0091-4169/15/10502-0345
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 105, No. 2
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Printed in U.S.A.

WHAT IS WRONG WITH SEX IN AUTHORITY RELATIONS? A STUDY IN LAW AND SOCIAL THEORY

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Criminalization of Sex within Authority Relations (SAR)—such as sex in the relationship between a therapist and a patient or an employer and an employee—is a growing phenomenon. Current theories conceptualize and consequently justify SAR offenses either under a liberal conception of sexual autonomy or under a feminist conception of gender inequality. Yet both conceptualizations are inadequate and fail to capture the distinctiveness of this new legal category. Specifically, they fail to explain the main puzzle underlying SAR offenses, which proscribe sexual contact in the absence of coercion by the offender. Rejecting both liberal and feminist analytical frameworks, this Article draws on Max Weber's theory of authority to suggest that SAR offenders engage in a novel type of abuse of authority. This abuse involves the overstepping of bureaucratic power into personal relationships and specifically the use of charisma of the office in sexual relations. This new conceptualization calls for a reconsideration of SAR criminalization as sex offenses and paves the way for an alternative regulation based on the notion of abuse of office, which is fundamentally understood as anticorruption regulation.

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INTRODUCTION

Consider the cases of a psychologist who pressures his patient into sexual intercourse; a boss who makes persistent sexual propositions to his subordinate until she caves in; and a university professor who persuades his reluctant research student into having sex. In all of these cases, there is a clear sense of wrong. Less clear is an understanding of the nature of the wrong, since neither extortion, fraud, nor any other traditional form of nonconsent under criminal law is involved. This Article offers a new theory to explain such cases.

Criminalization of sexual contact in relationships between a person of authority and a person under his authority is a contemporary trend in many

legal systems, including the United States, Israel,[1] Great Britain,[2] and Canada.[3] These offenses, which I refer to as Sex in Authority Relations (SAR) offenses, share a common element: they all proscribe sexual contact within a certain type of social relationship in which one side holds a position of power over the other. Notwithstanding this imbalance of power, SAR offenses do not require an element of force and prohibit seemingly consensual sexual relations. To be sure, certain SAR cases involve coercive threats by the authority figure—for example, a workplace supervisor who threatens to fire an employee if she refuses his sexual advances[4] or a high school principal who threatens to block a student's graduation if she fails to meet his sexual demands.[5] Other cases involve fraud—for example, a mental health therapist who falsely represents intercourse as part of therapy.[6] In all of these cases, traditional criminal law doctrines could view the sex as nonconsensual.[7] In many SAR cases, however, physical aggression is absent and the offender does not make coercive threats or represent fraudulent claims. Moreover, many SAR provisions disregard the question of victim consent or even specify that consent is not a defense.[8]

Thus, two important questions arise: If sex between a workplace supervisor and an employee or between a therapist and patient is consensual (or not nonconsensual), on what grounds are these cases criminalized?[9] Additionally, what justifies the prohibition, backed by severe criminal

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[1] American law and Israeli law are extensively addressed in this Article. *See infra* notes 21–71 and accompanying text.

[2] Sexual Offences Act, 2003, c. 42, § 16–24 (U.K.).

[3] Canada Criminal Code, R.S.C., 1985, c. C-46, § 273(2)(c).

[4] *See, e.g.*, Jin v. Metro. Life Ins. Co., 310 F.3d 84 (2d Cir. 2002).

[5] *See, e.g.*, State v. Thompson, 792 P.2d 1103 (Mont. 1990).

[6] *See, e.g.*, Shapiro v. State, 696 So. 2d 1321 (Fla. Dist. Ct. App. 4th Dist. 1997); CrimA 7024/93 Eli Falah v. State of Israel 49(1) PD 1 [1995] (Isr.).

[7] Criminal law traditionally recognized several categories for the invalidation of consent—namely, cases where the victim's outward signaling of consent was not considered a valid consent by criminal law. These are: incapacity, coercion through threats (extortion), and deception. For discussion of these categories, see 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 189–343 (1986).

[8] *See, e.g.*, N.D. CENT. CODE. §12.1-20-06.1 (2012) ("Any person who is or who holds oneself out to be a therapist and who intentionally has sexual contact, as defined in section 12.1-20-02, with a patient or client during any treatment, consultation, interview, or examination is guilty of a class C felony. Consent by the complainant is not a defense under this section.").

[9] The conceptual question addressed in this Article should be distinguished from another question which I do not discuss here—the *mens rea* of the offender in SAR cases. I do not consider *mens rea* issues but rather discuss a more basic and preliminary question, which concerns the *actus reus* and the wrongfulness in SAR offenses.

punishment, of a consensual sexual affair between mature[10] and competent partners? These are the fundamental questions hovering in the background of any contemporary analysis of SAR offenses and are the main questions pursued in this Article.[11]

At present, SAR laws fall within the jurisdiction of penal regulations—i.e., criminal offenses or wrongs. While the language of the legislation is clearly criminal, legal theory lacks a fitting explanation and a proper justification for SAR offenses. Existing scholarship and jurisprudence recognize the misfit between SAR and customary categories of nonconsent.[12] One common response, inspired by liberal thought, has been to cling to the language of nonconsent, using "coerced" consent when coercive measures were not used,[13] or "technical"[14] or ungenuine[15] consent when consent was nominally present. Another response, inspired by feminist thought, abandons the question of consent and describes SAR in terms of gender exploitation and abuse of power.[16]

This Article suggests that neither the liberal nor the feminist theory is best suited to explain SAR offenses, and that neither the language of

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[10] My analysis focuses on SAR offenses relating to mature victims. Cases involving minor victims deserve separate consideration and offenses against underage victims are therefore outside the scope of this Article.

[11] This Article is dedicated to the narrower but nevertheless prevalent set of cases that do not involve threats or fraud. These cases best exemplify the theoretical challenge underlying SAR. In Part III, I will return to SAR offenses that do involve extortion and fraud, and draw some broader normative implications that apply to SAR offenses in general.

[12] *See infra* notes 101, 109–112, and accompanying text.

[13] *See, e.g.*, Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 79–84, 101–107 (1998).

[14] CrimA 9256/04 Yosef Noy v. State of Israel 60(2) IsrSC PD 172, 184 [2005] (Isr.). The Israeli Supreme Court held that "even if consent was given," "criminal law, by taking into account the inferior position of the victim and the imbalance of power between the parties, treats this consent as *merely technical*, rather than legally effective." *Id.* at 183. This translation to English and all subsequent extracts from Israeli court decisions is the author's, unless otherwise stated.

[15] CSA 4790/04 State of Israel v. Ben-Hayim 60(1) PD 257, 268 [2005] (Isr.), *translated in* CSA 4790/04 State of Israel v. Ben-Hayim 1 IsrLR 376, 390 [2005] (Isr.). In interpreting the offense of SAR in employment, the Israeli Supreme Court held that

> [The relevant provisions] concern a situation in which consent was apparently given by the worker to the sexual acts that were committed against him or her. Notwithstanding, the aforesaid consent was obtained in circumstances in which the supervisor abused his position of authority. These circumstances give rise to a suspicion, which is based on life experience and common sense, that notwithstanding the fact that the sexual acts were apparently committed with consent, this was not a freely given and genuine consent.

Id. at 391.

[16] *See* discussion of feminist conceptualizations of SAR, *infra* Part I.B.

nonconsent nor the notion of gender exploitation is adequate for expressing this new legal category. Rather, the key to understanding SAR offenses is the concept of *abuse of authority.* This idiom (or some variation of it, such as *exploitation of authority*) already appears in many SAR provisions.[17] However, current theories do not dwell on it, nor do they seriously consider *authority* or *abuse of authority* as the conceptual focal point of SAR offenses. This Article aims to fill this void. It draws on Max Weber's account of modern bureaucracy to show that SAR offenses engage a novel type of abuse of authority, achieved through the overstepping of bureaucratic power into personal relationships.

This Article proceeds as follows: Part I introduces SAR legislation and case law and describes the crime's contemporary conceptualization within legal theory. Part II offers a new conceptualization for SAR offenses, based on social theory of authority. It introduces a new term—*charisma of the office*—and demonstrates its power in analyzing and theorizing SAR legislation and case law. Finally, Part III outlines the normative implications of this proposed conceptualization. Most importantly, it notes that SAR should not be criminalized as a sex offense and a "true crime," but rather criminalized as a regulatory offense. The aim of SAR is neither to vindicate sexual autonomy nor to prevent sex discrimination, but rather to restrain bureaucratic power and to prevent its expansion into the intimate lives of individuals. Ultimately, the normative aim of the new conceptualization of SAR offenses is to circumscribe criminalization and critique the current expansionist tendencies of both liberal and feminist theory.

I. THE PUZZLE UNDERLYING SAR OFFENSES

In what follows, I portray the emergence of SAR offenses in two legal systems (Israel and the United States), review existing theoretical justifications for these offenses, and point to the puzzle underlying SAR—namely, the lack of a fitting justification for the criminalization of seemingly consensual sexual contact. The case law and legislation I present do not provide an exhaustive survey of American and Israeli SAR legislation and case law, but rather a selection to serve as basis for the conceptual analysis hereafter.[18] Currently, Israeli and U.S. jurisdictions

[17] See, for example, the SAR provision of the Wyoming Criminal Code, which defines second-degree sexual assault as any case in which "[t]he actor is in a position of authority over the victim and uses this position of authority to cause the victim to submit." WYO. STAT. ANN. § 6-2-303(a)(vi) (2013).

[18] The statutes and case law discussed *infra* cover SAR offenses in the context of education, employment, and therapy. I have chosen these particular contexts for two main

provide an excellent laboratory to conduct this inquiry, as both legal systems contemporarily enforce impressive bodies of law in this area. American jurisdictions have persistently increased the scope of SAR legislation,[19] and Israeli courts have written pioneering case law in this field[20] that is sure to inform theoretical and practical debates worldwide and serve any jurisdiction that either has adopted or is considering adopting SAR regulations.

A. PUZZLING STATUTES, PUZZLING CASES

1. Medical Treatment and Therapy

A growing body of contemporary American legislation criminalizes sexual contact between patients and their doctors, psychologists, and other health care providers. According to an exhaustive study published in 1998,[21] at least sixteen American jurisdictions have introduced criminal prohibitions against sexual contact in medical treatment,[22] and at least twenty-two jurisdictions have included criminal prohibitions against sexual contact between mental health professionals and their patients.[23] Since some of these provisions use fraud or similar terms,[24] criminalization of sex in medical treatment could be perceived as a mere expansion of the traditional category of rape by fraud.[25] However, the current criminalization of doctor–

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reasons. First, education, employment, and therapy represent main targets of SAR criminalization in Israel and the United States. Second, education, employment, and therapy are primary locations of bureaucratic authority in the sense that I discuss hereinafter and serve as basis for the theory I develop regarding *charisma of the office*. *See infra* Part II.B. For a survey of additional areas of criminalization in Israeli and U.S. jurisdictions, such as clergy, custodial settings, and guardianship, see Galia Schneebaum, Offenses of Sexual Abuse in Authority Relations: Beyond Liberalism and Radical Feminism (August 2012) (unpublished Ph.D. Dissertation, Tel-Aviv University) (on file with author).

[19] Susan A. Lentz & Robert H. Chaires, *Sexual Assault Statutes Targeting Authority & Power Imbalances: A Step Forward in Rape Law Reform?*, 3 FREEDOM CENTER J. 1, 26 (2011).

[20] *See* discussion of Israeli case law, *infra* Part I.A.

[21] *See* Falk, *supra* note 13.

[22] *Id.* at 93.

[23] *Id.* at 96. A more recent study, published in 2011, documents over twenty states' criminalization of sexual contact in such relationships. *See* Lentz & Chaires, *supra* note 19, at 27.

[24] *See, e.g.*, KAN. STAT. ANN. § 21-3502(a)(3) (2007). The Kansas provision defines as rape any case in which the victim's consent to intercourse was obtained "through a knowing misrepresentation made by the offender that the sexual intercourse was a medically or therapeutically necessary procedure . . . ."

[25] The category of rape by fraud (or deception) is a recognized category of rape in common law jurisdictions. SANFORD KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 337–

patient sex extends far beyond the traditional "rape by fraud" cases. Conventional criminal law concepts no longer capture its essence.

