Of Nagging and Guilt-Tripping. Lack of Consent in One's Own Activities?

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A. Introduction: "New law makes new cases"

In recent years, many countries have replaced their outdated rape law with sex offenses that better correspond to the reconceptualization of rape and other sexual offenses as violations of a person's sexual autonomy. As a consequence, consent has replaced the element of force as the focal point of rape law in many jurisdictions.[1] There is little question that nonconsensual sexual interactions have rightly become the focus of the criminal justice system. However, the shift to a consent model has prompted new discussions about the limits of acceptable sexual behavior and acceptable sex regulation. Recent legal developments in rape law have made it possible to critically evaluate so called "grey areas" or "new" problematic behaviors in sexual relationships and sometimes reconstruct such behaviors as rape (or another offense).[2] One example for such a "new" problematic behavior is "stealthing" and other cases of sex-by-deception.[3] In the German criminal law doctrine, for example, the phenomenon of stealthing was not addressed before the reform of 2016. Only the shift to a consent model has allowed for discussions about whether or not stealthing should fall under the new "no-means-no"-statute in § 177 sec. 1 of the German criminal code.[4]

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1 See e.g., Amnesty International, *Europe: Spain to become tenth country in Europe to define rape as sex without consent* (3 March 2020), https://www.amnesty.org/en/latest/news/2020/03/europe-spain-yes-means-yes/.

2 See also Elise Woodard, *Bad Sex and Consent*, in The Palgrave Handbook of Sexual Ethics, 301–324 (David Boonin, ed. 2022) (arguing that we need more fine-grained tools for classifying sex that is not morally neutral yet does not constitute rape).

3 Alexandra Brodsky, *"Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal*, 32 Colum. J. Gender & L. 183–210 (2017). See also Nora Scheidegger, *Balancing Sexual Autonomy, Responsibility, and the Right to Privacy: Principles for Criminalizing Sex by Deception*, 22 German Law Journal 769–783 (2021).

4 See e.g., Kim Philip Linoh & Nico Wettmann, *Sexuelle Interaktionen als objektuale Vertrauensbeziehung, Eine juristisch-soziologische Untersuchung des Phänomens Stealt-*

Another "new" problem that has presented itself in legal scholarship and practice is a phenomenon for which in Sweden the term "nagging sex" ("tjatsex") has been established.[5] "Nagging sex" is used for sexual interactions that were preceded by nagging and/or other forms of non-violent verbal pressure, eventually leading to consent.[6] A similar phenomenon, which is often discussed in online forums, is "guilt-tripping" (for example: "if you really loved me, you would have sex with me").[7] Thus, the issue is not with coercion in a classical sense, but with the "usual" sorts of pressures and manipulations that are a typical part of life in other areas as well. People frequently use several types or forms of verbal pressure to obtain sex from an initially refusing partner,[8] namely "(…) telling a woman that her refusal to have sex was changing the way they felt about her; asserting that 'everybody does it' or questioning the woman's sexuality (…) making the woman feel guilty; (…) pushing her away when she would not have sex (…)."[9] The question arises as to how the law ought to treat these unpleasant techniques people sometimes employ to "seduce" reluctant partners.

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hing, ZIS 2020, 383–396; Johannes Makepeace, *"I'm not sure this is rape, but…" – Zur Strafbarkeit von "Stealthing" nach dem neuen Sexualstrafrecht*, KriPoZ 2021, 10–15. Moritz Denzel & Renato Kramer da Fonseca Calixto, *Strafbarkeit und Strafwürdigkeit der sexuellen Täuschung*, KriPoZ 2019, 347–354.

5 Linnea Wegerstad, *Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden*, 22 German Law Journal 734, 745 (2021).

6 See e.g., Tomas Stark, *Tingsrätten: "Tjatsex är inte våldtäkt"*, mitti, 11.11.2021 (discussing a Swedish case) (https://www.mitti.se/nyheter/tingsratten-tjatsex-ar-inte-valdtakt/repuim!mtYBwnpenQzLd4TzNUIxWg/).

7 See e.g., Crystal Raypole, *What Does Sexual Coercion Look Like?* Healthline, 1.12.2020 www.healthline.com/health/sexual-coercion ("Common coercion tactics include: guilt-tripping, making threats... ").

