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## Unpacking Affirmative Consent: Not as Great as You Hope, Not as Bad as You Fear

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# UNPACKING AFFIRMATIVE CONSENT: NOT AS GREAT AS YOU HOPE, NOT AS BAD AS YOU FEAR

Jonathan Witmer-Rich\*

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## I. INTRODUCTION

The debate over “affirmative consent” suffers from conceptual confusion and unwarranted assumptions. This Article seeks to clarify the concept of affirmative consent and dispel mistaken assumptions. In its most basic form, affirmative consent is a relatively modest reform that has already taken root, either overtly or *sub silentio*, in many American jurisdictions.<sup>1</sup> Affirmative consent does not offer the significant reform that some of its advocates desire nor present the dire risks many of its opponents fear.<sup>2</sup>

This Article makes the following points:

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1. See *infra* Section III.E.

2. See *infra* Part III (discussing misconceptions about affirmative consent).

- The phrase “yes means yes” is a slogan (perhaps a good one), not an actual legal standard or an explanation of a legal standard.
- Affirmative consent does not require “express verbal agreement.”
- Many advocates and critics assume that affirmative consent necessarily means “unambiguous consent” when, in fact, it does not. Some affirmative consent policies additionally require that consent be unambiguous, but many do not. This is a major distinction and one that has been ignored in the debate over affirmative consent. Unambiguous consent represents a significant change in the law whereas affirmative consent does not.
- Commentators state that affirmative consent changes the legal standard from one that requires an affirmative “no” to one that requires an affirmative “yes.” In fact, this change has been underway for decades as courts have steadily abandoned and rejected any rule that requires even “verbal resistance”—a clear “no.” This is an important but incremental shift and has already occurred in most jurisdictions, regardless of whether the jurisdiction invokes the concept of affirmative consent.
- Commentators suggest that affirmative consent policies change the significance of silence or passivity in rape cases. Some suggest that in the past, silence or passivity was equated with consent whereas under affirmative consent, it is not. The first claim—silence or passivity equals consent—was true in the past but is no longer true, at least as a doctrinal matter, in most jurisdictions today.<sup>3</sup> The second claim—silence or passivity does not show consent under affirmative consent policies—suffers from a critical ambiguity.<sup>4</sup> The more plausible resolution of that ambiguity shows silence and passivity play largely the same role under an affirmative consent policy as they do under existing law—namely, that silence or passivity is relevant but not sufficient standing alone to show the presence of consent.

At the heart of many of these confusions are unexplained and unjustified assumptions about how human communication works.<sup>5</sup> Both advocates and critics of affirmative consent policies seem to share the misperception that parties to sexual encounters commonly fail to communicate to each other their agreement to engage in sex.<sup>6</sup> Of course, parties to sexual encounters routinely communicate with one another in ways that are indirect, subtle, and nonverbal, but they are communicating nonetheless (not always

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3. See *infra* notes 158–59 and accompanying text (suggesting that the jurisdictions that equate silence with consent are outliers).

4. See *infra* notes 151–53 and accompanying text (noting that ambiguity results from policies that do not make it clear that silence does not indicate consent).

5. See *infra* Section III.F.

6. See *infra* Section III.F.

successfully).<sup>7</sup> In the vast majority of sexual encounters—including the vast majority of those contested encounters involving an allegation of rape or sexual assault—some affirmative signal or signals are sent between the parties.<sup>8</sup> Accordingly, requiring that consent be affirmative—that some positive signal be sent—will impact relatively few cases, and many of those cases are already successfully prosecuted under existing law.<sup>9</sup>

The main difficulty in many contested cases of rape or sexual assault is how to interpret various signals—verbal and nonverbal—sent between the parties to the encounter. The dispute is not over whether a signal was sent at all, and thus, requiring affirmative consent does not assist with or change that difficult task. That is because the problem is not in determining whether *some* affirmative signal was sent but in determining whether the combination of words and conduct, on balance and in context, indicated agreement to sex.

This Article aims to “unpack” the concept of affirmative consent by identifying common assertions about affirmative consent that are false or misleading and by separating issues that are commonly conflated. The goal here is not to advocate either for or against the notion of affirmative consent but to clarify the concept to show what is at stake (and what is not at stake) in these debates.

Part II of this Article sets forth definitions of affirmative consent, particularly noting the difference between policies that require unambiguous agreements and those that do not. Part III addresses the various misconceptions identified above. Section III.A discusses the “yes means yes” slogan. Section III.B notes that affirmative consent does not mean express verbal agreement. Section III.C explains that affirmative consent is different from unambiguous consent. Section III.D discusses the shift from “no means no” to “yes means yes,” noting that this change in the law has already occurred in most jurisdictions, regardless of whether the jurisdiction uses the term “affirmative consent.” Section III.E discusses the role of silence under affirmative consent policies, analyzing a significant ambiguity on this point. Section III.F seeks to dispel the perception that in many sexual encounters, the parties fail to indicate their interest in sex.

## II. DEFINITIONS OF AFFIRMATIVE CONSENT

The concept of affirmative consent carries with it a cluster of both substantive rules (related to the definition of consent) and procedural rules (related to how criminal prosecutions or university adjudications should be conducted).<sup>10</sup> This Article focuses on the former, not the latter—examining

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7. See *infra* Section III.F.

8. See *infra* Section III.F.

9. See *infra* Section III.F.

10. See, e.g., Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1946 (2016) (discussing the developments of both the procedural and substantive

the substantive concept of affirmative consent, not analyzing the various procedural rules that might go along with such a standard.<sup>11</sup>

Rape law has long contained a consent element.<sup>12</sup> Most American jurisdictions do not use the concept of affirmative consent to describe the consent element, although a few do. In the 1992 *M.T.S.* decision, the Supreme Court of New Jersey interpreted its state law to require “freely given affirmative permission to the specific act of sexual penetration.”<sup>13</sup> A few other states have statutory definitions that likewise require affirmative consent.<sup>14</sup>

The concept of affirmative consent has spread much more rapidly in the context of higher education. Hundreds of college and university policies now include some definition of affirmative consent as a component of their university sexual assault policies.<sup>15</sup>

Definitions of affirmative consent vary somewhat, but they can be categorized conceptually into two main groups: those that require some affirmative signal of consent and those that additionally require that consent be unambiguous or clearly expressed.

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components of affirmative consent policies); Wendy Adele Humphrey, “*Let’s Talk About Sex*”: *Legislating and Educating on the Affirmative Consent Standard*, 50 U.S.F. L. REV. 35, 41 (2016) (discussing both procedural and substantive issues in affirmative consent policies).

11. Several procedural issues are under consideration in connection with university affirmative consent policies. *See, e.g.*, Humphrey, *supra* note 10, at 39–40. To give just one example, there is considerable debate over whether universities should use a preponderance of the evidence standard in sexual assault cases or whether the standard should be higher. *Id.* at 46 (“[S]ome have criticized the preponderance of the evidence standard for being too low when determining a claim of sexual violence on campus, others maintain that the standard is appropriate . . .”) (footnote omitted); Anderson, *supra* note 10 (defending the preponderance standard on the ground that it is the ordinary standard for university disciplinary adjudications); Charles M. Sevilla, *Campus Sexual Assault Allegations, Adjudications, and Title IX*, 39 CHAMPION, Nov. 2015, at 16, 16 (“[T]he school reaction is a process in which human rights are often sacrificed by collegiate bureaucrats. Campus sexual assaults are a serious issue deserving of appropriate investigation and adjudication, but institutions of higher learning should not implement Alice-in-Wonderland techniques.”); Allison L. Marciniak, Note, *The Case Against Affirmative Consent: Why the Well-Intentioned Legislation Dangerously Misses the Mark*, 77 U. PITT. L. REV. 51, 67 (2015).

12. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES \*210 (noting that rape is the “carnal knowledge of a woman forcibly and against her will”).

13. *State ex rel. M.T.S.*, 609 A.2d 1266, 1278 (N.J. 1992) (“Such permission can be indicated either through words or through actions that, when viewed in the light of all the surrounding circumstances, would demonstrate to a reasonable person affirmative and freely-given authorization for the specific act of sexual penetration.”).

14. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/11–1.70(a) (West 2012) (“‘Consent’ means a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent.”); WASH. REV. CODE ANN. § 9A.44.010(7) (West 2007) (“‘Consent’ means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.”); WIS. STAT. ANN. § 940.225(4) (West 2013) (defining consent as “words or overt actions . . . indicating a freely given agreement to have sexual intercourse or sexual contact”).

15. Humphrey, *supra* note 10, at 57 (“[A]ccording to the National Center for Higher Education Risk Management, more than 800 colleges have adopted a policy based on a consent-based model and have included a definition of affirmative consent in their sexual assault policies.”) (footnotes omitted).

### A. Affirmative Consent

In the *M.T.S.* case, the New Jersey Supreme Court explained affirmative consent as follows:

In a case such as this one, in which the State does not allege violence or force extrinsic to the act of penetration, the factfinder must decide whether the defendant's act of penetration was undertaken in circumstances that led the defendant reasonably to believe that the alleged victim had freely given affirmative permission to the specific act of sexual penetration. Such permission can be indicated either through words or through actions that, when viewed in the light of all the surrounding circumstances, would demonstrate to a reasonable person affirmative and freely-given authorization for the specific act of sexual penetration.<sup>16</sup>

Beyond the term "affirmative permission" and the clarification that such permission could be indicated either through words or conduct, the court did not further define the concept. Several other American jurisdictions use a similar standard.<sup>17</sup>

Federal action has come from the Department of Education's Office for Civil Rights (OCR) in the context of enforcing Title IX's prohibitions on sex discrimination in higher education.<sup>18</sup> The OCR issued a 2011 "Dear Colleague Letter," providing guidance to universities on sexual assault policies and procedures.<sup>19</sup> The Dear Colleague Letter explained that "a school's responsibility [is] to respond promptly and effectively to sexual violence against students in accordance with the requirements of Title IX."<sup>20</sup>

Notably, neither the Dear Colleague Letter nor a 2014 "Questions and Answers" document uses the phrase "affirmative consent" or sets forth an affirmative consent standard.<sup>21</sup> Instead, the Dear Colleague Letter describes

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16. *M.T.S.*, 609 A.2d at 1278 (footnote omitted).

17. See *supra* note 14 (detailing several state statutes).

18. For a description of the origins of the affirmative consent standard in relation to Title IX, including the role of the OCR and the White House Task Force on Protecting Students from Sexual Assault, see Humphrey, *supra* note 10, at 41–54, and Janet Napolitano, "Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault, 33 YALE L. & POL'Y REV. 387, 393–94 (2015).

19. Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP'T EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (addressing sexual violence as a form of sexual harassment under Title IX).

20. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP'T EDUC. (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

21. See Anderson, *supra* note 10, at 1978 ("OCR has so far declined to enter the substantive conversations about how to define sexual assault on college campuses. However, at the same time that OCR was stepping up enforcement of Title IX against sexually hostile environments at colleges and universities, many campuses adopted affirmative consent standards to govern sexual behavior.").

procedures for handling sexual assault complaints but does not itself mandate an affirmative consent standard.<sup>22</sup>

In 2014, the White House Task Force on Protecting Students from Sexual Assault issued a report titled “Not Alone.”<sup>23</sup> The Task Force also released a “Checklist for Campus Sexual Misconduct Policies.”<sup>24</sup> This checklist (unlike the Dear Colleague Letter) specifically includes an affirmative consent standard.<sup>25</sup> The checklist states that a definition of consent should recognize, at a minimum, that:

- consent is a voluntary agreement to engage in sexual activity;
- someone who is incapacitated cannot consent;
- past consent does not imply future consent;
- silence or an absence of resistance does not imply consent;
- consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another;
- consent can be withdrawn at any time; and
- coercion, force, or threat of either invalidates consent.<sup>26</sup>

California has adopted an affirmative consent standard for sexual assault policies at its state universities.<sup>27</sup> The California legislative definition is the following:

An affirmative consent standard in the determination of whether consent was given by both parties to sexual activity. “Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It 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. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.<sup>28</sup>

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22. See Office for Civil Rights, *supra* note 20, at 24–26 (discussing ways to handle sexual violence).

23. WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT i, 2 (2014), [https://www.whitehouse.gov/sites/default/files/docs/report\\_0.pdf](https://www.whitehouse.gov/sites/default/files/docs/report_0.pdf).

24. White House Task Force to Protect Students from Sexual Assault, *Checklist for Campus Sexual Misconduct Policies*, DEP’T JUST. 1, 4, <https://www.justice.gov/ovw/page/file/910271/download>.

25. *Id.*

26. *Id.* at 4–5.

27. See S.B. 967, 2013–2014 Leg., Reg. Sess. (Cal. 2014) (adding § 67386 to the California Education Code).

28. CAL. EDUC. CODE § 67386(a)(1) (West 2014).

Many universities around the country similarly define affirmative consent to mean an “affirmative, conscious, and voluntary agreement to engage in sexual activity.”<sup>29</sup>

The Affirmative Consent Project, a nonprofit organization devoted to combating and preventing sexual assault and violence on college campuses and elsewhere, states, “‘Affirmative consent’ means affirmative, conscious, and voluntary agreement to engage in sexual activity.”<sup>30</sup>

The American Law Institute (ALI) is currently considering revisions to the rape and sexual assault provisions of the Model Penal Code.<sup>31</sup> The discussion draft dated April 28, 2015 included an affirmative consent provision defined as follows: “‘Consent’ means a person’s positive agreement, communicated by either words or actions, to engage in a specific act of sexual penetration or sexual contact.”<sup>32</sup>

Most of these definitions share the common thread of requiring that consent be given affirmatively. Notably, none of these definitions expressly require that the affirmative consent must also be unambiguous.<sup>33</sup>

### B. Affirmative, Unambiguous Consent

A number of university policies go further than the standards set forth above and also include language requiring that affirmative consent be unambiguous or clear.

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29. Tara Culp-Ressler, *What ‘Affirmative Consent’ Actually Means*, THINKPROGRESS (June 25, 2014), <https://thinkprogress.org/what-affirmative-consent-actually-means-ea665b32b388#.djhqh85j4>; see, e.g., WASH. ADMIN. CODE § 478-120-024(20)(c)(i) (2016) (“‘Consent’ means that at the time of and throughout the sexual contact, there are actual words or conduct indicating freely given agreement between the parties to engage in the sexual contact.”); GENDER-BASED MISCONDUCT OFFICE, GENDER-BASED MISCONDUCT POLICY AND PROCEDURES FOR STUDENTS 4, 7 (rev. ed. 2016), [www.columbia.edu/cu/studentconduct/documents/GBMPolicyandProceduresforStudents.pdf#page=9](http://www.columbia.edu/cu/studentconduct/documents/GBMPolicyandProceduresforStudents.pdf#page=9) (requiring affirmative consent for all sexual contact and stating that “[a]ffirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity”); UNIV. OF HAW., INTERIM POLICY AND PROCEDURE ON SEX DISCRIMINATION AND GENDER-BASED VIOLENCE 7 (2015), <http://hawaii.edu/policy/docs/temp/ep1.204.pdf> (“Consent is affirmative, conscious, and voluntary agreement to engage in agreed upon forms of sexual contact.”); UNIV. OF TENN., POLICY ON SEXUAL MISCONDUCT, RELATIONSHIP VIOLENCE, STALKING, AND RETALIATION 7 (2016), [http://sexualassault.utk.edu/wp-content/uploads/sites/34/2015/08/sexual\\_misconduct\\_policy.pdf](http://sexualassault.utk.edu/wp-content/uploads/sites/34/2015/08/sexual_misconduct_policy.pdf) (“Consent is an affirmative and voluntary agreement by a person to engage in a specific sexual act.”).

30. *What Is Affirmative Consent?*, AFFIRMATIVE CONSENT PROJECT, [affirmativeconsent.com/whatisaffirmativeconsent/](http://affirmativeconsent.com/whatisaffirmativeconsent/) (last visited Dec. 17, 2016).

31. See, e.g., MODEL PENAL CODE § 213.0(3) (AM. LAW INST., Discussion Draft No. 2, 2015).

32. *Id.* This draft has since been withdrawn. See Kevin Cole, *Backpedalling in Place: The ALI’s Move from “Affirmative” to “Contextual” Consent*, SAN DIEGO L. REV. (forthcoming 2016) (manuscript at 3–4) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2714057#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2714057#)).

33. Cole argues that the ALI Discussion Draft’s use of the term “positive agreement” creates an ambiguity as to whether that agreement must be signaled clearly and unambiguously. See Kevin Cole, *Better Sex Through Criminal Law: Proxy Crimes, Covert Negligence, and Other Difficulties of “Affirmative Consent” in the ALI’s Draft Sexual Assault Provisions*, SAN DIEGO L. REV. (forthcoming 2016) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2670419](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2670419)).



For example, the University of Minnesota's policy defines affirmative consent as "informed, freely and affirmatively communicated willingness to participate in sexual activity that is expressed by clear and unambiguous words or actions."<sup>34</sup> The Yale University policy requires a "positive, unambiguous, and voluntary agreement to engage in specific sexual activity throughout a sexual encounter. Consent cannot be inferred from the absence of a 'no'; a clear 'yes,' verbal or otherwise, is necessary."<sup>35</sup> Other universities similarly use language requiring unambiguous consent.<sup>36</sup>

Some universities first define affirmative consent without reference to a clear or unambiguous requirement but then go on in a later section or sentence to add that requirement.

For example, New York's policy for state universities begins with language very similar to California's: "Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity."<sup>37</sup> This language does not include a requirement that consent be unambiguous—a notable shift given that an earlier draft of the policy did expressly require a clear, unambiguous agreement.<sup>38</sup> However, in the next sentence, the New York policy adds that "[c]onsent can be given by words or actions, as long as those words or actions create clear permission regarding

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34. *Id.*

35. *Yale Sexual Misconduct Policies and Related Definitions*, *Sexual Misconduct Response*, YALE UNIV., [smr.yale.edu/sexual-misconduct-policies-and-definitions](http://smr.yale.edu/sexual-misconduct-policies-and-definitions) (last updated May 10, 2016).

36. UNIV. OF COLO., ADMINISTRATIVE POLICY STATEMENT: SEXUAL MISCONDUCT 5 (2015), <https://www.cu.edu/sites/default/files/5014.pdf> (University of Colorado's policy) ("Affirmative consent: Means the unambiguous and voluntary agreement to engage in a specific sexual activity. Consent is clear, knowing and voluntary words or actions which create mutually understandable clear permission regarding willingness to engage in, and the conditions of, sexual activity. Consent must be active; silence by itself cannot be interpreted as consent."); UNIV. OF FLA., REGULATIONS OF THE UNIVERSITY OF FLORIDA 4.041(4)(b)(3) (2012), <http://regulations.ufl.edu/wp-content/uploads/2012/09/4041.pdf> (University of Florida's policy) ("Consent is given by an affirmative verbal response or acts that are unmistakable in their meaning."); UNIV. OF MICH., THE UNIVERSITY OF MICHIGAN POLICY AND PROCEDURES ON STUDENT SEXUAL AND GENDER-BASED MISCONDUCT AND OTHER FORMS OF INTERPERSONAL VIOLENCE 15 (2016), <https://publicaffairs.vpcomm.umich.edu/wp-content/uploads/sites/19/2016/04/SMP-Final-master-version-4.6.16.pdf> (University of Michigan's policy) ("Consent is a clear and unambiguous agreement, expressed outwardly through mutually understandable words or actions, to engage in a particular activity."); *Student Sexual Misconduct Policy and Procedures: Duke's Commitment to Title IX*, DUKE POLICIES, <http://policies.duke.edu/students/universitywide/sexualmisconduct.php> (last updated Aug. 1, 2016) (Duke University's policy) ("Consent is an affirmative decision to engage in mutually acceptable sexual activity freely given by clear actions or words."); *Sexual Assault*, U. OR., <https://safe.uoregon.edu/sexual-assault> (last visited Oct. 23, 2016) (University of Oregon's policy) ("Explicit consent' . . . means voluntary, non-coerced and clear communication indicating a willingness to engage in a particular act. 'Explicit consent' includes an affirmative verbal response or voluntary acts unmistakable in their meaning.").

37. *Definition of Affirmative Consent*, ST. U.N.Y., <http://system.suny.edu/sexual-violence-prevention-workgroup/policies/affirmative-consent/> (last visited Nov. 25, 2016).

38. See OFFICE OF GEN. COUNSEL, SUNY POLICIES ON SEXUAL VIOLENCE PREVENTION AND RESPONSE DECEMBER 1, 2014, REDLINED AGAINST NEW YORK STATE LEGISLATION, JUNE 2015, at 3 (2015), <http://system.suny.edu/media/suny/content-assets/documents/sexualviolenceprevention/suny-policies-sexual-violence-prevention-response-updated-Jun2015.pdf>.

willingness to engage in the sexual activity.”<sup>39</sup> This seems to add a requirement that the agreement not only be affirmative but also that it be clear, which is a different concept. This type of policy poses some interpretive challenges as the second sentence purports to simply clarify the first but does so by adding a substantially new and different requirement.

This discussion does not represent an exhaustive catalogue of all the affirmative consent policies in American universities, but it provides an illustrative sample of how universities define the concept.

### III. MISCONCEPTIONS ABOUT AFFIRMATIVE CONSENT

The ongoing debate over affirmative consent is complicated by the fact that commentators often make unwarranted assumptions about the conceptual issues at play in affirmative consent reforms. This Article seeks to clarify the concept of affirmative consent and dispel several unfounded assumptions.

