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Rape Myths and Gender Stereotypes in Croatian Rape Laws and Judicial Practice

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Abstract In this paper I examine the presence of rape myths and gender stereotypes, and the norms of sexuality they reflect and reinforce, in Croatian rape laws, as exemplified by the recent practice of the Zagreb County Court. I begin with a general discussion of the gendered myths and stereotypes that have shaped the content and application of the criminal law of rape everywhere. I then briefly introduce the definition of rape under the 1997 Croatian Criminal Code which was in force at the time of my research, after which I proceed to the critical analysis and the assessment of the Zagreb County Court practice. Next, I turn to the changes in the new Criminal Code to see how they address the identified problems. I offer a model of an affirmative consent standard, based on a communicative model of sexuality, which values reciprocal responsibility, communication and mutuality of sexual desire. I argue that this standard has greater potential to challenge rape myths and gender stereotypes and to promote sexual freedom and gender equality.

Keywords Croatian rape laws and judicial practice · Gender stereotypes · Rape myths · Norms of sexual behaviour · Force-based models · Affirmative consent standard

Introduction

Rape myths and gender stereotypes have long been a focus of feminist research on rape law and practice.[1] They have not only shaped the law of rape but have also

[1] There is no consistent and unified definition of rape myths (Edwards et al. 2011). In this article, I use the term to desribe the dominant (generally false) ideas about what real rape and real vicitms look like, while I use the term gender stereotype to refer to assumptions about sexual behaviour of women.

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become entrenched by the law itself (Easton 2000, 167). While the issue of how gender stereotypes and rape myths impact on rape legislation and judicial practice has been widely discussed in comparative legal literature, there is a lack of feminist scholarship and empirical legal research on rape law in Croatia. In this paper I address this gap in the literature by analysing Croatian rape law and the judicial practice of the biggest County Court during the period of 1 January 2008 to 30 June 2012, with the aim of identifying the gender stereotypes, rape myths and norms of sexuality which they utilise and reinforce.

I begin with a general discussion of the operation of gendered myths and stereotypes that have shaped the content and application of the criminal law of rape everywhere. I then briefly introduce the definition of rape under the 1997 Croatian Criminal Code which was in force at the time of my research, after which I proceed to the analysis and the assessment of Zagreb County Court practice, highlighting the inadequacies of judicial thinking. Next, I turn to the changes in the new Criminal Code to see how they address the identified problems. Finally, I offer my own suggestions as to what still needs to be done to create a body of law that would better reflect the complexities of gender relations and women's sexual autonomy, and which incorporates the insights of the communicative model of sexuality.

Gender Stereotypes, Rape Myths and Norms of Possessive Sexuality

The law of rape has historically been based on stereotypical assumptions that women agree to sex whatever the circumstances because, as the myth goes, they want to be sexually possessed by men, and then they lie about being raped when the sex goes bad, for which they also bear the responsibility. The assumption is that women, like men, want to engage in penetrative sex, even if in a different manner—as seduced rather that seducer (Naffine 1994, 27). However, by engaging in sex for other than procreative purposes, women violate the socially defined respectable 'feminine mode of sexuality' and are presumed to 'cry rape' to justify their actions or for revenge (Edwards et al. 2011, 767–768). The law thus operates to confirm both female archetypes of the Whore and Madonna.

These stereotypical assumptions about women's sexual behaviour have helped construct the myth of a 'real rape' and a 'real rape victim' against which rape complainants are judged. 'Real rape' has been defined as a violent attack by a stranger in an outdoor setting on an unsuspecting victim which she physically resists (Estrich 1987; Temkin and Krahé 2008, 32), while a 'real rape victim' has been constructed as a 'chaste and responsible woman who … appreciates the *risk* of rape and takes all sensible and logical precautions to avoid or reduce the opportunity for such an attack' (Larcombe 2005, 62). She also behaves in a certain manner: she physically resists, cries, calls for help, is visibly emotionally upset and immediately reports the crime.

However, women's lived experiences of sexual violence often do not fit these scenarios. Women are most commonly raped by someone they know, very often in their homes or other places known to them, and they are often too frightened or

overpowered to fight back (Temkin and Krahé 2008, 22–23; Lees 2002).[2] Also, many victims do not show visible signs of emotional disturbance after the event; indeed 'emotional numbing' is one of the defining features of the post-traumatic stress disorder frequently shown by rape victims/survivors[3] (Foa and Rothbaum 1998). Despite this empirical data, victims who do not conform to these normative expectations are seen as untrustworthy or are blamed in accordance with the myth that women 'want' rape (Stewart et al. 1996, 766–767; Temkin and Krahé 2008, 2).

These stereotypes and myths are based on, and simultaneously support, the paradigm of possessive heterosexuality, according to which men are those who initiate sex, whose sexual pleasure is in possessing women, while women are those who passively accept sex, whose sexual pleasure is in being possessed by men (Naffine 1994, 13). The paradigm in turn reflects and perpetuates unequal gender relations, based on hierarchical subjectivities ascribed to women and men: while men are defined as autonomous rational agents who do not lose their autonomy in sexual encounters, women are defined through their 'offerings' to men, and their autonomy disappears in sexual encounters (ibid).

The norm of possessive sexuality is most visible in definitions of rape centred on force, where a sexual act without force, even if coerced, is presumed to be consented to by the victim/survivor. Many common law jurisdictions have thus moved to a consent-based model of rape law, the model that is also supported by international human rights law (Radačić 2008). This approach is more supportive of a model of communicative sexuality, based on free agreement between the participants, rather than male proposition (Munro 2008), although there have been problems with its application in practice, as well.

Croatian rape law is still predominantly based on a norm of possessive heterosexuality, despite some movement towards adopting a communicative model in the recent reforms of the Criminal Code. The norm of possessive heterosexuality is clearly visible in the 1997 Criminal Code, as will be shown in the next section.

The Definition of Rape in the 1997 Croatian Criminal Code

The 1997 Criminal Code[4] represents the first reform of criminal law since Croatian independence.[5] In the process of drafting this Code, little attention was given to the

[2] Data examined in the WHO study (2002) suggest that in some countries nearly one in four women may experience sexual violence by an intimate partner, and up to one-third of adolescent girls report their first sexual experience as being forced.

