

## San Diego Law Review

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Volume 53  
Issue 3 2016

Article 2

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10-1-2016

### Better Sex Through Criminal Law: Proxy Crimes, Covert Negligence, and Other Difficulties of “Affirmative Consent” in the ALI’s Draft Sexual Assault Provisions

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#### Recommended Citation

Kevin Cole, *Better Sex Through Criminal Law: Proxy Crimes, Covert Negligence, and Other Difficulties of “Affirmative Consent” in the ALI’s Draft Sexual Assault Provisions*, 53 SAN DIEGO L. REV. 507 (2016).  
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# Better Sex Through Criminal Law: Proxy Crimes, Covert Negligence, and Other Difficulties of “Affirmative Consent” in the ALI’s Draft Sexual Assault Provisions

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\* © 2016 Kevin Cole. Professor, University of San Diego School of Law. Many thanks to my colleagues Larry Alexander, Don Dripps, Mark Lee, Shaun Martin, Dave McGowan, and Chris Wonnell for their helpful comments on an earlier draft. Thanks also to Amanda Lomnicky for her excellent research assistance.

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## ABSTRACT

*The American Law Institute’s draft amendments to the Model Penal Code’s sexual assault provisions address the problem of unwanted sex through the use of proxy crimes. The draft forbids sex undertaken in the absence of certain objective indicia of willingness, or in the presence of certain objective indicia of unwillingness, even though the serious harm of sex with an unwilling partner does not always result from those situations. Proxy crimes are sometimes justified, as is the draft’s requirement that an express “no” be respected in the absence of subsequent words or actions by a partner rescinding the “no.” But proxy crimes also carry risks, some of which—in addition to other problems—are displayed by the draft’s requirement that sex occur only in the presence of “agreement” by the partner. Like any “affirmative consent” approach, the draft’s “agreement” standard must either embrace requirements that many will find objectionable or risk devolving into punishment for simple, tort negligence—or less. Imposing liability on a tort negligence standard would conflict with the Model Penal Code’s general insistence on subjective liability as a predicate to criminal liability. It would also strike many as a regrettably low standard for labeling an actor as a sex offender, and it would risk deterrent losses over time by diluting the stigma associated with the label.*

## I. INTRODUCTION

The American Law Institute's (ALI) draft revision of the Model Penal Code's sexual assault provisions is an impressive work, in many respects improving on the Code and on existing law more generally.<sup>1</sup> It often replaces open-ended concepts like "consent" with clear rules addressing how to resolve borderline questions—for example, the kinds of coercion that make sexual encounters criminal.<sup>2</sup> It also sensibly—though perhaps controversially—implements a "no-means-no" rule in sexual relations.

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1. The draft has been through multiple iterations. In Spring 2015, the ALI membership debated MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Discussion Draft No. 2, Apr. 28, 2015) [hereinafter APRIL DRAFT]. Following the meeting, the reporters presented another draft to its advisory group, MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Preliminary Draft No. 5, Sept. 8, 2015) [hereinafter SEPT. DRAFT]. This draft was partially supplanted by MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Council Draft No. 3, Dec. 15, 2015) [hereinafter DEC. DRAFT]. Additional changes were made in a memorandum from the reporters dated Jan. 17, 2016 [hereinafter 2016 Memorandum]. The first iteration of this Article, focusing on the April draft, is available on SSRN. See Kevin Cole, *Better Sex Through Criminal Law: Proxy Crimes, Covert Negligence, and Other Difficulties of "Affirmative Consent" in the ALI's Draft Sexual Assault Provisions* (Oct. 7, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2670419](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2670419) [<https://perma.cc/PU52-EWJZ>] [hereinafter Cole, *October Draft*]. I posted a separate piece about the project in January 2016, responding to the ALI's post-April drafts. See Kevin Cole, *Backpedalling in Place: The ALI's Move from "Affirmative" to "Contextual" Consent* (Jan. 11, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2714057](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2714057) [<https://perma.cc/B7YT-FC4G>] [hereinafter Cole, *January 2016 Draft*]. This Article largely tracks the organization of the October Draft, omitting certain portions that are less significant in light of subsequent ALI drafts. This Article also incorporates certain aspects of my January 2016 draft. After I posted my January draft, the reporters made additional changes, which I discuss in Kevin Cole, *Like Snow to the Eskimos and Trump to the Republican Party: The ALI's Many Words for, and Shifting Pronouncements About, "Affirmative Consent,"* (Mar. 23, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2753718](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2753718) [<https://perma.cc/4WCM-K3BA>].

2. Though it is in most respects exhaustive, the commentary does not discuss this respect in which it departs from the approach in some jurisdictions. But the result appears clear from the text. Section 213.4(1) forbids sexual penetration if an actor "obtains [the partner's] consent" by making any of the threats specifically enumerated. APRIL DRAFT, *supra* note 1, § 213.4(1). Obviously, the provision would never apply if those threats precluded a finding of "consent." If the listed threats do not preclude a finding of "consent," as the draft uses the term, then other threats should not do so either. That conclusion is not troubling, as sex obtained through the use of threats not listed in Section 213.4(1)—like the threat to do physical harm—are criminalized without any reference to the term "consent." See, e.g., *id.* § 213.1 (forcible rape defined without reference to "consent"). On the changes to the definition of consent since the April Draft, some of which could be viewed as undermining the position in the text through adoption of a requirement that consent be freely given, see Cole, *January 2016 Draft*, *supra* note 1, at 4 & n.14.

The work is supported by elaborate commentary that generally canvasses prior practice and illustrates the sometimes intricate workings of the draft provisions, notwithstanding the infrequency with which some of those provisions will come into play.

On a casual read, the draft may be congenial to those impressed by the Model Penal Code (MPC), the promulgation of which is among the ALI's greatest accomplishments.<sup>3</sup> The Code generally eschewed a negligence—or “objective”—standard of criminal liability. Instead it preferred a “subjective” approach that requires conscious advertence to risk—MPC “recklessness”—as a minimum culpability requirement.<sup>4</sup> The clueless were not deemed criminal. They might well need to compensate their victims for injuries, but the Code rejected the idea that criminal punishment was a form of compensation.<sup>5</sup> Similarly, the new sexual assault draft criticizes criminal liability for negligence.<sup>6</sup> In addition, the draft endorses the kind of clarity in the criminal law typified by the Code, and the draft's elaborate commentary signals the same careful attention to detail emblematic of the Code.<sup>7</sup> Reflecting a more recent emphasis among criminal law scholars, the draft commentary opens by acknowledging the United States' problem of overcriminalization.<sup>8</sup>

Closer inspection, however, gives cause for concern. The problem is in the draft's implementation of an “affirmative consent” model. In this respect, the draft is imprecise. That imprecision in itself is a significant problem

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3. References to the Code throughout are to MODEL PENAL CODE (AM. LAW INST., Official Draft and Explanatory Notes 1985) [hereinafter CODE].

4. See CODE, *supra* note 3, § 2.02(3). The Supreme Court has recently expressed similar views. See *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (“[A] ‘reasonable person’ standard is a familiar feature of civil liability in tort law, but is inconsistent with ‘the conventional requirement for criminal conduct—awareness of some wrongdoing.’ . . . Having liability turn on whether a ‘reasonable person’ regards the communication as a threat—regardless of what the defendant thinks—‘reduces culpability on the all-important element of the crime to negligence,’ and we ‘have long been reluctant to infer that a negligence standard was intended in criminal statutes[.]’” (citations omitted)).

5. See CODE, *supra* note 3, § 1.02(1).

6. See APRIL DRAFT, *supra* note 1, § 150–53.

7. See *id.* at 1–10.

8. *Id.* at 11–12. Despite extensive commentary accompanying prior drafts, the overcriminalization language did not appear until the April 2015 draft. See *id.* It was added in a revision that did not reduce penalties or eliminate crimes reflected in prior drafts. See Memorandum from the Am. Law Inst. Members & Advisers on Revisions to Sexual Assault Provisions of the Model Penal Code to Am. Law Inst. Dir., Deputy Dir., Project Reporters, Council and Members (May 12, 2015). Some advisors to the project have cited overcriminalization in opposition to aspects of the draft. See *id.* We should be better equipped now to recognize the costs of criminalization than we once were. But it is hard to view overcriminalization as a reason not to criminalize something new if the case can be made for doing so, rather than as a reason to reduce criminalization in places where it is excessive.

in a model code.<sup>9</sup> Moreover, the imprecision requires that normative assessment of the draft proceed in the alternative, exploring the various plausible ways in which the draft might be interpreted and implemented.

On its most plausible reading, the draft deviates significantly from the Code's commitment to subjectivism and clear liability standards. Under the April 2015 draft, the deviation would have affected the legality of every sex act between individuals who are not in an intimate, cohabiting relationship, as well as a fair number of sex acts within such relationships; in later drafts, the difficulty applies only to crimes of penetration, defined broadly enough to include digital penetration and oral sex.<sup>10</sup> The problem is not that the draft deviates from the sexual assault provisions in the Code; evolving social conceptions render many of those provisions archaic today—as some of them may have been when adopted. The problem is that the draft's approach deviates from the Code's general approaches to criminal liability, which remain sensible today, and does so without acknowledging those deviations and analyzing the case for and against them.

