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Chapter Three

What Are the Sexual Offences?

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INTRODUCTION

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Our law criminalizes a broad array of sexual, and sex-related, conduct. Among the offences that do this (or did until recently) are rape, sexual assault, coercion, human sex trafficking, female genital mutilation, forced marriage, sexual humiliation, voyeurism, public nudity and public indecency, sexual transmission of disease, selling and buying sexual services (prostitution), pimping and pandering, statutory rape and child molestation, abuse of position of trust, child grooming, creating and possessing child pornography, revenge porn, failure to register as a sex offender, fornication, sodomy, adultery, assault by sadomasochism, adult and child incest, bigamy, polygamy, miscegenation, bestiality, necrophilia, and sale of sex toys.

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While many of these offences, taken separately, have generated a significant body of analysis, there have been relatively few attempts to look at the category of sexual offences systematically, across the board. In this chapter, I intend to take a first step in considering the sexual offences as a whole by seeking to define the category itself. Specifically, I will address two basic issues:

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First, given the wide range of conduct that is covered, what exactly is to be gained by looking at the sexual offences as a whole? I will argue, among other things, that many of these offences, whether consensual, nonconsensual, or aconsensual, make use of, or rely on, the same set of basic concepts (including “sexual conduct,” “consent,” and “autonomy”) and ultimately reflect an interlocking set of common legal interests, rights, duties, harms, and wrongs. Looking at how the concepts are used in one context may yield insights about its application in a different, related context.

Second, what, if anything, distinguishes the sexual offences from other kinds of criminal offences? I will argue that there is no one set of necessary and sufficient conditions that defines the category and thereby distinguishes sex crimes from other kinds of crime. Rather, we need to look to several overlapping forms of prohibitions: on one or more kinds of socially disfavoured sexual acts; on conduct that is presumed to be preparatory of, or conducive to, future (illicit) sexual acts; and on conduct that, though it does not involve sex as such, nevertheless infringes on some aspect of another's right to sexual autonomy. Part of the challenge here will be to say what it means for conduct to be "sexual" and what distinguishes sexual autonomy from other forms of autonomy.

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I. WHY CONSIDER THE RANGE OF SEXUAL OFFENCES AS A WHOLE?

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The offences listed earlier involve an extraordinarily wide range of conduct. What can legal theory hope to gain by looking at the sexual offences as a whole? Let me suggest three reasons for doing so: To begin with, the category has real doctrinal significance. There are extensive collections of criminal statutes in Anglo-American law labelled as "sexual offences," as well as provisions that subject a wide range of "sex offenders" to registration and notice requirements, under which those convicted of offences as diverse as rape, incest, bestiality, voyeurism, and indecent exposure are all subject to the same regulatory regime.² Determining what these offences have in common is thus essential to determining whether such regimes make sense.

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A second reason for this comprehensive approach is that, from a historical perspective, the sexual offences can be said to have "grown up together." The offences were, and to some extent still are, largely complementary; they work in combination to define the limits of permissible sexual conduct. For example, in an era in which the only kind of sex officially valued by society was consensual, marital, vaginal intercourse, it may well have made sense that the only sort of act treated as rape was forced, nonmarital, vaginal intercourse, and that almost everything else was treated as criminal—typically, as fornication or sodomy—whether or not it was consensual.³ What constituted rape was also dependent on what constituted seduction; what constituted statutory rape was dependent on what constituted incest; and what constituted prostitution was dependent on what constituted sodomy (and vice versa). Today, as society's sense of what kinds of sexual activity constitute a "legitimate" and "acceptable" means of expressing one's sexuality has evolved and broadened, to include not just marital intercourse but a wide range of other forms of sexual activity as well, it is not surprising that the definition of what constitutes rape or sexual assault, as well as incest and

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prostitution, would continue to broaden and evolve as well. Nor is it surprising that offences like fornication, sodomy, and adultery would have virtually disappeared from the scene.

[3.8] Finally, and perhaps most fundamentally, the offences that make up this category of crime share a common set of conceptual building blocks, which ultimately reflect an interlocking set of legal interests that cut across the consensual and nonconsensual offences. For example, we need to have a coherent conception of *sexual conduct* in order to define both presumptively nonconsensual offences like abuse of position and child incest as well as presumptively consensual offences like adult incest and prostitution. Similarly, we need to know what *sexual autonomy* is and how it can be infringed in order to understand both why rape is a crime and why fornication and sodomy, and perhaps sadomasochism, no longer should be. And we need to understand the nature of *consent* to explain the criminalization not just of rape, but also of statutory rape and bestiality. More generally, consideration of the sexual offences can help us understand why certain kinds of sexual interests and behaviours are highly valued, and worthy of legal protection, while others continue to be reviled and even feared, and are arguably worthy of legal condemnation.

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II. DEFINING THE SEXUAL OFFENCES

[3.10] To determine what should count as a “sexual offence,” we will certainly want to consider how the issue is addressed in positive law. But it would be a mistake simply to survey the existing statutes, list the sex offences, and consider the question answered. We need to know what the sexual offences have in common, and how they differ from nonsexual offences. We need an approach that will give us a basis for evaluating schemes across different jurisdictions. We need some external criteria for deciding whether the classification of sexual offences in a given system is over- or under-inclusive.⁴ Are there offences that should be regarded as sexual offences that are not generally included on the list? Are there offences that are regularly included on the list that should be excluded?

[3.11] Although I will rely on existing sexual offence provisions as a starting point for analysis, that is no more than a start. It will be necessary to draw out certain salient features that such offences have in common. These features can then be used as a basis on which to go back and assess whether particular existing offences are in fact properly thought of as sexual offences after all. In attempting to develop a coherent and principled understanding of the norms that inform the sexual offences, it will often be necessary not only to describe the various approaches the law takes but also to advocate for a conception that departs from one or more prevailing formulations. The pro-



ject can thus be thought of as a kind of “normative reconstruction,” in which (as Neil MacCormick put it) we attempt to “dismantle” legal sources and make them “comprehensible,” “imaging and describing . . . the found order,” and deciding what fits into a “coherent whole,” and what needs to be “discarded or abandoned or at least revised.”⁵

A. The Sexual Offences as an Umbrella Category

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So what should count as a sexual offence? I am skeptical (because I have tried) that we could ever find a meaningful set of necessary and sufficient conditions that would cover every offence that has a plausible claim to being classified as such. We could say, in general terms, that an offence should be regarded as “sexual” if and only if it criminalizes sexual or sex-related activity, but that definition seems too conclusory and circular to be of much use. A better approach would be to think of the sexual offences as a kind of umbrella category that links a collection of at least three, partially overlapping subcategories of offences, all of which criminalize sex-related activity.

