

# Affirmative Consent

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Defining sexual consent to require an affirmative expression of willingness on the part of each participant has become commonplace on college campuses. In contrast, whether the criminal law should move in this same direction remains a subject of great controversy. Opposition to affirmative consent centers on the possibility of “miscommunication” and a related concern that unjust prosecutions will result if affirmative consent definitions are codified. What has gone largely unremarked is that affirmative consent definitions are not without criminal law precedent. A small number of states have required affirmative consent for decades, thus enabling a way to assess the functioning of this standard. By evaluating the case law in these affirmative consent jurisdictions, I identify three recurring fact patterns: sleep, intoxication, and fear. In none of these categories does the possibility of a mistake regarding consent tend to surface as an issue. While this analysis does not resolve the normative issues raised by affirmative consent, it begins to fill a descriptive void that has hindered the conversation surrounding criminal law reform.

I. Introduction.....	442
II. Against Affirmative Consent .....	444
III. Affirmative Consent on the Books .....	447
D. Diluted Affirmative Consent Jurisdictions .....	450
E. Pure Affirmative Consent Jurisdictions .....	451
IV. The Affirmative Consent Cases .....	451
F. Sleep.....	452
G. Intoxication.....	456
H. Fear.....	458
V. Mistakes as to Consent .....	464
VI. Conclusion .....	467

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## I. INTRODUCTION

The newly ascendant “yes means yes” movement has already accomplished a significant feat. An estimated 1,400 institutions of higher education have adopted disciplinary standards that codify an affirmative definition of sexual consent.<sup>1</sup> For those universities that have not yet amended their disciplinary codes to include this definition, the impetus to do so is powerful. Well-organized student activists are vocal about the importance of affirmative consent.<sup>2</sup> The Obama Administration, which can withhold federal funds from Title IX non-compliant institutions, construes consent as affirmative.<sup>3</sup> Congress also continues to push to require colleges to clarify their disciplinary standards regarding sexual assault.<sup>4</sup>

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<sup>1</sup> Sandy Keenan, *Affirmative Consent: Are Students Really Asking?*, N.Y. TIMES (July 28, 2015), [http://www.nytimes.com/2015/08/02/education/edlife/affirmative-consent-are-students-really-asking.html?\\_r=0](http://www.nytimes.com/2015/08/02/education/edlife/affirmative-consent-are-students-really-asking.html?_r=0) (citing current estimate of National Center for Higher Education Risk Management). At their core, affirmative consent standards require some outward manifestation of a willingness to engage in sexual activity, as opposed to simply an expression of unwillingness, or no indication one way or the other. For example, Yale’s definition of consent requires “positive, unambiguous, voluntary agreement at every point during a sexual encounter—the presence of an unequivocal ‘yes’ (verbal or otherwise), not just the absence of a ‘no.’” Tara Culp-Ressler, *Yale University Works to Strengthen Its Sexual Assault Policy By Clarifying ‘Consent’*, THINKPROGRESS, (Sept. 13, 2013), <http://thinkprogress.org/health/2013/09/13/2616531/yale-university-consent/>. Similarly, at the University of Iowa, “[c]onsent must be freely and affirmatively communicated between both partners in order to participate in sexual activity or behavior. It can be expressed either by words or clear, unambiguous actions. . . . Silence, lack of protest, or no resistance does not mean consent.” *University of Iowa Policy Summary*, DIVISION OF STUDENT LIFE, THE UNIVERSITY OF IOWA, <https://dos.uiowa.edu/assistance/consent> (last visited June 23, 2015). See also *infra* notes 33–52 and accompanying text (describing affirmative consent definitions in criminal law).

<sup>2</sup> At schools that have not yet incorporated a rule of affirmative consent, students are pressuring administrators to do so. For example, staffers at the Harvard Crimson (the daily newspaper) endorsed language that would require a “‘demonstrated intent to have sex’ from both parties,” adding that this change is “number one on [the] list of demands” of a campus group aimed at “dismantling rape culture.” See The Crimson Staff, *Fixing Sexual Assault Response: Harvard’s Sexual Assault Task Force Should Recommend Long-overdue Measures*, HARVARD CRIMSON (April 7, 2014), <http://www.thecrimson.com/article/2014/4/7/fixing-sexual-assault-response/>; *Our Demands*, OUR HARVARD CAN DO BETTER, <https://ourharvardcandobetter.wordpress.com/our-demands/> (last visited June 23, 2015). Alongside this effort, student activists are directly targeting cultural norms around sexual consent. See Natalie Kitroeff, *Making Consent Cool: Students Advocate for Consensual Sex*, N.Y. TIMES (Feb. 7, 2014), <http://www.nytimes.com/2014/02/09/education/edlife/students-advocate-for-consensual-sex.html>.

<sup>3</sup> According to the White House Sexual Assault Task Force, consent must be affirmative; “[s]ilence or absence of resistance does not imply consent.” *Sample Language and Definitions of Prohibited Conduct for a School’s Sexual Misconduct Policy*, NOT ALONE 1, 4, <https://www.notalone.gov/assets/definitions-of-prohibited-conduct.pdf> (last visited August 25, 2015).

<sup>4</sup> See Jennifer Steinhauer, *Senators Offer Bill to Curb Campus Sexual Assault*, N.Y. TIMES (July 30, 2014), [http://www.nytimes.com/2014/07/31/us/college-sexual-assault-bill-in-senate.html?\\_r=0](http://www.nytimes.com/2014/07/31/us/college-sexual-assault-bill-in-senate.html?_r=0). According to Senator McCaskill, a sponsor of the proposed legislation, “[t]he bipartisan Campus Accountability and Safety Act will create incentives for schools to take proactive steps to protect their students and rid their campuses of sexual predators.” See *The Bipartisan Campus Accountability and Safety Act* (July 30, 2014), <http://www.mccaskill.senate.gov/imo/media/doc/CampusAccountabilityAndSafetyAct.pdf>. The bill is designed in part to address the problem of confusion regarding “acceptable standards of conduct and definitions of rape and

Additionally, state legislatures are beginning to insist that universities within their borders incorporate affirmative consent standards.<sup>5</sup> All of this suggests an increasingly settled understanding that, on campus, sex without affirmative consent is rape.<sup>6</sup>

Off campus, the landscape is dramatically different.<sup>7</sup> A majority of jurisdictions still reflect traditional conceptions about the necessity of force and even resistance,<sup>8</sup> although the modern reformist trend has been toward consent-based formulations.<sup>9</sup> Notwithstanding a growing awareness of non-consent as the essence of rape, however, the legal meaning of sexual consent remains contested.<sup>10</sup> In contrast to what we are seeing in the university setting, the burgeoning “yes means yes” movement has not yet impacted the criminal law.

An increasingly pressing question is whether it should. The law of rape is very much in flux, as evidenced by ongoing efforts on the part of the American Law Institute (ALI) to reform the Model Penal Code provisions on sexual assault.<sup>11</sup> A number of the provisions, which were drafted in 1962, are by all accounts

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sexual assault.” See Press Release, Claire McCaskill, Bipartisan Bill Takes Aim at Sexual Assault on College and University Campuses (July 30, 2014), <http://www.mccaskill.senate.gov/media-center/news-releases/campus-accountability-and-safety-act> (a strengthened version of the bill was reintroduced in early 2015.). See *Expanded Bipartisan Coalition Introduces Legislation to Prevent Sexual Assaults on College and University Campuses* (Feb. 26, 2015), <http://www.mccaskill.senate.gov/media-center/news-releases/expanded-bipartisan-coalition-introduces-legislation-to-prevent-sexual-assaults-on-college-and-university-campuses>.

<sup>5</sup> S.B. 967, 2013-2014 Leg., Reg. Sess. (Cal. 2014), [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB967](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967); Gov. Program Bill 8R, 2015-2016 Leg., Reg. Sess. (N.Y. 2015) (enacted), [http://www.nygovernorstg.prod.acquiasites.com/governor.ny.gov/files/atoms/files/GPB\\_8R\\_CAMPUS\\_SEXUAL\\_ASSAULT\\_BILL.pdf](http://www.nygovernorstg.prod.acquiasites.com/governor.ny.gov/files/atoms/files/GPB_8R_CAMPUS_SEXUAL_ASSAULT_BILL.pdf). See Ian Lovett, *California Bill Sets Sights on Curbing Campus Sexual Assaults*, N.Y. TIMES (Sept. 10, 2014), <http://www.nytimes.com/2014/09/11/us/california-bill-sets-sights-on-curbing-campus-sex-assaults.html>; see also *Cuomo Signs Affirmative Consent College Sexual Assault Bill Into Law*, HUFFINGTON POST (July 7, 2015), [http://www.huffingtonpost.com/2015/07/07/cuomo-affirmative-consent\\_n\\_7746174.html](http://www.huffingtonpost.com/2015/07/07/cuomo-affirmative-consent_n_7746174.html). Legislation requiring colleges to adopt an affirmative consent definition has also been introduced in New Jersey, New Hampshire and Connecticut. See Keenan, *supra* note 1.

<sup>6</sup> For a more thorough defense of this proposition, see Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L. J. 1, 6–12 (2015).

<sup>7</sup> It is worth noting that the criminal law of rape is sprawling, marked by various state-by-state approaches to defining the prohibited conduct.

<sup>8</sup> Tuerkheimer, *Rape On and Off Campus*, *supra* note 6, at 15; see also *infra* notes 28–30 and accompanying text.

<sup>9</sup> See *infra* notes 31–52 and accompanying text.

<sup>10</sup> *Id.*

<sup>11</sup> See Judith Shulevitz, Op-Ed., *Regulating Sex*, N.Y. TIMES, (June 27, 2015), <http://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html?r=0> (“The more than 4,000 law professors, judges and lawyers who belong to this prestigious legal association—membership is by invitation only—try to untangle the legal knots of our time. They do this in part by drafting and discussing model statutes. Once the group approves these exercises, they hold so much sway that Congress and states sometimes vote them into law, in whole or in part. For the past three years, the law institute has been thinking about how to update the penal code for sexual assault, which was last revised in 1962.”).

obsolete.<sup>12</sup> However, the attempt to update them with more contemporary definitions of the prohibited conduct is proving exceedingly difficult. As New York Times contributor Judith Shulevitz described, “perhaps the most consequential deliberations about affirmative consent” have been fraught.<sup>13</sup> When a draft of proposed revisions circulated before the 2015 annual meeting of the ALI, Shulevitz reported, “some highly instructive hell broke loose.”<sup>14</sup>

This Essay considers and responds, at least in part, to concerns underlying opposition to affirmative consent. The discussion proceeds in four parts. Part One details commonly expressed objections to codifying affirmative consent, which mostly center on sexual encounters conceived as ambiguous—cases of “miscommunication”—that will be captured by this definitional shift. Part Two observes that the move to affirmative consent is not without precedent. In a small number of jurisdictions, affirmative consent has been legally required for decades. The statutes within these jurisdictions defy broad generalizations. Accordingly, I catalogue two types of laws: those that codify “pure” affirmative consent definitions, and those characterized by “diluted” affirmative consent. Part Three surveys the cases that have arisen in pure affirmative consent jurisdictions. This survey yields a taxonomy of fact patterns prosecuted under the controversial definition. The categories I identify are sleep, intoxication, and fear. In none of these categories, I argue, is miscommunication generally a concern. Part Four addresses the subset of cases that might raise a genuine mistake as to consent, focusing on the question of reasonableness. I conclude that, even in the affirmative consent jurisdictions, cases involving a plausible claim of a reasonable mistake are far eclipsed by the cases where miscommunication is not an issue. While this alone cannot resolve the debate about affirmative consent, an analysis of the relevant case law provides a framework that can inform the normative inquiry.