The draft employs overinclusive rules—proxy crimes—to address the problem of unwanted sex.<sup>11</sup> A proxy crime protects against social harm indirectly. The harm in sexual assault depends on the subjective mental state of the partner—whether the partner is willing to engage in the sexual activity, or perhaps, as the draft sometimes suggests, whether the partner welcomes the activity. The draft employs proxy crimes to protect that interest. It requires certain objective indicia of the partner's mental state and precludes sexual activity in the face of certain objective indicia of the partner's unwillingness. These are proxy crimes because they target a state of affairs—sex without certain indicia of willingness—for the purpose

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9. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 *NEW CRIM. L. REV.* 319, 331–32 (2007).

10. Compare SEPT. DRAFT, *supra* note 1, § 213.2 (defining sexual penetration against the will or without consent as when the actor “knows or recklessly disregards a risk” that the victim, who is “not the actor’s spouse or intimate partner,” has not expressed consent), with APRIL DRAFT, *supra* note 1, § 213.2 (defining sexual penetration against the will or without consent as when the actor “knowingly or recklessly engages in” sexual penetration with a person that “has not given consent”). On the progression of the drafts, see *supra* note 1.

11. For a description of proxy crimes and the literature about them, and an arguably too-grudging view of their utility, see LARRY ALEXANDER & KIMBERLY KESSLER FERZAN WITH STEPHEN J. MORSE, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 66–67, 309–13 (2009).

of avoiding a harm that may not be present even when the proxy crime is committed. For example, the draft itself cites studies indicating that partners sometimes say “no” when they don’t really mean it. Thus, criminalizing sex in the face of a “no” is a kind of proxy crime.

Proxy crimes are sometimes justifiable—when the correlation between proxy crime and harm is high, when the proxy crime helpfully guides behavior, and when the proxy crime is capable of clear expression. The draft’s “no-means-no” rule is an example, at least if it is sensitively implemented.<sup>12</sup> But proxy crimes raise concerns often lacking when a crime’s definition focuses more directly on the actual harm the crime seeks to avoid. The draft’s affirmative-consent provisions fall victim to some of the risks inherent in proxy crimes, as well as some others. As a result, the draft is objectionable as a basis for declaring an actor to be a criminal sex offender.

Revisions to the draft purported to shift from an “affirmative” to a “contextual” approach to consent. But the change was a modest one—indeed, it is unclear that the change would alter the result in any case from that under the prior drafts that explicitly embrace the “affirmative consent” label. More important, the change does not eliminate the central inconsistency between the draft and the Code’s general preference for a subjective approach to criminal liability. In short, by retaining an “objective” approach to consent, it deviates from the Code’s usual requirement of subjective culpability regarding the social harm that makes conduct criminal.<sup>13</sup>

Part II provides an extended overview of the problem. It sets forth how the April draft implemented its affirmative consent model—a form of criminal proxy crime—through reliance on the concept of “positive agreement” and how dropping the word “positive” in subsequent drafts, while eliminating some interpretive difficulties, fails otherwise to alter the analysis. It explains some of the risks of employing proxy crimes and argues that the most likely approaches to the draft’s imprecise standards would impose punishment on actors who manifest no more than simple tort negligence. The draft’s proxy rules stand in stark contrast to the Code’s usual concern that criminal punishment be reserved for the seriously culpable. The Part suggests that the draft’s salutary reforms might well be accomplished in ways more consistent with the Code. The Part concludes with an overview of the sections that follow, which explore in more detail a few aspects of the argument on which some readers might prefer greater detail.

After this Article was complete, in Spring 2016, the ALI membership rejected the draft’s objective definition of consent, instead defining it in

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12. See *infra* note 53 (discussing issues raised by the “no” rule).

13. See Cole, *January 2016 Draft*, *supra* note 1, at 3–9.

the way suggested in this Article—as “a person’s willingness to engage in a specific act of sexual penetration or sexual contact.”<sup>14</sup> However, this Article’s analysis of earlier version of the draft will remain helpful. It demonstrates the problems that will attend any effort to define consent in objective terms—a central feature of all affirmative consent provisions.

## II. AN EXTENDED OVERVIEW OF THE DRAFT AND ITS DIFFICULTIES

The April 2015 draft defined “consent” to “mean[] a person’s positive agreement, communicated by either words or actions, to engage in a specific act of sexual penetration or sexual contact.”<sup>15</sup> Under the April draft, this affirmative consent provision was critical to determining the legality of every sex act between individuals who were not in an intimate, cohabiting relationship.<sup>16</sup> Acts of penetration—which include digital penetration and oral sex—that occurred without positive agreement were misdemeanors.<sup>17</sup> Other sex acts—ranging from touches to hugs to kisses to gropes—were petty misdemeanors if they occurred without the requisite “positive agreement.”<sup>18</sup>

The concept of “positive agreement” was also important in applying the “no-means-no” provisions.<sup>19</sup> Penetration accomplished after a partner’s “no” was a third-degree felony; other sexual acts performed after a “no” were misdemeanors.<sup>20</sup> These provisions applied regardless of whether the actor and partner were involved in an intimate, cohabiting relationship. “Positive agreement” came into play under these provisions if conduct occurring after a “no” would plausibly be viewed as revoking the “no.”<sup>21</sup>

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14. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Amendment to Section 213.0, May 17, 2016) [https://www.ali.org/media/filer\\_public/11/1f/111f13e9-b34c-4a5f-b699-87b3f4f3de47/stith-motion-approved-by-membership.pdf](https://www.ali.org/media/filer_public/11/1f/111f13e9-b34c-4a5f-b699-87b3f4f3de47/stith-motion-approved-by-membership.pdf) [<https://perma.cc/4TY5-GVET>]; see also Bradford Richardson, *American Law Institute Rejects Affirmative Consent Standard in Defining Sexual Assault*, WASH. TIMES (May 17, 2016), <http://www.washingtontimes.com/news/2016/may/17/american-law-institute-rejects-affirmative-consent/> [<https://perma.cc/AM8S-BUVZ>].

15. APRIL DRAFT, *supra* note 1, § 213.0(3).

16. See *id.* § 213.9. An “intimate partner” was defined as “a person who, at the time of the alleged offense, was in a legal or common-law marriage, domestic partnership, or sexually intimate relationship involving cohabitation with the complainant.” *Id.* § 213.9(7)(a).

17. *Id.* § 213.2(2).

18. *Id.* § 213.6(3).

19. See § 213.2(1)(a) cmt. at 46.

20. *Id.* § 213.2(1)–(2).

21. *Id.* § 213.2(1)(a).



The oddly worded<sup>22</sup> provision imposed liability for penetration if the partner “has expressed by words or conduct his or her refusal to consent to the act of sexual penetration; a verbally expressed refusal establishes such refusal in the absence of subsequent words or actions indicating positive agreement.”<sup>23</sup> The draft commentary cites studies suggesting that the number of cases in which consensual sex occurs after a “no” is nontrivial.<sup>24</sup> So while much can be said in favor of such a rule, the rule would have operated in a significant number of cases, and the question of “positive agreement” would likewise arise in those cases.

Responding to harsh criticism, the September 2015 draft abandoned its affirmative consent approach to sex acts short of penetration, though it continued to define “penetration” to include digital penetration and oral sex.<sup>25</sup> After criticism of the September draft, the December 2015 draft purported to reject affirmative consent altogether. The December draft deletes the word “positive” and adds language clarifying that omissions to act, like the failure to object, can be considered in determining whether agreement exists, though consent may be lacking even in the absence of objection.<sup>26</sup> The January 2016 draft made few changes and only one change in the

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22. As drafted, the provision might be read to permit withdrawal of verbally expressed refusals but not those expressed by conduct—or to imply that different standards apply to finding withdrawal in the two situations. More plausibly, the provision simply seeks to reinforce that solely verbal refusals suffice to trigger the “no-means-no” rule.

23. APRIL DRAFT, *supra* note 1, § 213.2(1)(a).

24. *See id.* at 46; *see also* STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 267–68 (1998) (“Most women (at least 60 % in most studies) say ‘no’ *only* when they mean it.”).

25. *See* SEPT. DRAFT, *supra* note 1, § 213.0, at 2.

