encounters. The second wave feminist account of sex as something that is routinely done to women remains fairly accurate. What is new and challenging for the law is the growing body of research suggesting that women’s embrace of their own agency leads them to reject the characterization of sex they have not consented to, as rape.

Even as they act within the persistently gendered scripts governing sexual interactions, many contemporary young women have internalized a belief in their own agency that allows them to construct away the injury of rape. Because they believe they could have stopped the sexual act, they were not raped. As we explain in the section “Mapping the Theory onto Reality,” one possible consequence of young women’s embrace of sexual agency, even when such “agency” involves having intercourse to which they did not consent, is to compound and complicate the reasons underlying rapes’ notoriously high rates of underreporting. Current thinking is that rape is underreported because victims may fear stigma or fear of being re-traumatized by the legal system.<sup>5</sup> Our reading of contemporary literature regarding young women’s understanding of and expectations from sexual encounters suggests that women may not bring rape charges because they do not think of themselves as having been raped.

The analysis of contemporary culture also shows that sexual agency, particularly among younger women, manifests itself in the embrace of gender differentiation and sexual objectification. By constructing their bodies as ideal sexual objects, with practices ranging from lingerie shopping to breast implants and pubic hair waxing, women are actively embracing their own sexual objectification. Women's celebration of their sexuality as a vehicle to sexual empowerment makes it hard to argue that gender and sexual norms are imposed on women by men. MacKinnon said, "[A]ll women live in sexual objectification the way fish live in water" (MacKinnon, 1989b, p. 149). But many women, like the fish, appear to like it.<sup>6</sup>

Upon closer inspection, though, it is hard to understand what the celebration of sexuality is about. The eroticism celebrated in much of sex positivism and queer theory is strikingly absent from accounts of sexual encounters among straight young people. In the place of a pleasure discourse is evidence that sex is used instrumentally, both by women and men. Second, wave feminists long ago noted that men use sex as reification of their own masculinity, as a notch on the belt of masculine achievement. Today, women appear to use sex for comparably instrumental reasons, as a means of showcasing their femininity, situating their bodies as loci of personal achievement.

The section "Mapping the Theory onto Reality" reveals gender, sexual objectification, and casual sexual interactions as a part of a commercialized game, much of which people profess to enjoy playing. The benefits that come from playing this game rarely include the self-determination and sexual freedom values that Sex Positivists celebrate, but neither do the costs of playing the game seem to include the severe physical and emotional dangers that second wave feminist theory argued were so prevalent in rape. The game does produce a good deal of unwanted sex, however.

This observation informs our final inquiry into the extent to which contemporary norms have undermined the justification for presuming no-consent. We conclude that, although many of the original feminist justifications underlying this presumption may have crumbled, the harms of retaining it seem minimal. It may do some good and it does almost no harm. The presumption that sex, in the absence of consent, is a crime sends a symbolic message about the importance of mutuality in sex. That symbolic message exists in tension with norms that do not require sexual actors to ensure mutuality. Because of that tension with real-world norms, the presumption that nonconsensual sex is rape seems to have little effect on women's likelihood of reporting or even feeling raped. Nonetheless, the law does help underscore a normative vision that may get lost in a world in

which sex is only about individual pleasure. The argument against defining all sex without evidence of consent as rape was that it might chill sex that, in reality, was consensual. Our conclusions suggest no reason to believe the law has had that effect. To the extent that the legal baseline of “no” deters anything, it likely deters unwanted, even if possibly consented to, sex. As experienced now, a significant percentage of sex between young people, as described by young people themselves, lacks pleasure, let alone the sense of mutual transcendence touted by sex positivists. Indeed, it is often unwanted by both women and men, but especially by women. If what the baseline of no deters is unwanted sex, it isn’t doing much harm. If it helps young people, particularly young women, feel entitled to a more mutual experience, it could be doing much good.

Our conclusions necessarily beg bigger questions about what can be expected of the criminal law. Criminal law, in general, and criminal guilt, in particular, are binary. One is guilty or not. The concepts we explore, agency, consent, and injury are – upon analysis – anything but binary. Thus, it is possible, and indeed likely, that the problems we describe with rape law enforcement are an inevitable result of trying to categorize, with the criminal law’s binary terms, the nebulous concepts of sexual desire, motivation, and conduct. But unless the law is prepared to abandon rape as a crime, it must always be concerned with how to draw bright lines demarcating the difference between permissible and impermissible sexual conduct. Just enforcement of rape law may therefore require regular examination of the impact of contemporary sexual norms and conduct on our understandings of agency, consent, and injury.

Moreover, our analysis raises as many questions as it answers about the idea of injury. We draw no firm conclusions about whether or how badly women who have been pressured into nonconsensual sex, but reject perceiving themselves as having been raped, have been injured. Women’s resistance to seeing themselves as rape victims does not necessarily mean that they are unharmed by the nonconsensual sex. Nor does the law’s labeling nonconsensual sex as rape necessarily mean that women have been injured. Our gut sense, discussed briefly in the section “Mapping the Theory onto Reality,” is that even if women do not see themselves as rape victims, they may suffer hedonic injury when they engage in and are expected to engage in unwanted sex, especially when that sex seems to be much more about objectification, competition and gender dynamics, than it is about pleasure and eroticism. But we cannot establish the gravity of this injury nor even its existence. That said, we think we can, and do, establish that the harms that come from the law’s criminalization of nonconsensual sex are minimal,

and the normative benefits of criminalizing nonconsensual sex, at least given contemporary sexual mores, are important to women's ultimate sexual empowerment.

## MODERN RAPE REFORM

In the 1970s, a plethora of nonlegal feminist scholarship appeared describing the prevalence of forced sex. Susan Griffin (Griffin, 1971), Diana Russell (Russell, 1974), and Susan Brownmiller (Brownmiller, 1975) published widely read descriptive books on rape. These accounts did not so much expound on the theory of rape,<sup>7</sup> as they did detail its ubiquity. Coming in the midst of the second wave feminist political movement, these books helped fuel grass roots rape reform efforts. Take Back the Night Marches aimed to pressure communities to provide women more protection from sexual assault (Golden, Peterson, Hilgenkamp, Harper, & Boskey, 2010). Public campaigns sought to destigmatize rape, so as to enable more effective enforcement (Bevaqua, 2000, p. 30). Many states began to take a second look at their rape laws (Spohn, 1999, p. 122).

The reform efforts tended to focus on three areas: dispensing with a force requirement, creating gradations in kinds of rape, and restricting the use of evidence involving women's past sexual conduct. Force was the first traditional element to go.

As the rape literature worked its way into the legal consciousness, and as more women felt empowered to bring rape charges, it became clear that the force element, which required women to fight back in order to produce evidence of force, required women to engage in a physical battle that they were almost certain to lose. Story after story relayed how men were simply so much bigger, so much more powerful and so indifferent to the women's feelings, that fighting back made no difference (*People v. Dorsey*, 1980/1982).<sup>8</sup> Police departments, despite their reticence to pursue cases that lacked evidence of resistance, recognized that victim resistance often led to further violence, and therefore advised women not to resist (Spohn, 1999, p. 124). No other crime demanded that a victim resist in the manner that traditional rape prosecutions did and reformers eventually persuaded many state legislatures to dispense with the traditional force requirement (Spohn, 1999, p. 124).

Most states then redefined the crime to include various degrees of offense. Instead of one prohibition on "rape," many statutes now included

“first,” “second,” and “third” degree sexual assault. Professor Spohn (1999) explains that the degree of rape depends upon a host of variables:

[T]he circumstances of the offense, the seriousness of the offense (penetration vs. other sexual contact), the type and amount of coercion used by the offender (a weapon, physical assault, restraint of some type, threats), the degree of injury to the victim, whether the offender committed a felony in addition to the sexual assault or had accomplices, and the age and incapacitation of the victim. (pp. 122–123)

This reconfiguration of rape reflected a sense that, however, coercive a sexual encounter with a much more powerful acquaintance might be, it was not likely to be perceived, by the victim or a jury, in exactly the same way as would be an encounter with a stranger wielding a weapon. Lawmakers rarely specified whether the grading of sexual assault offenses reflected the distinct nature of the injury suffered by victims of different kinds of rape<sup>9</sup> or instead the degree of culpability involved in different kinds of rape.<sup>10</sup> Reformers accepted the proposition that the law could differentiate among types of rape, hoping the distinctions would encourage the state to proceed with prosecutions of “lesser” sexual assaults (BenDor, 1976, p. 152; Marsh, Geist, & Caplan, 1982, p. 21).

The next major area of reform had to do with the victim’s sexual demeanor and history. Through the 1970s, rape trials routinely required victims to defend and justify their past sexual behavior (Berger, 1977). The consent requirement made the women’s sexual history relevant because the jurors were free to conclude that (i) if she consented before she probably consented again or (ii) she dressed or behaved in such a way that she must have really wanted it (Baker, 1997, p. 587). Eager to diminish the likelihood of either inference, reformers embraced “rape shield laws,” which barred most of the evidence that allowed juries to make either inference of consent.

States took the lead in establishing rape shield laws, but Congress followed suit in 1978 by passing Federal Rule of Evidence 412. Rule 412 excludes evidence offered to show prior sexual behavior of the victim and evidence offered to show a women’s sexual predisposition. “The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with the disclosure of intimate details” (Rule 412 Committee Notes, 2012).

Despite these attempts to help the criminal law prosecute rape more effectively, by the 1990s, there was little evidence that the reforms increased either the conviction rate or the number of cases reported (Spohn, 1999, p. 129). Failure to secure more rape convictions may have stemmed from

a basic problem with the criminalization of rape. Even when reduced only to a question of consent, and even without the women's sexual history, the burden of proof in rape prosecutions poses an almost insurmountable obstacle (Baker, 1999, p. 690; Bryden & Lengnick, 1997, p. 1316). Conviction requires the state to prove, beyond a reasonable doubt, that the victim did not consent to sex.

Always difficult, proving nonconsent became even more onerous once premarital sex became commonplace. By the 1980s, it was reasonable to assume that a woman might consent to sex on a date, with an acquaintance, or even with someone she just met. Absent witnesses or evidence of violence, a rape prosecution pits her claim that she did not consent against his claim that she consented. In essence, the state must convince the trier of fact – beyond a reasonable doubt – that this particular victim did not consent, in spite of the fact that in comparable situations many women do consent.

Further complicating the prosecution's task were social norms inhibiting communication and encouraging female passivity during sexual encounters. "[B]oth women and men see it as normal and natural for the male to play a more dominant and assertive role in a heterosexual encounter and the female to play a more yielding or accommodating role" (Bem, 1993, p. 163; Warshaw & Parrott, 1991, p. 75). These social scripts parallel general gender scripts that associate independence and action with masculinity and dependence and pleasing others with femininity (Jackson, 1995, p. 19). Men are supposed to initiate sexual activity. Women are supposed to respond either by politely deferring or by quietly playing along; women's pleasure is mostly irrelevant.