8 See e.g., Brandie Pugh & Patricia Becker, *Exploring Definitions and Prevalence of Verbal Sexual Coercion and Its Relationship to Consent to Unwanted Sex: Implications for Affirmative Consent Standards on College Campuses*, 8 Behav. Sci. 69 (2018) ("Both men and women report that some men utilize coercive tactics, ranging from complimenting women and indicating how turned on they are, asking repeatedly, and trying to convince, or yelling/getting angry (…) to obtain sexual compliance.").

9 Charlene L. Muelenhard & Jennifer Shrag, *Nonviolent Sexual Coercion*, in Acquaintance Rape, the Hidden Crime 115, 122 (Andrea Parrot & Laurie Bechhofer eds., 1991) (discussing "verbal sexual coercion").

B. Two Cases

The following cases are presented here to help illustrate the legal difficulties that arise in the context of so-called "nagging sex":

The Surgeon:[10] Surgeon A and nurse B work in the same hospital. A as a Surgeon is (at least factually) in a position of power towards nurse B. They start an affair and have consensual sexual relations various times. One day, A demands oral sex from B, which B refuses. A keeps insisting verbally and by trying to guide B's hands towards his penis. Eventually, B performs oral sex on A for a few moments.[11]
The Date:[12] A and B go out together and end up at A's place. They start making out, even though B is not very comfortable with the pace of things going. A suggests having sex, B declines and goes to the bathroom. A few moments later B returns and says: "I don't want to be forced into something." A calms B down, but shortly afterwards A requests oral sex again and says: "Come on, please!". Eventually, B actively performs oral sex on A.

With these two cases in mind, I now briefly want to point out what this article is *not* about: it is not about the notion that "no means no", because in both cases, it is very clear that had A proceeded after the explicit

10 This case is inspired by a German Supreme Court decision, BGH NStZ 2019, 717 (Beschluss vom 21.11.2018 – 1 StR 290/18). For a discussion of this case see e.g., Tatjana Hörnle, *Sexueller Übergriff (§ 177 Abs. 1 StGB) bei aktivem Handeln von Geschädigten?* NStZ 2019, 439–442; Thomas Fischer, *Normative Tatbestandsausweitung bei sexuellem Übergriff – Zur Anwendung von § 177 Abs. 1 StGB bei aktivem Handeln der geschädigten Person*, NStZ 2019, 580–585; Elisa Hoven, *Irrungen und Wirrungen des neuen Sexualstrafrechts*, Einspruch Magazin FAZ, 13.02.2019.

11 This German case has been discussed by German scholars primarily with regard to the specific "No means No"-rule introduced in the German Criminal Code in 2016. Discussions centered around the question whether the oral sex that nurse B actively performed on surgeon A could be considered as a sexual act "against her will" or whether the active performance of oral sex could be seen as a change of mind and therefore consent, which would then negate the definition of the offence in § 177 sec. 1 CC. In this article, the issue shall be addressed from a more general point of view, regardless of a specific rape provision.

12 This case is inspired by the allegations against Aziz Ansari; see Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life*, Babe, 2018, https://babe.net/2018/01/13/aziz-ansari-28355. For a detailed discussion of the case see Kimberly Kessler Ferzan, *Consent and Coercion*, 50 Arizona State Law Journal 951–1006 (2018).

"no" of B and inserted his penis in B's mouth, A would have been guilty of rape (or another serious sexual offense, depending on the respective national law). But these cases are different: Even though B said "no" at first, after some "nagging" B nevertheless performed oral sex on A, which is typically considered to be a functional equivalent to saying "yes" or as tacit consent.[13] Here, the "no means no" principle seems unhelpful or at least incomplete.[14]

The purpose of this article is to address the following question: how *should* the law deal with cases where B, the possible victim, initially says "no", but the other person A keeps requesting sex, culminating in B eventually saying "yes" or actively performing the requested sexual act (which is considered to be tacit consent)? Is sex with "nagged consent" to be treated as consensual or as nonconsensual sex?