Texas's legislation, for example, uses an overarching category of "sex without consent" as its primary definition for sexual assault. This legislation identifies sexual relations with health care providers as nonconsensual in cases where "the actor is a mental health services provider or a health care services provider who causes the other person, who is a patient or former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor."[26] Other jurisdictions specify a per se rule prohibiting sexual contact during therapy and do not require any additional elements such as fraud, coercion, or exploitation, as Texas does. The North Dakota code is illustrative of this point:

> Any person who is or who holds oneself out to be a therapist and who intentionally has sexual contact, as defined in section 12.1-20-02, with a patient or client during any treatment, consultation, interview, or examination is guilty of a class C felony. Consent by the complainant is not a defense under this section.[27]

Israel has also adopted a criminal prohibition against sexual contact in therapy.[28] Yet even before the Knesset enacted legislation,[29] the Israeli Supreme Court had acknowledged the claim of sexual abuse in medical relations through expansive interpretations of the offense of rape.[30] The *Tayeb* case[31] is especially interesting for two reasons: first, because the

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42 (8th ed. 2007). One subcategory of rape by fraud was traditionally applied to sexual intercourse under the guise of medical examination. *See* WAYNE R. LAFAVE, CRIMINAL LAW 861 (4th ed. 2003).

[26] TEX. PENAL CODE ANN. § 22.011(b) (West 2011).

[27] N.D. CENT. CODE §12.1-20-06.1 (2012). Idaho provides another example of a per se prohibition against therapeutic sex. Its code specifies that

> [a]ny person acting or holding himself out as a physician, surgeon, dentist, psychotherapist, chiropractor, nurse or other medical care provider as defined in this section, who engages in an act of sexual contact with a patient or client, is guilty of sexual exploitation by a medical care provider. For the purposes of this section, consent of the patient or client receiving medical care or treatment shall not be a defense.

IDAHO CODE ANN. § 18-919(a) (2004). Note that unlike the Texas provision, the word "exploitation" here does not constitute an independent element of the offense, but merely appears in the title of the offense.

[28] Israel Penal Law, 5737-1977, LSI Special Volume, § 347A (1977). The Israeli offense is narrower than the Texas legislation, as it applies only to mental health providers and not to the general medical profession.

[29] The Knesset is the Israeli Parliament, which is authorized to enact legislation.

[30] *See, e.g.*, CrimA 7024/93 Eli Falah v. State of Israel IsrSC 49(1) PD 2, 15–22 [1995] (Isr.). Israeli rape law has its origins in the English common law, which became effective in Israel during the British Mandate (1922–1948).

[31] CrimA 115/00 Morris Tayeb v. State of Israel 54(3) PD 289 [2000] (Isr.).

Court expanded the rape offense beyond its traditional bounds, and second, because it illustrates the lack of an appropriate legal vocabulary or coherent justification for the criminalization of SAR.

In *Tayeb*, a young female patient attended a Jerusalem clinic for physical therapy for her ankle.[32] The patient had three satisfactory sessions.[33] During her fourth visit, the therapist, Morris Tayeb, deviated from his regular treatment routine. He first asked the complainant if she suffered pain in her back or neck in addition to her ankle.[34] When she responded in the affirmative, he asked her to take off her shirt and to lie on the treatment bed.[35] He gave her a massage around her back and neck, occasionally touching her stomach and breasts.[36] Then he unbuttoned his pants and commanded her to perform oral sex.[37] To this, the patient quietly submitted.[38] The defendant simultaneously inserted his finger into the complainant's vagina.[39] A few minutes later, she left the room while Tayeb stated, "I didn't force you, did I? These things happen . . . ."[40] The overwhelmed patient uttered, "I forgive you," and quickly left the room.[41] She later filed a complaint with the police, and Tayeb was indicted for rape.[42]

The Supreme Court convicted the therapist of rape[43] even though Tayeb did not use physical force, threats, or false pretenses to coerce the victim into submission. Judge Englard, delivering the majority opinion, relied on the existing rape statute, particularly those elements that constitute "lack of consent" due to incompetence.[44] Article 345(a)(4) and (5) of Israel's Penal Law prohibit sexual intercourse when the woman is unable to provide free consent either because she is unconscious, mentally ill or

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[32] *Id.* at 296.

[33] *Id.*

[34] *Id.* at 297.

[35] *Id.*

[36] *Id.*

[37] The defendant told the complainant "suck it, suck it." *Id.* at 297.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 298.

[41] *Id.*

[42] *Id.* at 296 (discussing the indictment); *id.* at 298 (discussing complainant filing the complaint).

[43] *Id.* at 316. The Supreme Court overruled the trial court's decision, which acquitted the defendant from rape and convicted him with a lesser offense, under the Indecent Act. The Supreme Court actually convicted the defendant of two separate offenses under Israel's Penal Law: rape, for the act of inserting his finger into the victim's vagina, and sodomy, for the act of inserting his penis into the victim's mouth.

[44] *Id.* at 313–16.

deficient, or because of *any other condition* that prevents her from resisting.[45] Traditionally, the "any other condition" provision was applied to non-enumerated situations that nevertheless involved legal incompetence. For example, the prohibition had been applied to situations like having sexual contact with an intoxicated woman.[46] In *Tayeb*, however, the Supreme Court was willing to interpret the "any other condition" alternative more leniently. It ruled that while lying on the treatment bed, the patient was completely unprepared for the defendant's sexual act.[47] Under these circumstances, the court concluded, the victim's ability to resist the defendant was "significantly impaired" to a degree that was enough to satisfy Article 345 (a)(4).[48]

While the Court's judicial acrobatics resonate with the reality of therapeutic relations, they are insufficient to account for the wrongdoing involved in SAR cases. Why should we consider a fully conscious and capable woman incompetent? Some scholars refer to the emotional vulnerability of patients within the doctor–patient relationship as the core issue, especially within mental therapy.[49] Similarly, the Texas legislation mentioned above notes a patient's vulnerability in a doctor–patient relationship as the potential grounds for criminalization. But why would we criminalize the abuse of emotional vulnerability? Surely we would not convict a man who picked up a woman in a bar and had sex with her, even if she were "emotionally vulnerable" at the time. I argue that SAR offenses are not concerned merely with dependence, as dependence is inherent in many human relationships and even in benign interactions, including marriage. Rather, SAR offenses address a distinct type of relationship and are concerned with a more specific form of abuse. The current legal system, however, lacks the conceptual framework to discriminate between these and other noncriminal behavior.

2. Employment and Education

An analogous development has taken place in the field of employment and education. Whereas jurisdictions in the United States have taken the

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[45] Israel Penal Law, 5737-1977, 42 LSI 57, §§ 345(a)(4)–(a)(5) (1987–1988).

[46] CrimA 61/79 State of Israel v. Ploni 33(3) PD 688 [1980] (Isr.).

[47] The complainant's own words are cited in the decision, describing her surprise by the defendant's move: "Everything was within seconds, as I said, that was like, other than the massage which took a long time, this was bang so there was no [sic] really time, I don't know." *Tayeb*, 54(3) PD at 315.

[48] *Id.*

[49] *See, e.g.*, STEPHEN J. SCHULHOFER, UNWANTED SEX 207 (1998).

lead in criminalizing SAR in medical and therapeutic relationships,[50] Israel has focused on employment relationships.[51] In the United States, the criminalization of sexual abuse in employment is less common,[52] but American feminist scholars have proposed introducing criminal legislation into the workplace.[53] Some U.S. legislators have already taken steps to criminalize SAR offenses in educational institutions.[54]

A 1988 provision added to the sex offenses section of the Israeli Penal Law illustrates the conceptual question raised by new SAR offenses. The provision proscribes an actor from having intercourse with a woman over the age of eighteen within employment supervisory relations "by exploiting [the actor's] authority in employment or service."[55] This provision introduces new terminology: "exploitation of authority." Reading this and provisions from other jurisdictions,[56] we now face the questions of what is abuse of authority and what is the underlying concept of wrongdoing in SAR offenses.

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[50] As I showed *supra*, several American jurisdictions had taken steps by 1998 to criminalize SAR in therapeutic relationships, while such an offense was enacted in Israel in 2003. *See supra* notes 21–23, 28, and accompanying text.

[51] The Israeli offense of SAR in employment was enacted in 1988 as part of an extensive reform to the sex offense chapter of the Penal Law. Israel Penal Law, 5748–1988, 41 LSI 57 (1987–1988).

[52] Sexual harassment in employment is treated in American law as a form of (civil) sex discrimination, often under the Civil Rights Act of 1964. For a survey of American sexual harassment law, see Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 692–98 (1997). One category of sexual harassment is known as "quid pro quo harassment." It takes place whenever a workplace supervisor presents sexual demands and makes submission to them a term or condition of an individual's employment. Since quid pro quo harassment involves a supervisor–employee relationship, it overlaps with certain SAR cases. However, the doctrines of sexual harassment and SAR are different and have different foci. First, while sexual harassment doctrine focuses on the negative employment consequences that might follow from sexual noncompliance by the employee, SAR focuses on a different harm—i.e., the harm involved in the sexual act itself if it does take place. Secondly, and more profoundly, as I argue *infra*, while sexual harassment is concerned with the protection of socially disadvantaged groups from discrimination, SAR is concerned with the prevention of abuse of authority.

[53] Carrie N. Baker, *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 LAW & INEQ. 213, 214 (1995); Michal Buchhandler-Raphael, *Criminalizing Coerced Submission in the Workplace and in the Academy*, 19 COLUM. J. GENDER & L. 409, 420 (2010).

[54] *See, e.g.*, N.C. GEN. STAT. § 14-27.7(b) (2013).

[55] Israel Penal Law, 5737-1977, LSI Special Volume, § 346(b) (1977).

[56] *See, e.g.*, N.H. REV. STAT. ANN. §§ 632-A:2(n) (LexisNexis 2007). Like the Israeli provision, the New Hampshire provision employs a "use of authority position" wording ("A person is guilty of the felony of aggravated felonious sexual assault if [he] engages in sexual penetration with another person . . . [w]hen the actor is in a position of authority over the victim and *uses this authority* to coerce the victim to submit . . . ." (emphasis added)).

In *Ben-Hayim*, the Israeli Supreme Court attempted to tackle these questions for the first time.[57] A post office manager made sexual advances to an employee who was twenty years his junior, even at times visiting her apartment.[58] He promised to help her gain permanent employment with the Israeli Civil Service.[59] The employee cooperated with the manager's sexual advances, although, as noted by the Court, at times uncomfortably and apparently without desire.[60] As time advanced, she decided to end the relationship.[61] The Court convicted Ben-Hayim of the SAR offense that prohibited "intercourse by consent."[62]

In interpreting the element of "abuse," the Court began by listing one obvious example of such exploitation: when the authority explicitly threatens the subordinate, such as "the making of an open and direct threat—'do what I want or I will show you the power of my authority . . . .'"[63] Bearing in mind the nature of supervisory relations within employment, extortion—the use of illegitimate threats to obtain something of value out of the victim[64]—does seem particularly relevant to such contexts. The very position of a workplace supervisor or an educational functionary provides him or her with extended access to a multitude of resources to use to extort sex from a subordinate. However, the Court was unsatisfied with the use of explicit threats or with extortion as the exhaustive meaning of abuse. The Court, moreover, did not focus on the

[57] CSA 4790/04 State of Israel v. Ben-Hayim, 60(1) PD 257 [2005] (Isr.), *translated in* CSA 4790/04 State of Israel v. Ben-Hayim 1 IsrLR 376 [2005] (Isr). The Supreme Court decided the case as a disciplinary appeal and addressed the criminal provision of SAR as part of its ruling on the disciplinary charges against Ben-Hayim within the Israeli Civil Service. However, the case became an authority on the interpretation of the criminal provision of SAR under the Penal Law. *See* CrimA 9256/04 Yosef Noy v. State of Israel 60(2) PD 172, 184, 186 [2005] (Isr.) (citing *Ben-Hayim* throughout and noting the power a person of authority has over his subordinates).

[58] *Ben-Hayim*, 60(1) PD at 261, *translated in Ben-Hayim*, 1 IsrLR at 380.

[59] *Id.*

[60] *Id.*, *translated in Ben-Hayim*, 1 IsrLR at 381.

[61] *Id.*

[62] Israel Penal Law, 5737-1977, LSI Special Volume, § 346(b) (1977).

[63] *Ben-Hayim*, 60(1) PD at 268, *translated in Ben-Hayim*, 1 IsrLR at 388.

