

# CONSENT CONFUSION

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*The slogans are ubiquitous: “Only ‘Yes’ Means ‘Yes’”; “Got Consent?”; “Consent is Hot, Assault is Not!” Clear consent is the rule, but the meaning of sexual consent is far from clear. The current state of confusion is evident in the numerous competing views about what constitutes mental agreement (grudging acceptance or eager desire?) and what comprises performative consent (passive acquiescence or an enthusiastic “yes”?). This paper seeks to clear up the consent confusion. It charts the contours of the sexual consent framework, categorizes different definitions of affirmative consent, and critically describes arguments for and against affirmative consent. Today’s widespread uncertainty is partly a product of the affirmative consent reform juggernaut and its rapid legal changes. Confusion is also connected to the nature of consent as a liberal, contract principle. Sexual consent appears a morally self-evident issue of free will, but it actually veils a struggle between various judgments about how sex should happen, its benefits and harms, and the role of criminal law in regulating it. Indeed, proponents and critics of affirmative consent entertain different empirical and normative presumptions and often simply talk past each other. Structurally mapping the consent framework and the affirmative consent debate reveals exactly what is at stake in this new world of reform—a revelation necessary for meaningful dialogue on acceptable sex and acceptable sex regulation.*

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## INTRODUCTION

The slogans are ubiquitous: “Only ‘Yes’ Means ‘Yes’”; “Got Consent?”; “Consent is Hot, Assault is Not”; “Ask First!”; and the unsettling, “Just Because She’s Drunk Doesn’t Mean She’s DTF,” which appeared on glossy posters at my law school. Clear consent is clearly the rule. Forcible rape is totally passé, not in the sense that it does not occur, but in the current legal conception of sexual assault’s essence. Rape law scholars have begun to regard force as so archaic as to barely merit mention. Far from the bad-old-days in which “real rape” was limited to a narrow category of violent stranger assaults resisted by victims “to the utmost,”<sup>1</sup> contemporary lawmakers, scholars, and university administrators, applying the consent framework, view as rape behaviors

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<sup>1</sup> See *People v. Geddes*, 3 N.W.2d 266, 267 (Mich. 1942); *Kinselle v. People*, 227 P. 823, 825 (Colo. 1924).

ranging from brutal to boorish to quite normal.<sup>2</sup> Today, the criminal law has an interest whenever unconsensual sex occurred, regardless of *why* it occurred.

However, consent is far from clear. The urgent question is “Got Consent?,” but people have wildly different conceptions about when to answer, “I do.” Consent is a liberal, contractarian principle that seems a peculiar basis for the criminal regulation of sex.<sup>3</sup> The contractual framework is both over- and under-inclusive. It could dictate that sexual agreement procured through deception, tainted by intoxication, or failing to meet formalities is invalid, leading to overbroad laws.<sup>4</sup> At the same time, contract principles might permit defendants to procure sexual consent through capitalizing on fear, insecurity, or lack of bargaining power, so long as such behavior does not amount to the duress that vitiates a contract.<sup>5</sup> As a result, “sexual consent” has a meaning quite distinct from consent in contract law.

But what is this meaning? Some will say that sexual consent is present when parties are mentally willing to have sex. However, there are a variety of views about what constitutes a consensual mental state, ranging from enthusiastic to grudging, from hedonistic to instrumental, from sober to quite inebriated.<sup>6</sup> Others argue that focusing on internal willingness puts victims on trial; thus, sexual consent should be about what the parties say and do.<sup>7</sup> Even here, there is considerable variability on what constitutes performative consent. Some hold that engaging in sexual activity without protest, or with weak protest, communicates consent. Others insist that consent be “affirmatively” or “positively” expressed.<sup>8</sup> To complicate matters, affirmative consent, depending on who you ask, runs the gamut from nonverbal foreplay to “an enthusiastic yes.”<sup>9</sup>

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<sup>2</sup> See *infra* notes 75–79 and accompanying text (discussing contemporary standards).

<sup>3</sup> See Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 700–04 (1990).

<sup>4</sup> See Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013) (asserting that the consent framework is inconsistent with legal rejection of rape by deception); cf. Mark Kelman, *Thinking About Sexual Consent*, 58 STAN. L. REV. 935, 978 (2005) (book review) (complicating purely autonomist notions of sexual consent).

<sup>5</sup> See Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171, 204 (2013) (positing a feminist and relational theory of contract).

<sup>6</sup> See *infra* Section I.A.

<sup>7</sup> See *In re M.T.S.*, 609 A.2d 1266, 1273 (N.J. 1992) (moving to affirmative consent because old law created credibility contest that put victim on trial); Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 794–98 (1986) (noting that some analyze whether complainant consented by looking at sexual history).

<sup>8</sup> See *infra* Section II.F.

<sup>9</sup> See *infra* Part II.

Actual definitions of consent in criminal codes and university manuals, with their vague references to “free agreement” and “affirmative cooperation,” do little to simplify matters.<sup>10</sup> It is no wonder that people come to wholly different conclusions about how consent and affirmative consent standards actually impact legal decisions and human behavior. Stephen Schulhofer, the reporter for the Model Penal Code Sexual Assault Project to reform the much-maligned current MPC rape provisions,<sup>11</sup> has defended affirmative consent as merely reflecting the common sense norm that “it is unacceptable to take liberties with someone’s person or property without permission.”<sup>12</sup> Compare this with Vox Media founder Ezra Klein’s passionate, but somewhat bizarre, justification of California’s affirmative consent law on the ground of its radically regulatory nature:

If the Yes Means Yes law is taken even remotely seriously it will settle like a cold winter on college campuses, throwing everyday sexual practice into doubt and creating a haze of fear and confusion over what counts as consent. . . . [However,] for one in five women to report an attempted or completed sexual assault means that everyday sexual practices on college campuses need to be upended, and men need to feel a cold spike of fear when they begin a sexual encounter.<sup>13</sup>

What has caused so much confusion? In short, decades ago, feminist reformers affected the shift from defining rape as forced sex to defining it as unconsensual sex, in an effort to broaden liability for bad

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<sup>10</sup> For a thorough discussion of existing consent statutes, see MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 58–61 (AM. LAW INST., Preliminary Draft No. 5 2015) [hereinafter MPC Draft 5]. The MPC Tentative Draft No. 1 (Apr. 30, 2014), is available at [http://jpp.whs.mil/Public/docs/03\\_Topic-Areas/02-Article\\_120/20140807/03\\_Proposed\\_Revision\\_MPC213\\_Excerpt\\_201405.pdf](http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/03_Proposed_Revision_MPC213_Excerpt_201405.pdf), but it is substantially different. A later version of the Model Penal Code consent provisions was adopted by the ALI Council in January 2016 and updated on January 17, 2016. MODEL PENAL CODE: SEXUAL ARTICLE § 213 (AM. LAW INST., Selected Revisions: §§ 213.0(3) & 213.2 2016) [hereinafter MPC Revisions] (on file with author). However, the ALI membership did not accept that version at the annual meeting, and a new draft is in the works. See *Model Penal Code: Sexual Assault and Related Offenses*, AM. LAW INST., <https://www.ali.org/projects/show/sexual-assault-and-related-offenses> (last visited Oct. 29, 2016). This article refers to Draft 5 throughout.

<sup>11</sup> See Deborah W. Denno, *Why the Model Penal Code’s Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207 (2003); *Model Penal Code: Sexual Assault and Related Offenses*, *supra* note 10.

<sup>12</sup> Stephen J. Schulhofer, *Consent: What It Means and Why It’s Time to Require It*, 47 U. PAC. L. REV. 665, 681 (2016) [hereinafter Schulhofer, *Consent*]. Professor Schulhofer has been a forceful proponent of affirmative consent, through words of actions, for years. See, e.g., STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 271 (1998) [hereinafter SCHULHOFER, UNWANTED SEX].

<sup>13</sup> Ezra Klein, “Yes Means Yes” Is A Terrible Law, and I Completely Support It, VOX (Oct. 13, 2014, 10:30 AM), <http://www.vox.com/2014/10/13/6966847/yes-means-yes-is-a-terrible-bill-and-i-completely-support-it>.

sexual behavior.<sup>14</sup> However, even this shift proved unsatisfying to many activists who contended that biased or mistaken decision-makers misapplied the standard, leading to under-regulation of unwanted sex. Activists urged affirmative consent standards to compel legal actors to arrive at the “right” conclusion about what constitutes rape. However, couching this revolutionary reform as a better way of doing consent obscured the various presumptions and normative commitments underlying reformers’ ideas about what *is* the right conclusion. To be sure, “unconsensual sex” is often just a proxy for whatever one views as harmful or unacceptable sexual behavior (i.e., intoxicated sex, subtly coerced sex, insufficiently communicative sex, rough sex, etc.). Today, affirmative consent reform is a juggernaut. The rapid proliferation of law, policy, and scholarship defining sexual consent has produced a legal terrain marked by uncertainty, contradiction, and hidden value judgments.

This Article seeks to clear up the consent confusion. It is not the first, nor will it be the last, word on consent in rape law. But it is the first to categorize and clarify the many words uttered in the media, in legislatures, and on campuses about the meaning of sexual consent. This categorical enterprise has two primary goals. First, it offers a toolkit for deciphering, deconstructing, and yes, dismantling affirmative consent.<sup>15</sup> It catalogues consent as a preface to a critical analysis of the arguments for and against the affirmative consent standard. The paper makes sense of an often muddled debate in which interlocutors entertain different presumptions and proceed to simply talk past each other. Some, for example, concentrate on whether sex without a yes is morally wrongful, while others focus on whether requiring a yes will help prosecutors get at “true” rapists who compel unwanted sex.<sup>16</sup> Debaters fluctuate between formalist and legal realist assertions, empirical bases for the rule and theoretical ones, and individualist frames and questions of just social order. Structurally mapping the debate is an important step toward a full understanding of the exact stakes of affirmative consent reform. Accordingly, much of this Article is taxonomical in nature—it charts consent, categorizes affirmative consent standards, and indexes affirmative consent argument types.

The Article has a second, more iconoclastic, goal: demystification. The consent framework’s unyielding and simplistic promotion of

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<sup>14</sup> Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 587–603 (2009) [hereinafter Gruber, *Rape, Feminism*].

<sup>15</sup> The analysis herein betrays my predisposition against affirmative consent as the benchmark for criminal sex regulation. Nonetheless, I am quite sympathetic to the standard and very far from many anti-affirmative consent polemicists. See *id.*

<sup>16</sup> See *infra* Sections II.B, II.D.

autonomy has obfuscated the empirical and moral bases of a complex set of reforms.<sup>17</sup> As noted above, many reformers initially rationalized affirmative consent as a way to control decision-makers' tendency to exonerate defendants, even in cases of clear unwillingness.<sup>18</sup> But that attempt to manage sexist jurors' inferences has created a world in which law, popular discourse, and public health surveys *define* rape as sex without affirmative consent, rather than compelled or unwilling sex. Thus, the prohibition of a broad category of sex (sex without a yes) somewhat surreptitiously evolved under the banner of preventing a narrower, less controversial category (compelled or aversive sex). Understanding the empirical and normative presumptions underlying affirmative consent is a necessary step toward responsible management of unlawful sexual behavior and the criminal apparatus constructed to regulate it.

Part I of the Article describes unambiguously consensual sex as a "consent transaction" between two (or more) people, involving both mental states and external manifestations of those states. Part II explains affirmative consent as an effort to narrow the world of external manifestations. It also categorizes affirmative consent standards, from very regulatory to more expansive. Part III maps the affirmative consent debate, which includes clashes over how people actually negotiate sex, whether sex without affirmative consent is culpable, and how affirmative consent laws play out in practice. The conclusion suggests that the rape discussion should shift from jousting over consent to truly grappling with the limits of acceptable sex and acceptable sex regulation.

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<sup>17</sup> Cf. Nicola Lacey, *Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law*, 11 CAN. J.L. & JURIS. 47, 53 (1998) ("The idea of autonomy is one which . . . assumes rather than explicates what is valuable about sexuality itself.").

<sup>18</sup> See *infra* note 60 and accompanying text.

## I. CONSENT

Consent is a philosophical, psychological, and legal quagmire, the escape from which I do not attempt here. Nevertheless, it bears mentioning that, philosophically, premising morality on consent implicates complicated theories of free will and determinism.<sup>19</sup> As a matter of psychology, harmful and regretted but “chosen” decisions can be more discomfiting than unavoidable or coerced occurrences. Some studies of rape and trauma, for example, link lasting psychological harm to self-blame and feeling like one had some control over the assault.<sup>20</sup> In terms of the law, critical legal theorists—feminists foremost among them—have argued that the principle of consent legitimates unjust hierarchies, economic inequality, and overt discrimination.<sup>21</sup> From adhesion contracts to the Supreme Court’s approval of consent to a suspicionless police search, scholars have long viewed consent’s justificatory power with a jaundiced eye.<sup>22</sup>

Feminists like Catharine MacKinnon assert that in a world rife with male hierarchy, women rarely freely choose sex.<sup>23</sup> Given feminism’s anti-liberalism bent, it is curious that consent evolved as the enlightened construction of rape law.<sup>24</sup> The force and coercion

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<sup>19</sup> See generally THE OXFORD HANDBOOK OF FREE WILL (Robert Kane ed., 2002); cf. Peter Strawson, *Freedom and Resentment*, in PERSPECTIVES ON MORAL RESPONSIBILITY 45 (John Martin Fischer & Mark Ravizza eds., 1993) (intimating that the free will determinism debate is a normative/legal, rather than metaphysical, debate).

<sup>20</sup> See Sara E. Ullman et al., *Psychosocial Correlates of PTSD Symptom Severity in Sexual Assault Survivors*, 20 J. TRAUMATIC STRESS 821, 822 (2007) (correlating trauma with “attributions of self-blame” and citing studies).

<sup>21</sup> See Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 999 (1985); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1199–1200 (1990); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975 (1983); Debora L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247, 1265 (1999); cf. Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 395 (1984).

<sup>22</sup> See, e.g., MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013) [hereinafter RADIN, *BOILERPLATE*]; Morgan Cloud, *Ignorance and Democracy*, 39 TEX. TECH L. REV. 1143 (2007) (discussing consent searches).

<sup>23</sup> See Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 647 (1983) [hereinafter MacKinnon, *Toward Feminist Jurisprudence*]. More recently, MacKinnon has remarked that “sex that is forced, coerced, and pervasively unequal can be construed as consensual, wanted, and free.” Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1088 (2004); see also Lynne Henderson, *Rape and Responsibility*, 11 L. & PHIL. 127, 130–32 (1992); Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1458 (1993) [hereinafter West, *Beyond Rape*].

<sup>24</sup> See Robin West, *Sex, Law and Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE 221 (Franklin G. Miller & Alan Wertheimer eds., 2010). In the domestic violence arena, feminist backlash to consent created a hyper-regulatory regime of mandatory arrest and

standard—which actually entails considering the larger circumstances of the sex—is a denigrated relic.<sup>25</sup> So what happened? From the 1970s to the 1990s, rape reformers highlighted cases in which rape-permissive courts, jurors, and law-makers narrowly defined force to prohibit violently compelled sex but permit a wide variety of otherwise coerced sex (i.e., subtle intimidation, “pinning,” or capitalizing on scary circumstances).<sup>26</sup> Thus, advocates sought to broaden the category of sexual incidents subject to criminal regulation.<sup>27</sup> Some jurisdictions did this by expanding force to include more situations, for example, “emotional” or “moral” coercion.<sup>28</sup> Other jurisdictions broadened regulation by defining rape as sex without consent, rendering the defendant’s coercive behavior (or lack thereof) mere circumstantial evidence of consent or irrelevant.<sup>29</sup> The move to consent proved

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prosecution, concerning liberal critics about victims’ autonomy. See Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1 (2009).

