Affirmative Consent

Aya Gruber[*]

A. Introduction

The slogans are ubiquitous: "Only 'Yes' Means 'Yes'"; "Got Consent?"; "Consent is Hot, Assault is Not." Clear consent is 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 regard force as so archaic as to barely merit mention. Far from the bad-old-days in which "real rape" was limited to violent stranger assaults resisted by victims "to the utmost,"[1] contemporary laws and policies widely apply the consent framework, in which rape can include behaviors ranging from brutal to boorish to normal. What matters is "consent."

But what is sexual consent? Some will say that sexual consent is when parties are mentally willing. However, there are diverse conceptions of willingness, ranging from enthusiastic to grudging, from hedonistic to instrumental, from sober to inebriated.[2] Others argue that focusing on victims' intent puts them on trial; thus, sexual consent should be about what the parties say and do, and not what they think.[3] Here, there is also variability. Some hold that engaging in sexual activity without protest, or with weak protest, communicates consent. Others insist that consent be "affirmatively" or "positively" expressed. And "affirmative expression consent," depending on who you ask, runs the gamut from nonverbal foreplay to "an enthusiastic yes."

Actual definitions of consent in criminal codes and university manuals, with their vague references to "free agreement" and "affirmative coopera-

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

2 *See infra* Section I.A.

3 *See In re* M.T.S., 609 A.2d 1266, 1273 (N.J. 1992) (moving to affirmative consent standard because old law put victim on trial).

tion," do little to simplify matters.[4] It is no wonder that people come to wholly different conclusions about how consent and affirmative consent standards impact legal decisions and human behavior. Proponents often characterize affirmative consent as a minor change that will not lead to unfair convictions, while opponents hyperbolize that the reform will lead to sex contracts.

What caused so much confusion? In short, decades ago, feminist reformers affected the shift from defining rape as forced sex to defining it as nonconsensual sex to broaden liability for bad sexual behavior.[5] 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 in contested consent cases. However, couching the affirmative-consent revolution as simply a better way of doing "ordinary" consent obscured the various presumptions and normative commitments underlying reformers' ideas about what *is* the right conclusion—when sex *should* be criminal. Affirmative consent reform is a juggernaut.

The rapid changes have produced a legal terrain marked by uncertainty, contradiction, and hidden value judgments. In this chapter, I categorize and clarify laws, policies, and discourses that purport to define affirmative consent and the normative arguments for and against the standard(s). Currently, the debate over affirmative consent is muddled, with interlocutors who hold different conceptions of the standard simply talking past each other. Commentators also have competing foci: some concentrate on whether sex without a yes is wrongful, while others focus on whether affirmative consent is a proper tool to get at "true" rapists. Accordingly, much of this chapter is taxonomical in nature—it charts consent, categorizes affirmative consent standards, and indexes affirmative consent argument types.

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4 For a thorough discussion of existing consent statutes, see Model Penal Code: Sexual Assault and Related Offenses 58–61 (Am. L. Inst., Preliminary Draft No. 5 2015) [hereinafter MPC Draft 5]. The MPC Tentative Draft No. 1 (Apr. 30, 2014), is available at https://web.archive.org/web/20210213103228/https://jpp.whs.mil/public/docs/03_Topic-Areas/02-Article_120/20140807/03_ProposedRevision_MPC213_Excerpt_201405.pdf (accessed August 25, 2022), but it is substantially different. This chapter refers to Draft 5 throughout, although it differs in meaningful ways from the final approved draft, which does not have an affirmative consent standard.

5 Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 Wash. L. Rev. 581, 587–603 (2009).

I have a second goal: demystification. The consent framework's simplistic championing of "autonomy" has obfuscated the normative bases of a complex socio-cultural reordering.[6] Reformers initially rationalized affirmative consent as a modest tool to control sexist decision-making.[7] But that attempt to manage sexist actors created a legal terrain that *defines* rape as sex without an affirmative *expression*, rather than compelled or unwanted sex. Thus, the prohibition of a large category of questionably wrongful sex (sex without a yes) surreptitiously evolved under the banner of preventing a smaller category of clearly wrongful sex (forced, aversive sex). Responsible sexual and criminal governance demands grappling with the choices underlying the affirmative-consent revolution.

B. Consent

Consensual sex is described variously as desired, wanted, willing, or agreed-to sex.[8] While such terms can mean quite different things, I, like most commentators, will treat them as fungible. The more pressing question is whether sexual consent is a mental state, an external performance, or both. There is little controversy when sexual actors' performances correspond to their mental states. For example, if a person who wants sex says "yes," sex is obviously "consensual." 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 both parties desired sex simply because the consent performance was deficient (i.e., "yes" was lacking).[9] Likewise, feminists are apt to dismiss as coerced an expressed "yes" that did not reflect internal willingness.[10] Consequently, uncontroversial consent to sex entails what I call

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6 *Cf.* Nicola Lacey, *Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law*, 11 Can. J.L. & Juris. 47, 53 (1998) ("The idea of autonomy... assumes rather than explicates what is valuable about sexuality itself.").

7 *See, e.g.*, Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1102–03 (1986).

8 *See, e.g.*, Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. Pac. L. Rev. 665, 671 (2016) (calling consensual sex "mutually desired").

9 *See* Sarah Gill, *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 89–90 and accompanying text.

10 Some go even further arguing that *any time* a person does not internally want sex it is sexual assault, even if the person freely says yes. *See, e.g.*, Wendy Murphy, Opinion, *Title IX Protects Women. Affirmative Consent Doesn't*, Wash. Post (Oct.

a "consent transaction," involving a sufficient internal mental state and expression.

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.