[64] Common law prohibitions against extortion were originally limited to property or to other pecuniary interests. MODEL PENAL CODE § 223.4. However, in recent years there has been a growing tendency to extend extortion prohibitions beyond nonpecuniary interests. *See, e.g.*, MODEL PENAL CODE § 212.5, for an American example of these extortion prohibitions. *See, e.g.*, Israel Penal Law, 5737-1977, LSI Special Volume, § 428 (1977), for an Israeli example. Specifically, sexual extortion—the use of illegitimate threats to induce the victim into having sex—was addressed in the 1960s under the Model Penal Code as *Gross Sexual Imposition*, carrying a ten-year imprisonment sentence. MODEL PENAL CODE § 213.1(2).

supervisor's promise to promote the complainant and did not base its judgment on a criminal quid pro quo theory.[65] Instead, the Court concluded that "[c]onduct that amounts to an 'abuse of authority' may take on many different guises"[66] and that "[i]n any case, the question whether or not the supervisor abused his power in order to obtain the consent to the sexual acts will always be examined against the background of the circumstances of the case and the context in which the acts were committed in each case."[67]

The fundamental point in *Ben-Hayim* is the substantive link between the element of abuse and the victim of the offense. The Court held that:

> In any case, whatever the guise that the element of an 'abuse of authority' takes, the significance is always the same: obtaining the consent of the subordinate to do acts which he does not really want to do but which he is induced to do as a result of the abuse of the position of authority[68]

and in fact endorsed an understanding of SAR under a consent theory.[69] While aiming to provide instruction for the future adjudication of SAR cases, however, the Court was unable to provide clear guidelines for assessing consent or exploitation in such cases.[70] In light of the Israeli Supreme Court's judgment, we are left with important questions unanswered. How can exploitive situations be differentiated from nonexploitive ones and consensual sex from nonconsensual sex in employment supervisory relations? If SAR is a new category of sexual nonconsent, why is the offense titled "forbidden intercourse by consent"?[71]

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[65] *See* Baker, *supra* note 53, at 230 (advocating the criminalization of sex within workplace supervisory relationships under a quid pro quo theory, which views such cases as criminal extortion). Unlike sexual harassment regulation, which proscribes supervisory threats *as well as* promises of reward as quid pro quo harassment, criminal law has traditionally distinguished between threats and offers, proscribing threats as illegitimate coercion while allowing offers as legitimate bargain. Legal scholars have recently challenged the traditional distinction by considering certain offers as coercive as well. For a discussion of "coercive offers," see ALAN WERTHEIMER, COERCION 202–21 (1987). The important point for our present purposes is to note that the Supreme Court in Israel has refused to limit the meaning of the abuse element in SAR offenses to threats *or* to offers, and thus has rejected a quid pro quo understanding of SAR.

[66] *Ben-Hayim*, 60(1) PD at 268, *translated in Ben-Hayim*, 1 IsrLR at 388.

[67] *Id.* at 270, *translated in Ben-Hayim*, 1 IsrLR at 391.

[68] *Id.* at 268, *translated in Ben-Hayim*, I IsrLR at 388.

[69] For a similar interpretation of SAR under a consent theory, *see, e.g.*, Scadden v. State, 732 P.2d 1036, 1039–40 (Wyo. 1987).

[70] *Ben-Hayim*, 60(1) PD at 270, *translated in Ben-Hayim*, 1 IsrLR at 394. The Court does mention several parameters that may help to determine abuse in future cases, such as the disparity of forces or the age gap between the parties. However, the judgment points out that the above factors do not exhaust the different considerations that are relevant to the issue, and therefore each individual case should be decided according to its circumstances.

[71] Israel Penal Law, (5737-1977), LSI Special Volume, § 346(b) (1977).

B. DISSATISFYING THEORIES

Despite many SAR cases receiving in-depth media coverage,[72] legal scholarship has, so far, paid minimal and sporadic attention to the underlying theory.[73] Moreover, present accounts typically do not systematically treat SAR offenses as a distinct field. This is indicative of contemporary SAR theory: the majority of existing scholarship has been guided by the idea that SAR is another form of nonconsensual sexual contact. Hence, it considers SAR together with other categories of nonviolent sexual conduct (such as fraud and extortion) and includes SAR in the general discussion of the problem of criminalizing nonviolent (and nonconsensual) sexual conduct.[74]

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[72] For an example of Israeli media coverage, see Efrat Weiss, *Hebrew University Professor Suspect for Sexual Involvement with Students in Abuse of Authority*, YNET (July 30, 2008, 5:00 PM), http://www.ynet.co.il/articles/0,7340,L-3575505,00.html, *archived at* http://perma.cc/YZD3-ZXNB. For an example of U.S. media coverage, see Paul Richter, *Army Sergeant Gets 25-Year Term for Rapes*, L.A. TIMES (May 7, 1997), http://articles.latimes.com/1997-05-07/news/mn-56313_1_25-year-term, *archived at* http://perma.cc/WP8P-WVCQ.

[73] American literature is addressed below. *See infra* notes 87, 91, 95–98, 101–105 and accompanying text. For Israeli literature, see KOBI VARDI, SEXUAL EXPLOITATION IN THERAPY (2001) (describing the problem of sexual exploitation in therapy, and examining various legal means to handle it); Michal Shaked, *How Brigadier General Nir Galili Lost His Chance for Promotion*, 9 PLILIM 443 (2000) (offering a narrative reading of a decision by the High Court of Justice, reviewing the promotion of a brigadier general in the Israeli Army accused of having a sexual affair with a female subordinate). Shaked's analysis is quite unique in the field, for she employs a descriptive rather than a normative methodology. Instead of advocating some kind of desired reform, her account carefully reads the *Galili* opinion, depicts its novelty in setting new standards for amorous relations in the army, and then tries to assess the deeper cultural meaning of the legal development. Noya Rimalt and Orit Kamir, two prominent feminist scholars in Israel, did not address SAR extensively in their writing. Rather, both of them mentioned certain SAR provisions or SAR cases briefly, mostly in the specific (and limited) context of the Law for the Prevention of Sexual Harassment. *See* Noya Rimalt, *On Sex, Sexuality and Human Dignity: The Law for the Prevention of Sexual Harassment in Light of Feminist Theory and Legal Reality*, 35 MISHPATIM 601, 627–31 (2005) (analyzing the *Galili* case from a feminist theory standpoint); Orit Kamir, *Sexual Harassment: Sex Discrimination, or an Injury to Human Dignity?*, 29 MISHPATIM 317 (1998).

[74] The problem of criminalizing nonviolent, nonconsensual sexual conduct has become central to the American deliberation of rape law in the last three decades. The traditional common law definition of rape required use of physical force. LAFAVE, *supra* note 25, at 857 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *210). In recent years, however, the force requirement began losing its exclusivity in the definition of rape. Israel eliminated the force requirement from the definition of rape in 2001. American jurisdictions, on the other hand, were less willing to divorce the physically-violent model of rape law, and this insistence gained considerable criticism in American legal literature. SCHULHOFER, *supra* note 49, at x ("Sexual misconduct is considered rape only when a man deploys physical force—and often not even then. Yet consent is far from voluntary when it is given in response to extortionate

In what follows, I describe existing literature on SAR offenses. These accounts utilize two distinct terminologies inspired by liberalism and radical feminism: one includes nonconsent, coercion, and offense-to-autonomy; the other, asymmetric power and gender exploitation. While these terminologies are grounded in well-known theories, current legal scholarship fails to properly conceptualize SAR as a legal wrong. This has led commentators and legal practitioners to overlook SAR's distinctiveness and to underappreciate the novelty of this legal category. As I show below,[75] an appropriate conceptualization should carry important doctrinal and punitive implications for SAR regulation.

1. The Liberal Conceptualization

Liberal theory is the dominant theory on modern sex offenses. While legal regulation of sex dates back to ancient times,[76] its establishment in liberal values is relatively new.[77] The transition may be described as relinquishing a traditional view, where sexual bans were derived primarily from status (mostly the status of marriage),[78] and adopting a modern view,[79] viewing individuals, rather than predetermined social status or moralistic norms, as the sole and final decisionmakers in matters concerning their sexuality. Through the course of this development, liberal theory emerged. It considers sexual autonomy[80] the underlying value of modern rape law, and nonconsent[81] the primary element of modern rape law doctrine.

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threats or the persistent sexual demands of a woman's doctor, lawyer, or psychiatrist."); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1092 (1986).

[75] *See infra* Part III.

[76] For the history of rape law, see SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 18 (1975) (describing rape in historical times as a property crime against the woman's husband or father). Another important, and very interesting, historiography of rape law was composed in recent years by Anne Coughlin. Coughlin argues that rape traditionally served to exonerate women from another accusation—adultery, when sex out of wedlock constituted a serious offense alongside rape. This, according to Coughlin, explains why rape victims were required to demonstrate "resistance to the utmost." Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 14, 30–35 (1998).

[77] Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1381 (2013).

[78] And thus marital rape was traditionally exempted from the legal definition of rape. For an overview of the marital exemption of rape in American law, including its historical origins at common law, see MODEL PENAL CODE & COMMENTARIES § 213.1 (Official Draft & Revised Comments 1962). For discussion of the marital exemption under Israeli law, see Yoram Shachar, *Lawfully Raped?*, 8 IYUNEI MISHPAT 649 (1982).

[79] For a description of the evolution of rape law from traditional to modern views in the United States, see LAFAVE, *supra* note 25, at 847–50.

[80] Stephen Schulhofer offers the most comprehensive theory of sexual autonomy under American legal scholarship. *See* SCHULHOFER, *supra* note 49 (arguing that sexual autonomy

In this vein, the development of rape law reform and its move beyond the exclusivity of physical force in rape law is important. As soon as rape was detached from its origins and came to be acknowledged as a crime against autonomy, it was no longer evident that physical force, which was central to the traditional definition of rape ("the carnal knowledge of a woman *forcibly* and against her will"[82]) was still material to the modern definition of rape. The question, in fact, was even broader than that. If rape was about sexual autonomy, new questions opened up to the meaning and proper scope of autonomy, and the variety of circumstances under which, even without physical coercion, a person's submission to sex would adequately qualify as valid consent.[83] Specifically, jurists urged expanding rape law beyond physical coercion to include two main categories of nonconsensual sex: sex based upon coercive threats and sex through fraudulent claims.[84] These two categories have long been categories of nonconsent in other legal fields, such as property with "theft by fraud" and "theft by extortion." With the liberalization of sex offenses, commentators called for their recognition within this field as well.

A similar line of thought found certain SAR cases worthy of criminalization. These accounts suggested that even though SAR offenses

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should be viewed as a fundamental legal entitlement deserving the protection of the law just as other legal entitlements, such as the right to property or to physical security, and testing the application of sexual autonomy theory in different contexts such as sexual bargaining, professional authority relations, and more); Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35 (1992) (paraphrasing Ronald Dworkin's *Taking Rights Seriously* and offering a theory of sexual autonomy as a distinctive constituent of personhood and freedom). For additional sources on sexual autonomy, see Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992) (acknowledging sexual autonomy as justifying the criminalization of some instances of coercive sex that are short of physical violence); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT. L. REV. 359 (1993) (developing a theory of sexual autonomy as underlying rape law and objecting to any sharp distinction between violent and non-violent breach of sexual autonomy). For a recent critique on sexual autonomy as the underlying value of rape law, see Rubenfeld, *supra* note 77.

[81] *See e.g.*, ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS (2003) (offering an in-depth analysis of the concept of consent in sexual relations from a legal, as well as moral, standpoint).

[82] This is the common law definition of rape. LAFAVE, *supra* note 25, at 857 (citation omitted) (emphasis added).

[83] *See* Ann T. Spence, *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, 37 COLUM. J.L. & SOC. PROBS. 57 (2003) (identifying a need, in contemporary rape law reform, to define "coercion" beyond physical coercion, and offering to import contract law conceptions of coercion into rape law to achieve that purpose).

