

THE SEXUAL BEING: A VULNERABILITY THEORY APPROACH TO SEXUAL ASSAULT

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INTRODUCTION

Sexual assault is a pervasive problem in the United States. Most state laws¹ addressing this issue erroneously presuppose that sexual assault usually occurs in an obvious and violent way. The quintessential rape scene according to American law is the following: a large male stranger attacks and

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¹ RAPE, ABUSE & INCEST NATIONAL NETWORK, *Rape and Sexual Assault Crime Definitions*, <https://apps.rainn.org/policy/compare/crimes.cfm> (last visited Sept. 11, 2019). Note that this article uses the terms “rape” and “sexual assault” interchangeably.

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forcefully penetrates a frail woman while she is out alone late at night.² However, the vast majority of reported³ sexual assaults do not look like this clear-cut scenario.

Of reported rapes, about eight out of ten are committed by someone the victim knew.⁴ According to a 2008 study conducted by the National Institute of Justice, of the rapes reported specifically by college students, for example, 85-90% were perpetrated by someone the victim knew, and about half occurred while the victim and perpetrator were on a date.⁵ In addition to college campuses, sexual assault frequently occurs in intimate relationships and marriages.⁶

Further, many sexual assaults do not involve physical force, but some form of coercion.⁷ Sexual coercion is defined as “unwanted sexual activity that happens when [someone is] pressured, tricked, threatened, or forced in a nonphysical way.”⁸ According to the National Intimate Partner and Sexual Violence Survey from 2010-2012, 13.2% of women and 5.8% of men in the U.S. have experienced sexual coercion.⁹ “State estimates of sexual coercion

² See, e.g., Sarah McMahon, *Changing Perceptions of Sexual Violence Over Time*, NATIONAL ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN, https://vawnet.org/sites/default/files/materials/files/2016-09/AR_ChangingPerceptions.pdf (2011) (“Early studies of social perceptions of sexual violence suggested that most people pictured the crime in an extremely narrow way, involving rape in situations where the victim was violently attacked outside by a stranger at night”); Genevieve F. Waterhouse, et al., *Myths and legends: The reality of rape offences reported to a UK police force*, THE EUROPEAN JOURNAL OF PSYCHOLOGY APPLIED TO LEGAL CONTEXT (2016), <https://www.sciencedirect.com/science/article/pii/S1889186115000244> (“[T]he ‘real rape’ myth, states that most rapes involve a stranger using a weapon attacking a woman violently at night in an isolated, outdoor area, and that women sustain serious injuries from these attacks.”).

³ Most rapes are never reported. See Maryland Coalition Against Sexual Assault, Fact Sheet, *Reporting Sexual Assault: Why Survivors Often Don't*, <https://ocrsm.umd.edu/files/Why-Is-Sexual-Assault-Under-Reported.pdf> (2013) (“It is believed that only 15.8 to 35 percent of all sexual assaults are reported to the police.”).

⁴ RAPE, ABUSE & INCEST NATIONAL NETWORK, *Perpetrators of Sexual Violence: Statistics*, <https://www.rainn.org/statistics/perpetrators-sexual-violence> (last visited Aug. 19, 2019); *Victims and Perpetrators*, NATIONAL INSTITUTE OF JUSTICE (Oct. 26, 2010), <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/victims-perpetrators.aspx> (last visited Sept. 11, 2019).

⁵ *Most Victims Know Their Attacker*, NATIONAL INSTITUTE OF JUSTICE (Sept. 30, 2008), <https://www.nij.gov/topics/crime/rape-sexual-violence/campus/Pages/know-attacker.aspx> (last visited Sept. 11, 2019).

⁶ *Perpetrators of Sexual Violence*, *supra* note 4.

⁷ *Sexual Assault*, OFFICE ON WOMEN'S HEALTH (Mar. 14, 2019), <https://www.womenshealth.gov/relationships-and-safety/sexual-assault-and-rape/sexual-assault> (last visited Aug. 28, 2019).

⁸ See *id.*, *Sexual coercion*.

⁹ Sharon G. Smith, et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010-2012 State Report*, at 2, CENTER FOR DISEASE CONTROL (Apr. 2017), <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf> (last visited Aug. 28, 2019).

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during the lifetime ranged from 9.1% to 20.0% (50 states) for women and from 3.9% to 9.1% for men (19 states).”¹⁰

The type of sexual assault this article seeks to address is, accordingly, not the quintessential example. It seeks to grapple with the ill-defined, messy contours of sexual assault—the kind that constitutes bad behavior in one state and a crime punishable by imprisonment in another. It examines the actions that are completely dependent on the definition of “consent” to establish whether they constitute sexual assault. This type of sexual assault can leave victims questioning for years what exactly happened to them and often is not obvious to some perpetrators themselves.

This topic is important because real-world sexual assault is insidious, confusing, and normalized. In sharp contrast, the quintessential example of sexual assault is conceptually easy. Once someone is categorized as a monster, outside of society rather than a product of it, any deeper analysis of their behavior is over. This nebulous type of sexual assault is difficult to face as a society because it means that those we know and love, or even we ourselves, may be a perpetrator or a victim. Our laws do not adequately deal with this fact.

A crucial dialogue has been started regarding the normalization of sexual assault, generally. Recent political initiatives such as the #MeToo movement have played a huge role in the continually changing norms. The movement was created to “address both the dearth in resources for survivors of sexual violence and to build a community of advocates, driven by survivors, who will be at the forefront for creating solutions to interrupt sexual violence in their communities.”¹¹ It began as a hashtag that went viral,¹² and thus exposed the horrifying number of people who have experienced sexual violence. It became a worldwide phenomenon and “elevated the global consciousness surrounding the obstacles women encounter in their daily lives, both personal and professional.”¹³ Similarly, the #TimesUp¹⁴ movement, though focusing specifically on ending sexual assault and harassment in the workplace, has a more action-focused approach.¹⁵

Despite this dialogue and the awareness that it has raised, the issue is far from resolved. Such movements and various resulting law reforms have

¹⁰ *Id.*

¹¹ Me Too., <https://metoomvmt.org/about/#history> (last visited Sept. 11, 2019).

¹² *Id.*

¹³ Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements- And How They're Alike*, TIME (Mar. 8, 2018), <http://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/>.

¹⁴ TIME'S UP, <https://www.timesupnow.com> (last visited Sept. 11, 2019).

¹⁵ See Langone, *supra* note 13.

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focused intensely on changing the term “consent” as a way to broaden or clarify what sexual assault is, but these definitions only spur more confusion. “Consent” is only useful when the scenario is obvious—when violence or force is used and the victim physically struggles to get away. These reactionary movements focus exclusively on victims and fail to address the source of the normalized nature of nonviolent sexual assault.

Further, legislators, courts, and these social movements disagree¹⁶ about how sexual assault should be defined, and specifically how “consent” should be defined. The definition of consent varies widely from state to state. On one end of the spectrum of consent lies a harmful “boys will be boys” mentality, requiring a person to clearly say “no” if they are not interested in a sexual advance, rather than to clearly say “yes.”¹⁷ At the opposite, most “progressive” end, lies a rigid and structured step by step guide of affirmative consent.¹⁸ One end stems from sexist ideas of female sexuality and tends to protect defendants, while the other assumes that all people have been given the social skills to recognize nonverbal cues and fails to account for how such encounters actually occur. Both ends of the spectrum are problematic, and therefore, perhaps reformers’ intense focus on consent is misplaced. Deciding on uniform definitions is important, but, as demonstrated by the widespread disagreement over such definitions, we must first understand the problem more fully.

By evaluating the neoliberal notion of sexual assault and consent through the lens of Martha Fineman’s vulnerability theory, a more comprehensive and effective response to the problem would be generated. The systemic, difficult issue needing to be addressed is that societal institutions have failed in significant ways to prepare youth for healthy interpersonal and sexual lives. Two significant background norms that have

¹⁶ *Rape and Sexual Assault Crime Definitions*, *supra* note 1; *Sexual Consent*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/relationships/sexual-consent> (last visited April 12, 2020); Irin Carmon, *Why Are So Many Men Confused About What Sexual Consent Means?*, THE WASHINGTON POST (Oct. 13, 2017), https://www.washingtonpost.com/outlook/what-counts-as-improper-sexual-contact-its-becoming-harder-to-tell/2017/10/13/b15506c6-af8e-11e7-9e58-e6288544af98_story.html?utm_term=.cde72c5a030e.