26. DEC. DRAFT, *supra* note 1, § 213.0(3) provides:

(3) “Consent”

- (a) “Consent” means a person’s agreement to engage in a specific act of sexual penetration or sexual contact, evidenced by words, conduct, or both, including both acts and omissions, as assessed under the totality of the circumstances; provided, however, that agreement does not constitute consent when it is the product of the force, fear, restraint, threat, coercion, or exploitation specifically prohibited by Section 213.1, Section 213.4, or Section 213.6 of this Article.
- (b) Consent may be expressed or it may be inferred from the totality of a person’s conduct. Neither verbal nor physical resistance is required to establish the absence of consent, but lack of physical or verbal resistance may be considered, together with all other circumstances, in determining whether a person has given consent.
- (c) Consent can be revoked at any time prior to or during the act by communicating unwillingness through words, conduct, or both. A verbal expression of unwillingness suffices to establish the lack of consent, in the absence of subsequent words or conduct indicating positive agreement prior to the act in question.

black-letter provisions, replacing the requirement that consent be assessed “under the totality of the circumstances” with language requiring that it be assessed “in the context of all the circumstances.”<sup>27</sup>

Unfortunately, both “positive agreement” and “agreement” are imprecise tests for imposing criminal liability.<sup>28</sup> The draft commentary, if adopted by a jurisdiction construing the vague statutory text, would add some clarity, but only at the ends of the continuum.<sup>29</sup> The April draft stated that positive agreement cannot be inferred from total passivity—the absence of any “words or action” by the partner.<sup>30</sup> On the other end of the continuum, positive agreement certainly exists if a partner tells the actor, “Penetrate me now,” or “Initiate oral sex,” or “Kiss me on the lips,” or “Kiss me on the neck.” But the draft commentary makes clear that these kinds of verbal authorizations, while sufficient, are not necessary to a finding of

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27. 2016 Memorandum, *supra* note 1, § 213.0(3)(a). It is not entirely clear why this change was made. Perhaps the drafters intend to bolster a textual argument that only activity temporally proximate to the sex act in question can be considered in assessing whether agreement exists. Commentary to the April draft asserted as much. *See* APRIL DRAFT, *supra* note 1, § 213.9 cmt. at 145 (“[T]he Code makes clear that the consent must accompany the specific disputed act, which reinforces the factfinder’s responsibility to focus on a particular incident, rather than the history between the partners.”). *But see* DEC. DRAFT, *supra* note 1, § 213.2 cmt. at 5 (valid consent mentioning partners’ past intimacy).

28. Of course, the Code sometimes used “agree”—unmodified—as a basis for imposing criminal liability. Conspiracy is an example. But in those cases, a finding of “agreement” was not the dividing line between culpable and nonculpable conduct. Apart from whether an actor agreed to facilitate a crime, the Code required the actor to have a purpose to facilitate the crime. *See* CODE, *supra* note 3, § 5.03(1); *see also, e.g.*, CODE, *supra* note 3, § 2.06(3)(a)(ii) (a person is an accomplice of another if “with the purpose of promoting or facilitating the commission of the offense, he . . . agrees . . . to aid such other person in planning or committing” the offense). *Cf.* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 400–01 (vague provisions should be viewed more skeptically when they draw the line between lawful and unlawful conduct than when they create “interior” offenses, the purpose of which “is not so much to inform citizens of what conduct is prohibited as it is to create or increase criminal penalties for conduct that is already understood to be absolutely forbidden by independent laws or social mores”). Moreover, “agree” could be read to specify a subjective mental state on the part of the actor. “Agreement” has a more objective cast, suggesting a role for the judge or jury in determining whether the historical facts known to the actor will be interpreted to constitute agreement.

29. It is not entirely clear what commentary from the April 2015 and September 2015 drafts will be altered to accommodate the changes made in the December 2015 draft. The December draft is a partial one, showing some amended commentary but not reprinting the commentary to every section.

30. This position is not made explicit by the black letter of the January 2016 draft, but it could easily continue as an interpretation of what will suffice to show “agreement.”

positive agreement.<sup>31</sup> Clarity about the passivity problem is an admirable reform. But most sex acts do not occur at the pure passivity end of the continuum, and something valuable in intimate encounters would be lost, as the Commentary recognizes, if sexual encounters were required to occur only at the explicit permission end.

For the majority of sex acts, the April draft's proposed statutory text provided little clue about central issues in interpreting "positive agreement." It points in contradictory directions about the enthusiasm the partner must have for the sex act in question, as if it were intended to provide fodder for future arguments among those holding the assorted positions represented in the extensive academic literature on sex offenses. The commentary sometimes speaks as if consent occurs only if the consenting party anticipates an actor's sexual moves with the certainty of a video gamer controlling an avatar. And it simply falls back on the label "positive agreement" when it attempts to explain how the common situation of escalating mutual foreplay might constitute consent to additional acts—an issue that applies even to couples with a long history of intimacy, as only those in cohabiting relationships are exempt from the affirmative-consent provision. Dropping "positive" from "positive agreement" eliminates some questions about meaning but leaves others to be determined, and the provisions and commentary that might have informed the meaning of "positive agreement" will also influence what constitutes "agreement."

Nor does the text clearly address the most important *mens rea* question under its consent rules. Clearly, the draft focuses on the actor's subjective mental state regarding the historical facts leading up to any particular sex act. An actor who thought a partner said "go" when the partner actually said "no" would be exculpated, so long as the actor was not reckless—that is, not consciously aware of a substantial and unjustified risk that the partner had actually said "no." But in the common setting of mutual foreplay, it is unclear whether conviction requires subjective awareness on the critical question—whether the historical facts might be *interpreted* not to constitute "agreement" to additional acts. The problem arises because "agreement"

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31. See APRIL DRAFT, *supra* note 1, at 30 (consent "does not require express verbal assent"); *id.* at 53–54 ("Section 213.2(2) allows words *or conduct* to transmit willingness to engage in sexual intimacy. Some scholars have urged a requirement of explicit *verbal* assent, noting that body language is inevitably ambiguous and a potential source of many false positives. Yet that standard finds no support in existing law and departs too far from current social practice. Section 213.2(2) recognizes the social reality that consensual sexual encounters quite frequently are not preceded by an explicit verbal 'yes.'"); *id.* at 54 ("Section 213.2(2) requires the factfinder to focus on the existence of consent regarding each of the disputed sexual acts, but of course it does not impose on the parties any obligation—as hyperbolic critics sometimes charge—to express their desires in any particular formal terms, much less in writing.").

does not unambiguously mean a partner's mental state, like willingness. Instead, as the drafters seem to intend, "agreement" can be viewed as a set of undefined objective indicia of the partner's mental state.<sup>32</sup> But it would be unusual to say that an actor must have consciously risked whether the law would be interpreted in a given case to mean that the indicia were inadequate.<sup>33</sup>

Perhaps the most likely conclusion is that the draft would be interpreted or applied so as to impose liability under an objective standard. The focus would be on whether a *reasonable* person would have interpreted the historical facts as showing that the actor's partner had the degree of enthusiasm required for the sex act in question, whatever that is ultimately clarified to be, not whether the defendant *consciously disregarded* a substantial and unjustified risk that the partner was unwilling. But because this objective test is hidden in the vague concept of "agreement," the argument about whether liability should be imposed based on negligence—in tension with the approach normally taken in the Code—is never made.

The December draft admits its objective orientation. While acknowledging that "a subjective definition of 'consent' has appeal," it claims that "only a conduct-based conception of 'consent' is workable."<sup>34</sup> Notably, the suggested inevitability of defining "consent" in "objective" terms ignores important data, including the remainder of the draft itself. The Restatement of Torts defines consent explicitly in subjective terms.<sup>35</sup> And the draft itself shows that inquiring directly into an actor's mental state regarding

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32. See *infra* note 34 and accompanying text.

33. See *infra* text accompanying notes 167–68.

34. DEC. DRAFT, *supra* note 1, § 213.0(3), Reporters' Notes, at 2 ("Although a subjective definition of 'consent' has appeal, only a conduct-based conception of consent is workable. In assessing consent, the factfinder must inevitably focus on the parties' actions and words in order to understand both the complainant's subjectively held feelings and fair notice to the defendant of such. Apart from observable acts, there is no fair and reliable way to measure the existence of consent or determine whether the defendant transgressed lawful boundaries. Accordingly, Section 213.0(3) posits that consent is a matter of conduct, and is conveyed by words, acts, or any combination of the two, including both affirmative behaviors and silent acquiescence, as judged under the totality of the circumstances.").

35. See RESTATEMENT (THIRD) OF TORTS § 112 (AM. LAW INST., Discussion Draft Apr. 3, 2014) ("A person actually consents to an actor's otherwise tortious conduct if the person is subjectively willing for that conduct to occur. Consent need not be communicated to the actor to be effective. It can be express or can be inferred from the facts."). See also RESTATEMENT (SECOND) OF TORTS § 892(1) (AM. LAW INST. 1979) ("Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.").

the partner's mental state, though sometimes difficult, is possible. It recognizes a defense in a prosecution for sex in the absence of consent for a spouse or intimate partner of the complainant if "in light of the specific facts and circumstances of that relationship and the context surrounding the disputed act, the actor honestly and reasonably believed that the complainant would welcome the act."<sup>36</sup> If a subjective definition of "consent" is unworkable, so too is the draft's defense.