## II. AGAINST AFFIRMATIVE CONSENT

Many who support affirmative consent as a rule of personal conduct<sup>15</sup> balk at incorporating this norm into a binding code. A dominant undercurrent that runs throughout objections to codification is the prospect of miscommunication in

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<sup>12</sup> See Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207 (2003).

<sup>13</sup> See Shulevitz, *supra* note 11.

<sup>14</sup> *Id.* (detailing members' criticisms of affirmative consent, among other provisions contained in the circulated draft).

<sup>15</sup> See, e.g., Shulevitz, *supra* note 11 (“Codes and laws calling for affirmative consent proceed from admirable impulses. . . . People should have as much right to control their sexuality as they do their body or possessions; just as you wouldn't take a precious object from someone's home without her permission, you shouldn't have sex with someone if he hasn't explicitly said he wants to. . . . But criminal law is a very powerful instrument for reshaping sexual mores. Should we really put people in jail for not doing what most people aren't doing? (Or at least, not yet?)”).

sexual interactions.<sup>16</sup> On this view, if one party's "seduction" of another results in unconsented-to sex, the erstwhile seducer should not be held liable.<sup>17</sup>

One strand of this preoccupation with miscommunication centers on the perceived difficulty of interpreting a party's signals in a sexual encounter.<sup>18</sup> In an extreme formulation, sexual relations are portrayed as inevitably confusing and ambiguous.<sup>19</sup> A softer version rejects the premise that sex is hopelessly opaque, but nevertheless despairs of specifying with adequate precision what constitutes consent.<sup>20</sup>

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<sup>16</sup> A separate critique is leveled at the prospect of eliminating, or reducing, the chances of miscommunication. This set of criticisms decries the "unsexiness" of affirmative consent rules. It asserts that affirmative consent will detract from the spontaneity of sexual encounters, and at considerable cost. *See, e.g.*, Tad Cronn, *California Proposes a License to Breed*, POLITICAL OUTCAST (June 5, 2014), <http://politicaloutcast.com/2014/06/california-proposes-license-breed/#YSPOYg5OWTFVDsRU.99> (arguing that California lawmakers, who passed the law requiring colleges to adopt an affirmative consent standard, "want sex to be as spontaneous as doing your taxes," and criticized the bill as "the sort of law that is designed to suck everything joyous, spontaneous, creative, intimate and beautiful out of human existence."). The cost of doing away with ambiguity is usually framed in terms of diminished sexual pleasure and the greater awkwardness that will result from communication around sex. *See* Steve Straub, *California Liberals Pass Bill to Regulate Sex; Requires Specific Verbal or Written Consent*, THE FEDERALIST PAPERS PROJECT, [www.thefederalistpapers.org/education-2/california-liberals-pass-bill-to-regulate-sex-requires-specific-verbal-or-written-consent](http://www.thefederalistpapers.org/education-2/california-liberals-pass-bill-to-regulate-sex-requires-specific-verbal-or-written-consent) (Aug. 26, 2015) (worrying that "[s]ex that occurs during the 'heat of the moment' would be outlawed" by the California affirmative consent law); Cathy Young, *California's Absurd Intervention Over Dorm Room Sex*, REASON (June 22, 2014), <http://reason.com/archives/2014/06/22/californias-absurd-intervention-over-dor> (criticizing a requirement of affirmative consent because "[w]hether anyone could feel 'sexy' under such conditions seems dubious at best"); Kitroeff, *supra* note 2 (observing, without endorsing the view, that "[t]oday, as it was decades ago, the butt of the joke is the awkward formality of the ask"); Young, *supra* note 16 (citing the "common view that such negotiations [around consent] are awkward moment-ruiners").

<sup>17</sup> *See* Shulevitz, *supra* note 11 ("Is a person guilty of sexual misconduct if he fails to get a clear 'yes' through every step of seduction and consummation? According to the doctrine of affirmative consent—the 'yes means yes' rule—the answer is, well, yes, he is.").

<sup>18</sup> *Id.* ("Most people just aren't very talkative during the delicate tango that precedes sex, and the re-education required to make them more forthcoming would be a very big project. Nor are people unerringly good at decoding sexual signals.").

<sup>19</sup> *See, e.g.*, Editorial, *Sex and College Students: Should the Legislature be in the Mix Too?*, L.A. TIMES (May 28, 2014), <http://www.latimes.com/opinion/editorials/la-ed-affirmative-consent-20140525-story.html> (worrying that the bill's language seems "vague—what exactly would constitute an unambiguous sign of consent?"); Emma Wolf, *Does California's College Rape Bill Go Too Far In Regulating Sex?*, THE DAILY BEAST (June 23, 2014), <http://www.thedailybeast.com/articles/2014/06/23/does-california-s-college-rape-bill-go-too-far-in-regulating-sex.html> (asserting that "resolving whether 'affirmative consent' was not only present but 'continuous' throughout an act will be nearly impossible.").

<sup>20</sup> *See, e.g.*, Amanda Hess, *'No Means No' Isn't Enough. We need Affirmative Consent Laws to Curb Sexual Assault*, SLATE (June 16, 2014), [http://www.slate.com/blogs/xx\\_factor/2014/06/16/affirmative\\_consent\\_california\\_weighs\\_a\\_bill\\_that\\_would\\_move\\_the\\_sexual.html](http://www.slate.com/blogs/xx_factor/2014/06/16/affirmative_consent_california_weighs_a_bill_that_would_move_the_sexual.html) (suggesting "[i]t's a bit ironic that the lawmakers behind the California bill seem more comfortable specifying what constitutes rape than actually describing what clear, unambiguous, enthusiastic consensual sex looks like. I suppose that's because consensual sex is intimate and fraught; like obscenity, you kind of know it when you see it."); Shulevitz, *supra* note 11 (quoting retired Judge Nancy

Relatedly, critics of affirmative consent rules worry about penalizing men who fail to conform their sexual practices to an ideal, since this vision is said to depart significantly from reality.<sup>21</sup> From this vantage, what are billed as “gray zone” cases should not count as rape unless and until sexual norms evolve well beyond their current state.<sup>22</sup> A stronger expression of this objection contends that all or most sex would count as rape if an affirmative consent requirement were to be adopted.<sup>23</sup>

What these objections share is a commitment to the idea that affirmative consent definitions capture too much sexual conduct. On this view, if the criminal law were to adopt an affirmative consent requirement, unjust prosecutions would, or could, result.<sup>24</sup> This perspective follows from a descriptive proposition: certain kinds of cases that would not otherwise be prosecuted would in fact be prosecuted in an affirmative consent jurisdiction.<sup>25</sup> Before reaching the normative inquiry, then, it is important first to determine what kinds of cases—in practice<sup>26</sup>—would likely be prosecuted under an affirmative consent standard. To the extent the

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Gertner as suggesting that “[i]f there’s no social consensus about what the lines are,” then affirmative consent “has no business being in the criminal law.”)

<sup>21</sup> One commentator has suggested, “the fact that many people seem to feel like [an affirmative consent requirement] marks such a radical departure from our current approach to sex reveals the depths of rape culture . . . more than all the stats on sexual assault, in my opinion.” Maya Dusenbery, “Affirmative Consent” Just Means Mutual Desire. And It Should Definitely Be the Standard, FEMINISTING (June 25, 2014), <http://feministing.com/2014/06/25/affirmative-consent-just-means-mutual-desire-and-it-should-definitely-be-the-standard/>.

<sup>22</sup> With respect to this concern, the specific language used to describe affirmative consent is critical. Cf. Young, *supra* note 16 (approving changes to the bill that removed “the warning against relying on nonverbal communication and the admonishment to stop for a safety check if any ambiguity seems to arise.”).

<sup>23</sup> See, e.g., Woolf, *supra* note 19 (cautioning that the affirmative consent law would “make most ordinary couples potentially liable for sex offenses”); David Bernstein, *YOU are a rapist; yes YOU!*, VOLOKH CONSPIRACY (June 23, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/23/you-are-a-rapist-yes-you/> (warning that an affirmative consent requirement “makes almost every adult in the U.S. (men AND women)—and that likely includes you, dear reader—a perpetrator of sexual assault.”).

<sup>24</sup> Critics of affirmative consent standards also point to perceived harms, apart from actual prosecutions, that might result from an unjustifiably broad definition. For instance, some commentators believe that a cultural shift toward requiring affirmative consent is unduly onerous; if this is true, the negative effects of this move might be realized regardless of the kinds of cases actually prosecuted under the definition. See *supra* note 16 and accompanying text (describing objections related to diminishing spontaneity in sexual relations). For the remainder of this discussion, however, I leave aside this contention in order to address the separate (albeit related) argument of affirmative consent opponents that seems to have the most traction—namely, that a move to affirmative consent will result in unjust prosecutions.

<sup>25</sup> Here, I am focused on the realm of prosecutorial practice. Critics of affirmative consent might point to the theoretical possibility of an unjust prosecution—observing (rightly) that prosecutorial discretion *could* be exercised to bring the hypothetical case involving legitimate miscommunication. However, this worry is significantly diminished—not eliminated, but diminished—if, in reality, prosecutorial practice does not encompass the feared hypothetical.

<sup>26</sup> See *supra* note 25.

standard results in the prosecution of conduct not otherwise prosecutable,<sup>27</sup> one could then proceed to consider whether, as a normative matter, this counts as a positive development.

The descriptive question I pose can be answered, at least tentatively, by examining those jurisdictions that have already adopted affirmative consent definitions. As it happens, the move to affirmative consent is not quite as radical as many have presumed. In the few states that have already adopted this requirement, an experiment—quite useful for present purposes—has been underway for many years. These test cases can, in ways not yet realized, inform the ongoing conversation about whether affirmative consent laws reach the kind of sexual behavior that should indeed be outlawed.