¹⁷ *No Means No Worldwide - About*, NO MEANS NO WORLDWIDE, <https://www.nomeansnoworldwide.org/our-story> (last visited Sept. 11, 2019); Kelsey Cochran, *No Means No - And It's Time for State Laws to Reflect It*, MS. (June 28, 2017), <https://msmagazine.com/2017/06/28/no-means-no-time-state-laws-reflect/>. *But see* Megan Garber, *The Dangerous Insufficiency of 'No Means No'*, THE ATLANTIC (Aug. 1, 2018), <https://www.theatlantic.com/entertainment/archive/2018/08/the-dangerous-insufficiency-of-no-means-no/566465/>.

¹⁸ *See* Robert Weiss, “*Yes Means Yes*” Means “*No Means No*” Is Not Enough, HUFFPOST (Jan. 8, 2017), https://www.huffingtonpost.com/entry/yes-means-yes-means-no-means-no-is-not-enough_us_587299e7e4b0eb9e49bfcb7.

allowed sexual assault to flourish include cultural permissiveness of female exploitation and religious institutions.

Additionally, our public educational system has failed to give adolescents medically accurate sexual education. In the United States, adolescents learn how to structure relationships in the private sphere of the home rather than in educational settings where learning can be more uniform. The vast majority learn sexual education from television and pornography, and never receive any formal education as to what makes a healthy adult relationship.¹⁹ As a result, children grow up with different expectations and understandings of what a healthy relationship looks like. A child will later understand as “normal” the things that are normalized in the private sphere of the home,²⁰ in movies, and in the media.

Moving forward, our social norms should be re-structured with regard to sexual relationships. Our educational systems should actually prepare children for healthy adult relationships, and our laws should reinforce these norms. This can be accomplished by focusing our policies and laws around the vulnerable subject, in this case, the “sexual being,” rather than the neoliberal subject. We can then address the overwhelming deficiencies in the institutions of family, education, and cultural and religious institutions, which play a central role in explaining why sexual assault is so rampant in our society.

This article proceeds in four Parts. The first Part defines vulnerability theory, lays out its core concepts, and contemplates the vulnerable sexual being. Part II discusses how the dominant culture in the United States has normalized sexual assault through harmful religious and cultural norms. It also specifically addresses how privatization of the family, failure of the public educational system, and the media’s exploitation of women contribute to this culture. Part III contemplates the notion of “consent” under the neoliberal model. It first compares various state definitions of consent and

¹⁹ Dr. John T. Chirban, *Pornography: The New Sex Ed For Kids*, PSYCHOLOGY TODAY (Dec. 15, 2012), <https://www.psychologytoday.com/us/blog/age-un-innocence/201212/pornographythe-new-sex-ed-kids>; Maggie Jones, *What Teenagers Are Learning From Online Porn*, NYT MAG. (Feb. 7, 2018), <https://www.nytimes.com/2018/02/07/magazine/teenagers-learning-online-porn-literacy-sex-education.html>; Alexandra Sifferlin, *Why Schools Can't Teach Sex Ed*, TIME, <https://time.com/why-schools-cant-teach-sex-ed/>.

²⁰ See Gisela Telis, *Kids Overimitate Adults, Regardless of Culture*, AAAS SCIENCE (May 7, 2010), <https://www.sciencemag.org/news/2010/05/kids-overimitate-adults-regardless-culture>; Andrew Meltzoff, *Born to Learn: What Infants Learn from Watching Us*, N.Fox & J.G. Worhol (Eds.) in THE ROLE OF EARLY EXPERIENCE IN INFANT DEVELOPMENT (Skillman, NJ: Pediatric Institute Publications, 1999), http://ilabs.washington.edu/meltzoff/pdf/99Meltzoff_BornToLearn.pdf; Brown University, *Counseling and Psychological Services, Dysfunctional Family Relationships*, <https://www.brown.edu/campus-life/support/counseling-and-psychological-services/dysfunctional-family-relationships> (discussing harmful parenting behaviors and their effects on children) (last visited Sept. 11, 2019).

then evaluates the term under a vulnerability theory lens. Finally, Part IV suggests how we should assign state responsibility to remedy some of these issues. It concludes that, through education and legal reform as well as regulation of harmful institutions, the United States could drastically reduce the pervasiveness of sexual assault.

I. THE VULNERABILITY THEORY PARADIGM

This Part defines vulnerability theory and explains in detail its core concepts. It then explains how to go about a vulnerability theory analysis. This Part then discusses the vulnerable sexual being and contemplates why some sexual beings are more resilient than others.

A. *Defining Terms and Core Concepts*

Vulnerability Theory is a utopian, descriptive theory recognizing human dependency and vulnerability to change as the ultimate human condition.²¹ Vulnerability Theory has two basic principles: “(1) That all individuals and institutions are constantly and universally vulnerable; and (2) That, given the role of societal institutions in providing resilience that will determine if individuals and social arrangements survive, endure, or thrive, the state must be responsive to vulnerability.”²² Vulnerability theory challenges Western society’s glorification of the “liberal subject” – the fictional “political subject who is fully capable and functioning and therefore able to act with autonomy.”²³ It therefore also challenges the notion that the liberal subject should be at the center of our law and policy.

The “liberal subject” is currently at the center of American institutions, policies, and laws.²⁴ By making the liberal subject the norm in our society, our laws and customs assume that anyone not falling within this norm is somehow deficient or not working hard enough. Almost everyone, however, falls outside of this fictional norm. “Competence is assumed and differences in power, circumstances, or actual ability are ignored”²⁵ when focusing on the liberal subject. The context of an individual’s experience is generally not relevant under this lens, though such context plays a crucial role in determining how resilient a person will be to various changes. Neoliberal

²¹ See Martha A. Fineman, *The Vulnerable Subject and the Responsive State*, EMORY L.J. 251, 263 (2010).

²² VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK 4, 11 (Martha Albertson Fineman et al. eds., 1st ed. 2018).

²³ Fineman, *supra* note 21, at 263.

²⁴ *Id.*

²⁵ Fineman, *supra* note 21, at 263.

laws are built on the idea of formal equality and attribute any differences in circumstances to personal failure.

In neoliberal discourse, “[i]ndividual transactions and interactions with the state and its institutions are posited to involve autonomous and independent actors in processes of negotiation, bargaining, and consent.”²⁶ However, in reality, all actors are vulnerable and dependent subjects. Any “autonomy” they have can be attributed to the context of social relationships and institutions that have shaped their lives and determined the resources that they have access to. In this way, “autonomy” is a bit of a myth.²⁷ All people are dependent on social relationships and institutions to flourish, and, therefore, those institutions have a responsibility to give all people the means to flourish.²⁸

The term “vulnerability” carries negative connotations, but it is the universal constant of human existence and should be viewed as such.²⁹ By structuring laws and social orderings instead around humanity’s universal vulnerability—the “vulnerable subject”—they would account for the enormous role dependency plays in each person’s life and in structuring society. Dependency is inevitable throughout the life course.³⁰ As Dr. Stu Marvel, a vulnerability theory scholar, stated:

When the liberal subject is replaced with the vulnerable subject, the universal relations of care upon which society depends are thrown into relief. A vulnerability approach allows us to understand our dependency not as a liability, but as the compelling impetus for the creation of social relationships and institutions. Indeed . . . it is precisely our universal vulnerability that has necessitated the formation of families, communities, associations, and even political entities and nation-states. The social institutions we construct are explicitly designed to mitigate human vulnerability, and to provide (at least some) with resources and support as we move across the life course.³¹

The most obvious forms of dependency include the need for parents or other caretakers to survive to keep infants alive, special care when someone is sick, and care towards the end of life when people become weak.³² However, this dependence should be viewed as a constant throughout one’s life rather than something that might happen at some point.³³ It is in fact

²⁶ *Id.*

²⁷ *Id.* at 259.