When the Code imposed liability for negligence, it normally required the elevated form—gross negligence—common prior to the Code.<sup>37</sup> For example, the Code created the crime of "negligent homicide," but the definition of "negligence" in Section 2.02 means that simple tort negligence does not suffice for conviction:

A person acts negligently . . . when he should be aware of a *substantial* and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a *gross* deviation from the standard of care that a reasonable person would observe in the actor's situation.<sup>38</sup>

Hiding a negligence standard within the vague concept of "agreement" would likely shield the covert negligence standard from the protections the Code generally employed when it deviated from subjective culpability standards.<sup>39</sup>

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36. *Id.* § 213.9(2)(b).

37. While the gross negligence standard was common before the Code, some jurisdictions did permit liability based on a simple negligence standard in some settings. For example, in general intent crimes, jurisdictions often required that an actor's mistake of fact be reasonable to exculpate, and simple negligence may have been sufficient. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 12.03[D][1], 158 (5th ed. 2009). The Model Penal Code gives mistakes of fact their logical force in negating the mental state required by an offense, and since the Code almost always requires at least gross negligence to convict, even an unreasonable mistake will be exculpatory unless it is grossly negligent. CODE, *supra* note 3, § 2.04(1).

38. CODE, *supra* note 3, § 2.02(2)(d) (emphasis added).

39. For an example of the gross negligence standard in the sexual assault setting, see SCHULHOFER, *supra* note 24, at 284 (proposing model statute). An earlier draft of the proposed revisions to the Code would have created separate crimes, with lowered penalties, for actors with a mental state of negligence with respect to the draft's other prohibitions, requiring gross negligence rather than simple negligence. *See, e.g.*, PRELIMINARY DRAFT NO. 3 § 213.5(1) (Oct. 30, 2013) [hereinafter PD No. 3] ("An actor is guilty of criminally negligent rape, a felony of the fourth degree, if he or she engages in an act of sexual intercourse when he or she should be aware of a substantial risk that the act occurs under any of the circumstances described in Section 213.1(1)(c) of this Article."); *id.* at 76 (commentary stating that the section "clarifies that the negligence standard rises beyond ordinary, civil negligence and instead requires a showing of gross, criminal negligence."). Neither the previous draft nor the reporter's model statute addresses specifically what *mens rea*, if any, applies to the question of whether certain historical

As an alternative or an adjunct to a negligence standard, courts might interpret the draft's "agreement" provision in certain settings and give instructions about whether certain facts constitute agreement. Indeed, notwithstanding the Commentary's statement that a verbal "yes" is not necessary to establish agreement to intercourse, a court might someday instruct a jury that a verbal "yes" *or equivalent expressive conduct*, like the nod of a head in response to a question, are required to establish "agreement." Other specific rules can also be imagined. Given the range of conduct to which the agreement requirement applies, the opportunities to develop a common law of foreplay are vast.<sup>40</sup> Instructions of this kind might offend due process if applied to conduct that occurred prior to the particular gloss in question, though the constitutional limits are not themselves clear.<sup>41</sup> If retroactive clarifying instructions were permitted, however, standard mistake-of-law doctrine would hold the actor strictly liable for not anticipating them. It may be as a practical matter that judges would articulate only reasonable rules. Even if that is true, however, the result is still that an actor is held liable for simple negligence in failing to anticipate the judicial gloss.

Another possible construction of the draft is that it seeks to decrease the risk of harm required for criminality by the Code—though if this is the draft's aim, it could be achieved without taking on the problems that accompany the vague "agreement" standard.<sup>42</sup> The definitions of both "recklessness" and "negligence" under the Code require the running of a "substantial" risk. Perhaps the drafters wish to impose liability on those

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facts constitute "positive agreement," though the reporter's model act does specify that the culpability provision applies when "knowledge of a *fact* is required" (emphasis added).

40. The phrase derives from Dan Subotnik, "*Hands Off*": *Feminism, Affirmative Consent, and the Law of Foreplay*, 16 S. CAL. REV. L. & SOC. JUST. 249, 249 (2007).

41. While the ex post facto clause does not apply to judicial decisions elaborating on statutes, the due process clause has been held to enforce similar values. But the "promise" of Supreme Court doctrine in this area "has been largely illusory." Harold J. Krent, *Should Bouie Be Bouyed? Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 38 (1997). The doctrine precludes retroactive application of judicial interpretations that are "unforeseeable," but foreseeability has been found for interpretations "that departed considerably from the legislative text and that reversed a settled line of precedent." *Id.* at 38–39.

42. As implied by the text, this shift in requisite risk could be coupled with a focus on objective liability. If "agreement" normally implies an objective assessment of objective manifestations, "positive" could simply be viewed to add the requirement that a reasonable person would think, from those objective manifestations, that the risk of a partner's unwillingness was extremely small—smaller than "substantial."

who run risks—either subjectively or objectively—that are less than “substantial” that their sex partners are unwilling to engage in particular acts. Indeed, the Code’s requirement that risks be “substantial” has been criticized, but the criticisms focus on cases in which actors know they are engaged in wholly antisocial conduct, like running a very small risk of death by discharging a gun because the actor likes to scare people.<sup>43</sup> Consensual sex does not fall into that category, and if some degree of spontaneity and surprise are welcome in sexual relations, running some risk of mistake is a logical corollary. This point applies to the draft’s provisions on sexual penetration, but it applied in spades to the April draft’s provisions that forbid any sexual contact without positive agreement to it; the commentary recognizes the problem but provides little guidance.<sup>44</sup>

On points this important to issues that will arise every day, the statutory text of a model code should provide clear guidance.<sup>45</sup> States adopting

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43. See ALEXANDER, *supra* note 11, at 25–27.

44. The problem in part comes in determining when consensual sex acts authorize additional or different sex acts, or even repetition of the same acts. Does consent to a kiss on the lips entail consent to a kiss on the neck? Does consent to a kiss at T-1 imply consent to a kiss at T-2? Does extended kissing entail consent to sliding one’s hand under a shirt? The commentary illustrates the difficulty in the way it elides the problem: the draft says that a factfinder “may judge the existence of such assent on the basis of the totality of the circumstances, even while considering *each new level* of intimacy separately.” APRIL DRAFT, *supra* note 1, at 54 (emphasis added). The commentary’s discussion of what counts as a new “level” is exhausted by a single example: “Thus, for example, a jury might find that a person willingly engaged in oral sex, but also find that this freely given permission did not extend to vaginal sex that followed.” *Id.* For discussion of the separate problem of the possibility of consent to acts that were not specifically anticipated, see *infra* Part II(D).

45. Arguably, clear rules are incapable of evolving with changing social norms. Negligence standards do not suffer this difficulty. The draft may reflect concerns along these lines. DEC. DRAFT, *supra* note 1, § 213.0(3) cmt. at 1–2 (“[T]he Code takes into account the complexities of mutually desired sexual interaction and leaves room for the evolving character of sexual communication.”); see also SEPT. DRAFT, *supra* note 1, § 213.2 cmt. at 72 (“Article 213 of the 1962 Code, despite its forward-looking posture, became obsolete and embarrassing within a remarkably short period of time. Proposed Section 213.2(2) seeks to assure that the Institute’s work in connection with this revision does not fall victim to a similar fate.”).

Samuel Buell, an advisor to the ALI project, has noted the argument that “[i]f one does not know one is crossing the criminal boundary and one cannot be expected to know where that boundary lies, then one does not deserve sanction.” But he finds the idea

distasteful. It would mean that the law of fraud cannot develop to respond to novel schemes of deception in complex economies, that the law of extortion cannot recognize new forms of impermissible coercion, that the law of bribery cannot respond to changes in the practices of politics and government, and that the law of sexual assault cannot change to encompass new conceptions of consent that are sensitive to better understandings of autonomy. Such hidebound law would leave victims of serious wrongs, and the public, without the redress they are entitled to expect in a society governed by the rule of law.

provisions of the Model Penal Code will not always adopt corresponding commentary. In its current form, the proposed text does not provide sufficient guidance, and even taking the draft commentary into account, clear answers do not emerge on the meaning of “agreement” in the vast majority of cases.

This critique of the draft’s agreement provisions derives from widely accepted perspectives on the criminal law. Indeed, as previously noted, the draft commentary itself embraces each perspective from which the agreement provision is criticized. The draft simply does not examine the agreement provision critically from those perspectives. The draft embraces the Code’s strong preference for subjective rather than objective liability standards, in fact expanding the subjective approach in important respects.<sup>46</sup> It sketches out the problems posed by a negligence standard in the setting of consent to sex, and it embraces the importance of clear liability standards, criticizing vague extant law on other issues. Rather than measuring the agreement provision against these standards, the draft commentary simply defends the provision in its clear application to one type of unusual case—a case where the partner is purely passive—and to the more common instance of sex after an explicit “no.” Each of these cases could be addressed independently, without the needless confusion caused by the “agreement” standard.