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One central subgroup of sexual offences involves the prohibition of one or more kinds of sexual conduct. This is true of nonconsensual offences like rape, sexual assault, statutory rape, and abuse of position of trust, as well as consensual or arguably consensual offences like fornication, adultery, prostitution, sodomy, adult incest, sadomasochism, bestiality, and necrophilia. As we shall see next, the manner in which the prohibited sexual conduct is defined varies significantly from offence to offence. In some cases, it is defined with almost clinical specificity; other times, it is left vague or is entirely implicit. In some cases, sex functions as a necessary conceptual element of the conduct prohibited, while elsewhere it seems to be merely contingent.

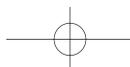
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A second group is comprised of sexual offences which prohibit conduct that is presumed to be preparatory of, or conducive to, future (illicit) sexual conduct. Offences of this type include solicitation, pandering, child grooming, bigamy, polygamy, failing to register as a sex offender, and (the English offence of) administering a substance with intent to commit a sexual offence. As is the case with other “preventive justice”-type criminal statutes, one of the concerns about such offences is whether the conduct prohibited by such provisions is too attenuated from the supposed harms sought to be prevented to justify criminalization.⁶

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A third, also highly significant, way in which sexual offence statutes can function is by prohibiting conduct that infringes on some aspect of another’s right to what I shall tentatively refer to as sexual autonomy. In many cases, conduct of this sort also involves the prohibition of a sexual act (as in the case of the first category of offences). Indeed, the reason the acts underlying rape and sexual assault are prohibited is precisely because they infringe on

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others' rights to sexual autonomy. Other autonomy-infringing offences, such as voyeurism (involving the infringement of a victim's right to sexual privacy), indecent exposure and obscenity (infringing a victim's right to avoid witnessing others' sexuality), and necrophilia (which arguably involves an infringement of a victim's presumed posthumous right to sexual autonomy), also require the performance of a sexual act. There are some cases, however, in which a victim's right to sexual autonomy is infringed in the absence of a sexual act. This is true, for example, of female genital mutilation, which infringes on a victim's future ability to enjoy sex, though it involves no sexual act per se. There are also cases, as we shall see, in which an offender satisfies the elements of rape or sexual assault by engaging in conduct that, though it infringes on a victim's sexual autonomy, does not necessarily qualify as "sexual."

[3.17] B. Sex as a Type, Rather Than Token

[3.18] Under my account, an offence will be sexual only if sex plays a role in how it is defined (as a type), rather than how it is carried out at the level of a token. For example, John Hinckley was alleged to have attempted to assassinate President Reagan out of an erotomaniac fixation on the actor Jodie Foster.⁷ Even though Hinckley's crime arguably involved an act that was sexual (at least to him), it would not qualify as a sexual offence on my account, since the offence which was committed—attempted murder—is not defined in a way that implicates sexual interests. The same would be true of a case in which an offender stole a sex toy, a bottle of Viagra, or even sexual services (from a prostitute).

[3.19] For similar reasons, I would exclude from my account violent assaults not specifically aimed at reducing or eliminating sexual capacity, but which have such an incidental effect. For example, the shooting of pornographer Larry Flynt by white supremacist serial killer (and recently executed) Joseph Paul Franklin was intended to kill Flynt, but ended up causing him, apparently, to lose his ability to have an erection (as well as walk). Unlike female genital mutilation, which is specifically intended to reduce the victim's sexual capacity and pleasure, and therefore properly regarded as a sexual offence, Franklin's shooting of Flynt does not qualify as such, since it did not have such a specific purpose.

[3.20] III. DEFINING SEXUAL CONDUCT

[3.21] In the remainder of this chapter, I will be concerned primarily with offences that fall into the first subcategory identified previously—namely, offences involving the prohibition of one or more forms of sexual conduct. I thus leave to the side offences that do not involve sexual conduct as such but

instead involve conduct that is preparatory of future sexual conduct (such as child grooming) or that constitutes an infringement of a victim's right to sexual autonomy (such as female genital mutilation).⁸ I also defer until later in the chapter a discussion of possible offences in which sex plays a role as a form of identity rather than as a form of conduct.

Defining the sexual offences partly in terms of sexual conduct prohibited raises an even more fundamental question: namely, what should count as *sexual conduct* in the first place? Although I acknowledged what I regarded as the futility of trying to find a set of necessary and sufficient conditions that define the class of sexual *offences*, I am more sanguine about the possibility of finding a set of necessary and sufficient conditions that define the class of sexual *conduct*. Moreover, more is at stake here from a practical perspective: Unless we have some clear criteria for defining sexual conduct per se, we will have difficulty in saying what constitutes sexual conduct in more specific cases—such as when it is forced (as in sexual assault), performed with someone other than one's spouse (as in adultery), bought and sold (as in prostitution), or performed with an animal or corpse (as in bestiality and necrophilia, respectively).⁹

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A. "Sexual Conduct" versus "Having Sex"

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For a start, I would distinguish between "sexual conduct" and "having sex." Consider in this connection an empirical study published in 1999, not long after Bill Clinton implied, in grand jury testimony, that he had not "ha[d] sex" with Monica Lewinsky (who, it turns out, had fellated, but apparently not had intercourse with, him). In the study, approximately six hundred American college students were asked what kinds of behaviours they would regard as "having sex."¹⁰ (Specifically, they were asked: "Would you say you 'had sex' with someone if the most intimate behaviour you engaged in was . . . (mark yes or no for each behaviour).") While there were some modest differences between the responses of men and women, a basic hierarchy emerged: More than 99 percent said they would be "having sex" if they had engaged in penile-vaginal intercourse; 81 percent, penile-anal intercourse; 40 percent, oral contact with genitals; 15 percent, having a person touch the genitals; and less than 5 percent, oral or digital contact with breasts or nipples, or deep kissing.