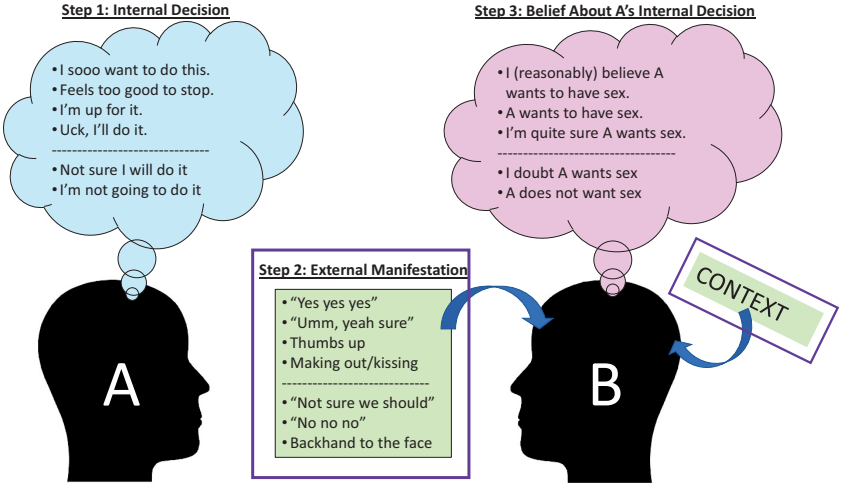

Figure 1: The Consent Transaction

Let us discuss each step, beginning with A's mental state.[11]

15, 2015), https://www.washingtonpost.com/news/in-theory/wp/2015/10/15/title-ix-protects-women-affirmative-consent-doesnt/ (accessed August 25, 2022); *cf.* Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 82 (1987) (the "political" definition of rape is "whenever a woman has sex and feels violated").

11 When examining Figure 1, A may start to look distinctly feminine and B masculine. *See* Lacey, *supra* note 6, at 60 (consent framework establishes asymmetric gendered relationship between sexual participants).

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. Some feminists assert that because of gendered pressures and gross inequality, coercion is the default for women. However, most theorists do not regard women's agreement to sex as mostly illusory, and they debate which coercive conditions undermine consent (i.e., lies, promises, financial need).[12] In addition, there are controversies about what a consensual mental state is. 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, and hedonistic.[13] Thus, although internal consent seems self-evident, it is the outcome of a struggle between value judgments—whether sex can be instrumental rather than hedonistic, whether it is an important life-decision or casual choice, and which person's (man's or woman's, evangelical's or agnostic's) perspective is the default.[14]

Accordingly, the very language of consent precludes open political debate on, for example, the permissibility of unenthusiastic or even undesired sex—an issue sociological studies indicate is more complex than one might initially think.[15] One study, for example, found that college students, female and male, widely agree to "unwanted sex," meaning sex that

12 *See, e.g.*, Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 Brook. L. Rev. 39 (1998) (fraud and coercion); Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1405–11 (2013) (deception).

13 *See* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 Calif. 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.

14 *See* Nancy Ehrenreich, *Surrogacy as Resistance? The Misplaced Focus on Choice in the Surrogacy and Abortion Funding Contexts*, 41 DePaul L. Rev. 1369, 1385 (1992) (reviewing Carmel Shalev, Birth Power: The Case for Surrogacy (1989)) ("[J]udicial 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.").

15 *See* Charlene L. Muehlenhard & Stephen W. Cook, *Men's Self-Reports of Unwanted Sexual Activity*, 24 J. Sex Rsch. 58 (1988); Lucia F. O'Sullivan & Elizabeth Rice Allgeier, *Feigning Sexual Desire: Consenting to Unwanted Sexual Activity in Heterosexual Dating Relationships*, 35 J. Sex Rsch. 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 Rsch. 125 (1994). For a fascinating literature survey on sexual compliance and sexual sacrifice, *see*

is not physically desired, for a variety of reasons like status and relationship intimacy and that such sex produces positive outcomes.[16]

Step 2: A's External Manifestations

Given that sexual activity is itself communicative, "unexpressive" sex will be rare. Thus, the primary issue is *which* external acts communicate consent. A popular view is that consenters just tell people what they want. One expert opines: "Parties who mutually desire sexual intimacy normally communicate that desire freely."[17] However, sexual consent negotiation is highly context specific and culturally ordered.[18] Further, considering the long American history of not communicating about desire, it is not surprising that mental states often diverge from external manifestations. Social science confirms that people are recondite about their sexual consent.[19] Thus, decisions about sex generate variable and even contradictory performances, conditioned by community norms, relationship status, age, gender, personality, etc. Some embedded norms influencing sexual communication, like stereotypical sex roles, are unpalatable. This leads reformers to the problematic belief—explored later—that instead of addressing the gendered sexual script, we should randomly punish some who follow the script in the hope that it will change the world.

Step 3: B's Understanding of A's Mental State

In a perfect consent transaction, B's belief that A wanted to have sex is a correct interpretation of A's manifestations. Things get more difficult when B's interpretation is wrong.[20] Indeed, studies show that men are prone to interpret "friendly" behavior as consent, while women view

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Emily A. Impett & Letitia A. Peplau, *Sexual Compliance: Gender, Motivational, and Relationship Perspectives*, 40 J. Sex Rsch. 87 (2003).

16 *See* O'Sullivan & Allgeier, *supra* note 15.

17 Schulhofer, *supra* note 8, at 670.

18 *See* Sprecher et al., *supra* note 15, at 126.

19 *See infra* notes 63–69 and accompanying text.

20 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, but the requirement of actus reus would foreclose liability.

consent as requiring verbalization.[21] But if B has a "reasonable" belief that A is willing, most scholars would agree that B is not liable even if B is wrong.[22] However, where sexist norms prevail, sexist defendants' determinations might be deemed "reasonable."[23] Reformers thus turn to affirmative consent. They identify the manifestations indicative of consent to *non-sexist* people. If such manifestations are not present, B is guilty regardless of whether the larger (sexist) society would agree that A consented.

It gets even more complicated when we subjectivize B's intent. If B is clueless, has an overinflated ego, or follows a bad sexual script, B could honestly but unreasonably believe A agreed to sex. B might be horrified to learn the sex was undesired. The question is whether we can punish B for being negligent. Negligence typically generates civil, not criminal, liability.[24] Under general criminal law principles, a conviction requires the person to know or recklessly disregard that they are committing the crime.[25] Critics argue that negligence is inappropriate and overly punitive, given the variability in how people understand sexual cues.[26] Nevertheless, many jurisdictions adopt a negligence standard.[27]

In sum, an uncontroversial sexual consent transaction involves: (1) A's internal decision to have sex; (2) A's external manifestations reflecting that decision; and (3) B's (reasonable) belief, based on the external manifestations and context, that A is willing. In the typical contested consent case, A claims the sex was internally unwanted. B responds either that A wanted

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21 *See* Antonia Abbey, *Sex Differences in Attributions for Friendly Behavior: Do Males Misperceive Females' Friendliness?*, 42 J. Personality & Soc. Psych. 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 Rsch. 258 (1999); Terry P. Humphreys & Mélanie M. Brousseau, *The Sexual Consent Scale – Revised: Development, Reliability, and Preliminary Validity*, 47 J. Sex Rsch. 420, 421 (2010).