As those who studied rape in the 1980s and 1990s repeatedly demonstrated that these scripts have a troubling by-product: the cultural taboo on explicit communication during sexual encounters leads to a great deal of miscommunication. Men may understand women who fail to make explicit their nonconsent as passive, but willing participants in some sexual encounters (Kanin, 1984, p. 97). Particularly early in a relationship, miscommunication is deeply linked to acquaintance rape (Shotland, 1992, pp. 129–130). One of the most comprehensive studies of sexual attitudes found that 22% of women reported having been forced by a man to do something sexual, while only 3% of men reported having forced a woman to do something sexual (Michael, 1995, p. 223). Much of this miscommunication apparently stems from men's tendency to interpret women's nonverbal actions as indicative of consent. Men are likely to interpret women's alcohol consumption, eye contact, interpersonal distance, flirting, and

casual touching as indicative of sexual intent (Anderson, 2005, p. 1417). When asked about the same nonverbal activities, women do not necessarily view them as indicative of sexual intent, let alone consent (Anderson, 2005, p. 1417).

For many feminists in the legal academy, the solution to the miscommunication problem seemed fairly obvious: *Communicate Better*. Feminists sought to ensure better communication by dislodging the cultural scripts mandating silence and reforming the law to require clear manifestation of consent. Not only should no mean no, silence should mean no. A man who proceeded in the absence of a clear indication of consent should be held responsible (Ayres & Baker, 2005, p. 601; Schulhofer, 1998, p. 271; Taslitz, 2005, p. 446). For example, Professor Michelle Anderson, who wrote extensively about rape in the early 2000s, suggested there must be more than a simple “yes;” there must be negotiation, a conversation back and forth between participants before a man could successfully claim consent to a sexual encounter (Anderson, 2005, p. 1406).

The reform efforts targeting better communication require defendants to tell a story of affirmative consent. In theory, this requirement should help overcome the formidable burden of proof problem. Without an affirmative consent requirement, a defendant is innocent as long as the trial narrative contains some ambiguity with regard to consent. With an affirmative consent requirement, ambiguity is not good enough for the defendant, because proceeding in the face of ambiguity is a crime. In essence, the affirmative consent requirement resets the baseline in rape prosecutions. The baseline becomes no. The jury must still start out believing the defendant, but his story must include a credible account of why he inferred the victim’s consent. In the absence of a credible yes, the jury must assume no.

Only a handful of states have explicitly adopted a baseline of no. In *State in Interest of M.T.S.* (1992),<sup>11</sup> the New Jersey Supreme Court concluded that the defendant must “reasonably || believe that the alleged victim had freely given affirmative permission to the specific act of sexual penetration” (*State in Interest of M.T.S.*, 1992, p. 1278).<sup>12</sup> Wisconsin, Washington, and Florida adopted statutes that appear to require affirmative consent.<sup>13</sup> Other states have simply grown less sympathetic to defendants who proceeded in the face of ambiguity with regard to consent. Although they stop short of requiring affirmative permission, both Massachusetts and Maine have upheld convictions of defendants who claimed they mistakenly believed that the woman consented (*Commonwealth v. Lopez*, 2001, p. 966; *State v. Reid*, 1984, p. 1296). Many states have adjusted the mens rea for rape such that negligence is sufficient

grounds for a rape conviction (Schulhofer, 2003, p. 282). The only way a man can ensure that he is not mistaken with regard to consent is to secure unequivocal signs of consent before proceeding.

The baseline of no consent sacrifices some sex for less rape. Sex that might happen if indicia of consent are ambiguous is discouraged. The baseline of no also inscribes a normative vision of sex. It encourages one particular kind of sex by penalizing other forms of sex. It encourages communicative, cautious sex and rejects as too dangerous what some people may affirmatively desire: atomistic, hierarchic, and noncommunicative sex (Mohr, 1988; Siligson, 2009, p. 101).<sup>14</sup> Thus, one's willingness to accept a baseline of no may turn on what kind of sex one wants. It is also likely to turn on what one thinks others may want, why they may want it, and the role that sex and sexuality play people's understanding of themselves. The section "Sex Narratives" turns to that discussion in more detail.

## SEX NARRATIVES

Sexual encounters are rich in underlying narratives. Whether for procreation or for pleasure, whether brought on by a seemingly uncontrollable urge or by cautious seduction, sexual encounters reflect at least two, and in the case of conflict, three or more perspectives or stories: those of the parties involved and those of the people who, in retrospect, seek to understand the encounter. All of those perspectives are informed by background beliefs about how sexuality functions in people's lives. In this section, we review the competing theoretical frameworks of sexuality employed by second wave feminists and sex positivists, analyzing the implications of each account for rape law.

### The Second Wave Feminist Account of Sex

Much of the discussion of sex in the 1980s and 1990s, when the affirmative consent standard was first being articulated and adopted by courts, was informed by second wave feminism. Second wave feminism's view of sexuality is not a particularly pleasant one. "Sexuality," wrote Catharine MacKinnon, "is the dynamic of control by which male dominance ... eroticizes and thus defines man and woman, gender identity and sexual pleasure" (MacKinnon, 1989b, p. 137). "Man fucks woman;

subject verb object” (MacKinnon, 1989b, p. 124). Sex, the act, is a mechanism for men to assert dominion over women. Femininity – the state of being female and the state of being sexual – “becomes women’s identity to women because it is imposed through men’s standards for desirability in women” (MacKinnon, 1989b, p. 8). Men objectify women sexually because men want sexual objects that they can control. Women become commodities in a process that MacKinnon called “the thingification of women” (MacKinnon, 1989b, p. 8).

Patriarchy, as described by MacKinnon, is a fully coherent, if horrifying, system of male dominance. Women’s differences from men do not justify or explain masculinity or femininity. Women’s differences are constructed by patriarchy so that men can dominate women and extract their sexuality. Male power then gets protected as sexual. “Male dominance is sexual. Men ... sexualize hierarchy” (MacKinnon, 1989b, p. 127). “Women are socialized to passive receptivity ... submit to survive” (MacKinnon, 1989b, p. 177). Although MacKinnon acknowledges there might be such thing as sex as distinct from rape, “for women,” she writes, “it is difficult to distinguish the two under conditions of male dominance” (MacKinnon, 1989b, p. 174). As for consent demarcating the difference, she suggests “when a woman accepts what would be rape if she did not accept it, what happens is sex” (MacKinnon, 1989b, p. 134).

One consequence of MacKinnon’s conflation of rape and sex was confusion as to why, from the women’s perspective, rape was so much worse than sex. According to MacKinnon “[t]he injury of rape lies in the meaning of the act to its victims” (MacKinnon, 1983, p. 652). Nonetheless, she was routinely and accurately quoted as saying “for women it is difficult to distinguish [rape from sex] under conditions of male dominance” (MacKinnon, 1989a, p. 174). By labeling as rape much of what the world called sex, MacKinnon raised crucially important questions about women’s agency and their control of their sexuality under conditions of male dominance. But she left unanswered whether, and to a certain extent why, rape was any worse than most sex. “What is wrong with rape,” she wrote, “is that it is an act of subordination of women to men” (MacKinnon, 1983, p. 652). But so, according to her, was a good deal of sex that was not rape.

MacKinnon’s totalizing view of sex as oppressive was not uniformly accepted by feminists. Many pro-sex feminists decried what they saw as MacKinnon’s inherent endorsement of a repressive, rigidly regulated world of sex (Abrams, 1995, pp. 304–305). One major flashpoint for the debate between the pro-sex feminists and MacKinnon revolved around the regulation of pornography (Abrams, 1995, pp. 304–305). The celebration of

sexual liberation among the pro-sex feminists did not endorse or seek to protect predatory behavior by men, but argued that the only way women could assume the control they needed in sexual encounters was to live in a world in which their sexuality was not so rigidly regulated (Abrams, 1995, pp. 312–314).

Within the legal academy, Robin West and a group that came to be known as cultural feminists took a somewhat different approach to sexuality. While acknowledging how violent and dangerous sex could be, West also emphasized that women often found joy in sex. Indeed, there was even joy to be found in subordination. And this paradox is what makes the criminalization of rape so hard. “[S]exual submission has erotic appeal when it is an expression of trust; is damaging and injurious when it is an expression of fear; and is dangerous because of its ambiguity” (West, 1987, p. 129). “The profound existential fact – that the most primal source of pleasure located in one’s own body is a source of danger and constitutes a risk to one’s survival – is something all women must somehow learn to live with and it is something only very few men ever confront” (West, 1997, p. 114).

Rape is something all women fear and they fear it because its injury is profound. Both violent and nonviolent rapes involve “assaults on the body. Both are experienced and typically described as more like spiritual murder than either robbery or larceny” (West, 1993, p. 1447). “The experience of rape is shot through with an unwilling invasion of the body, fear of one’s own imminent death and the pain of nonconsensual physical touching ...” (West, 2010, p. 232). The harm from rape comes from “the sure knowledge that one’s will is irrelevant, the immediate and total reduction of one’s self to an inanimate being for use by another.” (Id.)

West is very clear that consented to, yet unwanted, sex is not rape. It does not involve the same kind of injury.<sup>15</sup> “There is quite a felt difference between those coercive forces that elicit consent – no matter how bad the bargain struck – and the coercive force employed by an actor who overrides or ignores the lack of consent ...” (West, 2010, p. 226).<sup>16</sup> Nonetheless, unwanted sex, particularly when consented to repeatedly, in the absence of erotic desire, may be injurious. What happens to women’s relationships to their own sexuality, their own eroticism, and their own sexual desires if they routinely say yes to sex that they would rather not have?

MacKinnon’s discussion of rape raised questions about why sex is ever different than rape. West answers that by explaining that rape involves a spiritual injury, “a breakdown of selfhood” (Halley, 2006, p. 63),<sup>17</sup> that consensual sex does not. Not all unwanted sex involves that kind of injury, though the prevalence of unwanted sex may suggest an equally troublesome

problem. “Why,” West (1993) asks, “is it okay for her to have sex even though she does not want to, but not okay for him to not have sex even though he wants to? Why is the implied background norm what he wants” (p. 1456)?

In asking that question, West raised the baseline issue. A world in which it is routine to say yes to unwanted sex but uncommon to condemn a man for pressuring a woman into unwanted sex is a world with a baseline of consent. If sex is mostly good, not particularly harmful and makes at least one person happy, why not assume that most sex is fine? In asking why we preference the man’s interest in having sex over the women’s interest in not having it, West calls into question the baseline of consent. Why not start from no (West, 1993, p. 1451)?<sup>18</sup>

Many of the rape reform efforts described above took that question seriously and pushed the law, in a variety of ways, toward that baseline. But as the legal academy and law reform efforts were struggling with the issues surrounding rape and consent, scholars outside the legal academy were taking issue with the feminist theories of sexuality that first problematized the distinction between rape and sex. We turn to that literature next.

### Sex-Positivists’ Narrative Account of Sex

In a highly influential article, anthropologist Rubin (1984) argued that one must be careful not to make feminism into too much. “Feminism,” she wrote, “is the theory of gender oppression. To automatically assume that this makes it the theory of sexual oppression is to fail to distinguish between gender, on the one hand, and erotic desire, on the other” (Rubin, 1984, p. 169). Attention to erotic desire, how it might and might not be liberating, why it might and might not be gendered, how it might or might not influence and be influenced by power, how one is internally and externally identified by it, bred a flood of writing about sexuality. Sexuality studies now constitute a broad, deep, and rich body of scholarship. Our focus will be on those parts of the scholarship that address feminism in general and rape, or unwanted sex, in particular.