²⁸ *See id.*

²⁹ FINEMAN, *supra* note 22, at 4.

³⁰ Fineman, *supra* note 21, at 263.

³¹ Stu Marvel, *Response to Tuerkheimer—Rape On and Off Campus, The Vulnerable Subject of Rape Law: Rethinking Agency and Consent*, 65 EMORY L.J. ONLINE 2036, 2041 (2016).

³² Fineman, *supra* note 21, at 263.

³³ *See id.*

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inevitable and part of humans' normal existence. All people are constantly dependent upon various personal relationships and institutions.³⁴ When those institutions fail to provide resiliency, people succumb to hardship rather than overcome it.

The vulnerability that humans share is a result of our embodiment—humans all have a physical form that is always susceptible to change.³⁵ Accepting the universality of this concept “supports the demand that we need a political and economic system that reacts in a responsive and supportive way to that vulnerability.”³⁶ The concept of embodiment also recognizes the variations among human bodies by taking a “life-course” perspective.³⁷ Thus, a vulnerability approach takes account of differences arising from biology or development.³⁸ “By contrast, the autonomous legal subject is static, reflecting only an idealized (and often un-realized) age-specific point in the life course.”³⁹ The differences between individuals in society at any given point in time (race, gender, ability, circumstances, etc.), “highlight the need to focus on the way in which law affects or shapes the nature and functioning of the social institutions and relationships that respond to human vulnerability on a day-to-day basis.”⁴⁰ For example, a public school policy requiring children to purchase their own uniforms needs to be examined for how it affects those of different financial circumstances. The analysis cannot stop with the notion of equality (i.e. the notion that all children must purchase the same uniform, and, therefore, the policy is “fair”).

Humans also all have various desires and needs that must be satisfied in order to live productive and healthy lives. For example, we need connection with others—including sexual connection.⁴¹ Thus, humans are dependent on others for satisfaction of those needs.⁴² The embodied being of the vulnerable subject is therefore “inevitably embedded in social institutions and relationships.”⁴³ Our embeddedness is the intrinsic social component to our biological makeup. This “social dependency” begins at birth and continues throughout our lives.⁴⁴ As Fineman points out, this is the

³⁴ See generally *id.*

³⁵ FINEMAN, *supra* note 22, at 4.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ FINEMAN, *supra* note 22, at 4.

⁴⁰ *Id.* at 5.

⁴¹ See Jacques van Lankveld et al., *The associations of intimacy and sexuality in daily life, Temporal dynamics and genders effects within romantic relationships*, 35(4) J. SOC. & PERS. RELATIONSHIPS 557, 559 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5987853/>.

⁴² FINEMAN, *supra* note 22, at 5.

⁴³ *Id.*

⁴⁴ *Id.*

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very reason we created institutions such as the family, workplace, and educational systems in the first place.⁴⁵

While the concept of universal human vulnerability is the starting premise of vulnerability theory, a discussion of resilience and the institutions responsible for it is its core focus.⁴⁶ Although there is no position of invulnerability, all people have different levels of “resiliency.” Resilience is the means by which one can overcome her misfortune.⁴⁷ Vulnerability Theory gives us a new lens through which to look to critique the current amount and type of state responsibility for individual and societal resiliency.⁴⁸ “The ability to mitigate, compensate, or manage vulnerability will vary according to the quality and quantity of resources that individuals possess or can command.”⁴⁹

Thus, vulnerability can never be overcome, but our institutions can be structured in such a way that allows us to live with it—by giving us resilience—throughout the life course.⁵⁰ The amount of resilience that one has can be determined by how easy it is for her to recover from setbacks that inevitably will occur throughout her life.⁵¹ “Resilient individuals are able to form relationships, undertake transactions, and take advantage of opportunities or take risks in life, confident that if they fail the challenge or meet unexpected obstacles, they are likely to have the means and ability to recover.”⁵² Institutions can confer resiliency onto individuals by giving them certain assets. “Assets” are “resources in the form of advantages or coping mechanisms.”⁵³ There are five types of assets that make up these resources: physical, ecological, existential, human, and social.⁵⁴ This paper will focus exclusively on existential, social, and human assets.

Existential assets are those that are provided by cultural or religious beliefs.⁵⁵ So, for example, attending church can be considered for some as an existential asset insofar as church helps people recover from setbacks. “Social assets are networks of relationships from which we gain support and strength.”⁵⁶ The home is another primary example. If someone does not have a positive and supportive home life, they might have less resiliency due to a

⁴⁵ *Id.*

⁴⁶ FINEMAN, *supra* note 22, at 5.

⁴⁷ *Id.*

⁴⁸ *Id.* at 3.

⁴⁹ *Id.* at 5.

⁵⁰ *Id.*

⁵¹ *Id.* at 6.

⁵² *Id.* at 5.

⁵³ *Id.* at 6.

⁵⁴ *Id.* at 5.

⁵⁵ Fineman, *supra* note 21, at 271.

⁵⁶ FINEMAN, *supra* note 22, at 7.

lack of safety net to fall back on when they experience hardship. Finally, human assets are resources that “affect material well-being” and are categorized as human abilities and experience.⁵⁷ These abilities are developed through education and knowledge, and thus, the educational system is a primary human asset.⁵⁸

B. A Vulnerability Theory Analysis

Fineman has emphasized that vulnerability theory does not suggest specific answers to political questions, such as how, specifically, sexual assault should be defined or remedied. Instead, the theory challenges the base norms that appear to have created the problem in the first place, attempts to determine the institutions responsible for various types of resiliency to the problem, and suggests new questions that we should be asking in order to more completely solve the problem. To delve into a vulnerability analysis, we must ask the following questions:

1. Who is the vulnerable legal subject?
2. Why is this subject more or less resilient in this particular context?
3. What institutions are involved in making this subject more or less resilient?
4. What should the state’s responsibility be in providing more resilience to this subject?

By asking these questions rather than individual rights-based questions generated by focusing on the neoliberal subject, we gain a more realistic picture of responsibility as well as a more efficient means of solving the issue. Institutions do, in fact, shape us. They determine what we can handle, and what choices we might be more likely to make. They can prepare us to overcome hardship or all but ensure that we fail. Thus, this lens also makes institutions the primarily responsible entities rather than individuals. This is not to say that individuals are not responsible for their choices, but to broaden that realm of responsibility to include institutions’ responsibility to provide resiliency to individuals. Thus, in determining responsibility for a human failure—for example, if Person A robs Person B—the relevant question not only involves personal responsibility and rights-based questions—i.e. Person A’s fault and the rights of Person B to not be robbed—but it also involves institutional responsibility—i.e. which institutions (such as, for example, the family, educational, or healthcare systems) failed by allowing or contributing to Person A’s homelessness and lack of basic needs.

⁵⁷ Fineman, *supra* note 21, at 270.

⁵⁸ *Id.*

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C. The Vulnerable Sexual Being

The subject that this article addresses is the vulnerable sexual being. The sexual being encompasses all beings who engage in sexual activity. Any subject that only represents victims or only represents perpetrators (or men/women, initiators/responders) is under-inclusive. Current laws usually favor the rights of one side over those of the other.⁵⁹ By not evaluating the situation under a “rights-based” lens, and instead considering everyone who engages in sexual activity, a more comprehensive picture of the problem is created. Thus, we also gain an understanding of the resiliencies required to remedy the issue.

Various social influences contribute to a person becoming a rapist or sexual assaulter.⁶⁰ If we accept this premise, then perpetrators are also vulnerable. If the analysis used “victims,” as the subject to address, therefore, then it would look at how to provide resilience to only those who could become victims. A successful analysis should also consider how society can prevent people from becoming perpetrators. Further supporting this definition of the sexual being is the fact that sexual assault tends to be cyclic, in that victims often become perpetrators later in life.⁶¹

By making the subject of our analysis the “sexual being,” therefore, the shared vulnerability of both people in a sexual encounter is exposed. Sex is a normal part of existence and relationships that are formed through the life-course. Sex is needed both for procreation and connection with another. Humans are susceptible to both positive and negative change as sexual beings, and therefore, our human vulnerability manifests in a particular way when two people are in a sexual encounter.