C. *Factual consent and valid consent*

Even though the term "nagging sex" might be new, scholars have discussed this sort of behavior and its implications for criminal law for a long time.[15] In order to be able to provide a meaningful reconstruction of the discussions on "nagging sex" and similar behaviors, it might help to categorize the relevant arguments into two basic types. The starting point for this categorization is the understanding that consent can be distinguished into factual consent and legal consent: for a sexual act to be permissible, factual consent must be present. Factual consent means the performance of some "token" of consent, some positive indication of willingness, whereby all relevant circumstances have to be taken into account. Obviously, saying "yes" is one way of providing factual consent, but according to most scholars and legal systems, actively participating in the intimacy also con-

13 See e.g., David Archard, *"A Nod's as Good as a Wink" – Consent, Convention, and Reasonable Belief*, 3 Legal Theory 273, 282 (1997) ("If a woman responds to a man's question 'Do you want sex?' (or some similar unambiguous formulation) with a wordless but sexually explicit action, then that behavior, in such a context, may be presumed to constitute consent."). See also Joan McGregor, Is it Rape? On Acquaintance Rape and Taking Women's Consent Seriously, 132–35 (2005).

14 Stephen Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 Law and Philosophy 35, 42 (1992).

15 See e.g., Ferzan, *supra* note 12; Sarah Conly, *Seduction, Rape, and Coercion*, 115 Ethics 96–121 (2004); Scott A. Anderson, *Sex under Pressure: Jerks, Boorish Behaviour and Gender Hierarchy,* 11 Res Publica, 350 (2005); Schulhofer, *supra* note 14 at 42–45.

stitutes tacit factual consent. Yet it is evident that factual consent is not a *sufficient* condition for legally valid consent that will preclude criminal liability. A token of consent has the power to bring about a change in the nexus of rights and duties within a relationship only if it sufficiently reflects the agent's own will.[16] Accordingly, we must not only consider the eventual statement of consent but also the acceptability of the means used to procure it.[17] For example, if the victim gives factual consent only after being threatened, the factual consent would not amount to legal or valid consent.[18]

The arguments concerning "nagging sex" can now be categorized based on this distinction.

1. The strictly verbal standard of consent

One possibility to classify "nagging sex" as legally problematic is to argue that in both cases there was no (sufficient) factual consent. According to proponents of a strictly verbal standard of consent, sexual consent is given only if one (voluntarily) utters words like "okay" or "yes"[19] – which is lacking in both the "Surgeon case" and the "Date case". Due to space limitations in this chapter, it is not possible to elaborate in detail as to why a strictly verbal standard of consent seems to be an inadequate standard for criminal law.[20] Suffice it to say that a law stating that every sexual interaction without a verbal "yes" is a crime would not only stray very far

16 Andreas Müller & Peter Schaber, *The Ethics of Consent: An Introduction*, *in* The Routledge Handbook of the Ethics of Consent, 1, 3 (Andreas Müller & Peter Schaber eds., 2018); Thomas Gutmann, *Voluntary Consent*, *in* The Routledge Handbook of the Ethics of Consent, 211 (Andreas Müller & Peter Schaber eds., 2018).

17 See e.g., Kimberly Kessler Ferzan & Peter Westen, *How to Think (Like a Lawyer) About Rape*, 11 Crim. L. & Phil. 759–781 (2017), at 766 (arguing that consent requires that the consenter signaled "assent" and that it was given under sufficient conditions of freedom, knowledge, and capacity).

18 Peter Westen, The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct 10 (2004) (distinguishing between "factual consent" and "legal consent"). See also McGregor, *supra* note 13, at 163.

19 See e.g., Lois Pineau, *Date Rape: A Feminist Analysis*, 8 Law and Philosophy 217–43 (1989) (discussing a model of "communicative sexuality", where noncommunicative sexuality establishes a presumption of nonconsent.).

20 For a detailed discussion of the problematic aspects of a (verbal) affirmative consent rule see Aya Gruber, *Consent Confusion*, 38 Cardozo Law Review 415–458 (2016).

from behavioral practices,[21] it would also infringe on people's liberty to "control... their private sexual conduct."[22] Therefore, it is not surprising that even in jurisdictions with an "affirmative consent" standard in rape law, like Sweden, tacit or nonverbal consent to a sexual interaction is considered sufficient.[23]

2. *The Miranda Analogy*

The question of how a "no" followed by a "yes" should be interpreted has concerned many scholars. Schulhofer rightfully pointed out that an eventual "yes" should be rejected if threats or intimidation produced it. But what about cases where there is no straightforward coercion present? Should "no" irrevocably mean "no"? Should we embrace the idea that a "yes" can be rendered invalid by non-forcible persuasion like cajolery or manipulation of feelings or similar behavior "that refuses to honor the initial 'no'"?[24]

Susan Estrich seemed to hint at such an approach when she contrasted the law of rape to that of police interrogation, mentioning the *Miranda* Rule.[25] According to the *Miranda* Rule, a suspects' refusal to talk must be accepted and all questioning must cease, at least for a certain amount of time, and any "yes" produced by intervening attempts at persuasion are automatically deemed to be compelled.[26] Using this analogy for sexual encounters, we would then conclude that a person's initial "no" has to be protected against *any* modification.