[84] *See* Estrich, *supra* note 74, at 1120.

do not always involve physical violence,[85] the sex was nevertheless imposed on the victim, and thus she was forced into having unwanted sex. Legal literature, case law, and regulations note that while many SAR cases tell the story of a seemingly consensual sexual encounter—i.e., the subordinate did not resist, but rather submitted to the authority figure's sexual initiatives—submission should not be viewed as valid consent, but "technical,"[86] "tainted,"[87] "inauthentic,"[88] "flawed,"[89] or "coerced"[90] consent. Since the balance of power in authority relations may lead subordinates to accede to unwanted sexual advances made by someone in a superior position, criminal law, through codifying SAR offenses, steps in to protect potential victims from wrongful sexual imposition and infringement of their right to sexual autonomy.[91]

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[85] The famous Israeli *Katzav* case, dealing with sexual charges against the former president of the state, is, in this respect, atypical since most of the charges included force and Katzav was ultimately convicted with forcible rape. *See* CrimA 3372/11 Katzav v. State of Israel (Nov. 10, 2011), Israel Supreme Court Database (Isr.), *available at* http://elyon1.court.gov.il/files/11/720/033/c34/11033720.c34.htm, *archived at* http://vperma.cc/B2LR-WKYZ.

[86] CrimA 9256/04 Yosef Noy v. State of Israel 60(2) PD 172, 184 [2005] (Isr.). The Israeli Supreme Court held that "even if consent was given", "criminal law, by taking into account the inferior position of the victim and the imbalance of power between the parties, treats this consent as *merely technical*, rather than legally effective." *Id*. (emphasis added).

[87] *See* Schulhofer, *supra* note 80, at 77–84 (discussing cases of sexual abuse within professional and institutional authority under the title "tainted consent").

[88] CSA 4790/04 State of Israel v. Ben-Hayim, 60(1) PD 257, 268 [2005] (Isr.), *translated in* CSA 4790/04 State of Israel v. Ben-Hayim 1 IsrLR 376, 391 [2005] (Isr). Interpreting the offense of SAR in employment, the Israeli Supreme Court held that "this offense engages situations in which the victim allegedly consented to the sexual act" but "since this consent was achieved through an abuse or in exploitation of a position of authority . . . this gives rise to a suspicion that consent under such circumstance is in fact not free but *inauthentic*." *Id.* (emphasis added).

[89] "As a general rule, it is inappropriate for the state to limit sexual relations between consenting adults; in therapy, however, and specifically in mental therapy, consent by the patient is not real but *flawed*." Explanatory Note to the Draft Bill Amending the Penal Law (Exploitation of Patient's Dependence in Therapy) (No. 71), 2002, HH 868 (Isr.) (emphasis added).

[90] The wording "coerced consent" appears in American SAR provisions. *See, e.g.*, N.H. REV. STAT. ANN. § 632-A:2(I)(n) (LexisNexis 2007) ("A person is guilty of the felony of aggravated felonious sexual assault if such person engages in sexual penetration with another person . . . when the actor is in a position of authority over the victim and uses this authority to *coerce* the victim to submit . . . ." (emphasis added)). Similarly, Falk speaks of "coercion" as including extortion, as well as abuse-of-authority cases. Falk, *supra* note 13, at 47 ("[R]ape by *coercion* cases involve the abuse of authority and sexual extortion." (emphasis added)).

[91] Falk advocates the criminalization of abuse-of-authority cases (and other types of sexual imposition, such as extortion and fraud) under rape law, since this area of law is "designed to protect victims' sexual integrity as well as physical security" and therefore it

The fundamental problem with the proposition mentioned above is that it uses the terms "consent" and "coercion" in a rhetorical fashion. Many SAR cases do not conform to any of the *categories* of nonconsent traditionally recognized under common law: incapacity, coercion through threats (extortion), and fraud. Indeed, as we have seen, certain SAR cases involve fraud,[92] and others involve coercive threats,[93] but many SAR cases and many SAR provisions do not include these elements.[94] The typical scenario described in these cases is of two mature partners who engage in sexual relations with no explicit threat or fraudulent claims by the offender and with no expression of nonconsent by the victim.

One proposition, raised in the context of employment, has been to conceive SAR under a theory of implicit extortion. Stephen Schulhofer—an American commentator writing within the liberal tradition—considered the following example. Sally and her boss Bill are working together on a project late at night.[95] When they are about to leave the office, Bill invites Sally for a drink. Bill's invitation is not communicated during official working hours since Sally and Bob were clearly done working that day. Moreover, it is possible that Sally is attracted to Bill and will be delighted to have a relationship with him. Yet, claims Schulhofer,

> Bill's seemingly innocent act of asking Sally for a date can pose serious problems. He has enormous power to affect her career, whether he mentions it or not. And Sally would know that a decision to turn him down cannot help but color his feelings about her. So Sally might feel under pressure to accept, whether she really wants to or not.[96]

Schulhofer, in other words, identifies the potential for abuse as having to do with the supervisor's principal control over the employee's working conditions. This control is always there, even if the supervisor does not "threaten" to use it explicitly. The question arises, however, whether

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should be expanded "to include a broader range of methods by which sexual predation is accomplished . . . ." Falk, *supra* note 13, at 141.

[92] *See supra* note 6 and accompanying text.

[93] *See, e.g.*, State v. Thompson, 792 P.2d 1103 (Mont. 1990) (involving a high-school principal who threatened to block a student's graduation if she failed to meet his sexual demands).

[94] For my discussion of SAR cases, see *supra* note 15 and accompanying text (discussing CSA 4790/04 State of Israel v. Ben-Hayim, IsrSC 60(1) 257 [2005] (Isr.), *translated in* CSA 4790/04 State of Israel v. Ben-Hayim, 1 IsrLR 376 [205] (Isr.)); *supra* note 31 and accompanying text (discussing CrimA 115/00 Morris Tayeb v. State of Israel 54(3) PD 289 [2000] (Isr.)). For my discussion of SAR provisions, see *supra* notes 26–28 and accompanying text.

[95] SCHULHOFER, *supra* note 49, at 168.

[96] *Id.* at 168–69.

"retaliation is an ever present danger"[97] may still be understood as "extortion."

Technically, it is possible to strain the words "implicit threat" to encompass the ever-present danger that a workplace supervisor would retaliate against a subordinate for turning down his sexual advances. This, however, seems to distort the concept of extortion. Extortion requires something more than a mere *potential* for extortion. Even the most subtle, implicit threat needs, or traditionally was thought to require, something more than the kind of potential for retaliation that exists in employment supervisory relations. [98]

Current legal accounts do not offer a satisfying theory to explain how and why consent is invalidated in these cases. Absent such a theory, the current discourse's use of the terms *coercion* and *nonconsent* is unconvincing. The mere fact that the victim did not genuinely want sex does not qualify as proper conceptualization of these offenses. The leap from assuming *unwanted* sexual contact to concluding *nonconsensual* sexual contact is unfounded. It ends up transforming consent into a psychological experience,[99] which makes significant the victim's inner will (or lack thereof) in sexual contact. The long tradition of categories of nonconsent stands to testify that authenticating will has never been a strong point of criminal law. People may submit to sexual initiatives for a range of reasons that do not necessarily reflect their true desire for sex. And these actions are ordinarily not criminalized as sex offenses.[100]

Schulhofer seemed to be the most aware of SAR's unique conceptual challenges. He sought to anchor SAR in recognized categories of nonconsent (such as extortion and fraud) but repeatedly pointed to the irrelevance of these categories for SAR conceptualization. Schulhofer's

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[97] *Id.* at 183.

[98] Schulhofer therefore concludes that traditional coercion or extortion provisions would not treat the above-mentioned Bob and Sally example as a criminal offense. *See id.* at 169.

[99] The understanding of consent as a psychological phenomenon (also known as the "subjectivist view of consent") was defended in recent years by Heidi Hurd and Larry Alexander. *See* Heidi M. Hurd, *The Moral Magic of Consent*, *in* 2 LEGAL THEORY 121 (Larry Alexander et al. eds., 1996); Larry Alexander, *The Moral Magic of Consent (II)*, *in* 2 LEGAL THEORY, *supra*, at 165. For a critique of this approach, see WERTHEIMER, *supra* note 81, at 144–46.

[100] Wertheimer discusses an example that illustrates the point. A and B have been dating for a while but did not have sex until, at some point, A (typically the male) says to B (typically the female): "[E]ither we have sex, or I'm terminating the relationship." If B then gives in to the sexual pressure, she probably (or at least arguably) does not respond out of true sexual desire; however, criminal law would not tag her submission as nonconsent or offense to autonomy. In the words of Wertheimer, while "A's proposal may be wrong, crude, insensitive," it is not coercive. WERTHEIMER, *supra* note 81, at 164–70.

early writings conclude that autonomy "tied to already firm social understandings" is of no assistance for SAR theory, since existing conceptions of autonomy do not consider SAR offensive to autonomy.[101] However, Schulhofer was more supportive of the view that SAR should be treated as an offense to autonomy (and possibly even criminalized as such) in his book, *Unwanted Sex*, published some years later. The book's conclusions advocated criminalization of SAR in mental therapeutic relations[102] and his analysis throughout the book supported the risk to autonomy in contexts such as employment,[103] education,[104] and the like. Yet the book's overall analysis did not clearly lay out a conceptual basis for considering SAR a legal offense to autonomy. Whenever he referred to SAR cases absent extortion and fraud, Schulhofer resorted to a rhetorical use of autonomy, consent, or freedom of choice.[105] His account supposed that sex in authority relations is often *unwanted* (as his book title suggests), but it did not supply a proper reason to invalidate the subordinate's consent to sex in authority relations. Furthermore, it did not indicate a reason why unwanted sex within authority relations should be criminalized, when so many other cases involving unwanted sex, or not-entirely-authentic desire for sex, are not criminalized.

2. The Feminist Conceptualization

Another concept of SAR comes from the radical feminist movement. As opposed to other feminist schools,[106] radical feminism directs its

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[101] Schulhofer, *supra* note 80, at 83.

[102] SCHULHOFER**,** *supra* note 49, at 284 (proposing a Model Criminal Statute for Sexual Offenses, under which sexual penetration would be punished as sexual abuse, a felony of the third degree, if the actor engaged in "providing professional treatment, assessment, or counseling of a mental or emotional illness, symptom, or condition of the victim over a period concurrent with or substantially contemporaneous with the time when the act of sexual penetration occurs").

[103] *Id.* at 183 ("A worker pressured for sex by her boss isn't completely free to 'just say no,' because retaliation is an ever-present danger, one that existing law does not effectively deter.").

[104] *Id.* at 192 ("At the college and graduate school levels, sexual interaction between students and teachers becomes more frequent, and much of it is directly or indirectly coercive.")

[105] For example, he writes, "Without explicit threats or other improper inducements, *freedom of choice* can still be affected by the distribution of power in particular settings. *Consent can be tainted* by constraints that are inherent in relationships between teachers and students, between job supervisors and their subordinates, and between prison guards and inmates." *Id.* at 112 (emphases added).

[106] Feminist thought contains many different schools, but it is common to refer to three major strands: liberal feminism, cultural feminism, and radical feminism. For a survey of feminist strands and their practical influence on various law reforms, see Noya Rimalt*, On*

arguments and critique toward the regulation of sex and profoundly challenges the principles of liberal thought. It appeared originally—and in its purest form—in the writings of Catherine MacKinnon. Drawing on neo-Marxist ideology, MacKinnon argued that since females in society are profoundly subject to male domination, it is doubtful that female submission to sexual demands by males should ever rightfully be viewed as "consent."[107] Even in the absence of physical force, fraud, or coercive threats—liberal doctrines that other critics of rape law fought so hard to apply to the field—MacKinnon argued that it is doubtful female consent to sex could ever be a meaningful concept under conditions of male domination.[108]

Inspired by the challenge posed by radical feminism to the liberal notion of consent, feminist writers have been attentive to the inadequacy of consent in considering SAR cases.[109] Consequently, they often employ different terminology for SAR offenses, describing asymmetry or inequality between sexual partners. Thus, for example, sexual contact in clergy–

Law, Feminism and Social Change: The Example of the Law for the Prevention of Sexual Harassment, *in* STUDIES IN LAW, GENDER AND FEMINISM 985 (Daphne Barak-Erez et al. eds., 2006).

[107] CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 178 (1989) (stating that "[i]f sex is normally something men do to women, the issue is less whether there was force than whether consent is a meaningful concept"); *see also id.* at 174 (stating that "[p]erhaps the wrong of rape has proven so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance"). For other works by MacKinnon containing earlier versions of these ideas, see Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983).