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Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547, 594 (2015). Buell’s position seems to reflect a compensatory view of the criminal law not reflected in the Model Penal Code. One might prefer that tort law redress wrongs and that if criminal law is to evolve to meet newly recognized wrongs, it should do so through amendment or through prospective interpretation. In the article referenced above, Buell’s discussion of sexual assault focuses primarily on whether consent can be valid notwithstanding verbal protests and whether it can be valid when coerced by a person in a position of authority over another. Interestingly, in this area the drafts eschew the open-ended approach, adopting rules about conditions under which sex is unlawful rather than relying on undefined terms. See, e.g., DEC. DRAFT, *supra* note 1, §§ 213.4, 213.0(3) (defining conditions negating consent in terms of the specific prohibitions elsewhere in the draft). Of course, even clear, subjectivist criminal law is not entirely “hidebound.” Today, we might expect a jury to convict a person of “recklessly endangering another” by texting while driving. It is not indisputable that the person would have been consciously aware of the risks associated with the practice, but the chance of awareness is sufficiently great, given publicity about the problem, that the person probably would need to convince the jury that he was the exceptional case. In an earlier era, conviction would have been more difficult.

46. The draft defines “recklessly” so as to prevent application of the Code’s intoxication provision, see APRIL DRAFT, *supra* note 1, § 213.0(4), and it requires recklessness regarding age in statutory rape cases, *id.* § 213.5, .7, contrary to the Code’s requirement that mistakes about age be reasonable to exculpate.



Of course, adopting a negligence standard for criminal liability does more than punish the negligent. A negligence standard also permits punishment of those who are reckless or worse, and a negligence standard permits punishment of truly reckless actors who regrettably cannot be proven reckless beyond a reasonable doubt.<sup>47</sup> However, the negligence standard deprives the negligent actor who was not subjectively culpable of the opportunity to convince the trier of that fact, even if the trier will usually be unmoved. Generally, this deprivation was a price that the Code was unwilling to pay for potential deterrent gains. When it did, as with negligent homicide, the gross negligence standard increased the overlap between those convicted and those who were, in fact, subjectively culpable: as one increases the degree that an actor deviates from what a reasonable actor would do, one also increases the chance that the actor was consciously aware of the risk being run, even if the actor could not be found aware beyond a reasonable doubt. The ALI should address the wisdom of imposing criminal liability on those who unwittingly inflict harm in a way that would barely establish tort liability.

The draft has vacillated on the question of penalty. An early draft would have treated intercourse without affirmative consent as a fourth-degree felony punishable by a maximum penalty of five years—a punishment remarkably characterized by the commentary to that draft as “low.”<sup>48</sup> The April draft would have imposed a lower but still significant penalty—it would permit imprisonment for up to a year for intercourse without consent, and when post-“no” words and actions do not constitute “positive agreement,” up to ten years for post-“no” intercourse. The December 2015 draft advocates returning to the fourth degree felony sanction for intercourse without consent, relying on the—modest—changes in the “consent” definition.<sup>49</sup> A justification should be offered for permitting sanctions of this kind, and the stigma and collateral consequences of conviction of a sex crime, based on a showing of tort negligence. This obligation is especially apt in a Model Code ordinarily solicitous of those who are not subjectively culpable.

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47. See CODE, *supra* note 3, § 2.02(5) (when Code criminalizes negligence, more culpable mental states also satisfy *mens rea* requirement).

48. See PD No. 3, *supra* note 39, § 213.3(1). In explaining why prosecution under the lack-of-affirmative-consent provision would not be adequate to punish those who take advantage of clients receiving professional services involving disrobing (like massages), the commentary stated:

[T]he low level of [the] penalty [under the affirmative-consent provision] reflects ongoing cultural conflict about what constitutes a “yes” along with the extent to which positive affirmation is appropriately required before engaging in sexual intimacy. In other words, it is intended to appreciate the subtleties that may arise in the “dating situation.”

*Id.* at 42 (commentary to § 213.1).

49. See DEC. DRAFT, *supra* note 1, § 213.2.

The drafters do not defend a tort negligence standard by arguing that sexual assaults cause greater harm than homicides, where gross negligence is required. To do so would require recognition that the draft criminalizes the most serious sexual assaults in ways that do not turn on the definition of consent, and hence that those offenses are not relevant to any defense of a watered-down liability standard incorporated into the concept of agreement. For example, the draft's provision on consent is not relevant to intercourse accomplished through threat of serious physical harm.<sup>50</sup> Accordingly, deterring these most serious offenses is not part of the cost-benefit analysis when examining the draft's consent rules.<sup>51</sup> Moreover, the agreement standard is not needed to address the draft's concern with partners who suffer from "frozen fright" to the extent that those cases are reduced by the requirement that a single "no" be respected and by education about the "no means no" rule.<sup>52</sup>

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50. See APRIL DRAFT, *supra* note 1, § 213.1(2).

51. The need to focus precisely on the harm sought to be avoided should also inform evaluation of studies that purport to show an epidemic of sexual assault. Some of those studies generate counterintuitive results by lumping together acts that everyone will agree should be criminal with others that are quite different. For a concise evaluation of one such survey, see Eugene Volokh, *She Raped Him, Using Guilt and Arguing*, VOLOKH CONSPIRACY (Oct. 17, 2013, 1:22 PM), <http://volokh.com/2013/10/17/raped-using-guilt-arguing/> [<https://perma.cc/AY6Y-EHWT>]:

Item 3 was labeled as "coercive sex" (itself an unsound label, I think, especially when treated as a subcategory of "sexual violence"); items 1 and 2 were labeled as "attempted rape" and "completed rape." And this could describe rape, if "made" referred to physical coercion, or coercion through the threat of violence. But it could also describe "making" someone do something by cajoling, nagging, or emotional pressure, where the target consented to sex even though deep down inside they would have preferred not to do it (much like many of us consent to many things under the influence of "guilt," "arguing," and "pressuring," especially when this involves someone we know and feel obligated to in various ways). And indeed in the great majority of incidents of supposed "attempted or completed rape" reported by the study, the respondents apparently viewed "made" to refer to such emotional pressure.

For a similar critique of studies that seek to establish the "real rape" myth, see David Gurnham, *A Critique of Carceral Feminist Arguments on Rape Myths and Sexual Scripts*, 19 NEW CRIM. L. REV. 141 (2016).

52. See APRIL DRAFT, *supra* note 1, at 53. If not prevented by knowledge that "no" must be respected, some instances of frozen fright might well satisfy even the draft's requirement of "positive agreement." See *People v. Barnes*, 721 P.2d 110, 119 (Cal. 1986), *quoted in* SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 308–09 (8th ed. 2007) ("The 'frozen fright' response resembles cooperative behavior. Indeed, as [one psychologist] notes, the

Instead, the only argument offered by the drafters that might justify the consent provision's deviation from the Code's subjectivist approach involves the Code's acceptance of conventional mistake-of-law doctrine. That doctrine, of course, is itself in tension with a commitment to subjective culpability. After all, when ignorance of the law provides no excuse, an actor loses even if failure to know the law was reasonable. The drafters never explicitly defend the large and inexact middle of the "agreement" standard with this argument, but they do use the argument to defend the clear aspects of their approach: the requirement that a "no" be honored, and the explicit requirement in the April draft that consent not be inferred purely from inaction.

But using mistake-of-law doctrine to defend the agreement approach as applied to normal sexual encounters would ignore the Code's general approach to crime. That approach greatly cushions the impact of mistake-of-law doctrine. The Code usually criminalized the culpable risking of widely recognized and serious social harms. Almost everyone, in fact, will be aware that the criminal law forbids risking serious social harms, and the rare exception will be grossly negligent. Additionally, if an actor is truly unaware, the actor is likely dangerous enough that subjectivist principles must be subordinated to the need to protect society. The draft's consent rules, on the other hand, focusing as they do on objective indicia of the partner's mental state, are proxy crimes of the sort that the Code largely avoided—over-inclusive rules designed to avoid a social harm that does not inevitably result from violation of the rule. For example, if a verbal "yes" were required to establish consent to sexual intercourse, two persons unaware of the law might engage in intercourse without following the rule but also without experiencing the harm of an unwilling sex act or acting culpably about risking that harm. The same is true, though harder to describe as concisely, when two persons, unaware of what the law considers to be sufficient objective indicia to constitute "agreement," fail to meet that standard while willingly engaging in sex acts with each other.

Even for a subjectivist, a proxy crime can create culpability where otherwise none would exist. In other words, the crime itself might be said to be culpa-genic. Consider the draft's no-means-no rules. If an actor believes that people often say "no" to sex when they are in fact willing to engage in it, the actor can be blamed, consistent with subjectivist principles, if the actor, knowing that society has decided that "no" must be taken as "no," ignores that rule. This is true even if the actor is not consciously aware of a risk that his or her partner is unwilling in the particular case. The draft commentary suggests that the consent rules are culpa-genic in

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'victim may smile, even initiate acts, and may appear relaxed and calm. Subjectively, however, she may be in a state of terror.'").

this way. However, for a proxy rule to be culpa-genic, certain conditions must exist. Key among them is that the rule be clear. The affirmative consent provisions might be culpa-genic at one extreme of the continuum—in saying that consent cannot be inferred from mere passivity, and that a “no” cannot be undone in the absence of subsequent words or actions.<sup>53</sup> But it cannot be

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53. Whether the “no” rule meets the requisite level of clarity will depend on its implementation, as will other questions related to the fairness of the rule. As noted in the text, if the draft is not amended, the “no” rule will be dependent on the “positive agreement” standard on the question of when the “no” has been rescinded, which would carry all of the problems of that vague standard. But the “no” provision raises other questions as well.