[3] Neither of these words (nor even the combination of both) expresses all the aspects of the experience of being raped. The use of the word victim stresses the fact of victimisation and the responsibility of the perpetrator for such violation. The term survivor emphasises the individual's resistance, her or his ability to take action in the face of immense obstacles, to survive (and thrive) despite the trauma. For the sake of simplicity, I use the term victim, except when I analyse the case-law where I use the term complainant.

[4] The Code was adopted on 21 October 1997 and entered into force on 1 January 1998. It was amended 12 times. Official Gazette NN 110/97, 27/98, 50/00, 129/00, 51/01, 113/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11.

[5] Before independence in 1991, and since 1945, Croatia was one of the six republics of the Socialist Federative Republic of Yugoslavia (SFRY). Since 1974 when the Constitution of SFRY gave the

reform of sexual offences, despite the wide-spread occurrence of sexual violence in the conflict of the former Yugoslavia. The aim of the reform of sexual offences was to modernise this body of law in order to reflect social attitudes to sexual violence (Turković 2007). However the problematic nature of those social attitudes and the need to transform them was not discussed, and there was no comprehensive research or discussion of possible legal solutions. The only perceived problem with the definition of rape was the gender specificity of the offence (and the lack of criminal responsibility for rape in marriage), while the problematic nature of defining rape by force was not noted.[6]

The offence was included under Section XIV, entitled 'Criminal Offences against Sexual Freedoms and Sexual Morals'. Together with the offences of sexual intercourse with a helpless person, coerced sexual intercourse, sexual intercourse by abuse of position, and indecent acts, it fell under the sub-category of non-consensual sexual crimes (Turković 2007, 146). However, the defining element of these offences was not whether the act was wanted and consented to but force and coercion, while not even all forms of coercive sex were included.[7] This focus on coercion rather than sexual freedom, together with the specific reference to sexual morals in the title of the section, points clearly to the main feature of the Code: protection of women's sexual autonomy only to the extent that it is compliant with the dominant sexual morality of possessive heterosexuality.

The definition of rape adopted in the Code was in line with this approach. The offence was committed when a person compelled another to have sexual intercourse, or an equivalent sexual act, by the use of force or threat of immediate attack upon his/her life or limb, or the life or limb of a person close to him/her (Article 188). The existence of marriage became irrelevant and the acts were widened so that the offence became gender neutral: both a perpetrator and a victim could be female or male. However, in a hetero-normative manner, the differentiation was made between two categories of prohibited sexual acts—penile penetration of the vagina (the meaning of sexual intercourse in theory and judicial practice) and equivalent sexual acts. The acts treated as the acts equivalent to sexual intercourse were, according to judicial practice, all forms of sexual penetration (penetration of a vagina of a victim by body parts of a perpetrator or an object, penetration of anus or mouth of a victim by a penis of a perpetrator, penetration of a mouth of a perpetrator by a penis of a victim), but there was no consensus regarding acts which do not involve penetration. It was thus unclear when the non-penetrative sexual acts would be considered as equivalent to sexual intercourse and hence constituting acts of rape, and when as constituting acts of indecent assault, a

Footnote 5 continued
republics more autonomy, the general part of criminal law and certain crimes, such as crimes against the state or military forces, were under the competence of the federal government, while the republics gained competence to define most other crimes, including that of rape.

[6] Rape was defined as compelling a female person, to whom you are not married, to sexual intercourse by force or a threat of force to life or a limb. Article 79 of the Criminal Code of the Socialist Republic of Croatia, Official Gazette 25/77, 50/78, 25/84, 52/87, 43/89, 8/90, 9/91, 33/92, 39/92, 77/92, 91/92.

[7] Sex induced through deceit, fear or fraud was not criminalised.

subsidiary category of sexual offences, with very different symbolic meaning and much lower penalties.[8]

Force is a means for overcoming the victim's resistance, aimed at the realisation of sexual intercourse or an act equivalent to it (Turković 2007, 152). It has to be targeted towards a person, rather than objects, and there has to be an immediate causal link between the force and intercourse, both of which requirements are restrictive. The threat of force has to be 'serious': its content and the circumstances in which it is expressed must objectively be perceived as threatening. It has to be targeted at the life or body of the victim, or the life or body of a person close to him/her. The threat of some other harm, for example false imprisonment, destroying property, or the revealing of some information, does not suffice. The threat has to be simultaneous with, or immediately precede, the attack; if there is a passage of time, even if only a couple of hours, between the threat and the sexual intercourse, there will be no rape (Turković 2007, 152).[9] Hence threat, like force, is defined in a restrictive manner.

While lack of consent is not an element of the offence, it is discussed in practice. Consent is understood to exclude the criminality of the act.[10] Lack of physical resistance is usually taken as a sign of consent, and resistance is also relevant when assessing force, though there are different views in theory and practice as to whether resistance is a necessary element of rape and what type of resistance is required (Turković 2007, 153).

Rape was an offence of general intent under the previous law. The perpetrator must have been aware that he was using or threatening force, as well as of the lack of consent on the part of the victim (direct intent), or s/he must have been aware that the victim might not be consenting (indirect intent).[11] Any mistake about whether the victim was consenting—reasonable or unreasonable—precluded a finding of the required intent, as unreasonable mistakes are punishable only in connection with crimes which are subject to prosecution on the basis of criminal negligence. Hence, it was the defendant's perspective that defined what was considered rape; he was the subject of knowledge in line with the norm of possessive heterosexuality.

The prescribed penalty for rape was 3–10 years, while aggravated forms (due to the manner of commission, the characteristics of a victim or the consequences of the act) carried 3–15 or 5–15 years imprisonment. The sentence for an attempted rape (when a person starts using force or threats with the purpose of compelling another

[8] Indecent acts are committed when no other non-consensual sexual crime (mentioned above) is committed or attempted. They are defined in practice as sexual acts short of intercourse or equivalent acts committed against the body of a person in order to satisfy sexual lust. The penalty prescribed was imprisonment from 3 months to 3 years, while the penalty for rape was from 3 years to 10 years.

[9] Again, this could have constituted coercion to sexual intercourse as there was no requirement of immediacy for this offence.

[10] Some commentators take consent as a circumstance excluding criminality (Kurtović-Mišić i Garačić 2010), and some as one negating the core of the offence (Novoselec 2007).