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21 See Terry P. Humphreys & Mélanie M. Brousseau, *The Sexual Consent Scale – Revised: Development, Reliability, and Preliminary Validity*, 47 J. Sex. Res. 420, 421 (2010) ("Numerous studies have demonstrated that the preferred approach to signal consent for both women and men tends to be nonverbal instead of verbal"). See also Melissa Burkett & Karine Hamilton, *Postfeminist Sexual Agency. Young Women's Negotiations of Sexual Consent*, 15 Sexualities 815–833 (2012).

22 Gruber, *supra* note 20, at 449 (citing Lawrence v. Texas, 539 U.S. 558, 578 [2003]).

23 Wegerstad, *supra* note 5, at 740 ("The Swedish law does not state that a defendant can be held liable for rape solely on the ground that the other person did not say yes.").

24 Schulhofer, *supra* note 14, at 43.

25 Susan Estrich, Real Rape 41 (1987).

26 *Miranda v. Arizona*, 384 U.S. 436 (1966), at 461.

However, it is far from clear that a *Miranda*-based rule is appropriate for sexual encounters such as displayed in the "Date Case".[27] The *Miranda* Rule concerns people that find themselves in an extraordinary situation characterized by an immense power imbalance between law enforcement and civilians. Most sexual encounters are not comparable to being held in a police interrogation room, which can be characterized as an inherently compelling environment. Without such an extreme power imbalance in sexual encounters, there is simply no need for a strict rule based on *Miranda*.

Still, the *Miranda* analogy may help us get closer to the actual problem. Intuitively, something resembling a *Miranda* Rule seems more appropriate in the "Surgeon Case". However, it is not the repeated requests for oral sex *per se* that seem problematic, but the power imbalance between A and B that might have influenced B's decision.[28] The real issue in the "Surgeon Case" seems to be the question of *validity* of consent in situations of power imbalance between the "seducer" and the "seduced person". However, this issue may also arise in situations without an initial "no": If B fears for her job in the "Surgeon case", she might even be too frightened to say "no" in the first place. Whether or not a "no" was initially uttered should not be the decisive question here.

3. The "Real change of mind" Rule

A more nuanced view developed by Hörnle asks whether there was a real change of mind after B's initial "no"."[29] According to that view, the possible victim needs to autonomously withdraw his or her rejection. Unless there is a real and recognizable change of mind, the original "no" is not off the table[30]. However, according to Hörnle, a "real change of mind" is

27 Schulhofer, *supra* note 14, 43–44 (arguing that the Miranda analogy seems attenuated); David P. Bryden, *Redefining Rape*, 3 Buff. Crim. L. Rev. 317, 391 (2000) ("The Miranda approach makes little sense in dating").

28 Schulhofer, *supra* note 14, at 43 (pointing out that the *Miranda* Rule is also based on considerations of coercion and psychological pressure).

29 Hörnle, *supra* note 10, developed this view with regard to the offense in § 177 German CC. However, her thoughts can easily be considered here regardless of a specific legal situation.

30 See Hörnle, *supra* note 10, at 441.

not equivalent to "not being coerced" but is a more demanding concept.[31] Hörnle suggests several criteria for determining whether there was such a real change of mind. She proposes to take into consideration the phase between the "no" and the sexual act, the amount of time that had passed, and whether B acted upon a friendly request between partners or merely obeyed an order.[32]

Even though this view is appealing because it offers a nuanced approach to a complex problem, it has some problematic aspects. First, the "real change of mind" rule would impose stricter requirements for valid consent (and therefore a more demanding concept of autonomy) after a "no" than in a case where B did not say "no" before the requested sexual act. This different treatment of (subsequent) consent depending on whether or not a "no" was expressed at first would require more detailed reasoning and explanation - it is not self-explanatory.

In (sexual) consent theory, voluntariness (as an important part of valid consent) is often understood as follows: an act or decision is voluntary if it occurs without coercion affecting the actor's choice.[33] The relevant question for the two cases should therefore be: was the possible victim B *coerced* into performing the sexual act after the initial refusal? If not, B might just as well not have performed the sexual act. It would, however, be inconsistent to claim that B performed the sexual without valid consent although his or her right to self-determination was not in any way affected by coercion (provided B is an informed and competent adult).[34]According to this line of reasoning, the question of whether the victim had said "no" before eventually giving *uncoerced* consent does not play a decisive role.