One of the most glaring omissions from second wave feminism’s account of sexuality was any meaningful explanation of, let alone narrative for, same sex-attraction. If “man fucks woman” is “subject verb object” (MacKinnon, 1983), what grammatical diagram explains man fucks man or woman fucks woman?

At times, feminists seemed to argue that same sex relationships were derivative of heterosexual power relations. Catherine MacKinnon suggested that although a man may have sex with a man, what they are often manifesting in that sex is the same kind of power relations that control heterosexual sex (National Organization on Male Sexual Victimization, Inc., 1996). By contrast, cultural Feminism seemed to legitimate – even lionize – lesbianism, but it has been criticized for condemning much of gay male culture (Halley, 2006, pp. 64–66).<sup>19</sup> and “delet[ing] women’s desire for phallic masculinity” (Halley, 2006, p. 66).

For many women, feminism’s demonization of power relations within sex also simply failed to provide enough of a reason to reject as illegitimate their own erotic experiences and desires. West (1987) herself acknowledged that subordination in sex could be pleasurable.<sup>20</sup> A theory – or at least a political movement – that declares certain forms of erotic pleasure “suspect” must offer desirable alternatives, or the movement is not likely to stay strong. As two 20-something feminists wrote in the 1990s, “we live [our] desires through the discourses of patriarchal romances, not feminism. And the irony is that we know it, but that does not make the desires go away” (Gill & Walker, 1993, p. 69).

Moreover, power within individual relationships often seems to ebb and flow and sometimes to switch sides. Queer theorists inside and outside the legal academy argued that the feminist account of power was not wholly inaccurate, it was just wholly incomplete. Drawing on the poststructural work of Michel Foucault, queer theorists offered a very different view of sexual power (Foucault, 1980, p. 39). Power is ubiquitous and inevitable, in sex as in everything else. Sexualities are constructed by interacting norms of sex, gender, and deviance. One’s sexuality is not simply a function of a hierarchical system of male dominance. It is a function of a complex web of interacting, discursive, evolving relationships, the power in which is not fixed. That is why there can be such diversity in erotic desire<sup>21</sup> and why one cannot condemn sexual acts simply because they create and perpetuate power relationships. Virtually everything does that. Thus, as Halley (2006) summarizes, much queer theory accepts feminism’s idea that “sexuality is shot through with power, but it is much more open to the idea that the result is only episodically, not structurally, domination” (p. 114).

Acknowledging the ubiquity of power relationships in sex does not necessarily mean condoning all use of power in sexual relationships, though for many queer theorists, the price of regulating that power is too great. Many pro-sex theorists concede that sex can be, and perhaps often is, dangerous for women. But that danger may have its own positive erotic

potential. Danger is an inevitable part of sex. Professor Franke (2001) writes:

[D]esire ... risks bumping up against danger. Feminist legal theory often dismisses this ... as false consciousness, or worse, women imitating male sexuality. But to evacuate women's sexuality of any risk of confrontation with shame, loss of control, or objectification strikes me as selling women a sanitized meager simulacrum of sex not worth getting riled up about .... It is precisely the proximity to danger, the lure of prohibition, the seamy side of shame that creates the heat that draws us toward our desires ... It is also what makes pleasure, not a contradiction of or haven from danger, but rather a close relation. (pp. 206–207)

Halley (2006), commenting on the title of *Pleasure and Danger*, a formative collection of pro-sex feminist essays, notes that the title “puts pleasure and danger into conjunction (as in “salt and pepper”). It affirms that sex has a dark side” (p. 117). MacKinnon argued that patriarchy erotizes violence and domination. Much of queer theory agrees, but defends that dynamic precisely because of its erotic content.

At a minimum, pro-sex theorists argue, feminists must stop constantly harping on the danger. “The overwhelming attention we have devoted to prohibitions against bad or dangerous sex has obscured, if not eliminated, a category of desires and pleasures in which women might actually want to indulge” (Franke, 2001, p. 200). If danger must be controlled it should be controlled only to insure that women are not chilled from seeking erotic desire. As Vance (1993) wrote, the goal should be to “reduce the dangers women face and ... expand the possibilities, opportunities and permission for pleasure that are open to them” (p. 290). Danger “is bad not because it realizes male dominance but because it deters women from being sexually adventurous, from seeking and finding pleasure” (Halley, 2006, p. 117).

Throughout almost all of this pro-sex and queer critique of second wave feminism, there is an undeniable celebration of the erotic as liberating. In Glick's (2000) words, contemporary queer theory “encourages us ... to fuck our way to freedom” (p. 19).<sup>22</sup> Much contemporary writing in the legal academy adopts this strongly pro-sex stance.

Professor Cornell (1998) writes that “our sexuate being and the way we choose to represent ourselves sexually is basic and personality-defining and must therefore be protected by any meaningful concept of liberty and conscience” (Cornell, 1998, p. 33). Writing in response to *Lawrence v. Texas* (2003), Professors Rosenbury and Rothman (2010) argue that *Lawrence* inappropriately cabins a constitutional right to sexual activity within the context of intimate relationships (p. 809). It is the sex, not the intimacy, that they argue must be protected because intimate relationships “can mask

various dynamics that sustain gender and sexual hierarchies, thereby making those hierarchies seem natural or inevitable rather than the product of social or legal construction" (Rosenbury & Rothman, 2010, p. 837). In the name of toppling those hierarchies, they suggest that sex must be liberated from cultural constraints in order for individuals to express themselves and their identity.

Their framing of a right to sexual activity presents a stark contrast to the second wave feminist critique of sex: "[W]e contend that the recognition of a right to intimate association requires the recognition of a right to engage in consensual sexual activity without regard to the motives or goals behind the activity" (Rosenbury & Rothman, 2010, p. 863).

This disregard of motives is striking. The second wave feminist account of sex focused on men's motives in order to explain why sex was dangerous, how it could subordinate and why it often felt frightening, painful and/or hollow for women. Men's motives were either pernicious, a desire to dominate women, or just pathetic, selfish, indifferent, and rooted in a commodified understanding of sex. Rosenberg and Rothman (2010), in the name of breaking down sexual hierarchy, dispense with the motive question altogether. It does not matter if the motive was bad, because sex is good.

Rosenbury and Rothman (2010) do not erase rape as a crime.<sup>23</sup> They acknowledge that the sex must be consensual to be legal, but their approach almost certainly endorses a return to the baseline of consent. There is something so liberating about sex itself, with its seemingly infinite sources of pleasure (Rosenbury & Rothman, 2010, p. 863), with its relationship to "identity and self-expression" (Rosenbury & Rothman, 2010, p. 836), with its "heat that draws us toward our desires" (Franke, 2001, p. 207), that it seems safe to assume that everyone wants it. For sex positivists, the legal academy has spent too much time "theorizing circumstances in which 'no' is the right answer to a sexual encounter," and needs to start thinking about the "conditions under which we would be inclined to say 'yes'" (Franke, 2001, p. 206).

Before turning to how these theories of sexuality map onto contemporary young women's experiences, a note on gender is in order. Recall that according to MacKinnon gender is about sexuality, which in turn is about male dominance. "[T]he ruling norms of sexual attraction and expression are fused with gender identity formation and affirmation such that sexuality equals heterosexuality equals the sexuality of (male) dominance and (female) submission" (MacKinnon, 1989a, p. 177). Femininity is "imposed" on women "through men's standards" (MacKinnon, 1989a, p. 8). If gender and the objectification of gender is always about subordination, it is always

suspect. The contemporary critique of gender is not so unlike the original critique of MacKinnon's views on sexuality: Gender can be fun (Crawford, 2007, p. 120).<sup>24</sup> Today, women can take control of their own bodies, dress them and shape them and use them as they please. That capacity, for many young women, feels like the essence of agency and empowerment, although as we explain in the section "Contemporary Sexual Norms and Practice," the pressure many women feel to dress and shape their bodies to perfection may make us question the extent to which the embrace of gender is, in fact, empowering.

### As Applied to Rape Law

The competing sex narratives of second wave feminists and sex positivists underscore the challenge of drawing the line between sex and rape. If one accepts the second wave feminist account of sexuality, according to which sex and gender are primarily subordinating mechanisms employed by men, consciously or subconsciously, to maintain power over women, one need not be tremendously concerned if the law of rape draws a baseline that may over-deter sexual activity. If the physical and emotional harms flowing from nonconsensual sex are profound and permanent, then we should be vigilant in policing rape.

On the other hand, if, as much of pro-sex theory proclaims, sex, unburdened by traditional notions of gender and intimacy, allows people to realize joy, self-expression, identity and desire, then we need to be very concerned about a baseline that over-deters sex. If fear and danger are an inevitable, but not inevitably damaging or destructive, part of sexual activity, and if very few women get hurt (and even then, perhaps not so much) by nonconsensual sex, then there is little justification for presuming that sex is nonconsensual.

Recall that the baseline of "no" was rooted in the idea that so much sex is actually unwanted that, even if consent is hard to determine, a presumption against consent was not likely to be counterfactual. For pro-sex and queer theorists, the baseline of no may not only be counterfactual, but worse, it sends a normative message about appropriate sex that is antithetical to the autonomy, liberty and re-inventive potential inherent in fully realized sexual desire.

With that summary in mind, we turn in the next section to contemporary sexual norms and empirical work that explores how sexuality functions in young people's lives. Some of what we document suggests significant changes in sexual norms over the last 40 years. These changes may reflect

the influences of both feminism and queer theory or they might reflect influence and growth from completely different sources. We do not address the source of the change. Much of what we observe suggests no change at all, but reflects persistent gendered patterns in sex.

We are aware that by focusing on young people we are generalizing from a population that is relatively less experienced and more vulnerable to coercion. Young people may be less likely to experience the self-actualization and identity formation that the pro-sex endorsement of sex celebrates. It may be that to live the kind of life that much of pro-sex theory valorizes, one needs a maturity and sense of self that most young people lack. By focusing on the young, we may be skewing our conclusions in favor of a more protectionist regime.

We nonetheless think it appropriate to focus on the young for several reasons. First, statistically speaking, the young are most vulnerable to rape (Acierno, Resnick, Kilpatrick, Saunders, & Best, 1999, p. 543). Second, much of what we analyze involves the behavior of college students, most of whom are legal adults. For better or worse, the freedoms enjoyed or desired by sophisticated, discerning 30-year olds must also be afforded to naive and oafish 18-year olds, because that is where the law draws the line of adulthood. Third, we suspect that one's early experiences with sexuality may affect later sexual experience and desire.

## CONTEMPORARY SEXUAL NORMS AND PRACTICE

In this section, we review current research and contemporary norms surrounding sexual encounters. We begin with the much-touted advent of sexting, which reflects a significantly more public, or potentially public, form of flirtation than in generations past. We then turn to an account of social media, looking to depictions of women's display of sexual agency as evidence of a counter-narrative to the victim-centered trope of second wave feminism. Finally, we examine current research governing casual sexual encounters, known colloquially as "hook-ups."