This vulnerability can take many forms. For example, sexual encounters make people vulnerable to STDs, to having bad chemistry with someone, to being judged or rejected for our bodies or our sexual preferences, and, if a woman, to becoming pregnant. On the opposite end of the spectrum, we are also vulnerable to having powerful, intimate experiences with another

⁵⁹ See *Rape and Sexual Assault Crime Definitions*, *supra* note 1.

⁶⁰ See World Health Organization, *World Report on Violence and Health*, Ch. 6, *Sexual violence* 149, 161-62 (2002)(poverty, community belief in male superiority, laws supporting gender equality), https://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf?ua=; see also Van Badham, *How not to raise a rapist*, THE GUARDIAN (Oct. 28, 2013, 11:56 PM), <https://www.theguardian.com/commentisfree/2013/oct/29/rape-australia-drink>.

⁶¹ *Sexual Violence: Risk and Protective Factors*, CDC, <https://www.cdc.gov/violenceprevention/sexualviolence/riskprotectivefactors.html> (last visited Feb. 14, 2020).

person. Good sexual experiences are healthy and healing, and bad sexual experiences are physically and psychologically damaging.⁶²

The next step in the analysis is to learn why some sexual beings are more resilient than others, so that institutional power can be used to give more resilience to those who need it. By resilience in a sexual encounter, we mean the foundation to succeed in a sexual encounter by both not being a victim and not being a perpetrator of sexual assault.

II. HARMFUL NORMS: HOW OUR DOMINANT CULTURE NORMALIZES SEXUAL VIOLENCE

Harmful norms help explain much of normalized sexual violence. According to the CDC, risk factors of perpetrating a sexual assault crime include “[having an] emotionally unsupportive family environment,” “societal norms that support male superiority and sexual entitlement,” “societal norms that maintain women’s inferiority and sexual submissiveness,” “association with sexually aggressive, hypermasculine, and delinquent peers,” and “involvement in a violent or abusive intimate relationship,” among others.⁶³ Thus, having a supportive family and growing up in an environment where the norms do not support male superiority and female submissiveness contributes to resiliency.

Our deeply engrained religious institutions have, in part, created and continue to perpetuate harmful norms that make certain types of sexual assault reasonable and even expected. Educational systems fail to prepare members of society for functional interpersonal and sexual relationships, college campuses create harmful norms surrounding sex, and the media exploits female sexuality. Finally, the fact that sexual education is left to the private sphere of the home contributes to a lack of uniformity in such education.

A. Religious Institutions

The type of religious belief or culture that one is a part of will influence resiliency, whether positively or negatively.⁶⁴ Religion plays a huge role in how the sexual being understands sex and what his or her role in a sexual

⁶² See Jacques van Lankveld et al., *supra* note 41 (good sexual experiences are healthy); RAPE, ABUSE & INCEST NATIONAL NETWORK, *Effects of Sexual Violence*, <https://www.rainn.org/effects-sexual-violence> (last visited Sept. 11, 2019) (sexual assault is psychologically damaging).

⁶³ *Sexual Violence: Risk and Protective Factors*, *supra* note 61.

⁶⁴ It is worth noting that religion can be a source of resiliency. Statistically, those who identify as religious are happier in that they feel that they have a purpose. See Michael Inzlicht, Alexa M. Tullett & Marie Good, *The Need to Believe: a Neuroscience Account of Religion as a Motivated Process*, 1(3) RELIGION, BRAIN & BEHAV. 192 (2011).

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relationship is. Most people in the United States identify as religious,⁶⁵ and, harmfully, most major religions discriminate against women in significant ways.⁶⁶ The overwhelmingly dominant religion in the United States is Christianity, as more than three-fourths of Americans identify as Christian.⁶⁷ The analysis will therefore focus on issues specific to Christianity.

The Christian religion is based on biblical text. Biblical text⁶⁸ details how both men and women are to behave and is heavily misogynistic and patriarchal.⁶⁹ It is inherently and overtly sexist in its consideration of women. For starters, the text was written entirely by men, and “God” himself is gendered as male.⁷⁰ Although sexism in the Christian religion is so well-documented that it hardly needs to be explained, a few concrete examples drive this point home.

One example is in I Corinthians 11:8-9, which states “[f]or the man is not of woman; but the woman of the man. Neither was the man created for the woman; but the woman for the man.”⁷¹ Another is in Leviticus 12:5,⁷² which states that, after a woman gives birth to a child, she must go through a purification ritual to keep her “uncleanness” from harming others. The male rulers at that time deemed that, if the child a woman gave birth to was female, then the mother was deemed to be “unclean” for twice as long than she would

⁶⁵ Amber Pariona, *Religious Demographics of the USA*, WORLDATLAS (June 26, 2018), <https://www.worldatlas.com/articles/religious-composition-of-the-united-states.html>.

⁶⁶ See Beatrice Alba, *If we reject gender discrimination in every other arena, why do we accept it in religion?*, THE GUARDIAN (Mar. 5, 2019, 12:01 PM), <https://www.theguardian.com/commentisfree/2019/mar/06/if-we-reject-gender-discrimination-in-every-other-arena-why-do-we-accept-it-in-religion>; Graham Perrett, *Discrimination Against Women Isn't Unique To Any One Religion*, HUFFINGTON POST, (Mar. 13, 2017, 10:35 AM), https://www.huffingtonpost.com.au/graham-perrett/discrimination-against-women-isnt-unique-to-any-one-religion_a_21878825/; Courtney McCluney, *For the Bible Tells Me So: Justifying Gender Discrimination Based on Biblical Text*, MEDIUM.COM (Aug. 10, 2018), <https://medium.com/national-center-for-institutional-diversity/for-the-bible-tells-me-so-justifying-gender-discrimination-based-on-biblical-text-83c61dd4e639>.

⁶⁷ Reid Wilson, *The Second-Largest Religion in Each State*, THE WASHINGTON POST (June 4, 2014, 4:13 PM EDT), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/06/04/the-second-largest-religion-in-each-state/?noredirect=on>; AJ Willingham, *By 2040, Islam could be the second-largest religion in the US*, CNN POL. (Jan. 10, 2018), <https://www.cnn.com/2018/01/10/politics/muslim-population-growth-second-religious-group-trnd/index.html> (noting that Christianity is still the overwhelmingly dominant group).

⁶⁸ See Blue Letter Bible, 1 Corinthians 11 (2020).

⁶⁹ M.C. Haggard et al., *Religion's role in the illusion of gender equality: Supraliminal and subliminal religious priming increased benevolent sexism*, *Psychology of Religion and Spirituality*, APA DIV. 36 (May 21, 2018), <https://psycnet.apa.org/record/2018-23401-001>.

⁷⁰ Maryanne Cline Horowitz, *The Image of God in Man – is Woman Included*, 72 HARVARD THEOLOGICAL REV. 175 (1979) (published online by Cambridge University Press, June 10, 2011) <https://www.cambridge.org/core/journals/harvard-theological-review/article/image-of-god-in-man-is-woman-included/B20513BCE8394B01FE35C133B159078B>.

⁷¹ See Corinthians, *supra* note 68.

⁷² Blue Letter Bible, Leviticus 12, (2020).

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have been had she had a male child. Other examples include passages that: (1) explicitly demand that women be silent and live only for men;⁷³ (2) regulate women's virginity, such that a woman may be stoned if found to have had sex with a man who is not her husband;⁷⁴ (3) give husbands unlimited power over their wives;⁷⁵ and (4) state that men who marry a virgin woman must compensate her father.⁷⁶ This is, of course, not an exhaustive list.