22 Some might say that even if B is unreasonable, B's honest belief of consent is enough.

23 *See, e.g.*, Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 Yale L.J. 2687 (1991).

24 *See* Model Penal Code § 2.02(2)I cmt. 5 at 244 (Am. L. Inst. 1962).

25 *See*, *e.g.*, MPC Draft No. 5, *supra* note 4, at 147 (requiring honest and sincere belief).

26 *See id.* at 171 (noting the concerns over negligence imposing "penal liability greatly disproportionate to fault"). *See also* Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 Tex. J. Women & L. 42, 67 (1993) (advocating that "the minimum culpable mens rea as to consent should be negligence").

27 *See id.* at 169 (negligence standard for sexual assault is "prevailing" standard).

sex or that B (reasonably) believed A did. The jury will resolve the issue by looking at A's external manifestations in context. The tricky part is that decision-makers harbor diverse views about internal willingness, how it is manifested, and how manifestations should be interpreted.

C. *Affirmative Consent*

In determining consent, decision-makers can make bad calls: they may find coerced agreements valid, derive consent from lack of protest, allow the defendant to divine consent from kissing, etc.[28] To reduce bad calls, affirmative consent laws direct decision-makers to focus on the external manifestations themselves and decide whether they are sufficient expressions of consent. Only *certain* step-two external manifestations count as "affirmative consent." There is passionate debate over how narrow or broad that category should be. Narrow formulations (requiring a verbal yes, clear negotiation and acceptance, etc.) decrease the potential for victimization but are highly regulatory and potentially unfair. However, broad formulations that allow all manifestations to count as affirmative consent affect no real reform. The vague language in codes and policies ("positive cooperation") do not illuminate the issue.[29] The below categories of affirmative consent are culled from the vast amount of U.S. criminal law, educational policy, scholarship, and public commentary on affirmative consent.

28 *See* David P. Bryden, *Redefining Rape*, 3 Buff. Crim. L. Rev. 317, 426 (2000); *see also, e.g.*, *In re* M.T.S., 609 A.2d 1266, 1277–78 (N.J. 1992).

29 *See, e.g.*, Cal. Penal Code § 261.6(a) (West 2022) ("positive cooperation"); 720 Ill. Comp. Stat. Ann. 5/11–1.70(a) (West 2021) ("freely given agreement"); Wis. Stat. Ann. § 940.225(4) (West 2005) (same); *In re M.T.S.*, 609 A.2d at 1277 ("affirmatively and freely given authorization"); *see generally* Schulhofer, *supra* note 8.

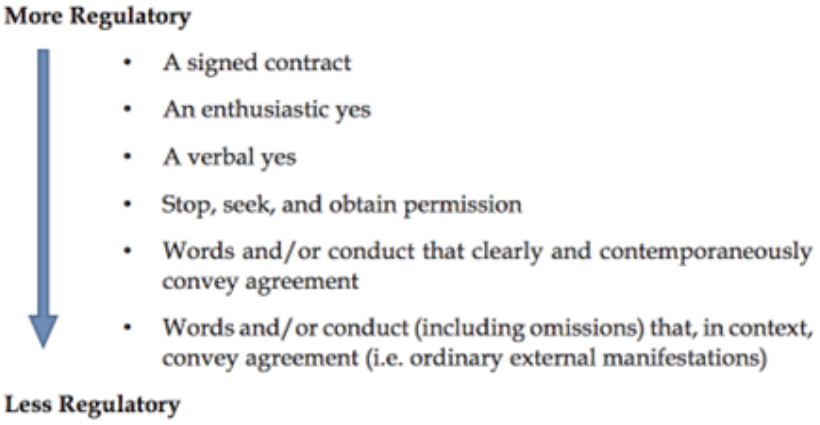

Figure 2: The Affirmative Consent Scale

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

I. The Contract

The most restrictive construction of affirmative consent—the signed contract—is largely a product of the derisive discourse of reform opponents seeking to provoke ridicule of affirmative consent.[30] That said, it is not completely fallacious to invoke the sex contract image. Commentary on the web extolls the written sex contract as best practice.[31] On affirmativeconsent.com, one can purchase "Affirmative Consent Kits" for $12.00, which include "Consent Contract Cards."[32] Website founder Alison Berke Morano told the press the cards are not a joke: "We're trying to change the conversation and make people more secure."[33]

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30 *See* Callie Beusman, *'Yes Means Yes' Laws Will Not Ruin Sex Forever, Despite Idiotic Fears*, Jezebel (Sept. 8, 2014), http://jezebel.com/yes-means-yes-laws-will-not-ruin-sex-forever-despite-i-1630704944 (accessed Feb. 8, 2022).

31 *See, e.g.*, Tamsen Butler, *Why You Should Use Sex Contracts*, Love to Know, http://dating.lovetoknow.com/Sex_Contracts (accessed Feb. 8, 2022).

32 *See 2015 Media Kit*, Affirmative Consent, at 5, http://affirmativeconsent.com/wp-content/uploads/2015/12/AffirmativeconsentPressKit1.pdf (accessed Feb. 8, 2022).

33 Blake Neff, *Sexual Consent Contracts Are Now A Real Thing You Can Buy*, Daily Caller (July 8, 2015), http://dailycaller.com/2015/07/08/sexual-consent-contracts-

II. An Enthusiastic Yes

The "enthusiastic yes" mantra is repeated in freshman orientations and enshrined in the feminist blogosphere.[34] Reflexive of the maligned no-means-yes trope, this requirement means that yes means no unless it is declared with alacrity.[35] 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.[36]

Requiring one to obtain perpetual enthusiasm is perhaps a higher burden than getting the signed contract.

III. Yes Means Yes

Prosecutors, reformers, activists, and college administrators frequently invoke this definition.[37] Nonetheless, even the reform-minded recognize

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are-now-a-real-thing-you-can-buy/#ixzz3udpy8nCO (accessed Feb. 8, 2022); *see also* Maura Lerner, *National Group Hopes to Stir Talk With Its Sex Consent Contracts*, Star Trib. (July 9, 2015), https://www.startribune.com/group-hopes-to-stir-talk-with-its-sex-consent-contracts/312694551/ (accessed Feb. 8, 2022).