[11] Intent is defined in the general part of the Code by awareness (of the offence) and volition (to commit it). There is some confusion in theory and judicial practice about what a perpetrator of rape should be aware of. The definition stated above is the most common, even though the requirement of awareness of force seems to be superfluous, while the requirement of the awareness of the lack of consent (or of a such possibility) introduced consent as an element of rape, which was not included in the definition of rape.

to engage in sexual intercourse) could fall below the prescribed minimum. The sentencing judge could generally reduce the penalty below the legal minimum if there were 'particularly mitigating circumstances' present, though no direction was provided in the old law as to what could constitute such circumstances.[12]

This brief description shows that the definition of rape under 1997 Code was based on a 'real rape' myth, in accordance with the norm of possessive sexuality. The offence only proscribed the most extreme forms of forced or coercive sex, where actual force or a threat of was used; other less obvious forms of coercive sexuality and violations of sexual freedom such as sex induced through fear or submission, were not included in the definition of rape. Phallo-centric sexuality, based on the masculine experience and meaning of sexuality as the pleasure of phallus (Smart 1995, 27), rather than women's (as well as men's) sexual freedom and pleasure, is the object of the protection.

The Definition of Rape in the Zagreb County Court

There were 29 cases in my sample of rape and attempted rape concluded by the Zagreb County Court[13] in the period from 1 January 2008 to 1 June 2012. All the perpetrators were male and all the victims female, and in most of the cases the perpetrators and victims knew each other (24 cases or 83 %, out of which 10 or 34 % of all cases concerned intimate partners). Only two cases (6 %) fitted the 'real rape scenario' of a violent attack by a complete stranger in a public space. Six cases ended with an acquittal and in three cases the prosecution was abandoned.

The cases highlight that there is no consistent approach to defining rape and interpreting its central elements by Zagreb County Court judges. In some cases rape was defined as a cruel and careless act of violence which occurs exactly because the victim resists, [and] defends herself in all possible ways.[14] According to this approach, non-consensual sex where there is no obvious physical violence present, and where the victim does not express non-consent through active resistance, would not be defined as rape. Such an approach is dominant in the cases studied and is obviously based on the myth that real rape is a violent attack by a stranger on a victim who resists to her utmost.

However, there is also a minority view of rape as an act 'that violates the victims' sexual freedom and their right to make decisions in a sexual sphere, whereby the

[12] In one of the cases in my sample (K 189/08) jealously of the defendant was held to constitute such a circumstance. Due to lack of space I do not discuss the penalties in this paper.

[13] Rape is tried in the first instance by in the County Court and on appeal by the Supreme Court, while there is also a possibility for the defendant to submit a constitutional complaint. Zagreb County Court is the biggest county court in the country, Zagreb being the capital (and the most modern) city. Croatia is a continental law country, which does not have a jury system, though there are two lay judges together with a professional judge in the chambers trying rape.

[14] K 79/08, the judgment of 19 February 2009, p. 4. All quotes taken from the Croatian County Court decisions are my translations. The expressions are often unclear and incorrect grammatically in Croatian, but I have not edited them.

perpetrator exercises supremacy and power over victims.'[15] This approach supports a wider definition of rape which would also include non-consensual sexual intercourse where no physical force is used and where the victim does not physically resist because, for example, she is afraid or dissociated from the event. Such a conceptualisation is more supportive of a communicative model of sexuality which supports sexual relations that are wanted by both parties.

As Zagreb County Court judges do not take a consistent approach to the offence of rape, there is also no common understanding of force/threat of force or the requirements of intent. Resistance and consent are examined in all the cases, but it is often not clear when they will be relevant for assessing the force used and when for intent, nor how these concepts are to be defined. For example, there is a view in judicial practice that there is no intent where the perpetrator thinks that the resistance is not serious.[16] However, there was no acquittal based exclusively on this account in the sample of analysed cases. Although it was frequently noted that the perpetrator could not have understood resistance as signalling the lack of consent, resistance was more often relevant in the assessment of force/threats used and whether the victim consented.

In the following section I will discuss how force, intent, consent and resistance have been defined, questioning how these interpretations reflect and construct rape mythologies and gender stereotypes. I will not only analyse the cases where these concepts were given restrictive meaning in line with the norm of possessive heterosexuality, but also those where the rape mythology has been resisted, and a more comprehensive understandings of force, consent and resistance given.

A Narrow Understanding of Force: The Requirements of Utmost Resistance and Immediacy of Force

Case K 183/08 concerning attempted rape is a good example of the judicial requirement that the victim must show the utmost resistance, and is demonstrative of the Court's narrow understanding of force. The complainant accepted an offer to be taken home by the defendant and his friends, who were guests in the bar at which she worked. However, instead she was driven for hours in the fields, during which time the defendant sexually assaulted her by touching her vagina and penetrating it with his fingers (which at the time of commission in 1995 was not an act of rape but an 'indecent act'). She tried to escape from the car but was persuaded back in when the defendant told her that a dead body had been found in the field. When they finally stopped the car at the parking lot where the defendant's van had been parked, he made her to come with him to the van and forced her to kiss him, holding her wrists. She, however, managed to escape by kicking open the door of the van.

The Court, assessing her behaviour while they were still in the car, found that 'she did not persist in showing serious and continuous resistance while she was not in such fear due to which she would not be able to resist.'[17] It did not accept the

[15] K 184/10, K 94/09. The same judge presided in both cases.

[16] K 59/08, p. 8.

[17] K 59/08, p. 6.

complainant's explanation that she had thought that it was better not to violently resist the defendant's sexual advances in order to avoid further violence and that she had only decided to violently resist once he had taken her into the van, when she realised that her non-violent approach had not worked. The fact that she tried to escape from the car, was also irrelevant. When she eventually did escape, this was also used against her, as the Court held that this proved that the force was not serious enough: holding the complainant's wrists did not constitute force 'of such an intensity to prevent resistance… as [she] had pushed away the suspect, a man, who was physically stronger, kicked the door of the van and run away.'[18] The fact that she had been subjected to what the Supreme Court later called 'sexual and psychological ill-treatment'[19] in the car was obviously irrelevant in assessing the seriousness of force. The Court thus legitimised the use of a certain amount of force in persuading women into sexual intercourse.