### III. AFFIRMATIVE CONSENT ON THE BOOKS

Even today, a majority of jurisdictions rely on the concept of force in defining rape.<sup>28</sup> Many states expressly require force as an element of the crime<sup>29</sup>

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<sup>27</sup> It may well be that prosecutors in affirmative consent jurisdictions are more likely to bring cases that, in the absence of an affirmative definition, would not be pursued despite their legal sufficiency. If this hypothesis is correct, I would argue that it describes a positive feature of affirmative consent, particularly given that rape law is significantly underenforced. See Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145 (2012) (documenting the dramatic attrition of rape allegations as cases progress through the criminal justice system); see also Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. (forthcoming 2016) (situating the underenforcement of rape law as an equal protection violation).

<sup>28</sup> See John F. Decker & Peter G. Baroni, “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, 1084–86 (2011). Because state statutory schemes vary substantially, cross-jurisdictional comparisons are necessarily inexact. See Patricia J. Falk, *Not Logic, But Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-by-Fraud*, 123 YALE L.J. ONLINE 353, 357 (2013) (“[T]he once-unitary common law crime of rape, with its heavy reliance on force, has given way to a vast array of criminal statutes differing in coverage and degrees of severity. Rape has transcended its constrictive, one-dimensional roots to become an umbrella for a large number of diverse offenses.”).

<sup>29</sup> For states that include force in their statutory offense definition, see ALA. CODE § 13A-6-61 (2006); ARK. CODE ANN. § 5-14-103 (West 2012); CAL. PENAL CODE § 261 (West 2014); CONN. GEN. STAT. ANN. § 53a-70 (West 2012); D.C. CODE § 22-3002 (2013); FLA. STAT. ANN. § 794.011(3) (West 2015); GA. CODE ANN. § 16-6-1 (West 2011); HAW. REV. STAT. § 707-730 (West 2008); 720 ILL. COMP. STAT. 5/11-1.20 (2012); IND. CODE ANN. § 35-42-4-1 (West 2012); IOWA CODE ANN. § 709.1 (West 2003); KAN. STAT. ANN. § 21-5503 (West 2012); KY. REV. STAT. ANN. § 510.040 (West 2006); LA. STAT. ANN. § 14:42.1 (2007); ME. REV. STAT. ANN. tit. 17-a, § 253 (2006); MD. CODE ANN. CRIM. LAW. § 3-303 (West Supp. 2014); MASS. GEN. LAWS ch. 265, § 22 (LexisNexis 2014); MICH. COMP. LAWS § 750.520b (Supp. 2015); MO. REV. STAT. § 566.030 (West Supp. 2015); N.M. STAT. ANN. § 30-9-11 (West Supp. 2014); N.Y. PENAL LAW § 130.35 (McKinney 2009); N.C. GEN. STAT. § 14-27.2 (2013); OHIO REV. CODE ANN. § 2907.02 (LexisNexis 2008); OKLA. STAT. tit. 21, § 1114 (Supp. 2013); OR. REV. STAT. ANN. § 163.375 (West 2015); 18 PA. STAT. AND CONS. STAT. ANN. § 3121 (West Supp. 2014); 11 R.I. GEN. LAWS ANN. § 11-37-2 (West 2014); S.C. CODE ANN. § 16-3-652 (Supp. 2014); S.D. CODIFIED LAWS § 22-22-1 (2006); VA. CODE ANN. § 18.2-61

while others define rape as sex without consent, but then include force as a component of non-consent.<sup>30</sup>

Among those states that define consent without reference to force,<sup>31</sup> many require a demonstration of unwillingness to engage in sexual conduct, or what might be conceived as verbal resistance.<sup>32</sup> In these states, “without consent” means without an expression of non-consent; absent such an indication, an alleged victim—even one who has remained inert throughout the encounter—is deemed to have consented.

Affirmative consent definitions, by way of contrast, transform the legal meaning of passivity. Absent some indication of consent, an alleged victim is deemed *not* to have consented. Affirmative consent need not be verbally expressed and may be implied.<sup>33</sup> To be clear, in an affirmative consent jurisdiction, the burden of proving guilt beyond a reasonable doubt remains on the

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(West Supp. 2013); WASH. REV. CODE ANN. § 9A.44.040 (West 2009); W. VA. CODE ANN. § 61-8B-3 (West Supp. 2014); WYO. STAT. ANN. § 6-2-302 (2007). The Model Penal Code also falls into the “force required” category, although this may be changing: for the first time in five decades, the American Law Institute is engaging in a process of reforming the Model Penal Code provisions on rape. See Project to Revise MPC Article 213 on Sexual Offenses Begins, 35 ALI Rep., no. 4, Summer 2012, at 1; see also MODEL PENAL CODE § 213.1 (AM. LAW INST.1962).

<sup>30</sup> For states with consent definitions that include force, see ALASKA STAT. ANN. § 11.41.410 (West 2007); ALASKA STAT. ANN. § 11.41.470(8) (West 2007); ARIZ. REV. STAT. ANN. § 13-1406 (West 2014); ARIZ. REV. STAT. ANN. § 13-1401(7) (West 2014); DEL. CODE ANN. tit. 11, § 773 (West 2010); DEL. CODE ANN. tit. 11, § 761 (West 2010); MONT. CODE ANN. § 45-5-502 (West 2009); MONT. CODE ANN. § 45-5-501(1) (West 2009).

<sup>31</sup> Some states that define rape as intercourse without consent fail to provide a statutory definition of consent. See, e.g., 18 PA. CONS. STAT. ANN. § 3124.1 (1995); MISS. CODE ANN. § 97-3-95(1)(a) (1998); TENN. CODE ANN. § 39-13-503(a)(2) (West 2009).

<sup>32</sup> See, e.g., NEB. REV. STAT. ANN. § 28-318(8), 319(1) (WEST 2010) (criminalizing penetration without consent and defining “without consent” as “express[ing] a lack of consent through words . . . or conduct” and requiring the victim to “make known to the actor the victim’s refusal to consent”); N.H. REV. STAT. ANN. § 632-A:2(I)(m) (WEST 2010) (prohibiting penetration “[w]hen 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.”); N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2013) (defining consent to require that “the victim clearly expressed that he or she did not consent to engage in [a sexual] act, 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.”); UTAH CODE ANN. § 76-5-402(1), 406(1) (WEST 2015) (criminalizing sexual intercourse without consent and defining consent as “the victim express[ing] lack of consent through words or conduct.”). See also WASH. REV. CODE ANN. § 9A.44.060 (WEST 2013) (prohibiting intercourse where “the victim did not consent . . . and such lack of consent was clearly expressed by the victim’s words or conduct.”).

<sup>33</sup> See, e.g., State *ex rel.* M.T.S., 609 A.2d 1266, 1277 (N.J. 1992) (“Persons need not, of course, expressly announce their consent to engage in intercourse for there to be affirmative permission. Permission to engage in an act of sexual penetration can be and indeed often is indicated through physical actions rather than words. Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act.”).

state.<sup>34</sup> In order to convict, the prosecution must demonstrate that the defendant engaged in intercourse without the alleged victim's consent, which must be manifested in an affirmative manner.<sup>35</sup>

The statutory schemes governing affirmative consent are surprisingly complex. On first glance, there appear to be about a dozen states with a consent definition that requires an affirmative gesture of willingness.<sup>36</sup> In addition, courts in Hawaii,<sup>37</sup> Iowa,<sup>38</sup> and New Jersey<sup>39</sup> have interpreted their state's rape statute to include an affirmative consent component. On closer inspection, however, these fifteen jurisdictions diverge substantially in their treatment of consent.

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<sup>34</sup> Despite some confusion, an affirmative consent definition does not shift the burden of proof to the defendant. Rather, it reflects a legal presumption that, in and of itself, an absence of conduct indicating willingness to engage in sexual activities does not constitute consent. *See, e.g.*, *Gates v. State*, 283 N.W.2d 474, 477–78 (Wis. Ct. App. 1979) (upholding the constitutionality of Wisconsin's affirmative consent statute against challenges for vagueness and for burden-shifting); *see also State v. Lederer*, 299 N.W.2d 457, 461 (Wis. 1980) (rejecting a constitutional challenge to statutory overbreadth).

<sup>35</sup> The New Jersey pattern jury instructions emphasize and clarify this burden:

The third element that the State must prove beyond a reasonable doubt is that defendant used physical force or coercion.

Physical force is defined as the commission of the act of sexual penetration without the victim's freely and affirmatively given permission to the specific act of penetration alleged to have occurred. You must decide whether the defendant's alleged act of penetration was undertaken in circumstances that led the defendant reasonably to believe that the victim had freely given affirmative permission to the specific act of sexual penetration. Simply put, affirmatively given permission means the victim did or said something which would lead a reasonable person to believe [he/she] was agreeing to engage in the act of sexual penetration, and freely given permission means the victim agreed of [his/her] own free will to engage in the act of sexual penetration. Freely and affirmatively given 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 that affirmative and freely given permission for the specific act of sexual penetration had been given.

NEW JERSEY CRIMINAL MODEL INSTRUCTIONS, SEXUAL ASSAULT (FORCE/COERCION), § 2C:14-2c(1) (2005), <http://www.judiciary.state.nj.us/criminal/juryindx.pdf>.

<sup>36</sup> *See* CAL. PENAL CODE § 261.6 (West 2011); COLO. REV. STAT. ANN. § 18-3-401(1.5) (West 2011); D.C. CODE § 22-3001(4) (2011); 720 ILL. COMP. STAT. 5/11-0.1, 1.70(a) (West 2011); MINN. STAT. ANN. § 609.341, subd. 4 (West 2011); VT. STAT. ANN. tit. 13, § 3251(3) (West 2011); WASH. REV. CODE ANN. § 9A.44.010(7) (West 2011); WIS. STAT. ANN. § 940.225(4) (West 2011). *Cf.* FLA. STAT. ANN. § 794.011(1)(a) (West 2011) (requiring "intelligent, knowing, and voluntary consent"). *See also* KY. REV. STAT. ANN. § 510.020(2)(c) (West 2011); ME. REV. STAT. ANN., tit. 17-A, § 255-A(1), 260(1) (2011); N.Y. PENAL LAW § 130.95(2) (McKinney 2011); W. VA. CODE ANN. § 61-8B-2(b)(3) (West 2011).

<sup>37</sup> *State v. Adams*, 880 P.2d 226, 234 (Haw. Ct. App. 1994), *cert. denied*, 884 P.2d 1149 (Haw. 1994).