34 *See* Cheryl Corley, *HBCUs Move To Address Campus Sexual Assaults, But Is It Enough?*, Nat'l Pub. Radio (Sept. 29, 2014), http://www.npr.org/2014/09/29/351534164/hbcus-move-to-address-campus-sexual-assaults-but-is-it-enough (accessed Feb. 8, 2022) (describing a Title IX hearing at Howard University where the administrator stated, "[r]epeat after me – an enthusiastic yes").

35 *See, e.g.*, Yale Univ., 2020 Annual Security Report 32 (2021), https://your.yale.edu/sites/default/files/files/PublicSafety/asr_2020.pdf (stating that the University directs students to "[h]old out for enthusiasm"); Elon Univ., Annual Security Report 8 (2013), https://web.archive.org/web/20160406014206/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 13, at 924–30 (enthusiasm requirement).

36 Jaclyn Friedman, *Consent Is Not a Lightswitch*, amplify: Blog (Nov. 9, 2010), https://web.archive.org/web/20101119203249/http://www.amplifyyourvoice.org/u/Yes_Means_Yes/2010/11/9/Consent-Is-Not-A-Lightswitch (emphasis in original) (accessed Feb. 8, 2022).

37 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 Coll., https://web.archive.org/web/20160213023908/https://www.amherst.edu/offices/student-affairs/handbook/studentrights#StmtConsent (accessed

the problems with limiting consent communication to a single word. Thus, while "only yes means yes" is a catchy soundbite, many affirmative consent proponents allow for more variability.[38] In this view, the consent performance doesn't have to be "yes," but it does have parameters. An increasingly popular affirmative consent formulation is that a person like B must stop, ask, and obtain clear permission.

IV. Stop and Ask

The stop-and-ask approach appears frequently in university policies and scholarly discourse.[39] California's controversial affirmative consent law mandates that universities specify that "[i]t is the responsibility of each person involved in the sexual activity to ensure that he or she has the affir-

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Feb. 8, 2022) ("Relying on non-verbal communication can lead to misunderstandings.... In the absence of an outward demonstration, consent does not exist.").

38 *See The Johns Hopkins University Sexual Misconduct Policy and Procedures*, Johns Hopkins Univ., http:// sexualassault.jhu.edu/ policies-laws/ #Section%20I-II%20-%20Definitions (last visited Feb. 8, 2022) [hereinafter *Johns Hopkins Policy*] (accessed Feb. 8, 2022) (requiring "a clear 'yes,' verbal or otherwise").

39 *See, e.g.*, *Gender-Based Misconduct Policy and Procedures for Students*, Colum. Univ. 7 (Aug. 23, 2019), http://www.columbia.edu/cu/studentconduct/documents/GBM-PolicyandProceduresforStudents.pdf (last visited Fed. 9, 2022) [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 Sexual and Gender-Based Harassment and Other Forms of Interpersonal Violence*, Univ. Va. 13 (July 1, 2015), https:// vpsa.virginia.edu/ sites/vpsa.virginia.edu/ files/ Title%20IX%20VAWA%20Umbrella%20Policy.pdf (last visited Feb. 9, 2022) ("stop and clarify"); *Student Sexual Misconduct Policy and Procedures: Duke's Commitment to Title IX*, Duke Univ., https://studentaffairs.duke.edu/conduct/z-policies/student-sexual-misconduct-policy-dukes-commitment-title-ix#consent (last visited Feb. 9, 2022) [hereinafter *Duke Policy*] (requirement to "stop[] and clarif[y], verbally, willingness to continue."); *Policy Prohibiting Discriminatory Harassment & Sexual Misconduct*, Wesleyan Univ., https://www.wesleyan.edu/studentaffairs/studenthandbook/university_policies/harassment-sexual-misconduct.html#top (last visited Feb. 9, 2022) [hereinafter *Wesleyan Code*] ("It is the responsibility of the person who wants to engage in sexual activity to ensure consent of their partner(s)."); *Administrative Guide: 1.7.1 Sexual Harassment*, Stan. U. (Nov. 4, 2020), https://adminguide.stanford.edu/chapter-1/subchapter-7/policy-1-7-1#:~:text=Prohibited%20Sexual%20Conduct%20is%20the,forms%20of%20Prohibited%20Sexual%20Conduct [hereinafter *Stanford Policy*] ("It is the responsibility of each person involved in the sexual activity to ensure that the person has the Affirmative Consent of the other or others to engage in the sexual activity.").

mative consent of the other or others to engage in the sexual activity."[40] Alarmist opponents call it the sex contract.[41] Defenders say that the law merely demands consent in its ordinary sense.[42] However, the more logical interpretation is that it requires a stop-and-ask ritual.

Under the California law, the sex proponent must take "reasonable steps... to ascertain" and then "ensure" affirmative consent.[43] The "ensure" language appears to obligate sex proponents, before and frequently during foreplay, to stop and ask for permission, something like, "Do you want to do it?," or as one public-awareness video counsels, "Do you want to bump and grind with me?"[44] The sex acceptor must then give an indication of permission, perhaps a thumbs up or "I would really like to bump and grind with you."[45] Some of the stop-and-ask scripts offered by college administrators verge on the humorous. One university pamphlet, "Making Consent Fun," suggests questions like, "Would you like to try an Australian kiss? It's like a French kiss, but 'Down Under.'"[46] This illustrates the difficulty in formulating an enlightened-but-sexy consent script.

V. Clear and Contemporaneous Consent

Many sexual consent policies do not require magic words or an ask-and-answer, but they do demand "clear" agreement specific to each individual sexual act.[47] When pressed, commentators have difficulty identifying the

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40 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.

41 *See, e.g.*, Beusman, *supra* note 30; Yehuda Remer, *California To Redefine Sex As Rape*, Truth Revolt (Mar. 10, 2014), https://web.archive.org/web/20140313090256/http://www.truthrevolt.org/news/california-redefine-sex-rape (last visited Feb. 9, 2022).

42 *See, e.g.*, Beusman, *supra* note 30.