#### A. “Yes Means Yes” Is a Slogan, Not a Legal Standard

The catchphrase of affirmative consent is “yes means yes.” This is a slogan, not a legal standard.

Commentators regularly affiliate the concept of affirmative consent with the phrase “yes means yes.”<sup>40</sup> Janet Napolitano, the president of the University of California system, summed up her adoption of an affirmative consent policy for the University of California by explaining, “Put simply, only yes means yes.”<sup>41</sup>

Taken as a slogan, “yes means yes” seems a worthwhile and valuable educational tool. The “yes means yes” slogan is designed to encourage all parties to a sexual encounter (particularly college students, at whom much of the advocacy is aimed) to make sure that their partner has freely indicated that he or she wants to have sex.<sup>42</sup> It is designed to discourage persons from assuming that consent is present unless their partner objects and instead to encourage them to get an affirmative signal of agreement.<sup>43</sup>

An educational slogan is not the same thing as a legal standard, however, and “yes means yes” is the former, not the latter. First, none of the

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39. *Definition of Affirmative Consent*, *supra* note 37.

40. *See* Napolitano, *supra* note 18, at 389–90.

41. *Id.* at 390.

42. *See id.*; 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/>; Jennifer Medina, *Sex Ed Lesson: ‘Yes Means Yes,’ but It’s Tricky*, N.Y. TIMES (Oct. 14, 2015), <http://www.nytimes.com/2015/10/15/us/california-high-schools-sexual-consent-classes.html>.

43. *See* Medina, *supra* note 42.

affirmative consent policies actually define affirmative consent as “only yes means yes.”

If it were a legal standard, the claim that “only yes means yes” could not be taken literally. None of the existing affirmative consent standards require participants in sexual activity to use the word “yes.” Thus, the claim that “only yes means yes” does not mean that consent can be signaled only by using the term “yes.”

Another possible interpretation of “yes means yes” is that an agreement to sex must be signaled by some words or conduct that are the equivalent of a “yes.” Not many affirmative consent policies actually state this, but a few do. Yale’s policy states that “a clear ‘yes,’ verbal or otherwise, is necessary.”<sup>44</sup>

Here, it is important to separate the following two ideas, discussed at greater length in Section III.C: an *affirmative* indication of agreement versus an *unambiguous* indication of agreement. The Yale policy requires both; many policies only require the former.<sup>45</sup> “Yes means yes,” as a legal standard, would not require that the indication of agreement be unambiguous, only that it be present.<sup>46</sup>

Finally, as noted in the following Section, affirmative consent policies recognize that the affirmative signal of agreement to sex does not have to be verbal but can be expressed through conduct or words.

The point here is not to criticize the phrase “yes means yes” but to clarify what purpose it serves. It is a slogan and may be an effective slogan and public relations tool.<sup>47</sup> It is not, however, the actual legal standard or legal definition of affirmative consent. Discussions of affirmative consent would benefit from clarity on this point.

#### *B. Affirmative Consent Does Not Mean “Express Verbal Agreement”*

Most legal commentators recognize that an affirmative consent standard does not require an express verbal agreement. Michelle Anderson, defending the concept, has noted that affirmative consent can include “verbal or nonverbal agreement.”<sup>48</sup> Janet Halley, criticizing the concept, has likewise recognized that California’s standard “does not require *express* consent, consent in words” but presumably includes consent “given by conduct.”<sup>49</sup> A recent ALI draft of an affirmative consent proposal provided that consent constituted a “positive agreement, communicated by either words or

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44. *Yale Sexual Misconduct Policies and Related Definitions*, *supra* note 35.

45. *Id.*

46. *See infra* Section III.C.

47. *See* Medina, *supra* note 42.

48. Anderson, *supra* note 10, at 1978.

49. Janet Halley, *The Move to Affirmative Consent*, 42 SIGNS CURRENTS (2015).

actions.”<sup>50</sup> The commentary noted that “[s]ome scholars have urged a requirement of explicit *verbal* assent,” but it concluded that this standard “finds no support in existing law and departs too far from current social practice.”<sup>51</sup> The draft thus “recognizes the social reality that consensual sexual encounters quite frequently are not preceded by an explicit verbal ‘yes.’”<sup>52</sup> New Jersey’s *M.T.S.* decision, one of the earliest legal sources of an affirmative consent standard, noted that affirmative consent “can be indicated either through words or through actions.”<sup>53</sup>

While legal commentators appear to appreciate this point, some journalists and advocates state or strongly imply that affirmative consent requires express verbal agreement. A *New York Magazine* feature on the sex lives of college students claimed affirmative consent meant “every step toward sex being explicitly agreed to with a ‘yes.’”<sup>54</sup> One of the California law’s cosponsors stated that the California bill means that individuals “must say ‘yes.’”<sup>55</sup>

It is easy enough to require express verbal consent if that is the goal—sexual assault can simply be defined as engaging in sexual conduct without express verbal consent. Antioch College received considerable attention in the early 1990s for adopting a policy that did, in fact, require express verbal consent at each stage of a sexual encounter.<sup>56</sup> This approach was heavily criticized and was not adopted by many other schools or jurisdictions.<sup>57</sup> None of the current affirmative consent policies contain this requirement.

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50. MODEL PENAL CODE § 213.0(3) (AM. LAW INST., Discussion Draft No. 2, 2015).

51. *Id.* § 213.0 cmt. 3.

52. *Id.*

53. State *ex rel. M.T.S.*, 609 A.2d 1266, 1278 (N.J. 1992).

54. Lauren Kern & Noreen Malone, *College Sex 2015: An Introduction*, N.Y. MAG. (Oct. 18, 2015, 9:00 PM), <http://nymag.com/thecut/2015/10/sex-lives-of-college-students.html>.

55. Josh Dulaney, *Students Question ‘Affirmative Consent’ Bill Designed to Combat Sexual Assaults*, SAN GABRIEL VALLEY TRIB. (June 8, 2014, 5:40 PM), <http://www.sgvtribune.com/government-and-politics/20140608/students-question-affirmative-consent-bill-designed-to-combat-sexual-assaults> (discussing the statement of Assemblywoman Bonnie Lowenthal (D-Long Beach) on a draft version of the California legislation).

56. Robert Shibley, *Antioch’s Infamous Sexual Assault Policy*, FOUND. INDIVIDUAL RTS. EDUC. (June 15, 2007), <https://www.thefire.org/antiochs-infamous-sexual-assault-policy/> (“Consent is defined as the act of willingly and verbally agreeing to engage in specific sexual conduct.”); see Phil McCombs, *Taking a Look at Love*, WASH. POST (Feb. 16, 1996), <https://www.washingtonpost.com/archive/lifestyle/1996/02/16/taking-a-look-at-love/185120d7-78d5-426e-bab9-ad4cf2b50483/> (quoting ANTIOCH COLL., SEXUAL OFFENSE POLICY (1992)).

57. See Katharine K. Baker, *Sex, Rape, and Shame*, 8 DEPAUL J. HEALTH CARE L. 179, 204 (2004) (“The most vitriolic criticisms of attempts to define consent have been reserved for the Antioch College Sexual Offense Policy.”).

*C. Affirmative Consent Is Different from “Unambiguous Consent”*

The most pervasive misunderstanding of affirmative consent is the notion that affirmative consent necessarily means “unambiguous consent.” This is mistaken. Affirmative does not mean unambiguous.

Most affirmative consent policies do not require clear and unambiguous consent, but some of them do. This is a major difference, which has gone largely unnoticed in the literature. Requiring unambiguous consent represents a major change to existing sexual assault law or university policies. Simply requiring affirmative consent does not.

Dictionary definitions of “affirmative” do not support interpreting that word to mean “unambiguous” or “unequivocal.” *Random House’s* definitions of affirmative as an adjective include:

1. affirming or asserting the truth, validity, or fact of something
2. expressing agreement or consent . . . .
3. positive; not negative
- . . . .
7. a manner or mode that indicates assent . . . .<sup>58</sup>

*Webster’s Third New International Dictionary* defines affirmative (adjective) as follows:

- [1.] CONFIRMATIVE, RATIFYING
- [2.] asserting a predicate of a subject or of a part of a subject *also* : asserting the truth or validity of a statement . . . contrasted with *negative*
- [3.a.] asserting that the fact is so : declaratory of what exists . . . .<sup>59</sup>

None of the various definitions indicate that affirmative means unambiguous or unequivocal.

In the context of affirmative consent, the term affirmative seems to require some active signal of agreement rather than the absence of an express “no.” Thus, Michelle Anderson explained that

[a]ffirmative consent is the notion that mere passivity or acquiescence to the will of another does not constitute meaningful permission to engage in sexual penetration. Meaningful consent must be active, and a person should

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58. *Affirmative*, RANDOM HOUSE UNABRIDGED DICTIONARY (2d ed. 2010).

59. *Affirmative*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 2002).

have to communicate positive, verbal or nonverbal agreement to engage in penetration before someone else should be allowed to penetrate them.<sup>60</sup>

The contrast here is between some affirmative (or positive) signal versus inferring consent from the absence of any signal (or passivity).<sup>61</sup> This is not the same thing as requiring the affirmative signal also be unequivocal or very clear.

Wisconsin law requires that consent be affirmative—“an affirmative indication of willingness”—but there is no language in the statute or the case law suggesting that affirmative consent must be clear or unambiguous.<sup>62</sup> The same is true in New Jersey—consent must be expressed affirmatively, but there is no case law suggesting that affirmative consent must be clear or unambiguous.<sup>63</sup>

Canada likewise has an affirmative consent standard for sexual assault cases requiring “that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity.”<sup>64</sup> At least one commentator characterized this as requiring communication that is “express, explicit, and unambiguous.”<sup>65</sup> But the Canadian case law, like that of Wisconsin and New Jersey, does not appear to contain this additional requirement that the consent be unambiguous.<sup>66</sup>

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60. Anderson, *supra* note 10, at 1978.

61. *Id.*

62. State v. Prineas, 2012 WI App 2, ¶ 16, 338 Wis. 2d 362, 373, 809 N.W.2d 68, 74 (quoting State v. Long, 2009 WI 36, ¶ 31, 317 Wis. 2d 92, 107, 765 N.W.2d 557, 564–65); *see also* WIS. STAT ANN. § 940.225(4) (West 2013).

63. State v. Garron, 827 A.2d 243, 268–69 (N.J. 2003) (“Both the Code’s provisions with respect to rape and the Rape Shield Law were intended to protect rape victims while defining the permissible restrictions on a defendant’s attempts to demonstrate the reasonableness of the defendant’s alleged belief that the victim has given affirmative permission to the specific act of sexual penetration charged in the indictment.”).