<sup>38</sup> *State v. Meyers*, 799 N.W.2d 132, 143 (Iowa 2011) (citing *State v. Bauer*, 324 N.W.2d 320, 322 (Iowa 1982)).

<sup>39</sup> *State ex rel. M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992).

### A. Diluted Affirmative Consent Jurisdictions

In many of what I will call “diluted” affirmative consent jurisdictions, the impact of an affirmative consent requirement is weakened by a separate requirement of force. For instance, in California, consent is defined as “positive cooperation in act or attitude pursuant to an exercise of free will”<sup>40</sup>—which would seem to qualify the definition as affirmative. But the crime of rape itself is described as “an act of sexual intercourse . . . accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury.”<sup>41</sup> Under the rape statute, inquiry into whether consent was affirmatively given is thereby subsumed by an insistence on force or its functional equivalent.

Other state statutes accomplish much the same by providing that affirmative consent is a defense to a charge of forcible rape, meaning that a defendant is not guilty if an alleged victim expressed her consent to forcible intercourse.<sup>42</sup> In some states, the affirmative consent standard applies only to a lesser crime of sexual contact, which does not require force or penetration.<sup>43</sup>

A handful of jurisdictions deploy the statutory language of expressed or implied “acquiescence” to explain the meaning of consent, but only for charges involving sexual contact and not for the highest-grade sexual offense.<sup>44</sup> Because they retain a force requirement<sup>45</sup> and because the notion of implied acquiescence departs substantially from the essence of affirmative consent,<sup>46</sup> these jurisdictions fall into the “diluted” category.

Finally, in Hawaii and Iowa, judicial opinions have interpreted the meaning of consent to require affirmative manifestations.<sup>47</sup> However, the relatively narrow statutory question presented can be understood as somewhat mitigating the effects of the holdings.<sup>48</sup>

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<sup>40</sup> CAL. PENAL CODE § 261.6 (West 2011).

<sup>41</sup> CAL. PENAL CODE § 261(a)(2) (West 2011).

<sup>42</sup> See, e.g., 720 ILL. COMP. STAT. 5/11-0.1, 1.70(a) (West 2011).

<sup>43</sup> See, e.g., COLO. REV. STAT. ANN. § 18-3-401(1.5) (West 2011); MINN. STAT. ANN. § 609.341, subdiv. 4 (West 2011).

<sup>44</sup> See ME. REV. STAT. ANN., tit. 17-A, § 255-A(1), 260(1) (2011); W. VA. CODE ANN. § 61-8B-2(b)(3) (West 2011). In Kentucky, a misdemeanor crime of sexual misconduct includes sexual intercourse without consent. KY. REV. STAT. ANN. § 510.020(2)(c) (West 2011). Likewise, in New York, a misdemeanor crime of sexual misconduct includes sexual intercourse without consent. N.Y. PENAL LAW § 130.95(2) (McKinney 2011).

<sup>45</sup> See *supra* notes 28–29 and accompanying text.

<sup>46</sup> See *supra* notes 32–35 and accompanying text.

<sup>47</sup> See *infra* note 48 and accompanying text.

<sup>48</sup> In Hawaii, the appellate court was addressing a defendant’s claim of mistake as to consent, rather than the meaning of consent itself. *State v. Adams*, 880 P.2d 226, 230 (Haw. Ct. App. 1994), *cert. denied*, 884 P.2d 1149 (Haw. 1994). I place Iowa in the “diluted” category because the relevant Supreme Court holding is, on its face, limited to an acceptance of psychological force as giving rise to a conviction under the “against the will” prong of the rape statute. *State v. Meyers*, 799 N.W.2d

### B. *Pure Affirmative Consent Jurisdictions*

Three jurisdictions employ what I call “pure” affirmative consent definitions: Wisconsin, Vermont, and New Jersey. Because they are so unusual, the precise terms of these definitions are worth noting.

In Wisconsin, consent “means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.”<sup>49</sup> Sexual intercourse without consent is a felony.<sup>50</sup>

In Vermont, consent “means words or actions by a person indicating a voluntary agreement to engage in a sexual act.” A person who engages in a sexual act without the consent is guilty of a felony.<sup>51</sup>

Finally, in New Jersey, the definition of affirmative consent is found not in the statute itself, but in the state Supreme Court’s interpretation of it. In the much-discussed case of *State of New Jersey in the Interest of M.T.S.*, the court held that consent requires “permission to engage in sexual penetration [that] must be affirmative and it must be given freely.”<sup>52</sup>

## IV. THE AFFIRMATIVE CONSENT CASES

We now turn to the cases that have arisen in the pure affirmative consent jurisdictions. As is true of any effort to extrapolate facts on the ground from appellate opinions, case law is an imperfect proxy for an entire class of prosecutions (here, cases where affirmative consent was the primary issue).<sup>53</sup> Still, since we are interested in whether prosecutors are bringing “gray-zone” cases—where the defendant claims to have misread passivity or silence as consent—we would expect the case law to provide a helpful glimpse into just these borderline

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132, 146 (Iowa 2011) (concluding that “psychological force or inability to consent based on the relationship and circumstance of the participants may give rise to a conviction under the ‘against the will’ element” of the statute). Given the generalizability of this conclusion, however, Iowa might be considered an affirmative consent jurisdiction for all practical purposes.

<sup>49</sup> WIS. STAT. ANN. § 940.225(4) (West 2011).

<sup>50</sup> *Id.* The statute was first enacted in 1975.

<sup>51</sup> VT. STAT. ANN. tit. 13, § 3251(3) (West 2011). The statute, which was first enacted in 1977, also includes reference to “compel[ling] the other person to participate in a sexual act,” but this provision does not add to the prosecutor’s burden of proving lack of consent. *See State v. Hazelton*, 915 A.2d 224, 233 (Vt. 2006) (holding that “[t]he element of compulsion is satisfied by lack of consent alone”). *Cf. Mock v. University of Tennessee*, No. 14-1687-II (Aug. 4, 2015) (holding that the University’s affirmative consent standard did not impermissibly shift the burden of proof to the respondent, and that the Chancellor erred in concluding otherwise).

<sup>52</sup> *See supra* note 39, at 1277.

<sup>53</sup> Across the board, most prosecutions result in guilty pleas. Those that go to trial and end in an acquittal will not result in a defense appeal; those that go to trial and end in a conviction may or may not result in an appeal and written opinion.

cases.<sup>54</sup> At the very least, the case law is a helpful gauge of the kinds of convictions that arise in jurisdictions requiring affirmative consent.

A survey of the case law reveals a number of recurring fact patterns,<sup>55</sup> which can be classified under the rubrics of sleep, intoxication, and fear.<sup>56</sup> As we will see, in none of these categories are the cases characterized by “mixed signals” or, more to the point, a reasonable mistake as to consent.<sup>57</sup>

### A. Sleep

The sleep cases fall on a continuum. At one end, the victim is asleep at the onset of the sexual encounter, meaning that she has no opportunity to communicate in a way that, in theory, could be misinterpreted. At the other end of the spectrum, the victim awakens relatively early on, allowing her, again in theory, to convey her willingness or unwillingness to engage in sexual activities.

*State v. Perkins*<sup>58</sup> illustrates the first scenario, where the defendant penetrates a sleeping victim. Antonio Perkins and Deanna T. were both college students at the time of the incident.<sup>59</sup> They met earlier that night, through mutual friends, and spent the evening studying and playing cards in a student lounge.<sup>60</sup> Around 2:00 a.m., Deanna fell asleep on a couch, faced down on her stomach, and her friends left the lounge shortly thereafter.<sup>61</sup> According to Deanna:<sup>62</sup>

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<sup>54</sup> In general, these cases may be somewhat more likely than non-borderline cases to go to trial and result in an appeal.

<sup>55</sup> My survey covered hundreds of cases in three jurisdictions—Iowa, New Jersey, and Wisconsin—where a written appellate opinion referenced the affirmative consent definition or statute. From this sample, I chose not to focus on cases where the victim was a young child, since sexual abuse cases raise issues sufficiently distinct from this discussion to warrant separate consideration. Similarly, many of the cases in the sample featured abundant physical force. *See, e.g., State v. Holloway*, 2011 WL 4483024 (Sup. Ct. N.J. Sept. 29, 2011) (defendant choked his victim into unconsciousness before penetrating her). Since under any definition of rape, these facts would clearly qualify, I did not further analyze cases in this category. The remaining cases fell into the categories described.

<sup>56</sup> These same categories first emerged in my study of non-forcible rape. *See Tuerkheimer, Rape On and Off Campus*, *supra* note 6, at 16–17.

<sup>57</sup> *See infra* notes 187–188 and accompanying text.

<sup>58</sup> *State v. Perkins*, No. 95-1353-CR, slip op. at \*1 (Wis. Ct. App. Aug. 7, 1996).

<sup>59</sup> *Id.* at \*1.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at \*2–3. Deanna had stayed awake the night before to complete an English paper, which made her especially tired on the night in question. Moreover, as a matter of course, she was an unusually heavy sleeper. *See id.* at \*3 (citing testimony by Deanna’s mother and by her friend to this effect).

<sup>62</sup> Once a jury has convicted, an appellate court will evaluate a defendant’s insufficiency claim in the light most favorable to the prosecution. I adopt the same approach throughout this discussion, although I also note where a defendant’s discrepant version of events is included in the judicial opinion. When evaluating these divergences, it is helpful to bear in mind that a competing narrative may present predominantly factual discrepancies or predominantly interpretative discrepancies.

she was awakened by the sensation of a man on her back and simultaneously became aware that both her pants and underwear had been pulled down to her thighs and her bra was unhooked. She could feel the man's penis against her buttocks. She pushed him off, stood up and saw that his pants and shorts were pulled down. She recognized Perkins, and after asking him, "what the hell are you doing?" she left the room.<sup>63</sup>

Perkins mostly agreed with Deanna's version of events.<sup>64</sup> While he claimed to have believed that Deanna was only pretending to stay asleep, this impression was not based on any conduct or communication on Deanna's part.<sup>65</sup> Even by Perkins' account, she did not send "mixed signals," and she was—by all objective measures<sup>66</sup>—inert throughout the entire incident.<sup>67</sup>

Under Wisconsin's affirmative consent definition, Deanna did not provide "freely given agreement" to engage in sexual contact.<sup>68</sup> The affirmative consent standard functioned to relieve the victim of the burden of expressing her lack of consent while in a dead sleep.