This notion of women as being beneath men unquestionably influences how women are perceived inside of religious institutions as well as how women who are part of these institutions perceive themselves. Women are likely to understand men as the more powerful, dominant partner, and that this is somehow the "natural order" of things, according to the Bible. This perception likely also influences their sexual lives and what women deem to be normal or permissible sexual experiences. For example, the Christian religion explicitly allows men to sexually assault their wives.⁷⁷

It is unlikely that the more extreme passages are preached about often in churches. Thus, an argument could be made that these sections of the bible are more or less ignored in practice. However, this argument ultimately fails, as the remnants of these passages can be seen everywhere in various church rituals and the structure of church operations. For example, a woman's virginity is still widely considered a "gift" to her husband.⁷⁸ Meaning that, once a woman marries a man, her body ceases to be hers. Passages read at marriage ceremonies frequently include Ephesians 5:22-33, which reads:

Wives, submit to your own husbands, as to the Lord. For the husband is head of the wife, as also Christ is head of the church; and He is the Savior of the body. Therefore, just as the church is subject to Christ, so let the wives be to their own husbands in everything.⁷⁹

This suggests that wives are to be *completely submissive* to their husbands "in everything." Thus, to be a good Christian wife, or the wives that adhere most strictly to the biblical texts, are passive, submissive, and quiet. Their role is to support their husbands rather than to have any ambitions or opinions of their own.

⁷³ Blue Letter Bible, 1 Timothy 2, (2020).

⁷⁴ Blue Letter Bible, Deuteronomy 22, (2020).

⁷⁵ Blue Letter Bible, Ephesians 5, (2020).

⁷⁶ Blue Letter Bible, Deuteronomy 22, *supra* note 74.

⁷⁷ Ephesians, *supra* note 75.

⁷⁸ Emily Timbol, *The Damage of Overvaluing Virginity*, HUFFPOST (July 14, 2012), https://www.huffingtonpost.com/emily-timbol/the-damage-from-overvaluing-virginity_b_1668113.html.

⁷⁹ *Marriage – Christ and the Church*, BIBLE GATEWAY, <https://www.biblegateway.com/passage/?search=Ephesians%205:22-33&version=NKJV&interface=amp> (last visited May 6, 2018).

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Further, many Christian men agree with this notion of “the good Christian wife.” A recent study from data collected from 216 conservative Protestant Christian churchgoers “assesse[d] individual social attitudes and ideological beliefs regarding systems of power and sexism in relationship to Bible interpretation choice about passages related to gender.”⁸⁰ The study found that “men were significantly more likely than women to prefer Bible interpretations oriented toward gender hierarchy.”⁸¹

Christianity still deems the “proper place” of women to be wherever men will allow. A relevant example of this is that many churches do not allow women to be ministers or deacons.⁸² Any leadership roles filled by women are confined to those which *permit* women to be in the position. Women almost always assume less powerful positions than the positions filled by men.⁸³ Thus, Christian women might be more likely to accept boundary-crossing behavior, and Christian men might be more likely to expect women to allow them sexual dominance. As shown, the harmful portions of biblical text are very much alive and well in the Christian religion, even barring use of the most damning passages.

Another problematic aspect of Christianity is what it teaches regarding sexuality, generally. If sex is not between a husband and a wife, it is a sin in the Christian religion.⁸⁴ Any sexual experimentation or deviancy from the “norm” is therefore “sinful” and considered dirty and wrong.⁸⁵ The human body is to be covered, and sex is something private, hidden, and not to be discussed openly. Sexuality is not something to be discovered or explored, but instead suppression and chastity are expected until marriage.

It is therefore not surprising that Christian institutions do not teach adolescents about sex, despite that about 40% of adolescents between ages 15 and 19 reported having sexual intercourse in 2015-2017.⁸⁶ Further, a

⁸⁰ Laura M. Northrop Orme et al., *Power, Sexism, and Gender: Factors in Biblical Interpretation*, 45 J. PSYCHOL. & THEOLOGY 274, 274 (2017) <https://journals.sagepub.com/doi/abs/10.1177/009164711704500403?journalCode=ptja>.

⁸¹ *Id.*

⁸² See Andrew Brown, *Female deacons could lead to female priests- and the Vatican knows it*, THE GUARDIAN (May 13, 2016), <https://www.theguardian.com/commentisfree/2016/may/13/female-deacons-priests-vatican-pope-francis-traditionalists-new-testament>.

⁸³ See Aleksandra Sandstorm, *Women relatively rare in top positions of religious leadership*, PEW RES. CTR. (Mar. 2, 2016), <https://www.pewresearch.org/fact-tank/2016/03/02/women-relatively-rare-in-top-positions-of-religious-leadership>.

⁸⁴ See Nicholas Davis, *9 Bible Verses That Teach That Sex Before Marriage Is a Sin*, CORE CHRISTIANITY, (June 15, 2017), <https://corechristianity.com/resource-library/articles/9-bible-verses-that-teach-that-sex-before-marriage-is-a-sin>.

⁸⁵ G. Runkel, *Sexual Morality and Christianity*, J. SEX. MARITAL. THER. 24(2): 103-22 (1998), <https://www.ncbi.nlm.nih.gov/pubmed/9611690>.

⁸⁶ *Adolescent Sexual and Reproductive Health in the United States*, GUTTMACHER INSTITUTE (Sept. 2019), <https://www.guttmacher.org/fact-sheet/american-teens-sexual-and-reproductive-health>.

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survey showed that, “[i]n 2013, about one in five 15-year-olds and two-thirds of 18-year-olds reported having had sex.”⁸⁷ Thus, a significant number of young people are engaging in sexual activity and, if they grew up in the church, they likely learned about sex elsewhere.

The Roman Catholic church, for example, teaches that preventing a pregnancy in any way is sinful and unacceptable, and thus does not allow or teach about contraception.⁸⁸ Though some Christian denominations allow contraception between married individuals, they do not condone and thus do not teach about contraceptive use for unmarried adolescents.⁸⁹

Adolescents involved in a Christian church are generally not taught sexual education until they are ready to get married. Their understanding of a “healthy” romantic relationship is also likely based on the Christian model. Such understanding is therefore arguably more likely to be skewed and damaging than the understanding of someone who did not grow up in a Christian church.

Finally, the overt sexism and lack of sexual education in Christian institutions is further exacerbated by the fact that they have historically been breeding grounds for sexual assault. The Southern Baptist Convention is the largest Protestant denomination in the United States.⁹⁰ As highlighted by a series of 2019 articles from the Houston Chronicle, roughly 380 Southern Baptist church leaders and volunteers have faced allegations of sexual misconduct since 1998.⁹¹ According to these articles, more of these allegations took place in Texas than in any other state.⁹² Over 200 offenders—pastors, ministers, youth pastors, Sunday school teachers, deacons, and church volunteers—have been convicted or pled guilty, with dozens of cases still pending.⁹³ The article notes that, “there is no central database that tracks ordinations, or sexual abuse convictions or allegations” which “makes Southern Baptist churches highly susceptible to predators.”⁹⁴ The Catholic Church also “finds itself in a period of extraordinary crisis”

⁸⁷ *See id.*

⁸⁸ *The Catholic Church and Birth Control*, PBS: AMERICAN EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/pill-catholic-church-and-birth-control/> (last visited Sept. 11, 2019).

⁸⁹ *See* Evan Lenow, *Protestants and Contraception*, FIRST THINGS (Jan. 2018) <https://www.firstthings.com/article/2018/01/protestants-and-contraception>.

⁹⁰ *Why Survivors Aren't Surprised by Sexual Abuse Inside Southern Baptist Churches*, PBS NEWS HOUR (June 12, 2019), <https://www.pbs.org/newshour/show/why-survivors-arent-surprised-by-sexual-abuse-inside-southern-baptist-churches>.

⁹¹ Robert Downen, Lise Olsen & John Tedesco, *Abuse of Faith*, HOUSTON CHRONICLE (Feb. 10, 2019) <https://www.houstonchronicle.com/news/investigations/article/Southern-Baptist-sexual-abuse-spreads-as-leaders-13588038.php>.

⁹² *See id.*

⁹³ *See id.*

⁹⁴ *Id.*

with regard to criminal sex offenses.⁹⁵ The problem of sexual assault by Catholic Church leaders has been known for decades, and states have begun to launch their own investigations of abuse.⁹⁶ In “[a]n Aug. 2018 grand jury report on clerical sex abuse in six Pennsylvania dioceses,” detailed and graphic accounts were given of decades of criminal offenses against minors by Catholic priests.⁹⁷

B. Cultural Norms

In addition to harmful norms perpetuated by the Christian religion, there are also harmful norms perpetuated by the institution of educational systems, the family, and the media. Such norms often link back to or were founded on religious norms but are perpetuated by cultural institutions in addition to religious institutions. Parents are responsible for teaching sexual and relationship education to their children, and thus are free to teach whatever they think is appropriate. If they are Christian parents, for example, they may choose not to discuss sex with their children or discuss it in a way that suggests to their children that sex is dirty. Or they may raise their daughters to be “submissive” to their husbands or to men in general.