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The authors concede that their study does not explain the reasoning behind these responses.¹¹ But we can speculate: Perhaps the young subjects in the study were thinking about whether they could engage in such contact and still, for better or worse, consider themselves virgins. Perhaps they were concerned with issues of "fidelity" to boyfriends or girlfriends. Perhaps their answers varied depending on their sexual orientation. In assessing their responses, it would be helpful to know what the subjects understood as the

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costs and benefits (to their mental health, self-esteem, reputation among their peers, and the like) of labelling some behaviour as “having sex.” Would their answers have differed if they had been asked to make judgments about the conduct of others, rather than themselves? What if the person they were making a judgment about was their own regular sexual partner, who had been intimate with someone else? Would it matter if the conduct was performed in the context of a “hook-up” or “one-night stand” rather than in a long-term relationship? What assumptions did the subjects make based on the minimal description of the conduct given? Did the subjects assume that the contact was consensual? Would their answers have differed if they had been told that they had been forced or tricked or coerced into having such contact?

[3.26] I expect to return to studies of this sort in future work, but for the moment, three points are worth making: First, while common or conventional usage is worth considering, it can hardly be viewed as conclusive in critical projects of this sort. Second, in deciding what constitutes “sexual conduct,” context and audience matter. Perhaps the subject students’ answers to the question “would you say you ‘had sex’” would have differed had it been posed in some forum other than a social science study—say, by a doctor taking a medical history or in a late night dormitory “bull session.” Third, and more specifically, the terms “having sex” and “sexual conduct” almost certainly refer to different phenomena: “Having sex” is commonly understood as a euphemism for sexual intercourse, and as such is best understood as a (centrally important and in some respects preeminent) subset of what I shall now suggest is the broader category of “sexual conduct.”

[3.27] **B. Previous Accounts of Sexual Conduct**

[3.28] Historically, theorists have been concerned less with the question “what is sex” or “what is sexual conduct” than with what is “natural” or “normal” or “morally worthwhile” sex or sexual conduct. And they have invariably answered this second question in terms of one or another purpose or end—whether it is procreation, love, communication, pleasure, or something else.¹² Judeo-Christian authorities have historically defined sex in terms of procreation: human beings are commanded to be fruitful and multiply.¹³ Activity that is directed toward that end, and performed within the framework of marriage, was regarded as normal or natural sex. Other conduct was considered deviant, perverse, or unnatural. Thus, for commentators like Augustine and Aquinas, the question of what constitutes sex was driven by what were essentially normative considerations.

[3.29] Modern, secular scholars have tended to focus on goals other than procreation. For example, Roger Scruton’s theory of sex focused on notions of intimacy, love, and “mutuality of desire,” while Thomas Nagel’s focused on sex as a kind of language—a complex, multilayered process of mutual per-

ception and arousal.¹⁴ Conduct that failed to achieve, or at least aim at, such ends—for Scruton, masturbation and bestiality; for Nagel, voyeurism and sadomasochism—was considered suboptimal, or even perverse. For present purposes, however, such a means-end approach presents problems. Although a comprehensive theory of the sexual offences will at some point need to deal with the concept of “deviant sex,” our more immediate concern is with defining the larger category of “sex,” of which “natural” and “unnatural” sex must logically be subsets.

One particularly influential response to the more general “what is sex” question is provided by Alan Goldman.¹⁵ Goldman says that we should define sex on its own terms, rather than as a means to something else. According to Goldman’s definition, “sexual desire is desire for contact with another person’s body and for the pleasure which such contact produces; sexual activity is activity which tends to fulfil such desire of the agent.”¹⁶ Although Goldman’s approach lacks the limitations of Scruton’s and Nagel’s, it nevertheless presents problems of its own. First, despite Goldman’s disavowal of a teleological approach, it appears that his approach is itself framed in terms of a means to an end—that is, having contact with another’s body *as a means to* pleasure. Second, Goldman’s approach to defining sexual activity seems to apply to conduct that should not properly be regarded as sexual; as such, it is over-inclusive. Goldman himself voices concern about cases such as contact sports and cuddling with a baby. Goldman concedes that both involve having contact with another’s body as a means to pleasure, but maintains that “the desire is not for contact with another body per se, it is not directed toward a particular person for that purpose, and it is not the goal of the activity.”¹⁷ In the case of contact sports, the goal is “winning or exercising or knocking someone down or displaying one’s prowess.” In the case of cuddling with a baby, the goal is to demonstrate “affection, tenderness, or security.”¹⁸

Perhaps. But even if Goldman is right about contact sports and baby cuddling, there remains the problem of (ordinary, non-“happy ending”) massage, which Goldman himself does not consider. Surely, getting a massage is an “activity which tends to fulfil” the “desire for contact with another person’s body and for the pleasure which such contact produces.” And while massage can certainly have therapeutic value, it is hard to deny that the basic point of a massage is the pleasure of physical contact. So, either massage is a form of sexual activity or Goldman’s account is too broad.

Third, Goldman’s physical-contact-leading-to-pleasure definition of sexual activity is also *under*-inclusive, inasmuch as it requires a (1) touching of (2) another person. There are some kinds of presumptively sexual activity that do not involve touching: think of phone sex, voyeurism, exhibitionism, viewing pornography, and even perhaps flirting. There are also forms of presumptively sexual activity that do not necessarily involve another person, such as masturbation, and, again, viewing pornography.