On appeal, the Supreme Court found that holding the complainant in the van constituted relevant force. However, it held that there was no intent to commit rape as 'during the events in the car and then in the van the suspect did not clearly, either by words or conclusive deeds, manifest his intent to commit sexual intercourse.'[20] The Court pointed out that there were no indicia of intent, such as undressing the complainant or verbally requesting sexual intercourse; 'it was only the complainant's perception which was not sufficient.'[21] Thus both courts dismissed the complaint's perspective: the County Court found her verbal expression of not wanting sex insufficient, while for the Supreme Court her perception that the defendant wanted to rape her was insufficient, as it required a verbal expression from the defendant that he had wanted sex. The reasoning hence seems to be that if a woman really does not want sex, she would exert the utmost and continuous physical resistance (but if she does show resistance then it should be treated with suspicion as it might prove that force was not sufficiently intense), and if a man wants it, he would explicitly say so. This imposes different standards of sexuality for women and men, whereby men are encouraged to speak and seek pleasure, while women are silenced.

The silencing of women is also seen in the case K 195/09, which exemplifies the dominant view that submission is a sufficient form of consent to sexual intercourse. The defendant, who was married to the complainant and had children with her, but was separated from her, came into the flat they used to share to talk to her. After she asked him to leave, he threatened that he would throw her out of the window if she did not have sex with him. He punched and slapped her, causing light bodily injury, before having sexual intercourse with her. The complainant pushed him and said 'don't, don't.'

The Court held that the complainant's actions could not be taken as either serious or continuous resistance and that the defendant could not have understood them as such, questioning why the complainant had not physically resisted in a more

[18] Ibid, p. 7.

[19] Judgment of 23 May 2010, Kž 437/09-5.

[20] Ibid, p. 2.

[21] Ibid.

aggressive manner. Referring to the complainant's statement that she had been afraid and thus had not resisted more seriously, the Court held that the 'fear was not of such intensity to block any resistance,'[22] stressing the fact that they knew each other well, while dismissing two previous events of violence as not constituting a pattern of abuse. Finally, a great emphasis was placed on the complainant's statement given during her questioning that she had eventually submitted to the intercourse, and had given up on resistance. The Court held that this constituted subsequent consent which negated criminal responsibility.

By accepting subsequent submission as consent, the Court drew on a presumption of women's willingness to be sexually possessed, especially in the context of marital (intimate) relationships (Larcombe 2005), even when these are violent. In support of its finding the Court referred to the fact that the complainant and the defendant had a coffee after the event and that the complainant herself did not describe the event as rape (but non-consensual sex), which in its view was inconsistent with a behaviour of 'real victims of rape.' The Court, however, failed to note how a victim's perception is often constrained by the 'real rape' myths as well (White Stewart et al. 1996) and it demonstrated a lack of understanding of the importance for many victims of normalising situations, especially where the perpetrator is their husband and the father of their children.

On appeal, the Supreme Court focused on a lack of sufficient resistance. It held that the defendant could not have understood the victim's actions as serious resistance, which in its view, confusingly, negated force rather than intent.[23] It thusly portrayed men as unable to understand 'no' unless expressed through force, which affirms the dominant archetype of macho masculinity. The Court further held that the complaint's eventual submission constituted consent, even if she really did not want the intercourse. It hence affirmed the premise that there is nothing wrong with being sexually possessed against your will, which reinforces a dominant norm of possessive sexuality.

This assumption was also visible in case K 229/08, which exemplifies the restrictive interpretation of force through the requirement of its immediacy. The complainant maintained that the sexual intercourse with her former partner was not consensual, that she tried to push him away and verbally objected to the intercourse. She confirmed that the defendant was not physically violent immediately before the intercourse, but 'only' spread her legs. However, a few hours before the intercourse, he had come to a bar in which she worked, insulted her, slapped her and compelled her to enter his car. After spending a couple of hours in another bar with him, the complainant agreed to sleep over at the defendant's place, as there was no public transport available. Even though she could not clearly qualify the act as rape, saying that she was 'raped in one way, but had not resisted,' she persisted in her claims that the intercourse had not been voluntary.

The Court first explained that force must be of such an intensity to *completely* prevent a person from freely deciding, obviously under the influence of a 'real rape' mythology.[24] Accepting that the complainant had pushed the defendant thus

[22] Judgment of 8 December 2009, p. 6.

[23] Judgment of 20 April 2010, Kž 150/10-03.

[24] Judgment of 20 May 2009, p. 3. My emphasis.

manifesting resistance, it held that the she failed to persist in her resistance and eventually submitted to intercourse. Starting from the assumptions how the 'real victims' behave, it also found it relevant that the complainant did not scream even though his parents were in the house, call the police or run away, not accepting her confusion and embarrassment as relevant explanations. Saturating her clothes and behaviour with sexual meaning the Court emphasised that she herself took off her pantyhose and concluded that no force or threat of force had been applied.

The Supreme Court agreed with the complainant that the intercourse had been against 'her real will,' but nevertheless held that no force or threat of force had been applied which compelled her to sexual intercourse.[25] Referring to the incidents of violence in the bar, the Court held that this could not be linked directly to the sexual intercourse due to the passage of time, as after this earlier episode the complainant had had many opportunities to prevent what had happened to her.

As in the case K 159/09 discussed above, the Court clearly stated that the law's task is not to protect the true will of the victim and her sexual autonomy, but only the 'real rape' victims of violent sexual acts, which the complainant in this case was obviously not considered to be—not only had she not been attacked by a stranger but an (ex)intimate partner; she also removed her pantyhose and failed to call for help. Further, the Court held she was responsible for what happened to her, as she had many opportunities to prevent what has happened, thus affirming the myth that women precipitate rape (Stewart et al. 1996; Temkin and Krahé 2008). The effects of the previous violence and of the complex nature of her relationship with the perpetrator on her ability to physical resist were not held to be relevant due to a narrow understanding of force.

A More Comprehensive Understanding of Force: Acting Against the Victim's Will

There were only two cases where verbal resistance was held to be sufficient and where force was defined in a more flexible manner, in a way that respected the value of sexual freedom. Both cases were decided by the same judge. In K 184/10, the complainant, who was a friend of the defendant, came to his house to socialise with him. During the course of the evening, he asked her if she wanted to have sex, an offer which she rejected. Sometime thereafter, he pushed her onto the sofa, undressed her and holding her wrists had sex with her. She claimed she resisted but could not remember what exact words or actions she used or other details of the event—how exactly he held her hands or undressed her, as she had been under the influence of alcohol and tired.

