

Consent: What It Means and Why It’s Time to Require It

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TABLE OF CONTENTS

| | |
|---|-----|
| I. INTRODUCTION | 665 |
| II. THE MEANING OF CONSENT | 668 |
| III. THE IMPORTANCE OF CONSENT..... | 669 |
| A. <i>The Normative Case</i> | 670 |
| B. <i>The Current State of Legal and Social Norms</i> | 671 |
| C. <i>Practical Concerns</i> | 674 |
| 1. <i>The Reality of Sexual Interaction</i> | 674 |
| 2. <i>Gap-Fillers</i> | 675 |
| 3. <i>Workability</i> | 676 |
| 4. <i>The Burden of Proof</i> | 676 |
| 5. <i>Over-Incarceration</i> | 677 |
| 6. <i>Plea Bargaining</i> | 678 |
| 7. <i>Re-shaping Social Norms</i> | 678 |
| 8. <i>Overly Punitive Responses</i> | 679 |
| 9. <i>Discriminatory Enforcement</i> | 680 |
| IV. CONCLUSION | 681 |

I. INTRODUCTION

Are we ready to acknowledge that no means no? American law still retains many remnants of the contrary view that “no” *does not* necessarily mean no. In roughly half the states, unwanted penetration is not a felony absent some sort of physical force or coercion beyond any forcible actions inherent in penetration itself.¹ This issue, however, need not be retraced here; the unmistakable trend in

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1. MODEL PENAL CODE § 213.2(1)(a) (AM. LAW INST., Discussion Draft No. 2 Apr. 28, 2015) (hereinafter “MPC”).

the recent legislation, jurisprudence, and academic writing is to the effect that, as the FBI definition now puts it, rape is “[sexual] penetration without consent.”² The current debate, now raging with intensity, centers on the appropriate understanding of that “without consent” requirement.

Putting aside issues concerning *incapacity* to consent and *constraints* on ability to freely refuse consent, the red-hot dispute centers around the criteria for establishing non-consent in cases involving a competent adult not under coercion or duress. The debate is sometimes identified as a contest between two rallying cries—“no means no” vs. “yes means yes.”³ Both slogans are misleading—for example, in seeming to prioritize *verbal* expression, but they conveniently summarize the matter in dispute: whether penetration is ordinarily “without consent” only when the person concerned has expressed *unwillingness* (non-consent means “no”) or whether penetration is also “without consent” when the person concerned has not expressed positive willingness (non-consent means the absence of “yes”).

The choice between the two is not merely a matter of semantics. Sexual communication is complex, and situational factors often impair people’s ability to express willingness or unwillingness. Thus, much sexual interaction falls into the space between “no” and “yes.” The law must take a stand on the treatment of behavior in that space. When a person has not clearly indicated either willingness or unwillingness, should it be permissible for another person to take the initiative and proceed to penetration, so that *only* “no” means no, or should it be a criminal offense to do so (so that *absence of “yes”* means no)?

Both approaches are prevalent in other areas of law and social practice. For example, consent to a property transfer usually requires permission, not merely a failure to object to someone’s taking it;⁴ consent to adjourn a meeting is commonly inferred from failure to object.⁵ In the present context, the issue is whether the law should assume that an adult is willing to have sex, even with strangers and in unexpected encounters, until the individual specifically indicates the contrary. Or, should *unwillingness* be assumed, even in the setting of parties and dates, until the person signals receptivity to intercourse?

This statement of the issue leaves open one crucial point—the sort of conduct sufficient to qualify as consent. It is impossible to talk intelligently about a consent requirement without knowing what conception of consent is intended. If

2. *An Updated Definition of Rape*, U.S. DEP’T OF J.: JUSTICE BLOGS (last visited Sept. 15, 2014), www.justice.gov/opa/blog/updated-definition-rape (on file with *The University of the Pacific Law Review*).

3. See generally Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321 (2005) (describing the “yes means yes” and “no means no” debate).

4. 63C AM. JUR. 2d *Property* § 24 (Feb. 2016).

5. *House Practice: A Guide to the Rules, Precedents, and Procedures of the House*, GOV’T PUBLISHING OFFICE (last visited Feb. 25, 2016), <https://www.gpo.gov/fdsys/pkg/GPO-HPRACTICE-104/html/GPO-HPRACTICE-104-2.htm> (on file with *The University of the Pacific Law Review*).

consent requires a written, notarized agreement, that requirement is hardly plausible. Yet discussion in popular media often ridicules a consent requirement—rather than engaging it as a legitimate issue—by casting it in those preposterous terms.⁶ Of course, no serious supporter of a consent requirement has ever suggested any such thing.

More plausibly, consent could be understood to require *verbal* permission, possibly because body language alone is easily misinterpreted.⁷ This is not, however, an argument I find persuasive, and as far as I know, no jurisdiction mandates express verbal permission as a legally enforceable conception of consent. Rather, wherever sexual consent has been formally defined and required—whether in criminal law,⁸ government-mandated codes of student conduct,⁹ or codes of conduct initiated by universities themselves¹⁰—it has been described as an expression of willingness or assent, communicated by *all* behavior, including both words *and* actions.