Some women awake earlier in the encounter. In the case of *State v. McCredie*,<sup>69</sup> Kelly K. was sleeping in her dark bedroom with her two children "when she was awakened by a man on top of her."<sup>70</sup> Thinking the man was Kraig, a friend whom she had agreed could spend the night in her apartment (though the two were never romantically involved), Kelly K. asked "Kraig, what are you doing?"<sup>71</sup> The man—who was in fact Kraig's brother, McCredie—began kissing

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<sup>63</sup> *Perkins*, slip op. at \*3.

<sup>64</sup> *Id.* ("In the statement he gave to the police after his arrest, Perkins stated that prior to Deanna pushing him off, he had lain prone on top of her back, repeatedly 'grinding' his penis against her buttocks. He claimed that her body was responsive to his, although he stated she never said anything to him. He further stated that during the encounter he unhooked her bra and touched her breasts. When he asked her to roll over and she did not respond, he reached under her and unzipped her pants. He then had digital contact with her vagina and pulled her pants and underwear down below her buttocks. Perkins then exposed his penis and resumed his hip gyrations. He testified that at this point Deanna pushed him off and asked him what he was doing.")

<sup>65</sup> According to Perkins, he realized that Deanna was sleeping on her stomach on the couch but he believed that, at some point, she awoke and was "pretend[ing] to be asleep," since, as he put it, "[women] pretend to be asleep . . . I guess it's a trick to get guys to do foreplay." *Id.*

<sup>66</sup> See *infra* notes 187–188 and accompanying text (noting the importance of reasonableness to the doctrine of mistake).

<sup>67</sup> See *Perkins*, slip op. at \*3. ("He claimed that her body was responsive to his, although he stated she never said anything to him."). It is unclear what Perkins perceived as "responsive" or how far along he had proceeded in the encounter before he apparently became aware of any movement whatsoever on Deanna's part.

<sup>68</sup> The court upheld the conviction. *Id.* See WIS. STAT. ANN. § 940.225(4) (West 2011).

<sup>69</sup> *State v. McCredie*, No. 2010AP1179–CR (Wis. Ct. App. Mar. 2, 2011).

<sup>70</sup> *Id.* at \*1.

<sup>71</sup> *Id.*

Kelly K., removing her clothing, and restraining her arms.<sup>72</sup> The court related the events that followed:

The man proceeded to vaginally penetrate [Kelly K.] with his penis; he then forcibly turned her over and shoved her face into a pillow and anally penetrated her. At this point Kelly K. told the man to stop, that he was hurting her, but he continued to anally penetrate her, followed by another act of vaginal penetration. Towards the end of the incident, Kelly K. realized the man was not Kraig. Kelly K. left the bedroom with her son and woke up her sister. Kelly K. asked her sister who was in her bedroom, and her sister replied that it was McCredie. Both of them went to Kelly K.'s bedroom and when they turned on the light they saw McCredie getting dressed. McCredie scampered out of the apartment as Kelly K. called the police.<sup>73</sup>

On appeal, McCredie claimed that, because Kelly K. consented to intercourse with Kraig, she also consented to intercourse with anyone who could trick her into thinking she was having intercourse with Kraig.<sup>74</sup> The court summarily dismissed the notion that consent to intercourse with an individual is consent to intercourse with a person impersonating that individual.<sup>75</sup>

But a further observation is relevant to the present discussion: in fact, Kelly K. did not consent to intercourse with Kraig. The affirmative consent standard bears on this conclusion. As the court explained, “the jury heard no testimony of ‘words or overt actions’ from Kelly K. ‘indicating a freely given agreement to have intercourse or sexual contact’ with anyone on the night [in question].”<sup>76</sup> Even if McCredie was Kraig, he would not have been entitled to climb on top of a sleeping Kelly, remove her clothing, restrain her arms, and vaginally and anally penetrate her.<sup>77</sup> Again, this is not—and would not be in the hypothetical case involving Kraig—a case of miscommunication.

On the far end of the continuum involving sleep are cases where the victim awakes shortly before the defendant begins to engage in sexual contact or intercourse. In these cases, sleep is a factor insofar as it places the victim in a vulnerable position. Sleep is also integral to understanding how victims tend to react in these cases upon awakening to unconsented-to sexual activity,<sup>78</sup> commonly

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at \*3.

<sup>75</sup> *Id.* at \*4.

<sup>76</sup> *Id.* at \*3.

<sup>77</sup> *Id.* at \*1. The court also noted, “Kelly K. testified that she did not consent to having sexual intercourse with McCredie and that she would not have consented to having sexual intercourse with Kraig either.” *Id.* at \*2.

<sup>78</sup> A victim who awakes becomes sufficiently cognizant to manifest her consent if she is a willing participant. If she is not a willing participant, she may manifest non-consent or, in the

with a person who was not present when the victim fell asleep. Because these fact patterns typically involve fright on the part of the person awakened, they also fall within the “fear” category, which I shortly describe.<sup>79</sup>

To see this overlap, consider the case of *State v. Brown*.<sup>80</sup> The victim, Patricia, was spending the night at the apartment of a friend, whose brother and a few friends were also present.<sup>81</sup> Patricia went to sleep alone in the bedroom.<sup>82</sup> According to her testimony, she was “later roused by someone jumping on the bed.”<sup>83</sup> The court continued:

That person grabbed her and held her hands behind her back. The person laid on top of her and asked if she would have sexual intercourse with him. She refused. Patricia tried to leave but could not because of the person’s weight. She said she couldn’t breathe, and her attempts to kick the assailant were futile because of his size. The victim is five feet, two inches tall and weighs ninety-nine pounds.<sup>84</sup>

As the court emphasized, the sole issue in the case was consent.<sup>85</sup> While the defendant’s version of events was different than Patricia’s, the dispute was more factual than interpretative.<sup>86</sup> The jury chose to accept Patricia’s account and, as the court concluded, this determination was not unreasonable.<sup>87</sup>

Note that, even under a definition that did not require an affirmative manifestation of willingness, Patricia did not consent to intercourse with the defendant. After all, “she refused” when asked to have sex with him, and then made efforts to kick his body off hers.<sup>88</sup> On facts like these, a concern for miscommunication would seem entirely misplaced.

alternative, not manifest consent. Under an affirmative consent definition, utter passivity may not qualify as consent. *See supra* notes 31–33 and accompanying text (explaining the distinction between affirmative and non-affirmative definitions of consent).

<sup>79</sup> *See infra* Part III. C; *see also McCredie*, slip op. at \*1 (when Kelly K. awoke to a man on top of her, “kissing [her], removing her clothing, and restraining her arms,” she “was afraid that if she tried to fight back or resist her children [who were also sleeping in the room] would be harmed.”).

<sup>80</sup> *State v. Brown*, No. 81-1865 (Wis. Ct. App. Aug. 5, 1982).

<sup>81</sup> *Id.* at \*1.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *See id.*

<sup>86</sup> *See id.* (“The defendant does not deny having sexual intercourse with the victim. The sole disputed issue is consent. Brown contends that Patricia did not resist and consented to the act. In support of that theory, [a number of witnesses] testified at trial that they did not hear a struggle or an assault. Brown also presented evidence that the bed was noisy, and the apartment walls were thin.”).

<sup>87</sup> *Id.* at \*2 (“We conclude that Patricia’s testimony does not conflict with conceded facts. . . . Patricia’s testimony is not inherently incredible, and the jury was free to judge it, as it judges any other piece of evidence. The jury chose to accept her version of the incident. There is sufficient evidence to support that determination.”).

<sup>88</sup> *Id.* at \*1.

### B. Intoxication

The intoxication cases range between total incapacitation and impairment that is severe, but not complete. This variation corresponds to the spectrum on which the sleep cases fall. At one extreme—unconsciousness—intoxication negates the capacity to communicate. In these cases, there should be no concern for “mixed signals” or confusion. At the other end of the continuum, intoxication leaves intact communicative abilities (though it may well impair them),<sup>89</sup> raising the question of what, if anything, the alleged victim conveyed with regard to her willingness to engage in sexual activities.<sup>90</sup>

*State v. Snow*<sup>91</sup> fairly represents the total impairment cases. After an “alcohol-fueled New Year’s Eve party,” the victim (unnamed in the opinion) fell unconscious in a bedroom.<sup>92</sup> She awoke “in pain with the defendant’s penis inside of her, immediately yelled at him, and left the room.”<sup>93</sup> The defendant told a very different story, asserting that the victim called him into the room and initiated mutual fondling.<sup>94</sup> The two narratives wholly diverged, raising a core factual dispute, as opposed to an interpretative disagreement. Even by the defendant’s own account (which was rejected by the jury), there was no claim of confusion on his part.

In general, regardless of whether a defendant acknowledges the accuracy of a victim’s description of events,<sup>95</sup> the affirmative consent standard underscores that

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<sup>89</sup> The impairment of judgment, as opposed to the impairment of communicative capacity, raises a conceptually distinct set of issues.

<sup>90</sup> Again, what matters in an affirmative consent jurisdiction is whether there is an expression of willingness, not whether there is a demonstration of unwillingness. *See supra* notes 31–33 and accompanying text (explaining the distinction between affirmative and non-affirmative definitions of consent).

<sup>91</sup> *State v. Snow*, 70 A.3d 971 (Vt. 2013).

<sup>92</sup> *Id.* at 972.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 976 (“Defendant testified that he had attempted to go to sleep on a loveseat in the living room of the house where the New Year’s Eve party took place but that the victim later called defendant into the bedroom. Defendant said that he and victim did not engage in sexual intercourse, but that they had engaged in other sexual activities. Specifically defendant testified that at some point after falling asleep next to the alleged victim, he awoke to the victim kissing him, and said that they then consensually fondled one another. . . . Counsel then described the State’s allegation that the victim had been assaulted while sleeping as ‘incredible,’ opining that ‘[n]o one can sleep through a sexual assault unless you have a medical condition,’ and that she was neither too drunk to consent nor was she drugged.”).

<sup>95</sup> For a case raising similar facts, see *State v. Valanos*, 2010 WL 272592 (Sup. Ct. N.J. 2010). In *Valanos*, the defendant admitted that he touched the victim’s vagina while she was intoxicated to the point of unconsciousness. *Id.* at \*2–3. On appeal, he challenged the basis for his guilty plea, arguing—not that the unconscious victim consented—but that his plea colloquy did not establish the facts necessary to prove “penetration.” *Id.* at \*7. The court rejected this argument. *Id.*

total passivity (unconsciousness) cannot establish consent to engage in intercourse.<sup>96</sup> This result hardly seems controversial.