Second, the above-mentioned criteria implicitly carry a statement about "good" and "bad" motives to have sex, which may not be universally shared.[35] Consider for example the following case: The husband wants to have sex, the wife says "no" twice. Eventually, after the third request, she gives in because she knows that otherwise he would make "the sad face" all week long. Would that be enough to constitute a real change of mind? The

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31 Hörnle, *supra* note 10, at 440 ("Die Überlegungen dazu, wann Handlungsentschlüsse als selbstbestimmte Entscheidungen gelten können und wann nicht, müssen komplexer ausfallen.").

32 Hörnle, *supra* note 10, at 441.

33 Alan Wertheimer, Consent to Sexual Relations 164 (2003).

34 Joachim Renzikowski, Münchener Kommentar zum StGB, § 177 StGB, marginal note 55 (2021); see also Fischer, *supra* note 10, 581–82.

35 Fischer, *supra* note 10, at 583 ("Diese Kriterien sind in der Sache nicht abwegig, beinhalten aber eine Vielzahl von impliziten Wertungen.").

answer is not so clear and might depend heavily on the judge's individual morals and values regarding sex.[36]

4. The Coercion Rule

We have seen that those views which focus mainly on B's initial "no" are not persuasive. As mentioned above, and as the "Real change of mind" rule acknowledges, what matters is what happens after B's initial "no" and whether the subsequent active performance of a sexual act by B can be qualified as the result of a voluntary decision. The relevant question thus is whether "nagged consent" is voluntary (and therefore valid) consent.

The discussion then shifts to the difficult question of what sorts of behavior constitute coercion and thereby undermine consent. This chapter cannot provide a full and comprehensive analysis of the ethics and legality of using pressure techniques in sexual seduction.[37] However, it can be reasonably argued that at least in the "Date Case", A does not coerce B in a legally relevant sense. According to Wertheimer, the critical elements of the test for coercion are whether A acts illegitimately in threatening to impose a certain sanction on B and whether this threat is sufficiently "powerful" to leave B "no choice" (so called Two-Pronged Theory).[38] Only behaviors that meet both criteria count as coercive. However, if B gives consent merely to secure an interest to which she has no antecedent right — B consents to sex with her boyfriend who "threatens" to end the relationship if B does not have sex with him —her consent is valid because B has no right that A continues dating B on terms A does not embrace.[39]

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36 See e.g., Hoven, *supra* note 10 ("Sagt etwa die Ehefrau, dass sie Kopfschmerzen und daher keine Lust auf sexuelle Handlungen habe, gibt dann aber, um ihre Ruhe zu haben, den Bitten ihres Mannes nach, würde sich dieser strafbar machen.") and Hörnle, *supra* note 10, at 441 ("Es dürfte nicht selten sein..., dass ein zunächst geäußertes Nein nach freundlicher Überredung und/oder Zärtlichkeiten wieder zurückgenommen wird. ").

37 For a more detailed discussion see e.g., Stephen J. Schulhofer, Unwanted Sex: The Culture of Intimidation and the Failure of Law (1998); McGregor, *supra* note 13; Westen, *supra* note 18; Wertheimer, *supra* note 33, ALAN Wertheimer, Coercion, especially chs. 12, 14 (1987).

38 Wertheimer, Coercion, *supra* note 37, at 170.

39 Wertheimer, Consent, *supra* note 33, at 170.

Of course, noncoercive "threats" are "ungenerous, hardhearted, and exploitative"[40] and can put a lot of psychological pressure on the victim, but the "moral problem of such an offer (...) does not lie in the fact that it undermines voluntary consent."[41] Or as Conly puts it:

> "It is not rape if the person asking for sex stays within what he has a right to ask for. (..) [O]ne has a right to ask for the other's consent and to try to persuade the other to give consent as long as one does this within legitimate parameters: the other should be a competent adult, capable of making a decision; sanctions should only be those one has a right to impose, like ending the relationship, not violence (…)."[42]