In this paper, I argue that it is time—past time—to give workable content to the notion of sexual consent and to require it as a prerequisite to the penetration of another person. Before turning to the core of my argument, however, I will explain the precise form of consent that I defend. Although it should be uncontroversial that consent—whether favored or opposed—is something communicated by the totality of a person’s conduct, there remains potential ambiguity and significant disagreement about how such a requirement is best framed. In Part I, I describe alternative formulations of consent-by-conduct that are currently in play and identify the specific definition that I consider most appropriate.¹¹ Part II then explains why consent, so understood, should always be a prerequisite to sexual penetration.¹²

6. The Young Turks, *This “Consent is Sexy” Video is Anything But Sexy*, YOUTUBE (Nov. 8 2014), <https://www.youtube.com/watch?v=hUwAKhHDX1U>.

7. Michelle J. Anderson, *Negotiating Sex*, 78 CAL. L. REV. 1401 (2005) (arguing that only verbal permission should suffice).

8. *E.g.*, CAL. PENAL CODE § 261.6 (West 2016); WIS. STAT. § 940.225 (West 2016); N.J. STAT. ANN. § 2C:14-2 (West 2016); UCMJ art. 920 (West 2016).

9. *E.g.*, CAL. PENAL CODE § 261.6 ; N.Y. PENAL LAW § 130.05 (McKinney 2016).

10. *E.g.*, *Sexual Misconduct, Relationship Violence, and Stalking*, N.Y.U. (Sep. 30, 2015), <https://www.nyu.edu/content/dam/nyu/compliance/documents/SexualMisconductPolicy.9.30.15.pdf> (on file with *The University of the Pacific Law Review*); *Sex Discrimination and Sexual Misconduct*, PRINCETON UNIV. (Feb. 10, 2016), <http://www.princeton.edu/pub/trr/part1/index.xml#comp13> (on file with *The University of the Pacific Law Review*).

11. *Infra* Part I.

12. *Infra* Part II.

II. THE MEANING OF CONSENT

Some consent definitions appear to require active cooperation.¹³ But it seems doubtful that any such provision is applied literally. In practice, the aim is to determine when the totality of an individual's conduct, including action and inaction, communicates willingness for the act of sexual intimacy to occur.¹⁴ A suitable definition of consent therefore need only make clear that a person contemplating an act of sexual penetration is not entitled to assume the other party's willingness and that the person who initiates physical intimacy must take steps to ascertain whether mutual desire is present.¹⁵ But this effort need not take any particular form; artificial verbal or behavioral contortions are not required.¹⁶ The point is simply to stress that before sexual penetration occurs, the person initiating that act must look for positive indications of willingness, exercising common sense and taking into account all the relevant circumstances.

An overly flexible concept of consent, however, could easily become a placeholder for divergent norms of sexual behavior or even an enabling mechanism for the wishful thinking of sexual aggressors. At one time, sexually assertive men were permitted to conclude that "no" did not really mean no, on the pretext that other aspects of the complainant's behavior—for example, her skimpy clothing—indicated consent.¹⁷ A viable criminal code should leave no ambiguity about the legitimacy of such a claim; it must make clear that any verbal expression of disinclination establishes a lack of consent, absent subsequent words or actions clearly communicating willingness.¹⁸

To clarify the governing norms, a well-drafted code should likewise stipulate that passive behavior cannot automatically establish willingness, since often the opposite could be just as likely, e.g. where fright or heavy drinking impairs a person's ability to resist. Silence cannot be equated with consent to an action that the person did not anticipate or had no adequate opportunity to protest. Thus, mere lack of physical or verbal resistance does not by itself constitute consent.

13. See, e.g., CAL. PENAL CODE § 261.6 (defining consent as "positive cooperation in act or attitude"); WIS. STAT. §940.225(4) (defining consent as "words or overt actions . . . indicating freely given agreement"); State v. Adams, 880 P.2d 226, 234 (Haw. Ct. App. 1994) (defining consent as "'voluntary agreement'"); State in the Interest of M.T.S., 609 A.2d 1266 (N.J. 1992) (defining consent as "affirmative permission").

14. MPC, *supra* note 1.

15. *Id.*

16. *Id.* at § 213.2(1)(a), cmt. 1.

17. John F. Decker, et al., "No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1082 (2011).

18. Compare N.Y. PENAL LAW § 130.05(2)(d) (defining lack of consent to require that "the victim clearly expressed that he or she did not consent . . . and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances"), with Commonwealth v. Lefkowitz, 481 N.E.2d 227, 232 (Mass. App. Ct. 1985) (holding that "when a woman says 'no,' . . . any implication other than a manifestation of non-consent that might arise in a person's psyche is legally irrelevant, and thus no defense").

Nonetheless, the absence of any sign of unwillingness is a common way to communicate receptivity in the context of gradual, increasingly intimate sexual foreplay, at least absent circumstances that might suggest fear or impairment. As a result, a contextually sensitive standard of consent-by-conduct must leave room for considering silence and passivity, together with all other circumstances, in assessing whether a person's conduct communicates receptivity to anticipated sexual initiatives. The point to stress is that while silence and passivity cannot by themselves be treated as consent, they are forms of *conduct*, and all of a person's conduct should be taken into account. This approach avoids the artificiality of positing that silent acquiescence can never constitute consent, without at the opposite extreme treating mere inaction as consent even when the person concerned did not expect sexual penetration or could not object before it occurred.

With these considerations in mind, I propose the following as a workable and socially realistic definition of consent:¹⁹

(a) "Consent" means a person's behavior, including words and conduct—both action and inaction—that communicates the person's willingness to engage in a specific act of sexual penetration or sexual contact.

(b) Consent may be express, or it may be inferred from a person's behavior. Neither verbal nor physical resistance is required to establish the absence of consent; the person's behavior must be assessed in the context of all the circumstances to determine whether the person has consented.