The Court, emphasising that rape was an offence against sexual freedom, held that the force used had been intensive enough and that the complainant's resistance had been sufficient: 'consumption of alcohol and tiredness in addition to the fact that she was physically weaker reduced her ability to physically resist more actively … but it is clear that she had verbalised that she did not want sexual intercourse

[25] Judgment of 11 May 2010, Kž 703/09-3, p. 2.

before the act.'[26] The fact that she had on previous occasions kissed the defendant, had come to his apartment and had been drinking with him and could not remember the details of the events, had not called for help (even though the defendant's parents had been in the house) and did not immediately report the offence, were *not* read as signs of her responsibility for rape or lack of credibility, as was the case when the defendant failed to call for help in the case K 229/08. According to the Court, the complainant's sexual freedom, which she exercised by saying 'no,' should have been respected regardless of her behaviour. This was confirmed by the Supreme Court which refused to accept the defence's arguments that the complainant had contributed to the rape by drinking with him, thus challenging victim precipitation myth.[27]

In the second case, K 94/08, concerning attempted rape, the complainant had been socialising with her friends in a bar. She was flirting with a waiter and, at some point in the night, he kissed her. When her friends left and they were left alone, he started to touch her and kiss her while holding her wrists, partly undressed himself, tried to undress her and asked her to perform fellatio. She refused and tried to push him off, but she said she had not used any 'particular aggressiveness' as she had been confused and had not previously seen a defendant as a threat, commenting that she might have been partly responsible for what had happened by not resisting more violently. She further stated that he had not been 'violent in a sense of hitting her or pushing her on the floor,' although he at some point hit her genitalia but she could not remember when.[28] At some point she managed to escape to the courtyard and started yelling, after which he let her go.

The Court found that force was used and that the complainant resisted: 'the defendant hugged and kissed her, placed his hand under her shirt, touched her breasts all against her verbal and physical resistance… which she expressed through crying, by words, pushing him off, asking him to stop and finally by running away to the courtyard and screaming.'[29] This judge did not support victim precipitation myths and did not accept the complainant's self-blame. Addressing the arguments by the defence, that the complainant had not resisted sufficiently enough, the Supreme Court affirmed that crying and saying 'no' were sufficient forms of resistance, accepting the 'no means no' standard, and defining force extensively as acting against the victim's will.

However, as seen in the cases analysed above where the judges required physical resistance, this standard is yet to be endorsed fully by all Zagreb County Court judges. The dominant conceptualisation of rape in the practice of this Court is in line with the 'real rape' myth which is based on, and supports, the norm of possessive heterosexuality according to which women enjoy being sexually possessed. Thus, the dominant view is that force has to be so intense as to 'prevent completely the victim from deciding' and that resistance has to be serious and continuous, while

[26] Ibid, p. 10.

[27] Judgment of 30 March 2011, Kž 152/11-4, p.3.

[28] Judgment of 10 October 2008, p. 6. There was no medical evidence of this, while she had bruises on the underarms.

[29] Ibid, p. 9.

submission due to fear is often equalised with consent. Even when the use of force left the physical injuries, such as in case K 195/09, the judges held that the sexual encounter was consensual as the victim eventually submitted.

New Criminal Code Solutions: Caught in Between Possessive and Communicative Models of Sexuality

In recent years the need to reform the sexual offences has arisen, primarily to secure a good international record for Croatia by addressing the incompatibilities of the legislation with international human rights law standards (Radačić 2008; Radačić and Turković 2010). The aim of the reform was to harmonise Croatian criminal law with international and EU standards, as well as other relevant Croatian laws and trends in comparative practice (particularly German, Swiss and Austrian), and to improve the position of victims and of the system of penalties (Government of the Republic of Croatia 2009). In respect of sexual offences, the Directions for Drafting of the Criminal Code (2009) stated that the name of the section needed to be changed, while the definition of rape should reflect that the object of its protection is the autonomy of a person and hence include the lack of consent, rather than force/threat of force, as its main element. The Draft Code was presented to Parliament as achieving this Government of the Republic of Croatia 2011. However, as will be seen in the analysis below, the change has not been as radical as presented, as rape was still defined by force, though a new offence of sexual intercourse without consent was also introduced. The authors of the Code[30] did not provide any explanations for their approach, and there was no comprehensive discussion of the proposed sexual offences in the Parliament. During the four and a half hour debate preceding the adoption of the Code, the sexual offences were mentioned only twice, to greet the 'paradigmatic change.'

The new Code was unanimously adopted by Parliament on 26 November 2011 and entered into force on 1 January 2013.[31] It deleted the earlier reference to morals in the title of the Section. In addition to rape, two new offences were introduced—sexual intercourse without consent and serious offences against sexual freedom. The legislation also expressly widened the scope of 'sexual acts' in relation to all three sexual offences to include situations where the defendant compels a person to have a sexual act with another, without consent, or to commit a sexual act on her/him/self. However, the division between heterosexual sex and other equivalent sexual acts was not challenged. Indecent assault remained a subsidiary category, while the Code for the first time criminalised sexual harassment.

[30] The working group, headed by Ksenija Turković, professor of criminal law at Zagreb Law School, included all the heads of criminal law departments in Croatia, as well as some judges, state attorneys and attorneys at law, but no other experts or representatives of NGOs were included, though there were some consultations with the NGOs when the draft was presented to the public.

[31] It was amended on 21 December 2012 (NN 144/12) but the only change in respect to sexual offences was to widen the type of relationship between the perpetrator and the victim from marital to any close relationship as an aggravating circumstance.

The reform has both positive and negative aspects. In addition to renaming the Section and widening the acts, a positive aspect of the legislation is the criminalisation of an unreasonable mistaken belief in consent. The test of reasonableness is a combined objective/subjective test: a belief is deemed unreasonable where the defendant should have been aware of consent in the relevant circumstances provided that s/he could have been aware of it in light of her/his personal characteristics (Article 29). The test of unreasonableness is not without problems: reference to relevant circumstances may invite scrutiny into the complainant's behaviour and thus reintroduce harmful rape myths and stereotypes (as noted by Temkin and Ashworth 2004 with respect to the standard in England and Wales), while reference to personal characteristics of the defendant may be used to shield those defendants who act according to such myths (Cowan 2007, also commenting on the standard in England and Wales). Further, the Code omitted to prescribe responsibility for unreasonable mistaken belief in consent for serious offences against sexual freedom. Despite these problems, criminalising a mistaken but unreasonable belief in consent, which means adopting a negligence standard under Croatian criminal law, is a welcome step forward in line with the trends in comparative law. Many jurisdictions have criminalised an unreasonable mistaken belief in consent, as the unqualified defence of mistaken belief in consent leads to the acquittal of many blameworthy defendants whose 'moral culpability … lies in a deliberate choice to engage in a sexual act with subjective awareness of one or more facts that are rationally inconsistent with the voluntary communication by the other person of valid capable consent' (Vandervort 2004, 658).