[108] *Id.* In her more recent work, MacKinnon addressed more explicitly the criminalization of sex under conditions of what she terms "social hierarchy." CATHARINE MACKINNON, WOMEN'S LIVES, MEN'S LAWS 244 (2005). Unlike her previous work, here MacKinnon seems to incorporate an awareness of social hierarchy into a legal conception of coercion and consent, claiming that "[a]wareness of social hierarchy is absent in the criminal law of rape[]," and that "rape is a physical attack of a sexual nature under coercive conditions, and inequalities are coercive conditions." *Id.* at 244, 247. However, as Buchhandler-Raphael rightly observes, MacKinnon does not develop these observations into a full conceptual framework for justifying the criminalization of sex under conditions of social hierarchy, nor does she develop the pragmatic implications of these general ideas. Buchhandler-Raphael, *supra* note 53, at 411–12.

[109] Feminist writers have dedicated little attention to discussing sex in authority relations as a criminal wrong. MacKinnon's groundwork theory of sexual harassment includes cases dealing with sex within supervisory employment relations, but she conceptualized the abuse as a form of (civil) sex discrimination. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 4 (1979).

penitent relationships is described as an abuse of "power dependency relations"[110] and relations between a workplace supervisor and subordinate is a "disparate power relationship,"[111] or simply an abuse of power.[112]

The feminist language of "asymmetry of power" adds an important element to understanding SAR. Its advantage over classic liberal language is that it grounds SAR in some inherent quality of the authority relations, rather than in the offender's action. American scholar Martha Chamallas mentions in her review on *Meritor Savings Bank v. Vinson*[113] that "the existence of an asymmetric relationship alone was enough to constitute intimidation, even if the supervisor had no specific intent to retaliate against the noncompliant employee."[114] Seemingly, the language of asymmetry of power resonates with an awareness felt in SAR cases: namely, that one party is more powerful than the other and that the relations between the parties carry a hierarchical nature.

However, the language of "exploitation of asymmetry of power" or of "abuse of power" is inappropriate for SAR conceptualization. The terminology of inequality and asymmetry is overinclusive. Inequality is one of the most complicated, elusive concepts.[115] It can be understood in many ways and fails to explain why, under SAR offenses, only specific contexts are identified as unequal, rather than conceptualizing sex in every instance of social or economic inequality as a legally wrong act against the victim.[116]

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[110] *See* Phyllis Coleman, *Sex in Power Dependency Relationships: Taking Unfair Advantage of the "Fair" Sex*, 53 ALB. L. REV. 95, 95–96 (1988) (arguing that "sexual contact occurring within certain human relationships . . . falls on a continuum of a presumption of exploitation due to what may be called 'power dependency.' Specifically, these relationships include parent–child, psychotherapist–patient, physician–patient, clergy–penitent, professor–student, attorney–client, and employer–employee." (citations omitted)). Coleman's essay does not address criminal law, but instead treats these cases within a tort framework. However, her conceptualization of the relationships as "power dependency" relations and her assumption that consent in these cases is defective are equally relevant to criminal law.

[111] *See* Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 805 (1988).

[112] Michal Buchhandler-Raphael, *Sexual Abuse of Power*, 21 U. FLA. J.L. & PUB. POL'Y 77 (2010) (proposing to conceptualize and to criminalize various instances of unwanted sexual relations within professional and institutional settings as sexual abuse of power).

[113] Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). *Meritor* is a leading U.S. case on sexual harassment, discussing a sexual affair between a workplace supervisor and a subordinate employee.

[114] Chamallas, *supra* note 111, at 805.

[115] *See* RONALD DWORKIN, SOVEREIGN VIRTUE 2 (2000) (pointing out the diversified, contested, and controversial meaning of equality in political discourse, as well as in philosophical analyses).

[116] Martha Chamallas's suggestion to neglect consent and move to a standard of

SAR offenses relate to *authority,* implying a notion distinct from gender domination and more specific than gender inequality. Moreover, at face value, "asymmetry of power" terms could deem that *all* sex that occurs within authority relations is criminal. However, as indicated above,[117] many SAR provisions prohibit only sexual contact that occurs "in abuse" of an authority position. Missing from the feminist discussion is an understanding of the natures of *authority* and its abuse;[118] hence, the feminist-inspired terms of inequality are inadequate.

II. RECONCEPTUALIZING SEXUAL ABUSE IN AUTHORITY RELATIONS

Part I presented the problems with current legal language and theories used in analyzing and adjudicating SAR. This Part proposes a new theory for SAR offenses. This theory claims that SAR offenses deal with a distinct type of abuse of authority—an abuse of a kind of power that I describe for the first time here. I term this power *charisma of the office.*[119] *Charisma of the office* emerges from the modern separation between the *professional sphere* and the *personal sphere.*[120] This separation between spheres is central to modern life and usually does not cause difficulty. Every person maintains a set of professional connections and a set of personal

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"mutuality" in sexual relations as a response to this difficulty is highly contentious. *See* Chamallas, *supra* note 111, at 835–36. Chamallas's suggestion to move to a standard of mutuality may invoke criticism, but for present purposes, it is important to see that her suggestion acknowledges that as soon as we speak of exploitation of an "asymmetry of power," we are no longer in the consent court. Instead, we have to adopt some other language to denote such wrongdoing.

[117] *See, e.g.*, Israel Penal Code, (5737-1977), LSI Special Volume, § 346(B) (1977); N.H. REV. STAT. ANN. §§ 632–A:2(n) (LexisNexis 2007).

[118] For a similar critique of the under-consideration of exploitation as a separate element in sex offenses, see Buchhandler-Raphael, *supra* note 112, at 138 (mentioning rape law reforms that "have failed to articulate the exploitation element, viewing the mere potential for exploitation in sexual relationships as enough to justify criminalization"). Buchhandler-Raphael's response to this difficulty is to offer an abuse of power model to address sexual exploitation within arenas of disparate power (such as the workplace and in the academy). *Id.* at 132. My analysis suggests that the abuse of power model is a step in the right direction, but offers a distinct and more rigorous understanding of the power involved, namely, the power of authority.

[119] I use charisma here in a way that is almost the opposite of the common use of this word. Charisma is usually used in a positive way. I use charisma as generating negative reactions, such as compliance. I further elaborate my reasons for choosing the term "charisma" *infra* subpart II.C.

[120] The distinction between a private sphere and public sphere is central to modern liberal thought. *See generally* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982) (discussing the history of this distinction). I use the less common term "professional sphere" and contrast it with the private sphere following Weber's analysis of bureaucracy. *See infra* Part II.B.

connections, and for the most part these connections are separate. SAR offenses deal with cases in which they are not: cases in which two people have an authority–subordinate relationship in the professional sphere and also interact in the personal sphere. SAR offenses are founded on the concern that the dividing line between the professional and the personal sphere may be obscured, and that the power held by authority figures in the professional sphere may extend impermissibly to the personal sphere. Criminal law has, in effect, recognized charisma of the office as a novel type of power and is trying to control its abuse. In the following sections, I use terms borrowed from social theory[121]—most notably *authority*, *charisma*, and *office*—to develop this new conceptual framework and then present it in detail.

A. THE NATURE OF AUTHORITY

Social theory portrays authority as a perplexing phenomenon.[122] On the one hand, it is a type of power that allows some to direct, instruct, and guide others.[123] On the other hand, it is a type of power that does not employ external means of coercion and does not rely on physical force or threat of force to its advantage.[124] Rather, power is sustained because of the followers' belief in the authority's legitimacy[125] and not through physical

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[121] My analysis *infra* relies on the theory of authority appearing in Max Weber's seminal work *Economy and Society*. In addition, I refer to Hannah Arendt's essay on authority (*What Is Authority?*) and to some additional observations (on authority) included in her book *On Violence*. I further rely on secondary literature on Arendt and Weber, primarily when such sources help illuminate or expand certain aspects of the original texts that are useful for the development of SAR theory.

[122] *See* HANNAH ARENDT, ON VIOLENCE 45 (Harcourt, Brace & World 1970) (arguing that authority is an "elusive . . . phenomen[on]").

[123] Weber considers authority as a specific type of domination, which signifies "the probability that a command with a given specific content will be obeyed by a given group of persons." 1 MAX WEBER, ECONOMY AND SOCIETY 53 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., University of California Press 1978) (1922).

[124] Kronman observes that authority—the most durable form of political power—is not based on physical compulsion but on a belief in the binding quality of the normative principles that justify the authoritarian order. ANTHONY KRONMAN, MAX WEBER 39 (1983).

[125] "Experience shows that in no instance does domination voluntarily limit itself to the appeal to material or affectual or ideal motives as basis for its continuance. In addition every such system attempts to establish and to cultivate a belief in its *legitimacy*." WEBER, *supra* note 123, at 213 (emphasis added). Commenting on Weber, Kronman observes that "the hallmark of an authority relationship is the fact that it involves an exercise of power that is justified in the eyes of the person being dominated because he acknowledges the normative validity of the principle to which the party wielding power appeals as the warrant for his actions." KRONMAN, *supra* note 124, at 39.

coercion or verbal persuasion.[126] This special characteristic of authority is vital for conceptualizing SAR offenses, since SAR is an offense even when the offender does not use coercion.

The first step in understanding authority is recognizing that authority is fundamentally a social power that not only operates within social relations, but also originates from society and gains its validity through societal norms.[127] Hence, the exercise of authority is not an exclusive expression of personal traits (such as charm or physical strength), and in the same manner, subjection to authority is not an exclusive outcome of individual weakness or helplessness.[128] Indeed, in *Scadden*, the Wyoming Supreme Court discussed a recent SAR provision, noting:

> [I]t is apparent that the legislature used the word "authority" to mean an externally granted power, not a self-generated control. One in a position of authority is a person who acquires that status by virtue of society and its system of laws granting to him the right of control over another.[129]

Therefore, authority is a social power, but two characteristics turn it into a distinct type of social power. First, authority involves a hierarchical order of command and obedience: it implies a person in a position of authority who gives orders and a subordinate who follows these orders.[130] The hierarchical order of authority, moreover, often takes place routinely rather than

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> [126] [A]uthority precludes the use of external means of coercion; where force is used, authority itself has failed. Authority, on the other hand, is incompatible with persuasion, which presupposes equality, and works through a process of argumentation . . . . If authority is to be defined at all, then, it must be in contradistinction to both coercion by force, and persuasion through arguments.

HANNAH ARENDT, *What Is Authority?*, *in* BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 91, 93 (1958).

[127] Weber's consideration of authority as social order is evident in his introduction of basic sociological concepts such as social action, sociological relationship, and legitimate order. WEBER, *supra* note 123, at 3–62.

[128] Weber distinguished between various types of submission in social interaction. Particularly, he distinguished between submission which is due to individual weakness and submission to authority:

> [P]eople may submit from individual weakness and helplessness because there is no acceptable alternative. But these considerations are not decisive for the classification of types of domination. What is important is the fact that in a given case the particular claim to legitimacy is to a significant degree and according to its type treated as "valid"; that this fact confirms the position of the persons claiming authority and that it helps to determine the choice of means of its exercise.

Id. at 214.

[129] Scadden v. State, 732 P.2d 1036, 1042 (Wyo. 1987).

[130] For Weber's definition of domination, see WEBER, *supra* note 123, at 53. See also Arendt's definition of the authoritarian relationship as involving "the one who commands and the one who obeys." ARENDT, *supra* note 126, at 93.

casually. The phrase "authority relations" conveys an enduring reality (a "relationship") rather than an isolated episode.[131]

Second, authority is based on a legitimate belief in the authoritarian order. Weber thus refers to authority as *legitimate domination.*[132] I shall soon return to the notion of legitimacy in greater detail. At present, it is important to note that legitimacy enables authority figures to exercise power without the actual use of force and without relying on such advantages as economic superiority. Grounded in legitimacy, authorities operate without coercion. In fact, as Hannah Arendt observed, the use of force is often a testimony to the lack of authority: "Since authority always demands obedience, it is commonly mistaken for some form of power or violence"; however, she continues, "authority precludes the use of external means of coercion; where force is used, authority itself has failed."[133]

Authority signifies a form of domination, which is distinct from coercion through force, misuse of economic asymmetries, or exploitation of individual vulnerabilities. It relies on a hierarchical order of command and obedience and on a common belief in the legitimacy of that order.[134]

Weber identifies three types[135] of existing authority that differ from one another in the type of legitimacy upholding them: *traditional authority* rests on "an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them"; *charismatic authority* rests on "devotion to the exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him"; and *rational authority* rests "on a belief in the legality of enacted rules and the right of those elevated to

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[131] The durability and stability of authority as a specific type of social power is emphasized in Weber's account. KRONMAN, *supra* note 124, at 39 ("Although authority is merely one form of power, it is, according to Weber, the most stable and enduring form.").