(c) Consent may be revoked any time before or during the act of sexual penetration or sexual contact, by behavior communicating that the person is no longer willing. A clear verbal refusal—such as "No," "Stop," or "Don't"—suffices to establish the lack of consent. A clear verbal refusal also suffices to withdraw previously communicated willingness in the absence of subsequent behavior that communicates willingness before the sexual act occurs.

III. THE IMPORTANCE OF CONSENT

When consent is understood in these contextual terms, there is a compelling justification for requiring that it be given prior to sexual penetration. Part A of this section addresses the basic normative case for a consent requirement.²⁰ Part

19. MODEL PENAL CODE § 213.0(3) (AM. LAW INST., Tentative Draft No. 2, Apr. 15, 2016). The Commentary to this and related provisions offers several illustrations as benchmarks for applying this contextually sensitive standard. *Id.*

20. *Infra* Section A.

B then canvasses the current state of legal and social norms concerning the expression of consent/nonconsent,²¹ and Part C addresses a variety of practical concerns often raised in opposition to a consent requirement.²²

A. *The Normative Case*

If law *lacks* a consent requirement, it in effect presumes that all individuals are receptive to sexual intercourse—at any time, with any person—until they communicate their unwillingness. In contrast, the premise of a consent requirement is that individuals *do not* want to be sexually penetrated unless and until they indicate that they do. Across the wide range of situations in which acquaintances and strangers encounter one another—on the street, at work, in parks, at parties, on dates—a presumption of disinterest in sexual intimacy is accurate much more often than a presumption that both individuals want to have intercourse with each other. And as a matter of first principles, it is more appropriate to assume that each individual prefers bodily privacy until he or she indicates otherwise. Only substantial practical impediments could justify a standard that presumes round-the-clock availability for intercourse and requires individuals to clearly communicate their intention to revoke it.

No practical concerns of this sort can be shown. Indeed, practical concerns strongly *support* a consent requirement. Sexual interaction too often occurs when the ability of one or both parties to express unwillingness is impaired. A person may experience fright or intimidation—for example, in settings involving unfamiliar surroundings, surprise, or unexpectedly aggressive sexual advances.²³ Most important, sexual encounters *commonly* occur—perhaps more often than not—in the context of social drinking or extended partying, and frequently one or both individuals are intoxicated to some degree.²⁴ That pervasive situation readily lends itself to miscommunication, impaired capacity to express and/or interpret social signals, and inability to physically or verbally resist unwanted advances.²⁵

Under those circumstances, a standard that prohibits penetration only when there is coercion, incapacity, or acts that clearly signal unwillingness presents unacceptable dangers of sexual abuse. In contrast, a standard that prohibits penetration until a person communicates consent to a sexual act with words or conduct mitigates those dangers at no significant social cost. Parties who mutually desire sexual intimacy normally communicate that desire freely; in the event of ambiguity, one party need only clarify the other's wishes. Resolving

21. *Infra* Section B.

22. *Infra* Section C.

23. MPC, *supra* note 1, at § 213.0(3).

24. *Id.* at pp. 62–64.

25. *Id.*

ambiguity can be as simple as asking “all cool?”; it need not comply with any talismanic formula.

One often-mentioned concern is the risk of unfairness to an accused who was also intoxicated.²⁶ But that concern can be addressed by a distinct requirement of *mens rea*—requiring the prosecution to prove beyond a reasonable doubt the defendant’s awareness of all the relevant facts.²⁷ There is no need—and a large cost—in seeking to avert that problem by the overbroad tactic of withholding criminal sanctions even when the person who takes the initiative is well aware that the other party has not given consent.

B. *The Current State of Legal and Social Norms*

These considerations favoring a consent requirement are gaining ever-increasing recognition. The trend in criminal law, in codes of conduct in schools and colleges, and in social norms more generally—is one of steadily growing support for consent as a legal requirement.²⁸ Although older generations recall social norms and sexual scripts in which male initiative and female reticence were taken for granted in mutually desired sexual interaction (an assumption at odds with a consent requirement), substantial segments of American society now consider the expectation of consent perfectly realistic. In a recent Kaiser Family Foundation poll of over one thousand young adults, sixty-nine percent said that a strong form of the consent requirement—“the Yes Means Yes Standard”—is “realistic . . . when individuals are initiating and engaging in any sexual activity.”²⁹ Only thirty percent said the standard is “[n]ot realistic.”³⁰ Among college students, polls find even stronger support for defining consent as “conscious, positive willingness,” with no significant gender differences.³¹ The generational divide on the issue is marked with support for a consent standard much stronger among respondents under thirty than among those over sixty.³²

26. *Id.* at 62–68.

27. *Id.* at 63–64.

28. *50 States of Consent Map Legend*, AFFIRMATIVE CONSENT, <http://affirmativeconsent.com/affirmative-consent-laws-state-by-state/> (last visited Mar. 1, 2016) (on file with *The University of the Pacific Law Review*).

29. *Washington Post-Kaiser Family Foundation Survey of College Students on Sexual Assaults*, WASH. POST, Jan. 15–Mar. 29, 2015, at 14, <http://apps.washingtonpost.com/g/page/national/washington-post-kaiser-family-foundation-survey-of-college-students-on-sexual-assault/1726/> (on file with *The University of the Pacific Law Review*).

30. When the poll asked which standard—affirmative consent or “no means no” (a standard under which “sexual activity must stop if one person objects”)—was “the better standard to use when determining whether sexual activity is consensual or not,” forty-two percent preferred “no means no,” but fifty-seven percent preferred affirmative consent or thought there was “not much difference”—with virtually identical preferences among men and among women. *Id.*

31. *Id.* at 13.