64. R. v. Ewanchuk, [1999] 1 S.C.R. 330, para. 49 (Can.).

65. Lucinda Vandervort, *Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory*, 23 COLUM. J. GENDER & L. 395, 402 (2012) [hereinafter Vandervort, *Affirmative Sexual Consent in Canadian Law*]. In another article, Vandervort states that “Canadian law requires affirmative sexual consent to all sexual activity, not merely between strangers. Sexual consent is defined as the communication, by words or conduct, of ‘voluntary agreement’ to a specific sexual activity, with a specific person.” Lucinda Vandervort, *Sexual Consent as Voluntary Agreement: Tales of “Seduction” or Questions of Law?*, 16 NEW CRIM. L. REV. 143, 146 (2013) [hereinafter Vandervort, *Sexual Consent as Voluntary Agreement*]. That description does not claim that consent must be unambiguous. *Id.*

66. No Canadian cases directly state that affirmative consent must be communicated clearly or unequivocally.

Many advocates<sup>67</sup> as well as critics<sup>68</sup> of affirmative consent seem to share the view that affirmative consent means unambiguous consent. Commentators discussing recent campus sexual assault policies shift from one policy to another without noting the significant difference that some policies require only affirmative consent whereas others require clear or unambiguous consent.<sup>69</sup>

This understanding can be traced back to Stephen Schulhofer, an early proponent of an affirmative consent standard.<sup>70</sup> Schulhofer has repeatedly proposed a consent standard requiring both elements: an affirmative indication of agreement (as opposed to an affirmative indication of disagreement) and that the affirmative agreement be expressed clearly or unequivocally.<sup>71</sup>

Schulhofer argued that to adequately protect female sexual autonomy, “[c]onsent for an intimate physical intrusion into the body should mean in sexual interactions what it means in every other context—affirmative permission clearly signaled by words or conduct.”<sup>72</sup> He recognized that “[t]here are many ways to make permission clear without verbalizing the word ‘yes,’ . . . [b]ut permission must be an affirmative indication of actual willingness. Silence and ambivalence are not permission.”<sup>73</sup> “Clear proof of an unequivocal ‘no’ should not be required.”<sup>74</sup>

Schulhofer further explained his proposal in his influential book, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*.<sup>75</sup> Here,

67. See Sarah Croskery-Hewitt, *Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex*, 26 N.Z. U. L. REV. 614, 631 (2015) (“[C]onsent should be defined positively in a manner that incorporates ideas such as free, conscious, voluntary and affirmative agreement. . . . [A]n affirmative standard emphasizes the need for consent to be a positive act, manifested through clear words or overt actions . . . .”); Beatrice Diehl, *Affirmative Consent in Sexual Assault: Prosecutors’ Duty*, 28 GEO. J. LEGAL ETHICS 503, 511 (2015) (referring to affirmative consent as requiring proof of “affirmative and clear consent”); Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1476 (2014) (describing the SlutWalk movement’s advocacy of a standard requiring a clear indication of consent as an affirmative consent standard).

68. Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 263–64 (2015) (“[ALI Draft] Section 213.4 is an ‘embrace of an affirmative-consent requirement.’ It makes clear that no one should feel entitled to sex unless one’s partner gives clear indications of consent.”) (footnote omitted); Dan Subotnik, *Copulemus in Pace: A Meditation on Rape, Affirmative Consent to Sex, and Sexual Autonomy*, 41 AKRON L. REV. 847, 848 (2008) (“What is affirmative consent? It is a rule of law proposed by a number of male and female academics that would criminalize sexual penetration not preceded by real and very clear consent . . . .”).

69. See, e.g., Anderson, *supra* note 10, at 1979–80 (quoting California’s standard and then New York’s standard without noting that New York adds the significant additional requirement that the agreement be clear).

70. See generally STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998); Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151 (1995).

71. SCHULHOFER, *supra* note 70, at 272–73; Schulhofer, *supra* note 70, at 2175.

72. Schulhofer, *supra* note 70, at 2181.

73. *Id.*

74. *Id.*

75. See generally SCHULHOFER, *supra* note 70.

Schulhofer can be faulted for failing to consistently recognize the conceptual difference between affirmative and unambiguous consent.<sup>76</sup> There is nothing conceptually mistaken about proposing a standard that combines both of these elements. But it is a mistake to assume that the term “affirmative” also connotes “unambiguous.”

Schulhofer defined consent as “actual words or conduct indicating affirmative, freely given permission to the act of sexual penetration.”<sup>77</sup> This standard requires an affirmative signal of agreement but, as stated, does not contain a requirement that the signal be unambiguous. Yet, Schulhofer proceeded as if this standard includes that requirement, conflating affirmative and unambiguous consent. He argued that the law should move away from requiring an affirmative “no” “and insist instead that the man have affirmative indications that she *chose* to participate. So long as a person’s choice is *clearly expressed*, by words or conduct, her right to control her sexuality is respected.”<sup>78</sup> Referring to conduct that might indicate agreement, Schulhofer states, “Only unambiguous body language should suffice to signal affirmative consent, of course.”<sup>79</sup>

This repeated conflation of the concept of affirmative consent and unambiguous consent has persisted in both critical and supportive commentary, and it also seems to have created confusion in the standard universities around the country are adopting.<sup>80</sup>

Following Schulhofer’s lead, commentators discussing affirmative consent often assume, without explanation, that affirmative consent includes a requirement of unambiguous consent.<sup>81</sup> To be fair, many of these commentators are discussing Schulhofer’s proposal or others like it that do explicitly require an unambiguous signal of agreement.<sup>82</sup> Thus, it is reasonable for them to analyze not just the affirmative component of Schulhofer’s standard but also the unambiguous component.<sup>83</sup> But, regardless of what proposal is under consideration, it is critical to maintain the conceptual understanding that the term affirmative itself does not mean unambiguous.<sup>84</sup>

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76. *See id.*

77. *Id.* at 283.

78. *Id.* at 272–73 (second emphasis added).

79. *Id.* at 272.

80. *See infra* notes 87–88 and accompanying text (describing the resulting confusion in university affirmative consent policies).

81. *See* Schulhofer, *supra* note 70, at 2181; *see also* SCHULHOFER, *supra* note 70, at 283 (discussing a requirement of affirmative, but not unambiguous, consent); David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 397 (2000) (equating Schulhofer’s proposed affirmative consent reform with the standard adopted in the *M.T.S.* case, even though Schulhofer advocates for “clear and unequivocal” affirmative consent whereas *M.T.S.* does not require that).

82. *See generally* Bryden, *supra* note 81, at 396.

83. *See id.* at 393–97.

84. *See* Schulhofer, *supra* note 70, at 2181.



This mistake is very prevalent in the media where journalists regularly state or assume that all affirmative consent policies require that agreement be unambiguous.<sup>85</sup> An article from the website *Inside Higher Ed* incorrectly quoted the standard from the *draft* California legislation, which required unambiguous agreement, as being the actual standard signed into law, which does *not* require unambiguous consent.<sup>86</sup>

The failure to be clear about the difference between affirmative and unambiguous consent has resulted in confusion in university affirmative consent policies. Most commentary on the recent trend of affirmative consent policies at colleges and universities is either generally positive or generally negative.<sup>87</sup> These commentators fail to appreciate what appears to be a very considerable difference: some university policies require that consent be affirmative but say nothing about consent being unambiguous, whereas other policies require that consent be both affirmative and unambiguous. Finally, some university policies blend the two approaches in a particularly confusing way.<sup>88</sup>

California's law states, "'Affirmative consent' means affirmative, conscious, and voluntary agreement to engage in sexual activity."<sup>89</sup> Neither that sentence nor later sentences contain any language requiring that the affirmative consent be unambiguous or unequivocal.<sup>90</sup> A number of other universities have similar policies.<sup>91</sup>

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85. See, e.g., Jenée Desmond-Harris, *Yes Means Yes: California's New Sexual Assault Law, Explained*, VOX (Oct. 9, 2014, 10:56 AM), <http://www.vox.com/2014/10/9/6951409/yes-means-yes-californias-new-sexual-assault-law-explained> (claiming that under California's policy, "if both people didn't make it absolutely clear that they consented to their sexual encounter, the college can find that the person who didn't consent was assaulted. . . . In other words, did she either say 'yes' or make it very clear that she meant 'yes'?"); 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> (claiming that the California university policy, which does not contain a "clear" or "unambiguous" requirement, means that "[t]he Yes Means Yes law could also be called the You Better Be Pretty Damn Sure law"); Maura Lerner, *University of Minnesota to Adopt 'Affirmative Consent' Rule for Sex Partners*, STARTRIBUNE (July 7, 2015, 2:53 PM), <http://www.startribune.com/university-of-minnesota-to-adopt-affirmative-consent-rule/311650821/> (noting that the University of Minnesota is "joining a national movement" to require affirmative consent and comparing its policy to California's—notwithstanding the fact that California does not require unambiguous consent and the University of Minnesota does).

86. Jake New, *The 'Yes Means Yes' World*, INSIDE HIGHER ED (Oct. 17, 2014), <https://www.insidehighered.com/news/2014/10/17/colleges-across-country-adopting-affirmative-consent-sexual-assault-policies> (reporting that under California's bill, as signed by Governor Brown, "[c]onsent is now 'an affirmative, unambiguous, and conscious decision by each participant to engage in mutually agreed-upon sexual activity'"). The legislation as enacted does not use the term "unambiguous." *Id.*

87. See *id.* (noting commentary both in support of the recent trends and from those who believe that commentary to be absurd).

88. See generally OFFICE OF GEN. COUNSEL, *supra* note 38, at 3.

89. See S.B. 967, 2013–2014 Leg., Reg. Sess. (Cal. 2014) (adding § 67386 to the California Education Code).

90. See *id.*

91. See *supra* Section II.B.

In contrast, the University of Minnesota's policy defines affirmative consent as the "informed, freely and affirmatively communicated willingness to participate in sexual activity that is expressed by clear and unambiguous words or actions."<sup>92</sup> A number of other universities have policies that also contain the term unambiguous or some equivalent term.<sup>93</sup>

Finally, New York's state policy is an example of a policy that first defines affirmative consent without any reference to requiring clear or unambiguous consent but then proceeds in a following sentence to add a requirement that the consent be "clear."<sup>94</sup> New York starts by defining affirmative consent as "a knowing, voluntary, and mutual decision among all participants to engage in sexual activity."<sup>95</sup> This language, which is similar to California's, does not use language meaning clear or unequivocal. In the next sentence, however, the New York policy adds that "[c]onsent can be given by words or actions, as long as those words or actions create *clear permission* regarding willingness to engage in the sexual activity."<sup>96</sup> This seems to add a requirement that the agreement not only be affirmative but also that it be clear, which is a different concept.