For example, assume that, during a session of mutual foreplay, an actor moves into a position clearly preparatory to vaginal intercourse. The partner says “no,” but the actor proceeds with vaginal intercourse anyway. This is a clear violation of the “no” rule, and anyone educated about the passage of a “no-means-no” rule would have to understand that fact.

Now suppose instead that, immediately after the “no,” the actor shifts position and fondles the partner’s vagina, without the partner’s having done anything after saying “no.” The actor subsequently claims that he thought the partner’s “no” related to vaginal intercourse, not to the other kinds of sexual activity in which the two of them had just recently been involved. The draft could be interpreted such that the actor would not be guilty of criminal sexual contact in the fondling. The rule imposes punishment if an actor “knowingly or recklessly engages in sexual contact with another person and . . . the other person has by words or conduct expressly refused to consent to such contact.” APRIL DRAFT, *supra* note 1, § 213.6(2)(c) (emphasis added).

Construing the draft so that a “no” would preclude all subsequent sexual touching in the absence of post-“no” words or conduct—a complete show-stopper, like putting the hands on the hips in roller derby—would not be unclear. That kind of rule, however, would deviate from what we might expect from average people. The gap between the rule and average perceptions would make education more important, and it would predictably lead to more cases in which those not reached by the educational efforts would unwittingly violate the law.

The well-known problem of the duration of the “no” can also be handled by sensitive attention to whether an actor knows or is reckless regarding whether a partner’s “no” is to “the act of sexual penetration,” *id.* § 213.2(1)(a) (emphasis added), or “to such [other sexual] contact,” *id.* § 213.6(2)(c), when the express refusal was to an overture temporally remote from a later overture. If a partner were to say, “Never touch me like that again—I’m not interested in you that way,” an actor would be ill advised to attempt sexual activity even days later in the absence of fairly clear indicia of receptivity; other cases will present closer questions about whether a partner’s words or acts signal a change of heart.

Finally, as the draft recognizes, the “no-means-no” rule might lead to punishment of some actors who are not subjectively culpable because they (1) did not believe the partner’s “no” was genuine and (2) did not know the law required that “no” be respected. *Id.* at 154 (“The principal remaining risk of unfairness lies in the residual possibility that a defendant might in good faith believe, for example, that it was permissible to disregard a verbal ‘no’ when other circumstances led him to infer willingness.”). The practical difficulties in avoiding unwanted sex if a “no” need not be taken seriously are great enough

culpa-genic in most sexual encounters. To say otherwise would modify the ancient *ignorantia legis* maxim contrary to the way that mistake-of-law doctrine operates in the Code: “Ignorance of the law is no excuse, even though there is no way in advance to figure out what the law is.”

The draft itself implicitly recognizes the importance of a law’s clarity when relying on mistake-of-law doctrine to displace actual proof of subjective culpability. However, it does not extend this insight to the many cases that will be governed by the imprecise standard of “agreement.”<sup>54</sup> The Code’s commitment to subjective culpability would be a hollow one if nothing normatively constrains a legislature from repackaging mistakes about facts as mistakes about law.

Many have argued that sex crimes are different in a way that justifies some form of negligence liability. Others have disagreed.<sup>55</sup> The draft should confront this question directly as applied to its agreement standard. Once one recognizes the extent to which the agreement standard incorporates a negligence approach deviating from the Code’s commitment to subjectivism, it is fruitful to consider how damage to subjectivist principles might be limited while still achieving the salutary effects of the draft’s truly culpa-genic proxy crimes. The draft would accomplish important reform if it were simply to declare that “no” must be taken as “no” in the absence of subsequent words or actions indicating consent. Less significantly, but nontrivially, the draft would accomplish important reform if it were simply to declare that consent cannot be inferred in the absence of a partner’s words or actions—that mere passivity cannot suffice. Both of these reforms can be accomplished without swallowing the difficulties caused by defining “consent” in terms of agreement. Both reforms could be part of a provision that generally punishes those who are reckless or worse with respect to the possibility that they are engaged in sex acts with an unwilling partner. If such a scheme accomplishes the main goals of reform, that scheme’s plausibility is relevant to whether a negligence standard is necessary.

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to justify a deviation from subjective culpability here, though an actor who believed a partner was actually willing to engage in sexual relations might present a case for sentencing at levels below the maximum authorized by the draft.

54. APRIL DRAFT, *supra* note 1, at 154. The December draft adds illustrations in its commentary to clarify how the “agreement” standard would work in certain situations. Even assuming that this commentary could be effectively communicated to those governed by it, the examples cannot hope to provide clear guidance in the range of cases that will arise.

55. See SCHULHOFER, *supra* note 24, at 258 (“The argument for expanding liability in rape cases from deliberate wrongdoing to carelessness remains controversial. Most serious felonies . . . require proof that the defendant knew he was causing injury or was aware of a substantial risk.”).

Even if the ALI concludes that sexual assault is sufficiently special to justify employing a negligence standard of criminality, adopting that standard explicitly would reduce the confusion inherent in the current draft. It also would deter courts from the ill-fated attempt to formulate a common law of foreplay through the interpretation of “agreement.” The clear core of the current draft’s proposals—precluding a finding of consent from passivity alone, and precluding such a finding if a “no” is followed only by passivity—can be guaranteed by supplementing an explicit negligence standard with simple and clear rules to that effect. And if considered appropriate, that explicit negligence standard could be framed in a way that would incorporate the requirement of “gross” negligence that applies to prosecutions in the vast majority of other cases in which the Code authorized punishment for negligence.<sup>56</sup>

The problems with the agreement standard are not unique. They will vex any of the so-called affirmative-consent standards—requirements of some particular objective manifestation of consent—that are nuanced enough to be palatable in light of the great variety of sexual interaction that people find desirable, or at least tolerable. Some jurisdictions have already interpreted their affirmative-consent provisions to impose liability for negligence, while others just throw the question to jurors without any guidance as to what affirmative consent means. An alternative objective standard, like a requirement of an affirmative “yes” as a predicate to penetration, would not inevitably reduce to a negligence standard. But as the draft commentary recognizes, such a standard would be unacceptably at odds with social practice. When the clear standards available to govern an area are otherwise objectionable, vague proxy rules will, by their nature, devolve into negligence standards in the ways described above. Those committed to subjectivist approaches will view this as an argument that the criminal law is limited in its ability justly to shape social attitudes. When rules are relatively clear—no means no, don’t drive drunk—there

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56. Although it does not fit the definition of “proxy crime” offered previously, an explicit negligence standard shares certain features with proxy crimes. A negligence standard can be viewed as a proxy crime—the contours of which are elaborated by fact-finders on a case-by-case basis—as they apply the general standard of negligence to specific factual patterns. This process might well be inferior to clearly articulated proxy crimes in guiding behavior. After all, determinations of negligence in particular cases are hard to describe to the public in sufficient detail and the basis for decision is often obscure; whether for those reasons or for some other, they are not typically viewed as having binding effect in future cases. Still, an explicit negligence standard might be preferable to some imprecise proxy crimes.

is a cost, but it may be acceptable. The cost is higher when the reforms cannot be clearly specified.

Of course, the draft's approach is similar to affirmative consent provisions that have found their way into college disciplinary codes.<sup>57</sup> Even in the college discipline environment, one might prefer clearer standards, but one might also believe that colleges should be permitted to discipline and dismiss students on standards that would not justify the imposition of criminal sanctions.

Notably, however, the draft's agreement standard is only loosely related to many of the highly publicized concerns about sex on campus. It is not needed to address the problems raised by date-rape drugs. They are punished in a separate—though arguably under-inclusive—provision that can lead to up to twenty years' imprisonment.<sup>58</sup> Nor does the agreement standard solve the problem of sex actively undertaken by an intoxicated person who later regrets the decision—a category campus affirmative-consent provisions may seek to reach through ad hoc inquiries into how much drink negates consent. The drafters sensibly admit that the search for a test that will identify intoxication-related, “inauthentic” consent is hopelessly metaphysical, and that efforts along those lines have been vague, wrong, or both. Accordingly, the April draft included a provision that has nothing to do with the positive agreement standard and that authorizes up to ten years' imprisonment if an actor recklessly disregards the risk that the partner lacks “the capacity to *express* nonconsent,” an inquiry more manageable and more limited than a focus on whether consent given will be regretted later.<sup>59</sup> The September draft changes that provision in ways

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57. As a condition of public funding, California insists that its public colleges employ an affirmative-consent approach for disciplinary purposes. S.B. 967, 2013–14 Reg. Sess. (Cal. 2014), *quoted in* APRIL DRAFT, *supra* note 1, at 52 n.149.