32. Peter Moore, *Yes Means Yes*, YOUGOV, <https://today.yougov.com/news/2014/10/06/sexual-assault/> (last visited Mar. 1, 2016) (on file with *The University of the Pacific Law Review*).

In formal standards of conduct, affirmative consent is increasingly required. According to the Chronicle of Higher Education, more than 800 colleges and universities—including all of the Ivies except Harvard—now require consent in their codes of student conduct.³³ And both California and New York have mandated an “affirmative consent” standard for all institutions of higher education receiving state funds.³⁴

The criminal law picture, though more mixed, nonetheless indicates an unmistakable trend in favor of requiring consent. Of the fifty-three most relevant U.S. jurisdictions, including the D.C., U.S., and military codes, twenty-seven now impose criminal sanctions for sexual penetration without consent.³⁵ This count *does not include* jurisdictions that directly or indirectly require force, duress, verbal resistance, or some expression of unwillingness to convict; it includes only jurisdictions in which absence of consent for penetration is sufficient by itself to establish a criminal offense.

Thirteen jurisdictions punish the offense as a felony.³⁶ Fourteen additional jurisdictions punish the offense as a misdemeanor.³⁷ The Uniform Code of

33. Jared Misner, *California Shifts to ‘Yes Means Yes’ Standard for College Sex*, CHRON. FOR HIGHER EDUC. (Sept. 29, 2014), <http://chronicle.com/article/California-Shifts-to-Yes/149057/> (on file with *The University of the Pacific Law Review*).

34. See CAL. EDUC. CODE § 67386(a)(1) (West 2015).

“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.

Id.; N.Y. EDUC. LAW § 6441 (McKinney 2015).

35. Many of these jurisdictions define consent in language suggesting “affirmative” consent— i.e., a direct expression of willingness, permission or agreement. See, e.g., 10 U.S.C. § 920(8) (“freely given agreement”); CAL. PENAL CODE § 261.6 (“positive cooperation in act or attitude”); COLO. REV. STAT. ANN. § 18-3-401(1.5); D.C. CODE § 22-3001(4) (“words or overt actions indicating a freely given agreement”); 720 ILL. COMP. STAT. ANN. 5/11-1.70 (“freely given agreement”); MINN. STAT. ANN. § 609.341, subd. 4 (“words or overt actions by a person indicating a freely given present agreement”); VT. STAT. ANN. tit. 13, § 325 (“words or actions by a person indicating a voluntary agreement”); WASH. CODE REV. ANN. § 9A.44.010(7) (“actual words or conduct indicating freely given agreement”); WIS. STAT. ANN. § 940.225(4) (“words or overt actions . . . indicating a freely given agreement”); UNIF. CODE OF MIL. J., Art. 120(g)(8); *State v. Adams*, 880 P.2d 226 (Haw. Ct. App. 1994) (“voluntary agreement or concurrence”); *State v. Blount*, 770 P.2d 852 (Kan. Ct. App. 1989) (“capable, deliberate, and voluntary agreement”); *State in the Interest of MTS*, 609 A.2d 1266 (N.J. 1992) (“affirmative and freely given permission”).

Many of the remaining jurisdictions that criminalize sexual penetration without consent define the term more flexibly or do not define it at all. See, e.g., CONN. GENN. STAT. ANN. § 53a-70 (West 2015); FLA. STAT. ANN. § 794.011 (West 2015); GA. CODE ANN. § 16-6-1 (West 2015); KY. REV. STAT. ANN. § 510.020 (West 2015); LA. STAT. ANN. § 14:42 (West 2015); ME. REV. STAT. ANN. tit. 17-A, § 255-A (West 2015); MD. CODE ANN., CRIM. LAW § 3-305 (West 2015); MISS. CODE ANN. § 97-3-95 (West 2015); MO. ANN. STAT. § 566.030 (West 2015); MONT. CODE ANN. § 45-5-501 (West 2015); N.Y. PENAL LAW § 130.05 (McKinney 2015); OKLA. STAT. tit. 21, § 1111 (2015); OR. REV. STAT. ANN. § 163.411 (West 2015); 18 PA. STAT. AND CONS. STAT. ANN. § 311 (West 2015); S.D. CODIFIED LAWS § 22-22-7.4 (2015); TENN. CODE ANN. § 39-13-503 (West 2015).

36. 10 U.S.C. § 920, Art. 120 (2015); FLA. STAT. ANN. § 794.011 (West 2015); HAW. REV. STAT. ANN. § 707-730 (West 2015); LA. STAT. ANN. § 14:42 (2015); ME. REV. STAT. ANN. tit. 17, § 255-A (2015); MISS.