Rape culture is alive and well on college campuses, and college-age adults have a high risk of being subjected to sexual violence.⁹⁸ If rape culture is pervasive on college campuses, students are more likely to normalize that behavior later in life.⁹⁹ However, these norms could change if adolescents received comprehensive, medically accurate sexual education before going to college. Statistically, those who receive formal sexual education that includes sexual assault education are far less likely to sexually assault someone.¹⁰⁰ Also, the more a person is educated regarding sexual assault, the more likely she is to recognize when another person is crossing her boundaries.¹⁰¹ Thus, resiliency to sexual assault is created at least in part by access to comprehensive sexual education.

⁹⁵ Wiestse De Boer, *The Catholic Church and Sexual Abuse, Then and Now*, ORIGINS, (Mar. 2019) <http://origins.osu.edu/article/catholic-church-sexual-abuse-pope-confession-priests-nuns>.

⁹⁶ *See id.*

⁹⁷ *Id.*; *see also* Nicholas Little, *The Privilege of Predators: Church Sexual Abuse And Society's Deference to Religion*, CENT. FOR INQUIRY (Aug. 15, 2018), <https://centerforinquiry.org/blog/the-privilege-of-predators/>.

⁹⁸ RAPE, ABUSE & INCEST NATIONAL NETWORK, *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence> (last visited Sept. 11, 2019).

⁹⁹ *See* Katie Roe, *Rape Culture on College Campuses*, ODYSSEY (Dec. 30, 2017), <https://www.theodysseyonline.com/rape-culture-on-college-campuses>.

¹⁰⁰ *Sexual Violence: Prevention Strategies*, CENT. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/violenceprevention/sexualviolence/prevention.html> (last visited May 6, 2018).

¹⁰¹ *See id.*

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However, uniform sexual education is not required to be taught in our public educational systems.¹⁰² Further, sexual relationships are often portrayed poorly and harmfully in the media.¹⁰³ Thus, youth often have a fragmented and skewed understanding of sexuality and romantic relationships. Although there is wide agreement among parents and legislators that children should receive comprehensive sexual education beginning in middle school, less than half of public high schools and a fifth of middle schools teach all topics recommended by the CDC.¹⁰⁴ Even more alarming is the fact that, of those states that do mandate sexual education, only 13 require the information taught to be medically accurate.¹⁰⁵ The decision to implement sex education into public school curriculum is often left up to individual school districts, which may account for some of the problem.¹⁰⁶ “Overall, in 2011-2013, 43% of adolescent females and 57% of adolescent males did not receive information about birth control before they had sex for the first time.”¹⁰⁷ According to a study by the Guttmacher Institute, “[m]any U.S. teens are not receiving formal sex education, and fewer teens now than in the past are being exposed to important and timely information about a range of sex education topics.”¹⁰⁸

The media further exacerbates this issue. According to a 2015 study, about 85% of films and 82% of television shows include some portrayal of sex, with very minimal reference to sexual risk or responsibility.¹⁰⁹ Women are more often shown in sexually explicit ways, and this extends to video games.¹¹⁰ Women are routinely over-sexualized in this context. Although some results of this study showed that this might have a positive impact on society’s attitude toward sexuality—such as being more permissive of “uncommitted sexual exploration”—other results indicated that more

¹⁰² *What’s the State of Sex Education in the U.S.?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/for-educators/whats-state-sex-education-us> (last visited May 7, 2018).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Zoe D. Peterson, *Sexual Consent Research and Affirmative Consent Policies: From Saturday Night Live to State Legislatures*, ITEMS (July 30, 2019), <https://items.ssrc.org/sexuality-gender-studies-now/sexual-consent-research-and-affirmative-consent-policies-from-saturday-night-live-to-state-legislatures/>.

¹⁰⁶ Planned Parenthood, *supra* note 102.

¹⁰⁷ Planned Parenthood, *supra* note 102.

¹⁰⁸ News Release, *Fewer U.S. Teens Are Receiving Formal Sex Education Now Than in the Past*, GUTTMACHER INSTITUTE (Apr. 14, 2016), <https://www.guttmacher.org/news-release/2016/fewer-us-teens-are-receiving-formal-sex-education-now-past>.

¹⁰⁹ Lucretia M. Ward et. al., *Sexual Media Content and Effects*, OXFORD RESEARCH ENCYCLOPEDIAS (Aug. 2016), <http://communication.oxfordre.com/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-2>.

¹¹⁰ *Id.*

exposure to this material correlated with permissiveness of double standards and gender-related sexual roles.¹¹¹

Parents are assumed to teach their children the proper functioning of a relationship and comprehensive sexual education. Fineman points out that “policy discussions about economic and social issues implicitly incorporate a certain image of the family, assuming its structure and functioning.”¹¹² We do not teach these things uniformly in our public schools because this is a task left to the family. It is assumed that all parents teach these things to their children. This task is just another of the “assumed family,” Fineman discusses.¹¹³

“The family is a major institution providing social resources, particularly for the young or others in need of care.”¹¹⁴ The family is a privatized institution in that it avoids public regulation or intrusion of any kind. Thus, it makes our universal vulnerability invisible. Fineman argues that “. . . the family has been deemed the primary societal institution responsible for dependency . . . [and] [t]he family is the mechanism by which we privatize, and thus hide dependency and its implications.”¹¹⁵ This privatization, therefore, allows “simplistic assertions of the attainability, as well as the superiority, of individual independence and self-sufficiency. . . .”¹¹⁶

Further, Fineman points out that the “zone of privacy” within the family allows dependency to be “largely rendered invisible” and “comfortably privatized and mistakenly assumed to be adequately managed for the vast majority of people.”¹¹⁷ In this context, the dependency that is inadequately being managed is that of children learning how to form functional personal and sexual relationships.

As a primary social institution, the structure of the family determines the amount of certain types of resilience developed in individuals.¹¹⁸ “Conceptually and ideologically, the assumed family relieves the state and the market from assuming responsibility for delivering the day-to-day necessities and addressing the dilemmas presented by dependency.”¹¹⁹ However, in many cases family dynamics are so contorted and damaging that they inhibit rather than give resiliency.

¹¹¹ *Id.*

¹¹² Martha A. Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER, SOC. POL’Y & L. 13, 14 (1999).

¹¹³ *Id.*

¹¹⁴ Fineman, *supra* note 21, at 271.

¹¹⁵ *Id.* at 263.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 266 (explaining that “zone of privacy” goes “beyond the scope of state concern absent extraordinary family failures, such as abuse or neglect.”).

¹¹⁸ See Marvel, *supra* note 31, at 2044.

¹¹⁹ Martha A. Fineman, *Contract and Care*, 76 CHI. KENT L. REV., 1403, 1419 (2001).

We must recognize the importance of family in shaping the resilience of children (and later, adults). In particular, with regard to personal and sexual relationships, we need to act on the fact that children's learning is not taking place in school. Though sexual education should be taught in school, it is instead left to the private, opaque sphere of the family, which often means it is not being taught at all.

III. HOW "CONSENT" FALLS SHORT

Damaging norms have resulted in confusion about sexuality, which includes the meaning of "consent." The focus of our laws on the liberal subject, rather than the vulnerable subject, play a central role in explaining why we cannot find a satisfactory definition of consent. Analyzing the issue under a vulnerability lens exposes the problem with analyzing consent altogether. This Part goes even further, past the Vulnerability analysis, and suggests a new term in the place of consent as well as a wider focus on the issue of sexual assault.

A. *Definitions of "Consent" in Neoliberal Discourse*

States disagree as to the definition of consent,¹²⁰ and many do not define it at all. Some states still require a show of force in order for a sexual act to be non-consensual. Even among single states, "consent" is confusing. In New York—one of the most progressive states—for example, there are three different legal standards for "consent."