43 S.B. 967; *see also Wesleyan Code*, *supra* note 39 (using the word "ensure").

44 SAVP Vassar, *How do I Ask For Consent?*, YouTube (Apr. 29, 2014), https://www.youtube.com/watch?v=vbyaFyr2h6Q (accessed Feb. 9, 2022).

45 *Id.*

46 *Consent*, Univ. Wyo., http://www.uwyo.edu/reportit/learn-more/consent.html (last visited Feb. 8, 2022). See Gersen & Suk, *supra* note 13, at 928–29 for more examples.

47 *See, e.g.*, *Prohibited Bias, Discrimination, Harassment, and Sexual and Related Misconduct*, Cornell Univ. 14, https://policy.cornell.edu/sites/default/files/vol6_4.pdf (accessed Feb. 9, 2022) (defining affirmative consent as "words or actions [that] create clear permission"); *Sexual Misconduct, Intimate Partner Violence, and*

line between foreplay that expresses consent to just that foreplay and foreplay that expresses consent to more intimate acts. But they are clear that only a *subset* of sexual behaviors express consent to penetration or oral sex. Many agree that "kissing alone" is not consent to penetration but leave vague what is.[48] Most university policies require a specific (although unspecified) consent expression to "each act," indicating escalating intimacy is not enough.[49]

Another specification is that past consent does not "imply" present consent.[50] In interpreting external manifestations (i.e., kissing and petting), sex proponents may consider the immediate context (the sex acceptor said, "Take the lead tonight") but not past evidence (on ten previous occasions, petting led to sex). Most policies do not render past intimacy and relationship irrelevant, but they specify that they are minimally "indicative" of consent, if at all.[51] Thus, the external manifestations must be the type that

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Stalking, Univ. Colo. (Sept. 2, 2021) 15, https://www.cu.edu/sites/default/files/aps/79746-aps-5014-sexual-misconduct-intimate-partner-violence-and-stalking/aps/5014.pdf [hereinafter *Colorado Policy*] ("unambiguous... agreement"); *Sexual Respect: Definitions*, Dartmouth Coll., https://web.archive.org/web/20180109120523/www.dartmouth.edu/sexualrespect/definitions.html (last updated Feb. 3, 2015) ("clear and unambiguous agreement, expressed in mutually understandable words or action"); *Yale Sexual Misconduct Policies and Related Definitions*, Yale Univ., http://smr.yale.edu/sexual-misconduct-policies-and-definitions (last updated Aug. 12, 2020) ("unambiguous... agreement"); *see also* Stephen J. Schulhofer, Unwanted Sex: the Culture of Intimidation and the Failure of Law 271 (1998) (advocating "permission... clearly communicated").

48 *See, e.g.*, *Columbia Policy*, *supra* note 39, at 10 ("Consent to one form of sexual activity does not imply consent to other forms of sexual activity.").

49 *See, e.g.*, *Sexual and Gender-Based Harassment, Sexual Violence, Relationship and Interpersonal Violence and Stalking Policy*, Brown Univ. 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"); Michelle J. Anderson, *Negotiating Sex*, 78 S. Cal. L. Rev. 1401, 1420 (2005).

50 *See Brown Policy*, *supra* note 49, at 7 (past or present relationship does not necessarily imply consent); *University of Chicago Policy on Harassment, Discrimination, and Sexual Misconduct*, Univ. Chi., https://harassmentpolicy.uchicago.edu/policy/ (accessed Feb. 9, 2022) [hereinafter *Chicago Policy*]; *Stanford Policy*, *supra* note 39; sources cited *supra* note 49 (consent to one act is not consent to another).

51 *Compare Chicago Policy*, *supra* note 50 (sexual relationship does not "in and of itself" constitute consent), *and Stanford Policy*, *supra* note 39 (dating relationship does not "by itself" indicate consent), *with Colorado Policy*, *supra* note 47, at 15 (previous and current sexual relationships "do not imply consent"), *and Columbia Policy*, *supra* note 39, at 10.

would clearly convey consent to a stranger, even if the sex is within a years-long relationship.[52]

A related concept is that affirmative consent must be "continuous," "persistent," or "ongoing."[53] In terms of internal consent, continuous agreement is epistemologically problematic if it renders sex nonconsensual whenever a person has a fleeting second thought. The requirement of ongoing external consent is similarly confounding. What exactly does a continuous communication of agreement look, or sound, like? The requirements of ongoing consent and consent to each act are thus frequently understood as the necessity to clearly and unambiguously express agreement to some *critical* acts (penetration, oral sex)[54] but not others (touching a breast?).

Having examined the various formulations of affirmative consent, let us now turn to normative debate over the desirability of affirmative consent.

D. The Affirmative Consent Debate

There is considerable confusion in the normative debate over affirmative consent. The justifications and criticisms sometimes assume strong and sometimes assume weak versions of the standard. Debaters frequently make self-contradictory claims. For example, proponents justify the rule because it simply codifies actual sexual practice and because it is an admittedly aspirational standard that is necessary to provoke "cultural change." This Part catalogues and analyzes the affirmative consent debate. A caveat is that the level of persuasiveness of pro and con claims is also a function of which affirmative consent formulation and which legal forum (college, civil, criminal) the claimant assumes.[55] There are four types of debates: empirical, aspirational, retributive, and distributional.

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52 *See Columbia Policy*, *supra* note 39, at 10 ("The definition of consent does not vary based upon... relationship status.").

53 *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 38; *Sexual Harassment, Sexual Assault, Stalking and Relationship Violence*, Univ. Minn., https://policy.umn.edu/hr/sexharassassault (accessed Feb. 9, 2022) [hereinafter *Minnesota Policy*]; *Stanford Policy*, *supra* note 39.

54 Thus "ongoing" is used in counter-distinction to irrevocable. *See, e.g.*, *Stanford Policy*, *supra* note 39 ("Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time.").