<sup>25</sup> See, e.g., Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 466 (2016) [hereinafter Tuerkheimer, *Affirmative Consent*]; Deborah Tuerkheimer, *Rape on and Off Campus*, 65 EMORY L.J. 1, 1 (2015) (calling force “archaic”); Lani Anne Remick, comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1116 (1993); cf. Vivian Berger, *Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 8 (1977) (noting that non-consent is the “ancient” definition of rape but that “force” came to be added”).

<sup>26</sup> Two Pennsylvania cases figure prominently in that critique. See *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1347 (Pa. Super. Ct. 1992) (per curiam) (holding no “forcible compulsion” when complainant repeatedly said “no”), *aff’d in part*, 641 A.2d 1161 (Pa. 1994); *Commonwealth v. Mlinarich*, 498 A.2d 395, 396 (Pa. Super. Ct. 1985) (holding that adult guardian’s threat to return fourteen-year-old to juvenile detention was not “forcible rape”), *aff’d*, 542 A.2d 1335 (Pa. 1988); see also Berger, *supra* note 25, at 8; Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1093 (1986) (“If in 1986 silence does not negate consent, at least crying and saying ‘no’ should.”); Cheryl Siskin, *Criminal Law—No. The “Resistance Not Required” Statute and “Rape Shield Law” May Not Be Enough—Commonwealth v. Berkowitz*, 609 A.2d 1338 (Pa. Super. Ct.) (per curiam), *alloc. granted*, 613 A.2d 556 (PA. 1992), 66 TEMP. L. REV. 531, 560 (1993). But see J.H., No. 6-2801-9874-2, 1995 WL 937281, at \*5, 8 (Minn. Off. Admin. Hrgs. Oct. 16, 1995) (finding respondent violated student conduct code prohibiting “implied use or threatened use of force” because “[h]e didn’t ask, and she didn’t say”).

<sup>27</sup> See Kit Kinports, *Rape and Force: The Forgotten Mens Rea*, 4 BUFF. CRIM. L. REV. 755, 755–56 (2001) (describing the under-inclusion argument).

<sup>28</sup> See, e.g., *State v. Eskridge*, 526 N.E.2d 304, 306 (Ohio 1988) (“[F]orce . . . can be subtle and psychological.”); *Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1986) (rape may involve “moral, psychological or intellectual force”). Many feminists prefer the move toward broad coercion, rather than liberal consent. See, e.g., Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988).

<sup>29</sup> The consent move was spurred on by varied analogic reasoning, such as describing rape as a battery—“any ‘unauthorized [sexual] touching.’” *In re M.T.S.*, 609 A.2d 1266, 1276 (N.J. 1992). But the battery analogy proves complicated given that for every-day touchings—handshakes, back pats, etc.—the law is honored in the breach. Of course, sexual intercourse is not a hand shake, nor is it a fistfight. Other consent analogies fare little better (sex is materially different from surgery, force-feeding, taking property, etc.). Some feminists have



enduring, and today the nature of rape as a “harm to autonomy” is rarely up for debate.<sup>30</sup>

Debated more frequently is the question of what sexual consent *is*. Consensual sex is described variously as desired, wanted, willing, or agreed-to sex.<sup>31</sup> While such terms are used interchangeably, they can mean quite different things. People could willingly have unwanted sex, or they could want but not desire sex.<sup>32</sup> For the moment, let me put aside any further parsing of these distinctions. For now, I, like most rape commentators, will treat the consent terms fungibly. The more pressing definitional question is whether sexual consent is a mental state, an external performance, or both.

There is little controversy when the sexual actors’ performances correspond to their internal states. For example, if a person really did not want sex and candidly expressed that lack of desire, there will be little question that the sex was not “consensual.”<sup>33</sup> Controversy arises, however, when there is mismatch between the internal state and external manifestations. Affirmative consent critics recoil at the idea that it can be rape when the complainant passionately desired—and the defendant believed they<sup>34</sup> passionately desired—sex simply because the consent performance was deficient.<sup>35</sup> Likewise, feminists are apt to

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lauded liberal autonomy’s instrumental value to women. *See, e.g.*, Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999).

<sup>30</sup> *See, e.g.*, Johnson v. State, 328 P.3d 77, 89 (Alaska 2014) (“[R]ape has as its goal preventing the loss of autonomy, dignity, free will, and bodily integrity . . . .”); People v. Soto, 245 P.3d 410, 418 (Cal. 2011) (rape is violation of “sexual autonomy”); Estrich, *supra* note 26, at 1095 (“[A]ny discussion of rape begins (and ends) with consent.”); R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively*, 75 B.U. L. REV. 1397, 1406 (1995) (equating “underemphasis of women’s consent” with “insufficient respect for the dignity of women”).

<sup>31</sup> *See, e.g.*, Schulhofer, *Consent*, *supra* note 12, at 671 (calling consensual sex “mutually desired”).

<sup>32</sup> Sexual “desire” seems to connote the particular intent to have sex for physical satisfaction. “Wanted” sex, by contrast, could mean sex that one hopes will happen for any reason. “Willingness” might imply a neutral state of mind, that is, the person can take the sex or leave it. “Agreeing” to sex might have a different meaning, involving some “meeting of the minds,” where a person agrees to an offer of sex.

<sup>33</sup> Of course, defendants may have the option to argue lack of mens rea if their warped view of sexual communication led them to honestly believe the other consented. *See infra* notes 55–59 and accompanying text.

<sup>34</sup> I try not to specify the sex/gender of parties unless specific to a point or case. Occasionally, I will use “their” or “they” as a singular pronoun to signify an individual without sex/gender. *See* Jessica Bennett, *She? Ze? They? What’s In a Gender Pronoun*, N.Y. TIMES (Jan. 30, 2016), [http://www.nytimes.com/2016/01/31/fashion/pronoun-confusion-sexual-fluidity.html?\\_r=0](http://www.nytimes.com/2016/01/31/fashion/pronoun-confusion-sexual-fluidity.html?_r=0).

<sup>35</sup> *See* Sarah Gill, Essay, *Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA WOMEN’S L.J. 27, 61 (1996) (discussing this argument); *infra* notes 165–68 and accompanying text.

dismiss as coerced an expressed “yes” that did not reflect internal willingness.<sup>36</sup> Consequently, uncontroversial consent to sex entails what I call a “consent transaction,” involving both a sufficient internal mental state and external performance of that state.

A sexual consent transaction between two people, *A* and *B*, consists of a three-step process. Step 1: *A* internally agrees to have sex. Step 2: *A* displays external manifestations of that agreement. Step 3: Based on *A*’s external manifestations and the context, *B* believes *A* internally agrees to have sex. Of course, *B* must also share *A*’s attitude toward the sex, and *A* must believe *B* internally agrees. For now, *B* will represent the sex proponent (the person seeking sex) and *A* will be the sex acceptor/rejecter. Here is an illustration of the consent transaction:

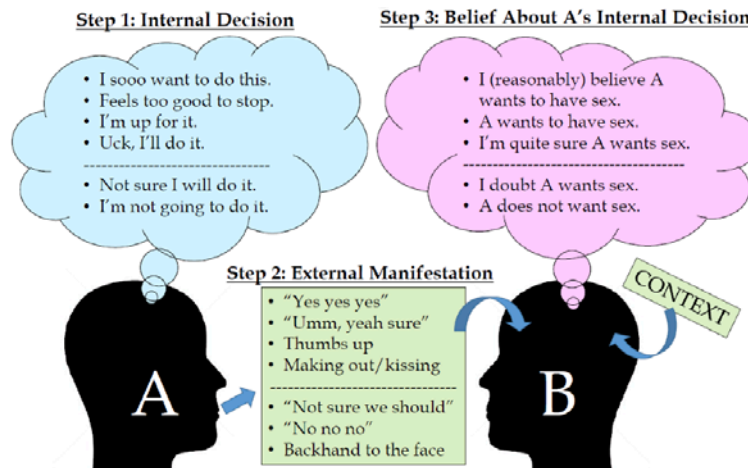


Figure 1: The Consent Transaction

Let us discuss each step in turn, beginning with *A*’s mental state.<sup>37</sup>

<sup>36</sup> Some activists go even further arguing that *any time* a person does not internally want sex it is sexual assault, even if the person says “yes,” and there is no coercion. See, e.g., Wendy Murphy, Opinion, *Title IX Protects Women. Affirmative Consent Doesn’t*, WASH. POST (Oct. 15, 2015), [https://www.washingtonpost.com/news/in-theory/wp/2015/10/15/title-ix-protects-women-affirmative-consent-doesn't/?utm\\_term=.97e664743d5b](https://www.washingtonpost.com/news/in-theory/wp/2015/10/15/title-ix-protects-women-affirmative-consent-doesn't/?utm_term=.97e664743d5b); cf. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 82 (1987) (articulating a “political” definition of rape as “whenever a woman has sex and feels violated”).

<sup>37</sup> When examining Figure 1, *A* may start to look distinctly feminine and *B* masculine. See Lacey, *supra* note 17, at 60 (critiquing the consent framework for establishing a gendered asymmetric relationship between sexual participants).

## A. Step 1: A's Internal Agreement to Sex

A consensual mental state involves a “free” decision to have sex. The meaning of free is subject to interpretation. As noted above, some feminists assert that because of gendered pressures and gross inequality, coercion is the default for women.<sup>38</sup> However, proponents of consent, even affirmative consent, do not characterize women’s agreement to sex as mostly illusory, but rather hold that only specific coercive pressures render consent ineffective.<sup>39</sup> For example, the September 2015 Draft of MPC sexual assault revisions provide that consent does not count when it is “the product of force, restraint, threat, coercion, or exploitation.”<sup>40</sup> Yet the issue of which types of “coercion” or “exploitation” (i.e., lies, promises, relationship, or economic factors) undermine consent is a subject of intense controversy among rape experts.<sup>41</sup> Thus, the consent framework has not relieved policymakers of the need to discuss with specificity the types of pressures that render sex criminal, despite apparent agreement.<sup>42</sup>

In addition, there are controversies over which mental states are in fact consensual. Figure 1 draws the line at grudging acquiescence, counting it as consensual, but designating being unsure as insufficient. By contrast, some commentators suggest that consent requires sex to be enthusiastic, deliberative, hotly desired, and/or engaged in *for its own sake*.<sup>43</sup> Anything else, they argue, should be regulated (whether through criminal law, disciplinary proceedings, or public health programs).<sup>44</sup> Of course, epistemic states are indefinite, and the forms they can take are infinite. Consequently, just as drawing lines between culpable mental states (knowing, reckless, negligent) involves external normative judgments, so does dictating the specific quality of internal consent.

The requirement of internally consensual sex, which may appear

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<sup>38</sup> See *supra* notes 19–24 and accompanying text.

<sup>39</sup> See, e.g., Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2177 (1995).

<sup>40</sup> MPC Draft 5, *supra* note 10, at 32.

<sup>41</sup> See, e.g., Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998) (fraud and coercion); Rubinfeld, *supra* note 4, at 1405–11.

<sup>42</sup> See West, *Beyond Rape*, *supra* note 23, at 1442.

<sup>43</sup> See Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881, 925–28 (2016) (cataloguing various colleges’ and universities’ sexual assault definitions that define consent as enthusiastic, sober, creative, sincere, etc.); see also *infra* Section II.B.

<sup>44</sup> Indeed, the American Association of Universities study that generated the now (in)famous one-in-five statistic counted having sex for “promised rewards” as sexual assault. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT (2015), [https://www.aau.edu/uploadedFiles/AAU\\_Publications/AAU\\_Reports/Sexual\\_Assault\\_Campus\\_Survey/AAU\\_Campus\\_Climate\\_Survey\\_12\\_14\\_15.pdf](https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_12_14_15.pdf) [hereinafter AAU Study].

morally self-evident, is thus really the outcome of a struggle between various value judgments about whether sex can be instrumental rather than hedonistic, whether sex is the type of life-decision that must be deeply contemplated or something people just go with, and whether we look at sex from a male or female perspective.<sup>45</sup> Accordingly, the language of consent can preclude open political debate on, for example, the permissibility of grudging, hasty, or even undesired sex—an issue sociological studies indicate is more complex than one might initially think. Studies find that college students, female and male, widely agree to “unwanted sex,” meaning sex that is not physically desired. They engage in this unwanted sex for a variety of reasons, including status and relationship intimacy,<sup>46</sup> and such sex actually produces positive outcomes.<sup>47</sup>

### B. Step 2: A’s External Manifestations

Step 2 reflects the instinct that consensual sex requires partners to communicate with each other. Given that sexual interaction is itself communicative, absolutely unexpressive sex will be rare. Thus, the primary issue is *which* external acts communicate willingness (and which do not). A popular view is that consenters just tell people they want to do something. For example, one expert opines: “Parties who mutually desire sexual intimacy normally communicate that desire freely.”<sup>48</sup> However, sexual consent negotiation is highly context specific

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<sup>45</sup> This is necessarily the case given that any “determinations that contracts (or sexual relations or criminal conspiracies) were freely entered into are *not* determinations about ‘what happened,’ but rather they are value-based decisions about what should be considered choice.” Nancy Ehrenreich, *Surrogacy as Resistance?: The Misplaced Focus on Choice in the Surrogacy and Abortion Funding Contexts*, 41 DEPAUL L. REV. 1369, 1385 (1992) (book review); cf. West, *supra* note 24, at 246 (noting that willingness can mark the line between criminal and noncriminal but is not co-extensive with well-being).

<sup>46</sup> See Charlene L. Muehlenhard & Stephen W. Cook, *Men’s Self-Reports of Unwanted Sexual Activity*, 24 J. SEX RES. 58 (1988); Lucia F. O’Sullivan & Elizabeth Rice Allgeier, *Feigning Sexual Desire: Consenting to Unwanted Sexual Activity in Heterosexual Dating Relationships*, 35 J. SEX RES. 234 (1998); Susan Sprecher et al., *Token Resistance to Sexual Intercourse and Consent to Unwanted Sexual Intercourse: College Students’ Dating Experiences in Three Countries*, 31 J. SEX RES. 125 (1994). For a fascinating literature survey on sexual compliance and sexual sacrifice, see Emily A. Impett & Letitia A. Peplau, *Sexual Compliance: Gender, Motivational, and Relationship Perspectives*, 40 J. SEX RES. 87 (2003). *But see* Dorothy E. Roberts, *Rape, Violence, and Women’s Autonomy*, 69 CHI.-KENT L. REV. 359, 380 (1993) (likening sex resulting from “women’s desire to please men because of cultural expectations of feminine conduct” to sex produced by threat or fear).

<sup>47</sup> See O’Sullivan & Allgeier, *supra* note 46.