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[3.33] Goldman himself recognizes the difficulty his definition of sexual activity has in applying to such conduct. His solution is an awkward one:

[3.34] While looking at or conversing with someone can be interpreted as sexual in given contexts it is so when intended as preliminary to, and hence parasitic upon, elemental sexual interests. Voyeurism or viewing a pornographic movie qualifies as a sexual activity, but only as an imaginative substitute for the real thing. . . . The same is true of masturbation as a sexual activity without a partner.¹⁹

[3.35] I am not sure I really understand what Goldman means when he says that certain kinds of activity “qualif[y]” as sexual activities, but only as “imaginative substitute[s] for the real thing.” It seems to me that masturbation and pornography viewing are such ubiquitous activities that they should be able to stand on their own as discrete forms of sexual behaviour. It seems odd, in other words, to insist that “real” sex necessarily involves physical contact with a partner when so much sex-like behaviour seems to involve neither.

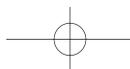
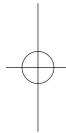
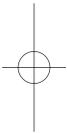
[3.36] **C. A Subjective Approach to Defining Sexual Activity**

[3.37] So far, I have criticized Goldman’s hedonic account of sex on the grounds that it would include presumptively non-sexual activities like massage, and exclude, or at least downgrade to “substitutes,” presumptively sexual activities like masturbation, viewing pornography, voyeurism, phone sex, and flirting. Can I offer an account that is more consistent with common usage?

[3.38] I agree with Goldman that the definition of sex should be closely tied to the notion of pleasure, but I would propose two major changes to his account. Goldman says that “sexual desire is desire for contact with another person’s body and for the pleasure which such contact produces.” I would modify this to say that *sexual desire is desire for sexual pleasure; sexual activity is activity that tends to fulfil such desire of the agent*. I would thus (1) eliminate the requirement that desire be for contact with another person’s body, and (2) specify that sexual desire is desire for *sexual* pleasure.

[3.39] So what do I mean by sexual pleasure? Is it not circular to define sexual “desire” as a desire for sexual “pleasure”? How exactly would my account distinguish the pleasure of a lover’s caress from the pleasure of a massage therapist’s effleurage?

[3.40] I would say that the difference between massage and a lover’s caress is a phenomenological one, a matter of how each activity is perceived. Unlike massager and massagee, caresser and caressee (ordinarily) feel sexually aroused. Moreover, such subjective feelings of arousal typically manifest themselves in a range of objectively measurably ways. In men, arousal typically involves the swelling and erection of the penis and changes in hormone levels. In women, sexual arousal involves vaginal wetness, swelling and



engorgement of external genitals, internal enlargement of the vagina, and increases in testosterone levels. Other changes include an increase in heart rate and blood pressure, a feeling of being hot and flushed. Evidence of sexual arousal has also been observed in images of the amygdala and hypothalamus.²⁰ This is not to say that every sexual thought, image, or activity will trigger all of these responses in all people, or that these physical symptoms cannot in some unusual cases result from nonsexual feelings.²¹ It is only to recognize that there is an unmistakable subjective feeling that virtually everyone can recognize as sexual. And as neuroscience progresses, it will increasingly be possible to observe the neural bases on which such feelings supervene. Under this approach, what is perceived as sexual *is* sexual.²²

If I am right, this would explain why neither massage nor baby cuddling should normally qualify as sex. Though physically pleasurable, neither of these activities is typically attended by the subjective feeling or physiological indicators of sexual activity.

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My account would also eliminate Goldman's requirements of touching and sharing. The question here is largely a definitional one. We could say, along with Goldman, that masturbation and viewing pornography are merely "imaginative substitutes" for genuine sexual contact; and at some level that is certainly true. But it seems likely that masturbation and pornography viewing often involve subjective feelings and physiological responses that are similar to those experienced during intercourse, foreplay, and other shared forms of sexual contact and its precursors.

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Another advantage of the subjective approach is that it allows us to account for objects and situations that are not normally regarded as sexual, but which evoke an idiosyncratic sexual response in one or more persons—such as fetishes and paraphilia. Often, these involve everyday objects and situations that are not thought of as sexual by the general public—say, running shoes, or frotteurism—but become viewed as sexual by some individuals. When these objects and situations trigger a sexual response, it makes sense to think of them as sexual.

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This, in turn, brings us back to cases like that involving John Hinckley. On my account, Hinckley's shooting of Reagan *was* a sexual act, since it presumably felt sexual to him. But this does *not* necessarily mean that his act should be classified as a sexual offence. Classification of crimes occurs at the level of types, not tokens, and involves generalizations about the harms and wrongs that such conduct typically entails. We could decide that homicides motivated by sexual motives posed such a distinctive set of wrongs and harms that they should be classified as sexual offences.²³ But I am not aware of any jurisdictions having done so to date.

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[3.45] D. Nonpleasurable Sex

[3.46] If I am correct that conduct should be regarded as sexual if and only if it tends to fulfil the desire for sexual pleasure, we then face a question concerning the status of some sex-like conduct (including some that are important in the realm of the sexual offences) that does not involve pleasure for one or both parties.

[3.47] Consider first the case of prostitution. One can easily imagine that, while sexual contact with a prostitute tends to fulfil *customers'* desire for sexual pleasure, it does not normally serve the same function for prostitutes themselves. If that is so, it would seem to point to the possibility that intercourse could constitute sexual activity for the former, but not for the latter. And perhaps that is the right to think about such cases. Alternatively, we might consider amending the definition offered here to say that “sexual desire is desire for sexual pleasure,” and that “sexual activity is activity that tends to fulfil such desire of the agent *or the agent's partner.*”

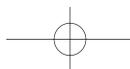
[3.48] Rape presents an even more puzzling case. Let us assume not only that very few, if any, victims of rape derive sexual pleasure from the act of intercourse or other putative sexual activity, but that there are cases in which the rapist himself also derives no sexual pleasure from the act.²⁴ For example, consider a recent case in which soldiers in Congo engaged in the atrocity of torturing a young woman by ramming a small tree into her vagina.²⁵ Because the perpetrators had taken drugs that made them temporarily incapable of having an erection, it is possible that they had no intention to achieve sexual gratification. Their victims, needless to say, also derived no sexual pleasure from the act. On my account, this would likely not constitute a sexual act. It would, however, constitute a sexual offence, since the horrific act obviously violated the women's sexual autonomy, and was clearly intended to inflict humiliation of a specifically sexual (and especially grotesque) sort.