58. Proposed section 213.1(1)(c) would impose rape liability on an actor who:  
... engages in an act of sexual penetration with a person who at the time of such act ... lacks substantial capacity to appraise or control his or her conduct because of drugs, alcohol, or other intoxicating or consciousness-altering substances that the actor administered or caused to be administered, without the knowledge of such other person, for the purpose of impairing such other person's capacity to communicate, by words or actions, his or her refusal to engage in such act.

*See* APRIL DRAFT, *supra* note 1, at 3. The provision does not criminalize a third party who has sex with the impaired victim knowing that the victim's capacity has been impaired through these devices, so long as the third party did not act in concert with the person who spiked the victim's drink. In this respect the draft follows the Code. *See* CODE, *supra* note 3, § 213.1(1)(b); *see also id.* at 136 (defending rule on grounds that only the person who surreptitiously administers drugs should be responsible for drawing fine distinctions about capacity). This provision is an example of an intentionally underinclusive crime. *See infra* note 117.

59. *See* APRIL DRAFT, *supra* note 1, at 5, 128; CODE, *supra* note 3, at 91 (specifying ten-year maximum imprisonment for second degree felonies).

that raise new problems, but the provision still does not depend on the definition of “agreement.”<sup>60</sup>

The Commentary does suggest that the April draft’s positive-agreement standard, and presumably the December draft’s agreement standard, will work a significant reform in other troubling cases involving a partner’s intoxication—those in which the partner still possesses the capacity to express non-consent but does not affirmatively demonstrate consent. But as this Article discusses more fully below, this suggestion is independently troubling—unless it is simply meant to imply that the draft’s covert negligence standard can take account of the partner’s intoxication, in which case it is troubling for the reasons already discussed in connection with using negligence standards in the criminal law. Instead, the Commentary may be read to imply that some not-yet specified set of objective indicia of consent will be required to demonstrate positive agreement, that that set will be the same regardless of the intoxication of the partner, and that the set will suffice to prevent sex with unwilling and severely intoxicated partners.<sup>61</sup> But if that is what the drafters intend, the scheme illustrates a problem with proxy crimes generally—the extent to which they treat different cases alike and thereby increase risks of injustice. A standard set high enough to protect an extremely intoxicated and inexperienced partner with whom an actor has never before engaged in sexual relations will require indicia of consent that even reasonable people will not perceive as necessary to protect a sober partner who has engaged in sexual relations with the actor previously—assuming that the couple does not meet the cohabitation standard necessary to displace the agreement standard altogether. Accordingly, reasonable people would be more likely to inadvertently violate such a rule than they would be to inadvertently violate a rule more

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60. See Cole, *January 2016 Draft*, *supra* note 1, at 10–11 (discussing the draft’s shift to a standard focusing on whether the partner “is passing in and out of consciousness or is in a state of mental torpor as a result of intoxication” as substantially less clear than prior draft, requiring fine distinctions between “unacceptable ‘torpor’” and “acceptable ‘languor’”).

61. The December draft’s definition of “consent,” by emphasizing the relevance of “the totality of the circumstances,” might have been thought to argue against the conclusion that the actions by an intoxicated partner would be interpreted in the same way as actions by a sober partner. See DEC. DRAFT, *supra* note 1, at 1. But given the commentary on intoxicated actors, the conclusion was not inevitable: one might have argued that the fact of intoxication should be excluded from the circumstances considered. Moreover, the January 2016 draft replaced the “totality” language with an alternative that does not as strongly suggest that all circumstances can be considered. See *supra* text accompanying note 27.



narrowly tailored to sober, repeat players, or a more general standard that allowed consideration of all the facts in drawing conclusions about consent.

No one denies that sex is better when the objective manifestations of consent clearly reveal strong mutual desire. Nor should consent to one sex act entail consent to all other imaginable sex acts. Intercourse by ambush is a noxious practice deserving of condemnation when the actor is aware of a substantial risk that the partner is unwilling. The draft admirably attempts to address at least some of these concerns, but its solution comes at significant cost. Not all people are equally demonstrative in lovemaking, and surprise and spontaneity have a place in the bedroom. Particularly when supplemented with a prohibition on inferring consent from mere passivity and a requirement that “no” be respected unless revoked, a standard focusing on whether an actor was subjectively culpable in proceeding with sex acts will often suffice to protect partners against unwanted sex. The critical question is whether the added deterrence of subjecting actors to the entirety of the draft’s problematic agreement requirement is necessary and fair.

The draft accepts the chance that the state will inflict harms on well-meaning actors who misinterpret their partners’ signals. The chance would be greatly reduced if the draft imposed only the clear core of its consent rules—the requirement that a “no” be respected and that consent not be inferred simply from passivity. And the clear core itself would significantly reduce the risk that partners would be subjected, consciously or not, to sex acts in which they were unwilling to engage.

In the war on drugs, those who legislate are technically subject to the law and simply immune as a matter of practice. By largely exempting married couples and those in intimate, cohabiting relationships from the vagaries of the positive agreement standard, the April draft would have often made legislators not just practically immune, but formally immune. Still, legislators and ALI members should think about how laws will affect those who differ from them. It is important to educate people—especially young people inexperienced in intimate activity—about how sex can go wrong. Using the criminal law to do so, however, imposes a considerable cost. As is often the case, the law’s costs will fall disproportionately on those least like the law’s promulgators.<sup>62</sup>

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62. The December draft eliminates the provision that exempts intimate cohabitants from prosecution for having sex with their partner in the absence of consent. An affirmative defense exists for intimate cohabitants prosecuted for having sex with an unconscious partner or a partner “passing in and out of consciousness or is in a state of mental torpor as a result of intoxication”: the defense exists when “liability is based . . . only on the absence of consent” and “in light of the specific facts and circumstances of that relationship and the context surrounding the disputed act, the actor honestly and reasonably believed that the complainant would welcome the act.” DEC. DRAFT, *supra* note 1, § 213.9(2)(b).

The parts that follow provide further detail on certain aspects of the argument sketched out above. To clarify the discussion of how the draft employs proxy crimes, Part III begins with a brief exploration of how a partner's subjective willingness and the partner's objective manifestations of that willingness relate to the social harm in sexual assault. It continues with a discussion of several key ambiguities in the draft: its inconsistency in describing the level of enthusiasm a partner must have for a sex act and the possibility that "agreement" is intended instead, or in addition, to signal that less than substantial risks of a partner's unwillingness should inform how "positive agreement" is cashed out. It concludes by discussing a point that might at first seem counterintuitive but that is important in defining the boundaries of consent—the possibility that a partner can consent to acts that were not specifically foreseen, and the implications of that possibility for criminal doctrine.

Part IV discusses in more detail how the draft might be interpreted, by judges and juries, so as to impose negligence liability on the question of whether admitted historical facts are interpreted as constituting "agreement." The section also addresses why the Code's embrace of conventional mistake-of-law doctrine fails to justify dispensing with a requirement of subjective culpability regarding this interpretive question. The section then examines the reasons that the draft's explicit requirements of recklessness are unlikely to be construed as applying to the question of whether historical facts are interpreted to constitute "agreement." While isolated commentary in the April draft suggested the drafters' intent to apply the requirement to the interpretive question, that commentary was removed when sex acts short of penetration—broadly defined—were excluded from the "consent" requirement. Even in the April draft, however, other commentary conflicted, and in light of the statutory text, even clear commentary might not have been enough to lead courts to apply *mens rea* requirements to the interpretive question.

Part V addresses some issues raised by the draft's commentary regarding consent by an intoxicated partner. It addresses the continued significance of passivity—and failure to resist—even under the April draft's approach; the discussion helps illustrate why the December draft's shift to "contextual consent" did not much change the draft's approach. The part argues that passivity's probative value varies from setting to setting: it is more probative, for example, for some sex acts than for others, and it is more probative when a partner is mature, sober, and has had sexual relations with the actor in the past. To the extent that the Commentary signals that a single standard of

“agreement” applies regardless of intoxication, it illustrates the problems caused when a proxy rule aggregates cases that are insufficiently similar. A rule sufficient to protect an inexperienced and severely intoxicated partner will be overly protective in other cases, meaning that a significant percentage of non-reckless or even non-negligent actors in those other cases could be deemed to violate the draft’s vague provisions.

### III. THE NATURE OF CONSENT AND THE DRAFT’S AMBIGUITY ON WILLINGNESS, ENTHUSIASM, CERTAINTY, AND FORESIGHT

This section discusses the draft’s ambiguity on some central issues. As background, it first discusses the relationship of subjective and objective consent standards and the draft’s objective approach. That question differs from whether the draft imposes an objective *mens rea* standard, though the terminology is regrettably similar. The focus here is on the victim—is the social harm in sexual assault related to the victim’s subjective mental state, or instead on the victim’s objective manifestations of consent?

The section then explores the meaning of the April draft’s “positive agreement” standard. Despite the elaborate commentary accompanying most of the draft’s provisions, not a word explains the meaning of the word “positive” in the definition of consent. Unfortunately, the word can be read to channel several different ideas that are hinted at in the commentary, all of which are independently troubling. This section explains how the draft’s “positive agreement” standard might be read as seeking to limit consent to cases in which a partner welcomes or is enthusiastic about a sex act, as opposed to merely being willing to engage in the act. Next, it addresses the possibility that “positive agreement” is designed to require a heightened degree of certainty that the partner has the requisite subjective mental state for consent. Finally, it evaluates the possibility that the draft expects that a partner will have a degree of foresight regarding an actor’s lovemaking that many will find unlikely, undesirable, or both.