[132] WEBER, *supra* note 123, at 215.

[133] ARENDT, *supra* note 126, at 92–93.

[134] "The authoritarian relationship between the one who commands and the one who obeys rests neither on common reason nor on the power of the one who commands; what they have in common is the hierarchy itself, whose rightness and legitimacy both recognize and where both have their predetermined stable place." *Id.* at 93.

[135] WEBER, *supra* note 123, at 215. In accordance with Weber's methodology, he refers to those types as *ideal types.* An ideal type is a methodological tool that is meant to capture the main characteristics of a given social phenomenon in a non-empirical fashion. For the methodology of ideal type, see LEWIS A. COSER, MASTERS OF SOCIOLOGICAL THOUGHT: IDEAS IN HISTORICAL AND SOCIAL CONTEXT 223–24 (1972). In the particular context of the tripartite classification of authority, Weber mentions that neither of these types of authority is to be found in historical cases in their pure form, but the consideration of diverse forms of authority on the basis of sociological, nonempirical terms ("ideal types") has clear advantages. WEBER, *supra* note 123, at 216.

authority under such rules to issue commands."[136] Weber characterizes the types according to different historical periods.[137] In particular, rational authority is typical of modern times and traditional authority of premodern times. Moreover, Weber distinguishes between two different subcategories of rational authority: legal (rational) authority and bureaucratic (rational) authority.[138] SAR offenses specifically engage bureaucratic authority and focus on a specific type of abuse—conflation of bureaucratic authority with charismatic authority.

B. BUREAUCRATIC AUTHORITY

1. Bureaucracy and the Authority of Office

Classic legal thought usually restricts authority to governmental authority, and the authority referred to is almost invariably the authority of law.[139] Yet new prohibitions on sex in employment, therapeutic, and educational relationships assume that authority relations exist in a much broader scope. These prohibitions are not limited to government employers but also apply to authority positions in the private sector. I therefore use Weber's account of bureaucratic authority in modern times to examine authority positions in the broader sense.

Like other scholars, Weber referred to the authority of modern law as positive law issued by state institutions.[140] He described it as a rational form of authority with a human source of legitimacy (reason), rather than a divine or transcendental source.[141] In addition to the rule of law and the

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[136] WEBER, *supra* note 123, at 215.

[137] On the historical dimension of Weber's tripartite classification of authority, see KEN MORRISON, MARX, DURKHEIM, WEBER 362 (2d ed. 2006).

[138] Weber thus dedicates separate attention to legal authority and to bureaucratic authority. His account of legal authority is conducted primarily as part of his sociology of law. 2 MAX WEBER, ECONOMY AND SOCIETY 641–900 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., University of California Press 1978) (1922). His account of bureaucratic authority is conducted as part of the sociology of power and domination. WEBER, *supra* note 123, at 212–301.

[139] *See, e.g.*, JOSEPH RAZ, THE AUTHORITY OF LAW (1979) (offering a moral–philosophical account of the authority of law and describing the foundations for the legal system's claim for authority). For a comprehensive account of the shortcomings of classic jurisprudence in addressing bureaucratic organizations, see MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS (1986).

[140] This understanding of modern law is known as the school of legal positivism. For a discussion of legal positivism, see Leslie Green, *Legal Positivism*, STAN. ENCYCLOPEDIA OF PHIL. (Fall 2009, Edward N. Zalta (ed.)), http://plato.stanford.edu/entries/legal-positivism/ (last visited October 28, 2014), *archived at* http://perma.cc/L8FR-BSDF.

[141] According to Weber, traditional forms of authority were religious in essence, while

authority of the state, Weber identified modern authority in *bureaucracy*, a basic form of administration that is "the root of the modern Western state."[142] Weber referred to such authority as bureaucratic and analyzed its special characteristics.[143] According to Weber, bureaucratic authority connotes authority that is granted to people by virtue of their profession[144] or position in an organization's hierarchy.[145] The operation of bureaucratic authority spans vast social arenas such as the modern workplace ("the office") and modern hospitals and clinics.[146]

In Weberian bureaucracy, individuals receive power based on their qualifications and professional training. They exercise that power according to their specialized knowledge.[147] Thus, Weber's understanding of *bureaucracy* is not limited to state bureaucracy.[148] Accordingly, modern hospitals and workplaces are bureaucratic whether they are owned by the government or not. Moreover, under Weber's account, these institutions are bureaucratic in a special sense that goes beyond the common connotations

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the legitimacy of modern authority rests on its rationality. *See supra* note 136 and accompanying text.

[142] WEBER, *supra* note 123, at 223.

[143] *Id.* at 220–26.

[144] Weber hardly ever uses the word "professional." Instead, he refers to the "technical" or "specialized" training of officials under bureaucracy, which signifies precisely the idea of professionalism:

> The rules which regulate the conduct of an office may be technical rules or norms. In both cases, if their application is to be fully rational, specialized training is necessary. It is thus normally true that only a person who has demonstrated an adequate technical training is qualified to be a member of the administrative staff of such an organized group, and hence only such persons are eligible for appointment to official positions.

Id. at 218. In addition, Weber mentions that "[b]ureaucratic administration means fundamentally domination through knowledge." *Id.* at 225.

[145] Weber often speaks of officials within hierarchical organizations. For example, he refers to the fact that many bureaucratic organizations follow "the principle of hierarchy; that is, each lower office is under the control and supervision of a higher one." *Id.* at 218.

[146] "[B]ureaucracy is found in private clinics, as well as in endowed hospitals . . . . Bureaucratic organization is well illustrated by the administrative role of the priesthood (*Kaplanokratie*) in the modern [Catholic] church . . . ." *Id.* at 221.

[147] *Id.* at 218. Weber further argues that the systematic operation of bureaucracy dominates many aspects of modern life. Indeed, according to Weber, almost all areas of contemporary life function in this manner—capitalistic corporations, the workplace, the healthcare system, and of course state bureaucracy, which is charged with public services: "[I]t would be sheer illusion to think for a moment that continuous administrative work can be carried out in any field except by means of officials working in offices. The whole pattern of everyday life is cut to fit this framework." *Id.* at 223.

[148] Weber thus clarifies that as far as bureaucracy is concerned, "the situation is exactly the same in the field of public administration and in private bureaucratic organizations, such as the large-scale capitalistic enterprise." *Id.* at 222.

of bureaucracy with complex organization and dysfunction.[149] Rather, modern workplaces, hospitals, and educational institutions are bureaucratic because they exhibit a distinct type of authority and a unique mode of interpersonal domination.

Weber adds the term "office," a delimited sphere of power that is granted to perform professional enterprises, to enhance his discussion of bureaucracy. His central idea is that the partition of power into offices reflects a systematic division of labor,[150] and thus authority is accorded for specific purposes.[151] Every office thus embodies a multitude of powers and prerogatives that, in the normal course of affairs, are used to execute professional matters in the service of individuals or organizations. Moreover, an office typically means occupying a tangible space, i.e., a physical "office" that is distinguishable from the officeholder's private residence.[152] The word "office" thus simultaneously connotes a sphere of bureaucratic authority—a professional jurisdiction, if you will—and a physical space from which an organization or business typically operates.

The different types of legitimacy underlying traditional and rational authority have important implications for the structure of authority. In traditional authority, the authority fundamentally belonged to rulers. Consequently, its power was holistic and permeated the entire existence of both the rulers and the ruled.[153] Domination rested upon "personal devotion to, and personal authority" of "'natural' leaders"[154] and the "obligations of personal obedience" tended to be "essentially unlimited."[155] Contrary to traditional authority, bureaucratic authority is essentially demarcated and limited.[156] Authority is justified by a rational consideration: the efficient

[149] For a discussion of bureaucracy that similarly goes beyond the pejorative connotations of complexity and dysfunction, see Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983).

[150] "Each office has a clearly defined sphere of competence," which has been "marked off as part of a systematic division of labor." WEBER, *supra* note 123, at 218, 220.

[151] Weber notes that each office entails a "rationally delimited jurisdiction" and "sphere of obligations" corresponding to the systematic division of labor. *Id.* at 218.

[152] Weber thus observes the physical separation between "the place in which official functions are carried out—the 'office' in the sense of the premises" and the private domicile of the officeholder. *Id.* at 219.

[153] Kronman observes that traditional authority is at once religious and economic, and so traditional authority structures treat both the sacred and the everyday dimensions of social life as essentially continuous. KRONMAN, *supra* note 124, at 45.

[154] WEBER, *supra* note 138, at 1117.

[155] *Id.* at 227.

[156] Weber thus speaks of the authority of office as a "rationally *delimited* jurisdiction." *Id.* at 218 (emphasis added).

administration of society;[157] hence, authority is granted to serve specific—usually professional—purposes. In modern organizations "the person who obeys authority does so, as it is usually stated, only in his capacity as a 'member' of the organization"[158] and "there is an obligation to obedience only within the sphere of the rationally delimited jurisdiction . . . ."[159]

2. Doctors, Employers, and Teachers as Bureaucratic Authority Figures

Doctors, employers, and teachers exercise bureaucratic authority and fulfill offices in the sense described above. Workplace supervisors have power, by virtue of their positions, to determine work conditions, whom to hire, and whether to promote subordinate employees. Doctors are empowered, by virtue of their positions, to prescribe medicine and perform medical procedures on a patient. Teachers and university professors have, by virtue of their positions, the power to issue grades and to allocate scholarships. SAR prohibitions thus engage professionals holding bureaucratic positions of power. Feminists and feminist-inspired scholarship, whose main interests lie with gender inequality and social gender categories, have overlooked this important point.

Weber's analysis of bureaucratic authority reminds us that doctors, employers, and teachers hold positions of authority under modern bureaucracies. Legal texts addressing SAR have often mentioned these powers and spoken of the positions of employers, doctors, and teachers as positions of power.[160] Contemporary legal texts suggest that these powers offer a means to extort sex[161] and occasionally understand SAR under a paradigm of explicit or implicit extortion. In what follows, I suggest that

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[157] Experience tends universally to show that the purely bureaucratic type of administrative organization—that is, the monocratic variety of bureaucracy—is, from a purely technical point of view, capable of attaining the highest degree of efficiency . . . . It is superior to any other form in precision, in stability, in the stringency of its discipline, and in its reliability . . . . It is finally superior both in intensive efficiency and in the scope of its operations, and is formally capable of application to all kinds of administrative tasks.

> . . .
>
> [T]he needs of mass administration make it today completely indispensable.

Id. at 223.

[158] *Id.* at 217.

[159] *Id.* at 218.

[160] *See, e.g.*, CrimA 9256/04 Yosef Noy v. State of Israel IsrSC 60(2) 172, 184 (Isr.) (while adjudicating a SAR criminal case, the Israeli Supreme Court observed that "[in criminalizing SAR] the legislature sought to prevent those who hold positions of power and authority over other people—be them workplace supervisors, army commanders, therapists, or others who hold positions of authority—from abusing their position of authority . . .").

[161] *See, e.g.*, SCHULHOFER, *supra* note 49, at 234 ("The doctor may abuse his *power*, for example by threatening to withhold drugs the patient badly needs.").

SAR is concerned not with these powers but with a charismatic abuse of the powers of office.

3. Separate Spheres: The Bureaucratic Sphere and the Personal Sphere

A consequent implication of rationalization of authority in modern times is the demarcation of authority to one sphere and the separation between the sphere of authority and "private life."[162] While historically there was an "undifferentiated continuity" between official and private life, modernity requires a sharp division between the two domains.[163] In modern times, there is a primary separation between the bureaucratic sphere, the sphere of authority, and the private sphere, in which hierarchy and domination are undesirable. People who are authority figures in their professional lives—i.e., in the clinic or in the office—are not supposed to have power or authority over others in their private lives. In the privacy of their own lives (say, when they meet friends), they are equal—or are supposed to be equal—to everyone else. This reality of separate spheres, and the difficulty individuals have adopting its artificial circumstances, is the heart of the problem to which SAR regulation responds. SAR regulations assume that sexual relations should fall into the private—not the bureaucratic—sphere, and thus that they should not carry authority or power from the bureaucratic sphere.[164]

C. WHAT IS SEXUAL ABUSE IN AUTHORITY RELATIONS?

We have reached the stage to answer the puzzle of SAR offenses: namely, what motivates the criminalization and adjudication of sex within authority relations? The basic SAR scenario is a sexual encounter within the context of a professional relationship. Yet what is wrong with this combination? While an amorous relationship could interfere with the proper professional functioning of those involved and is not a new quandary,[165] it

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[162] I mean "private life" here in the everyday sense of the word: life when one is by herself or with family or friends, and is not engaged in professional activities.