[3.49] IV. SEXUAL CONDUCT IN SEXUAL OFFENCES

[3.50] The question of what constitutes sexual conduct turns out to be quite relevant within the context of the sexual offences. Many offences specifically enumerate those activities that will be considered “sexual.” Others leave that determination to the finder of fact, based on the defendant's motives or intent.

[3.51] A. Sexual Offences Act 2003

[3.52] A good example is provided by the United Kingdom's Sexual Offences Act 2003, which on some occasions enumerates specific activities that will be



regarded as sexual and on other occasions leaves that determination to the finder of fact.²⁶ Consider section 4, which makes it a crime to cause a person to engage in “sexual activity” without consent. “Sexual activity,” in turn is defined quite explicitly. It consists of penetration of the victim’s anus or vagina, penetration of the victim’s mouth with a person’s penis, penetration of a person’s anus or vagina with a part of the victim’s body or by the victim with anything else, or penetration of a person’s mouth with the victim’s penis. This provision of the statute could hardly be more specific or categorical about what kinds of “sexual activity” are covered.

What constitutes “sexual activity” in other provisions of the act, however, is defined in a much less categorical manner. For example, the offence of sexual assault (Section 3) criminalizes nonconsensual touching of any part of the victim’s body with any part of the offender’s body or with anything else, provided that the “the touching is sexual.” A touching would, in turn, be considered “sexual” “if a reasonable person would consider that it was of a sexual “nature” or that its “circumstances” or “purpose” were sexual.²⁷

So what does it mean for a touching to be of a sexual nature, have a sexual purpose, or occur in sexual circumstances? To decide that, I would apply something like the test articulated above. I would ask whether the activity is of the sort that a reasonable person would think “tends to fulfil” the “desire for sexual pleasure.”

Consider in this context the English case of *Court*.²⁸ The defendant (“D”) pulled the victim (“V”), a twelve-year-old girl, across his knees and smacked her buttocks with his hand through her shorts. Had V been a parent or schoolmaster, he might have been doing so for nonsexual, disciplinary purposes. But, in the actual case, D was a store clerk and V was a customer, and when asked by the police why he had done what he did, D admitted that he had a “buttock fetish.” For this reason, D was held to have had a “sexual” motive, and therefore to have committed indecent assault. This seems to me the right result.

Now contrast the case of *Tabassum*.²⁹ D carried out what may have been genuine research into breast cancer, aware that women he examined mistakenly assumed he was a medical doctor. The court held that their mistake vitiated the women’s consent and that, even assuming the research was genuine and done without a sexual motive, the examinations were inherently sexual and therefore constituted indecent sexual assaults rather than mere assault.

I am skeptical that the reasoning in *Tabassum* is correct. Though obviously wrongful, touching a woman’s breast for the purpose of unconsented-to medical research does not appear to qualify as a sexual act. It is not an activity that tends to fulfil the desire for sexual pleasure. Indeed, there are many acts that involve contact with “sexual” bodily parts that are not, in the normal course of things, sexual. These include not only medical research

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involving such body parts, but also certain therapeutic acts (such as gynecological exams, urological exams, mammograms, and certain forms of surgery), and perhaps certain kinds of “hands on” sex education.³⁰ Touching those parts without informed consent is certainly a violation of the victim’s rights to bodily autonomy, but it does not seem to be a violation of any specifically sexual rights.

[3.58] B. Sex as a Necessary or Contingent Element

[3.59] Another question that needs to be asked about the role sexual conduct plays in defining various sexual offences concerns the extent to which the sexual nature of such conduct is necessary, or merely contingent. In some cases, the infringement of a right to sexual autonomy serves to inform the offence and distinguish it from otherwise similar nonsexual crimes. For example, sexual assault differs from other assaults in the particular wrongs it entails; unjustifiably touching someone who does not want to be touched is morally wrong, but forcing someone to engage in sexual contact is almost invariably treated as a distinct offence. Female genital mutilation follows a similar pattern; although non-lethal mutilation involving nonsexual organs is a very serious crime, mutilation of the sexual organs has physiological and psychological effects on a victim’s life that are distinctive, and for this reason female genital mutilation deserves to be treated as a distinct offence. Offensive exposure of any sort can make observers uncomfortable, but indecent exposure that involves sex arguably involves a distinctive kind of wrong. As Joel Feinberg explains, “nudity and sex acts have an irresistible power to draw the eye and focus the thoughts on matters that are normally repressed.”³¹ When a person forces others to witness his nudity or sexual activity, he forces them to be a kind of unwilling “participant” in his sex life. Similarly, all voyeurism involves an infringement of the victim’s privacy, but voyeurism that intrudes on a victim’s sexual privacy is arguably distinctive and worthy of specialized legislation. Sex is an inherently and quintessentially private act. For most people, nothing is more likely to extinguish sexual desire and even induce shame than the realization that one’s sexual activities are being spied on.³² And though there are many ways for teachers, coaches, and clergy to exploit the young people over whom they have authority, using their position to obtain sex seems especially wrongful and therefore worthy of special criminalization.

[3.60] But there is also a range of offences that, though sometimes classified as sexual, prove, on inspection, to be only contingently so. For example, using sex to transmit disease is wrongful, but it is not clear that it is qualitatively worse than doing so by means of a (non-sexual) blood transfusion, provided that both underlying acts are voluntary, or involuntary, as the case may be.³³ Necrophilia is also typically classified as a sex offence, but I am sceptical



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that corpse desecration involving sex is qualitatively different from non-sexual forms of corpse desecration, such as dismemberment. And to the extent that bestiality is properly thought of as a form of cruelty to animals, it is not clear that it should be viewed as involving a form of cruelty that is qualitatively different from subjecting an animal to beating, abandonment, or confinement.

IV. THINKING ABOUT SEX NORMATIVELY

[3.61]

So far we have been considering the sexual offences mainly in definitional terms: we have been looking in particular at the role that sexual conduct plays in defining such offences. Now, I want to say a bit about why the sexual offences are deserving of a distinct place in the criminal code.