Military Justice defines consent largely in terms of positive agreement.³⁸ Abroad, both Canada (in 1999)³⁹ and England (in 2003) expressly adopted the affirmative consent approach.⁴⁰ The Canadian standard is not only satisfied when “the accused knew that the complainant was essentially saying ‘no’, but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying “yes.”⁴¹ In England “a person consents if he agrees by choice, and has the freedom and capacity to make that choice.”⁴² Conviction can be based on proof that the accused did not reasonably believe that the other person consented and “[w]hether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.”⁴³ Although alarmism about the consent requirement

CODE ANN. § 97-3-95 (West 2015); OKLA. STAT. ANN. tit. 21, § 1111 (West 2015); N.J. STAT. ANN. § 2C:14-2 (West 2015); OR. REV. STAT. ANN. § 163.411 (West 2015); 18 PA. STAT. AND CONS. STAT. ANN. § 311 (West 2015); TENN. CODE ANN. § 39-13-503 (West 2015); VT. STAT. ANN. tit. 13, § 3251 (West 2015); WIS. STAT. ANN. § 940.225 (West 2015). Six of these expressly require affirmative permission, positive agreement or active cooperation: Fla., Haw., N.J., Vt., Wis., and UCMJ. Two states allow an inference of consent from “implied acquiescence”: Me. and Or. Five simply punish “penetration without consent,” without defining consent but without requiring force, duress, verbal resistance or any expression of unwillingness: La., Miss., Okla., Pa., and Tenn.

37. 10 U.S.C. § 920; CAL. PENAL CODE § 261.6 (West 2016); COLO. REV. STAT. § 18-3-401 (West 2015); CONN. GEN. STAT. ANN. § 53a-70 (West 2015); D.C. CODE § 22-3006 (2015); GA. CODE ANN. § 16-6-1 (West 2015); KAN. STAT. ANN. § 21-5503 (West 2015); KY. REV. STAT. ANN. § 510.020 (West 2015); MD. CODE ANN., CRIM. LAW § 3-305 (West 2015); MINN. STAT. ANN. § 609.341 (West 2015); MO. REV. STAT. § 566.030 (West 2015); MONT. CODE ANN. § 45-5-501 (West 2015); N.Y. PENAL LAW § 130.05 (McKinney 2015); S.D. CODIFIED LAWS § 22-22-7.4 (2015). Among these fourteen, six jurisdictions define the required consent in terms that involve affirmative permission, positive agreement or active cooperation: Cal., Colo., D.C., Kan., Minn., and Mont. Two others permit consent to be inferred under all the circumstances: Ky., and N.Y. Six simply punish “penetration without consent,” without defining consent but without requiring force, duress, verbal resistance or any expression of unwillingness: Conn., Ga., Md., Mo., S.D., and the U.S.C.

38. 10 U.S.C. § 920, Art.120(g)(8) (“The term ‘consent’ means a freely given agreement to the conduct at issue by a competent person. . . . Lack of verbal or physical resistance . . . does not constitute consent. . . . All the surrounding circumstances are to be considered in determining whether a person gave consent.”). Subdivisions (b) and (f) also give operational significance to this definition by punishing as the equivalent of a felony any nonconsensual sexual penetration. *Id.* at Art.120(b), (f).

39. *R. v. Ewanchuk* [1999] 1 S.C.R. 330, 334 (Can.). In Canadian law consent is conceived as an entirely subjective state of mind on the part of the complainant; consent means that “the complainant in her mind wanted the sexual touching to take place.” *Id.* But the mens rea requires that the accused be “reckless of, or willfully blind to, a lack of consent on the part of the person touched;” thus the “mens rea of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying ‘no,’ but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying ‘yes.’” *Id.* (emphasis added).

40. Sexual Offenses Act, (2003) pt. 1, § 1 [hereinafter Sexual Offenses Act] (“A person (A) commits an offence [of Rape] if — (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b) B does not consent to the penetration, and (c) A does not reasonably believe that B consents.”). The offense is punishable by life imprisonment. *Id.*

41. *Ewanchuk*, 1 S.C.R. at 334.

42. Sexual Offenses Act, *supra* note 40 at pt. 1, §74.

43. *Id.* at pt. 1, § 1(2). The Crown Prosecution Service’s policy guidance for prosecutors explains, “The defendant (A) has the responsibility to ensure that (B) consents to the sexual activity at the time in question. It will be important for the police to ask the offender in interview *what steps (s)he took to satisfy him or herself that the complainant consented* in order to show his or her state of mind at the time.” CROWN PROSECUTION SERVICE, PROSECUTION POLICY AND GUIDANCE, RAPE AND SEXUAL OFFENCES, *Chapter 3: Consent*,

pervades recent media accounts, which often portray the concept as a radically new and dangerous innovation, the requirement is neither unusual nor new to the criminal law. Pennsylvania's criminal code affords a straightforward example:

[A] person commits a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent.⁴⁴

C. Practical Concerns

1. The Reality of Sexual Interaction

Underlying the nightmare scenarios of notarized consent agreements and consent apps on every iPhone is the concern that unambiguous documentation, even if not technically necessary, will become a *de facto* requirement because of the factual ambiguity and uncertainty of attempting to establish consent on any other basis, especially if consent is understood as nothing less than "positive cooperation" or "affirmative agreement."⁴⁵ But the flexible, contextual conception of consent largely obviates this concern. In any event, the same worry applies, with identical force, to almost any alternative approach, such as one that equates non-consent with clearly communicated *refusal*. Unwillingness, just like positive agreement, must be determined by assessing words and conduct under the circumstances: Did the complainant turn away, cry, or attempt to push the other person back? And were such actions emphatic, perfunctory, or merely coy and seductive? The elusive, fact-sensitive inquiry into the meaning of conduct can be avoided only by insisting that nothing except the word "no" can

available at http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/consent (emphasis added) (on file with *The University of the Pacific Law Review*).