<sup>48</sup> Schulhofer, *Consent*, *supra* note 12, at 670. Kudos to Fred Bloom for noticing the double layered use of “normally.”

and culturally ordered.<sup>49</sup> Further, considering the long Anglo-American history of not communicating forthrightly about sexual desire, it would follow that internal mental states are unlikely to have some obvious and clear relationship to external manifestations. Indeed the social science on sexual consent, which we will examine in detail in Part III, confirms that people are normally recondite about their sexual intentions.<sup>50</sup>

Thus, the Step 2 external manifestations are not necessarily linearly reflective of the Step 1 internal decision. A decision to or not to have sex can generate a range of variable and even contradictory manifestations, conditioned on many factors like community norms, relationship status, age, gender, sexual orientation, and individual personality. Some of the factors influencing sexual communicative practices—for example, stereotypical sex roles—are not palatable and reflect various inequalities and harms experienced by complainants individually and women generally. Thus, the way people do communicate sexual willingness might differ from the way we think they should. And it might lead us to embrace the problematic belief—explored later—that instead of addressing the inequalities underlying the prevailing sex script, we should randomly punish some who engage the script in the hope that it will change the world.

### C. Step 3: B's Understanding of A's Mental State

In a perfect consent transaction, B's belief that A mentally agreed to sex will be a correct interpretation of A's external manifestations. Things get more difficult when there is a discrepancy between B's belief and A's actual state of mind. For example, B might interpret A's manifestations as indicating willingness, when, in fact, A is adamantly opposed to the sexual act.<sup>51</sup> Indeed, studies show that men are prone to interpret "friendly" behavior as consent, while women view consent as requiring verbalization.<sup>52</sup> Most scholars would say that B is permitted to have sex if he has a *reasonable* belief that A is willing.<sup>53</sup> Nevertheless, there

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<sup>49</sup> See Sprecher et al., *supra* note 46, at 126.

<sup>50</sup> See *infra* notes 122–28 and accompanying text.

<sup>51</sup> Alternatively, B might be convinced that A is unwilling and decide to pursue sex anyway, but, in fact, A is quietly enthusiastic. We would probably consider B a pretty bad person and a walking hazard, but the requirement of *actus reus* would foreclose liability.

<sup>52</sup> See Antonia Abbey, *Sex Differences in Attributions for Friendly Behavior: Do Males Misperceive Females' Friendliness?*, 42 J. PERSONALITY & SOC. PSYCHOL. 830 (1982); Susan E. Hickman & Charlene L. Muehlenhard, "By the Semi-Mystical Appearance of a Condom": *How Young Women and Men Communicate Sexual Consent in Heterosexual Situations*, 36 J. SEX RES. 258 (1999); Terry P. Humphreys & Mélanie M. Brousseau, *The Sexual Consent Scale—Revised: Development, Reliability, and Preliminary Validity*, 47 J. SEX RES. 420, 421 (2010).

<sup>53</sup> There may be a case for strict liability in a particular class of "public welfare offenses,"

remains the perennial problem of the meaning of reasonableness in an unreasonable world.<sup>54</sup> Where sexist norms prevail and “reasonable” people presume women consent unless they resist, requiring reasonableness will hardly produce justice.<sup>55</sup> Rape reformers who regard the reasonable belief standard as too lenient turn to affirmative consent. The goal is to identify a limited set of external manifestations indicative of consent to *nonsexist* people. If such manifestations are not present, *B* is guilty regardless of whether *B* believed *A* was willing, and in fact the larger (sexist) society would agree with *B*’s assessment. We will discuss affirmative consent in more detail in the next two Parts.

It gets even more complicated when we subjectivize *B*’s intent. If *B* is totally clueless, has an overinflated self-image of sexiness, or adheres to a defective sexual script, *B* might honestly believe that *A* agreed to sex, even though reasonable people would have read *A*’s behavior otherwise. *B* might in fact be horrified to know the sex was undesired. Nevertheless, *B*’s actions, though well-intentioned, are negligent, and the question becomes whether we should punish a person who honestly but negligently misinterprets external manifestations. Unreasonable actions that harm others typically generate civil, rather than criminal, liability.<sup>56</sup> Under general criminal law principles, *B* is not liable for rape if *B* honestly (or non-recklessly) believed *A* was willing, regardless of the reasonableness of this view.<sup>57</sup> Nevertheless, many jurisdictions do adopt a negligence standard for sexual assault.<sup>58</sup> This leads to the criticism that negligence is imprecise and overly punitive, given the variability in how people define reasonably prudent sexual behavior.<sup>59</sup> All this said, for

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because of the danger and difficulty in proving intent, but lack of intent is generally anathema in individual traditional crimes. See *Morrisette v. United States*, 342 U.S. 246, 255 (1952).

<sup>54</sup> This reasonable-racist/sexist/homophobe problem comes up in a variety of situations in criminal law. See CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (2003); see also Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

<sup>55</sup> See, e.g., Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687 (1991).

<sup>56</sup> See MODEL PENAL CODE § 2.02(2)(c) cmt. 5 at 244 (AM. LAW INST. 1962).

<sup>57</sup> See, e.g., MPC Draft No. 5, *supra* note 10, at 147 (“If the actor honestly and sincerely believes a sexual overture is welcomed, there should not be liability even if the other person in fact found the date insufferable, and yet continued to be politely accommodating.”).

<sup>58</sup> See *id.* at 169 (surveying case law and concluding that a negligence mens rea for unconsensual sex is the “prevailing view in contemporary American case law”).

<sup>59</sup> See *id.* at 171 (noting the “concern[] that a negligence standard in this context will result in penal liability greatly disproportionate to fault”).

most theorists, so long as *B* acts within reasonable communicative norms, *B* has acted lawfully.<sup>60</sup>

In sum, an uncontroversial sexual consent transaction involves: (1) *A*'s internal decision to have sex; (2) *A*'s external manifestations of that decision; and (3) *B*'s (reasonable) belief, based on the external manifestations and context, that *A* is willing to have sex. In the typical contested consent case, *A* claims the sex was internally unwanted. *B* responds either that *A* did internally agree, that *B* (reasonably) believed *A* internally agreed, or both. The jury, not being mind-readers, will resolve the issue by looking at *A*'s external manifestations in context. The tricky part is that decision-makers harbor a wide spectrum of views as to what constitutes internal willingness, how that willingness is or should be manifested, and how a person should interpret those manifestations.

## II. AFFIRMATIVE CONSENT

Determining whether there is a valid consent transaction in any given case is a difficult task. There are so many pieces to the puzzle of internal willingness, external manifestation, and defendant's mens rea, not to mention disputes over what occurred, creating credibility contests. The ordinary consent standard leaves it to police officers, prosecutors, and jurors to determine the parameters of a consensual mental state and divine the proper meaning of external manifestations. Rape reformers are rightfully concerned that such decision-makers can make bad calls by, for example, finding subtly coerced agreement valid, invariably deriving willingness from silence, or allowing the defendant too much leeway to interpret any behavior as consent. To reduce the risk of bad calls, reformers advocate for affirmative consent.<sup>61</sup> Affirmative consent laws direct decision-makers to focus on what complainants do or say, and not on what they intend. Step one is no longer part of the picture. This is not a radical change, given that jurors in ordinary consent cases generally look at the external manifestations in context to determine the complainant's mental state.<sup>62</sup> It is the second

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<sup>60</sup> See, e.g., Estrich, *supra* note 26, at 1102–03; Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 67 (1993) (advocating that “the minimum culpable mens rea as to consent should be negligence”).

<sup>61</sup> See David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 426 (2000) [hereinafter Bryden, *Redefining Rape*]; see, e.g., *In re M.T.S.*, 609 A.2d 1266, 1277–78 (N.J. 1992).

<sup>62</sup> The exception would be an ordinary consent case where the complainant was silent, passive, or resisting, but he sent a text right after the sex stating: “I just had the best sexual experience and was totally happy that my partner took control.” Here, the jury might acquit, determining that the complainant internally agreed to the sex based, not on his external

directive that drives the passionate debate: only *certain* step two external manifestations count as “affirmative consent.” Affirmative consent reforms narrow the world of communicative performances that make sex permissible.

The meaning of “affirmative consent,” nevertheless, is not uniform, and can range from narrow communicative prescriptions (contract, verbal yes) to any behavior that conveys internal agreement (foreplay, acquiescence). Narrow formulations protect victims but appear sex-regulatory and unfair to defendants. However, broad formulations that allow any words, conduct, or omissions to establish affirmative consent are not much of a reform at all. A number criminal rape statutes include some form of affirmative consent. But these laws are notoriously vague, requiring, for example, “positive cooperation” or “freely given agreement” without specifying whether that cooperation or agreement requires something more than participation without protest, and what that something more is.<sup>63</sup> The below categories of affirmative consent are culled from the vast amount of criminal law, educational policy, scholarship, media commentary, and internet discussion regarding affirmative consent. Here is a spectrum of affirmative consent formulations from more sex-regulatory/prosecutorial to less sex-regulatory/lenient:

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manifestations at the time of the encounter, but the later text. In this case, an affirmative consent standard, which eliminates step one from the inquiry, would make a big difference, even if it permitted any type of external manifestation to count as affirmative consent.

<sup>63</sup> See, e.g., CAL. PENAL CODE § 261.6 (West 2014) (“positive cooperation in act or attitude pursuant to an exercise of free will.”); 720 ILL. COMP. STAT. ANN. § 5/11-1.70 (West 2002) (“freely given agreement to the act of sexual penetration”); WIS. STAT. ANN. § 940.225(4) (West 2005) (“words or overt actions by . . . indicating a freely given agreement”); *In re M.T.S.*, 609 A.2d at 1277 (“affirmatively and freely given authorization”). For a current accounting of the various types of affirmative consent laws, see Schulhofer, *Consent*, *supra* note 12; Tuerkheimer, *Affirmative Consent*, *supra* note 25; and MPC Draft 5, *supra* note 10, at 58–61. Thus, the below standards are primarily taken from university conduct codes, which tend to be more specific about affirmative consent.



**More Regulatory**

- A signed contract
- An enthusiastic yes
- A verbal yes
- Stop, seek, and obtain permission
- Words and/or conduct that clearly and contemporaneously convey agreement
- Words and/or conduct (including omissions) that, in context, convey agreement (i.e. ordinary external manifestations)

**Less Regulatory**

*Figure 2: The Affirmative Consent Scale*

The following Sections examine each formulation, starting with the most regulatory.

### A. *The Contract*

The most restrictive construction of affirmative consent—the signed, notarized, contract in triplicate—is largely, although not exclusively, a product of the derisive discourse of rape reform opponents, who seek to provoke public ridicule of affirmative consent.<sup>64</sup> That said, it is not completely fallacious to ally the sex contract with anti-rape activism. Commentary on the web extolls the written contract as a good way to manage sexual communication.<sup>65</sup> Indeed, on [affirmativeconsent.com](http://affirmativeconsent.com), one can purchase “Affirmative Consent Kits” for \$12.00, which include “Yes Means Yes Cards.”<sup>66</sup> The website is part of the “Affirmative Consent Project,” a group that lobbies law and policy makers to adopt affirmative consent standards.<sup>67</sup> Founder Alison Berke Morano asserts the cards are not a joke: “We’re trying to change

<sup>64</sup> See Callie Beusman, ‘Yes Means Yes’ Laws Will Not Ruin Sex Forever, Despite Idiotic Fears, JEZEBEL (Sept. 8, 2014, 5:00 PM), <http://jezebel.com/yes-means-yes-laws-will-not-ruin-sex-forever-despite-i-1630704944>.

<sup>65</sup> See, e.g., Betsy Gallup, *Sex Contracts*, LOVE TO KNOW, [http://dating.lovetoknow.com/Sex\\_Contracts](http://dating.lovetoknow.com/Sex_Contracts) (last visited Oct. 23, 2016).

<sup>66</sup> See AFFIRMATIVE CONSENT, <http://www.affirmativeconsent.com> (last visited Oct. 5, 2016). The price of the packet in 2015 was a mere \$2.99.

<sup>67</sup> Maura Lerner, *National Group Hopes to Stir Talk with Its Sex Consent Contracts*, STAR TRIB. (July 9, 2015, 5:17 AM), <http://www.startribune.com/group-hopes-to-stir-talk-with-its-sex-consent-contracts/312694551>.

the conversation and make people more secure,” she explained to the press.<sup>68</sup>

### B. *An Enthusiastic Yes*

A step down from the signed contract formulation of affirmative consent is the requirement of an “enthusiastic” verbal yes. Reflective (and reflexive) of the maligned no-means-yes trope, this requirement holds that yes means no, unless the yes is declared with alacrity.<sup>69</sup> The “enthusiastic yes” mantra is repeated in freshman orientations and enshrined in the feminist blogosphere.<sup>70</sup> In some ways, the requirement of perpetual enthusiasm might be more difficult to attain than even the signed contract in triplicate. One blogger opines:

“Sex” is an evolving series of actions and interactions. You have to have the enthusiastic consent of your partner for all of them. And even if you have your partner’s consent for a particular activity, you have to be prepared for it to change. . . . [I]f you want to have sex, you have to be continually in a state of enthusiastic consent with your partner.<sup>71</sup>

The requirement of an enthusiastic expression is related to the new feminist ideology that sex is gender oppression unless the woman (typically envisioned as the sex acceptor) engages in it deliberately and hedonistically.<sup>72</sup> The enthusiastic yes reform thus weighs in both on the quality of a consenting mental state and the character of the

<sup>68</sup> Blake Neff, *Sexual Consent Contracts Are Now A Real Thing You Can Buy*, DAILY CALLER (July 8, 2015, 8:52 AM), <http://dailycaller.com/2015/07/08/sexual-consent-contracts-are-now-a-real-thing-you-can-buy/#ixzz3udpy8nCO>; see also Lerner, *supra* note 67.

<sup>69</sup> See, e.g., YALE UNIV., 2013 ANNUAL SECURITY REPORT 21 (2014), <http://your.yale.edu/sites/default/files/files/Yale%20Clery%20Report%202013.pdf> (stating that the University directs students to “[h]old out for enthusiasm”); ELON UNIV., ANNUAL SECURITY REPORT 8 (2013), <http://www.elon.edu/docs/e-web/bft/safety/Elon%20University%20ASR%202013.pdf> (consent is “comprehensible, unambiguous, positive, and enthusiastic”); see also Gersen & Suk, *supra* note 43, at 924–30 (discussing the enthusiasm requirement).

<sup>70</sup> See Cheryl Corley, *HBCUs Move to Address Campus Sexual Assaults, but Is It Enough?*, NPR (Sept. 29, 2014, 3:26 AM), <http://www.npr.org/2014/09/29/351534164/hbcus-move-to-address-campus-sexual-assaults-but-is-it-enough> (describing a Title IX hearing at Howard University where the administrator stated, “[r]epeat after me—an enthusiastic yes”).

<sup>71</sup> Jaclyn Friedman, *Consent Is Not a Lightswitch*, AMPLIFY: BLOG (Nov. 9, 2010), [http://amplifyyourvoice.org/u/Yes\\_Means\\_Yes/2010/11/9/Consent-Is-Not-A-Lightswitch](http://amplifyyourvoice.org/u/Yes_Means_Yes/2010/11/9/Consent-Is-Not-A-Lightswitch).