[3.62]

A. The Value of Sex

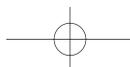
[3.63]

Sex, of course, plays a highly valued role in our lives. Many people regard the decision whether, when, how, and with whom to have sex to be among the most meaningful kinds of choice they must make.³⁴ A major reason sex is so valued is that it holds the potential for a range of significant benefits that ordinarily cannot be obtained by other means. Without sexual intercourse, of course, most people (or at least those without access to costly technologies such as in vitro fertilization and artificial insemination) could not reproduce, and under evolutionary theory, we would expect human beings to place a priority on controlling their reproductive autonomy.³⁵ Sex also provides significant hedonistic benefits—both as a relief from the carnal demands of sexual desire, and in what Richard Posner has called the more refined sense of “*ars erotica*, the deliberate cultivation of the faculty of sexual pleasure; the analogy is to cultivating a taste for fine music or fine wine.”³⁶ Finally, and perhaps most complexly, sex can satisfy deep-seated needs for human connection, intimacy, and communication (as well as, in some cases, for domination and submission).

[3.64]

Simply tabulating the many benefits of sex, however, probably doesn’t fully account for the importance we place on it in our lives. For one thing, not all sexual acts produce these benefits equally. Obviously, only sexual intercourse has the potential for procreation; and only certain kinds of sexual activity performed with a partner hold the potential for human connection and intimacy. Yet, even those sexual acts with few clear benefits are still considered to be within the realm of privileged conduct. As Foucault and others have argued, there seems to be something about sexual conduct and sexual identity that, at least in our era, help us define our most basic sense of self.³⁷

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[3.66] B. Hierarchies in Sexual Conduct

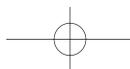
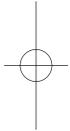
[3.67] Given the wide range of activities that would qualify as sexual on my account, it is worth asking whether, within the category of sexual conduct, some activities should be regarded as more central or highly valued than others. The answer to that question, of course, will depend on the criteria by which such acts are judged. Some sexual acts are more conducive than others to pleasure, intimacy, procreation, communication, or other goals. In a system that judged the value of a given sexual act by its ability to produce X, those sexual activities that produced more X would be judged as more valuable than those that produced less.

[3.68] These judgments are important because they affect not only how we choose to conduct some of the most important aspects of our lives, but also how we classify and grade the sexual offences, and whether various offences should be crimes to begin with. In the case of nonconsensual sexual offences such as rape and sexual assault, we can observe the following pattern: the more central or significant or highly valued the form of sex in which *V* is compelled to participate, the greater the infringement, and, consequently, the more serious the offence.³⁸ For a variety of reasons—cultural, physiological, hedonic, and historical—sexual intercourse seems to enjoy a special moral and legal status. It typically involves a higher level of intimacy than, say, kissing or fondling.³⁹ So forcing *V* to have sexual intercourse will be viewed as entailing a more wrongful and harmful act than forcing *V* to submit to a kiss or caress.

[3.69] In the case of consensual or aconsensual sexual offences, such as voluntary adult incest and sadomasochism, a different sort of pattern exists. Here, we might say that, the more valuable the form of prohibited sex is to its practitioner, the greater we would expect the burden on the government to justify the prohibition.

[3.70] VI. SEX AS A FORM OF IDENTITY

[3.71] To this point, the discussion has focused on offences that criminalize a collection of human behaviours we refer to as “sexual” as well as infringements of autonomy rights associated with such behavior. But there is another important sense of the word *sex* that also needs to be considered. In addition to referring to activities that hold the potential to produce a distinctive form of pleasure, the term also refers to an aspect of a person’s identity typically defined by a suite of biological differences (including differences in chromosomes, hormonal profiles, and internal and external sex organs) and which mark a person out as male or female.⁴⁰ This duality of meaning—between sex as an activity or subject of autonomy, on the one hand, and sex as an aspect of identity, on the other—leads to an important question about what



should count as a “sexual offence”: Should the concept of sexual offences be understood to include not only offences that relate to sexual activity or autonomy but also offences that relate to a person’s sex (in the sense of being male or female)?

A couple of examples will help illustrate what I have in mind: First, consider a provision in Israel’s innovative Prevention of Sexual Harassment Law, which makes it a crime, inter alia, to make “an intimidating or humiliating reference directed towards a person concerning his sex.”⁴¹ Second, imagine that, in response to a rash of misogynistic killings of women, a law was enacted making it a crime to kill someone “because of their sex.” Should such laws be classified as sexual offences despite the fact that they make reference only to a person’s identity as male or female, and not to her sexual conduct or sexual autonomy? The question is one that goes to the heart of how we conceive of the sexual offences. It will not be possible to resolve it definitively here, but I would like to offer some preliminary thoughts on how the issue should be approached.

A closely analogous (if converse) question arises in the context of the American (civil) law of sexual harassment and sexual discrimination. Title VII of the Civil Rights Act of 1964 states that it “shall be an unlawful . . . to discriminate against any individual . . . *because of such individual’s* race, color, religion, *sex*, or national origin.”⁴² By referring to discrimination on the basis of an “individual’s . . . sex,” it seems obvious that the statute is intended, at least in the first instance, to prohibit discrimination based on the fact that a person is male or female, in the same way that it would prohibit discrimination based on the fact that a person is African American or Latino or Jewish. But is Title VII also intended to prohibit discrimination on the basis of a person’s sexual preferences or practices? Is it intended to prohibit discrimination based on a person’s being gay or lesbian, straight or bisexual? Should it protect against discrimination directed toward a person who was considered “effeminate” or “butch”? Should it protect people who are transgender? Would it prohibit discrimination against a person who was promiscuous or celibate or who favoured sadomasochistic sex?

The case law, legislative history, and scholarly literature regarding such questions are highly complex and contested.⁴³ I offer no views on how Title VII should be interpreted. For present purposes, my only point is that sex as an identity and sex as an activity (or as the subject of autonomy) should be understood as conceptually distinct, even if they sometimes overlap in practice.