Another positive aspect of the new Code is its treatment of consent, which is defined in a positive manner. Consent exists if a person voluntarily decides to engage in sexual intercourse or an equivalent act and is capable of making and exercising this decision (Article 152). Lack of consent will be presumed in the following circumstances: when sexual intercourse or an equivalent act is committed through force or threat of force, deception, abuse of position, taking advantage of the situation of a person in which s/he is not able to resist, or false imprisonment[32] The presumptions include all of the coercive circumstances contained previously in the so-called non-consensual offences and include two new ones—deception and false imprisonment. The problem is, however, that they are not sufficiently defined. The Commentary to the Code (Turković et al. 2013) discusses only two of the presumptions—taking advantage of the situation of a person due to which s/he cannot resist, and deception. With respect to the first one, it indicates that this covers the following situations: when a victim is physically disabled, such as immobile or mute, or mentally disabled, asleep or unconsciousness, under the influence of drugs or alcohol, without further qualifying disability with the requirement of incapacity to give consent or communicate with the defendant. With respect to the second one, deceptions regarding marital status or using contraceptives or impersonating the husband of the victim are specifically mentioned. However, the first two types of deception are problematic since they do not negate consent to sexual intercourse with the perpetrator, while the last one focuses too narrowly on the marital bond. On

[32] The list is not exhaustive. Grozdanić and Srsen (2011).

the other hand, deception as to the nature or purpose of the act is omitted, even though this is a clear example of deception negating consent found in comparative jurisprudence, such as in the criminal law of England and Wales or the Australian state of Victoria. While the purpose of the Commentary is to provide directions to the judges in their interpretation of the Code, this incomplete and superficial analysis of the presumptions of the lack of consent leaves many things undefined.

A further problem is that the relationship between the different offences is not clear. The offence of rape remains in the Code just slightly changed,[33] even though the presence of threat of force are included in the basic offence as raising a presumption of non-consent (Article 153).[34] The Commentary does not explain why there was a need for this offence. It also does not provide a rationale for the third category of non-consensual sexual offence: serious offences against sexual freedom. This offence is constituted where the basic offence, or the offence of rape, is committed in the following aggravating circumstances: against a close person[35]; against a person especially vulnerable because of age, illness, dependence, pregnancy, disability; in a specifically cruel or humiliating manner; due to hate; together with one or more other persons; with the use of weapons; and if the consequences of rape are serious injury, pregnancy or death.[36] As seen above, vulnerability of the victim is also relevant when assessing consent as a defining element of the basic offence, since taking advantage of the situation of a person due to which s/he is not able to resist and abuse of position are listed as the presumptions of the lack of consent. Commentary states that taking advantage of the situation of a person in which a person cannot resist will be generally considered a serious offence against sexual freedom (committed against a vulnerable victim), but gives no further explanation. It further notes that commission of sexual intercourse or equivalent acts against a vulnerable person includes situations where a person has sexual intercourse with a minor who is in his/her care, even though abuse of position is also specifically mentioned in defining a basic offence. Hence, these provisions are overlapping and the Commentary does not help in defining the relationship between the three key offences.

The Code could thus add further confusion to already inconsistent judicial practice. The last two analysed cases of rape,[37] where force was interpreted widely as a lack of respect for the victim's will, would under the new Code seem to fall under the first category of the sexual offences as their defining element was lack of

[33] The person against whom force/threat of force is used does not have to be close to the victim any more. Initially, force was included in the list of presumption of circumstance in which consent is presumed to be lacking in Article 153 (3), but this was changed in the amendmends of the Code in 2012 (Official Gazette 144/12).

[34] When the perpetrator has an unreasonable mistaken belief in consent the penalty ranges from 6 months to 5 years imprisonment.

[35] Close persons are members of the family, ex spouse or a partner and persons living in the same household. Article 20 of the Law Amending the Criminal Code, Official Gazette 144/12.

[36] It is interesting to note that pregnancy is defined as a condition of disability, and deemed as serious a consequence as death and serious injury, but for the lack of space and in the view of the complexity of the issue I am not engaging in the analysis of this issue.

[37] K 184/10 and K 94/08.

consent, which carry a lower sentence than rape: six months to five years (up to three years if the defendant believed in consent). So the effect of the Code could actually be to lower already inadequate sentences in practice, and influence community perception of the seriousness of sexual offences. Some sentences in the new Code were explicitly lowered, contrary to the trends in comparative law: the minimum penalty for rape is now one and not three years (10 years maximum remained), while the provision concerning accumulation of aggravated forms of rape which previously carried 5–15 years imprisonment has been deleted. Aggravated forms of rape (defined as serious offence against sexual freedom) now carry 3–15 years, while the five year minimum is only prescribed if the sexual act results in death of the victim. Though harsher penalties are not necessarily any more effective and might actually increase attrition rates (Temkin and Krahé 2008, 28), lowering the penalties is problematic in light of the fact that judges already issue sentences in the lower range and very often mitigate the sentence below the prescribed minimum.[38] It was exactly for this reason that the minimum penalty for rape was increased from one to three years in 2006. The reduction in penalties by half for cases where crimes were committed with unreasonable belief in consent is problematic and is not found in comparative jurisprudence.

The final problem with the reforms is that, if the lack of consent is seen as a defining element of sexual offences, there is no need for three different, hierarchically ordered offences based on different forms of non-consent. If the drafters of the Code perceived a need to differentiate offences on account of their seriousness, it would have been better if this was done with regard to the consequences of the crime (such as serious physical injury or death), and the manner of commission (for example by weapon, gang rape) as consent does not have degrees. While the reforms were presented as a shift to the non-consent paradigm, it actually seems that they represent a compromise between two very different approaches to sexual offences, one based on a possessive model of sexuality, which conceptualises them as violent acts, and the other more supportive of a communicative model, which defines them as non-consensual acts. This contradictory scheme of sexual offences will be very difficult to apply in practice, as already observed by certain judges,[39] and might not be able to achieve the shift to the communicative model of sexuality.