44. 18 PA. STAT. AND CONS. ANN. § 3124.1 (West 2015). Pennsylvania pattern jury instructions for this offense read as follows:

To find the defendant guilty of this offense, you must find that the following three elements have been proven beyond a reasonable doubt: First, that the defendant had [sexual intercourse] [deviate sexual intercourse] with [name of victim]; Second, that the defendant had the intercourse without [name of victim]'s consent; and Third, that the defendant acted knowingly or at least recklessly regarding [name of victim]'s nonconsent. . . . Consent is present if the victim at the time of the alleged crime [is willing that [give specifics]] [is willing that [give specifics] and makes [his] [her] willingness known to the defendant by words or behavior] [give specifics].

Id. (emphasis added).

45. *E.g.*, 10 U.S.C. § 920(8) ("freely given agreement"); CAL. PENAL CODE § 261.6 ("positive cooperation in act or attitude . . ."); WASH. REV. CODE ANN. § 9A.44.010(7) ("actual words or conduct indicating freely given agreement"); WIS. STAT. ANN. § 940.225(4) ("words or overt actions . . . indicating a freely given agreement"); UNIF. CODE OF MIL. J., Art. 120(g)(8); State in the Interest of MTS, 609 A.2d 1266 (N.J. 1992) ("affirmative and freely given permission").

establish non-consent, a solution just as absurd as insisting that nothing except the word “yes” can establish the presence of consent.

Fact-finding difficulty is undeniable in any regime that takes conduct and circumstances into account. But there is no acceptable alternative. And a consent standard is no worse in these terms than any other approach that respects the complexity of sexual communication.

2. *Gap-Fillers*

An important reason for requiring consent is that competent adults often find intercourse abhorrent but are not able to say so—e.g., individuals taken by surprise; persons immobilized by unexpectedly aggressive sexual advances; heavily intoxicated individuals. In response, opponents of reform sometimes suggest that the law could manage without a general consent requirement by relying instead on specific gap-fillers to cover these problematic situations. Many existing statutes illustrate this possibility by permitting a complainant’s passivity to suffice for conviction under special circumstances.

But statutes now on the books do not solve the problem because they typically define those special circumstances very narrowly, requiring proof that the complainant was *unable* to express unwillingness.⁴⁶ An adequate gap filler would have to lower that hurdle. But a more flexible concept of “incapacity” would inevitably entail considerable vagueness. Moreover, fairness to the defendant, a prominent concern for those who resist a general consent requirement, requires that the defendant be *aware* of the other party’s incapacity. Indeed, many states that impose liability for negligent failure to realize the absence of consent nonetheless require subjective awareness of the absence of *capacity* to consent, precisely because that condition is so elusive and outside the ken of the ordinary citizen.⁴⁷ Yet people observing an impaired person often have difficulty assessing the degree of impairment. Jurors are not easily persuaded, and should not easily be persuaded, that a defendant *realized* the complainant’s incapacity. As a result, the need to prove the defendant’s *awareness* of the incapacity could rarely be met across the range of situations of concern (i.e. surprise, tonic immobility, heavy drinking), even when the defendant was not drinking himself.

The upshot is that a large class of cases falls into a grey area where a person’s willingness to accept sexual intimacy is unclear, but his or her ability to protest is also unclear. An act of sexual penetration is clearly and inexcusably

46. Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 139 (2002).

47. CAL. PENAL CODE § 261 (West 2016).

abusive in these circumstances, but absent a consent requirement, such an act would be legally permissible.

3. Workability

Those who object to requiring consent often assert that a criminal law requirement of this sort is not workable, or that such a requirement, where adopted, simply is not enforced.⁴⁸ On-the-ground research in jurisdictions that have a strong “affirmative-consent” requirement finds a degree of truth to these impressions, but also considerable exaggeration. Prosecutors acknowledge the obvious—that they are more hesitant to charge and that juries are more reluctant to convict in the absence of physical injury, threats of force, or clear verbal protests.⁴⁹ But resistance to consent requirements, even where “affirmative-consent” provisions are now on the books, is much less evident in some jurisdictions than in others. And in contrast to earlier research,⁵⁰ more recent surveys find no state in which an enacted consent standard is consistently ignored or considered unenforceable.⁵¹

4. The Burden of Proof

The consent requirement preserves the prosecutor’s burden to establish that the complainant’s words and conduct did not indicate willingness and that the defendant knew as much. A jury that entertains a reasonable doubt on either issue must acquit.⁵² A change in the elements of an offense obviously can shrink the factual area in which doubts will require acquittal. For example, a reform eliminating the offense element of physical force relieves the prosecution of the burden of proving a previously required fact. But such a reform raises no due process difficulty and changes in no way the prosecutor’s procedural burden to prove all elements of the offense as newly defined. A law that makes the normative judgment to remove demonstrated *unwillingness* as an element of the

48. Judith Shulevitz, *Regulating Sex*, N.Y. TIMES, June 28, 2015, at SR1 (quoting a critic of the consent requirement as saying “It’s an unworkable standard.”).

49. CASSIA C. SPOHN ET AL., PROSECUTORS’ CHARGING DECISIONS IN SEXUAL ASSAULT CASES: A MULTI-SITE STUDY, FINAL REPORT 59 (2002), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/197048.pdf> (on file with *The University of the Pacific Law Review*).

50. *E.g.*, STEPHEN J. SCHULHOFER, UNWANTED SEX, THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW 25 (1998).

51. Data from Wisconsin, for example, show hundreds of non-compromise convictions on this basis in Milwaukee County alone. See MODEL PENAL CODE § 213.2 (AM. LAW INST., Preliminary Draft No. 5, Sept. 8, 2015), at 67 & note 187.