Consider a case in which an employer decided not to hire, or even interview, a prospective employee simply because she was a woman. Assume that he did so without any knowledge of her sexual practices or preferences. In such a case, the employer would have discriminated against the prospective employee because of her status as a woman and not because of her sexual



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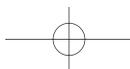
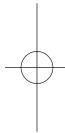
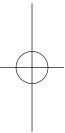
activities or preferences. This would be discrimination in the same sense that denying a person a job because of his race or religion would be discrimination.

[3.76] Now contrast a case in which an employer repeatedly propositioned a female employee to have sex she did not wish to have, made unwanted comments about her appearance or sex appeal, or subjected her to pornography she did not wish to see. Unlike the previous case, this treatment *would* involve an infringement of the woman's sexual autonomy. (It might simultaneously involve discrimination because of her sex as well: the employer might be motivated to engage in such acts precisely because of his animus towards women.)

[3.77] What about denying a person a job because he's gay or bisexual (or straight)? That question is a bit trickier. Being gay, bisexual, or straight are also kinds of identity, but they are identities that are inextricably tied to one's sexual preferences. Being gay or lesbian means being sexually attracted to persons of one's own sex. Being heterosexual means being sexually attracted to persons of the opposite sex. Being bisexual means being sexually attracted to persons of both sexes. Discriminating against or harassing a person because he is gay, straight, or bisexual would thus seem to infringe on his sexual autonomy.

[3.78] How about discriminating against someone because he's transgender—that is, because his gender identity is different from the gender assigned to him at birth? Being transgender seems to have to do mostly with sexual identity rather than any particular sexual preference. To say that a person is transgender tells us nothing more about the person's sexual practices than saying that a person is male or female. A transgender male or female could be straight, gay, bisexual, or asexual. So, from this perspective, discriminating against or harassing a person because he or she is transgender should not necessarily be categorized as a sexual offence. It is analogous to discriminating against the person because of his race or religion. At the same time, it should be recognized that much harassment of trans persons takes the form of unwanted questions or remarks about such persons' anatomy or sexual practices. Behaviour like that certainly could infringe on a person's sense of sexual autonomy, in the same way that similarly unwanted remarks to a non-trans person would infringe on her autonomy.

[3.79] The question raised in this section has mostly been a theoretical one. In our current system, conduct of this sort is not normally criminalized. But there is no reason in principle why certain serious acts of discrimination based on a person's sex alone could not be treated as a crime. If we were to enact such an offence, should it be classified as a "sexual offence"? I have offered some reasons for treating offences that involve sex as a form of identity as conceptually distinct from offences that involve sex as a form of conduct.



NOTES

[3.80]

1. Distinguished Professor of Law, Rutgers School of Law. This chapter is part of a larger book-length work-in-progress, tentatively titled *Criminalizing Sex: A Unified Theory*. An earlier version was presented as the Second Annual Hugo Adam Bedau Memorial Lecture in the Tufts University Department of Philosophy, and at workshops at the Universities of Cambridge, Durham, London, Oxford, and South Carolina. I am grateful for the many helpful comments and questions I received. Special thanks to Thom Brooks, Chad Flanders, James Chalmers, Tommy Crocker, Michelle Dempsey, Audrey Guinchard, Jonathan Herring, Zach Hoskins, Erin Kelly, Suzanne Kim, Matt Kramer, John Stanton-Ife, Rebecca Williams, and Lucia Zedner.

[3n1]

2. See, for example, Sexual Offences Act 2003, c. 42 (Eng.), http://www.legislation.gov.uk/ukpga/2003/42/pdfs/ukpga_20030042_en.pdf (includes rape, assault, child sex offences, abuse of position of trust, prostitution and related offences, indecent exposure, indecent photographs of children, voyeurism, bestiality, necrophilia); Model Penal Code Art. 213 (includes rape and related offences, deviate sexual intercourse by force or imposition, corruption of minors and seduction, sexual assault, and indecent exposure). Sexual offender registration is dealt with in part 2 of Sexual Offences Act and in numerous state and federal Megan's Laws.

[3n2]

3. For a useful account, see Estelle B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (2013).

[3n3]

4. Consider, for example, the fact that kidnapping of a minor is one of the offences included in the Sex Offender Registration and Notification Act (SORNA), the federal version of Megan's Laws. Without a theory as to what the sexual offences are, it's hard to explain exactly why this offence may be misconceived. SORNA, 42 U.S.C. §§ 16901-16945, <http://ojp.gov/smart/pdfs/42 usc index.pdf>.

[3n4]

5. Neil MacCormick, *Reconstruction after Deconstruction: A Response to CLS*, 10 Oxford J. Legal Studies 539, 556 (1999).

[3n5]

6. See, generally, Andrew Ashworth and Lucia Zedner, *Preventive Justice* (2014).

[3n6]

7. Thanks to Matt Kramer for the example. For further discussion of such crimes, see *infra* notes 21–22 and accompanying text.

[3n7]

8. Both issues are considered in Stuart P. Green, *Lies, Rape, and Statutory Rape*, in *Law and Lies in the United States: Deception and Truth-Telling in the American Legal System* (Austin Sarat, ed., forthcoming), 194, 205–14, 238–51.

[3n8]

9. See Alan Soble, *Activity, Sexual*, in *1 Sex from Plato to Paglia: A Philosophical Encyclopedia* (2006), 15, 15 (making similar point).

[3n9]

10. Stephanie A. Sanders and June M. Reinisch, *Would You Say You "Had Sex" If . . . ?*, 281 JAMA 275 (1999). Although the study was published after the Lewinsky scandal broke, the data were obtained prior.

[3n10]

11. *Id.* Though some later studies have attempted to explore these questions. See, for example, Ava D. Horowitz and Louise Spicer, *"Having Sex" as a Graded and Hierarchical Construct: A Comparison of Sexual Definitions among Heterosexual and Lesbian Emerging Adults in the U.K.*, 50 J. Sexual Res. 139 (2013).

[3n11]

12. For a helpful summary, see Igor Primoratz, *Ethics and Sex* (1999), 9–49.

[3n12]

13. Of course, there are significant differences both between the Jewish and Christian views of sexuality and within the two traditions. For a useful discussion, see David M. Feldman, *Birth Control in Jewish Law* (1998).