Towards a Communicative Model

Unlike the model of possessive sexuality, the communicative model of sexuality is not based on the premise that women like to be sexually possessed; it is ‘grounded in agreement about intercourse between the parties, rather than presumption of male

[38] Research of sentencing practice from 1998 to 2002 showed that in 70 % of cases the courts sentenced perpetrators to a term of imprisonment ranging from 3 months to 5 years while in 14 % they mitigated the sentence (Garačić 2004). In my sample, the sentences ranged from the suspended sentence to 9 years imprisonment, the median being 1.69 years, while the sentences were mitigated below the minimum in 33 % (10) cases.

[39] This information was obtained through personal conversations.

proposition'(Munro 2008, 943). This model is best supported by the so called 'yes plus' or 'affirmative consent' standards. According to this standard, the submission to coercion would not constitute consent, and neither would token acquiescence in the absence of coercion; rather, there would an inquiry into the process of deliberation on, and communication of, agreement (Cowan 2007; Munro 2008; Gotell 2008, 2010).[40] This model has its own challenges in defining consent in a way that would take into account different social, structural and embodied constraints on choice while still respecting autonomy (Munro 2008). Another challenge is identifying the proper locus of consent while overcoming the mind/body dichotomy and ensuring that the victim's will is not undermined by misinterpretation of women's actions (Cowan 2007; Larcombe 2005). Moreover, as shown in jurisdictions which have adopted it, such as the Australian state of Victoria, Canada, and England and Wales,[41] the rape myths and gender stereotypes do not disappear under this model, but are transformed in line with the neo-liberal rhetoric of responsibility and risk advertence that lead to victim blaming and mask structural violence and inequality, and this needs to be challenged (Gotell 2008, 2010).

Despite these problems, the 'consent plus' standard with its requirement of communication between the parties is a step forward from a force-based model, as it challenges the norm of possessive heterosexuality.[42] Furthermore, alternative models, such as those focusing on injury (Rush and Young 1997; Rush 2011) or different ways through which autonomy can be undermined, such as force, fraud, drugging (Tadros 2006) do not solve any of the identified problems as they are unable to displace discussions of consent in judicial practice. Interpreting what constitutes injury, for example, would still involve examination of the complainant's state of mind (in practice this is often assumed by her behaviour), and thus would not displace the focus on the defendant. Moreover, consent would still be available as a defence. While sexual offences in the old Croatian Code were defined

[40] Anderson's communication model (2005) similarly argues for investigation into whether the person initiating sex had negotiated it and secured a free agreement, and could hence be classified as a 'consent plus' model, despite the fact that she distances her model from what she calls 'yes models'. She criticises 'yes models' not only for the ease with which they slip into 'no models,' but also for the endorsement of the passive view of the victim who either rejects or accepts the proposition. However, it is not clear that her model actually overcomes this problem.

[41] The criminal laws in these jurisdictions define consent, an element of differently defined sexual offences, as a voluntary/free agreement (Canada, Victoria) or define choice, freedom and capacity as its necessary conditions (England and Wales), and state examples (Canada, Victoria) or presumptions of non-consent (England and Wales), such as presence of violence, fear, detention, incapacity to give consent, abuse of trust, deceit. Further, they qualify a defence of a mistaken belief in consent by either the requirement of reasonableness (England and Wales), or by defining circumstances in which the defence would not be available, such as where the defendant was wilfully blind, reckless, did not take any steps to secure that the victim is consenting (Canada), or did not give any thought to whether the victim is consenting (Victoria). See Criminal Offences Act (2003), Ch 41 of England and Wales, Criminal Code of Canada, RSC, 1985, c. C—46, Crimes Act 1958 of Victoria.

[42] For a view that the consent model endorsed in the Sexual Offences Act of England and Wales actually supports the norm of possessive sexuality see Russell (2013). In my opinion this critique does not stand if consent is interpreted in a positive manner in line with the consent plus/affirmative consent proposals, such as one that I propose.

by coercion, rather than consent, the consent was always discussed in practice. Finally, consent, defined in a positive manner, seems to be the best expression of the value of sexual autonomy.

By combining the features of different existing legal models (primarily those in Victoria, Canada and England and Wales) and considering their critiques and proposals for (re)interpretation mentioned above,[43] my proposal provides a model of rape law supportive of the norms of communicative sexuality, with legal solutions aimed at shifting the inquiry from whether the survivor/victim accepted sexual advances to whether the perpetrator respected the sexual autonomy and integrity of the victim. Under this model there would be no need for different offences based on the form of non-consent; a single crime of sexual penetration without consent (whereby there would be no differentiation between heterosexual sex and other sexual acts, while non-penetrative acts would be excluded) should be introduced.[44] In order to minimise the potential for stereotypical interpretations of consent, it should be explicitly stated in the Code that submission, or the fact that person did not protest or physically resist, or sustained injury, or had previous sexual encounters with the defendant or other persons, shall not constitute consent, while the fact that a person did not say or do anything to indicate—unequivocally—consent should mean that the consent was not present, as with the Jury Directions in Victoria.[45] As found in Canadian jurisprudence, a lack of consent should be judged from a survivor's/victim's perspective.[46] Her subjective will, rather than her actions, should be the locus of consent.

The circumstances enumerated under Article 152(3) should be understood to constitute (conclusive) examples of non-consent, rather than evidential presumptions, as this would also minimise the potential to apply rape myths. They should be widened to include submission due to fear as a common form of negation of sexual freedom. The circumstances of taking advantage of the situation of the person in which s/he cannot resist and deception should be more clearly defined to include the following, as in the law of Victoria: victim is asleep, unconscious, or so drunk or under the influence of another drug as to be incapable of freely agreeing; is incapable of understanding the sexual nature of the act; is mistaken about the sexual nature of the act, or about who the person is who is performing it; or believes mistakenly that the person is performing the act for medical or hygienic purposes. The list should not be exhaustive.