### Sexting

Students of all ages have been passing notes, many with sexual overtones or innuendo, for decades, but as numerous public figures whose sexually explicit e-mails and text messages have disrupted their careers can attest,

flirtation-communication looks different today. The internet and cell-phones have given rise to new ways of messaging. The newer twist on flirtation-communication arising from this medium of communication is called “sexting,” which has been defined as “the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs via cellular telephones or over the Internet” (Miller v. Skumanick, 2009, p. 637). It is very common. As of May 2010, 20% of teens had posted or texted nude or semi-nude photos of themselves (Melby, 2010, p. 1).<sup>25</sup> Thirty-nine percent had sent sexually suggestive texts or e-mails (Melby, 2010, p. 1). These messages have become commonplace among relatively young teens (Hoffman, 2011, p. 1). As one reporter concluded in a story documenting the legal and emotional fall-out from the “viral” spread of a text message containing a photo of a naked 8th grade girl: “For teenagers, who have ready access to technology and are growing up in a culture that celebrates body flaunting, sexting is laughably easy, unremarkable and even compelling: the primary reason teenagers sext is to look cool and sexy to someone they find attractive” (Hoffman, 2011, p. 1).

Often it can be more complicated than that though. Some evidence suggests that sending nude photos is not simply a new way of flirting, but is something that boys pressure girls into doing (National Campaign to Prevent Teen and Unplanned Pregnancy, 2010, p. 4).<sup>26</sup> In one study, 51% of the teen girls polled thought their peers texted because boys pressured them to do so, though only 12% of teen girls indicated that they themselves had been pressured. (National Campaign to Prevent Teen and Unplanned Pregnancy, 2010, p. 4). Stories abound of girls who were humiliated when their boyfriends forwarded a sext to others (Celizic, 2009; Inbar, 2009).<sup>27</sup> Far fewer stories exist of girls doing the same, and empirical work suggests that boys may pressure girls to “sext” far more often than the reverse (Celizic, 2009; Inbar, 2009).

Some girls almost certainly sext on their own because they take comfort and pride in their developing bodies (Hoffman, 2011, p. 1). That comfort and pride may come with a dark side though. Many young girls’ obsession with their bodies today verges on the pathological. British psychologist Susie Orbach (2008) writes, “hatred is too mild a word for [girls’] relationship with their physicality” (p. 227). Two-thirds of young women report wanting plastic surgery (Orbach, 2008, p. 220). As we will discuss more fully below, for many girls and young women, sexual experiences are primarily fora for displaying their bodies as “sites of achievement” (Orbach, 2008, p. 227). So even for those girls who sext willingly, without undue pressure, sexting may reflect an obsession with and objectification of

one's body – a “thingification” – that raises concern for many (Orbach, 2008, p. 227).

Sexting emerges not only as a complicated modern manifestation of sexual norms, but also as a reason to call into question the sex narratives invoked by theorists—feminist and otherwise. The fact that only 12% of the many girls who take and send sexually charged pictures of themselves admit to having been pressured to do so suggests a degree of sexual agency and confidence that undermines the feminist trope that women are so socialized into passivity that we cannot expect them to assert themselves during sexual encounters. Sexting might also indicate the sender's comfort with sexuality and the sexual nature of her body. That sexting has become commonplace might lead one to believe we'd finally evolved into a culture that permitted women to experience the kinds of sexual pleasures that were for centuries denied them. It also suggests an acceptance of public sexuality that would be celebrated by many sex positivists.<sup>28</sup>

On the other hand, the fact that a much higher percentage (51% vs. 12%) of teen girls think that girls send pictures of themselves because boys pressure them, suggests a far more traditional dynamic of male initiation and female acquiescence. For some, sexting just involves a new platform for the demonstration of an age-old sexual script involving men pressuring women to perform sexually. Sexting may just reflect the ongoing power of the male gaze, with its perpetuation and dissemination of pornographically stylized images of the female body. Some women are willing to forego the privacy traditionally associated with the disclosure of sexual histories (Palfrey & Gasser, 2008, p. 71), but those women who need to be pressured into sexting may still want some of that privacy. In reality, many girls are likely conflicted about how much privacy they want, how much privacy they think they have a right to, and how to project themselves as both whole and sexual persons. This conflict is probably all the more difficult for them because their embrace of their body's sexuality is accompanied by a fixation on perfection and body commodification that seems at odds with female empowerment.

Sexting offers girls the opportunity to be publicly sexual in a manner that more conservative sexual norms denied them, but the fact that some girls take advantage of that opportunity, while others seem to need to be pressured to do so, and many probably feel simultaneously empowered and pressured, does not tell us that much about the extent to which young women actualize their agency. And to the extent that sexting, like sex itself<sup>29</sup> seems to be as much about presenting the body as perfect as it is about presenting the body as sexual, it may not be particularly liberating.

It is hard to believe that the way to widespread sexual self-actualization is through adherence to the principle that we must all look like models. The next section delves more deeply into the messages that those models and other media images send about sexuality.

### Contemporary Media

It seems that every generation of adults professes dismay at the next generation's norms around sexuality. We do not claim that contemporary media's embrace of sexual imagery is somehow more dramatic or important than when Elvis swiveled his pelvis in public, some 60 years ago. In the discussion below, we simply explore the sexual messages that are conveyed in two modern music videos, separated by almost 10 years, but both conveying important messages about women's sexuality (Wallis, 2011).<sup>30</sup>

The Milkshake Song dates back to 2003 (Kelis, 2009).<sup>31</sup> The full first line, repeated at least 8 times in the song is "My Milkshake Brings All the Boys to the Yard." In the video, Kelis, the singer/"narrator," dressed in a low cut halter top and tight fitting jeans, enters and dances around a diner. She bends and contorts her body in ways that clearly emphasize her breasts and bottom. The imagery from the diner amplifies the effect, two buns coming out of the oven, two eggs frying. Kelis deliberately dances in the men's faces. She shakes her breasts and her butt at them as they eat. She sucks long and hard on a straw and gobbles up a cherry, licking the whipped cream underneath it. There is nothing remotely subtle about this video.

By the end of the video, men are lining up outside the diner trying to peek in, but Kelis is not interested in them. Instead, her chosen audience, throughout the video, is the chorus line of other girls working with her in the diner. The song's full refrain is "My milkshake brings all the boys to the yard and they're like, 'It's better than yours.' Damn right, it's better than yours. Can teach you, but I have to charge." Her co-workers move to her music, swing their hips in a well-choreographed manner, but never come close to being like Kelis. They clearly do not possess her skills or command her power.

There is much for both feminists and pro-sex theorists to celebrate in this video. Kelis is a woman in charge of her own sexuality. She is using her sexual power and loving it. She is not a befuddled (nor even a faux befuddled) Marilyn Monroe, sheepishly smiling as some other force – the wind from an air vent – blows her dress up around her face (Wilder, 1955). Kelis herself is doing all the blowing and sucking. Unlike Madonna's

highly successful 1984 video, *Like a Virgin* (Madonna, 2009), sex in this video is not good because it feels novel and innocent, it is good because Kelis is so good at it. She is her own sexual agent, fully in charge of what she does. At least as long as the boys keep coming to her yard.

But there may also be cause for concern. Kelis' body parts are clearly abstracted from herself. It may feel like progress that she, rather than some man, is the one abstracting her body parts from herself, but sex for her seems to be about her breasts, not about her. What she appears to love is the power that her sexual parts bring. It is power over the men, who are falling all over themselves trying to see her, but just as importantly, it is power over women. Recall that it is the women to whom she is singing. Kelis uses her sexual agency to demonstrate how much more sexual power she has, relative to the other women. This is not a video depicting everyone luxuriating in a culture without sexual inhibition. This is a video about one person getting all the goods.<sup>32</sup> And the reason she is the one able to get all the men and all that sex is because she has better sexual assets than do the other girls.

In the spring of 2010, another artist, Ke\$ha, released a video demonstrating female sexual agency in a very different way (Ke\$ha, 2010). In *Blah, Blah, Blah*, Ke\$ha sings to the men telling them what she wants – or more precisely – what she does not want, sexually. Cavorting around a bar with duct tape in hand, her most common demand is that the men stop talking.

“Stop talking that blah, blah, blah,” Ke\$ha croons. All the while, she's spinning a roll of duct tape around the mouth and body of a man. “Want to dance in the back with no pants?” she asks the camera. “Then meet me with a jack by the juke box.” She demonstrates the power of choice, the ability to say no. “Think you'll be getting this? At which point, she bares her cleavage to the camera. “I don't wanna be naked with you when you're wasted.”

Again, there is much to celebrate in this video. Ke\$ha is in charge. She understands what she wants sexually and asks for it. She is clear in what she does not like. Her comfort with her own desire and her ability to express what she does not want demonstrates a female sexual agency that many feminists worked hard to unleash. Yet it is difficult to imagine a more obvious rejection of feminist rape reformers' justification for presuming that sex without evidence of consent is rape. The baseline of no was rooted in a need to address women's sexual passivity and socialized acquiescence. Ke\$ha shows none of that. Just as important, the baseline of no was meant to encourage communication because sex without it was risky and communication was considered a necessary part of a healthy,

mutual sexual experience. The duct tape soundly rejects that idea. Both videos celebrate sex for its own sake – free from intimacy and relationship. One gets the distinct impression that for both the protagonists and the men involved, sex is just as queer theory and sex positivism would want it to be: pleasure-seeking, varied, edgy, and frequent.<sup>33</sup>

Still, while women celebrating their own sexuality may be a sign of progress, but there is still a stark gender difference in what gets objectified and sexualized. Women and women's body parts still constitute the sexual prize, even if it is women taking charge of the sexual demonstration. As the American Psychological Association has concluded, "women and girls are more likely than men and boys to be objectified and sexualized in a variety of media outlets (including television, magazines, sports media and music videos [and] in advertising" (American Psychological Association, 2002, p. 14). Regardless of whether one believes that "difference means dominance" (MacKinnon, 1989a, p. 39), it is notable how much difference there still is. Moreover, the women who play the supporting roles in the videos suggest a dimmer view of the sexual agency these videos depict. They are left out of the celebration, unable to charm the men, and leaving the viewer to wonder whether they are likely to get the sexual adulation of a Kelis and Ke\$ha, or instead, be relegated to the chorus line.