<sup>72</sup> See, e.g., *Creating a Culture of Consent*, HARV. U. OFF. OF SEXUAL ASSAULT PREVENTION & RESPONSE, <http://osapr.harvard.edu/creating-culture-consent> (last visited Oct. 23, 2016) (embedding into the notion of consent that each person is “sincere in their desires” and that they “know[] and feel[]—without a doubt—that the other person is excited to engage [in sexual conduct]”).

performance. Both must be carnal and ebullient. In times past, the sex regulatory tendency was toward instrumentalist intercourse, strictly for reproductive purposes. Today's regulatory impulses tend toward sybaritic sex, strictly for (hetero female-style) pleasure purposes.<sup>73</sup>

### C. *Yes Means Yes*

Moving down the line, a more common formulation of affirmative consent is the requirement of a verbal yes. Reformers, activists, and college administrators tout this threshold as necessary to ensure that one's sexual partner has internally agreed to sex.<sup>74</sup> Nonetheless, even those sympathetic to clear modes of sexual communication acknowledge that insisting on a specific word to legitimate sex is artificial and unrealistic, given the heterodoxy of intimate signaling. Thus, while "only yes means yes" is a catchy sound bite, for many affirmative consent proponents, the permission script can be more variable.<sup>75</sup> In this view, one does not have to ask for and receive a "yes," but there are communicative hurdles that must be traversed. Thus, a common formulation of affirmative consent dictates that a person seeking intercourse must stop, explicitly seek permission, and obtain permission in some clear form.

### D. *Stop and Ask*

The stop-and-ask approach, which appears frequently in university policies, puts a legally enforceable obligation on the sex proponent to

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<sup>73</sup> And what is pleasurable to women is conceived of in very narrow and gendered terms as sensitive, communicative, loving, committed, gentle sex. See Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 206–07 (2001); cf. Chamallas, *supra* note 28, at 839 (advocating regulation to encourage "reservation of sex for intimacy and pleasure," but not through criminal law).

<sup>74</sup> Although most colleges do not require verbal consent, they counsel strongly in favor of it. See, e.g., *Amherst College Sexual Misconduct and Harassment Policy*, AMHERST C., <https://www.amherst.edu/campuslife/health-safety-wellness/sexual-respect/sexual-misconduct-and-harassment-policy/node/497976> ("Relying on non-verbal communication can lead to misunderstandings. . . . In the absence of an outward demonstration, consent does not exist."); cf. Tovia Smith, *Campuses Consider Following New York's Lead On 'Yes Means Yes' Policy*, NPR (July 8, 2015, 4:30 PM), <http://www.npr.org/2015/07/08/421225048/campuses-consider-following-new-yorks-lead-on-yes-means-yes-policy> (quoting Governor Cuomo as characterizing New York's affirmative consent bill as requiring "[t]he other person . . . to say yes. It's yes on both sides.").

<sup>75</sup> See *The Johns Hopkins University Sexual Misconduct Policy and Procedures*, JOHNS HOPKINS U., <http://sexualassault.jhu.edu/policies-laws/#Section%20III%20-%20Definitions> (last visited Oct. 24, 2016) [hereinafter *Johns Hopkins Policy*] (requiring "a clear 'yes,' verbal or otherwise").

stop the sexual interaction, expressly seek permission for a specific act, and obtain a “yes” or its functional equivalent from the sex acceptor.<sup>76</sup> California’s highly publicized and controversial affirmative consent law, for example, mandates that university conduct codes define consent as “affirmative, conscious, and voluntary agreement to engage in sexual activity” and specify that “[i]t is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity.”<sup>77</sup> This language, like that of many affirmative consent statutes, permits a variety of interpretations. Alarmist opponents call it the sex contract.<sup>78</sup> Defenders say that the law merely demands consent in its ordinary sense.<sup>79</sup> Despite its somewhat ambiguous nature, the law does appear to require some stop-and-ask ritual.

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<sup>76</sup> See, e.g., *Gender-Based Misconduct Policy for Students*, COLUM. U. 7 (Sept. 19, 2016), <http://www.columbia.edu/cu/studentconduct/documents/GBMPolicyandProceduresforStudents.pdf> [hereinafter *Columbia Policy*] (“If there is confusion or ambiguity, participants in sexual activity need to stop and talk about each person’s willingness to continue.”); *Policy on Harassment, Discrimination, and Sexual Misconduct*, U. CHI., <https://studentmanual.chicago.edu/page/policy-harassment-discrimination-and-sexual-misconduct#Consent> (last updated Aug. 23, 2016) [hereinafter *Chicago Policy*] (“It is the responsibility of the person who wants to engage in a sexual activity to obtain the consent of the other person for that sexual activity.”); *Policy on Sexual and Gender-Based Harassment and Other Forms of Interpersonal Violence*, U. VA. 13 (July 1, 2015), <https://vpsa.virginia.edu/sites/vpsa.virginia.edu/files/Title%20IX%20VAWA%20Umbrella%20Policy.pdf> (“stop and clarify”); *Prohibited Sexual Conduct: Sexual Misconduct, Sexual Assault, Stalking, Relationship Violence, Violation of University or Court Directives, Student-on-Student Sexual Harassment and Retaliation*, STAN. U. (Mar. 11, 2016), <https://adminguide.stanford.edu/printpdf/chapter-1/subchapter-7/policy-1-7-3> [hereinafter *Stanford Policy*] (“It is the responsibility of person(s) involved in sexual activity to ensure that he/she/they have the affirmative consent of the other . . . .”); *Student Sexual Misconduct Policy and Procedures: Duke’s Commitment to Title IX*, DUKE U., <https://studentaffairs.duke.edu/conduct/z-policies/student-sexual-misconduct-policy-dukes-commitment-title-ix#consent> (last visited Oct. 24, 2016) [hereinafter *Duke Policy*] (“[I]t is essential that each participant stops and clarifies, verbally, willingness to continue.”); *Wesleyan University 2016–2017 University Standards and Regulations*, WESLEYAN U. 23, <http://www.wesleyan.edu/studentaffairs/studenthandbook/StudentHandbook.pdf> (last visited Oct. 31, 2016) [hereinafter *Wesleyan Code*] (“It is the responsibility of the person who wants to engage in sexual activity to insure consent of their partner(s).”). The MPC draft makes some overtures toward the stop-and-ask model, stating that “the more assertive party [must] ensure receptiveness to each more intimate or different act of penetration,” but ultimately leaves it to the jury to determine whether there is consent “on the basis of all the circumstances.” MPC Draft 5, *supra* note 10, at 73.

<sup>77</sup> S.B. 967, 2014 Leg., 2013–2014 Reg. Sess. (Cal. 2014). The name of the bill is “Student Safety: Sexual Assault,” but it is widely referred to as the “Affirmative Consent” or even “Yes-Means-Yes” bill.

<sup>78</sup> See, e.g., Beusman, *supra* note 64; Yehuda Remer, *California To Redefine Sex As Rape*, TRUTH REVOLT (Mar. 10, 2014), <http://www.truthrevolt.org/news/california-define-sex-rape>.

<sup>79</sup> See, e.g., Beusman, *supra* note 64.

Under the California law, the sex proponent must “ensure” that there is affirmative consent.<sup>80</sup> Elsewhere, the law requires “reasonable steps . . . to ascertain whether the complainant affirmatively consented.”<sup>81</sup> One plausible reading of this language is that a person has to do no more than look for reasonable signs of agreement. However, the word “ensure” indicates that sex proponents must, in some meaningful sense, *guarantee* consent. One might accordingly be concerned that ensuring consent requires magic words or, worse, a document to record consent.<sup>82</sup> And now the sex contract interpretation seems a bit less like conservative men’s paranoia.<sup>83</sup>

More likely, the “ensure” language obligates sex proponents, before and frequently during a make-out session, to stop and ask for permission, something like, “Do you want to do it?,” or as one university public awareness video counsels, “Do you want to bump and grind with me?”<sup>84</sup> The sex acceptor must then give an indication of permission, something like a thumbs up, or “I would really like to bump and grind with you.”<sup>85</sup> Some of the stop-and-ask scripts offered by college administrators and activists verge on humorous, reminiscent of spoof 1970s pick-up lines. One university pamphlet, “Making Consent Fun,” suggests procuring consent through questions like, “Baby, you want to make a bunk bed: me on top, you on bottom?” and “Would you like to try an Australian kiss? It’s like a French kiss, but ‘Down Under.’”<sup>86</sup> Or consider these directives from a “sex-positive” feminist blogger for attaining consent: “Describe a hot fantasy before you hit the bedroom,” and “Use your body as a guide: You can’t go grabbing someone else’s parts without asking, but you can definitely grab at your own.”<sup>87</sup> These suggestions illustrate the difficulty in formulating the ideal enlightened-but-sexy consent script.

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<sup>80</sup> S.B. 967; *see also Wesleyan Code*, *supra* note 76, at 23 (using the word “insure”).

<sup>81</sup> S.B. 967.

<sup>82</sup> Indeed, some policies require that people “verbally clarify” ambiguous consent. *See, e.g., Columbia Policy*, *supra* note 76.

<sup>83</sup> *See supra* Section II.A.

<sup>84</sup> SAVP Vassar, *How do I Ask For Consent?*, YOUTUBE (Apr. 28, 2014), <https://www.youtube.com/watch?v=vbyaFyr2h6Q>.

<sup>85</sup> *Id.*

<sup>86</sup> *Where is Your Line: Consent is Sexy!*, U. WYO., [http://www.uwyo.edu/stop/resources/10\\_stop\\_consentSexy\\_booklet.pdf](http://www.uwyo.edu/stop/resources/10_stop_consentSexy_booklet.pdf) (last visited Oct. 24, 2016). *See Gersen & Suk, supra* note 43, at 928–29 for more examples.

<sup>87</sup> Kristen Sollee, *4 Sexy Ways To Ask For Consent, Because It Can Be A Turn-On*, BUSTLE (Oct. 16, 2015), <http://bustle.com/articles/103236-4-sexy-ways-to-ask-for-consent-because-it-can-be-a-turn-on>.

### E. *Clear and Contemporaneous Consent*

The next formulation of affirmative consent falls between stop-and-ask and the world of Step 2 external manifestations. A number of sexual consent policies do not require magic words or an ask-and-answer process, but they do demand “clear” agreement specific to and contemporaneous with a particular sexual act.<sup>88</sup> Here, affirmative consent to sex cannot just be a make-out session, but must involve some relatively unequivocal communication of agreement to the particular sex act. When pressed, commentators have difficulty identifying the line between foreplay that demonstrates consent to just that foreplay and foreplay that demonstrates consent to more intimate sexual acts.<sup>89</sup> The important thing is that in this version of affirmative consent, such a line exists, which means that only a subset of make-out sessions count as affirmative consent to sexual penetration.

That subset can be broader or narrower. Many commentators hold that “kissing alone” is not affirmative consent to penetrative intercourse, but otherwise decline to delineate which intimate activities constitute “clear” agreement.<sup>90</sup> A good number of scholars and most university policies go further and maintain that affirmative consent must be specific to “each act,” that is, every stage of the sexual proceedings.<sup>91</sup> This would indicate that kissing does not communicate consent to breast touching, breast touching does not communicate consent to genital touching, genital touching does not communicate consent to oral sex, and oral sex does not communicate consent to genital

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<sup>88</sup> See, e.g., *Prohibited Student Conduct: Sexual Assault*, CORNELL U., <http://titleix.cornell.edu/prohibited-conduct/sexual-assault> (last visited Oct. 31, 2016) (defining affirmative consent as “words or actions [that] create clear permission”); *Sexual Misconduct*, U. COLO. (July 1, 2015), <http://www.cu.edu/sites/default/files/5014.pdf> [hereinafter *Colorado Policy*] (“unambiguous . . . agreement”); *Sexual Respect: Definitions*, DARTMOUTH C., <http://www.dartmouth.edu/sexualrespect/definitions.html#consent> (last updated Feb. 3, 2015) (“clear and unambiguous agreement, expressed in mutually understandable words or action”); *Yale Sexual Misconduct Policies and Related Definitions*, YALE U., <http://smr.yale.edu/sexual-misconduct-policies-and-definitions> (last updated May 10, 2016) (“unambiguous . . . agreement”); see also SCHULHOFER, UNWANTED SEX, *supra* note 12, at 271 (advocating “permission . . . clearly communicated”).

<sup>89</sup> See *infra* note 115–21 and accompanying text (discussing the complexities of foreplay).

<sup>90</sup> See, e.g., Note, *Acquaintance Rape and Degrees of Consent: “No” Means “No,” but What Does “Yes” Mean?*, 117 HARV. L. REV. 2341, 2345–46 (2004) (critiquing general view that consent to one activity implies consent to another).

<sup>91</sup> See, e.g., *Sexual and Gender-Based Harassment, Sexual Violence, Relationship and Interpersonal Violence and Stalking Policy*, BROWN U. 7 (Sept. 2, 2016), <https://www.brown.edu/about/administration/title-ix/sites/brown.edu/about/administration.title-ix/files/uploads/policy-final-sept-16.pdf> [hereinafter *Brown Policy*] (affirmative consent to “each instance of sexual contact”).

penetration.<sup>92</sup> In this view, there must be some additional (although not always specified) expression that conveys clear agreement to a sex act in a way that participation in the overall intimate encounter does not.<sup>93</sup>

A similar requirement of consent contemporaneity specifies that present consent cannot be inferred from past consent or an existing sexual relationship.<sup>94</sup> Sex proponents may be permitted to contextualize external manifestations (i.e., kissing and petting), with recent occurrences (i.e., the sex acceptor said “take the lead tonight”). They may not, however, contextualize that same kissing and petting with past evidence (i.e., on ten previous occasions, petting led to sex). Although most of these policies do not say that past intimacy or relationship status is completely irrelevant, they do single out past events/relationship as “not indicative” of present consent.<sup>95</sup> This suggests that the external manifestations must be the type that would clearly convey sexual willingness to a stranger, even if the sex occurs between two people in an existing sexual relationship.<sup>96</sup>

A concept related to contemporaneity, which appears frequently in expert commentary and university handbooks, is that affirmative

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<sup>92</sup> See, e.g., Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1420 (2005); *Columbia Policy*, *supra* note 76, at 7 (“Consent to one form of sexual activity does not imply consent to other forms of sexual activity.”); see also *Duke Policy*, *supra* note 76; *Sexual Assault, Stalking and Relationship Violence*, U. MINN. app. (Aug. 2015), <https://policy.umn.edu/operations/sexualassault> [hereinafter *Minnesota Policy*]; *Sexual Misconduct*, EMORY U. (Sept. 26, 2016), <https://policies.emory.edu/8.2>. The MPC draft “requires consent for each act of sexual penetration” and states that “consenting to oral sex act does not necessarily imply permission to engage in vaginal or anal sex.” MPC Draft 5, *supra* note 10, at 73 (emphasis added). However, it also “leaves room for . . . interpretive disputes about how to understand such words and conduct under all the circumstances.” *Id.*

<sup>93</sup> The now-infamous Antioch College Sexual Offense Prevention Policy attempted to specify such temporal lines, stating: “Verbal consent should be obtained with each new level of physical and/or sexual behavior in any given interaction, regardless of who initiates it. Asking ‘Do you want to have sex with me?’ is not enough. The request for consent must be specific to each act.” A 1996 version of the policy, originally passed in 1993, is available at <http://www.d.umn.edu/cla/faculty/jhamlin/3925/Readings/Antioch.html>. Its radical nature drew biting ridicule. See Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 687 (1999) (discussing “vitriolic criticisms” in the media).