Under Article 130.5 of New York's Penal Law,¹²¹ "lack of consent results from . . . any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct." So, under the Penal Law, "acquiescence" is required, which is something less than an enthusiastic "yes." However, New York's "Enough is Enough"¹²² law "requires colleges in New York State to adopt a uniform definition of affirmative consent, defined as: 'knowing, voluntary, and mutual decision among all participants to engage in sexual activity.'¹²³ This standard clearly places the burden on both parties to clearly ensure the other party is a willing participant. Adding to further confusion, in *People v. Newton*¹²⁴ the New York Court of Appeals held that:

¹²⁰ RAPE, ABUSE & INCEST NATIONAL NETWORK, *Consent Laws* (last visited May 6, 2018), <https://apps.rainn.org/policy/compare/consent-laws.cfm>.

¹²¹ N.Y. PENAL LAW, §130.05.

¹²² *Enough is Enough: Combating Sexual Assault on College Campuses*, NY.GOV, <https://www.ny.gov/programs/enough-enough-combating-sexual-assault-college-campuses> (last visited May 6, 2018).

¹²³ *Id.*

¹²⁴ *People v. Newton*, 298 A.D.2d 896, 896 (N.Y. App. 2002).

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The proper inquiry for the factfinder is not whether a defendant actually perceives a lack of consent, but whether the victim, by words or actions, clearly expresses an unwillingness to engage in the sexual act in such a way that a neutral observer would have understood that the victim was not consenting.¹²⁵

This standard places the burden on the victim to “clearly” show non-consent to some fictional neutral observer. So, there appears to be three different standards for consent in New York: “acquiescence,” “knowing and voluntary” participation, and “no clear indication” of unwillingness.

The ambiguity created by these New York laws is troubling because it teaches students one version of consent but holds citizens to a different standard as soon as they enter the real world. Part of solving the issue of sexual violence in the United States will entail defining what it means for people to agree, together, to have sex. However, as previously discussed, it is not enough to stop there. To demonstrate this lack of sufficiency, let us suppose that all states adopt some form of affirmative consent law.¹²⁶ These laws, like New York’s “Enough is Enough” law, define consent as:

[A] voluntary, affirmative, conscious, agreement to engage in sexual activity, that . . . can be revoked at any time, that a previous relationship does not [obviate] . . . and [which cannot be established by] coercion or threat of force. Affirmative consent can be given either verbally or nonverbally. Additionally, . . . a person who is incapacitated by drugs or alcohol, or is either not awake or fully awake, is . . . incapable of giving consent.¹²⁷

What this means in practice is astoundingly unclear. Does every new sexual act during a string of sexual acts need separate consent? If two people are drinking at a bar and later have sex while intoxicated, did they both commit sexual assault against the other? How do we define coercion? How do we define voluntariness? What constitutes nonverbal consent? This definition assumes that there are clearly understood definitions to these terms. States that implement such definition assume that people have the skills needed to provide informed and affirmative consent, such as “self-reflection about what they do and do not want and value sexually,” and “skills to talk to a partner about sexual likes and dislikes.”¹²⁸ Further, this law assumes that people have a basic knowledge of sexual acts and anatomy. As

¹²⁵ *Id.*

¹²⁶ Most states have not adopted the progressive definitions and laws that New York has. Many still require a show of force to prove rape. However, a close examination of all states is beyond the scope of this paper. This article attempts to show that, even using the most progressive definition, the problem remains.

¹²⁷ *We Have the Power to Give Consent*, THE RANGER, Oct. 17, 2016, <https://acraner.com/2016/10/17/we-have-the-power-to-give-consent/>.

¹²⁸ Peterson, *supra* note 105, at 3.

discussed *supra*, very few states require schools to provide sexual education, and only 13 states require sex education to be medically accurate.¹²⁹

Further, if legally binding, this definition would pose issues for defendants in that they would have to prove consent, which, as others have argued,¹³⁰ goes against the weight of our constitutional law jurisprudence. Defendants do not have to prove innocence, but the State is required to prove guilt.¹³¹ Any legal definition of consent—Yes Means Yes or No Means No—implicitly gives one party (the one initiating sex or the one who does not want to have sex) more legal responsibility than the other. The law does not adequately address the vulnerabilities of both subjects.

Thus, all of this discussion of consent, while signifying an important cultural shift, does little to correct the problem. It is unlikely, even if the most progressive legal definition of consent was agreed upon across all states, that this would have an immediate impact on the cultural norms that normalized sexual violence in the first place. However, laws are only one enforcement mechanism. A vulnerability approach is needed to understand the relevant context surrounding these issues.

B. “Consent” Under a Vulnerability Analysis

In addition to practical problems presented by the definition, it has been argued¹³² that the concept of “consent” as it is used in current legal discourse is problematic under a vulnerability theory analysis. This is because it assumes a formal equality between parties that does not exist. As Fineman points out, in Western liberal tradition, “[o]ur primary metaphor for looking at social and institutional relationships (outside of the family) is that of contract.”¹³³ The notion of “consent” is contractual, yet our interactions with each other, particularly in the sexual context, are full of inequalities and complexity that “consent” does not capture. Further, the term “consent” implies acquiescence rather than enthusiasm. It implies an aggressor and someone who acquiesces.

Some vulnerability scholars, such as Dr. Marvel, have evaluated sexual consent under a vulnerability framework. Marvel notes that, often, “the issue of consent appears to miss the point”¹³⁴ in that it focuses unnecessarily on individual agency and responsibility.¹³⁵ The more important focus is that of

¹²⁹ *Id.*

¹³⁰ See Paul Robinson, *The Legal Limits of “Yes Means Yes”*, Faculty Scholarship Paper 1628 (2016) https://scholarship.law.upenn.edu/faculty_scholarship/1628/.

¹³¹ *See id.*

¹³² Fineman, *supra* note 21, at 262.

¹³³ *Id.*

¹³⁴ Marvel, *supra* note 31, at 2044.

¹³⁵ *Id.*

the context in which the relationship occurs. “[A] vulnerability analysis would broaden the frame to share responsibility within the context of the institutional setting while also taking into account the nature of their social relationship and its inherent dependencies.”¹³⁶ Thus, it is the relationship between both parties in a sexual encounter that needs the most attention and protection. Marvel further notes that this is particularly true “when such relationships are loaded with unequal distributions of dependency and care.”¹³⁷ Given the way that people grow up learning to interact with others (sexually and otherwise) in a private, non-uniform way, there will always be some level of unequal distribution of dependency and care. All sexual relationships are therefore going to be inherently unequal in multiple respects.

Although vulnerability theory does not answer the question of what “consent” should mean or whether the definition should be replaced, it directs us to consider all of the background context and institutional responsibility involved in a sexual encounter — which a “consent” analysis cannot do. If one young adult sexually assaults another, for example, at a college party, the questions become: How did our institutions fail to prepare these young adults for this sort of encounter? Who is more or less resilient in this scenario and why? What is the culture of the university, and how did that impact this situation?

It is worth noting that the neo-liberal lens can make for a clear-cut way for courts to evaluate these situations and assign blame. However, such evaluations ignore crucial context. A vulnerability theory analysis addresses the larger background issues. Vulnerability Theory does not assume that both parties have the unlimited and equal capacity to “consent” or to have the education that would give them the ability to correctly read another person’s nonverbal cues. Neoliberal discourse presupposes that the experiences and resources (or lack thereof) of two people in a sexual encounter do not cloud their free will and power of choice. It assumes an equality that simply does not exist, as Fineman has stated in previous works.¹³⁸ Vulnerability Theory can be applied to sexual assault situations to allow us to ask the right questions to determine how we should define and use “consent,” if at all. Ultimately, defining “consent” should come after we’ve evaluated sexual assault issues with an understanding of the correct subject.

¹³⁶ *Id.* at 2045.

¹³⁷ *See id.* at 2048.

¹³⁸ *See* Fineman, *supra* note 119, at 1419.