### Hooking Up

Ke\$ha's desire for sex without verbal communication appears to be one of the hallmarks of hook-ups, the predominant form of sexual activity on college campuses today. Hooking up now plays the role once played by a casual date (Garcia, Reiber, Massey, & Merriweather, 2012, pp. 161–162). Though definitions vary, a hook-up is generally defined as "a sexual encounter (that may or may not involve sexual intercourse) between two people who are brief acquaintances or strangers, usually lasting one night without the expectation of developing a relationship" (Paul & Hayes, "The causalities of casual sex: A qualitative exploration of the phenomenology of college students' hookups," 2002, p. 640).<sup>34</sup> Between 60% and 80% of North American college students report having some hook-up experience. (Garcia et al., 2012, p. 163). One study found that on average, a college student had 6.9 hook-ups during college and 28% of college students had 10 or more hook-ups (England, Shafer, & Fogarty, 2008, p. 533). Hook-ups are usually initiated at social gatherings, are often fueled with alcohol, and only sometimes lead to what might be called a dating

relationship. For the most part, the sexual experience proceeds without much verbal communication about what is happening (Bisson & Levine, 2009; Paul, 2006, p. 146; Paul & Hayes, 2002, p. 658).<sup>35</sup>

Again, there may be much to celebrate in this now dominant form of young adult sexual interaction. Young people are free to experiment sexually without the burdens and expectations of relationship (Bradshaw, Kahn, & Saville, 2010).<sup>36</sup> Particularly in an age when college-going young people need flexibility and mobility professionally, being able to explore sex without commitment may be an essential growing experience. If relationships require mutual giving and one person's occupational or personal desires are likely to conflict with another's, surely there will be people who would rather not bother with that conflict, yet still enjoy an active sex life. As Professors Rosenbury and Rothman (2010) pointed out, the intimacy that was once thought to be an essential component of a sexual relationship (Ayres & Baker, 2005; Rosenbury & Rothman, 2010) is all too often encapsulated in pre-conceived notions of relationship that "sustain gender and sexual hierarchies" (Armstrong, Hamilton, & England, 2010; Rosenbury & Rothman, 2010). Moreover, many young women love sex qua sex, pure in and of itself, without its baggage (Dansky, 2000). They believe, to para-phrase Glick (2000),<sup>37</sup> in fucking their way to happiness (Bullock-Jordan, 2000, p. 232; Miya-Jervis, 2000, pp. 280–281).<sup>38</sup>

As with sexting and cultural images, though, there may be reason for concern. A great deal of hook-up culture is still deeply gendered. Consider, for example, the extent to which a hook-up involves antiquated norms of male/female sexual interactions. In a survey of 4,000 students at five major colleges, one team of researchers found that although women may start a conversation or ask a man to dance,<sup>39</sup> men are more likely to do so, and men are much more likely to initiate the sexual interaction (England et al., 2008, p. 535). Once the sexual interaction is initiated, the gendered script continues. The same study found that 44% of men experienced orgasm during hook-ups while only 19% of women did (England et al., 2008, p. 535). Men who engage in intercourse without oral sex had an orgasm 70% of the time, while women who engaged in intercourse without oral sex had an orgasm only 34% of the time (England et al., 2008, p. 535). One obvious reason for this disparity is the often nonreciprocal nature of the sexual activity. In 45% of cases involving oral sex without intercourse, only men received the oral sex. In 15% of cases, only women received the oral sex (England et al., 2008, p. 536).

Another potential reason for the orgasm gap is the noncommunicative nature of the sexual activity. Because the parties do not talk about what

they are doing, it may be difficult for them to know each other's wants, needs, and feelings. Indeed, it appears that there is still a great deal of miscommunication. In cases involving cunnilingus, women report having orgasms 25% of the time, but men report their partners achieving orgasm 60% of the time. Miscommunication between partners with regard to orgasm is not unique to the hook-up experience, but the large disparity suggests that miscommunication is common in hook-ups. However tantalizing the image of Ke\$ha with her duct tape, silence appears to have some information costs.

The lack of mutuality may also be related to the absence of any future commitment. As one man explained, "if it's just a hook-up ... it's more of a selfish thing" (England et al., 2008, p. 538). Another man commented that if "it's a one night thing, I don't think [the woman's orgasm is] gonna matter to [men] that much." Certainly, orgasms are not the only reason people participate in sexual activity. Sexual activity can be pleasurable without orgasm, of course, but the orgasm gap does indicate that for many on contemporary college campuses sex mainly involves women servicing men.

Another nonmutual aspect of hook-up culture pertains to the reputational effects of sex, which are still very different for men and women. In short, women are called "sluts" far more readily than men are called "man whores" (Armstrong & Hamilton, 2009, p. 598). The idea that men might be referred to as "whores" is probably some indication of emerging norms of gender equality,<sup>40</sup> but both women and men hold women to a stricter standard of sexual propriety.<sup>41</sup> When asked if they ever hooked up with someone who they think respected them less because of the hook-up, 55% of the women, but only 21% of the men said "yes" (England et al., 2008, p. 539). As one man said describing what he considered a positive hook-up, "I got oral sex without putting much effort forth. It felt good but I'm glad I'm not going out with someone slutty like that" (Paul & Hayes, 2002, p. 653).<sup>42</sup>

If aversion to sluttiness helps women slow down, the esteem of one's peers gives men a reason to speed up. As it has been for some time – maybe for all time – sex is a source of masculinity-enhancement for men (Baker, 1999, p. 673). Men get credit with their peers for "scoring" (Ray & Rosow, 2010, p. 537). "Many males defined good hook-ups as those that earn you bragging rights, especially when the hook-up partner was ... a trophy" (Paul, 2006, p. 146). Hook-ups, like other forms of "girl watching," "work[] as a dramatic performance played to other men, a means by which a certain type of masculinity is produced and heterosexual desire displayed.

It is a means by which men assert masculine identity to other men" (Quinn, 2002, p. 555).

Contemporary research suggests that this kind of competition is not unique to men, however. Notwithstanding the reputational harms that may come from too many hook-ups, women compete with each other for good hook-ups. Women also perceive themselves of having "won" when they "score" with a worthy hook-up partner. Describing a "good" hook-up, one woman said, "I was pretty happy, a little drunk, enjoying the fact that the hottest guy at the party was kissing me. I felt like I had just won a game ..." (Paul & Hayes, 2002, p. 653). Another woman more succinctly said, "I was so proud of myself that I finally got him; put a notch on my belt" (Bryant & Schofield, 2007, p. 334).

Notably, the same woman who wanted a notch on her belt reported feeling terrible the next morning because her partner had been married and the encounter was not "romantic" (Bryant & Schofield, 2007, p. 334). Although some hook-ups may be about increasing the number of notches on the belt, part of what appears to motivate women, as traditional notions of gender would suggest, is a desire for relationship. One of the hallmarks of a bad hook-up for women is that it did not lead to relationship (Paul & Hayes, 2002, p. 542). Younger men, in general, have less interest in relationships and may see hook-ups as a way of avoiding them (England et al., 2008, p. 542; Paul & Hayes, 2002, pp. 653 and 658).<sup>43</sup>

The satisfaction with "scoring" for women may also have more to do with body image than either sex or relationship. When asked about sensual pleasures, girls repeatedly describe instances in which they felt they looked good (Hurtado & Sinha, 2005). As Orbach (2008) puts it, "Bodies have become personal productions" (p. 227). Psychologist Deborah Tolman elaborated on this concept when describing girls' self-objectification to the *New York Times*:

By the time they are teenagers, the girls I talk to respond to questions about how their bodies feel – questions about sexuality or desire – by talking about how their bodies look. They will say something like, "I felt like I looked good." Looking good is not a feeling (Orenstein, 2010, p. MM11).

Commercial markets for beauty products and body manipulations surely help women perfect their personal productions. Despite a growing number of male consumers, the cosmetic enhancement industry – be it make-up, surgery or pubic hair removal – is overwhelmingly targeted toward female consumers (Rhode, 2010, p. 30). Women spend far more annually than men do on "producing" their bodies (Rhode, 2010, p. 32). This cost

disparity surely is related to the fact that girls and women, much more than boys and men, self-objectify. "In self-objectification, girls internalize an observer's perspective on their physical selves and learn to treat themselves as objects to be looked at and evaluated for their appearance. Numerous studies have documented the presence of self-objectifications more in women than men" (American Psychological Association, 2002, p. 2). As third wave feminists would emphasize, women choose to spend this money, and shape their bodies, but it is worth stating the obvious: physical perfection is unattainable. That women may feel empowered enough to self-objectify does not render the objectification itself empowering or harmless.

Indeed, one potential casualty of this self-objectification is women's relationship to their own sexuality. With so much invested in their bodies as objects, for some young women, sex becomes an instrumental means of proving to oneself and others that one looks good. Orbach (2008) observes that for young women "sex is often a form of production or an aspect of self that is manufactured rather than integral to self" (p. 224). "For many young women, sex is to be experienced from the outside and performatively, identity enhanced by the capacity to view oneself as doing it as one is meant to" (Orbach, 2008, p. 225).

Seen as such, it is hard to see how hook-ups permit women to "fuck their way to freedom." Fucking is just a way of demonstrating that one looks good. In a retrospective commemorating the anniversary of psychologist Michelle Fine's plea that women and girls grow more comfortable articulating their discourse of sexual desire, Fine wrote, "a discourse of desire is [now] rampant, commodified, and being sold. Careful what you ask for ..." (Fine, 2005, p. 57).

Of deeper concern, perhaps, is the indication that the hyper-objectification of one's own body may hamper women's ability to experience sexual desire and protect themselves from sexual activity they do not want. As one group of researchers explained, because sexual activity usually involves exposing one's body and making it vulnerable to evaluation, women who are intensely concerned with making sure their body looks perfect may be reticent to disrupt the physical act, even if the act is undesired, unprotected and/or painful (Impett, Schooler, & Tolman, 2006, p. 131). If sex is performance and the goal of performance is to make one's body look good, one may not want to break up the performance: Saying no can make one's body look bad.

Finally, it is important to note that women regret hooking-up far more often than do men.<sup>44</sup> Although researchers are careful to qualify their findings with a recognition that psychologically distressed women may be more

likely to hook-up, studies repeatedly confirm the regret gap (Fielder & Carey, 2005; Owen & Fincham, 2010; Owen et al., 2010).<sup>45</sup> “[S]ome women may have experienced positive emotions during the sexual encounter (feeling chosen, noticed, attractive), [but] they are more likely to feel ashamed and regretful after” (Paul & Hayes, 2002, p. 656). Paul and Hayes (2002) concluded that “[t]he dominant notion of regret for females centered on shame and self-blame for engaging in sexual behaviors in the context of a hook-up .... The dominant notion of regret for males centered on disappointment over a bad choice of hook-up partner” (p. 655).<sup>46</sup> Women’s regret may reflect more than just disappointment. One study of hooking up during the first two months of college showed that women were more likely than men to experience unwanted sexual penetration (Katz, Tirone, & van der Kloet, 2012).

That women feel shame and self-blame suggests that women hold themselves accountable for what happened. They believe in their own agency and wish they had said no to the sex. But consider how little agency they seem to have in their own accounts of the hook-up:

It was going to happen whether I wanted it or not. (Paul & Hayes, 2002, p. 654).

I was trapped at a party. I wanted to get out of there. (Paul & Hayes, 2002, p. 654).

I wouldn’t say no, but I wouldn’t say yes either, so I was passive and he’s kind of a forceful guy. (Bay-Cheng & Eliseo-Arras, 2008, p. 394).

He just mauled me in my drunken stupor. I wanted to cry and throw up. I felt used (Paul & Hayes, 2002, p. 654).

I was wasted. He took advantage. I felt horrible and used and experienced pain for days (Paul & Hayes, 2002, p. 654).

If these women took seriously the baseline of no consent, believing that sex without consent should be presumptively illegal, they would have described these experiences as rape. None of them did. In her study of 27 young women who had sexual experiences that involved force or coercion, Phillips (2000) found that 25 of them (95%), refused to label their experience as abuse or victimization (p. 196). Indeed, when one of Paul’s (2006) subjects was asked whether she held anyone other than herself accountable she said no because “when you blame it on the other person, it sounds rapish” (p. 148). Women do not want to be raped, and by blaming themselves instead of the men who “maul” or “take advantage,” they don’t have to be raped.