To address the problem of a male bias in an undefined standard of reasonableness (MacKinnon 1989) in the *mens rea* requirement, these examples of non-consent should also constitute examples of unreasonableness of the belief in consent, if the defendant was aware of their existence. In determining whether a defendant was capable of understanding that there was no consent, the steps s/he took to ascertain that there was consent should be examined, rather than his personal beliefs about

[43] These critiques do not propose an abandonment of the model and a shift to the force based model, but rather an interpretation of the model in line with feminist goals.

[44] This term is preferred to rape because of rape's association with force and discourses of victimisation.

[45] Crimes Act 1958, SECT 37AAA.

[46] *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.

what the victim wanted. Wilful blindness should not be allowed to excuse the defendant.

Even in the absence of coercion or deception, the investigation should not stop at whether there was a token acquiescence but rather whether the sexual intercourse was wanted by both parties. This would require an inquiry into a process of deliberation and decision making, taking into account the circumstances in which the choice was made (and whether there was choice at all). But, if the dominant script of possessive heterosexuality is to be challenged, the focus must not be on what the victim did or did not do; rather, the inquiry should shift into whether the defendant negotiated and came to agreement about sexual penetration with the other person (Anderson 2005, 1423); in other words, whether s/he had acted with or without respect for the person's sexual autonomy and integrity. In the absence of an established relationship of mutual respect, trust and equality, negotiation would require some element of verbal discussion.

While adopting this model cannot alone eradicate gender stereotypes and rape myths, it does minimise the potential for their application, and it sends a symbolic message to both the judges and the wider community about the importance of women's (as well as men's) sexual freedom. Unlike the force-based models, it is not based on the norms of possessive sexuality; rather, it promotes sexual relations where the both parties share their desires, intentions and set up their boundaries.

If this model was applied to the analysed cases, it is likely that results would have been different, as the proposed legal solutions would leave much less space for application of myths and stereotypes by the judges. In all of these cases the judges accepted that the sexual act was against the complainant's will but held that there was no rape, either because they equalised submission with consent or because they held that force was not intense enough. Under the proposed model, the fact that the sexual penetration was against the victim's will (which would have been clear in the cases discussed due to the force used) would mean that there was no consent, regardless of the lack of the 'sufficient' resistance or submission. As stated above, submission (or the 'subsequent consent') would not constitute relevant consent under the proposed model, which would be explicitly stated in the law. Since the intercourse in the cases was achieved in coercive circumstances, of which the defendants were aware, intent requirements would have been satisfied as well. This is true of the case K 229/08 where the force was not immediate but preceded the event for a few hours, as the defendant did not take any steps to ensure agreement, which in the circumstance of that case would require a certain discussion or positive action of the complainant.

In order to be effective, the reform should not end with the law. A number of feminist scholars have highlighted the difference between the law and law in practice, and how the difference is maintained by attitudes of those that apply the law (Temkin and Krahé 2008). Hence, the attitudes that are responsible for the creation and maintenance of rape myths and gender stereotypes have to be addressed. One appropriate forum is education, particularly sexuality education, legal education and the training of the legal officials. In Croatia, after many years of discussion, sexuality education was for the first time introduced experimentally in the school year 2012/2013 with a significant resistance, but was taken out of the

curriculum after the Constitutional Court annuled the decision on introducing the curriculum on health education in the schools (which contained the part on sexuality education).[47] However, there are still no courses on feminism and human rights of women in the law schools and no gender studies programs at universities.[48] Moreover, feminism, violence against women and human rights are not incorporated into the legal education or judicial training. Judges are very reluctant to be trained by non-judges, in particular by non-legal professionals and women service providers, who are exactly those who work with the victims. While the lack of education on these issues contributes to the general lack of gender sensitivity and helps maintain the dominant norm of possessive sexuality, it is simultaneously a consequence of a socio-political climate. Hence, wider cultural and political changes need to be instituted which would promote sexual freedom and gender equality, which is a task well beyond this paper.

Conclusion

This article examined the rape myths, gender stereotypes and norms of sexuality endorsed in Croatian rape laws and the recent practice of the County Court in Zagreb and proposed suggestions for a model of rape law based on socio-sexual norms that support more equal gender relations. Under the (now reformed) 1997 Croatian Criminal Code, rather than securing sexual freedom, sexual offences were aimed at protecting women from sexual coercion, according to the dominant model of possessive heterosexuality and in acceptance of 'real rape' myths. The practice of the Zagreb County Court has mainly endorsed this model, requiring serious and continuous resistance from the victims, narrowly defining force and equating submission with consent, though at least one judge has focused more on the sexual freedom of the complainant.

The first move towards a model based on sexual freedom was taken in the new Criminal Code which entered into force on 1 January 2013. However, by including both the offences of sexual intercourse without consent and rape, and adding the third category of serious offences against sexual freedom, grounded in different forms of non-consent, without clarifying their relationship, the Code may only add further confusion. Further, the new Code does not go far enough in affirming the sexual autonomy of women, as it still endorses a force-based model in the offence of rape.

[47] Acting on the proposal of two NGOs, a right wing political party and a few individuals, the Constitutional Court found that there were 'procedural defects' in the process of the adoption of the decision, in particular the lack of inclusion of the Committee of Parents and the Agency for Education in the decision-making process. (The Constitutional Court's decision UII/1118/2013 od 22 May 2013)

[48] This author was initialy denied a title in law as her area of research—feminism and human rights—does not fall neatly under any recognised branch of law in Croatia, as developed in the Croatian legal academia. See Weiler (2013).

I have argued that the affirmative consent model has greater potential to challenge rape myths and gender stereotypes and promote sexual freedom and equality, based on reciprocal responsibility, communication and mutuality of sexual desire, and an equal authority to direct sexual interactions. Adoption of this model would require certain additional changes to the law to ensure that consent is defined in a positive and dynamic/active manner as a process of communication and negotiation resulting in a free agreement, at the level of classifying offences and defining consent, as well as at the level of defining the reasonableness of a mistaken belief in consent.

If such an approach had been applied to the cases analysed above, in which the judges accepted the complainant's view that the sexual act was not wanted and freely agreed to, but nevertheless held, for different reasons, that rape had not been committed, the outcomes would have been different. This would not only provide justice for individual complainants who would no longer be blamed for being raped, but would also send an important symbolic message about what kind of sexual relationships are (il)legitimate. While law is not omnipotent, it can lead by example by setting up a model of sexual relations that values sexual integrity, mutuality and respect for people's desires and boundaries.

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