55 I do not probe the distinction between college discipline and criminal prosecution here.

I. The Empirical Argument: Affirmative Consent Reflects Sexual Practice

Affirmative consent proponents argue that decision-makers, due to bias or mistake, regard too wide a range of manifestations as indicating willingness.[56] There are undoubtedly some prejudiced jurors who ignore the consent requirement when a woman "asks for it." However, such a juror would also ignore an affirmative-consent requirement.[57] Thus, proponents more likely have in mind decision-makers who mistakenly assess external manifestations due to inaccurate and sexist background beliefs. Reformers contend that people do not say "no" when they mean "yes;" they move from foreplay to sex only after forthright discussion; and people consent actively not passively.[58] One scholar pronounced it a "myth" that "'no' does not *always* mean 'no.'"[59]

In promoting their views of the empirical world of sex, activists sometimes play fast-and-loose with social science. Stop-and-ask proponent Michelle Anderson argues that negotiation before sex reflects prevailing "social and sexual mores."[60] Anderson bases this conclusion 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 majority answered affirmatively.[61] But the fact that young people in relationships at some point talk about sex says very little about how people, strangers or familiars, communicate consent on a specific occasion. The

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56 *See, e.g.*, Beatrice Diehl, Note, *Affirmative Consent in Sexual Assault: Prosecutors' Duty*, 28 Geo. J. Legal Ethics 503, 508 (2015) (affirmative consent standard will combat jurors' adherence to "myths about rape"); *see also supra* note 7 and accompanying text.

57 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, *supra* note 28, at 417.

58 *See* Schulhofer, *supra* note 8, at 670 (characterizing open communication as normal).

59 Diehl, *supra* note 56, at 508.

60 Anderson, *supra* note 49, at 1433.

61 *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).

author also speculates that escalating foreplay does not indicate consent to penetration because people engage in foreplay to *avoid* penetration.[62]

Despite this kitchen-sink style of determining sexual communication practices, there is an empirical field of sexuality studies where researchers carefully design studies to measure how people negotiate sex. The studies make clear that the typical way young people express sexual intent is *not* by open verbal communication.[63] 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."[64] Even agreement to genital penetration often does not resemble ask-and-answer. Sexual consent signaling is frequently 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."[65] This reticence is undergirded by troubling gender dynamics.[66] Studies show that young people adhere to "traditional" sexual scripts in which men initiate and women act as "gatekeepers."[67] Women are keenly aware of the social costs of breaking from the traditional script and engaging in the "wrong" kind of sexual

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62 Anderson, *supra* note 49, at 1420 (citing Lisa Remez, *Oral Sex among Adolescents: Is It Sex or Is It Abstinence?*, 32 Fam. Plan. Persp. 298, 298–301 (2000)) ("The more diverse the sexual experiences people participate in – experiences that deliberately do not include vaginal or anal penetration – the less those experiences suggest consent to vaginal or anal penetration.").

63 Many of the studies do not claim to describe the dynamics of same-sex sexual communication. *See* Humphreys & Brousseau, *supra* note 21, at 421.

64 *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 Elec. 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 Rsch. 435 (1992).

65 *See* Humphreys & Brousseau, *supra* note 21, at 421 (citing Hall, *supra* note 64).

66 These differentials may not be so pronounced in other countries. *See* Sprecher et al., *supra* note 15, at 130.

67 Hickman & Muehlenhard, *supra* note 21, 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).

communication.[68] Because of this, "token resistance," that is, communicating refusal when one is willing, continues to be a significant practice.[69]

II. The Aspirational Argument: Affirmative Consent Is a Crucial Objective

Given the scant evidence that sexual communication is affirmative, proponents alternatively argue that it *should be* and that the law can enable the shift toward an edified consent script, involving open negotiation, overt agreement, and frequent double-checking.[70] Of course, "sex positive" commentators regard this as dystopian and argue we should not use state carceral power to stamp out sexual ambiguity.[71] But many progressives rightly regard traditional sexual communication not as ambiguous and fun but as dangerous and sexist.[72] Many affirmative-consent critics agree that best sexual practices involve clear communication.[73] They too hope that sexual conventions will change over time. The debate is over whether criminal law (or college discipline) is the way to achieve this transforma-

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68 *See* Michael W. Wiederman, *The Gendered Nature of Sexual Scripts*, 13 Fam. J. 496 (2005).

69 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. Psych. 872 (1988); O'Sullivan & Allgeier, *supra* note 15.

70 *See, e.g.*, Nicholas J. Little, *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, 1356 (2005) (drawing analogy to civil rights laws that "led popular culture").

71 *See, e.g.*, Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 Colum. L. Rev. 181, 206–07 (2001) ("[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"); *see also* Schulhofer, *supra* note 47, 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).

72 *See* Franke, *supra* note 71, at 208; Gruber, *supra* note 5, at 635 & n.297 (affirmative consent envisions male sex proponents).

73 *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 (accessed Feb. 9, 2022) (stating that "[n]o one could oppose" affirmative consent's goals of enthusiasm and mutual desire).

tion.[74] Regulatory affirmative consent laws make wide swaths of the public subject to criminalization in the quest to change culture. Some proponents are candid that ordinary sexual actors will be sacrificial lambs.[75] One opines: "The Yes Means Yes law creates an equilibrium where too much counts as sexual assault. Bad as it is, that's a necessary change. [The] culture... isn't going to be dislodged with a gentle nudge."[76]

One should, however, be wary of the punitive impulse that criminalization is the best tool of social change.[77] In fact, people react poorly to criminalization of "ordinary" behavior, and laws that "nudge" a culture at a tipping point are far more effective than laws seeking to "shove" radical changes.[78] In fact, shoves may produce backlash. Indeed, sexual communicative norms, especially among young people in their formative sexual years, are deeply psychological and socially entrenched.[79] 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.[80] Proponents rejoin that it is "easy" for people to comply with affirmative consent.[81] However, social science indicates that people—especially young people—have strong incentives to eschew direct expression of sexual desire to "save face" in the

74 *See* Judith Shulevitz, Opinion, *Regulating Sex*, N.Y. Times (June 27, 2015), http://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html?r=0 (accessed Feb. 9, 2022).

75 *See* Ezra Klein, *"Yes Means Yes" is a Terrible Law, and I Completely Support It*, Vox (Oct. 13, 2014), https://www.vox.com/2014/10/13/6966847/yes-means-yes-is-a-terrible-bill-and-i-completely-support-it (accessed Feb. 9, 2022); Little, *supra* note 70, at 1356; Schulhofer, *supra* note 8, at 679 ("[U]sing criminal law to discredit harmful social norms can be fair and effective.").

76 Klein, *supra* note 75.

77 *See* Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. Miami L. Rev. 961 (2014).