Thus, like most modern sexual practices, hook-up culture presents a mix of new and old. Although it provides both men and women many of

the freedoms that queer and pro-sex theory seem to prize (e.g., the opportunity to experiment sexually without intimacy or relationship, the opening of “possibilities ... and permissions for pleasure,” Vance, 1993, and the chance to have a great deal of sex), it also brings with it a distinctly transactional understanding of sex, one that can play out with the actors in traditionally gendered roles. The overwhelmingly gendered script of the hook-up, and particularly the passive norms governing female initiation, suggest that, although many perceive themselves as choosing their course of conduct when hooking up, the reality is that something else, if not someone else, is controlling much of what they do. Men initiate the sex; they get more sexual satisfaction out of it and they are much less likely to regret it afterward. Sex in these encounters may not be something that men do to women to assert dominance over them, but that does not mean that the benefits of the encounter are mutual and correlative.

For the law, though, the important question is not whether a given sexual encounter was mutually beneficial. Instead, the central inquiry is whether a jury should be permitted to convict for rape in the absence of evidence showing both that parties consented to have sex. It is to this question that we turn in our final section.

## MAPPING THE THEORY ONTO REALITY

In the section “Modern Rape Reform,” we saw how rape law reform’s embrace of a baseline of no was rooted both in a perceived need to overcome sexual scripts that dictate women’s passivity and also in a perceived need to encourage communication as a means to assuring a more mutually enriching sexual experience. In the section “Sex Narratives,” we saw how such a baseline was justified by the second wave feminist accounts of how sexuality functioned in people’s lives, but was more suspect in a sex positivist world in which eroticism is a primary, liberty-enhancing force that must not be over regulated.

The section “Contemporary Sexual Norms and Practice’s” analysis of contemporary sexual culture shows that neither theory gets reality right, but neither theory gets it all wrong either. Feminists are both right and wrong that women lack agency. The nonconsensual expropriation of sex by men from women still seems commonplace, but the injury it causes women does not seem like spiritual murder. Indeed, most of the women studied reject classifying it as injurious.

It is also clear that despite the normative slant implicit in the baseline of no consent,<sup>47</sup> sexual norms have not realigned in support of a communicative, mutually-pleasurable sexuality. At the same time, our evaluation of young women's experiences of contemporary casual sexual interactions reveals few of the benefits that pro-sex and queer theorists argued underlay sex qua sex. Indeed, much of the sex that does occur is simply unwanted, whether consented to or not. The discussion below fleshes out these paradoxes as they pertain to the contemporary understandings of agency, injury and sex itself in young people's lives.

### Agency

Our analysis suggests that there are many reasons to believe that women are, as MacKinnon said, "socialized into passive receptivity ... submit to survive." First, women are far less likely to start a sexual interaction that they do want. Second, no one verbally communicates much of anything, or at least anything not dictated by the accepted script, during a hook-up. This may reflect an erotic desire to dispense with conversation, but it may just as easily reflect social conventions that have nothing to do with desire. Third, women are far more likely to provide pleasure to men than to ask a man to provide pleasure to them. Perhaps women prefer giving to receiving oral sex, but if there is gendered disparity in desire as well as gendered disparity in performance, perhaps we should remain skeptical, as feminists suggested we should, about the origins of desire.

There are many reasons to believe that women feel themselves empowered to say no, though. Clearly, Ke\$ha and Kelis portray images of women being able to ask for and get what they like. Girls and women are sexting, many without explicit pressure from boys. To some, this practice represents a disquieting commodification of one's body parts, but it also represents agency. Whether they are doing so because men want them to or because they want to showcase themselves, women are pushing the send button. In their study of college students' unwanted sexual experiences, Professors Bay-Cheng and Eliseo-Arras (2008) observe that "conventional prescriptions for a passive and pleasing female sexuality operate alongside simultaneous – and seemingly oppositional – expectations that women portray themselves as wantonly and flagrantly sexual (p. 386). Through mainstreaming of "raunch culture," women and even young girls are encouraged to perform and act out sexual personae previously reserved for women porn stars and prostitutes" (Bay-Cheng & Eliseo-Arras, 2008, p. 389).<sup>48</sup>

Women are encouraged to demonstrate the sexual agency once forbidden them under more traditional notions of femininity.

The pervasiveness of raunch culture is likely to affect both the participants in unwanted or nonconsensual sex and the jurors who might sit in judgment of it. If ubiquitous cultural messages suggest that women are in charge of their own sexuality and sexual exchanges, why should we expect jurors to believe that women claiming rape really lay there passively? And indeed, why should the women themselves believe it? If women grow up with an expectation that they will be powerful sexual actors, they will resist accounts that describe them as passive.

Bay-Cheng and Eliseo-Arras (2008) also found that the “neoliberal” rhetoric of “self-determination and personal responsibility ... lead women to blame themselves” for unwanted sex (p. 389). Consider this woman’s account of unwanted sex:

There’s nothing that I’ve done that has been against my will. Maybe things I didn’t necessarily want to do, but I mean I wasn’t pushed into these experiences. I mean, there were reasons these guys were led to believe I would do those things. (Bay-Cheng & Eliseo-Arras, 2008, p. 389)

This woman did sexual things she did not want to do. The men inaccurately assessed her sexual desires. She did not correct the men’s misperceptions. She did not stop what was happening. But she believes that she could have. Because she believes she could have stopped them, she does not blame the men. If potential victims blame themselves, not men for unwanted sexual experiences, it is extraordinarily unlikely that the law will be able to blame men. Women’s belief in their own agency will inevitably undermine a criminal proscription rooted in an understanding of women as conditioned for passivity.

### Injury

As discussed in the section “Sex Narratives,” the extent to which the law needs to police nonconsensual sex depends, in large part, on how bad non-consensual sex is. West (2010) describes the different feminist and queer theoretic views of the rape injury this way:

Queers, like feminists, blur the distinction between consent and nonconsent, the former to say, it’s all a little consensual so it’s okay, the latter to say it’s all a little nonconsensual so it’s not okay (p. 231).

West (2010) warns, though, that just because “some undesired sex is harmless hardly means that it all is” (p. 238). West is indisputably right on this point, but the hook-up literature repeatedly involves narratives in which unconsented to sex was not experienced as that bad. It was unpleasant. It often hurt. It often made the women feel ashamed. But fully consensual sex can be experienced, and often is experienced, in precisely the same way.

That women do not seem to experience terror or much pain in some nonconsensual sex may mean that West was just wrong in her earlier account of what distinguishes rape from unwanted but consensual sex. Or it could mean that women's sense of their own agency and their belief in their control over their own bodies actually diminishes their injury. Perhaps the spirit is not murdered if women interpret their decision not to fight back, to get it over with, to let it happen, as a kind of control that keeps their souls intact. Women use their sense of their own agency to construct away their injury. They do not want to be raped, so they are not raped.

Legally, then, one might say that because the injury from nonconsensual sex is not that bad, the baseline should not be no. We needn't over-deter sex to protect the vulnerable because the vulnerable are not hurt very much. Further, one could argue that contemporary norms surrounding casual sexual encounters inevitably will lead to some mistaken assumptions of consent, but that these mistakes, even if they result in unwanted inter-course, are not sufficiently injurious to women that the law should classify them as sex crimes.<sup>49</sup>

On the other hand, the baseline of no is not likely to deter much of anything if women consistently construct away their injury. Women who do not feel raped do not bring rape charges. No man has to worry about being charged with rape by such a woman, because a woman who does not want to consider herself, or have others view her as, a rape victim, does not go to the police. It does not matter what the baseline is if no one is a victim.

There may be some women, though, who feel much more injured. When “mauled” or “taken advantage of,” some women feel powerless. They feel they cannot escape; they feel like their soul is being shattered. These women may identify themselves as having been raped and they may bring charges.

How can a potential rape defendant know whether his sex partner is the kind of person who will be hurt and name that injury as rape? Catharine MacKinnon wrote that women had a hard time telling the difference between rape and sex, but perhaps it is not just women who have a hard time. If two women might experience, or interpret, the same kind of

interaction so differently, one feeling like it was sex she should have avoided by saying no, and the other feeling like she was raped, how is a man supposed to know when he will cross the line into illegality?

One obvious, yet surprisingly controversial, answer is that men might simply ask.<sup>50</sup> Pro-sex and queer theorists suggest that “just asking,” in addition to regulating a core area of personal liberty, may well “kill the heat that draws us toward our desires” (Franke, 2001). To these theorists, accepting the baseline of no in the name of protecting the women who feel deeply injured by nonconsensual sex stifles too much excitement. If the empirical work suggested that contemporary sexual encounters among young people generated anything like the transgressive, heterogeneous, liberating sexuality that pro-sex and queer theorists celebrate, we might find this argument more convincing. That is, if power in hook-up relationships manifested itself episodically, not structurally<sup>51</sup> and if the danger women exposed themselves to seemed even remotely related to whatever pleasure they receive, the costs of the baseline of no might seem more real to us. Given the reality of contemporary sexual culture, the dangers from over-regulating and even punishing ambiguously consensual sex seem minimal.

### Sex

Our analysis of contemporary culture suggests that feminists have largely failed in their attempt to prescribe a more communicative mutual sexual experience. Pro-sex and queer theorists may decry any attempt to inscribe a normative view of sexuality, but, at least as pertains to young people, they need not be particularly worried about the normative vision embedded in the baseline of no because that normative vision is altogether absent from hook-up culture. Yet the feminist communicative ideal has not been displaced by the sex positivists’ ideal of more passionate, edgy, erotic sex. Hook-ups are hardly that. They are minimally satisfying sexual transactions in which both sides often engage for reasons tangential to the desire for sex itself. Apparently, men get more pleasure out of casual sexual encounters than do women, but both men and women are using the sex for reasons surprisingly distinct from erotic pleasure. They are using it to accumulate points in different, though possibly complementary games. Women are using sex to showcase their bodies. Some women are using sex to find relationship, even though hook-ups are defined as sex without relationship. Men are using sex to achieve masculinity points. Men frequently use

hook-ups to “get” orgasms, but even those hardly seem like the transcendent events celebrated by sex positivists.

These varying motives for sex, many of which are probably not that well understood by the young people acting on them, may explain why so very much unwanted sex happens. During one two-week period studied by Bay-Cheng and Eliseo-Arras (2008), 50% of college women and 26% of college men said they engaged in unwanted coitus (p. 386). These statistics suggest yet another gender disparity with regard to unwanted sex, but they also show an alarmingly high rate of unwanted sex by both women and men.

If, by retaining the baseline of no, the law is even mildly deterring this unwanted – even if consensual – sex, we think it is doing some good. Hook-up culture, in which both men and women acquiesce to so much unwanted sex, creates its own kind of hedonic risks. If repeated acquiescence to unwanted sex alienates women from their own felt sexual desires, then the risk of over-deterring consensual but unwanted sex emerges as a hedonic good – a pro-sex policy, if you will.