IV. ASSIGNING STATE RESPONSIBILITY: EDUCATION AND REGULATION

Institutional failures can allow someone to be a perpetrator or a victim in certain contexts. As discussed, the public education system is failing students and contributing to the problem of sexual assault by denying adolescents a uniform sexual education. Such education would make them more resilient in circumstances that could give rise to sexual assault. In addition to mandating educational courses for minors and young adults, we should strive to create healthy norms for casual dating and nonsexual human interaction, generally. This might include teaching a new concept or phrase that does not include the term “consent.”

Society should also encourage or regulate the media and religious institutions so that women are not discriminated against and sexuality is not portrayed in a way that exploits them. Only after we accomplish changing our norms to be positive and healthy can we set up our legal structures to reflect those norms.

A. Education

“[Families] cannot comfortably be assumed to be the primary repository for dependency.”¹³⁹ We need our educational systems to do the heavy lifting. Sexual assault is a public, rather than a private, responsibility. As we cannot force families to do anything inside of the household, we should instead ensure that all children receive education regarding relationships. Mandated, comprehensive sexual and interpersonal education across grade school and college curriculums is the best thing we can do as a country to increase resilience of all sexual beings. The state has a responsibility to provide this education as a social resource to those who do not have access to it. Currently, sexual education in public schools is suggested, but not mandatory by the government.¹⁴⁰ It should be made mandatory.

Paul Schewe, a professor studying violence prevention at the University of Illinois Chicago, stated in a recent NPR article¹⁴¹ that such conversations should start as early as possible. For example, he asserts that 5-year-olds should be taught that the correct way to know if someone wants a hug when they are sad is by asking them (rather than hugging them without asking).¹⁴² Likewise, he suggests that children should be taught that it is okay if they do

¹³⁹ See Fineman, *supra* note 119, at 1431.

¹⁴⁰ Tovia Smith, *To Prevent Sexual Assault, Schools and Parents Start Lessons Early*, NAT'L PUB. RADIO (Aug. 9, 2016), <https://www.npr.org/2016/08/09/487497208/to-prevent-sexual-assault-schools-and-parents-start-lessons-early> (heard on Morning Edition).

¹⁴¹ *Id.*

¹⁴² *Id.*

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not want to be hugged. They can tell the other person not to hug them.¹⁴³ Educating children early to understand the concept of physical boundaries teaches them respect for the boundaries of others and how to set boundaries themselves.

Such education should target any public high school that does not teach sexual education as well as the vast majority of public elementary and middle schools. Public schools of all levels should be made to include a course on something like “human relations” that teaches adolescents how to form healthy relationships. Schools that have these components will instill more resilience in their students.

The educational system is a primary institution for giving children resilience, and it should be able to carry this additional requirement. Fineman, arguing the importance of public schooling as opposed to homeschooling, stated that “[c]hildren must learn how to live in and relate to the community to which they will belong as adults; this ability provides resilience, conferring a sense of belonging and purpose in making a commitment to a shared social vision.”¹⁴⁴ The “social vision” of healthy sexual relationships must indeed be “shared” or more shared than it is currently, for us to make progress. Fineman stressed the importance of children learning a uniform education together, arguing that this process would instill in our children “essential values that provide social cohesion in the next generation of citizens.”¹⁴⁵

Fineman’s argument about homeschooling supports the notion that teaching children at home how to form personal relationships and have healthy sexual relationships can be damaging. It robs the student of a comprehensive sexual education and potentially subjects her peers to an uneducated and therefore potentially harmful version of herself later in life.

B. Replacing “Consent” in Education

The entire discussion of “consent” is problematic in itself because of the equality and autonomy it assumes. Given that the way that we grow up learning to interact with others (sexually and otherwise) is private and non-uniform, there will always be some level of unequal distribution of dependency and care in sexual interaction. Thus, equality that “consent” presupposes does not exist. Thus, the relevancy of “consent” to this issue is minimal at best. We cannot agree on levels of expectation from the other party involved.

¹⁴³ *See id.*

¹⁴⁴ Martha Fineman et al., “Homeschooling: Choosing Parental Rights Over Children’s Interests,” 46 U. BALT. L. REV. 72 (2016).

¹⁴⁵ *Id.*

Perhaps, instead of “consent,” the phrase “enthusiastic and comfortable” should be used. If both parties are enthusiastic about the encounter and comfortable in the encounter, then the encounter can proceed. There are no unwanted connotations or implications with these words; “acquiescence” is clearly not enough, and it is not implied that one person need be the aggressor. Both parties are responsible for ensuring, at every stage, that the other is enthusiastic and comfortable. If they sense discomfort or lack of enthusiasm, then that is grounds to stop the encounter. A term or phrase that reflects that two people are agreeing to do something *together* is needed.

There is no situation where someone would be enthusiastic and comfortable but not consenting. However, there are many situations where someone could be “consenting” under multiple definitions of the term, and not be enthusiastic or not be comfortable. Also, comfort and enthusiasm are more tangible terms for the other party. If someone looks uncomfortable or unenthusiastic, that could be an indicator of not wanting to have sex.

C. Regulation

In addition to mandated educational courses, more stringent regulation of religious institutions should be seriously considered. Religion can play an integral part in inhibiting resiliency to the sexual being. The Christian religion is hugely problematic for addressing issues of sexual assault, and it detracts from the existential resources that all people need to build resiliency. It is unclear how these norms might be able to change and keep the religion intact, as they are actually written into the religious text.

We should start by banning any trace of required religion from all public institutions, which is already the law (though it is frequently not followed).¹⁴⁶ Although our freedom of speech laws and right to religious practice are deeply engrained notions of our “liberal subject” society, the government may not adopt any dominant religion.¹⁴⁷ We should thus try to truly disestablish Christianity (or any religion) as a “norm” in public society, instead fostering freedom of religion as a completely private practice.

Further, religious institutions must still comply with all federal and state laws that are “valid and neutral law[s] of general applicability.”¹⁴⁸ The Constitution permits the legislature to pass certain laws without infringing on religious liberties. And the legislature has, in theory, a pretty wide latitude

¹⁴⁶ See Linda K. Wertheimer, *Schools should teach religion. What they shouldn't teach is faith.*, NBC NEWS (Feb. 6, 2018, 12:01 PM), <https://www.nbcnews.com/think/opinion/schools-should-teach-religion-what-they-shouldn-t-teach-faith-ncna844926>.

¹⁴⁷ *Your Right to Religious Freedom*, ACLU, <https://www.aclu.org/other/your-right-religious-freedom> (last visited May 7, 2018).

¹⁴⁸ *Employment Division v. Smith*, 494 U.S. 874 (1990).

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to do so. For example, a local law banning all use of peyote mushrooms (even for religious practice) was deemed constitutional as it was found generally applicable to all people; not just to religious people or just to people of one particular religion.¹⁴⁹ Likewise, laws preventing things like sexual assault are laws of general applicability. Thus, in theory, Congress could pass a law banning all discrimination on the basis of sex, not exempting any private institution, thus bringing religious institutions under the purview of discrimination regulation. This same type of regulation should be considered to help get rid of harmful sexual norms portrayed in the media, if they are discriminatory.

CONCLUSION

Analyzing the issue of sexual assault under a vulnerability lens will bring a more fruitful solution to the issue than looking under a neo-liberal lens. This is because the subject shifts to the sexual being, and responsibility for the issue is placed on educational, social, and media institutions in addition to the individual. Although likely culprits of the creation of these harmful norms are deeply engrained religious and educational institutions, we can better structure such institutions in a way that addresses the issue.

The definition of consent will not fix the problem of sexual assault, but increased sexual education is a great place to start. The government should implement mandatory relationship and sexual education at all public schools, particularly in rural locations. Society should also consider removing the term “consent” altogether in our sexual assault laws and in sexual education courses in favor of a new term or phrase with more concreteness and no present conflicting definitions.

Although religious norms play a huge role in American society, we should be questioning their foundations and evaluating whether they are perpetuating sexist norms that contribute to the issue of sexual assault. By changing our intense national focus from defining legal terms to focusing on education and questioning norms, we can change the culture and norms surrounding sexual assault. By changing such norms, society has a better chance of reducing the pervasiveness of sexual assault.

¹⁴⁹ *Id.*