Where intoxication does not render a victim unconscious, but nevertheless results in significant impairment, the operation of an affirmative consent standard tends to become more visible. In many of these cases, a victim's ability to "resist" is undermined by alcohol, and her unwillingness to engage in sexual activities may manifest as resignation. However, since unresponsiveness does not qualify as consent under an affirmative definition, the inebriated victim who does nothing—whether or not she is fully unconscious—is deemed not to have consented.<sup>97</sup>

Notwithstanding the possibility of this fact pattern arising,<sup>98</sup> cases in this category more often seem to feature expressions of non-consent. *State v. Soler*<sup>99</sup> illustrates the dynamic of intoxication short of unconsciousness. The victim, M.R., was a high school senior at the time of the incident.<sup>100</sup> On her first day of work as an office assistant, she met the defendant, who invited her to lunch after instructing her not to let the manager know that she was leaving with him.<sup>101</sup> Once they arrived at their destination, which M.R. came to realize was a "go-go bar," the defendant ordered drinks for two.<sup>102</sup> After an hour, M.R. became dizzy and nauseous.<sup>103</sup> She went to the bathroom and vomited.<sup>104</sup>

When M.R. returned to the bar, the defendant took her to a dark back room,<sup>105</sup> at which point he "sat her in a chair, began kissing her and removed her pants and underwear."<sup>106</sup> As the court emphasized, "M.R. told [the] defendant 'no,' but could not 'physically resist.' Defendant ignored her pleas, picked her up from the chair and penetrated her vagina with his penis."<sup>107</sup>

Clearly, M.R.'s level of intoxication impaired her ability to physically resist the attack. As she would later explain, "I didn't know what to think. It just felt,

<sup>96</sup> Irrespective of the defendant's version of events, the jury is of course instructed on the prosecution's burden of proof and the applicable definition of consent, including (in an affirmative consent jurisdiction) the requirement of an expression of willingness. *See supra* notes 34–35 (describing burden of proof and New Jersey's pattern jury instruction on affirmative consent).

<sup>97</sup> *See supra* notes 31–33 (observing the various legal meanings of passivity).

<sup>98</sup> It is difficult to find appellate opinions that reflect these facts, presumably because allegations of this sort are rarely prosecuted. For one case that seems to raise the issue, see *State ex rel. B.K.*, 2006 WL 1975431, at \*1 (N.J. Super. Ct. App. Div. July 17, 2006) ("The victim alleged that she was quite intoxicated and that, immediately prior to the sexual conduct, things had become 'blurry.' She denied consent.").

<sup>99</sup> *State v. Soler*, No. A-3533-08T4, 2011 WL 6845889 (N.J. Super. Ct. App. Div. Dec. 30, 2011).

<sup>100</sup> *Id.* at \*1.

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

<sup>102</sup> *Id.* at \*2.

<sup>103</sup> *Id.*

<sup>104</sup> *See id.* ("Several of the dancers came into the bathroom to make sure she was alright, and one warned her 'to be careful.'").

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

kind of, like it was a blur at that moment. . . . I didn't know what was going on, and on top of that I see him doing these things, but then I can't, I can't seem to respond with my body to what is going on."<sup>108</sup> Still, she managed to somehow express her unwillingness to engage in intercourse, as evidenced by her "no's."<sup>109</sup> On these facts, miscommunication does not seem a legitimate concern.<sup>110</sup>

### C. Fear

In the category of fear, in contrast to sleep and extreme intoxication, there is—at least in theory—an opportunity to communicate consent. Even so, many of these cases also feature a communicated lack of consent. On these facts, the conduct alleged would qualify as non-consensual under any definition, affirmative or otherwise. Here, there should be no real concern about "mixed messages."<sup>111</sup>

*State v. Lederer*<sup>112</sup> typifies this fact pattern. The victim (referred to in the opinion as the "prosecutrix") was acquainted with the defendant and agreed to inspect a rental property with him. The court described what followed:

At the home, defendant began to disrobe the prosecutrix. The prosecutrix objected and pushed defendant's hand away. The defendant allegedly told her that it would be worse if she fought. She permitted the defendant to disrobe her. Defendant performed an act of sexual intercourse, despite the verbal protestations of the prosecutrix.<sup>113</sup>

Given these facts, it was readily apparent that the victim did not consent to intercourse.<sup>114</sup> Applying the jurisdiction's affirmative standard, the court stressed

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

<sup>109</sup> *Id.*

<sup>110</sup> Apart from the fact that M.R. said "no," she did nothing affirmative to suggest that she was a willing participant in sexual intercourse. Accordingly, an affirmative consent standard would prohibit the defendant's conduct regardless of whether M.R. offered verbal resistance. *See supra* notes 91–96 and accompanying text (discussing the unconscious victim). Even in this hypothetical case, with identical facts apart from the "no's," I contend that a worry about confusion would be addressed by a framework that centers on the reasonableness of a mistake as to consent. *See infra* notes 187–188 and accompanying text.

<sup>111</sup> *See, e.g., State v. Root*, No. 80786-CR., slip op. at \*2 (Wis. Ct. App. Feb. 18, 1981) ("The victim clearly communicated her objection to having sexual intercourse with Root. Root cannot complain that he did not have fair notice that his behavior was not consented to by the victim.").

<sup>112</sup> *State v. Lederer*, 299 N.W.2d 457 (Wis. Ct. App. 1980).

<sup>113</sup> *Id.* at 459.

<sup>114</sup> The victim's ordeal continued, as described by the court:

Defendant fell asleep on top of the prosecutrix. When defendant awoke in the early hours of July 12, 1978, defendant performed a second act of sexual intercourse. Defendant again fell asleep with his arm and part of his body across the prosecutrix. A third act of intercourse was performed when defendant awoke, as well as an act of fellatio. Defendant then took several photographs of the prosecutrix in the nude. Acts of sexual

that “actions on the part of the prosecutrix can hardly be said to be manifestations of consent, particularly when viewed together with the threat of the defendant that things would be worse if she did not comply.”<sup>115</sup> In cases like this, where the victim has expressed her non-consent, it is important to notice that any definition of consent—affirmative or otherwise<sup>116</sup>—would render the conduct unlawful.<sup>117</sup>

Where the victim’s fear is more debilitating, however, an affirmative consent requirement becomes a factor in determining guilt. Whether the fright at issue results from the perpetration of incest,<sup>118</sup> past physical abuse,<sup>119</sup> or a surprise attack,<sup>120</sup> these cases have in common a victim who is sufficiently afraid that she remains passive throughout the sexual assault. In an affirmative consent jurisdiction, her passivity is deemed legally insufficient to constitute consent.

In *State v. DeSautels*,<sup>121</sup> the defendant became angry when he learned that the victim, his former girlfriend, had a male guest in her apartment.<sup>122</sup> Uninvited, the defendant went to the victim’s apartment, attacked her verbally, slapped her in the face, and punched her in the stomach.<sup>123</sup> He then “ripp[ed] her underwear off and shov[ed] his hand in her vagina to see if she had had sex with another man. He forced her to perform fellatio and have vaginal sex with him despite her verbal and physical protestations.”<sup>124</sup> The defendant left the apartment alone after trying unsuccessfully to convince the victim to come with him.<sup>125</sup>

Later that night, the defendant returned to the victim’s home.<sup>126</sup> As the court described the events that followed:

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intercourse and fellatio were again performed. Defendant then drove the prosecutrix home.

*Id.*

<sup>115</sup> *Id.* at 461. The court further observed that, “‘No’ means no, and precludes any finding that the prosecutrix consented to any of the sexual acts performed during the night.” *Id.*

<sup>116</sup> See *supra* note 32 (listing statutes that define non-consent as requiring an expression of unwillingness on the part of the victim).

<sup>117</sup> In these cases, the affirmative consent standard is not outcome determinative. *But see supra* note 27 (hypothesizing that prosecutors may be more willing to bring cases where physical force is absent in affirmative consent jurisdictions).

<sup>118</sup> See, e.g., *State v. Colson*, 338 N.W.2d 530 (Wis. Ct. App. 1983); *State v. Hammond*, 54 A.3d 151 (Vt. 2012).

<sup>119</sup> See, e.g., *State v. Pardo*, No. A-2633-09T1, 2012 WL 1569814 (N.J. Super. App. Div. May 7, 2012); *State v. Desautels*, 908 A.2d 463 (Vt. 2006).

<sup>120</sup> See, e.g., *State ex rel. K.B.*, No. A-2001-11T2, 2013 WL 3340654 (N.J. Super. App. Div. June 28, 2013); *State v. Benitez*, No. A-1102-90T4, 2010 WL 4811893 (N.J. Super. App. Div. Nov. 29, 2010); *State ex rel. S.M.I.*, No. A-4222-10T2, 2012 WL 1473326 (N.J. Super. App. Div. Apr. 27, 2012).

<sup>121</sup> *Desautels*, 908 A.2d at 463.

<sup>122</sup> *Id.* at 467.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

The victim was afraid defendant would become violent if she did not let him in, so she instructed her children to open the door. Defendant was still angry and called the victim a whore. The victim then accompanied defendant into the bedroom, where they engaged in sexual activity. Throughout defendant's second visit, the victim was upset and crying. The victim testified that she was afraid of defendant, and did not think she could refuse him.<sup>127</sup>

Because the victim apparently did not protest, verbally or physically, during this second encounter, the applicable consent definition—“words or actions by a person indicating a voluntary agreement to engage in a sexual act”<sup>128</sup>—was of greater importance to the outcome of the case.<sup>129</sup> Noting that proof of resistance was not required, the court emphasized that the victim’s fear may have led her to “cooperate” with the defendant, but that this cooperation could not be equated with consent.<sup>130</sup>

As for any concern about confusion on the part of the defendant, the court expressly dispensed with this worry. Because the victim “communicated her fear by shaking and crying throughout the second encounter,” the defendant had no reason to believe that she was a willing participant in the intercourse.<sup>131</sup>

It should come as no surprise that violence often leads a victim to remain passive during a sexual assault. When the violence is conceived as “past”—that is, as temporally preceding the intercourse, without regard to how little time has lapsed or the fear that lingers—the legal definition of “force” may not be satisfied.<sup>132</sup> But, significantly, in jurisdictions that criminalize sex without an

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 468.

<sup>129</sup> The issue on appeal was the sufficiency of evidence with respect to the second sexual encounter. *Id.*

<sup>130</sup> *Id.* at 464 (“[The] evidence tended to show some cooperation by the victim during her second sexual encounter with defendant, but not consent, and it could be inferred from the victim's testimony that her cooperation arose out of fear of defendant, based on the violent physical and sexual assault occurring only a few hours earlier, his continuing anger, as demonstrated by his verbal abuse, and fear for her children's safety.”).