New York's choice of language here shares a similarity with Schulhofer's early proposal and can be criticized on the same ground: for conflating affirmative and clear.<sup>97</sup> As noted above, one of Schulhofer's definitions of affirmative consent is "actual words or conduct indicating affirmative, freely given permission to the act of sexual penetration."<sup>98</sup> He then states that this standard presents the question of whether "a person's choice is *clearly expressed*, by words or conduct."<sup>99</sup>

The ALI's April affirmative consent proposal used the term "positive" rather than "affirmative."<sup>100</sup> This is a notable distinction. While university policies use a variety of definitions of affirmative consent, none of those listed in Part II use the term "positive." As Kevin Cole explains, the phrase "positive agreement" has some ambiguity.<sup>101</sup> The ALI proposal did not define positive agreement, but some definitions of "positive" indicate that the term means "expressed clearly" or without "reservation."<sup>102</sup> Cole thus discusses the possibility that positive agreement might require some level of

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92. See *Appendix to Policy: Affirmative Consent*, University Policy Library, U. MINN., <https://policy.umn.edu/operations/sexualassault-appa> (last visited Nov. 25, 2016).

93. See *supra* Section II.B.

94. See OFFICE OF GEN. COUNSEL, *supra* note 38, at 3.

95. *Id.*

96. *Definition of Affirmative Consent*, *supra* note 39 (emphasis added).

97. *Id.*; see Schulhofer, *supra* note 70, at 2181.

98. SCHULHOFER, *supra* note 70, at 283.

99. *Id.* at 273 (emphasis added).

100. Cole, *supra* note 32 (quoting MODEL PENAL CODE (AM. LAW INST. Discussion Draft No. 2, 2015)).

101. Cole, *supra* note 33 (manuscript at 21–22).

102. *Id.* at 22–25, 22 n.40 (quoting *Positive*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1993)).

enthusiasm from the consenting party or some level of certainty by the other party, and he criticizes the draft for failing to offer clarity on these points.<sup>103</sup>

While the term “positive” may sometimes connote clearly or unambiguously, the term “affirmative” does not. Accordingly, campus university policies that require consent to be affirmative do not contain this potential textual ambiguity.

Ultimately, my purpose here is neither to advocate for the affirmative standard versus the unambiguous standard nor is it to discern precisely what it would mean to require consent to be not only affirmative but also unambiguous.<sup>104</sup> Rather, the point is to highlight the conceptual difference between those two concepts and to call on advocates, critics, and other commentators to be explicit about which definition of affirmative consent they are defending or attacking.

#### *D. Affirmative Consent and the Ongoing Shift from “No” to “Yes”*

Advocates of affirmative consent routinely state that under existing law, the complainant must prove some clear act of disagreement (“no”), whereas under an affirmative consent standard, the focus “shifts” to whether the defendant received an affirmative signal of agreement (“yes”).<sup>105</sup> This seems

103. *Id.* at 21–25.

104. For example, in another context (asserting *Miranda* rights in police interrogations), the Supreme Court has required that invocations must be unambiguous. *Davis v. United States*, 512 U.S. 452, 459 (1994) (discussing that a suspect must “unambiguously request counsel” to properly invoke the Fifth Amendment right to counsel during an interrogation); see WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.9(g), at 371 (4th ed. 2004) (“Ambiguous, Equivocal, Limited and Untimely Assertions of Rights.”). This rule means that there are many cases in which suspects make some affirmative signal regarding their right to remain silent or right to counsel, and yet, that signal is not sufficiently clear or unambiguous to qualify as an effective invocation. See, e.g., LAFAVE ET AL., *supra* (“[A] statement that is much more limited by expressing an unwillingness to respond to a particular interrogator (e.g., ‘I don’t want to talk to you guys’), or an unwillingness to discuss the matter at a particular time (e.g., not ‘right now’), an unwillingness or inability to respond to a particular inquiry (e.g., ‘You’ve done asked me a question I can’t answer’) is not a general claim of the privilege.”).

105. *An Act Concerning Affirmative Consent: Hearing on H.B. 5376 Before the Comm. on Higher Educ. & Emp’t Advancement*, 2016 Leg. Sess. (Ct. 2016) (testimony of Deb Heinrich, Director of Policy and Public Relations), [https://www.cga.ct.gov/2016/HEDdata/Tmy/2016HB-05376-R000301-Deb%20Heinrich,%20Director%20of%20Policy%20and%20Public%20Relations%20Connecticut%20Alliance%20to%20End%20Sexual%20Violence%20\(formerly%20CONNSACS\)-TMY.PDF](https://www.cga.ct.gov/2016/HEDdata/Tmy/2016HB-05376-R000301-Deb%20Heinrich,%20Director%20of%20Policy%20and%20Public%20Relations%20Connecticut%20Alliance%20to%20End%20Sexual%20Violence%20(formerly%20CONNSACS)-TMY.PDF) (“Affirmative consent is a shift from ‘no means no’ to ‘yes means yes.’ While ‘no means no’ places the burden on the victim to actively resist, ‘yes means yes’ engages both partners in a dialogue about what they want and about actively seeking consent.”); Desmond-Harris, *supra* note 85 (“[E]mphasizing that the law is a departure from the more common approach to sexual assault allegations, which is to ask if the alleged victim ever said ‘no.’ . . . It simply changes the nature of topic about which the accused and accuser are testifying. In the criminal context, the question the court asks is generally ‘Did she say no?’ In the California college campus context, that will change to ‘Did she say yes?’”); Humphrey, *supra* note 10, at 55 (“At educational institutions across the nation, the affirmative consent standard shifts the burden during a campus disciplinary board’s investigation and adjudication of sexual misconduct allegations. Instead of asking a sexual assault complainant if he or she said ‘no’ during the sexual encounter, under an affirmative consent standard, the questioning is directed toward the accused and becomes a matter of whether the alleged victim actually expressed a ‘yes.’”) (footnote omitted); Nicholas J. Little, Note, *From No Means*

to be another major concern behind the drive for affirmative consent policies.<sup>106</sup>

Several significant clarifications are needed to understand this shift—and to what degree it represents a shift at all.

The first clarification involves distinguishing practice from doctrine. In practice, it may be true that some prosecutors, judges, and juries are reluctant to find guilt in cases involving a complainant who is silent or passive rather than one who affirmatively expresses her nonconsent.<sup>107</sup> This practice question is different, however, from the substance of the existing legal doctrine.

The second clarification is understanding the actual state of the doctrine. Doctrinally, it is no longer generally true to state that the law requires an affirmative expression of nonconsent (“no”). The shift from “no” to “yes” has mostly already occurred, regardless of whether jurisdictions use the phrase “affirmative consent.” The change from “no” to “yes” in rape and sexual assault law has been underway for decades as courts have steadily abandoned and rejected any rule that requires the complainant to express a “no” or offer “verbal resistance.”

On the first point, it may be true that the criminal justice system sometimes requires the complainant to prove some clear act of disagreement (“no”) to proceed with a rape prosecution or conviction. It is difficult to assess how often, as a matter of practice, police, prosecutors, judges, or juries require clear evidence of a “no” from the complainant.

If a complainant explains to police or prosecutors that she did not say anything (and thus did not say “no”) during a sexual encounter, then the police or prosecutor may use that fact as a reason not to prosecute the case. Some may refuse to prosecute because they believe that a failure to say “no” means the complainant actually wanted to have sex at the time and only later felt regret.<sup>108</sup> Some may refuse to prosecute because even though they believe the complainant did not consent, they believe (falsely) that the law requires affirmative nonconsent.<sup>109</sup> Some may refuse to prosecute because even though they know that the law does not require affirmative nonconsent, they nonetheless believe that a factfinder (judge or jury) will refuse to convict without clear evidence of nonconsent.<sup>110</sup>

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*No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1347 (2005) (“The traditional system works on the assumption that consent can be presumed unless withdrawn by the women. The victim is therefore required to demonstrate to the jury’s satisfaction that she made the man aware that she did not wish to engage in sexual intercourse. Under an affirmative consent standard, the law presumes that a woman does not grant consent unless she is asked.”).

106. See sources cited *supra* note 105.

107. See sources cited *supra* note 105.

108. Little, *supra* note 105, at 1358.

109. *Id.*

110. *Id.*

In addition to the role of the police and prosecutor, factfinders (judges or juries) may refuse to convict in a rape or sexual assault case in which the victim does not clearly express her disagreement (“no”).<sup>111</sup> In part, this may stem from confusion about the legal standard because jury instructions in rape and sexual assault cases often do not offer much explanation of what constitutes consent.<sup>112</sup>

A final confounding factor is that in many American jurisdictions, sex without consent *simpliciter* is not a crime.<sup>113</sup> Instead, the prosecution must prove an additional element, such as force or threat of force.<sup>114</sup> Thus, in many cases in which the complainant was passive, the most difficult problem in obtaining a conviction is not the consent requirement but the force or threat of force requirement.<sup>115</sup>

In short, as a description of how the legal process sometimes works, it is no doubt true that in some cases, the complainant must prove some clear act of disagreement for the prosecutor to prosecute the case and obtain a conviction.

In another sense, however, the claim that the law requires an affirmative “no” is false in many jurisdictions—false as a description of the doctrinal law.<sup>116</sup> Some of this is a chronological issue. Traditionally, the law was clear that the prosecution in a rape case had to prove affirmative nonconsent

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111. See Cole, *supra* note 33 (manuscript at 33).

112. See *id.* at 58.

113. See Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 1000–01 (1998). There are a few states that criminalize “sex without consent” without additionally requiring force or some additional element. *Id.*

114. *Id.*

115. For evidence of the difficulty of prosecuting acquaintance rape cases, see Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 971–72 (2008) (canvassing evidence); and see also Schulhofer, *supra* note 70, at 2184 (“[O]ne thing missing in the law of rape is some way to punish sexual misconduct that is not physically violent. It is as if we had a law against armed robbery but no law against theft. The way to fill that gap is not to try expanding what we mean by force but to have statutes punishing, as an offense distinct from forcible rape, any sexual imposition without valid consent.”). Many of the most notorious rape cases involving reversed convictions in which many commentators believe the evidence was sufficient to prove forcible rape involve courts finding insufficient evidence of force, not nonconsent. See, e.g., *Rusk v. State*, 406 A.2d 624, 628 (Md. Ct. Spec. App. 1979) (reversing a rape conviction by concluding there was insufficient evidence of force), *rev’d*, 424 A.2d 720 (Md. 1981) (reversing the appellate court and affirming the defendant’s conviction); *State v. Alston*, 312 S.E.2d 470, 475 (N.C. 1984) (reversing a rape conviction by concluding there was insufficient evidence of force); *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1352 (Pa. Super. Ct. 1992) (reversing the defendant’s conviction by concluding there was insufficient evidence of force), *aff’d in part, rev’d in part*, 641 A.2d 1161 (Pa. 1998). *Alston*, *Rusk*, and *Berkowitz* are all used in Joshua Dressler and Stephen P. Garvey’s textbook on criminal law. JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 397, 409, 419 (6th ed. 2012). *Alston* has been cited in at least eighty law review articles, *Rusk* in over one hundred, and *Berkowitz* in at least fifty-nine. See WESTLAW, www.westlaw.com (login and search required).

116. See cases cited *infra* note 124 (describing rape cases that were successfully prosecuted without affirmative nonconsent).