Following Wertheimer's Two-Pronged Theory, A does not coerce B and thus does not engage in nonconsensual sexual act in the "Date Case". The assessment in the "Surgeon Case" might be somewhat different, because the "Surgeon Case" clearly involves the *exploitation* of a relationship characterized by dependency or authority, where blatant coercion is often not necessary in order to get the inferior party to comply. Even in the absence of an explicit and blatant threat the inferior party may legitimately fear that his or her rejection will be sanctioned by the superior party.[43]

5. Position of Power and Dependency

Even without an implicit threat, requesting a sexual favor may *in itself* be problematic in situations where the person making the request has the authoritative power to (illegitimately) sanction the inferior person. Therefore, it may make sense to punish A if he makes use of his authority derived from his position (as, for instance, an employer over his subordinate or as a professor over her student).[44] In Switzerland, for example, Art. 192 and Art. 193 CC criminalize the abuse of a position of power and the exploitation of dependency. These offenses cover situations in which the victim factually and legally consents (because no "classic" coercion is

40 Wertheimer, Consent, *supra* note 33, at 170.
41 Gutmann, *supra* note 16, at 216. See also McGregor, *supra* note 13, at 173.
42 Conly, *supra* note 15, at 118.
43 Stuart P. Green, Criminalizing Sex: A Unified Liberal Theory, 155–56 (2020) (pointing out that offers are sometimes accompanied by implicit threats), see also McGregor, *supra* note 13, at 175–76.
44 Green, *supra* note 43, at 193 (discussing the aims of such provisions).

present), but the consent is nevertheless considered to be somehow "corrupted" by the exploitation of a position of power or dependency.[45] However, it is worth noting that such exploitation and "abuse of power" provisions cannot be justified on the basis that they *directly* protect B's sexual autonomy, since exploitation and abuse of power does *not* undermine the victim's autonomy.[46] Nevertheless, the criminalization of sex that occurs within hierarchical relationships might be justified for other reasons, e.g., the protection of institutions and of institutional roles.[47]

The "Date Case", however, does not involve the exploitation of such a relationship of power imbalance.[48] By performing oral sex without being coerced to do so, B voluntarily consented to the sexual act, even though she did not really "want" it (internally). A's behavior might be morally condemnable, insensitive and annoying. But in Bryden's words: "[W]e are not talking about whether [A] is behaving boorishly; we are talking about whether he should go to prison. Assuming that [B] is free to do so, the proper remedy for requests that are merely tiresome is to leave, not to call the police."[49]

Conclusion

In this chapter, I have argued that not every "boorish" behavior that eventually leads a reluctant partner to consent is legally coercive and thus deserving criminalization. It might be helpful to remind ourselves that even though scholars often speak of the "moral magic" of consent[50],

45 See Nora Scheidegger, Das Sexualstrafrecht der Schweiz, Grundlagen und Reformbedarf 261 (2018).

46 Green, *supra* note 43, at 200 ("Coercion negates consent and undermines the victim's autonomy in a way exploitation arguably does not.").

47 See e.g., Green, *supra* note 43, at 195–97. See for a more detailed discussion of alternative justifications of exploitation provisions Scheidegger, *supra* note 45, at 264–66.

48 But see Anderson, *supra* note 15, at 350 (arguing that accounts that rely on Wertheimer's work fail to adequately consider the hierarchical gender system we currently live in).

49 Bryden, *supra* note 27, at 396. Similarly, Hoven, *supra* note 10 (arguing that adults should be trusted to be able to make autonomous decisions and to stick to their expressed "no" even in unpleasant situations). The assessment might be different in a case where B legitimately worries that A's behavior might escalate and that A might use force.

50 Heidi Hurd, *The Moral Magic of Consent*, 2 Legal Theory 121–46.

the presence of consent does not guarantee morally "unproblematic" sex.[51] We can consent to sex that we do not actually want or desire and we can consent to sex that is detrimental for our wellbeing. As Robin West stated, consent may well be a good marker for the divide between the criminal and non-criminal, but it is not a good proxy for wellbeing.[52] However, the criminal law must respect competent adults' sexual choices, even if that sometimes means that persons engage in sex they later regret or – even at the time the moment – do not "really" want.

51 See e.g., Burkett & Hamilton, *supra* note 21, at 825–826; Archard, *supra* note 13, at 275; see also Woodard, *supra* note 2, at 324 ("[C]onsent is, at best, a minimal standard for avoiding rape.").

52 Robin West, *Sex, Law and Consent*, in The Ethics of Consent: Theory and Practice 245 (William Miller & Alan Wertheimer, eds. 2009).