78 *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).

79 *See supra* notes 63–69 and accompanying text.

80 *See* Kahan, *supra* note 78. In addition, the more artificial the script, the less likely it is that there will be widespread enforcement by officials. *Id.*

81 *See, e.g.*, Schulhofer, *supra* note 8, at 671–72; Rebekah Kuschmider, *Ask a Feminist: Affirmative Consent. What Is It?*, Huff. Post: Impact (last updated Oct. 29, 2016), http://www.huffingtonpost.com/ravishly/ask-a-feminist-affirmative-consent-what-is-it_b_8153606.html (accessed Feb. 9, 2022) ("[Affirmative consent] can be easy, sexy, not awkward.").

event of rejection.[82] Indeed, one wonders why harsh criminal sanctions would be necessary to compel people to do that which is so easy to do.[83]

Experience shows that decision-makers will use discretion to temper the power conferred by broad criminal laws. The expansive criminal codes in the U.S. outlaw many acts routinely performed by ordinary people (e.g., loitering and trespass). In mediating broad penal power, police and prosecutors tend to apply their authority to the "usual suspects"—poor people of color.[84] In turn, the majority of citizens remain blissfully unaffected by the massive criminal regulatory regime because its negative effects fall on a marginalized segment of society.[85] If strict affirmative-consent laws follow this familiar pattern, only the marginalized will be prosecuted for "yes"-less sex, and the rest of society will have little incentive to break from psychologically entrenched sexual communication practices.[86]

III. The Retributive Argument: Affirmative Consent Is Morally Required

Opponents of affirmative consent argue that it is morally impermissible to sacrifice "innocents" —those who act within current norms—in the quest to secure utopian sexual communication.[87] Proponents respond by summarily declaring that sex without affirmative consent is wrongful, and

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82 Humphreys & Brousseau, *supra* note 21, at 422 (citing studies).

83 *See supra* Part II.

84 *See* Dorothy E. Roberts, Foreword, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. Crim. L. & Criminology 775 (1999).

85 *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/43tabledatadecoverviewpdf (accessed Feb. 9, 2022).

86 Even if not discriminatorily applied, affirmative consent is unlikely to change norms. *See* Johnson & Hoover, *supra* note 67 (discussing studies indicating that directives on consent are ineffective because people interpret the term "consent" variably); Humphreys, *supra* note 64 (noting that a decade of affirmative consent in Canadian criminal law has not changed the entrenched sexual script).

87 *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).

those who impose it are morally culpable.[88] To be sure, the slipperiness of retributivism allows lawmakers to declare all kinds of behaviors "wrongful" and all manner of high sentences "deserved." Critics of retributivism argue that it propelled the United States to become the world's biggest imprisoner.[89] Still, retributivists reject that one can simply declare a behavior wrongful to hide that the behavior is being regulated in service of an end.

Retributivist penal theorists argue that the crux of nonconsenual (and therefore wrongful) sex is unwillingness, and defendants are culpable only when they intend to have sex against another's will.[90] They argue that defendants who reasonably—or even honestly—believe that sex is wanted are not culpable, regardless of the consent performance.[91] For the law to hold otherwise, they assert, is to criminally punish the non-culpable to satisfy some other regulatory aim, which is morally repugnant.[92] A legislature might, for example, prohibit "sex during college" in an effort to curb unwanted sex. Most would concede that having sex during college is not wrongful. Similarly, many would scoff at the idea that two people who actively engage in mutually desired sex are *both* culpable because neither procured a verbal "yes."[93]

Affirmative-consent proponents contend alternatively that sex without affirmative consent is not itself immoral, but failure to get a yes *culpably risks* nonconsensual sex. In this view, failure to procure affirmative consent is like speeding or drunk driving: the law can regulate it even when it does not produce harm. But many theorists question the government's power to criminalize when the actor neither causes nor intends harm. Affirmative consent changes the risk question from whether a reasonable person would foresee an unacceptable risk that the sex is unwanted to whether the defendant violated a bright-line rule based on reformers' predeterminations of unacceptably risky behavior. Any sex risks unwanted sex, just as

88 *See, e.g.*, Lois Pineau, *Date Rape: A Feminist Analysis*, 8 L. & Phil. 217, 238–39 (1989) (a "communicative approach" to sex is "morally required").

89 *See* Kyron Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 Mich. L. Rev. 811, 812 (2002).

90 *See* Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 Ohio St. J. Crim. L. 397 (2016).

91 *See id.* at 416; Husak & Thomas, *supra* note 87, at 107–08; *supra* Section I.C.

92 *See* Kimberly Kessler Ferzan, *A Reckless Response to Rape: A Reply to Ayres and Baker*, 39 U.C. Davis L. Rev. 637, 641 (2006).

93 Feminist commentators often assume the criminal prohibition against uncommunicative sex will be applied only to men. *See, e.g.*, Pineau, *supra* note 88, at 239–40 (advocating criminalizing lack of "communicative sexuality" to entrench a "norm of sex to which a reasonable woman would agree").

any driving risks an accident. Is sex-without-a-yes like driving with a blood alcohol level of . 01% or.09 %?

IV. The Distributional Argument: Affirmative Consent Produces Distributive Justice

The final set of arguments in favor of affirmative consent is legal realist in nature: the arguments assert that the law "in action" does not punish people who reasonably believed sex was consensual but did not get a "yes." The reform simply gives prosecutors another tool to go after "real rapists"—those who intentionally force sex or have sex against a person's will. Reformers often simply assume that their proposals will have the effects they intend them to have,[94] so the effort of affirmative consent proponents to trace the effects of nascent reform is positive.[95] However, most of these tracing projects are less about finding out the effects of the affirmative-consent standard and more about *defending* it against criticism that it gives broad authority to the state to prosecute anyone whose sexual communications were not perfect. Affirmative consent proponents maintain that the standard will not lead to more reporting of cases or close cases, and if it does, prosecutors will weed them out.[96]

Strangely, this argument rationalizes affirmative consent laws on the ground that they will *not* be followed. And it seems to conflict with the argument that reform is needed to increase reporting and control recalcitrant police and prosecutors. Nevertheless, proponents say that the standard will increase the *right* kind of reporting and prosecutions. In the status quo, the argument goes, women fail to report forcible and nonconsensual rapes because of embarrassment, fear, traumatization, or other structural barriers. Police and prosecutors decline to pursue cases because of prejudice or concern about losing. Juries acquit because of error

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94 *See* Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 Fordham L. Rev. 3211, 3229–30 (2015); 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*, Harv. J. L. & Gender 335, 336 (2006).