(“no”).<sup>117</sup> The older the case, the more likely for it to reflect this view; more recent decisions have repudiated many of those older cases.<sup>118</sup> A few jurisdictions, such as Idaho, still explicitly require some express verbal or physical resistance to prove forcible rape.<sup>119</sup> And there are a few recent cases suggesting that evidence of the complainant remaining passive and silent as well as failing to resist or manifest nonconsent is insufficient to show nonconsent.<sup>120</sup>

But in recent years, there are many more cases—including cases in jurisdictions that have not adopted affirmative consent standards and that still require both force and nonconsent—in which rape or sexual assault convictions are affirmed on evidence of a purely passive complainant who did not affirmatively register her disagreement.<sup>121</sup> For example, in *People v. Iniguez*, a 1994 case, the Supreme Court of California affirmed a conviction for forcible rape when the complainant was awoken by the defendant soon

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117. See, e.g., *State v. Brown*, 83 A. 1083, 1084 (Del. Ct. Oyer & Terminer 1912) (“If sexual intercourse is obtained by milder means, or with the consent or silent submission of the female, it cannot constitute the crime of rape in contemplation of law.”); *State v. Green*, 2 Ohio Dec. Reprint 255, 258 (Ohio Ct. C.P. 1860) (“And as the State is required to prove the *absence of consent*, in order to make out guilt, a prosecution will generally be defeated by evidence of *acquiescence*. . . . In such case, passive submission is evidence of acquiescence.”); *Stringer v. State*, 278 S.W. 208, 209 (Tex. Crim. App. 1925) (reversing a rape conviction due to the failure to give an instruction that “[m]ere intercourse, coupled with passive acquiescence, is not rape by force. There must be resistance upon the part of the alleged raped female . . .”).

118. See, e.g., *Curtis v. State*, 223 S.E.2d 721, 723 (Ga. 1976) (rejecting earlier cases that required active disagreement and resistance, and stated that “[a]ny consent of the woman, however reluctant, is fatal to a conviction for rape,” and noting that “[w]e expressly disapprove and will not in the future apply this and similar language used in these and other cases, because such language is on its face plainly inconsistent with the principle that lack of resistance, induced by fear, is not legally cognizable consent but is force”).

119. See *State v. Jones*, 299 P.3d 219, 229 (Idaho 2013) (“We hold that there is insufficient evidence to support a charge of forcible rape based on Count II. By her own admission, [the victim] ‘didn’t respond’ physically, or even verbally, to Jones’ advances on May 28—she ‘just froze.’ Idaho’s forcible rape statute expressly requires resistance.”).

120. See *United States v. Inlow*, ARMY 20070239, 2009 WL 6842640, at \*5 (A. Ct. Crim. App. June 15, 2009) (“The second difference concerns [the victim’s] resistance, or lack thereof. Unlike their first sexual encounter, during the second incident [the victim] did not physically or verbally manifest a lack of consent to the sexual intercourse between her and appellant. Rather, [the victim] just passively laid in bed during the second act of sexual intercourse because she thought she did something the night before to ‘deserve what was going on.’ . . . We are mindful that the government need not prove resistance as an element of rape, but a lack of resistance may be probative on the issue of consent.”); *Travis v. State*, 98 A.3d 281, 291 (Md. Ct. Spec. App. 2014) (“Subsection (a)(1)—‘by force, or the threat of force, without consent of the other’—deals with an act of sexual intercourse committed on a victim who is both conscious and competent. Such a victim must make a choice: ‘Yes, I will’ or ‘No, I won’t.’ The very reason that the elements of ‘force’ or ‘threat of force’ are a part of (a)(1), but not a part of (a)(2) or (a)(3), is that in the case of a conscious and competent victim, *mere passivity on the victim’s part will not establish the absence of consent*. The law looks for *express negation* or *implicit negation* as evidenced by some degree of physical resistance or an explanation of why the will to resist was overcome by force or fear of harm.”) (emphasis added).

121. See, e.g., *State v. Leon*, No. 1 CA–CR 10–0519, 2011 WL 2517325, at \*3 (Ariz. Ct. App. June 23, 2011) (describing a case in which the victim did not affirmatively register her disagreement); *State v. Stevens*, 53 P.3d 356, 365 (Mont. 2002).

before he began having sex with her.<sup>122</sup> The court found sufficient evidence of nonconsent even though the complainant remained entirely silent and passive throughout.<sup>123</sup>

There are quite a few cases—from a variety of jurisdictions that have not claimed to adopt affirmative consent definitions—demonstrating successful prosecutions of rape and sexual assault charges in cases in which the victim remained silent and passive and did not affirmatively state or indicate “no.”<sup>124</sup>

This trend is particularly notable in a recent case from New Hampshire.<sup>125</sup> New Hampshire’s aggravated felonious sexual assault statute appears to require proof that the complainant affirmatively said “no” or otherwise indicated her disagreement with sexual activity.<sup>126</sup> The statute provides that

A person is guilty of the felony of aggravated felonious sexual assault if such person engages in sexual penetration with another person under . . . the following circumstances:

. . . .

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122. *People v. Iniguez*, 872 P.2d 1183, 1188 (Cal. 1994).

123. *Id.*

124. *See, e.g., United States v. Datz*, 61 M.J. 37, 38 (C.A.A.F. 2005) (reviewing a conviction of rape in a case in which the complainant remained passive and did not affirmatively say no, reversing the conviction due to evidentiary errors, and declining to address the sufficiency of the evidence); *United States v. Clark*, 35 M.J. 432, 433–34 (C.M.A. 1992) (affirming a conviction of forcible rape when the evidence showed that the complainant did not affirmatively agree or disagree); *United States v. Kinney*, ARMY 9800451, 2000 WL 35801741, at \*3 (A. Ct. Crim. App. June 6, 2000), *aff’d*, 56 M.J. 354 (C.A.A.F. Feb. 7, 2002) (affirming a conviction of forcible rape when the complainant testified that she did not consent and also testified that she did not say “no” or “stop” or yell out during the encounter); *Leon*, 2011 WL 2517325, at \*3 (affirming a conviction of sexual intercourse without consent when the defendant engaged in sex with the complainant “without consent or an indication of consent,” notwithstanding testimony that the complainant “did not object or say no”); *Stevens*, 53 P.3d at 365 (affirming the convictions of sexual assault without consent, rejecting the defendant’s argument “that since the victims in this case failed to ‘communicate’ their dissatisfaction when he initiated sexual contact during the massage, he could not have possibly known that they did not find the contact ‘agreeable,’” and agreeing with the prosecution’s claim that “the victims’ testimony that they ‘froze’ out of fear indicated they did not consent to [defendant’s] sexual contact”); *State v. Krieger*, No. COA12–730, 2012 WL 6591662, at \*1 (N.C. Ct. App. Dec. 18, 2012) (affirming a rape conviction in a case in which the defendant grabbed the victim at a park and engaged in various sex acts with her, and the victim “did not cry or scream because she ‘was frozen in shock and fear’”); *State v. El-Berri*, No. 89477, 2008 WL 2764873, at \*2 (Ohio Ct. App. July 17, 2008) (sustaining a conviction of forcible rape in a case in which the complainant remained entirely passive during the encounter, never affirmatively indicating her willingness or unwillingness to sex); *State v. Neubauer*, 162 P.3d 1044, 1046 (Or. Ct. App. 2007) (affirming a conviction of sexual intercourse without consent, even though the complainant testified that “[she] didn’t actually say no”); *Holden v. Commonwealth*, No. 2245–97–2, 1998 WL 345525, at \*1 (Va. Ct. App. June 30, 1998) (affirming a conviction of forcible sodomy in a case in which the complainant “neither protested nor resisted” but “pretended to be asleep” during the sexual encounter “because she was ‘scared to move or do anything’”); *State v. Pitmon*, 379 P.2d 922, 923–24 (Wash. 1963) (discussing the complainant’s testimony that established she was terrified, played a passive role, and did not resist or verbally disagree; the conviction of rape was affirmed).

125. *State v. Lisasuain*, 117 A.3d 1154, 1159 (N.H. 2015).

126. *Id.* at 1158–59.

... When at the time of the sexual assault, the victim indicates by speech or conduct that there is not freely given consent to performance of the sexual act.<sup>127</sup>

In *New Hampshire v. Lisasuain*, the defendant—a forty-six-year-old man—performed oral sex and digital penetration on a fourteen-year-old girl.<sup>128</sup> The defendant, Lisasuain, was a friend of the family who had been staying at the girl's home.<sup>129</sup> While the girl was lying on the couch watching television, Lisasuain began giving her a foot rub.<sup>130</sup> He then began sucking her toes, and the complainant was “in shock.”<sup>131</sup> He told her she was “dangerously beautiful” and eventually got down on his knees.<sup>132</sup> He asked her “if he could go lower,” and the complainant “assumed that he was talking about [her] vagina.”<sup>133</sup> Throughout, she said nothing and did not answer because she “couldn’t believe what was going on.”<sup>134</sup> The defendant then removed her pants and underwear, performed oral sex on her, and penetrated her vagina with his fingers.<sup>135</sup>

The defendant argued that the evidence was insufficient to show that “the victim indicate[d] by speech or conduct that there [was] not freely given consent to performance of the sexual act” because “the victim did not testify that she pushed the defendant away or told him to stop or took any other kind of affirmative action to express that consent was not freely given.”<sup>136</sup> The defendant argued “that the legislature ‘has chosen only to criminalize sexual penetration where there is an affirmative statement of non-consent, rather than criminalizing sexual penetration unless there is an affirmative statement of consent’”—a fairly reasonable argument in light of the language of New Hampshire’s statute.<sup>137</sup> The defendant argued that the State was required to prove “‘that the victim somehow, through verbal or physical action, communicate[d] her lack of consent,’ and that the ‘legislature did not enact a statute that makes passive silence stand for lack of consent.’”<sup>138</sup>

The New Hampshire Supreme Court disagreed.<sup>139</sup> The court effectively reasoned that the victim’s failure to respond was in fact an indication of nonconsent: “[I]n failing to respond in any way, [the victim] indicated that

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127. N.H. REV. STAT. ANN. § 632-A:2(I)(m) (2007).

128. *Lisasuain*, 117 A.3d at 1157.

129. *Id.* at 1156.

130. *Id.* at 1157.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 1157–58.

137. *Id.* at 1158.

138. *Id.*

139. *Id.* at 1160.



she did not consent to the sexual assaults by the defendant.”<sup>140</sup> Thus, the court affirmed the defendant’s conviction.<sup>141</sup>

The *Lisasuain* decision is a particularly striking example of the trend away from requiring affirmative evidence of nonconsent because it involved a state statute that plausibly appeared to require just that.<sup>142</sup> Even given such a statute, the New Hampshire Supreme Court construed the statute to permit a finding of nonconsent even when the victim remained entirely silent and passive.<sup>143</sup>

It is thus increasingly inaccurate to claim that courts require the prosecution in rape or sexual assault cases to show some affirmative disagreement or verbal resistance, and that is true even in jurisdictions that do not claim to have adopted an affirmative consent standard.