<sup>94</sup> See *Brown Policy*, *supra* note 91, at 7 (past or present relationship does not necessarily imply consent); *Chicago Policy*, *supra* note 76; *Stanford Policy*, *supra* note 76; sources cited *supra* note 92 (consent to one act is not consent to another).

<sup>95</sup> Compare *Chicago Policy*, *supra* note 76 (sexual relationship does not “in and of itself” constitute consent), and *Stanford Policy*, *supra* note 76 (dating relationship does not “by itself” indicate consent), with *Colorado Policy*, *supra* note 88 (previous and current sexual relationships “do not imply consent”), and *Columbia Policy*, *supra* note 76, at 7 (previous relationship “is not consent to sexual activity”).

<sup>96</sup> See *Columbia Policy*, *supra* note 76, at 7 (“The definition of consent does not vary based upon . . . relationship status.”).

consent must be “continuous,” “persistent,” or “ongoing.”<sup>97</sup> In terms of *internal* consent, continuous agreement is epistemologically problematic if it renders sex unconsensual whenever a party has a fleeting second thought. More plausible is that persistent consent means there must be an overall mental state of agreement, even though uncertainty or hesitation might occasionally crop up. The requirement of ongoing *external* consent is similarly confounding. What exactly does a continuous communication of agreement look, or sound, like? The requirement of ongoing performative consent must instead mean something like specific consent to each *critical* act.<sup>98</sup>

#### F. *Contextual Consent and No Means No*

I will end this parsing of affirmative consent by touching on formulations that are related to, and sometimes even called, “affirmative consent,” although they are very far from yes means yes, stop and ask, and clear consent standards. Several past drafts of the MPC sexual assault revisions purport to establish “affirmative consent,” but in fact set up a standard in which nearly all external manifestations can, in context, count as evidence of internal agreement.<sup>99</sup> In fact, the MPC standard acknowledges that silence and passivity can sometimes communicate consent.<sup>100</sup> However, there is a meaningful limitation on this free reign to interpret the external manifestations: when a person utters a verbal refusal, one *must presume* that the person is unwilling, regardless of the overall context.<sup>101</sup>

Some may be concerned that no means no is too artificial, given that young people sometimes engage in perfunctory and duplicitous sexual protest.<sup>102</sup> The MPC draft, however, tempers the directive: “no” can be countered by any *subsequent*—though curiously not preceding or simultaneous—words or actions indicating consent.<sup>103</sup> Accordingly,

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<sup>97</sup> See, e.g., S.B. 967, 2014 Leg., 2013-2014 Reg. Sess. (Cal. 2014) (“Affirmative consent must be ongoing throughout a sexual activity.”); *Johns Hopkins Policy*, *supra* note 75; *Minnesota Policy*, *supra* note 92, app.; *Stanford Policy*, *supra* note 76.

<sup>98</sup> Thus “ongoing” is used in counter-distinction to irrevocable. See, e.g., *Stanford Policy*, *supra* note 76 (“Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time.”).

<sup>99</sup> See, e.g., MPC Draft 5, *supra* note 10. The January 2016 Council Draft wisely drops the “affirmative consent” label in favor of “contextual consent,” but the standard still requires expressive consent and presumes that no means no. See MPC Revisions, *supra* note 10.

<sup>100</sup> MPC Draft 5, *supra* note 10, at 34.

<sup>101</sup> *Id.* at 53.

<sup>102</sup> See *infra* note 128 and accompanying text.

<sup>103</sup> MPC Draft 5, *supra* note 10, at 54.



assessing a package of external manifestations that includes a “no” is identical to an ordinary consent assessment, so long as *something* performative followed the “no.” And since the draft counts even passive engagement as consent performance, its no-means-no rule would primarily affect cases where the “no” *immediately* precedes the relevant sex act. In any case, even a stricter no-means-no rule is a far cry from the type of regulation represented by the various affirmative consent formulas examined above. This is precisely why activists urge the move from no means no to yes means yes.<sup>104</sup>

Finally, some laws make sex a rape only when the victim expressly refuses or resists. These refusal laws, like New York’s felony provision requiring that “the victim clearly expressed that he or she did not consent,” differ substantially from laws that punish any unconsensual sex.<sup>105</sup> Refusal laws might not criminalize a situation where the victim was clearly unwilling but did not openly protest. For example, in one California case, the defendant awoke the complainant, a houseguest sleeping in the living room, from a deep slumber, quickly penetrated her, ejaculated, and left.<sup>106</sup> The lethargic and surprised complainant had no time to protest.<sup>107</sup> Although the California court ultimately found nonconsent (and force),<sup>108</sup> one could imagine such a defendant being acquitted under a refusal law.<sup>109</sup> However, the alternative to a presumption of willingness in the absence of explicit refusal does not have to be a presumption of unwillingness in the absence of explicit affirmative agreement. Rather, an ordinary consent law could refrain from presupposing—and dictating canons of sexual interpretation reflecting—a general human disposition toward sex (desirous or repulsed). It instead can direct decision-makers to focus on the details of the sexual interaction, without any presumptions about an overall stance toward sex.

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<sup>104</sup> See, e.g., Nicholas J. Little, Note, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321 (2005); see also Jake New, *More College Campuses Swap ‘No Means No’ for ‘Yes Means Yes’*, PBS (Oct. 17, 2014, 1:04 PM), <http://www.pbs.org/newshour/rundown/means-enough-college-campuses>.

<sup>105</sup> N.Y. PENAL LAW § 130.05 (McKinney 2009); see also NEB. REV. STAT. ANN. §§ 28-318(8), 319(1) (West 2009); UTAH CODE ANN. §§ 76-5-402(1), 406(1) (West 2015); WASH. REV. CODE ANN. § 9A.44.060 (West 2015).

<sup>106</sup> *People v. Iniguez*, 872 P.2d 1183 (Cal. 1994); see also MPC Draft 5, *supra* note 10, at 61–62 (indicating this case evidences the need for affirmative consent).

<sup>107</sup> *Iniguez*, 872 P.2d at 1185.

<sup>108</sup> *Id.* at 1190.

<sup>109</sup> Then again, this might not happen. See *State v. Lisasuain*, 117 A.3d 1154, 1158 (N.H. 2015) (finding passive behavior without refusal to satisfy rape statute requiring victims to “indicate[] by speech or conduct that there is not freely given consent”).

Having examined the various formulations of affirmative consent, from more to less regulatory, let us now turn to the arguments for and against them.

### III. THE AFFIRMATIVE CONSENT DEBATE

The preceding Part emphasized the great variability in what affirmative consent is. There is perhaps even greater diversity and perplexity regarding *why* affirmative consent is desirable. The justifications and criticisms of affirmative consent sometimes assume strong and sometimes assume weak versions of the standard. “Briefs” for and against the standard can be self-contradictory. For example, affirmative consent is sometimes rationalized on the ground that the rule simply codifies actual sexual practice.<sup>110</sup> Other times, supporters articulate a directly contradictory claim, namely, that because of widespread sexist practices, affirmative consent policies are necessary to provoke “cultural change.”<sup>111</sup> This Part catalogues affirmative consent arguments in an effort to give the reader clarity on the standard’s empirical and normative justifications. It should be noted that the persuasiveness of any given argument is dependent, to some extent, on which affirmative consent formulation it assumes. In addition, some commentators find strict affirmative consent standards tolerable in the college discipline, but not criminal, context.<sup>112</sup> There are four types of justifications of affirmative consent: empirical, aspirational, retributive, and distributional.

#### A. *The Empirical Argument: Affirmative Consent Reflects Sexual Practice*

Affirmative consent reforms respond, in large part, to the problem that decision-makers can interpret external manifestations incorrectly and impermissibly. According to the argument, jurors and state actors, due to prejudice or mistake, will regard too wide a range of performances as indicating internal willingness.<sup>113</sup> There are

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<sup>110</sup> See *infra* notes 116–21 and accompanying text.

<sup>111</sup> See *infra* notes 131–35 and accompanying text.

<sup>112</sup> This Article does not deeply probe the distinction between college discipline and criminal prosecution.

<sup>113</sup> See, e.g., Beatrice Diehl, Note, *Affirmative Consent in Sexual Assault: Prosecutors’ Duty*, 28 GEO. J. LEGAL ETHICS 503, 508 (2015) (stating that an affirmative consent standard will combat jurors’ adherence to “rape myths” about how women communicate about sex and

undoubtedly some prejudiced decision-makers who view women who act sexy, go to parties, get drunk, etc., as “deserving” of sexual assault and simply ignore the legal question of consent. However, requiring affirmative consent will hardly affect a decision-maker determined to focus on the complainant’s “precipitating” behavior. A sexist jury set on acquitting will simply ignore the affirmative consent standard just as it would a regular consent standard.<sup>114</sup>

Affirmative consent advocates more likely have in mind decision-makers who inaccurately assess external manifestations due to incorrect views about how people communicate sexual willingness—views that may be influenced by gender stereotypes. In reality, reformers contend, people do not say “no” when they mean “yes,” people move from foreplay to sex only after forthright discussion, and people are active rather than passive when they want sex.<sup>115</sup> Affirmative consent proponents often simply declare the truth of their observations about actual sexual negotiation.<sup>116</sup> For example, one scholar pronounces that it is a “myth” to believe that “‘no’ does not *always* mean ‘no.’”<sup>117</sup>

In promoting their views of the empirical world of sex, activists sometimes play fast-and-loose with social science. Rape theorist Michelle Anderson, for example, advocates a form of stop-and-ask that criminalizes sexual penetration not preceded by open negotiation.<sup>118</sup> She rationalizes this reform in part by asserting that under existing “social and sexual mores,” people candidly negotiate before each act of sexual penetration—an observation that might run counter to common instincts regarding sexual interaction.<sup>119</sup> Anderson bases this conclusion about sexual consent on a national survey of young adults’ sexual *health*, which asked: “Thinking about your current sexual or most recent sexual *relationship*, have you ever talked to your partner about what you feel comfortable doing sexually?” to which the vast majority answered

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clarify “confusion” by establishing that only yes means yes); *see also supra* note 60 and accompanying text.

<sup>114</sup> Social science indicates that jurors’ belief systems are more predictive of outcomes in mistaken consent cases than the breadth of the legal definition of consent. *See* Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729 (2010); *see also* Bryden, *Redefining Rape*, *supra* note 61, at 417.

<sup>115</sup> *See* Schulhofer, *Consent*, *supra* note 12, at 670 (characterizing open communication as normal); *cf.* MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 23, at 652–54 (opining that reasonable consent will reflect a male-oriented point of view).

<sup>116</sup> The MPC draft cites a survey in which college students called the affirmative consent “realistic.” However, it is unclear that respondents understood the standard, given that many thought there was “not much difference” from no means no. MPC Draft 5, *supra* note 10, at 64 & n.178 (citing WASHINGTON POST-KAISER FAMILY FOUNDATION SURVEY OF COLLEGE STUDENTS ON SEXUAL ASSAULT, WASH. POST (2015)).

<sup>117</sup> Diehl, *supra* note 113, at 508.

<sup>118</sup> *See, e.g.*, Anderson, *supra* note 92.

<sup>119</sup> *Id.* at 1433.

affirmatively.<sup>120</sup> But the fact that young people in sexual relationships at some point talk about sex says very little about how any two people, strangers or familiars, communicate consent on a *specific* sexual occasion. The author similarly declares that foreplay often does not indicate willingness to have intercourse. Anderson reasons from studies indicating that women sometimes chose oral sex rather than intercourse to preserve “technical virginity,” that engaging in extensive foreplay is evidence of *nonconsent*: “The more diverse the sexual experiences people participate in . . . the less those experiences suggest consent to vaginal or anal penetration.”<sup>121</sup>

Although intuition and marginally relevant surveys are familiar bases for affirmative consent proponents’ empirical conclusions, sociological literature on sexual consent performance appears less frequently. Sexuality Studies is a specialized field, and as in many developing areas of science, literature on sexual consent is in a state of development. But the studies make one thing clear: the typical way young people express sexual intent is precisely *not* by open verbal communication.<sup>122</sup> Surveying the literature, sociologists Terry Humphreys and Mélanie Brousseau observe: “Numerous studies have demonstrated that the preferred approach to signal consent for both women and men tends to be nonverbal instead of verbal.”<sup>123</sup> While the science does indicate that people will be clearer as sexual contact becomes more intimate, agreement even to penetration is not likely to be a verbal ask-and-answer. Sexual consent signaling is, in fact, often entirely passive: “[M]any men and women passively indicate their consent to sexual intercourse by not resisting, such as allowing themselves to be undressed by their partner, not saying no, or not stopping their partner’s advances.”<sup>124</sup>

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<sup>120</sup> *Id.* (citing HENRY J. KAISER FAMILY FOUND., NATIONAL SURVEY OF ADOLESCENTS AND YOUNG ADULTS: SEXUAL HEALTH KNOWLEDGE, ATTITUDES AND EXPERIENCES 19 tbl.13 (2003), <http://www.kff.org/youthhivstds/3218-index.cfm>).

<sup>121</sup> Anderson, *supra* note 92, at 1420 (citing Lisa Remez, *Oral Sex Among Adolescents: Is It Sex or Is It Abstinence?*, 32 FAM. PLAN. PERSP. 298, 298–301 (2000)).

<sup>122</sup> Many of the studies do not claim to describe the dynamics of same-sex sexual communication. See Humphreys & Brousseau, *supra* note 52, at 421.

<sup>123</sup> *Id.* (citing studies); see also Terry P. Humphreys, *Understanding Sexual Consent: An Empirical Investigation of the Normative Script for Young Heterosexual Adults*, in MAKING SENSE OF SEXUAL CONSENT 209 (Mark Cowling & Paul Reynolds eds., 2004); David S. Hall, *Consent for Sexual Behavior in a College Student Population*, 1 ELECTRONIC J. HUM. SEXUALITY, Aug. 10, 1998, <http://www.ejhs.org/volume1/consent1.htm>; Lucia F. O’Sullivan & E. Sandra Byers, *College Students’ Incorporation of Initiator and Restrictor Roles in Sexual Dating Interactions*, 29 J. SEX RES. 435 (1992).

<sup>124</sup> See Humphreys & Brousseau, *supra* note 52, at 421 (citing Hall, *supra* note 123).

The social science literature on sexual consent also reveals significant and troubling gender differentials, at least within the United States.<sup>125</sup> Young people continue to adhere to “traditional” sexual scripts in which men initiate sex and women act as “gatekeepers.”<sup>126</sup> Relatedly, studies document that women are keenly aware of the social costs of breaking from the traditional script and engaging in the “wrong” kind of sexual communication.<sup>127</sup> It is thus not surprising that the phenomenon of token resistance, that is, communicating refusal when one is willing, continues to be part of the consent performance landscape.<sup>128</sup>

B. *The Aspirational Argument: Affirmative Consent Is a Crucial Objective*

When faced with scant evidence that sexual communication is largely affirmative and unequivocal, affirmative consent proponents switch to aspirational claims that people *should* “play it safe” and openly negotiate consent.<sup>129</sup> Broad affirmative consent laws and policies, the argument goes, will enable this behavioral shift.<sup>130</sup> In making this case for strict affirmative consent laws, proponents take pains to point out the ubiquity of unconsensual sex—touting statistics like one-in-four/five college women experience sexual assault.<sup>131</sup> The vacillation between

<sup>125</sup> These differentials may not be so pronounced in other countries. See Sprecher et al., *supra* note 46, at 130.