At the very least, the frequency with which women engage in unwanted sex suggests that there are reasons beyond second wave feminism's conflation of sex and rape that validate deterring encounters in which consent is ambiguous. It is not that what the man has done in proceeding with consensually ambiguous sex is so contemptible. It is that the objectification, competition and gender dynamics that explain why women endure unwanted sex are so powerful that they overshadow, if not completely displace, pleasure and eroticism. The resulting injury may be less immediately intense than rape, but just as problematic (Phillips, 2000, p. 192).<sup>52</sup>

Contemporary sexual practices among young people hardly reveal the erotic nirvana that sex positive and queer theorists might have hoped would emerge once we dispensed with all the baggage that intimacy and relationship are supposed to bring. Contemporary sexual norms clearly do not create a world in which sexual self-expression and lived desire bring forth sexual self-actualization and joy. A baseline of no may over-deter sex, but if sex is as the studies of hook-up culture suggest, it is not clear why we need to be concerned with over-deterring it.

## CONCLUSION

According to the organizations that keep such statistics, nonconsensual sex and sexual assault is commonplace. The Guttmacher Institute reports that

11% of women aged 18–24 who had sex before age 20 said that it was “unwanted” (Guttmacher Institute, 2013). The Department of Education reports that one in five women on college campuses are victims of sexual assault (Sieben, 2001). Data from the United Kingdom suggest the exact same percentage (Orbach, 2008, p. 220). In one study of high school students, 80% of the girls had experienced sexual harassment, defined as unwanted sexual overtures and comments (Tolman, Spencer, Rosen-Reynoso, & Porche, 2003, p. 162).<sup>53</sup>

The rape reform movement attempted to reduce some of these numbers by instituting a baseline of no, trying to ensure men secured consent before proceeding with sex. The perceived need for a default of no grew out of norms that encouraged women’s passivity, discouraged communication, and rewarded men but not women for sexual conquest. Many of those norms have changed. Women are no longer perceived as or perceive themselves as passive sexual victims, though women still act passively. Women embrace their own objectification. Both men and women use sex as a form of conquest, or at least as an opportunity to gain points in a game that has little to do with the sex itself. Everyone resists attempts to force communication during sex.

Although much of the original justification for the baseline of no has disappeared, our examination of contemporary sexual norms and realities makes it hard to see how the baseline of no does any harm. Women’s embrace of their own agency seems to diminish their immediate sense of having been raped, and with it the likelihood that they will bring rape charges. Men will not be deprived of the sex they want if they know the women with whom they have sex will not bring rape charges. The rare woman who does feel injured might bring charges, but it seems likely that jurors, exposed to the ubiquitous cultural images of women’s sexual agency, will hold the accusing woman to the same standard to which women hold themselves. She could have said no, and because women portray themselves as having agency, there is no excuse for her not saying no, even if the law says that she does not have to. To the extent a man is still concerned about ambiguous consent, he can just ask.

To be sure, leaving in place a baseline of no consent raises the stakes for those who would rather proceed on the assumption of consent than have a potentially awkward conversation about consent. As such, the baseline of no consent may deter some sex. But the reality of young people’s sexual practices raises doubts about why anyone should be too concerned about such deterrence. A significant amount of consensually ambiguous sex is unwanted. That unwanted sex, even if not soul-murder, may cause its own

kind of harm. The sheer prevalence of unwanted sex makes us comfortable in concluding that the baseline of no does minimal harm. Neither women nor men, at least on college campuses, seem much enhanced by the vast majority of casual sexual activity in which they participate. Sex is there in abundance, but none of the studies of young peoples' sexual lives suggest that people are fucking their way to anything like freedom.

## NOTES

1. See, for example, California Jury Instructions – Criminal. CALJIC 1.23.1. “Consent” – Defined in Rape, Sodomy, Unlawful Penetration and Oral Copulation. (“In [prosecutions under] Penal Code section, the word ‘consent’ means positive cooperation in an act or attitude as an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.”)

2. We use the term “second wave” here only for the sake of convenience – to reference the era of feminists who, between approximately 1970 and 1990, called attention to the institutional bias against women and worked to set an agenda for law reform in fields such as workplace rights, family law and, as noted herein in, criminal law. Scholars have aptly noted the inaccuracy of the label “second wave” for the generation of feminists whose work was inspired by the civil rights movement of the 1960s. The monikers “second” and more recently “third” wave feminism are problematic, as they highlight primarily the activism of white feminists working for expanded civil and political and gender rights, and erase equally important movements of other feminists, such as slave women who engineered rebellion against race violence and slavery (Harris, 1990, p. 584).

3. While sex positivism and queer theory can be distinguished at many levels, there is substantial overlap between the two bodies of thought, particularly with regard to the way they contrast with feminism’s accounts of sexuality. For purposes of this paper, we treat sex positivism and queer theory as overlapping ideologies.

4. Our claims and concerns in this paper pertain only to contemporary heterosexual experiences and the law of rape. All of the studies we cite and the norms we analyze reflect how sexual practices usually play out between young men and women. Norms and practices and the relationship of the law to those norms and practices may be very different for same sex couples, and indeed, very different for gay men than lesbians. We offer no analysis and make no claims as to how the law relates to contemporary same sex sexual practices. We invoke and analyze queer theory not because of what it says about same-sex sex, but because of its implications for heterosexual sex.

5. According to a National College Women Sexual Victimization Study, jointly sponsored by NIJ and Bureau of Justice Statistics, about one-third of all rape/sexual assaults are reported to the police, and only about one-half of those reported are cleared by an arrest, and many arrests do not result in convictions. (Dressler, 2009, p. 388). Contemporary research suggests that, once reported to law

enforcement officials, rape cases do not have a significantly higher attrition rate than do aggravated assaults (citing a Department of Justice study on rape prosecution) (Dressler, 2009, p. 388). The lingering puzzle, then, is why women hesitate to report rape in the first place. Current thinking blames the underreporting problem on the “re-traumatization” experienced by victims at the hands of the legal system. (Szczesniak, 2004, p. 243).

6. The standard feminist response to this insight is that women’s embrace of their own objectification shows the awesome, comprehensive power of patriarchy: Women are taught to crave their own subordination through the eroticization of objectification. “Only” 25 years have passed since MacKinnon wrote her groundbreaking work on sexuality, and 25 years is but a blink of an eye in the history of patriarchy. A counter-argument is possible, though, and practically-speaking, it is necessary: 25 years may be enough time for women to evaluate their terms of sexual engagement, and to dismiss as stale claims of false consciousness about their bargain with pleasure. Unlike statutory rape, in which the law presumes the victim is too young to provide meaningful consent, non-consent rape laws outlaw sexual encounters that adult women consider acceptable. This may simply be an untenable position for criminal law. Adult women must perceive themselves as victims before anyone can expect the law to punish the men who engage in nonconsensual sex.

7. Bowmiller (1975) contributed the most theoretically, as the champion of the idea that rape is a crime of violence not of sex. A decade later, Catharine MacKinnon went on to critique that idea, suggesting that it because rape was a crime of sex it was a crime involving subordination, power and violence.

8. See, for example, *People v. Dorsey*, 104 Misc 2<sup>nd</sup> 963, 429 NYS2d 828 (1980), aff’d, 89 A.D. 2d 521, 452 NYS2d 210 (1982) (involving a 49-year-old, 5’ tall, 130 pound woman in an elevator with a 15-year old, weighing 200 pounds, who stopped the elevator between floors).

9. Comprehensive studies of all the different kinds of rape victims are very difficult to find. Some reports suggest that women suffer as badly when raped violently by someone to whom they are very close (a spouse) as when they are raped violently by a stranger (Bergen, 2005; Finkelhor & Yllö, 1985). And some victims of acquaintance rapes may be very badly injured psychologically (Anderson, 2005, p. 1401) (describing acquaintance rape victims “flashbacks and acute psychological distress”).

10. Most everyone agrees that it is easier to condemn the stranger rapist with a weapon than the date rapists. Indeed, as Susan Estrich (1992) concisely put it, much of the problem with prosecuting acquaintance rape stems from the fact that “it is easier to condemn date rape, than the date rapist” (pp. 32–33).

11. State in Interest of M.T.S. (1992).

12. One scholar, I. Capers (2011), claims that there have been no prosecutions based on the MTS standard baseline of no (p. 1305). It is difficult to accept this proposition in the absence of empirical evidence regarding the nature of rape claims filed by prosecutors. The absence of reported, appellate cases using the MTS standard in no way proves that the standard is not being used at the charging, pleading and trial level.

13. In Wisconsin Statutes (2007), the crime is defined as sexual intercourse with a person without the consent of that person, with consent being defined as “words or

overt actions by a person who is competent to give informed consent indicating a freely given agreement ..." (sec. 940.225(5)). In Florida Statutes (2007), rape is defined as sex without "intelligent, knowing and voluntary consent" (sec. 794.011(5)). In Washington Revised Code Annotated (2008), the consent is defined to mean "that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating feely given agreement to have sexual intercourse or sexual contact" (sec. 9A.44.010(7)).

14. See, for instance, one commentator to a story on hook-ups in *The Daily Beast*. "Who wants fair sex? Boring repressed people" (Siligson, 2009). Mohr (1988) writes "sex withdraws one from the world of waking and talking, from reason persuasion and thought. Sex is essentially a world of silence; words, such as they are, are not reports, descriptions or arguments, but murmurs and invocations which emphasize silence and its awe" (p. 101).

For more elaborate discussions of queer and pro-sex cultures celebration of sex that seems to embody something very different than the second wave feminist vision, see Spindelman (2011) (book review of Tim Dean, *Unlimited Intimacy: Reflections on the Subculture of Barebacking*) (analyzing culture and thrill of men who have unprotected sex in order to become infected) (passim); Kennedy (2001) ("For the Libertine, sex on your knees, sex which is not reciprocated, sex by your-self, by yourself with another person, sex in a dog collar, sex when the parties are not equal in status and wealth and salary and job grade and beauty and age and height can also be sex.") (p. 289).

15. Elaborating on all the reasons women say yes to sex that they do not want, West (2005) explains that women say yes because otherwise "he will be in an unbearable snit the next day, or he will be abusive to the children ...[or he will be] physically abusive to me, or humiliate me, or embarrass me. I consent because, if I don't, I'll lose status at the high school, or I won't be liked, or I won't like myself. This kind of sex happens because my friends expect it to and will think less of me if it doesn't" (p. 448).

16. Note that West is careful to point out that the fear and pain she describes are not present with consensual s/m or unwanted but consensual sex.

17. This is Janet Halley's characterization of West's claims about the injury of rape.

18. One of the reasons, West (1993) suggests, that we do not condemn consensual but unwanted sex has to do with the commodification of sex. MacKinnon emphasized the way that patriarchy commodifies women, West criticized how our culture commodifies sex itself. Once something becomes a commodity, bargaining for it makes sense. Sex is just another good a resource-rich man can get from someone with fewer resources. "The self that commodifies is the self that trades, gives, or disposes and then benefits accordingly. That which is traded, given, disposed of or sold must be separated from the self who trades. By contrast when we "have sex" or make love, we do not hold our "self" back in this way .... Ideally – and it is an ideal worth holding on to – the self is given with the giving of sex" (p. 1451).