<sup>131</sup> *Id.* at 468 (“The victim testified that although she may have told defendant that she loved him and that she was sorry, she communicated her fear by shaking and crying throughout the second sexual encounter. . . . The victim's actions were consistent with the State's theory that her cooperation with the second sexual encounter was an attempt to keep defendant under control and avoid further violence. Looking at all of the evidence surrounding the second sexual assault, we conclude there was sufficient evidence for the jury to find beyond a reasonable doubt that the victim did not consent.”).

<sup>132</sup> A much-discussed case to hold accordingly is *State v. Alston*, 312 S.E.2d 470 (N.C. 1984). See also *infra* note 133 (discussing *State v. Pardo*, No. A-2633-09T1, 2012 WL 1569814 (N.J. Super. App. Div. May 7, 2012)).

affirmative manifestation of consent, a victim's fright-induced passivity does not signify consent.<sup>133</sup>

A separate subset within the fear category of cases involves fright that arises not from physical violence, but from a surprise attack. These cases, which have been described as involving "passive failure to cooperate,"<sup>134</sup> frequently involve young, trusting victims.<sup>135</sup>

For instance, the victim in *State v. Benitez*,<sup>136</sup> a girl called J.R., was 17 years old.<sup>137</sup> The defendant, in his forties, was the husband of J.R.'s church pastor.<sup>138</sup> On the night in question, following a church event, the defendant offered to drive J.R. and the other youths to their homes.<sup>139</sup> After dropping off everyone but J.R., the defendant drove in the opposite direction from her house and stopped on a dead-end street.<sup>140</sup> He then "began to rub the inside of J.R.'s thighs, kissed and bit her neck, put his hands under her shirt and rubbed her breasts."<sup>141</sup>

The court tellingly observed that, "[a]t first, J.R. was so frightened that she could not speak."<sup>142</sup> Because she experienced an egregious violation of trust, which was likely compounded by her youth and a vast age differential, J.R. was

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<sup>133</sup> See *supra* notes 121–131 and accompanying text (analyzing *DeSautels*). Cf. *State v. Pardo*, No. A-2633-09T1, 2012 WL 1569814 at \*1–4 (N.J. Super. App. Div. May 7, 2012) (where the defendant "physically assaulted [the victim] both before and after they had sexual relations," the evidence was legally sufficient to show that "she really didn't want to have sex that night," the jury nonetheless acquitted the defendant of forcible sexual assault). For a summary of New Jersey's judge-made law on force, see *supra* notes 51–52 and accompanying text (discussing *State ex rel. M.T.S.*, 609 A.2d 1266 (N.J. 1992)).

<sup>134</sup> See *infra* note 174 and accompanying text. See also *supra* notes 78–79 and accompanying text (explaining that attacks on sleeping victims who awake are typically "fear" cases).

<sup>135</sup> See, e.g., *State ex rel. S.M.I.*, No. A-4222-10T2, 2012 WL 1473326 at \*1 (N.J. Super. App. Div. Apr. 27, 2012). As the court recounted the incident, the thirteen-year-old victim told an acquaintance from the neighborhood "several times that she was too young and did not want to do the things he was doing or suggesting. The juvenile continued to pursue his aims. He lay on top of her, holding her wrists above her head, and eventually he penetrated her in sexual intercourse, using a condom." *Id.* See also *infra* notes 167–185 and accompanying text (further discussing the case).

<sup>136</sup> *State v. Benitez*, No. A-1102-90T4, 2010 WL 4811893 (N.J. Super. App. Div. Nov. 29, 2010).

<sup>137</sup> *Id.* at \*1.

<sup>138</sup> *Id.* at \*2.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* The defendant was indicted on two counts of criminal sexual contact, one of which involved the use of "physical force or coercion." *Id.* at \*1. The other count required that the defendant act while having "supervisory or disciplinary power" over the victim. *Id.* The basis for the appeal was the prosecutor's rejection of the defendant's application for admission to the Pretrial Intervention Program, which would have allowed for dismissal of the indictment following a successful period of supervision. *Id.*

<sup>142</sup> *Id.* at \*2. She "eventually told [the] defendant to stop and drive her home," which he did after warning her not to tell anyone what he had done. *Id.* As it happened, J.R. disclosed the abuse immediately. *Id.* When confronted by J.R.'s father, the defendant admitted to "touch[ing] the girl in an inappropriate manner." *Id.*

afraid, and she froze.<sup>143</sup> J.R. did not specifically indicate that she was unwilling to engage in sexual contact; nevertheless, because the case arose in an affirmative consent jurisdiction, she was deemed not to have consented.

Another case to display the paralyzing effects of an abrupt assault is *State of New Jersey in the Interest of K.B.*<sup>144</sup> On the day of the incident, the twelve-year-old victim, D.J., was spending time after school with the fourteen-year-old defendant, K.B., along with their mutual friends.<sup>145</sup> At one point in the afternoon, K.B. asked D.J. if she was a virgin, and she told him she was.<sup>146</sup> A few hours later, one of the teenagers told D.J. that K.B. wanted to talk to her.<sup>147</sup>

The court summarized what followed:

[D.J.] followed K.B. into the bathroom and sat on the sink. The door was closed. It was dark but she could see a little bit from a light coming from the kitchen. “He then put [her] on the floor and he pulled [her] pants and panties” halfway down her legs, a little below her knees. He then “put his dick in [her] pussy.” She did not want him to do this and he hurt her; while he was doing this she did not say anything because he had his hand over her mouth, although she made noises that were like “moaning and screaming put together.”<sup>148</sup>

Citing the requirement of “affirmative and freely-given permission,” the appellate court upheld the trial court’s finding that D.J. did not consent to sexual intercourse.<sup>149</sup>

The last subset of cases in the fear category involves familial relationships. In many ways these cases resemble those involving trust and surprise. But here, the dynamics of incest augment the element of surprise, resulting in passivity on the part of the victim. Where ongoing incest is involved, the victim’s fear often becomes sufficiently intense, having accumulated as a result of repeated assaults, as to overwhelm her capacity to demonstrate a lack of consent.<sup>150</sup> In these

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<sup>143</sup> See *M.C. v. Bulgaria*, Eur. Ct. H.R. 39272/98, 146 (2003) (noting American courts’ reliance on evidence that “some women become frozen with fear at the onset of a sexual attack and thus cannot resist”).

<sup>144</sup> *State ex rel. K.B.*, No. A-2001-11T2, 2013 WL 3340654 (N.J. Super. App. Div. June 28, 2013).

<sup>145</sup> *Id.* at \*3.

<sup>146</sup> *Id.* at \*4.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* When confronted by the police, K.B. first denied having any sexual contact with D.J., but then admitted to penetration, albeit with a willing participant. *Id.* at \*6–13.

<sup>149</sup> *Id.* at \*13. Mistake was not raised as an issue in the case.

<sup>150</sup> See, e.g., *State v. Colson*, 338 N.W.2d 530, 1983 Wisc. App. LEXIS 3799 (Ct. App. Wis. 1983). In *Colson*, the eighteen-year-old adopted daughter of the defendant testified that he “had sexual intercourse with her regularly, often several times per week, over the last four years.” *Id.* at \*3. On one occasion when she objected, the defendant “slapped and kicked her.” *Id.* The girl did

instances, the affirmative consent definition functions to clarify that passivity cannot be equated with consent.

Consider the case of *State v. Hammond*.<sup>151</sup> The defendant lived with his wife and two stepdaughters, including the eighteen-year-old victim.<sup>152</sup> On the night in question, the defendant and the victim (described by the court as “complainant”) were home alone.<sup>153</sup> Because the victim had run in a cross-country meet that day, her legs were sore.<sup>154</sup> The defendant offered her a leg massage.<sup>155</sup>

As the court explained:

Defendant sat on the couch, and she lay across the couch on her stomach with her legs across his. Defendant began massaging her calves. Defendant then moved his hands up her legs, reached under her shorts, and began massaging her lower buttocks. Complainant was uncomfortable but said nothing. Defendant moved one of his hands toward her inner thigh and then penetrated her vagina with one or two of his fingers, up to the second joint, for about two minutes. Scared, complainant remained silent.<sup>156</sup>

Here too, the applicable definition of consent—“words or actions by a person indicating a voluntary agreement to engage in a sexual act”<sup>157</sup>—clarified the legal meaning of the victim’s silence. Although she was too “uncomfortable” and afraid to manifest her refusal to engage in sexual activities with her stepfather, the victim was still deemed not to have consented to digital penetration.<sup>158</sup> It is worth observing that, as with other cases described, a concern for “miscommunication”—or a reasonable mistake as to consent<sup>159</sup>—does not seem warranted on these facts.

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not report the incidents because the defendant “told her that incest was not wrong and that her mother would not put both of them out of the house if she found out.” *Id.*

<sup>151</sup> *State v. Hammond*, 54 A.3d 151 (Vt. 2012).

<sup>152</sup> *Id.* at 153.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *See id.* at 153–54 (“After defendant stopped, complainant went to her room.” At trial, the defendant denied that he had intentionally touched the victim.).

<sup>157</sup> *Id.* at 158.

<sup>158</sup> On appeal, the defendant contended that the jury should have been instructed that it must find that he had “knowledge that he compelled the victim to engage in the sexual act without her consent.” *Id.* The appellate court rejected this argument, observing:

The crux of the defense was lack of intentional sexual contact with complainant, not that defendant perceived her as acquiescing to a sexual advance. Defendant testified that he accidentally “bumped [complainant’s] groin” or “butt,” but denied penetrating her vagina with his fingers. Defendant neither claimed nor suggested a misunderstanding about complainant’s volition, so whether consent or mistake was a valid defense was never a real issue at trial.

*Id.*

<sup>159</sup> *See infra* notes 187–188 and accompanying text.

In sum, the fear cases encompass one of two fact patterns. In the first, the victim indicates her unwillingness to engage in sexual activities, relieving the affirmative consent standard of heavy lifting.<sup>160</sup> In the second set of cases, where an affirmative consent standard performs real work, utter passivity results from fear that is induced by the defendant. A survey of this latter set suggests that, overall, “mixed signals” is not a warranted concern. Rather, the cases in the sample (again, those ending in conviction and appeal)<sup>161</sup> tend to reflect predatory behavior, not confusion. Put differently, the fear cases feature behavior designed to capitalize on a victim’s vulnerability, as opposed to conduct resulting from “miscommunication.”