<sup>126</sup> Hickman & Muehlenhard, *supra* note 52, at 259 (citing studies); Annika M. Johnson & Stephanie M. Hoover, *The Potential of Sexual Consent Interventions on College Campuses: A Literature Review on the Barriers to Establishing Affirmative Sexual Consent*, 4 PURE INSIGHTS, 2015, <http://digitalcommons.wou.edu/cgi/viewcontent.cgi?article=1050&context=pure> (citing studies).

<sup>127</sup> See Michael W. Wiederman, *The Gendered Nature of Sexual Scripts*, 13 FAM. J. 496 (2005).

<sup>128</sup> For a fascinating retrospective on the study of “token resistance,” see Charlene L. Muehlenhard, *Examining Stereotypes About Token Resistance to Sex*, 35 PSYCH. WOMEN Q. 676 (2011); see also Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes?*, 54 J. PERSONALITY & SOC. PSYCHOL. 872 (1988); O’Sullivan & Allgeier, *supra* note 46.

<sup>129</sup> See, e.g., Jaclyn Friedman, *Adults Hate ‘Yes Means Yes’ Laws. The College Students I Meet Love Them*, WASH. POST (Oct. 14, 2015), [https://www.washingtonpost.com/posteverything/wp/2015/10/14/adults-hate-affirmative-consent-laws-the-college-students-i-meet-love-them/?utm\\_term=.80cb345897ed](https://www.washingtonpost.com/posteverything/wp/2015/10/14/adults-hate-affirmative-consent-laws-the-college-students-i-meet-love-them/?utm_term=.80cb345897ed).

<sup>130</sup> See, e.g., Little, *supra* note 104, at 1356 (analogizing affirmative consent to civil rights laws that “led popular culture”).

<sup>131</sup> See, e.g., Morgan Baskin, *Controversial 1-in-5 Sexual Assault Statistic Validated in New National Survey*, USA TODAY C. (Sept. 21, 2015, 10:36 AM), <http://college.usatoday.com/2015/09/21/controversial-1-in-5-sexual-assault-statistic-validated-in-new-national-survey>; Tara Culp-Ressler, *Study Finds ‘Epidemic Level’ Of Rape On College Campus*, THINKPROGRESS (May 20, 2015), <http://thinkprogress.org/health/2015/05/20/3661010/campus-rape-surveys>; see also AAU Study, *supra* note 44 (one-in-four study); CHRISTOPHER P. KREBS ET AL., THE CAMPUS

characterizing the young adult sexual world as one of enlightened consent communication and rampant unconsensual sex seems inescapably contradictory.

Some reformers attempt escape by asserting that what accounts for the prevalence of unconsensual sex is not ordinary college boys—they stop and ask—but deviant “serial rapists” who hide behind lax disciplinary policies. Consider Senator Kirsten Gillibrand’s comments: “These are not dates gone bad, or a good guy who had too much to drink. This is a crime largely perpetrated by repeat offenders, who instead of facing a prosecutor and a jail cell, remain on campus after a short-term suspension, if punished at all.”<sup>132</sup> However, if aberrant offenders who force sex or clandestinely administer drugs are the problem, then there is little justification for requiring everyone to get a “yes.”<sup>133</sup> Moreover, it appears that young men likely to engage in rape-like behavior are not depraved recidivists, but rather the sexually uninitiated who eventually evolve,<sup>134</sup> shedding light on why freshman year is the “red-zone.”<sup>135</sup>

In any case, the idea is that law and policy should shift behavioral practices toward an edified sexual consent script, involving open negotiation, overt agreement, and double-checking frequently during the sexual encounter.<sup>136</sup> Of course, “sex radical” commentators of both genders might regard this as quite a dystopian sexual world, and instinctively recoil at the notion that the government can use its carceral

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SEXUAL ASSAULT (CSA) STUDY, NAT’L INST. JUSTICE (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [hereinafter CSA STUDY] (one-in-five study).

<sup>132</sup> Kirsten Gillibrand, *We Will Not Allow These Crimes to Be Swept Under the Rug Any Longer*, TIME (May 15, 2014), <http://time.com/100144/kirsten-gillibrand-campus-sexual-assault>; see also Amanda Marcotte, *Rape Victims Are Common. Rapists Are Not*, SLATE (May 1, 2014, 11:58 AM), [http://www.slate.com/blogs/xx\\_factor/2014/05/01/campus\\_sexual\\_assault\\_statistics\\_so\\_many\\_victims\\_but\\_not\\_as\\_many\\_predators.html](http://www.slate.com/blogs/xx_factor/2014/05/01/campus_sexual_assault_statistics_so_many_victims_but_not_as_many_predators.html).

<sup>133</sup> Most of these claims invoke a 2002 study. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73 (2002). That study has been heavily criticized, if not totally “debunked.” See Kevin M. Swartout et al., *Trajectory Analysis of the Campus Serial Rapist Assumption*, 12 JAMA PEDIATRICS 1148 (2015) (discussing problematic aspects of the Lisak study); see also Lizzie Crocker, *Is Sex Assault Coverage Really Sexist?*, DAILY BEAST (Dec. 18, 2015, 1:00 AM), <http://www.thedailybeast.com/articles/2015/12/18/is-sex-assault-coverage-really-sexist.html>.

<sup>134</sup> See Swartout et al., *supra* note 133.

<sup>135</sup> See *As Freshmen Enter ‘Red Zone,’ Colleges Re-Think Sexual Assault Policies*, USA TODAY C. (Sept. 7, 2014, 9:36 AM), <http://college.usatoday.com/2014/09/07/a-freshmen-enter-red-zone-colleges-re-think-sexual-assault-policies>; Peter Jacobs, *The ‘Red Zone’ Is A Shockingly Dangerous Time For Female College Freshmen*, BUS. INSIDER (July 14, 2014, 12:16 PM), <http://www.businessinsider.com/red-zone-shockingly-dangerous-female-college-freshmen-2014-7>. The CSA STUDY, *supra* note 131, and AAU Study, *supra* note 44, also support this idea.

<sup>136</sup> See Anderson, *supra* note 92; *supra* Sections II.D, II.E.

powers to violently stamp out sexual ambiguity.<sup>137</sup> Nonetheless, many rightly regard the traditional sex script not as deliciously ambiguous, but troublingly gendered and harmful to women.<sup>138</sup> Indeed, reading the sociological literature on sex negotiation leaves one more unsettled than reassured.<sup>139</sup> Yet even those with a robust skepticism of current sexual culture (or even sex's inherent value) are not likely to view as utopian a world of written sex contracts.<sup>140</sup> On the other hand, less reformist proposals, like the MPC's contextual consent, hardly please those who seek to "upend" traditional sex scripts.<sup>141</sup> Perhaps there is an overlapping consensus on how ideal sexual consent should be performed, involving something like stop and ask or clear agreement.

Critics often concede the wisdom of affirmative consent and agree that best sexual practices involve clear communication.<sup>142</sup> Most thoughtful commentators rightly hope that sexual communication, sexual practices, and the repercussions of sex will change over time, such that harmful sex is reduced and the costs and benefits of sex are distributed more equally between men and women. The debate, however, is about whether criminal law (or even college discipline) is an appropriate tool of this cultural transformation.<sup>143</sup> The more restrictive

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<sup>137</sup> See, e.g., Franke, *supra* note 73, at 206–07 (“[T]o evacuate women’s sexuality of any risk of a confrontation with shame, loss of control, or objectification strikes me as selling women a sanitized, meager simulacrum of sex not worth getting riled up about in any case.”); see also SCHULHOFER, UNWANTED SEX, *supra* note 12, at 272 (“A world without ambiguity in erotic interaction might be a very dull place . . .”). See generally Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89 (2014). For a fascinating history illuminating the connection between feminist views of sexual violence and Republican politics, see Carole S. Vance, *More Danger, More Pleasure: A Decade After the Barnard Sexuality Conference*, 38 N.Y.L. SCH. L. REV. 289, 290 (1993).

<sup>138</sup> See Franke, *supra* note 73, at 208; Gruber, *Rape, Feminism*, *supra* note 14, at 635 & n.297 (observing that affirmative consent envisions male sex proponents and fits in with existing gender expectations).

<sup>139</sup> See *supra* notes 122–28 and accompanying text (discussing the nonverbal and highly gendered nature of consent negotiation).

<sup>140</sup> Highly sex-restrictive aspirational visions, like the written contract, garner public ridicule. See Section II.A; see, e.g., thedavechannel, *Sexual Consent Video*, YOUTUBE (Oct. 13, 2007) <https://www.youtube.com/watch?v=RLhH1axWiTI>. The video—created by and for men, it seems—means to ridicule the standard by portraying an in-bedroom negotiation with counsel. *Id.* But it actually seems like a pretty cool sex script (minus the legal fees). Interestingly, the woman negotiates both for progressive things (ten minutes of cunnilingus) and retrogressive things (meeting parents), illustrating the complexity of how women navigate gender roles, intimacy, and desire in sexual negotiation. *Id.*

<sup>141</sup> See, e.g., Anderson, *supra* note 92, at 1411–21 (critiquing broad affirmative consent standards).

<sup>142</sup> See, e.g., Cathy Young, *Campus Rape: The Problem with ‘Yes Means Yes’*, TIME (Aug. 29, 2014), <http://time.com/3222176/campus-rape-the-problem-with-yes-means-yes> (stating that “no one could oppose” affirmative consent’s goals of enthusiasm and mutual desire in sexual encounters).

<sup>143</sup> See Judith Shulevitz, *Regulating Sex*, N.Y. TIMES (June 27, 2015), <http://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html?r=0>.

the affirmative consent law, the greater the population subject to incarceration in the quest for cultural transformation. Certain affirmative consent proponents are candid that ordinary sexual actors will be sacrificial lambs in the larger cultural effort.<sup>144</sup> Klein, for instance, opines: “The Yes Means Yes laws creates an equilibrium where too much counts as sexual assault. Bad as it is, that’s a necessary change. A culture where one-in-five women is assaulted isn’t going to be dislodged with a gentle nudge.”<sup>145</sup>

One should, however, be wary of the “punitive impulse” to embrace criminalization as a preferred tool of social change.<sup>146</sup> Experts note that because society reacts poorly to the widespread criminalization of ordinary behavior, laws that “shove” through change by radical behavioral prescriptions are less effective than laws that “nudge” a culture already at a tipping point.<sup>147</sup> In fact, shoves may produce backlash and further entrench disfavored social practices. Correspondingly, one might put more stock in the broader affirmative consent standards than the narrow contract-type rules. Indeed, sexual communicative norms, especially among young people in their formative sexual years, are deeply psychological and socially entrenched.<sup>148</sup> Such norms are likely to be “sticky” and resistant to change, even in the face of the prosecution of a selection of those who abide by the norms.<sup>149</sup>

Indeed, experience shows that decision-makers will use discretion to temper the power conferred by broad criminal laws—a phenomenon we will return to in the distributional Section below. It bears mentioning at this point that such discretion may undercut the cultural evolutionary potential of affirmative consent laws. Our expansive criminal codes already outlaw many acts routinely performed by ordinary people (i.e., loitering and trespass). In mediating broad penal power, police and prosecutors tend to apply their authority in certain geographic areas and to certain people.<sup>150</sup> In turn, the majority of citizens remain blissfully

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<sup>144</sup> See Klein, *supra* note 13; Little, *supra* note 104, at 1356; Schulhofer, *Consent*, *supra* note 12, at 679 (“[U]sing criminal law to discredit harmful social norms can be fair and effective.”).

<sup>145</sup> Klein, *supra* note 13.

<sup>146</sup> See Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIAMI L. REV. 961 (2014).

<sup>147</sup> See Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000); 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, 1805 (1992).

<sup>148</sup> See *supra* notes 122–28 and accompanying text.

<sup>149</sup> See Kahan, *supra* note 147. In addition, the more artificial the script, the less likely it is that there will be widespread enforcement by officials. *Id.*

<sup>150</sup> See Dorothy E. Roberts, Foreword, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999).



unaffected by the massive criminal regulatory regime because the negative effects of broad prosecutorial authority fall on a marginalized segment of society.<sup>151</sup> If strict affirmative consent laws follow this familiar pattern, we might expect such sex regulation to apply in the manner criminal regulation typically applies—to the “usual suspects.” In turn, the rest of society will have little incentive to break from deeply embedded, psychologically entrenched sexual communicative practices.<sup>152</sup>

In addition to the deterrence argument that affirmative consent laws will not change behavior, critics lodge the retributive objection that criminal law should not punish “innocents”—those who act within the current norm—in the quest to secure a culture of utopian, risk-regulated, sexual communication.<sup>153</sup> It is now prosaic for critics to claim that criminal law is “a blunt tool.” Indeed, publicity about mass incarceration and racialized policing has raised awareness of the extensive costs—human, social, and economic—of criminal regulation in particular. In response, defenders of affirmative consent set forth retributive and distributional arguments. The retributive argument denies that innocents are, in fact, sacrificed by the standard because those who have sex without affirmative consent are simply not innocent. The distributional argument, in direct contrast, does not deny that strict affirmative consent rules are *facially* overbroad but holds that, in practice, the rules will produce the right balance between convicting bad actors and preserving ordinary sexual practice.

### C. *The Retributive Argument: Affirmative Consent Is Morally Required*

The retributive argument is that people who fail to get positive permission for sex are morally culpable and should be subject to

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<sup>151</sup> See William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2012 (2008); Loïc Wacquant, *Race as Civic Felony*, 57 INT'L SOC. SCI. J. 127, 128 (2005). As for all violent crimes, the proportion of blacks arrested for sexual offenses far exceeds the proportion of blacks in society. See *Crime in the United States 2012*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/43tabledatacoverviewpdf> (last visited Oct. 25, 2016).

<sup>152</sup> Even if not discriminatorily applied, affirmative consent is unlikely to change norms. See Johnson & Hoover, *supra* note 126 (discussing studies indicating that directives on consent are ineffective because people interpret the term “consent” variably); Humphreys, *supra* note 123 (noting that a decade of affirmative consent in Canadian criminal law has not changed the entrenched sexual script).