19. Halley (2006) writes of Robin West, "she knows the difference between morally good and morally bad sex. Virtuous sexuality is feminist sexuality and it has a decidedly infantile, lesbian and caring shape .... [Her] redemptive sexuality deletes the possibly vital and life-affirming dimensions of men's bodily immediacy,

phallic drive and aggression. It's virtually a mandate to men who want to sleep with feminists: Become lesbians" (pp. 64–66).

20. West (2005) has since gone to even greater lengths to distinguish between sexual encounters marked by desired subordination and hierarchy and undesired sex that involves (and probably happens because of) subordination and hierarchy. Some women clearly desire hierarchic sex, but that does not mean that all hierarchic sex is desired (p. 456).

21. As Eichner (2001) has argued, postmodernists have had a tendency to assume that the heterogeneity and multiplicity of sexual desires that they value can be realized simply by pronouncing their existence ("postmodern strivings for heterogeneity, multiplicity and difference ...[are]... ends to be achieved through political and legal work, rather than as goals that can be reached through simple theoretical pronouncements") (p. 77). Foucault (1988) himself recognized that despite the potential for deviant disruption, sexuality is often normalized (*passim*). The section "Contemporary Sexual Norms and Practice" certainly suggests the normalization of vast amounts of sexual desire and behavior among young people.

22. Professor Eichner (2009) has cogently pointed out that this untempered valorization of sex in queer theory exists in considerable tension between queer theory's embrace of poststructuralism. Presumably, poststructuralism would teach us that sexuality, like power, is socially constructed, not natural or innate and therefore not inherently liberating. "Taking the poststructuralist conception of power seriously, sexual activity is not appropriately valenced as intrinsically positive, as many queer theorists would have it, just as it is not as negative as dominance feminists portrayed it" (p. 317). Elaborating somewhat, Eichner (2009) goes on "As Foucault recognizes, power forms subject in a way that can make subjection feel good .... A politics that strives for freedom and self-determination accordingly needs a more nuanced set of precepts than 'if it feels good do it'" (p. 317).

23. Thus, it would be inappropriate to equate Rosenbury and Rothman's disregard of motive with Halley's (2005) more encompassing critique that by "framing, claiming and blaming" sexual injuries for so much, feminists generated harms that did not exist before the feminists claimed them (pp. 83–84).

24. "Third-wave feminists embrace make-up, feminine styles of dress and traditional "girlie" behaviors. If the second wave's famous slogan, "the personal is political," turned every personal grooming decision into a political one, then third-wave feminists have made no decision political" (Crawford, 2007, p. 120).

25. See also (Day, 2010, pp. 73–74). Most sexters shared his or her naked picture with a romantic interest. And they intend for the photo be for the recipient's eyes only, but twenty percent of sext recipients pass the photos along to unintended viewers (Day, 2010, pp. 73–74). *Id.* Indeed, a study by The National Campaign to Prevent Teen and Unplanned Pregnancy (2008) found that 38% of teen girls and 39% of teen boys reporting having had sexually suggestive text messages or e-mails – originally meant for someone else – shared with them (p. 3).

26. Fifty-one percent of teen girls say pressure from a guy is the reason girls send sexy messages or images; only 18% of teen boys say pressure from girls motivates boys to send such messages. The National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young*

Adults, 4. (2010), [http://www.thenationalcampaign.org/sextech/pdf/sextech\\_summary.pdf](http://www.thenationalcampaign.org/sextech/pdf/sextech_summary.pdf)

27. See the September, 2009 story of 13-year-old Hope Witsell from Saundance, Florida, who committed suicide after someone intercepted a topless photo of her that she had meant to send to a boy in hopes of getting his attention earlier that year. Not only was her photo shared with her schoolmates, but also with students at a nearby high school. Hope's schoolmates surrounded her, hurling taunting and vulgar remarks like "whore" and "slut" at her. See also the July, 2008 story of 18-year-old Jesse Logan from Cincinnati, Ohio, who committed suicide when her ex-boyfriend, following their break-up, sent nude pictures of Jesse to other girls. These were pictures that Jesse had sent to her boyfriend when they were dating. The girls harassed Jesse, calling her a slut and a whore. She was miserable and depressed, afraid even to go to school. Ultimately, Jesse committed suicide.

28. Sex positivists often criticize the condemnation of promiscuity or any public display of sexuality (Rubin, 1984) (listing promiscuity and having sex in public as markers of what normalizing influences have determined to be "bad sex"); (Warner, 1999) (listing "public" as a marker of impermissible sex). Not much noted by sex positivists is how the embrace of public sexuality calls into question the need for the rape shield laws, which ban evidence of women's prior sexual experience from rape trials because of the harm associated with "disclosure of personal details" see *supra*. If women are revealing their sexual selves in so public a manner, perhaps the privacy concerns that many thought necessitated rape shield laws have sufficiently evaporated.

Perhaps, because women so readily share their sexual selves with the public, they will no longer be mortified during a rape trial in which they are required to testify about their sexual past. After all, they have texted and sexted about it before. We do not endorse the repeal of rape shield laws, however, because our strong guess is that the mortification in rape trials comes not from the espoused reason for rape shield laws (the need for sexual privacy) but from a sexual double standard that still judges women far more harshly for sexual activity than men. That double standard is alive and well, see *infra*.

29. See *infra* the section "Hooking Up".

30. The two videos we discuss are of course just a small sample of what is available. A full survey of all music videos for the contemporary period is well beyond the scope of this paper, but others have provided academic analysis of music videos' depiction of women's sexuality (Wallis, 2011). Wallis' analysis suggests that the two videos we select are representative. See also Hobbs and Gallup (2011) (suggesting that contemporary music lyrics often celebrate sexuality without commitment).

31. The original video was produced and made popular in 2003.

32. Indeed, Kelis' arrangement bears a striking resemblance to traditional polygamy. The reason she is able to get all the sexual partners is because she has the best resources. See 2 Chronicles 11:21 ("Rehoboam ... took eighteen wives and sixty concubines"); Judges 8:30 ("Gideon ... had many wives."); 1 Kings 11:2-3 (Solomon ... had seven hundred wives and three hundred concubines.); (Johnson, 1987, pp. 57-58) (detailing the many wives of Brigham Young).

33. Though, it might be noted, the sex Ke\$ha desires is sober sex, not drunken, out-of-control sex.

34. Another common form of sexual experience is known as “Friends With Benefits,” (“FWB”) which involves a sexual relationship of purposefully indeterminate duration between 2 people that are social friends. With FWBs, there is a friendship that parties presume will continue, even if there is no such expectation about the sexual aspect of the relationship (Owen, Rhoades, Stanley, & Fincham, 2010, p. 653).

35. See (Paul, 2006, p. 146): “[N]onverbal communication is predominant in the initiation and experience of a hook-up. Verbal communication is rare and is viewed by many students as ‘breaking the moment.’; (Bisson & Levine, 2009) (finding that FWB relationships rarely involve communication about the relationship). In describing a “bad” hook-up, one man commented “she said some things you just don’t say during a hook-up. She wanted to talk about how we felt about each other” (Paul & Hayes, 2002, p. 658).

36. Discussing the relative risks and benefits of hooking up compared to traditional dating relationships, and concluding that, although women’s motives differ from men’s, hooking up “can be much more egalitarian” (Bradshaw et al., 2010, p. 669).

37. Glick (2000): queer theory “encourages us ... to fuck our way to freedom”.

38. “[I]f I could be sure I would never have any kind of sex again, I would take a quick header off the nearest tall building” (Bullock-Jordan, 2000, p. 232). “I’ve never been one of those oh-sex-is-okay-but-what’s-all-the-fuss-about kind of girls. More like the sex-sex-where-can-I-get-more-sex kind” (Miya-Jervis, 2000, pp. 280–281).

39. England et al. (2008) found that half of their respondents indicated that both men and women initiate dancing or talking. But those who did not believe that initiation was equal overwhelming said that it was men who initiated (p. 535).

40. Although it is always difficult to track colloquialisms, to our knowledge “male whores” were unheard of 30 years ago. Nor do we suspect that “male whore” packs the pejorative punch that “whore” packs for women. (Indeed, it may be a diminutive version of the “real thing,” in much the same way that “lady lawyer” is a lesser form of “lawyer”).

41. For a contrary perspective, see Marks and Fraley (2005), who offer empirical evidence in the form of two surveys showing that women and men both suffer diminished peer esteem as their number of sexual partners increases, and suggesting that the so-called gender double standard may be self-perpetuating (p. 183).

42. As many researchers observe, “slut” is not just a word imposed on women by men. Women call each other sluts (Hadley, 2003). As psychologist Deborah Tolman has observed, “slut bashing keeps sexuality under control” (Hadley, 2003, p. 390). Why women feel a need to keep sexuality under control may be a question for more study by sex-positivism.

43. Paul and Hayes (2002) report one man saying “it felt good but I’m glad I’m not going out with someone slutty like that” and one man who understood that talking about feelings for each other was inconsistent with a hook-up) (pp. 653, 658).

44. We recognize that regret and the lack of it can be strongly influenced by social conditioning. Women may be taught to regret having too much sex and men

may be taught not to. That young people may be conditioned into their regret or lack thereof does not negate the need to be concerned about it.

45. (Owen et al., 2010): "[I]t appears that hooking up was not an experience that most college students felt positively about, especially women. The findings suggest that women are at substantially more risk than men for feeling upset about the experience."; (Fielder & Carey, 2005, p. 1116): "Our finding suggest that penetrative ex hook-ups may lead to an increase in distress for females."

46. One man summarized his regret this way, "My beer goggles made me pick a dog" (Paul & Hayes, 2002, p. 665).

47. As we mentioned earlier, the baseline of no implicitly endorses a particular kind of communicative, mutual sexual experience.

48. (Party Theme Place, 2008): "One of the most popular adult party themes today is pimps and ho's (sic)," and providing ideas for games and costumes).

49. Most states now require most people found guilty of a sexual crime to be classified as some form of "sex offender" (Janus, 2003). As many have argued, the individual demonization of sex offenders is inconsistent with most second wave feminist teaching; (Janus, 2003, p. 258): (sexual offender notification laws paint "sexual violence as a small and exceptional aberration" not "widespread and domesticated); (Baker, 1997, pp. 578–583): (debunking view that rapists should be singled out for special treatment because rape somehow reflects individual pathology. Rape reflects more of a general social than individual psychological problem.)

50. It is important to remember that despite the intensity of the debate surrounding whether silence should be interpreted as consent, there is a simple solution available to those who are in doubt. They needn't risk a false rape accusation; they need only ask their partner whether she consents.

51. Compare Halley (2006) (endorsing the view that domination in sexuality is episodic not structural) with (Armstrong, Hamilton, & Sweeney, 2006, pp. 490–495): (Describing the hook-up culture on one college campus as one in which "women cede control of turf, transportation and liquor." To get sexual experiences, women must enter the men's world where "virtually all men's methods of extracting sex are defined as legitimate.")

52. By declaring all but the most obvious forms of non-consent outside the law's legitimate inquiry, we may put the "critique of male behavior ... out of earshot of the very men whose conduct needs to be challenged" (Phillips, 2000, p. 192).

53. All of these statistics may be infected by definitional bias. Perhaps if we did not live in such a sexually repressive culture, many of these sexual encounters would be more welcome, or at least less unwanted.

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