52. *See, e.g., supra* note 44 (quoting Pennsylvania pattern jury instructions which state that to convict, the jury “must find . . . beyond a reasonable doubt . . . that the defendant had the intercourse without [name of victim]’s consent; and . . . that the defendant acted knowingly or at least recklessly regarding [name of victim]’s nonconsent.”).

offense and instead to require permission before an act of sexual penetration stands on a similar footing.

To be sure, a law requiring consent prior to penetration does impose a *behavioral* burden on previously permissible conduct. Absent a consent requirement, an individual who wants sex is permitted to assume willingness and need make no effort to determine the other party's actual wishes; a person who takes the initiative has *no burden of inquiry*, and the other party bears the burden to communicate her unwillingness. A consent requirement instead obliges the person who initiates a sexual advance to ascertain whether the other party is willing. One can debate whether this change in prohibited behavior is normatively desirable. It is incorrect, however, to equate this shift in prohibited *behavior* with a shift in the prosecutor's *burden at trial* to establish the behavior that had occurred.

5. *Over-Incarceration*

The many states that already punish penetration in the absence of consent provide no evidence that adoption of this standard will trigger a flood of new prisoners. Across the spectrum of sexual offenses, from the more aggravated offenses to those based only on absence of consent, crimes remain heavily underreported and undercharged.⁵³ Investigation and prosecution are resource-intensive; victims remain reluctant to subject themselves to arduous legal processes; crucial facts are highly context- and credibility-dependent; and the essential offense elements are comparatively difficult to prove. As a result of these barriers to conviction, the apparently high incidence of rape and sexual assault has not translated into correspondingly frequent convictions and prison sentences. Although the option to charge on the basis of non-consent alone is increasingly invoked where available, it is subject to the same difficulties that impede prosecution for more aggravated sexual offenses. And these obstacles—mostly inherent in the contextually complex facts—will keep the volume of cases comparatively small even in the pessimistic scenario in which citizen behavior makes no adjustment to new legal standards.

To be sure, the severity and relative inflexibility of criminal sanctions make potential over-reliance on criminal law an important issue, regardless of case volume and even if incarceration rates overall were low. This Article addresses that issue below. But the contemporary problem of mass incarceration is largely a consequence of drug enforcement policy, harsh mandatory minimums, zero-tolerance probation revocation, over-use of prison to punish nonviolent property

53. See Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 585 (2009) (discussing that date rape crimes continue to go underreported).

crime, and similar problems.⁵⁴ Any solution to America's bloated prison population must be framed in those terms; sexual offense policy is neither a cause of the problem nor a means to alleviate it in any significant way.

6. Plea Bargaining

Many observers worry that when *allegations* are very serious (a violent assault or blatant disregard of emphatic resistance), but credibility is sharply contested, a prosecutor might fall back on the lesser charge of non-consent, and a defendant facing serious felony counts might well find that plea offer irresistible.⁵⁵ The upshot would be conviction on a lesser charge when in principle the defendant should have been acquitted of all charges because of reasonable doubt about whether any criminal conduct had occurred at all.

Such an outcome deserves criticism. But unfortunately, there is little reason to believe that this troublesome dynamic is less prevalent in jurisdictions that do not have an offense based on the absence of consent. The criminal code of every jurisdiction affords prosecutors a wide range of fallback offenses (including sexual offenses) to wield strategically if they seek to insure a guilty plea in a factually disputed case—charges such as attempted rape, attempted sexual assault, assault with intent to commit a sexual offense, unlawful sexual contact, and so on.⁵⁶ Whatever the prosecution's strategic calculus and policy preferences, its ability to secure a lesser-offense plea is not significantly affected by adding one more fallback offense to its already long list of bargaining options.

Practicing attorneys confirm this expectation. Defense counsel in affirmative-consent jurisdictions describe a range of offenses, both sex- and non-sex based, that serve as the default plea in a variety of cases;⁵⁷ the absence-of-consent offense is not distinctive in this way. Nor is there any indication that the plea-bargaining dynamic differs in jurisdictions that reject a consent requirement; on the evidence of current experience, the absence of a consent requirement does not impede prosecutors' plea bargaining tactics, because alternative fallback options—with a wide range of penalties—supply ample sources of leverage.

7. Re-shaping Social Norms

Many critics of the consent standard insist that criminal law should accept social norms as they stand.⁵⁸ They argue that—at least outside the area of low-level regulatory offenses—the criminal law should not punish behavior absent a

54. James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 999 (2010).

55. SPOHN ET AL., *supra* note 49.

56. *E.g.*, ME. REV. STAT. ANN. tit. 17-A, § 251–261 (West 2015).

57. *See* MODEL PENAL CODE § 213.2 (Preliminary Draft No. 5, *supra* note 51), at 69.

58. David Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 405 (2000).

clear social consensus that the conduct involves moral turpitude.⁵⁹ They insist, moreover, that an attempt to use criminal law to reshape social norms is bound to prove unfair and ineffective.⁶⁰ Alcohol prohibition, they say, is the classic case in point.⁶¹

The first difficulty here is that the social norm has already gravitated toward a consent requirement, not only in public opinion and college codes of behavior but also in the criminal law itself.⁶² But equally important, criminal sanctions are sometimes necessary to prevent harmful behavior, even when a significant segment of society fails to appreciate its dangers. This is especially true when, as in the case of unwanted sexual intrusion, the dangers bear most heavily on a discrete group, in this case, women, who have traditionally had less influence in shaping the relevant social norms.