<sup>153</sup> See Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape*, 4 WM. & MARY J. WOMEN & L. 203, 206 (1997); Douglas N. Husak & George C. Thomas III, *Rapes Without Rapists: Consent and Reasonable Mistake*, 11 PHIL. ISSUES 86, 107 (2001).

punishment. When retributive concerns over just deserts are ascendant, other considerations like deterrence and mass incarceration fall by the wayside. The axiom that the guilty deserve punishment is rarely denied. The Supreme Court has held, for example, that even if the death penalty does not deter murders, states may decide that it is retributively warranted.<sup>154</sup> Retribution is indeed an expansive theory that critics charge with enabling the hyper-punitive turn in American criminal law.<sup>155</sup> Unreflectively invoking desert, they contend, can justify punishing anyone for anything. Proponents of affirmative consent advance two retributive claims about the standard's fairness: First, it is fair to criminalize sex without affirmative consent so long as people have notice of the prohibition.<sup>156</sup> Second, criminalization is warranted because sex without affirmative consent is morally wrongful behavior.<sup>157</sup> Affirmative consent proponents sometimes profess surprise that the standard provokes so much consternation, given how "easy" it is to comply with.<sup>158</sup> The idea is that law and policy can tell young people to get a "yes," and they will just do it.<sup>159</sup> Nevertheless, the social science discussed above casts doubt on the ease of breaking with entrenched sexual practices and complying with aspirational norms. Indeed, open sexual communication comes at an emotional and psychological cost, and not just for women. Studies show that people of both sexes—especially young people—have strong incentive to eschew direct expression of sexual desire to avoid awkwardness and embarrassment and "save face" in the event of rejection.<sup>160</sup> In addition, one might wonder why harsh criminal sanctions are necessary to compel people to do that which, according to proponents, is already easy to do. In any case, the notice given by various affirmative consent laws and policies is

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<sup>154</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>155</sup> See Kyrion Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811, 812 (2002).

<sup>156</sup> See, e.g., SCHULHOFER, UNWANTED SEX, *supra* note 12, at 266 (stating that once the law announced the standard "it will be perfectly fair to punish anyone who disregards that standard"); Gill, *supra* note 35, at 62.

<sup>157</sup> See, e.g., Lois Pineau, *Date Rape: A Feminist Analysis*, 8 L. & PHIL. 217, 238–39 (1989) (stating that a "communicative approach" to sex is "morally required").

<sup>158</sup> See, e.g., Schulhofer, *Consent*, *supra* note 12, at 671–72; Rebekah Kuschmider, *Ask a Feminist: Affirmative Consent. What Is It?*, HUFF. POST: IMPACT (Oct. 29, 2015, 3:18 PM), [http://www.huffingtonpost.com/ravishly/ask-a-feminist-affirmative-consent-what-is-it\\_b\\_8153606.html](http://www.huffingtonpost.com/ravishly/ask-a-feminist-affirmative-consent-what-is-it_b_8153606.html) ("[Affirmative consent] can be easy, sexy, not awkward.").

<sup>159</sup> See, e.g., Anderson, *supra* note 92, at 1433–34 (noting that extensive education will precede the rule); Gill, *supra* note 35, at 62 (asserting that affirmative consent might "decrease the risk of convicting innocent men by placing them on notice"); Schulhofer, *Consent*, *supra* note 12, at 671–72; Kuschmider, *supra* note 158 ("[affirmative consent] can be easy, sexy, not awkward.").

<sup>160</sup> Humphreys & Brousseau, *supra* note 52, at 422 (citing studies).

far from clear (hence, the need to categorize them), leaving many to wonder exactly what compliance entails.<sup>161</sup>

Imagine, however, a law that clearly stated sex without a “verbal ‘yes’” is a crime.<sup>162</sup> For many theorists, there would remain the pressing question of whether the government *should* have the ability to declare such thing a crime. Indeed, one might set forth a constitutional argument under *Lawrence v. Texas* that punishing sex-without-a-yes constitutes regulation that infringes on people’s liberty to “control . . . their private sexual conduct.”<sup>163</sup> In other words, in the quest to eliminate unwanted sex, strict affirmative consent standards criminalize a significant amount of wanted, consensual sex. Such sexual-liberty restricting regulation is not necessarily saved by “a pattern of nonenforcement with respect to consenting adults.”<sup>164</sup> Affirmative consent advocates would probably respond that *Lawrence* declares a liberty interest only in consensual and harmless sex, and sex-without-a-yes is unconsensual and harmful.<sup>165</sup> Nevertheless, the more the affirmative consent standard strays from accepted behavioral practices (i.e., requiring a contract), the harder it is to maintain that those who violate it are invariably immoral and harmful actors.<sup>166</sup>

Penal theorists, such as Professor Kim Ferzan, argue that the crux of wrongful sex is internal unwillingness, and defendants are culpable only when they intend a wrongful act (to impose unwanted sex).<sup>167</sup> While philosophers might vary on the precise mens rea required for culpability, most would agree that defendants who reasonably believe that sex is wanted are not culpable, regardless of whether they stopped,

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<sup>161</sup> See *supra* Part II.

<sup>162</sup> While no law says this, certain university policies do. See *supra* notes 74–75 and accompanying text.

<sup>163</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>164</sup> *Id.* at 559. Interestingly, the *Lawrence* opinion recognizes that one of the functions of anti-sodomy law was to punish “predatory acts against those who could not or did not consent.” *Id.* at 569. This would imply that a law infringing on sexual liberty is not necessarily rendered constitutional because it is enforced only in cases of clear harm. This balance of punishing the innocent and the government’s regulatory aim is typical of substantive due process cases. See *Foster v. State*, 286 So. 2d 549, 551 (Fla. 1973) (holding that substantive due process prevented state from punishing the possession of a screwdriver as a burglary tool without proof that the screwdriver was used in a burglary). One possibility is that a yes-means-yes standard might be constitutional, but only if applied to a case where there was also proof of actual nonconsent.

<sup>165</sup> See *supra* note 157 and accompanying text (noting the argument that having sex without express permission is a harm, regardless of whether the victim internally assented).

<sup>166</sup> Schulhofer, for example, endorses a form of no-means-no standard, but asserts that the contract formula is “preposterous” and the argument for verbal consent is unpersuasive. Schulhofer, *Consent*, *supra* note 12, at 667.

<sup>167</sup> See Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397 (2016) [hereinafter Ferzan, *Consent*].

asked, and received a “yes.”<sup>168</sup> For the law to hold otherwise, they assert, is to criminally punish the non-culpable in an effort to satisfy some other regulatory aim, which is morally repugnant.<sup>169</sup> While retributivist declarations about what is and is not culpable conduct can seem arbitrary,<sup>170</sup> the particular concern that very strict affirmative consent laws punish innocents feels intuitively correct. Most people would scoff at the idea that two people who engage in mutually desired, communicative sex are *both* immoral actors because neither procured a contract or a verbal “yes.”<sup>171</sup>

This retributivist concern leads some critics to argue that affirmative consent impermissibly makes rape a “strict liability” offense.<sup>172</sup> In fact, affirmative consent laws and policies do not eliminate mens rea, but rather attach intent to the required external manifestations, instead of the complainant’s mental state.<sup>173</sup> Thus, under a yes-means-yes standard, if “yes” is absent, defendants cannot argue that they reasonably believed the complainant wanted sex, and this *does* dispense with intent on internal willingness. However, the yes-means-yes law is not formally a strict liability law so long as it requires the defendant to know (or have some intent) that the complainant did not say “yes.” Thus, reformers are correct to say that affirmative consent laws contain mens rea. This, however, does not explain why such mens rea establishes criminal culpability.<sup>174</sup> A legislature might, for example, prohibit “sex during college” in an effort to curb unwanted sex and specify that the prosecution must prove<sup>175</sup> that the defendant

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<sup>168</sup> See *id.* at 416; Husak & Thomas, *supra* note 153, at 107–08; *supra* Section I.C.

<sup>169</sup> See Kimberly Kessler Ferzan, *A Reckless Response to Rape: A Reply to Ayres and Baker*, 39 U.C. DAVIS L. REV. 637, 641 (2006) (critiquing proposed crime of first-time sex without a condom for being “overinclusive” and “punishing the morally innocent”).

<sup>170</sup> See Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843 (2002).

<sup>171</sup> Feminist commentators often assume the criminal prohibition against uncommunicative sex will be applied only to men. See, e.g., Pineau, *supra* note 157, at 239–40 (advocating criminalizing “a man [who] does not engage in communicative sexuality” to entrench a “norm of sex to which a reasonable woman would agree”).

<sup>172</sup> See, e.g., Joseph J. Fischel, *Per Se or Power? Age and Sexual Consent*, 22 YALE J.L. & FEMINISM 279, 325 (2010) (equating affirmative consent with “guilty until proven innocent”).

<sup>173</sup> See, e.g., MPC Draft 5, *supra* note 10, at 52 (establishing a recklessness mens rea for lack of affirmative consent).

<sup>174</sup> Ferzan argues that such affirmative consent standards are not formal strict liability, but that they are substantive strict liability because the standard does not attach to wrongful conduct. Ferzan, *Consent*, *supra* note 167, at 418 (citing Kenneth W. Simons, *When Is Strict Criminal Liability Just*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1087 (1997)).

<sup>175</sup> Critics of affirmative consent mistakenly argue that affirmative consent is burden shifting. See MPC Draft 5, *supra* note 10, at 68. It is not. Instead of having to prove unconsensual sex, the prosecution can prove something much easier, such as sex without a “yes.” Cf. Susan Dwyer, *What a Difference ‘Yes’ Makes for Sex*, AL JAZEERA AM. (Jan. 6, 2015,

“knowingly” engaged in that behavior. Most would concede that having sex during college is not wrongful and those who do it knowingly are not criminally culpable.<sup>176</sup> For many critics, narrow affirmative consent standards represent a similar overreach, even if they contain robust intent requirements.

Nevertheless, some activists declare that it *is* morally wrong for men to fail to obtain affirmative consent because they participate in chauvinist culture.<sup>177</sup> However, the same might be said of women who are sexually passive and engage in token resistance. We would think it outrageous to jail women for engaging in this “rape-permissive” behavior.<sup>178</sup> One might claim that the difference is that men who do not obtain a “yes” impose unwanted sex on their victims, whereas women who perform token resistance do not harm anyone, except perhaps women in general. Yet this is only true if the lack of a “yes” is coextensive with internal unwillingness, which it is not.<sup>179</sup> Thus, if men who do not get a “yes” are culpable for maintaining bad sexual culture when they could “easily” do otherwise, women are similarly culpable for engaging in token resistance when they could “easily” say what they want.<sup>180</sup>

More persuasive is the argument that sex without affirmative consent, although not immoral in itself, is culpably *risky* (of producing unwanted sex). In this view, such sex is like speeding or drunk driving: law can regulate the risky behavior itself and hold defendants responsible when the behavior produces harm, even relatively unforeseeable harm.<sup>181</sup> As an initial matter, it is a bit surreal to hear liberal criminal law theorists tout reduction of risk—unquantified

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2:00 AM), <http://america.aljazeera.com/opinions/2015/1/campus-sexual-assaultaffirmativeconsent.html> (applauding affirmative consent for “shift[ing] the burden”).

<sup>176</sup> And it would likely be subject to constitutional challenge. See *supra* notes 163–64 and accompanying text (discussing *Lawrence’s* prohibition of criminalizing consensual sex).

<sup>177</sup> See, e.g., Pineau, *supra* note 157.

<sup>178</sup> But see Little, *supra* note 104, at 1348 (advocating affirmative consent as a “model of sexual interaction where both participants take responsibilities for their desires and actions”).

<sup>179</sup> See, e.g., *supra* Section I.B.

<sup>180</sup> Indeed, culture changing programs target men and women. See Tovia Smith, *Colleges Straddle Line Between Assault Prevention and Victim-Blaming*, NPR (Nov. 21, 2014, 4:17 AM), <http://www.npr.org/2014/11/21/365460145/colleges-straddle-line-between-assault-prevention-and-victim-blaming>. Radical feminists might simply grant women immunity for participating in sexist culture, considering such participation a product of male domination, but rape reformers rarely openly articulate such a “female supremacist” view. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 72 (2006).

<sup>181</sup> See MPC Draft 5, *supra* note 10, at 70 (comparing no means no to drunk driving laws). We might question whether criminal risk regulation is warranted in the driving context. Theorists struggle with, for example, DUI manslaughter laws or whether negligence per se should apply in vehicular homicide cases.

risk—as a basis for criminal liability.<sup>182</sup> Moreover, the dangerous sex/dangerous driving analogy creates more questions than answers about affirmative consent. Any sex risks unwanted sex, just as any driving risks an accident, and the question is when risk warrants regulation. Is sex-without-a-yes like driving fifty or ninety miles per hour? Is failing to stop-and-ask like driving with a .04 or a .09 blood alcohol level? Who gets to draw the line? Risky sex is no longer a matter of the defendant's (or even reasonable person's) awareness of a probability that the complainant is unwilling, but rather a matter of violating a bright line based on some independent risk calculation. Culpability is accordingly a function of distribution. This rule-like negligence dictates that people deserve punishment, not when they are subjectively reckless or even socially unreasonable, but when they transgress a regulatory rule based on some external balance of sex risks and rewards.<sup>183</sup> This calculation is inevitably a function of one's beliefs as to how risky sex without affirmative consent is and the value of the sex that is repressed.<sup>184</sup>

D. *The Distributional Argument: Affirmative Consent Produces Distributive Justice*

The final set of arguments in favor of affirmative consent are not formalist like retributivist arguments, but are legal realist in nature: they defend the standard by asserting that the law “in action” does not criminalize ordinary sex; rather, it pushes back on the under-prosecution of clearly unacceptable sex. As an initial matter, it is certainly worthwhile to try to trace or predict the winners and losers of any given legal regime or recommended reform. Indeed, I and others have touted “distributional analysis” as a preferred method of engaging

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<sup>182</sup> Perhaps the prominence of the risk reduction argument is a function of recent public-healthizing of the sexual assault discussion by federal bureaucrats and college administrators. But given that age, drunkenness, and other factors are as (or perhaps more) predictive of unwanted sex than the utterance of “yes,” public health programs target a range of behaviors and include things like abstinence, gender segregation, and party prevention. See Gersen & Suk, *supra* note 43, at 912–16 (discussing such public health initiatives).

<sup>183</sup> See Kelman, *supra* note 54, at 610.

<sup>184</sup> Regulations are often based on some calculus of the likelihood that the activity (manufacturing, securities trading, labor practices, etc.) performed at a certain “level” will cause harm versus how reducing that “level” might affect the activity's beneficial effects. See Louis Kaplow & Steven Shavell, *Economic Analysis of Law*, in 3 HANDBOOK OF PUBLIC ECONOMICS 1661, 1667–71 (Alan J. Auerbach & Martin Feldstein eds., 2002). Does sex without “affirmative consent” significantly increase the risk of unwanted sex? If it does, who gets to decide the value of the foregone sex?

in progressive legal lawmaking.<sup>185</sup> Too often, reformers simply assume that their proposals will operate in the manner they envision in their minds. Advocates can be so wedded to these visions that they argue for their programs by contrasting the status quo with what is *ideal* rather than what is *possible*.<sup>186</sup> Consequently, the impetus of rape reformers to determine what consent laws are out there, how they are being used, and who they are being used for and against, is a very positive development in rape theorizing.<sup>187</sup>

Having said that, it bears noting that most proponents' law-on-the-ground analyses are less about showing that the affirmative consent standard produces good results than about defending it against critics' gloom-and-doom predictions that the standard will widely punish ordinary sexual actors.<sup>188</sup> As a result, those making distributional arguments have already determined that affirmative consent is warranted—probably for reasons cited above—and set out to show that it will not lead to jailing people who have sex without getting the magic words.

Affirmative consent critics decry the risk that a willing sexual partner will report rape, for whatever reason, and unless there was a “yes,” the accused is guilty.<sup>189</sup> Advocates respond that this vision of a world full of vindictive or unreasonable complainants utilizing broad affirmative consent standards to punish ordinary sexual actors is nothing more than men's persistent “nightmare.”<sup>190</sup> Reformers rightly assert that fears of vengeful women lying about rape are greatly exaggerated.<sup>191</sup> However, advocates go further and argue that critics'

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<sup>185</sup> See Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 *FORDHAM L. REV.* 3211 (2015) [hereinafter Gruber, *Theory*]; Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 *HARV. J.L. & GENDER* 335, 405 (2006) (describing “distributionally focused legal analysis”).