The upshot of this discussion is that an affirmative consent standard does not represent a meaningful departure from the existing law of consent in most jurisdictions. At most, it may serve as a helpful clarification, reminding judges and jurors that the prosecution is not required to prove some affirmative indication of nonagreement and that purely silent or passive behavior standing alone is not sufficient to infer consent.

To the extent that the criminal justice system does require a complainant to show a clear “no,” that problem mostly lies with police, prosecutors, judges, or juries, who may be reluctant to investigate, prosecute, or convict (respectively) without some clear expression of nonconsent by the complainant. Thus, a doctrinal reform misses the mark—the target of reform should be changing prosecutorial and police policies and training, as well as improving jury instructions and juror training.

In the few jurisdictions that do continue to require some affirmative showing of disagreement by the complainant, an affirmative consent standard (like those in New Jersey, Wisconsin, and other states) would be a meaningful reform. In most other jurisdictions, this doctrinal transformation has already occurred. A clear statutory definition of consent, requiring some act or indication of agreement, would be a useful clarification of the law but not a significant change from existing doctrine.

#### *E. The Role of Silence in Affirmative Consent: An Ambiguous Standard*

A major component of affirmative consent standards is the role of silence or passivity in consent.<sup>144</sup> This issue seems to be one of the primary

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140. *Id.* at 1159.

141. *Id.* at 1160.

142. *See id.*

143. *Id.*

144. *See id.* at 1154–60; Anderson, *supra* note 10, at 1978–79.

purposes of enacting an affirmative consent standard.<sup>145</sup> As noted above, Michelle Anderson explained,

Affirmative consent is the notion that mere passivity or acquiescence to the will of another does not constitute meaningful permission to engage in sexual penetration. Meaningful consent must be active, and a person should have to communicate positive, verbal or nonverbal agreement to engage in penetration before someone else should be allowed to penetrate them.<sup>146</sup>

Affirmative consent policies routinely contain language indicating consent cannot be inferred from silence or passivity. California's policy states, "Lack of protest or resistance does not mean consent, nor does silence mean consent."<sup>147</sup> New York's policy states, "Silence or lack of resistance, in and of itself, does not demonstrate consent."<sup>148</sup>

These statements are often ambiguous and therefore difficult to assess. There are at least two possible interpretations of statements indicating that "silence does not mean consent":

1. Silence or absence of resistance is irrelevant to determining consent and cannot be considered in determining consent (Statement (1)).
2. Silence or absence of resistance, standing alone, does not suffice to establish consent (Statement (2)).

Statement (1) would be a very significant change to rape law, but it is hard to understand how this interpretation would actually function. Moreover, none of the advocates of affirmative consent policies seem to advance this claim. Statement (2) is far more plausible but is, at most, a modest clarification of existing law.

The first issue is whether the text of various affirmative consent policies embody Statement (1) or Statement (2). Some policies, like New York's, explicitly state the latter rather than the former by including language clarifying that silence "standing alone" or "in and of itself" does not show consent.<sup>149</sup>

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145. See *Lisasuain*, 117 A.3d at 1154–60; Anderson, *supra* note 10, at 1978–79.

146. Anderson, *supra* note 10, at 1978; see also Vandervort, *Affirmative Sexual Consent in Canadian Law*, *supra* note 65, at 402 ("When consent is defined as the communication of express voluntary agreement, neither passivity, submission, silence, nor refusal constitutes consent for the purposes of proof of the *actus reus*. Facts that show the complainant was passive, submitted, said nothing by means of either words or gestures, or refused to comply with the assailant's requests do not show that the complainant voluntarily agreed to anything.").

147. See S.B. 967, 2013–2014 Leg., Reg. Sess. (Cal. 2014) (adding § 67386 to the California Education Code).

148. OFFICE OF GEN. COUNSEL, *supra* note 38, at 3.

149. *Id.* ("Students should understand that consent may not be inferred from silence, passivity, or lack of active resistance alone."); *Student Sexual Misconduct Policy and Procedures: Duke's Commitment to Title IX*, *supra* note 36.

Other policies do not contain similar language but simply state that silence “does not imply consent”<sup>150</sup> or “cannot be interpreted as [c]onsent.”<sup>151</sup> These policies are ambiguous as to whether they embody Statements (1) or (2).<sup>152</sup> They do not contain clear language stating that silence is irrelevant or cannot be considered at all in determining consent, and they do not contain language clarifying that silence “alone” is insufficient to show consent.<sup>153</sup>

If these policies are interpreted to mean that silence or passivity are irrelevant or cannot be considered at all in assessing consent, then the standard quickly becomes unworkable unless both parties are constantly repeating signals of consent—an approach that no recent defenders of campus affirmative consent policies have endorsed or defended. In many of even the most clearly consensual sexual encounters—in which the parties have voluntarily, unequivocally, enthusiastically, and affirmatively expressed their agreement to engage in sex—there are periods of time during which one or both partners may be temporarily passive and thus not actively signaling agreement. During such periods, both parties assume, reasonably, that earlier expressions of agreement remain in force unless something happens to suggest agreement may no longer be present. The parties’ silence and passivity during such periods, absent some indication of nonconsent, are reasonably interpreted in light of the clear, voluntary, and enthusiastic agreement of moments earlier as indicating continued consent.

A rule to the contrary—that silence or passivity are irrelevant and cannot be considered at all—would require both parties to a sexual encounter to continually send active signals of agreement to sex. This seems unworkable and unrealistic, and does not appear to be advocated by any of the proponents of affirmative consent standards.

This leaves the first interpretation: silence standing alone is not sufficient to demonstrate consent, but silence or passivity after active signals of agreement may be one way to infer ongoing agreement.

This interpretation is both reasonable and plausible and, for some of the affirmative consent policies, clearly stated by the text.<sup>154</sup> It is not, however, a meaningful change from existing law. At most, this interpretation is a modest clarification. As such, it is valuable insofar as it may assist juries who are confused on this point. But it does not significantly change the existing law of rape and sexual assault because existing doctrinal law, for the

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150. See, e.g., GENDER-BASED MISCONDUCT OFFICE, *supra* note 29, at 10.

151. UNIV. OF HAW., *supra* note 29, at 8; see also UNIV. OF MICH., *supra* note 36, at 15 (“Consent is not to be inferred from silence, passivity, or a lack of resistance, and relying on non-verbal communication alone may not be sufficient to ascertain Consent.”).

152. See generally GENDER-BASED MISCONDUCT OFFICE, *supra* note 29; UNIV. OF HAW., *supra* note 29; UNIV. OF MICH., *supra* note 36.

153. See generally GENDER-BASED MISCONDUCT OFFICE, *supra* note 29; UNIV. OF HAW., *supra* note 29; UNIV. OF MICH., *supra* note 36.

154. See WASH. ADMIN. CODE § 478-120-024 (2016).

most part, already incorporates this insight that silence standing alone does not constitute consent.

Distinguishing Statement (1) from Statement (2) is important, in part, because of the vastly different significance of those two rules. Defendants often argue not that the complainant's silence *alone* constituted her consent to sex but that the complainant's silence or passivity *in combination* with earlier words, conduct, or both constituted consent.<sup>155</sup> A few jurisdictions affirmatively require sexual assault victims to express disagreement.<sup>156</sup> In those jurisdictions, silence alone does mean consent.<sup>157</sup> But there are many more cases upholding rape and sexual assault convictions—and finding sufficient evidence of nonconsent—when the complainant was passive and silent.<sup>158</sup>

In many cases, however, the dispute is not over silence alone but over the complainant's silence or passivity when viewed in combination with earlier words or conduct that the defendant claims indicated affirmative agreement.<sup>159</sup>

Michelle Anderson recognized this problem in her critical assessment of the “no means no” versus “yes means yes” debate.<sup>160</sup> In particular, Anderson highlighted the role of silence under the “yes means yes” model and noted how similar it is, in many contexts, to the role of silence under the “no means no” model.<sup>161</sup>

During a sexual encounter, once there are affirmative signals of agreement, silence is then often used to infer ongoing consent. For example, Anderson cited Stephen Schulhofer, the “architect of the Yes Model,” who notes that “sexual petting” can indicate agreement to sexual penetration.<sup>162</sup> Schulhofer stated, “If she doesn't say ‘no,’ and if her silence is combined with passionate kissing, hugging, and sexual touching, it is usually sensible to infer actual willingness.”<sup>163</sup> Anderson thus observed that “[w]hen things heat up, . . . the Yes Model melts into the No Model, in which silence

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155. See, e.g., *State v. Adams*, 880 P.2d 226, 234–35 (Haw. Ct. App. 1994) (“Defendant’s defense was that he acted under a mistake of fact which negated his awareness of the lack of consent, i.e., he acted under the mistaken belief, occasioned by [the victim’s] actions during the day and her failure to say or do anything during the event, that he had her consent to commit the acts of penetration.”).

156. See *supra* notes 118–19 and accompanying text (discussing cases that require verbal disagreement to prove nonconsent).

157. See *supra* notes 118–19 and accompanying text (discussing cases in which courts concluded silence and passivity failed to demonstrate nonconsent).

158. See cases cited *supra* note 120 and accompanying text (detailing cases in which convictions were upheld despite the complainant’s silence and passivity).

159. Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1405–06 (2005).

160. *Id.* at 1404–08.

161. See *id.* at 1404–05.

162. *Id.* at 1405.

163. SCHULHOFER, *supra* note 70, at 272.

constitutes consent.”<sup>164</sup> She argued that this mode of analysis is really no different from the “no means no” model:

If the woman is silent and fails to say “no,” one may presume she consents to penetration. What happened to “actual permission” for penetration? Passionate kissing, hugging, and sexual touching supply it. Once she engages in kissing and petting, the No Model supplants the Yes Model, and verbal resistance is again required.<sup>165</sup>

Anderson’s criticism here led her to propose a new standard for consent—the “negotiation model.”<sup>166</sup> Discussion of that proposal is beyond the scope of this Article, which focuses on affirmative consent. For present purposes, the importance is Anderson’s recognition of the substantial overlap, in many circumstances, between the No Model and the Yes Model.

In sum, affirmative consent policies suffer from a critical ambiguity related to the roles of silence or passivity. Whether the affirmative consent standard claims that “silence is irrelevant to consent” rather than “silence alone does not equal consent” is often unclear. The former approach would be radical and unworkable, and perhaps for those reasons, supporters of affirmative consent policies do not seem to advocate for it. The latter approach is reasonable but does not represent more than a modest clarification of most existing doctrines.

In any event, clarity on this point—on the part of both critics and advocates—would advance the debate over affirmative consent.