95 *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 "sex crimes" court might distribute costs and benefits); Deborah Tuerkheimer, *Affirmative Consent*, 13 Ohio St. J. Crim. L. 441 (2016).

96 *See, e.g.*, Tuerkheimer, *supra* note 95, at 464–68 (fears about "miscommunication" cases are overblown).

or sexism.[97] 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 prosecutions and convictions in clear, but not in questionable, rape cases.

Will affirmative consent work out this way? We probably will never get a satisfying empirical evidence answer. Forcible and nonconsensual rapes are already fully criminalized without affirmative consent. Victims of these rapes fail to report because of structural barriers, not for lack of criminalization, and they would continue to face such barriers regardless of affirmative-consent reform. An affirmative-consent law is therefore likely to affect a different class of potential reporters: those who experience questionably consensual sex. Studies reveal that people do not report sex without affirmative consent because they do not see them as "rapes." Affirmative consent laws may have the effect of persuading such victims and/or the people they consult with that sex without enthusiastic consent *is* serious enough to report. Consider this scenario:

A: "B and I were making out heavily, and I just went along with sex. I'm not sure what to do, but it doesn't seem right."

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

Encouragement increases reporting, so let us assume A reports.[98] This is obviously a great result for reformers who want to increase reporting of ambiguous consent.[99] However, it runs directly counter to the contention that affirmative consent will *not* increase reporting and prosecution of miscommunication cases. Indeed, some proponents say affirmative consent increases reporting because it signals to victims that they will be believed, will not be "put on trial," and will obtain a favorable outcome. But this incentive structure applies to victims in clear and ambiguous cases alike.[100]

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97 *See supra* notes 56–57 and accompanying text.

98 *See* Lisa A. Paul et al., *Does Encouragement by Others Increase Rape Reporting? Findings from a National Sample of Women*, 38 Psych. Women Q. 222 (2013); *but see* Bryden, *supra* note 28, at 422 (arguing that affirmative consent will not greatly increase reporting because of social norms).

99 Of course, feminists would perhaps not want reporting if we imagine A as a male and B as a female. *See supra* note 11.

100 *Cf.* Ashe Schow, *Student Newspaper Just Fine with False Accusations*, Wash. Exam'r (Oct. 22, 2015, 1:59 PM), http://www.washingtonexaminer.com/student-news-

Some suggest that prosecutors will use their discretion to weed out such cases. Professor Deborah Tuerkheimer, for example, canvassed published appellate cases[101] and found that the term "affirmative consent" cropped up, not in ambiguous consent situations, but in incidents involving force, intoxication, and unconsciousness.[102] This suggests that despite the law, prosecutors continued to pursue only clear force and nonconsent cases. One must, however, exercise caution in drawing conclusions from the fact that the few appeals all involved "traditional" rape scenarios. This may just mean that the ambiguous cases pled out or were not appealed. In any case, one of affirmative consent reform's express aims is to encourage prosecutors to pursue cases they otherwise would not, but one can only speculate on whether this happens.[103]

So let me speculate. Assume that a jurisdiction makes it a low-level felony to have sex without stopping and asking for permission. The law might operate as prosecutorial power often does—compelling defendants in close cases to forego trial and plead guilty. Thus, if evidence of force, coercion, intoxication, or nonconsent is weak, the prosecution can bring up the conviction-friendly affirmative consent law to induce a plea.[104] Whether this is good or bad depends on whether one thinks prosecutors *should* induce pleas in highly contestable cases.

The second possibility is that prosecutors will use the new authority to pursue a subset of ambiguous consent cases. Charges will arise when the prosecutor instinctively views the defendant as "a bad guy" and the victim as a credible "good girl" or when the victim is particularly vehement. These prosecutions might meaningfully overlap with the type of cases reformers think should be pursued, but they might not. Prosecutors' views of true criminality may be influenced more by racial and socioeconomic

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paper-just-fine-with-false-accusations/article/2574703 (discussing student newspaper's claim that false accusation is a justified cost of increased reporting).

101 Tuerkheimer included all jurisdictions whose rape statutes plausibly required performative consent. Tuerkheimer, *supra* note 95, at 447–51.

102 *Id.* at 451–52; *see* David P. Bryden, *Reason and Guesswork in the Definition of Rape*, 3 Buff. Crim. L. Rev. 585, 591 (2000) (noting "danger" that affirmative consent will lower the burden of proof in serious cases).

103 *See* Diehl, *supra* note 56, at 507 (prosecutors have a duty to strictly enforce affirmative consent to educate an "unaware" society about "acceptable sexual behavior").

104 Prosecutors can also take weak force or intoxication cases to trial, with lack of affirmative consent as a fall back.

characteristics than by the nature of the event.[105] Similarly, assessments of victims' credibility may involve race, class, and gender stereotyping. Moreover, the most vehement victims may also be the most biased and uncredible.[106] It is true that these are problems of prosecutorial discretion in general, not just affirmative consent prosecutions; however, rape reformers should not get a "free pass" to write off the problems of the U.S. penal system, especially when creating new and broad carceral authority.

Affirmative consent proponents have faith that the standard will lead to more prosecutions of clear cases of nonconsent, although the law *establishes* lack-of-affirmative-consent cases as "clear" cases. They have faith that reform will produce a yes-means-yes culture without punishing innocents and disproportionately burdening the marginalized. But "faith" is the correct word because there is no reason to believe that this is happening. Consequently, while all thoughtful law reformers should endeavor to determine whether 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.[107]

E. Conclusion

I hope 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. I also hope I have shed a skeptical light on the virtual consensus that consent is the best framework for rape law. Situating affirmative-consent reform as

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105 *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, *supra* note 102, at 591 (postulating that affirmative consent might lead to discriminatory enforcement).

106 *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.").

107 *But see* Diehl, *supra* note 56, at 507 (urging prosecutors to use affirmative consent to prosecute ambiguous cases).

a mere means to improving the liberal consent inquiry has obscured the very motivations behind rape reform—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 chapter 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.[108]

108 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."