Nevertheless, there remains the possibility that, even on facts like those described, the defendant could somehow have believed that the victim—passive or even, as some have argued,<sup>162</sup> protesting—consented to sex. This scenario raises the prospect of an interpretative divergence between alleged perpetrator and victim, a scenario that drives critics of affirmative consent.<sup>163</sup>

#### V. MISTAKES AS TO CONSENT

One way to appraise the likelihood of a misunderstanding is to assess the kinds of cases that have arisen in the three “pure” affirmative consent jurisdictions.<sup>164</sup> We should first ask whether the facts of these cases are compatible with the idea that the defendant genuinely mistook the victim’s conduct, or lack thereof, for consent. The plausibility of a mistake, in turn, might inform a sense of how vexed we ought to be about the notion of confusion. As we have seen, the cases in the fear category—along with those in the categories of sleep and intoxication—quite rarely present a tenable claim to a belief in consent.

Admittedly, relying on the case law to assess the viability of a mistake defense has its limitations. For the most part, appellate opinions suggest that, at trial, the defendant advanced a version of events different from the victim’s,<sup>165</sup> meaning that competing accounts tend to diverge factually, rather than hinge on opposing interpretations of accepted events.<sup>166</sup>

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<sup>160</sup> See *supra* notes 31–33 and accompanying text (differentiating between affirmative and non-affirmative consent definitions).

<sup>161</sup> See *supra* note 55 (explaining the selection of cases).

<sup>162</sup> See, e.g., George C. Thomas III & David Edelman, *Consent to Have Sex: Empirical Evidence About “No”*, 61 U. PITT. L. REV. 579 (2000).

<sup>163</sup> See *supra* notes 16–24 and accompanying text.

<sup>164</sup> See *supra* notes 48–52 and accompanying text.

<sup>165</sup> The defendant may provide an account to police, in trial testimony, or both. Of course, he also has a constitutional right not to do so.

<sup>166</sup> See *supra* notes 62, 94–95, 148 and accompanying text.

One case that did raise a “mixed messages” claim, albeit on appeal rather than at trial, is *State of New Jersey in the Interest of S.M.I.*<sup>167</sup> The thirteen-year-old victim (referred to as “the girl”) and S.M.I., a sixteen-year-old adjudicated as a juvenile, were neighbors.<sup>168</sup> On the afternoon in question, S.M.I. came to the victim’s home, where she was alone.<sup>169</sup> She did not invite S.M.I. in, nor did she stop him from entering and heading to her bedroom, although she did tell him that he “must leave because her father would soon arrive home from work and would be displeased with his presence in the house.”<sup>170</sup>

S.M.I. did not comply, but “pressed her for sexual activity, telling her that she was pretty and similar words of flattery.”<sup>171</sup> As the court emphasized, the victim “told him several times and in different ways that she did not want to engage in sexual activity with him and that she was concerned about her father coming home and finding them.”<sup>172</sup> But S.M.I. “persisted, not accepting her declinations.”<sup>173</sup>

The court summarized the victim’s account of what followed:

[T]he juvenile undressed himself and her and engaged in several forms of sexual activity short of intercourse. She did not resist him physically, but she attempted to communicate her discomfort verbally and through passive failure to cooperate with his conduct. She testified that she told him several times that she was too young and did not want to do the things he was doing or suggesting. The juvenile continued to pursue his aims. He lay on top of her, holding her wrists above her head, and eventually he penetrated her in sexual intercourse, using a condom.<sup>174</sup>

In his testimony at trial, S.M.I. “denied outright that he had engaged in any sexual conduct with the girl and, in fact, denied that he had been to her house.”<sup>175</sup> At the conclusion of the trial, the judge “focus[ed] most prominently on the opposing versions of the girl and the juvenile,” and concluded that the victim’s “testimony about the incident itself” was credible.<sup>176</sup>

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<sup>167</sup> *State ex rel. S.M.I.*, No. A-4222-10T2, 2012 WL 1473326 (N.J. Super. Ct. App. Div. Apr. 27, 2012).

<sup>168</sup> *Id.* at \*1.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at \*2. “The State had no forensic evidence of a sexual assault, apparently because the police only learned about the incident eight days after it occurred, and also because the juvenile had allegedly used a condom, thus making it unlikely that his DNA could be recovered from bedding or clothing.” *Id.*

<sup>176</sup> *Id.* Later, “[a]t a disposition hearing, the judge imposed a term of three years at the Training School for Boys but suspended the term on condition that the juvenile successfully complete two years of probation and complete the Capital Academy Program.” *Id.* at \*3.

On appeal, S.M.I. challenged the sufficiency of the evidence of “force or coercion.”<sup>177</sup> Under the governing framework,<sup>178</sup> the fact finder must determine “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 permission to the specific act of penetration.”<sup>179</sup> S.M.I.’s argument—which, it should be noted, directly contradicted his testimony at trial<sup>180</sup>—is worth scrutinizing, especially as it bears on the confusion concern that has come to dominate the discourse surrounding affirmative consent.

As the court explained:

Here, the juvenile argues that the mixed messages communicated by the girl led him to believe reasonably that she was a willing sexual partner. His reasonable belief arose from her allowing him into her house and bedroom, kissing him, returning to the bedroom after she left to use the bathroom, and staying when she had multiple opportunities to leave or to order him out of her house. The juvenile argues that the girl never attempted to stop his conduct, which together with the ambivalence of her communications and conduct caused him to believe that her only concern was her father coming home and not the sexual activity itself.<sup>181</sup>

On these facts, in contrast to the vast majority of cases that constitute the jurisprudence of affirmative consent, it might not be farfetched to surmise that S.M.I. proceeded on the assumption that he could substitute his judgment for the victim’s.<sup>182</sup> However, as the appellate court noted, this does not mean the defendant actually believed that the victim was providing “affirmative and freely-given authorization.”<sup>183</sup> Far from it: “[t]he evidence permitted the judge to find that the girl said ‘no’ a number of times, but the juvenile would not cease his

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<sup>177</sup> *Id.* In particular, he asserted that, “the evidence was insufficient to refute his reasonable belief that the girl had consented to the sexual activity.” *Id.*

<sup>178</sup> See NEW JERSEY CRIMINAL MODEL INSTRUCTIONS, SEXUAL ASSAULT (FORCE/COERCION), *supra* note 35 and accompanying text.

<sup>179</sup> S.M.I., 2012 WL 1473326 at \*4 (“[s]uch 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”) (quoting *State ex rel. M.T.S.*, 609 A.2d 1266 (N.J. 1992)).

<sup>180</sup> See *supra* note 62 and accompanying text (noting, as a general proposition, that competing versions of event tend to diverge factually).

<sup>181</sup> S.M.I., 2012 WL 1473326 at \*4.

<sup>182</sup> The argument is premised on the idea that S.M.I. disregarded the girl’s expressed “ambivalence” because the concern he believed it reflected—that her father would return home to find him there—was unimportant (or, more precisely, less important than his desire to have intercourse at that moment).

<sup>183</sup> *Id.* at \*3.

efforts. The judge concluded that the juvenile's persistence amounted to coercion in the circumstances of this case."<sup>184</sup>

Even in this case, which may come as close to any we have seen to the "gray zone," a judge dispensed with the idea that a mistake was made. But let us assume for the moment that S.M.I. did in fact believe that the girl was consenting. What then?<sup>185</sup>

This hypothetical, as we have seen,<sup>186</sup> animates a good deal of opposition to the move toward affirmative consent in criminal law. As I have shown, cases in which this hypothetical is arguably salient appear to be an exceedingly small portion of the whole. Even so, the question of "what then?" deserves an answer, which the development of doctrinal rules can provide.

As a general rule, a person is not guilty of rape if he possessed a genuine and reasonable belief in consent as defined by the applicable statute.<sup>187</sup> This means that, where a defendant is actually confused, the criminal law has created an outlet for evaluating whether this confusion is justified.<sup>188</sup> As the discourse surrounding affirmative consent evolves, this feature of the criminal law should not be overlooked.

## VI. CONCLUSION

Affirmative consent has become the rule on college campuses. But whether to migrate this standard to the criminal law is a subject of ongoing debate. This debate has been mired in speculation about how affirmative consent definitions would be implemented. Yet the fears of critics are belied by what we have seen transpire in a trio of "pure" affirmative consent jurisdictions. A close look at the

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<sup>184</sup> *Id.*

<sup>185</sup> The appellate court implicitly alluded to the normative dimensions of this question when it underscored, "the bottom line . . . is that no means no." *Id.* at \*4.

<sup>186</sup> See *supra* notes 16–24 and accompanying text (describing common objections to affirmative consent).

<sup>187</sup> See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 595–96 (2009) (emphasis in original). As Dressler explains:

Rape is ordinarily denominated as a general-intent offense in non-Model Penal Code jurisdictions. As such, a defendant need not possess an intent that sexual intercourse be nonconsensual. It is enough that he possessed a morally blameworthy state of mind regarding the female's lack of consent. Therefore, the general rule is that a person is not guilty of rape if he entertained a genuine and reasonable belief that the female voluntarily consented to intercourse with him. This rule conforms with ordinary common law mistake-of-fact principles relating to general-intent offenses.

*Id.*

<sup>188</sup> The "reasonable mistake" defense to rape raises complex doctrinal and conceptual issues. For a discussion of the problem of misinterpretation and the limits of existing models of consent, see Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1417–1420 (2005).

cases that have arisen in these states surfaces a number of important facts about affirmative consent on the ground.

As a rule, in cases involving sleep, intoxication, and fear, where we often (though not invariably) see passivity, a requirement of affirmative consent formalizes an understanding that is, or is becoming, uncontroversial: a victim who is unconscious, sleeping, or immobilized by fright does not consent to intercourse simply by virtue of not resisting. I have argued that the facts of the affirmative cases bear out this understanding, or—at a minimum—cohere a realistic framework for evaluating the proposition.

Miscommunication appears to be far less of a concern than opponents have suggested, although it is nevertheless important to allow for the possibility. In those cases where a plausible claim of mistake arises, the inquiry into reasonableness becomes paramount.<sup>189</sup>

The law of affirmative consent, on the books and in practice, provides a platform for engaging the normative facets of defining rape.<sup>190</sup> The wisdom of importing an affirmative consent requirement to the criminal law will surely not be resolved by a descriptive account alone. But reframing the conversation so that it does not depend on unlikely assumptions should enhance the next phase of reform.

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<sup>189</sup> See *supra* notes 187–188 and accompanying text.

<sup>190</sup> The normative dimensions of affirmative consent are profoundly important. As I have written:

For most of our history, women’s sexuality has been variously denied, controlled, and harnessed. Today, women insist on the positivity of sexuality, or at least its potential.

While social forces continue to construct sexuality in ways that warrant resistance, it can be said—emphatically—that expressions of sexual consent have meaning.

Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335, 352 (2013). See also Tuerkheimer, *Rape On and Off Campus*, *supra* note 6, at 40–43 (arguing that affirmative consent definitions underscore and promote the agentic quality of sexuality).