[163] KRONMAN, *supra* note 124, at 47.

[164] The concept of spheres and its application in the field of social and legal policy are not new. *See, e.g.*, MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983) (conceptualizing society as comprised of several distinct spheres of activity, such as money and commodity, office, and political power, and advocating an ideal of complex equality, by which power from one sphere should be restrained from dominating other spheres). The specific use of bureaucratic sphere, its application to SAR, and the assertions regarding desired equality in these situations are mine.

[165] Professional codes of conduct have long proscribed sex between doctors and patients as professional misconduct: "The ban on physician–patient sexual contact is based on the recognition that such contact jeopardizes patients' medical care." Council on Ethical and

is not the crux of SAR offenses. These offenses, unlike professional rules of conduct, are not concerned with the influence of sex on professional treatment, but rather the influence of professional relationships on intimate relationships. SAR offenses are concerned with individuals and their abuse by professional authority figures. Our mission is to explain why and how.

At the heart of SAR criminalization is a novel type of power: one derived from the office that extends into personal matters—where it has no place being. I term this new power *charisma of the office*. Legislators and courts are, even if they lack the proper language to realize it themselves, trying to limit this new power, making sure the powers vested in a bureaucratic office do not overstep the office's bounds and influence subordinates' private lives. The following subsections expand and clarify these concepts and show their power in analyzing SAR offenses and cases.

1. Revisiting the Tayeb *Case*

I return to *Tayeb*, the Israeli Supreme Court case involving a patient and her physical therapist.[166] Evident in the case is the therapist's power over the patient, but the nature of the power is unclear. Even if the Court's attempts to verbalize this power were lacking, it is evident that the Court found that Tayeb had power over the patient and that the sexual act was wrongful. Without finding the correct language, the Court resorted to the complainant's testimony:

> I just submitted to every word he said. I thought, well if ever I was in a situation like that, I would know what to do, but I was like I came under his authority, I came under his submission. I didn't fight, I just did what he said.
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> . . . .
>
> [H]is voice was very authoritative and strong, and I just came under what he had to say.
>
> . . . .
>
> Like if you say to a little child, 'do this', they do that, that is exactly how I was.[167]

Interestingly, the complainant's attempt to explain what happened to her reflects the very same embarrassment that informs the entire legal field: how to explain sexual submission in the absence of true desire on the one hand and the absence of overt coercion on the other hand. But while the

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Judicial Affairs, *Sexual Misconduct in the Practice of Medicine*, CJA Report A—I-90 Am. Med. Ass'n 1 (1990).

[166] CrimA 115/00 Morris Tayeb v. State of Israel 54(3) PD 289 [2000] (Isr.).

[167] The complainant, a tourist from Australia, gave her testimony in English and appeared as is in the Court's protocol. *Id.* at 315 (citations omitted).

complainant is disappointed by her own passivity ("I didn't fight"), her testimony implies something other than mere helplessness. It indicates, rather, a submission to authority ("I came under his authority"). I contend that the underlying assumption of the Court's judgment is that Tayeb possessed, as part of his professional status, a power to make patients follow his orders and that the complainant's sexual submission took place as part of this habituation. The Court concluded that the complainant's submission to her therapist did not reflect "free choice."[168] I argue that this conclusion reflects a fundamental perception of the complainant's submission as subservient compliance within an authority relation.

Attentive now to the insights drawn from social theory of authority, we can better understand the Court's intuition and why the Court considered the complainant's behavior compliance. The categorization of doctor–patient relations as authority relations makes sense to anyone who has been party to such relations and has experienced their hierarchical nature. Using Arendt's vocabulary, such relations involve a hierarchy between "the one who commands and the one who obeys."[169] Such a hierarchy was embedded in the relationship between Tayeb and his patient. It is the fundamental parameter underlying our "gut feeling" that Tayeb was more powerful than the complainant and that sex between the parties was wrongful.

2. Charisma of the Office

Hierarchy in itself, or the power embedded in it, is not what concerns us in *Tayeb*. Doctor–patient relationships are based precisely on the authority of the doctor, due to his or her professional knowledge and skills. This hierarchy is there because we intend it to be. Patients routinely rely on it when they follow a doctor's prescription or listen to his advice, "surrendering" their own judgment to that of a professional. The problem in *Tayeb* and similar situations is that the doctor *extended* the power that was originally granted for professional purposes to a strictly *non*-professional domain. This extension or overstepping is what the Court considered to be wrong and abusive toward the patient–complainant. I term this extended influence *charisma of the office*.[170]

Tayeb relied on the kind of influence that is typical of authority relations, which works neither through force nor through coercion. This type of influence makes people follow the guidance and direction of a

[168] *Id.* at 306.

[169] ARENDT, *supra* note 126, at 93.

[170] This expression is borrowed from Weber, although I attach a different meaning to it and employ it in a different context, to serve my own purpose in interpreting SAR offenses. For Weber's concept of *charisma of the office*, see WEBER, *supra* note 123, at 248.

person of authority with no external means of coercion. Normally, this type of domination is available to people by virtue of their professional status and is used—and is expected to be used—only within their professional domain and only for professional purposes. Tayeb, however, extended it to sex. The complainant's submission was due to a residue, extension, or halo of the credited influence of the authority that Tayeb possessed as a therapist. I chose the term *charisma* because of the subtle and hard-to-define nature of this influence. A "halo" or "residue" is much closer to the aura of charisma than it is to a physical power.

Yet *charisma* usually signifies a positive attribute—a gift that some have that allows them to lead and inspire others. Like personal *charisma*, *charisma of the office* leads people into action. Unlike personal *charisma*, however, *charisma of the office* is not due to a charming or extraordinary personality, but rather originates from a professional position of power. It is, in fact, an extension of the authority that was originally accorded as part of their professional position—as part of their office—that continues even outside the professional domain. It is thus a *charisma* deriving from an office. I argue that Tayeb was punished for using *charisma of the office* to induce sexual submission. This conception of wrongdoing underlies additional SAR cases and designates SAR as a legal category.

In sum, Tayeb extended and misused his power as an authority figure. Tayeb, like any therapist, had physical access and proximity to the complainant on the treatment bed; yet he did not use physical coercion. Tayeb, like other therapists, possessed knowledge and expertise vital to the complainant's wellbeing; however, he did not "bargain" his professional expertise for sexual favors. Moreover, he did not use fraud. His offense was not achieved through lies or misrepresentation—the complainant did not for one minute think that sex was part of the therapeutic session. Otherwise, she would not have been so deeply puzzled in her later testimony by her inability to resist Tayeb and would instead have attributed her submission to being mistaken or misinformed. Tayeb did not commit an offense according to any traditional category of violation of autonomy. What he did was use (or abuse) the *charisma of the office*—the extended power that he benefited from based upon his professional office, which he used wrongfully in an arena completely outside of his professional realm.

3. What Is Wrong with Sex in Authority Relations

What remains to be explained is why the dynamic of *Tayeb* is not exceptional and why it is endemic to modern society. This pervasive behavior has consequently given rise to SAR offenses and ultimately to the need for their justification. At first, this type of offense may seem alien to

modern bureaucracies. After all, the separation of spheres and the clear demarcation of bureaucratic authority is inherent to the logic of modern life. However, SAR offenses acknowledge the gap between the Weberian ideal of bureaucratic authority and its actualization in real life. Under the Weberian ideal, SAR abuse would be impossible: officeholders would know and accept the limits of their authority and subordinates would ascribe power to officeholders only within the realm of their competencies. In everyday life, people may find it difficult to act upon the artificial divide between the spheres. The outcome is the charismatic extension of power from the bureaucratic sphere to the personal sphere. This charismatic extension of power is the heart of the problem to which SAR regulation responds.

The separation between professional and personal is not always problematic. The two spheres can lead a parallel existence as long as one has professional relationships with some people and private relationships with others. The spheres peacefully coexist, each under its own separate logic. Fundamentally, this parallel existence is obliterated when two people, who adhere to a professional hierarchy within the sphere of office, add sex, an intimate activity *par excellence*, to their relations. As noted in *Falah*,[171] an Israeli Supreme Court decision dealing with sexual abuse by a psychologist, in these instances the distinction between professional treatment and personal lovemaking becomes blurred,[172] and the parties enter the "twilight zone" of therapy interwoven with romance.[173] Criminal law (through SAR offenses) assumes that whenever sex is initiated between two people who, concurrently with their sexual liaison, also have a professional association, it may lead to a particular type of exploitation resulting from the lack of distinction between professional and private life. The distinction between the spheres is not problematic when the parties are clearly in either one or the other: when the doctor gives medical advice, the sides are clearly in the sphere of office; when doctor and patient meet in the theater, they are clearly in the private sphere. The confusing cases are those in the middle, especially if sex is initiated by an authority figure in "the office," the physical space designated for professional activity.

On any strictly rational account, sexual matters are outside the scope of authority of teachers, workplace supervisors, or of therapists. On a purely informational level, subordinates know this well. Nevertheless, SAR offenses assume subordinates may find it difficult or even impossible to

[171] CrimA 7024/93 Eli Falah v. State of Israel 49(1) PD 2 [1995].
[172] *Id.* at 37.
[173] *Id.* at 24.

maintain the separation between the two spheres. Criminal law assumes that, in everyday life, subordinates find it hard to act upon the rational assumption that the person standing in front of them asking for sex is operating in his capacity as a private person and should be acknowledged as their equal rather than an authority figure. Instead, they tend to submit to such sexual requests or to feel as if they are not in a position to refuse them. At the moment of truth, they tend to perceive the authority figure as holistically powerful rather than merely professionally authorized, and certain officeholders on their part take advantage of this tendency and manipulate subordinates into having unwanted sex.

III. NORMATIVE IMPLICATIONS

SAR offenses acknowledge a distinct wrong: the charismatic overstepping of authority from the bureaucratic sphere into the intimate sphere. This conceptual analysis has clear normative implications on the regulation of SAR offenses. Other conceptualizations of the wrong—e.g., liberal and feminist—lead to different, mistaken, regulatory arrangements. The following Part proposes a new regulation, based on the conceptualization presented above. The following discussion is not a comprehensive model for a new regulation but rather an outline of the normative implications of this Article's analysis.

The most important normative consequence of the new conceptualization is recognizing that SAR should be regulated as a new type of abuse of authority under a regulatory criminal model and not as a sex offense or as a core criminal offense. Consequently, SAR offenses should be punished less severely than traditional sex offenses (which are core offenses). Secondly, the new conceptualization of SAR allows for a more precise definition of the elements of the offense: the *actus reus* of SAR should include abuse of authority and not nonconsent, and the legal inquiry should focus on the offender's misconduct and not on the subjective state of mind of the victim.

A. IMPLICATIONS FOR THE TYPE OF REGULATION

Thus far, criminalization of SAR was justified either through liberal or through feminist premises. This has had detrimental consequences on SAR regulation. Liberals equate SAR with a breach of sexual autonomy. Consequently, they consider SAR offenses as sex offenses and as "true crimes," i.e., analogous to other sex offenses such as rape and sexual assault.[174] In the event a breach was not proven, SAR offenders were

[174] Schulhofer, for example, supports the criminalization of sex within mental therapy

altogether exempted from criminal sanctions. The feminist account criminalizes SAR offenses as gender exploitation of power. Feminists, like liberals, do not distinguish between SAR and other sex offenses and consequently advocate for its severe punishment—on the same scale as other sex offenses.

While both liberals and feminists conceive of SAR under the general category of sex offenses and take authority relations as a subcategory, SAR is better placed under the general category of abuse of authority, with sexual relations as a subcategory. Criminal law has traditionally proscribed abuse of authority, but the prohibition was limited to the abuse of public authority.[175] SAR offenses engage a different type of authority—bureaucratic authority—and seek to prevent its charismatic abuse. Thus conceived, SAR should be perceived as an expansion of traditional abuse of authority offenses,[176] rather than an expansion of sexual assault offenses.