#### *F. Affirmative Consent and the Mystery of Sex Without Communication*

One significant point of conflict among advocates and critics of an affirmative consent standard involves criminalizing sex that is “passionately desired” but not “overtly communicated.”<sup>167</sup> Some advocates of an affirmative consent standard recognize the risk of criminalizing sex in this circumstance but believe the contrary harm is greater:

Of course, a legal standard requiring the *expression* of agreement inevitably makes sexual penetration impermissible in situations where passionate desire is subjectively present but not overtly communicated. Yet the contrary standard inevitably has the opposite and far more dangerous effect of permitting sexual penetration when such intimacy is entirely *unwanted*.

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164. Anderson, *supra* note 159, at 1405.

165. *Id.* at 1413.

166. *Id.* at 1407, 1421–37 (“This Article defines and defends a new model of rape law reform. It argues that the law should eliminate the requirement of nonconsent. In its place, the law should recognize the centrality of negotiation, in which individuals would be required to consult with their partners before sexual penetration occurs.”).

167. See Halley, *supra* note 49.

Section 213.2(2) reflects the judgment that the harms that arise under the latter standard present far greater reason for concern.<sup>168</sup>

One critic of the affirmative consent standard called this “an astonishing passage,” reflecting the idea of “[c]riminal unwantedness.”<sup>169</sup>

Both sides of this debate are mistaken. Both sides share the view that a significant number of sexual encounters occur in which both parties passionately, voluntarily desire to engage in sex, and yet, at least one of the parties does not communicate this desire to the other party in any way—i.e., does not indicate through any affirmative signal his or her interest in sex.

Why either side believes that this is true is unclear. Certainly, people commonly engage in passionate, voluntary sex without communicating their consent in any legalistic, formulaic manner.<sup>170</sup> Very few sign a consent form or expressly state, “I hereby consent to engage in the following act of sex. . . .”<sup>171</sup> It may also often be the case that persons in a fully voluntary sexual encounter do not communicate with one another in ways that are clear and unambiguous.<sup>172</sup>

Perhaps, then, this belief that “a legal standard requiring the *expression* of agreement inevitably makes sexual penetration impermissible in situations where passionate desire is subjectively present but not overtly communicated” stems from conflating the concepts of affirmative and unambiguous, as discussed above in Section III.C.<sup>173</sup> But, as this Article argues, an affirmative indication of agreement is not the same thing as an unambiguous indication of agreement.

When persons engage in sexual activity together, they communicate with one another in a myriad of ways. They use a complex system of words and conduct. The meaning of those words and that conduct is highly sensitive to the social context of the communication, the culture or subculture in which the participants are communicating, and many other factors. This system is not unique to sex—it is human communication.<sup>174</sup>

In many “voluntary, desired” sexual encounters, the signals of agreement are partly or entirely nonverbal. In some cases, those signals are ambiguous.<sup>175</sup> In other cases, the signals may be perfectly clear to the parties

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168. MODEL PENAL CODE § 213.2 cmt. (c)(ii) (AM. LAW INST., Preliminary Draft No. 5, 2015).

169. Halley, *supra* note 49 (“[I]ts advocates admit that they are willing to endorse the conviction of people who initiated sexual penetration (and, in the earlier version, contact as innocuous as hand-holding) with passionately desirous partners who later charge sexual assault.”).

170. *See id.*

171. *See id.* But see *Should Lovers Sign a Pre-Sex Contract?*, ABC NEWS (Jan. 7, 2016), <http://www.abcnews.go.com/GMA/story?id=128101&page=1>.

172. *See* SCHULHOFER, *supra* note 70, at 271–72.

173. MODEL PENAL CODE § 213.2 cmt. (c)(ii) (AM. LAW INST., Preliminary Draft No. 5, Sept. 8, 2015).

174. *See generally* Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1 (1995).

175. *See* SCHULHOFER, *supra* note 70, at 271–72.

in the particular context of their encounter, even if in other contexts those similar signals would not necessarily signal agreement to sex.<sup>176</sup>

But there are far fewer cases of voluntary, desired sex in which there are no affirmative signals of agreement at all. An affirmative consent standard, unless that standard also dictates the much different requirement of unambiguous consent, deals only with the latter situation, not the former.<sup>177</sup>

A fundamental and ongoing difficulty, particularly in acquaintance rape cases, is adjudicating disputes over the meaning of various signs or signals in a given social context. Affirmative consent is not a solution to that problem and does not ameliorate it. Affirmative consent requires that there be a signal as opposed to relying solely on the absence of any signal. But, in most cases, the most significant problem is not determining whether there is “a signal” but in determining what—if anything—different signals mean in the given social context.

There are at least two significant difficulties in many contested rape or sexual assault cases: (1) resolving disputes over what actually happened (what was said and what was done) and (2) resolving disputes over whether a given set of words or conduct signaled a person’s agreement to engage in sex.

The first problem is evidentiary and is resolved through rules of evidence, court procedures, and selection of a factfinder—often a jury in the United States but sometimes a judge.<sup>178</sup> It is common to assert that the problem of “he said, she said” is particularly acute in rape and sexual assault cases,<sup>179</sup> but it occurs throughout the legal system. Claims of assault and self-defense routinely require factfinders to adjudicate between two contested factual claims, both by interested parties, and often without much in the way of corroborating evidence.<sup>180</sup> Courts often adjudicate deadly self-defense claims on even narrower grounds—with only one “he said” because the erstwhile narrator of the other side of the story has been killed and cannot testify.

Moreover, it is far too simplistic to retreat to the view that a rape claim is no more than a “he said, she said” situation. Police and prosecutors have many tools at their disposal that they routinely use to test whether self-serving statements can really be believed—interrogations, the dogged pursuit of

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176. See generally Tiersma, *supra* note 174.

177. See *supra* Section III.C.

178. See generally C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1295 (1982) (discussing the role of the fact finder in determining “what happened” in cases); Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1590 (2007) (discussing the evidentiary rules’ impact on rape trials).

179. See Leigh Gilmore, *Stanford Sexual Assault: What Changed with the Survivor’s Testimony*, CONVERSATION (June 16, 2016, 5:55 AM), <https://theconversation.com/stanford-sexual-assault-what-changed-with-the-survivors-testimony-60913>.

180. See, e.g., *Rasley v. State*, 878 So. 2d 473, 476–78 (Fla. Dist. Ct. App. 2004).

corroborating or contradictory evidence, and the like.<sup>181</sup> One former prosecutor of rape and sexual assault cases recently asserted, “There is no such thing as ‘he said, she said.’ There is always something more there.”<sup>182</sup> That may be an overstatement, but it is a healthy corrective to the notion that most rape cases boil down to “he said, she said.”

In any event, our legal system is routinely tasked with determining “what happened” in circumstances in which that is a very difficult task. The ordinary response is to insist on fair procedures and rules of evidence, zealous advocates, competent judges, and neutral, fair factfinders—and then entrust the task of determining “what happened” to that system.<sup>183</sup>

Even after a factfinder determines “what happened,” the second difficulty in many contested rape and sexual assault cases is determining what those words or conduct signify or how they should be interpreted.<sup>184</sup>

An affirmative consent standard neither helps resolve this difficult problem nor alters the nature of the dispute. In the vast majority of sexual encounters, including the vast majority of those contested encounters involving an allegation of rape or sexual assault, some affirmative signal or signals are sent, or at least claimed to have been sent, between the parties. Some of those signals are clear and some are not; clarity often comes from social context. In one situation, leaning back onto a bed during passionate kissing may be an affirmative indication to proceed further. In another situation, leaning back may indicate uncertainty, unwillingness, or fear. As Michelle Anderson has noted, there is substantial evidence that men tend to misinterpret women’s nonverbal behavior, “imput[ing] erotic innuendo and sexual intent where there is none.”<sup>185</sup>

Requiring that there be an affirmative indication of consent does not solve this puzzle. As Anderson explained, the dilemma remains in most cases, regardless of whether one requires an affirmative signal of disagreement (“no”) or an affirmative signal of agreement (“yes”):

Under the No Model, a man may misinterpret a woman’s body language to mean consent to sexual penetration. He has permission to penetrate her until she objects. Under the Yes Model, a man may also misinterpret a woman’s body language to mean consent to sexual penetration when there

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181. See generally PRACTICAL ASPECTS OF RAPE INVESTIGATION: A MULTIDISCIPLINARY APPROACH (Robert R. Hazelwood & Ann Wolbert Burgess eds., 4th ed. 2009).

182. *Criminal Justice Forum III*, CLEV.-MARSHALL C. L. (Feb. 22, 2016), <http://mediasite.ulib.csuohio.edu/Mediasite/Play/2901aa77c9d2479f867cb81f3f9877941d> (Statement of Ohio State Representative Greta Johnson, former prosecutor of rape and sexual assault cases at Cleveland-Marshall Criminal Justice Forum lecture) (time markers at 24:29–24:35).

183. See Tiersma, *supra* note 174, at 63–74.

184. See generally Anderson, *supra* note 10.

185. Anderson, *supra* note 159, at 1417–20.



is kissing, hugging, and petting involved. He may then penetrate her until she objects.<sup>186</sup>

Stated differently, the problem in these cases is in *interpreting* the various signs and signals in a sexual encounter, and therefore, requiring that there be *some affirmative* sign or signal will not solve this interpretive difficulty.

Accordingly, requiring that consent be affirmative—that some positive signal be sent—will impact relatively few cases—only those cases in which one party to an encounter remains entirely passive and silent. Those cases are undoubtedly important, but as noted above in Section III.D, many of those cases are already successfully prosecuted under existing law.

Again, this suggests that the notion of affirmative consent is a modest and helpful clarification of the existing doctrinal trend. Unless affirmative consent is also coupled with a requirement to prove unambiguous consent, however, it is not a radical change in the law of consent.<sup>187</sup> Nor would it result in criminalizing many sexual encounters in which sex is passionately desired.

#### IV. CONCLUSION

Given the widespread adoption of affirmative consent standards for campus sexual assault adjudications and the ongoing debate over affirmative consent, it is critical for both advocates and critics to maintain conceptual clarity over what the concept of affirmative consent does—and does not—mean.<sup>188</sup> This Article seeks to advance that debate not by taking a side but by dispelling a number of common misconceptions and by clarifying what is and is not true under existing law.

The basic concept of affirmative consent simply means that some signal of agreement must be sent by each party to a sexual encounter.<sup>189</sup> This is a modest requirement and is largely a *fait accompli* because it appears to reflect the practice of most American jurisdictions in rape and sexual assault cases.

The concept of unambiguous consent is different from that of affirmative consent, and this seems to be the source of much of the uncertainty, unease, and confusion over adopting affirmative consent policies.<sup>190</sup> Advocates should be clear about whether they propose only affirmative consent or the additional, more radical requirement of unambiguous consent, and likewise, critics should separate the two concepts.

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186. *Id.* at 1419–20.

187. *See supra* Section III.C.

188. *See supra* Sections III.A–B.

189. *See supra* Section II.A.

190. *See supra* Section III.C.