Moreover, using criminal law to discredit harmful social norms can be fair and effective. The failure of alcohol prohibition does not suggest otherwise because that experiment sought to criminalize transactions between fully consenting adults. Efforts to deter victimless crime are notoriously problematic and hold few lessons for situations in which one party sees himself or herself as the victim of traumatic abuse. Classic instances of the latter include domestic violence and drunk driving. In both instances, practices that until recently were viewed as normal and even legitimate, such as police unwillingness to intrude into “private” domestic disputes or offering a driver “one for the road,” now are widely condemned, in part because of changes in criminal justice policy.

Even more pertinent in the present context is the rape reform initiative eliminating physical force as a required element of felonious sexual assault. Only a few decades ago, a deeply ingrained cultural belief system held that male disregard of verbally expressed unwillingness was not aberrant or even inappropriate. That viewpoint was eroding only slowly until legal reform, moving ahead of the social norm, made clear that “no means no” was a legal principle, not just the slogan of a fringe movement.

8. *Overly Punitive Responses*

Far too often, our society applies criminal sanctions too harshly and inflexibly, and such approaches are especially common in the case of sexual offenses. But that fact cannot be permitted to drive the substantive offense definitions of a well-designed penal code. If overly punitive sanctions are taken

59. *Id.* at 406.

60. *Id.*

61. Mark Thorton, *Alcohol Prohibition Was a Failure*, CATO INST. POLICY ANALYSIS NO. 157 (1991), available at <http://www.cato.org/publications/policy-analysis/alcohol-prohibition-was-failure> (on file with *The University of the Pacific Law Review*).

62. *Supra* Part III.B.

as a given, they understandably push criminal justice reformers to set high substantive barriers to conviction; the egregious cases that pass that threshold in turn reinforce support for those harsh sanctions and may even generate sentiment for making those sanctions even more severe. Convicted defendants obviously lose from this dynamic, but victim interests are damaged too because severity reinforces the perceived need to limit conviction to the most egregious conduct and to leave less serious abuses unpunished. And even then, accusations that fall into a grey area can have disastrous consequences for the accused, because the defendant convicted of a grey-area offense bears the full brunt of the system's harsh penalties.

This is no way to frame a model approach to criminal justice policy. A constructive statutory structure must insist on scaling back penalty levels and delineating distinct levels of offense seriousness. In this way, reform proposals can offer a coherent overall approach. Rather than distorting optimal recommendations on the basis of anticipated political reaction, recommendations for reform have far greater clarity and force when they confront public sentiment head-on and cogently criticize unwarranted practices.

9. Discriminatory Enforcement

Far more troubling is the concern that a consent requirement would be unevenly enforced, with greatest impact on defendants of color and LGBT communities, while *under*-protecting minority victims.⁶³ America's history of abusive rape prosecutions against Black men suspected of intimacy with white women makes worries about discriminatory enforcement readily understandable.⁶⁴ Charging and adjudication, even in the case of lower-level offenses, could well be influenced by racial stereotypes and lack of empathy for individuals who are seen as cultural or socioeconomic outsiders. A particular prosecutor might, for example, more readily pursue alleged violations of a consent requirement when the complainant is an upper-middle-class white woman accusing a working-class Black man. Conversely, some prosecutors may be less willing to enforce a consent requirement when the person claiming to have suffered abuse is a gay man or an African-American woman. In these ways a consent requirement could result in both over-enforcement against low-status defendants and under-enforcement in cases involving a low-status victim.

63. Gruber, *supra* note 53, at 606 (discussing under-enforcement of criminal laws involving minority victims); Lise Gotell, *Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of R. v J.A.*, 24 CAN. J. WOMEN & L. 359, 367 (2012) (discussing difficulties of affirmative consent as to sexual minorities, including Aboriginal women, homeless women, and women with disabilities).

64. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 3 (1977); *see e.g.*, *Giles v. Maryland*, 386 U.S. 66, 81–82 (1967) (vacating the sentences of African-American appellants who had been sentenced to death, and remanding because of due process violations).

The danger of unequal enforcement, however, cannot be allowed to exert an all-purpose veto over efforts to fill gaps in the criminal law. Bias in the administration of justice is a deep systemic problem that calls for systemic remedies, not constraints on otherwise justified definitions of crimes. Law enforcement responses to domestic violence make this principle clear. There is convincing evidence that the criminal justice system too often takes domestic violence complaints less seriously when they are brought forward on behalf of a poor Black woman or a victim in the LGBT community.⁶⁵ That sort of bias must be addressed, but it is not plausible to do so by returning to the days when domestic violence enforcement was neglected across the board. A solution to discrimination cannot be achieved by equal *non*-protection of citizens at risk.

IV. CONCLUSION

It's time to recognize that physically penetrating another person's body without their permission is serious misconduct that our society and our criminal law ought to condemn. The need for permission is elementary, and it need not be understood in terms of written contracts, artificial verbal formulas, or any other unrealistic behavioral ritual. Ordinary citizens know what it means to have permission, express or implied, and they know that it is unacceptable to take liberties with someone's person or property without permission. That's all that consent means, and it's a matter of simple justice to require it.

65. Max D. Siegel, *Surviving Castle Rock: The Human Rights of Domestic Violence*, 18 CARDOZO J.L. & GENDER 727, 740 (2011–2012) (discussing deficiencies in the criminal justice system as to minorities and domestic violence); Caitlin Valiulis, *Domestic Violence*, 15 GEO. J. GENDER & L. 123, 151 (2013–2014) (discussing deficiencies in the criminal justice system as to the LGBT community and domestic violence).