[3n13]

14. Roger Scruton, *Sexual Desire: A Philosophical Investigation* (reprint 2006) (1986); Thomas Nagel, *Sexual Perversion*, in *Mortal Questions* (1979), 39. See also Robert Solomon, *Sexual Paradigms*, 71 J. Phil. 336 (1974) (describing linguistic theory of sexuality).

[3n14]

15. Alan H. Goldman, *Plain Sex*, 6 Philos. & Pub. Aff. 267, 268 (1977). Primoratz calls Goldman's the "best philosophical statement of the hedonist understanding." Primoratz, *supra* note 11, at 41. Alan Wertheimer also adopts Goldman's definition of sex as his own. Alan Wertheimer, *Consent to Sexual Relations* (2003), 37–38.

[3n15]

16. Goldman, *supra* note 14.

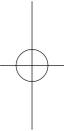
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- [3n17] 17. Id. at 269.
[3n18] 18. Id.
[3n19] 19. Id. at 270.
[3n20] 20. *Sexual Arousal*, Wikipedia, http://en.wikipedia.org/wiki/Sexual_arousal (last visited June 21, 2015).
[3n21] 21. Simon Blackburn offers the case of priapism as involving the physical manifestations of lust or desire, but without the usual psychological triggers. Simon Blackburn, *Lust* (2004), 16.
[3n22] 22. A somewhat similar subjective approach is suggested in Margo Kaplan, *Sex-Positive Law* 87 N.Y.U. L. Rev. 89 (2014), though Kaplan would apparently go even further and include in the definition of sex not just sexual pleasure produced by physical, visual, or auditory stimuli, but also “mere thoughts and fantasies without any external stimulation.” Id. at 95.
[3n23] 23. See, generally, John E. Douglas et al., *Sexual Homicide: Patterns and Motives* (1995) (empirical study of serial sex murderers).
[3n24] 24. But see Diana T. Sanchez et al., *Eroticizing Inequality in the United States: The Consequences and Determinants of Traditional Gender Role Adherents in Intimate Relationships*, 48 J. Sex Res. 168 (2012) (postulating that male rapists typically experience sexual pleasure).
[3n25] 25. The case was described to me by Matthew Kramer during the discussion following a talk I gave at the Cambridge Forum for Legal and Political Philosophy in October 2013. Kramer recalls that he originally heard about the case in a “From Our Own Correspondent” report on BBC4 during the summer of 2010.
[3n26] 26. See, generally, Peter F. G. Rook and Robert Ward, *Rook and Ward on Sexual Offences: Law and Practice*, 4th ed. (2010).
[3n27] 27. Note that the language in neither section 3 nor section 4 is broad enough to cover a range of activities that would be regarded as sexual under the analysis of sexual activity offered earlier, including, for example, voyeurism, indecent exposure, possession of child pornography, bestiality, and necrophilia. Most of these offences are dealt with in a separate part of the act, titled simply “other offences.” Sexual Offences Act of 2013, §§ 66–71.
[3n28] 28. R. v. Court [1989] AC 28, 44.
[3n29] 29. R. v. Tabassum [2000] 2 Cr. App. R. 328.
[3n30] 30. Thanks to John Stanton-Ife for his help in sorting this out.
[3n31] 31. Joel Feinberg, *Offense to Others: The Moral Limits of the Criminal Law* (1985), 17.
[3n32] 32. See, generally, Richard D. Mohr, *Why Sex Is Private: Gays and the Police*, 1 Pub. Aff. Q. 57 (1987).
[3n33] 33. English law views transmission of this sort as a nonsexual assault. R. v. B. [2006] EWCA Crim 2945, [2007] 1 W.L.R. 1567; Sharon Cowan, *Offenses of Sex or Violence? Consent, Fraud, and HIV Transmission*, 17 New Crim. L. Rev. 135 (2014) (contrasting English, American, and Canadian approaches to the question).
[3n34] 34. For an interesting take on the decision to abstain from sex, see Elizabeth F. Emens, *Compulsory Sexuality*, 66 Stan. L. Rev. 303(2014).
[3n35] 35. See Jeffrie G. Murphy, *Some Ruminations on Women, Violence, and the Criminal Law*, in *In Harm’s Way: Essays in Honor of Joel Feinberg* (Jules L. Coleman and Allen Buchanan, eds., 2004), 209, 214.
[3n36] 36. Richard A. Posner, *Sex and Reason* (1992), 111.
[3n37] 37. Michel Foucault, *The History of Sexuality: An Introduction*, vol. 1 (Robert Hurley, trans., 1978), 155–56, <https://suplaney.files.wordpress.com/2010/09/foucault-the-history-of-sexuality-volume-1.pdf>.
[3n38] 38. John Gardner and Stephen Shute make a similar point their chapter, *The Wrongness of Rape*, in *Oxford Essays in Jurisprudence*, Fourth Series, vol. 4 (Jeremy Horder ed., 2000), 212. For an empirical study that tends to support this intuition, see Carol McNaughton Nicholls et al., *Attitudes to Sentencing Sexual Offences* 193 Sentencing Council Research Series (2012), <http://www.natcen.ac.uk/media/24273/attitudes-sentencing-sexual-offences.pdf>.
[3n39] 39. Though it is worth noting that refraining from mouth-to-mouth kissing appears to be a common practice among prostitutes. Sheril Kirshenbaum, *The Science of Kissing: What Our Lips Are Telling Us* (2011), 121–22.
[3n40] 40. *Sex* in this sense is also contrasted to *gender*, which describes the characteristics that a society or culture delineates as masculine or feminine, or as somewhere along the continuum.



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41. Prevention of Sexual Harassment Law, 5758-1998, SH 166, <https://www.jewishvirtuallibrary.org/jsource/Politics/PrventionofSexualHarassmentLaw.pdf>, Art. 3(a)(5), Art. 5.

[3n41]

42. 42 U.S.C. § 2000e-2(a)(1).

[3n42]
[3n43]

43. For a small sampling, see Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 Harv. L. Rev. 445 (1997); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 Stan. L. Rev. 691 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L. J. 1683 (1998).