<sup>186</sup> See Gruber, *Theory*, *supra* note 185, at 3229–30; Halley et al., *supra* note 185, at 336.

<sup>187</sup> See, e.g., Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 *AKRON L. REV.* 957, 979 (2008) (considering how a specialized “sex crimes” court might distribute costs and benefits across different classes); Tuerkheimer, *Affirmative Consent*, *supra* note 25.

<sup>188</sup> See, e.g., Tuerkheimer, *Affirmative Consent*, *supra* note 25, at 446–47.

<sup>189</sup> See Dwyer, *supra* note 175 (describing this view); see also Marnie Eisenstadt, ‘Yes Means Yes’ will Lead to False Claims of Sexual Assault, *Male Student Advocate Says*, SYRACUSE.COM (July 15, 2015, 1:03 PM), [http://www.syracuse.com/state/index.ssf/2015/07/yes\\_means\\_yes\\_will\\_lead\\_to\\_false\\_claims\\_of\\_sexual\\_assault\\_male\\_student\\_advocate.html](http://www.syracuse.com/state/index.ssf/2015/07/yes_means_yes_will_lead_to_false_claims_of_sexual_assault_male_student_advocate.html); Scott Greer, Opinion, *Campus Rape Hysteria Has No Use for Due Process*, DAILY CALLER (Sept. 14, 2015, 1:27 AM), <http://dailycaller.com/2015/09/14/campus-rape-hysteria-has-no-use-for-due-process/#ixzz40RwvaDYD>.

<sup>190</sup> See Susan Estrich, *Rape*, 95 *YALE L.J.* 1087 (1986); Little, *supra* note 104, at 1357 (describing the “[b]ogeyman of the [f]alse [a]ccusation”).

<sup>191</sup> See Gruber, *Rape, Feminism*, *supra* note 14, at 597–98, 598 n.84 (discussing competing statistics); see also Dwyer, *supra* note 175 (calling this a “morally repulsive assumption”).

fears are misplaced because affirmative consent standards will not lead victims to file reports in ambiguous, fraught, or contestable consent cases, and if they do, police, prosecutors, and college investigators will not pursue them.<sup>192</sup>

This argument is somewhat strange, given that it rationalizes affirmative consent laws on the ground that they will *not* be followed. And it seems to conflict with the justification that the reform increases reporting and controls recalcitrant police and prosecutors. Accordingly, the pro-affirmative consent distributional argument must say something more like this: the standard will increase the *right* kind of reporting and prosecutions. In the status quo (non-affirmative consent world), the argument goes, women fail to report even forcible and clearly unconsensual rapes because of embarrassment, fear, traumatization, or other structural barriers. Police and prosecutors decline to pursue all types of rape cases because of prejudice or concern over obtaining a conviction in a he said, she said situation. Juries acquit because of error or prejudice.<sup>193</sup> Affirmative consent standards will encourage these victims to report, these police and prosecutors to pursue cases, and these juries to convict. The net result is more frequent prosecution and conviction in clearly harmful, but not contestable, cases.

Will affirmative consent work out this way? We simply do not have—and probably will never get—empirical evidence on how affirmative consent affects reporting in uncontroversial versus contestable rape cases. It is worth noting, however, that forcible intercourse and clearly unconsensual sex are already fully criminalized without affirmative consent. Victims fail to report such rapes because of structural barriers, not lack of criminalization, and they would face such barriers regardless of an affirmative consent law.<sup>194</sup> An affirmative consent law is therefore likely to affect a different class of potential reporters: those who experience more ambiguous sexual assaults, like cases involving “miscommunication,”<sup>195</sup> and think they are not crimes. Indeed, studies reveal that victims often do not report such assaults because they do not see them as “rapes” or regard them as serious enough to report. Affirmative consent laws may have the effect of

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<sup>192</sup> See, e.g., Tuerkheimer, *Affirmative Consent*, *supra* note 25 (asserting that fears about “miscommunication” cases are overblown).

<sup>193</sup> See *supra* notes 113–14 and accompanying text.

<sup>194</sup> As it is, the existence of “stereotypical” rape attributes like physical force and injury are the best predictors of when a rape will be reported. See Ronet Bachman, *The Factors Related to Rape Reporting Behavior and Arrest: New Evidence from the National Crime Victimization Survey*, 25 CRIM. JUST. & BEHAV. 8, 20, 22 tbl.2 (1998).

<sup>195</sup> See Tuerkheimer, *Affirmative Consent*, *supra* note 25, at Part I (describing an array of concerns over miscommunication).



persuading such victims and/or the people they consult with that sex without affirmative consent *is* serious enough to report. The conversation might go something like this:

A: "I'm not sure I should report this. We were both pretty drunk, and I didn't say to stop. But I just don't feel right."

A's Best Friend: "B did not stop and ask your permission. You did not say yes. That is *rape*, and you should report it."

Encouragement increases reporting, so let us assume *A* decides to report.<sup>196</sup> This is obviously a great result for affirmative consent proponents who want to increase reporting in cases of ambiguous consent.<sup>197</sup> However, it runs directly counter to the contention that affirmative consent will *not* increase the prosecution of miscommunication cases. Indeed, affirmative consent is linked to reporting because it signals to victims that they will be believed, will not be "put on trial," and will obtain a favorable outcome. However, this incentive structure applies with equal force to victims in clear and ambiguous cases alike.<sup>198</sup>

Some suggest that prosecutors will use their discretion to weed out fraught reports. Professor Deborah Tuerkheimer, for example, canvassed published appellate decisions in "affirmative consent jurisdictions"<sup>199</sup> and found that the term affirmative consent cropped up, not in miscommunication or contested consent situations, but in incidents involving force, intoxication, and unconsciousness.<sup>200</sup> The cases went like this: The prosecution argued that the victim was asleep/incapacitated/deathly afraid. The defendant argued that the victim was not and, in fact, consented. The court upheld the conviction because the jury could find that the victim was

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<sup>196</sup> See Lisa A. Paul et al., *Does Encouragement by Others Increase Rape Reporting? Findings from a National Sample of Women*, 38 PSYCHOL. WOMEN Q. 222 (2013). *But see* Bryden, *Redefining Rape*, *supra* note 61, at 422 (postulating that affirmative consent would not greatly increase reporting in general because of social norms).

<sup>197</sup> Of course, there is reason to wonder whether feminist reformers would want this if we imagine *A* as a male and *B* as a female. *See supra* note 37.

<sup>198</sup> *Cf.* Ashe Schow, *Student Newspaper Just Fine with False Accusations*, WASH. EXAMINER (Oct. 22, 2015, 1:59 PM), <http://www.washingtonexaminer.com/student-newspaper-just-fine-with-false-accusations/article/2574703> (discussing student newspaper's claim that false accusation is a justified cost of increased reporting).

<sup>199</sup> Tuerkheimer included all jurisdictions whose rape statutes plausibly required performative consent. Tuerkheimer, *Affirmative Consent*, *supra* note 25, at Part III.

<sup>200</sup> See David P. Bryden, *Reason and Guesswork in the Definition of Rape*, 3 BUFF. CRIM. L. REV. 585, 591 (2000) [hereinafter Bryden, *Reason and Guesswork*] (noting the "danger" that affirmative consent will lower the burden of proof in more serious cases).

asleep/incapacitated/deathly afraid and, therefore, did not "affirmatively consent."<sup>201</sup> Tuerkheimer's study, thus, indicates that affirmative consent exerts little influence on miscommunication cases and rape prosecution in general. The author reasons that this lack of influence may be due to prosecutors' refusal to bring "gray zone" cases.<sup>202</sup>

It may be that prosecutors in affirmative consent jurisdictions do not pursue difficult miscommunication cases. One must, however, exercise caution in drawing conclusions from the sparse evidence in published appellate decisions. In affirmative consent jurisdictions, the few appeals all involve "traditional" rape scenarios, but this may just mean that the miscommunication cases pled out or were not appealed. The appellate case analysis simply does not speak to the types of rapes prosecuted but not appealed and why prosecutors pursued them. That said, if it is true that prosecutors weed out the "gray" cases affirmative consent law could address, one is left to wonder exactly what the reform does. The law's aim is evidently to encourage prosecutors to pursue cases they otherwise might not—cases provable under affirmative consent but not weaker rape laws.<sup>203</sup> However, one can only speculate on whether this happens.

So let me engage in some brief speculation. Assume that a jurisdiction makes it a low level felony to have sex without stopping and asking permission. What will happen with this newfound prosecutorial power? One possibility is that it will operate how prosecutorial power often does—compelling defendants in close cases to forego trial and plead guilty. Thus, if evidence of force, coercion, or intoxication is weak, the prosecution will threaten the affirmative consent law to induce a plea.<sup>204</sup> Whether this is good or bad depends on whether one thinks that prosecutors are currently too stingy with force, coercion, and intoxication prosecutions and whether the evidentiary threshold in such cases is too high.<sup>205</sup> In diametric opposition to this scenario, some

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<sup>201</sup> Tuerkheimer, *Affirmative Consent*, *supra* note 25, at Part II.

<sup>202</sup> *Id.* at 467.

<sup>203</sup> See Diehl, *supra* note 113, at 507 (asserting that prosecutors have a duty to strictly enforce affirmative consent to educate an "unaware" society about the "distinction between rape, consent, and acceptable sexual behavior").

<sup>204</sup> Prosecutors can also take weak force or intoxication cases to trial, with lack of affirmative consent as a fall back.

<sup>205</sup> Compare Tuerkheimer, *Affirmative Consent*, *supra* note 25, at 447 n.27 (prosecutors bringing more cases would be "a positive feature of affirmative consent, particularly given that rape law is significantly underenforced"), and Schulhofer, *Consent*, *supra* note 12, at 670–71 (asserting that performative consent is necessary to address intoxication and subtle coercion), with Bryden, *Redefining Rape*, *supra* note 61, at 408 ("To use an affirmative-consent law mainly to solve proof problems, when the prosecutor believes, but perhaps cannot prove, that the defendant is guilty of a more serious crime, would be troubling." (footnote omitted)).

hypothesize that focusing prosecutors and jurors on consent performance will make them less likely to prosecute and convict in cases of subtle coercion where victims appear to agree.<sup>206</sup>

The second possibility is that prosecutors will use the new authority to pursue a subset of miscommunication cases. Charges may arise when the prosecutor instinctively views the defendant as a true criminal (not a regular guy), when the prosecutor regards the victim as “credible,” or when the victim is vehement. These discretionary prosecutions might meaningfully overlap with the type of cases scholars think should be brought, but they might not. Prosecutors’ views of true criminality may be influenced more by racial and socioeconomic characteristics than by the nature of the sexual event.<sup>207</sup> Similarly, assessments of victims’ credibility may involve race, class, or gender stereotyping. Moreover, the most vehement victims may also be the most biased and unbelievable.<sup>208</sup> It is true that these are problems of prosecutorial discretion in general, not just affirmative consent prosecutions; however, rape reformers do not get a “free pass” to write off the problems of the U.S. carceral system, especially when investing state actors with broad discretionary power.

In the end, it is difficult to predict how the burdens and benefits of affirmative consent rules will distribute.<sup>209</sup> Affirmative consent proponents have faith that broad proposals will lead to increased prosecution of “clear” (not miscommunication) cases and eventually produce a yes-means-yes culture, without the cost of punishing those who act within the norms of prevailing sexual culture. But “faith” is the correct word here because there is no particular reason to believe that this is how things will play out. In any case, the fact is that affirmative consent laws say that lack-of-affirmative-consent cases *are* “clear” cases. Consequently, while all thoughtful law reformers should endeavor to

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<sup>206</sup> See Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 1005 (1998) (noting the argument that focusing on the complainant’s consent can deflect from a focus on the coercive means used by the defendant to procure sex).

<sup>207</sup> See Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 360 (2009); Jeffrey J. Pokorak, *Probing the Capital Prosecutor’s Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1815, 1819–20 (1998) (both discussing race and prosecutorial discretion in capital punishment); see also Bryden, *Reason and Guesswork*, *supra* note 200, at 591 (postulating that affirmative consent might lead to discriminatory enforcement).

<sup>208</sup> See Lynne Henderson, Commentary, *Co-opting Compassion: The Federal Victim’s Rights Amendment*, 10 ST. THOMAS L. REV. 579, 584 (1998) (“‘Victims’ are ‘blameless,’ innocent, usually attractive, middle class, and white.’”).

<sup>209</sup> See Richard Pérez-Peña & Ian Lovett, *California Law on Sexual Consent Pleases Many but Leaves Some Doubters*, N.Y. TIMES (Sept. 29, 2014), [http://www.nytimes.com/2014/09/30/us/california-law-on-sex-consent-pleases-many-but-leaves-some-doubters.html?\\_r=1](http://www.nytimes.com/2014/09/30/us/california-law-on-sex-consent-pleases-many-but-leaves-some-doubters.html?_r=1) (noting that universities applying California’s law “are hampered by a lack of hard data about what works” and thus “rely on instinct and anecdote”).

determine if their reform does what it says, affirmative consent proponents are in the strange position of speculating on the effects of the rule, *despite* what it says.<sup>210</sup>

#### CONCLUSION

My hope is that the reader now better understands what policy makers and public intellectuals mean when they tout or reject “affirmative consent” and the types of arguments and counterarguments that follow. This understanding is critical at a moment when the debate over rape law, on each side of the political fence, has a say-anything-for-the-sake-of-argument feel. This Article also sheds a skeptical light on scholars’ relative consensus that consent is the best framework for rape law. In other areas of rape law, policy makers lay out and debate the specific types of circumstances that render sex criminal: age combinations, types of extortion, nature of promises, fiduciary relationships, categories of force, etc. And then there is consent.

Consent ends up playing the role of a catchall, permitting rape prosecutions in the areas where the law fails to articulate the specific unacceptable conditions of sex. But its liberal construct has prevented meaningful dialogue on the exact sexual interactions rape-consent laws should catch. Reformers maintain that, left to its own devices, consent did not catch enough criminal behavior. But rather than abandoning the consent framework, they turned to affirmative consent, which purported to build a better consent mousetrap and thereby vindicate “sexual autonomy.” Situating affirmative consent reform as a mere means to improving the liberal consent inquiry has obscured the very motivations behind expanding the catch-all—the empirical and normative beliefs about how sex happens, how it should happen, the benefits and harms of sex, and the role of criminal law in regulating sexuality. This Article brought those claims into the open, where they should be, as a preface to a clear, communicative, and unambiguous negotiation over the content of rape law.<sup>211</sup>

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<sup>210</sup> *But see* Diehl, *supra* note 113, at 507 (urging prosecutors to use affirmative consent to prosecute ambiguous cases).

<sup>211</sup> Recently, I was speaking to a student about an affirmative consent paper topic. She said: “I want to argue that affirmative consent is a straightforward standard from contract law that simply requires agreement.” So I asked her what actions or communications would constitute such agreement. Concerned, she replied: “If I were to get into that I’d have to talk about sex.”