The most important consequence of the new conceptualization is recognizing that SAR offenses should be classified and treated as regulatory offenses and not as core criminal offenses. The distinction between core offenses and regulatory offenses is central to modern criminal law and criminal legal theory.[177] Core crimes carry severe criminal punishment (typically imprisonment) and require proof of subjective fault (*mens rea*) by the offender. Regulatory offenses are punishable by low levels of punishment (typically fines) and satisfied with proof of negligence or an even lower *mens rea*. Two main categories comprise core crimes: violation of individual autonomy (e.g., murder and theft) and crimes against public

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relationships as "sexual abuse"—a felony of the third degree under a comprehensive code for the criminalization of sex offenses. SCHULHOFER, *supra* note 49, at 283–84.

[175] For a useful introduction of abuse-of-office offenses in criminal law, including *official oppression*, *common law extortion*, *malfeasance*, *misfeasance*, and *nonfeasance in office*, see ROLLIN M. PERKINS, CRIMINAL LAW 483–92 (2d ed. 1969). For a thorough consideration of official extortion offenses under contemporary American law, see James Lindgren, *The Theory, History, and Practice of the Bribery–Extortion Distinction*, 141 U. PA. L. REV. 1695 (1993).

[176] In recent decades, there has been a growing tendency to criminalize nongovernmental corruption—for example, commercial bribery. For a classic piece on the criminalization of nongovernmental corruption, see Note, *Control of Nongovernmental Corruption by Criminal Legislation*, 108 U. PA. L. REV. 848 (1960). For a detailed account of the analogy between SAR offenses and traditional abuse-of-office offenses in criminal law, see Schneebaum, *supra* note 18, at 119–37.

[177] For a thorough consideration of the distinction between crimes and regulatory offenses, see ALAN BRUDNER, PUNISHMENT AND FREEDOM 169–73 (2009). For a classic piece depicting the emergence of regulatory offenses since the nineteenth century, see Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933). In particular, the article associates the introduction of regulatory offenses with modernization (most notably technological development and urbanization).

legal authority and order (e.g., treason and bribery).[178] SAR falls in neither of the two categories, as SAR offenses are neither concerned with personal autonomy nor public legal authority, but rather with bureaucratic authority. Nevertheless, SAR is a legal wrong that should be criminalized, albeit to a lesser extent.

Regulatory offenses address wrongdoings against the general welfare and are a justified instrument to prevent harm to society as a whole, as well as to unspecified groups of individuals.[179] Legally, these offenses do not focus on particular victims and in fact might not have a victim at all. These offenses protect less essential public interests and consequently are not punished with the same severity as a core offense. The best analogies to SAR are other offenses that regulate public or semipublic spaces (such as the workplace, the environment, industries, and others). Thus conceived, SAR regulates the bureaucratic environment and not the rights of individual victims. It seeks to prevent harm to individuals but does not vindicate the violation of individual autonomy. It only protects individuals as long as they are in a bureaucratic environment and only from the abuse of bureaucratic authority. It also attempts to enable the coexistence of personal and professional relationships in a bureaucratic environment. Under this account, SAR is not concerned with the general protection of socially disadvantaged groups from discrimination, but rather with the prevention of abuse of authority. SAR, moreover, is distinguishable from professional ethics to the extent that the latter protects the integrity of the profession and office, independent of any negative effect on individuals. The aim of SAR offenses is neither to protect the subordinate as a victim nor the professional standard of the officeholder, but rather to protect the space, the environment, and the relationship between the two.

B. IMPLICATIONS FOR THE DOCTRINE

In addition to reconsidering the severity of SAR crimes and punishment, several other normative and doctrinal consequences follow from its new conceptualization. First, the central element of SAR is the

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[178] *See generally* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 29 (6th ed. 2009) (distinguishing between crimes against individual autonomy and core crimes against the community as a whole).

[179] Brudner thus observes that regulatory offenses punish for acts that do not involve a domination of the free will of individual victims. ALAN BRUDNER, THE UNITY OF THE COMMON LAW 215 (1995) ("[O]ne may incur penalties for acts that do not dominate the free will of others, either because (as in the case of a breach of a safety regulation) they involve no transaction with another person or because (as in the case of trafficking in narcotics) the transaction is consensual.").

abuse of authority and not the lack of consent. Contrary to liberal accounts of SAR offenses, which require proof of the victim's nonconsent,[180] the proposed conceptualization assumes victim consent and requires proof of the offender's abuse of authority.

Secondly, the presence of authority alone is not enough—there needs to be an *abuse* of authority. The mere coexistence of sexual relations and authority relations is insufficient to warrant criminal punishment. What we are looking for, instead, is to identify and proscribe sexual acts performed under the influence of official power and thus in abuse thereof. It is possible to think of sexual contact between an officeholder and a subordinate, which is not procured through the undue diversion of official power from the professional to the private sphere. For example, a dentist who meets a patient at a dinner party thrown by a mutual friend and asks her for a date, which is later followed by a sexual affair, surely has not committed a criminal offense. The distinction between abusive and nonabusive sex in these contexts is not easy. Naturally, some cases are more difficult to decide than others, but there are clear cases on each end of the spectrum. Abuse of authority is, in any case, the guiding concept to distinguish among them and to define the limits of criminality. It follows that existing SAR provisions that are phrased as per se prohibitions—i.e., that categorically proscribe all sex in authority relations without requiring an additional element of abuse—may be acknowledged as instances of overcriminalization.

Following these principles, a new and more precise legal definition of the offense can be derived from the new conceptualization. To recall, the offense was defined as abuse of authority, and specifically, the abuse of the charismatic authority of office. This definition entails the following doctrinal elements:

Authority: The offender holds bureaucratic authority. This definition excludes other forms of authority: charismatic authority (e.g., a rock star) as well as state authority (e.g., a police officer). It, however, includes

[180] In their attempt to interpret SAR provisions, courts have read an element of nonconsent into the offense even if the official definition did not include nonconsent. *See, e.g.*, Scadden v. State, 732 P.2d 1036, 1040–41 (Wyo. 1987) ("In the exercise of its governmental police power, the legislature has thrown out the protecting arm of the law to guard those persons who are vulnerable to the powers and influence of one in a position of authority. This legislative act permits the State to show that the victim did not consent, by demonstrating that the perpetrator occupied a position of authority over the victim and used that position to impose his sexual will."). I argue that this interpretation is misguided and that SAR offenses should not include an element of sexual nonconsent, but rather should focus on abuse of authority.

professional bureaucrats (e.g., a post office manager) and authority figures in other institutional contexts (e.g., a member of the clergy).[181]

Authority Relations: The offender is an officeholder who has effective authority over the victim within the sphere of bureaucratic competency (employer over an employee; doctor over a patient).

Abuse of Authority: The offender uses his authority to achieve an objective that does not belong to the bureaucratic sphere. The paradigmatic case of abuse of authority is charismatic abuse of bureaucratic authority. Extortionate threats[182] and false claims by an officeholder should be covered by the offense as clear cases of abuse of authority. They are, however, less typical. In addition, extortionate and fraudulent cases constitute sexual nonconsent and may be covered by sex offense provisions, to the extent that such provisions cover sexual extortion and fraudulent sex. To conclude, extortionate threats and false claims are the only SAR cases that may be criminalized both as sex offenses and as abuse of bureaucratic authority.

Abuse of Charisma of the Office: An essential component of the offense is proving that an authority overstepped the boundaries between the bureaucratic and the intimate spheres. A sexual relationship may be one paradigm but does not exhaust the range of proscribed conduct. Nonsexual intimacy that manipulates the *charisma of office* may also constitute an offense. In adjudicating SAR cases, courts need to assess the extent to which the line between the personal and professional sphere is blurred. The following elements are not conclusive in determining abuse, but considering them would be helpful in deciding the case:

(1) Where did the sexual encounter take place? An officeholder who initiates sexual contact in the physical space of bureaucratic authority—the office, the university, the clinic—effectively plays on the blurred line between the bureaucratic sphere and the personal sphere. Hence, a sexual affair taking place in the office or clinic (or initiated in these locations) is more suspect than a sexual encounter taking place in a nonoffice location, such as a bar, after working hours.

[181] Regulators of SAR offenses have come up with more elaborate and, for the most part, satisfying demarcations of bureaucratic authority. *See, e.g.*, IDAHO CODE ANN. § 18-919(a) (2004).

[182] An interesting question arises as to offers as opposed to threats in this context. While traditional criminal law standards distinguish between threats and offers and between coercion and bargain, an abuse-of-authority model may support the criminalization of offers by bureaucratic authority as well. The present Article focuses on charismatic abuse of bureaucratic authority, where neither threats nor offers are present. Thus, a full development of the argument regarding coercive offers is outside this Article's scope.

(2) Who initiated the sexual act? Since the offense seeks to prevent the overstepping of bureaucratic authority, we are mostly concerned with cases where the authority figure was the initiating party.

(3) How active was the authority figure in transferring his professional power to the personal sphere? Aggressive or persistent sexual requirements presented by an officeholder are more suspect than a single offer.[183]

CONCLUSION

More and more jurisdictions have criminalized or are in the process of adopting legislation prohibiting SAR. Feminists and liberals alike support such prohibitions and share a strong sense that SAR is often wrongful and abusive. But while the sense of moral wrong is apparent, its legal foundations are uncertain. This Article suggests a new theory and a new justification for SAR criminalization, which carries both conceptual and normative implications.

As this Article shows, threats are not the ground for the criminalization of SAR offenses. Instead, new statutory definitions use "abuse of authority" (rather than extortion); courts employ a "totality of the circumstances" test to adjudicate SAR cases; and legal scholarship acknowledges the shortcomings of extortion theory for SAR offenses.

Feminists have been correct to identify the limitations of standard liberal theory with respect to SAR offenses. The theory of authority relations suggested here, while based on different premises, shares an important point with feminist thought and methodology: it looks beyond the liberal portrayal of individuals as autonomous actors and incorporates social theory in order to account for the social structure in which SAR offenses take place. Unlike feminism, however, the suggested theory focuses on authority rather than on male power and develops a theory of abuse of authority, rather than power domination.

The concept of abuse of authority is not foreign to criminal law. However, the traditional criminalization of authority has been limited in the common law tradition to governmental authority and the misconduct of public officials. SAR offenses apply to a different type of authority—bureaucratic authority—that is present in private sphere institutions and

[183] Buchhandler-Raphael similarly stresses the persistence of sexual advances by an authority figure as an important indication for criminal abuse. *See* Buchhandler-Raphael, *supra* note 53, at 484. Buchhandler-Raphael, however, considers this parameter as part of an abuse-of-power model, which includes economic and professional power, rather than an abuse-of-authority model. Buchhandler-Raphael, *supra* note 112, at 133.

relationships whenever people are granted power by virtue of their profession or place in the hierarchy of an organization.

SAR offenses, as we have seen, identify a new potential for abuse that emerges in bureaucratic arenas. While bureaucratic authority is supposed to be demarcated and apply to professional matters only, authority figures in effect are able to extend their *charisma of office* to nonprofessional matters. SAR statutes are particularly troubled by the overstepping of power from the bureaucratic sphere to the personal sphere and criminalize sex in authority relations as a novel type of abuse of authority.

Understood in this way, SAR offenses should not be construed as introducing a new conception of legal autonomy. These offenses do not modify the legal standard of sexual nonconsent, but rather apply to consensual sexual relations that are nevertheless wrongful because the offender misuses his position of bureaucratic authority. Criminal law does not assume that sex is—or should be—free from any type of social power or *charisma*, hence personal *charisma* (e.g., the *charisma* of a rock star soliciting a woman into sexual involvement) is not covered by SAR offenses. SAR offenses are concerned particularly with the coexistence of personal and professional relationships and the overstepping of bureaucratic *charisma* into the sphere of intimacy and sex.

Modern society faces a new kind of challenge in the age of bureaucracy. While we strive for freedom, our ambition cannot be and should not be to eliminate bureaucratic domination. While we strive for equality in our personal lives, we require hierarchy in our professional lives and in our institutions. As Weber explains, bureaucracy offers great advantages in terms of efficiency and productivity and is indispensable to modern life. This is not to assume that these boundaries are "natural" or even easily maintainable. It is precisely their ambiguous nature and fluctuating borders that give rise to SAR offenses. Our challenge is to limit bureaucratic rule and to prevent the overstepping of boundaries that might turn bureaucratic domination into an unacceptable status relationship. This Article suggests that SAR offenses are concerned with an instance of this challenge. It reflects an understanding of the problem we face not as a problem of coercion (as liberals would have it), but of abuse. Not as a problem of eliminating power relations (as some feminists would have it), but rather one of restraining power and keeping it within limits.