Some of the argument turns on the implications of the word “positive,” which is no longer part of the draft. However, “agreement” itself is capacious enough to embrace the suggestions set forth in the commentary discussed below.

#### A. *The Relationship of Subjective and Objective Conceptions of Consent*

One can think of consent as being either an objective or a subjective concept. The draft embraces an objective standard. But understanding and evaluating an objective approach to consent requires appreciation of the

harm in sexual assault, which is, at bottom, a subjective one. It is important to understand that a subjective approach is not indifferent to objective manifestations of consent. Once the full sense of the subjective harm in sexual assault is appreciated, attention can profitably be turned to how an objective approach might be interpreted and whether any particular objective approach is sensible.

A simple example helps clarify that the harm in sexual assault turns on the subjective mental state of the victim. Assume that a jurisdiction adopts a requirement that sexual intercourse must be authorized by advance verbal permission. Such a rule would be inconsistent with the commentary's explanation of the "positive agreement" standard, but the example is easier to understand than one put in the draft's vague "positive agreement" language. This "yes" requirement would be an objective rule about consent. Further, assume that two sex partners, unaware of the "yes" requirement, engaged in intercourse at the end of a session of mutually escalating foreplay. Quite plausibly, neither participant would feel wronged in any way.<sup>63</sup> If we feel that the "yes" rule should nevertheless be required, it is likely because we think, in the long run, that the rule will avoid cases in which one participant actually does subjectively experience the serious harm of sexual invasion. In other words, the objective consent standard is a proxy crime, or overinclusive rule, designed to prevent the serious social harm of sex with a partner who is subjectively unwilling.

Viewing the social harm in sexual assault to turn on the victim's subjective mental state does not entail ignoring the absence of objective manifestations of consent in any particular sexual encounter. A partner might be attracted to an actor and strongly desire to have sex with the actor during a particular encounter but still subjectively feel violated if the actor proceeded in the absence of objective indications of the partner's willingness. Willingness to have intercourse after foreplay does not foreclose unwillingness to be abruptly penetrated, and even if a particular partner was willing to be penetrated without giving any objective indicia of willingness, the actor who did so might rightly be convicted of attempted sexual assault if the actor had the requisite mental state regarding the partner's possible lack of subjective willingness.<sup>64</sup>

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63. The focus on both partners presupposes that neither would be perceived as the aggressive partner at the time of intercourse. In theory, a "yes" requirement could make both partners guilty of raping each other in the same encounter.

64. The partner's subjective mental state would be an attendant circumstance if the crime were defined in terms of that mental state. The commentary to the Code would

An objective approach to consent may be justified. To decide if it is, however, one must compare the objective standard to the subjective harm sought to be avoided. A lack of clarity about the subjective harm complicates an assessment of whether the objective standard avoids that harm, and when the objective standard itself is imprecise, a lack of clarity about the subjective harm complicates the interpretation of the objective standard. For example, what “positive agreement” means will depend on whether that objective standard—“objective” in its external nature but not in clarity—seeks to guard against sex with an unwilling partner or sex with an unenthusiastic partner. Sufficient indicia of willingness may be insufficient indicia of enthusiasm.

The draft does little to clarify the subjective harm its objective standard seeks to prevent. This may not be surprising. Just as an objective approach can be badly tailored to avoiding the subjective harm it seeks to avoid, so too can a subjective standard be badly implemented. Subjecting an alleged victim to an extensive examination of the victim’s sexual history is easier to defend—though still ultimately wrong—under a subjective standard. Concluding that an alleged victim who repeatedly says “no” has nevertheless consented is easier to defend—though also dubious—under a subjective standard. Accordingly, explicitly subjective accounts of consent have a bad reputation in some quarters.<sup>65</sup>

But past problematic applications of a subjective standard do not justify use of an objective standard that relates to nothing, and untoward applications of a subjective standard can be guarded against more discretely than by

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permit an attempt conviction when the actor has the purpose to have intercourse and the mental state regarding attendant circumstances that would be required for conviction—presumably recklessness. Even if one were to apply the Code’s “purpose” requirement for attempt to the consent issue, the purpose requirement is satisfied by “belief” in an attendant circumstance—a mental state that would likely exist in a case where the partner has given no objective indication of subjective willingness. See CODE, *supra* note 3, § 5.01 (attempt); *id.* § 2.02(2)(a)(ii) (purpose regarding attendant circumstances is satisfied by belief).

Juries might be confused by being asked to consider an attempt prosecution in a case where penetration clearly occurred. The problem might be avoided by defining the crime in a way that never requires penetration for conviction, much as the Code criminalizes reckless endangerment regardless of whether anyone gets hurt. See Cole, *January 2016 Draft*, *supra* note 1, at 9–10.

65. Consider for example the famous, or infamous, *R v. Morgan*, [1976] AC 182 (HL) (appeal taken from Eng.). On an account that requires a showing of defendant’s subjective culpability regarding consent, *Morgan* can be viewed, if defendant’s story is credited, as a tragic case—the victim has been raped, but there is no rapist. See *id.* at 183. If an objective approach is taken, *Morgan* can be viewed as easy, because defendant was certainly aware of the objective manifestations that can be viewed to establish nonconsent. See *id.* at 186. While *Morgan* is an atypical case that should not distort the rules in ordinary cases, the draft’s “no-means-no” rule would guard against an acquittal in a case like *Morgan*, even without employing the draft’s vague “positive agreement” standard.

rejecting subjectivity altogether. Rape-shield laws and “no-means-no” rules can supplement subjective approaches and guard against the mistakes of the past without creating a new mistake that cannot be mitigated.

*B. The Draft’s Confusing Hints About Enthusiasm*

The draft could easily clarify the relationship between its objective “positive agreement” standard and the underlying subjective harm sought to be prevented. It could define consent as “positive agreement, communicated by either words or actions, indicating *willingness* to engage in a specific act of sexual penetration or sexual contact.” Alternatively, it could define consent as “positive agreement, communicated by either words or actions, indicating that a specific act of sexual penetration or sexual contact is *welcome*.” Indeed, by elaborating what the “words or actions” are meant to show, the draft could profitably dispense with the term “agreement” altogether. Instead, the draft merely hints at the different approaches that might be taken to this central question.

The word “agreement” implies that a partner’s simple willingness to engage in sexual activity is the subjective standard the law seeks to protect. After all, people agree all the time to do things they wish they didn’t need to—for example, selling property or buying goods at the best price offered, rather than at the price hoped for. However, adding “positive” to the phrase “positive agreement” must mean something. One might argue that “positive” simply conveys the idea that “agreement” should not be inferred from mere passivity, but if that is the case, then either “positive” or “words or actions” become surplusage.

Does “positive” imply that the partner must have more enthusiasm for the sex act in question than simple willingness? One dictionary definition might support that conclusion: it focuses on whether an expression is without “reservation.”<sup>66</sup> The commentary does not clearly so state, but it does not clearly indicate to the contrary either. Its references to the partner’s subjective mental state sometimes use the term “willingness”<sup>67</sup> but sometimes suggest

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66. *Positive*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1770 (1986) (“[E]xpressed clearly, certainly, or peremptorily with no doubt, reservation, or unclarity.”); *see also Positive*, XII OXFORD ENGLISH DICTIONARY 166 (2d ed. 1989) (“Explicitly laid down; *expressed without qualification*; admitting no question; stated, explicit, express, definite, precise; emphatic; objectively certain.”) (emphasis added).

67. *See, e.g.*, APRIL DRAFT, *supra* note 1, at 46 (“Permitting persistence in the face of verbal or behavioral indicia of unwillingness unjustly privileges the desires of the aggressor

more.<sup>68</sup> The idea that a partner must be more than willing to engage in sexual activity has been both championed<sup>69</sup> and questioned.<sup>70</sup>

The only time the statutory text refers to the partner's subjective mental state is when it refers to whether the partner found the act "welcome." This reference appears in the provision involving intimate partners, creating an affirmative defense for sex acts with an intimate, cohabiting partner who is unconscious or extremely intoxicated.<sup>71</sup> The language does not appear in any general provision on consent, but nothing in the commentary explains why one would apply a "welcomeness" standard in one setting but not the other. In other words, if an intimate partner is willing but not enthusiastic about being penetrated while asleep or drunk, why should that be criminal if willingness negates the subjective harm in penetration of a conscious partner? Distinctions can be drawn, but the commentary does not do so.<sup>72</sup>

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over those of his or her partner."); *id.* at 47 ("The very fact of that ambiguity, however, insures that error will be inherent in *any* rule for assessing unwillingness for legal purposes."); *id.* at 54 ("Body language such as taking off the other party's clothes and aggressively touching him or her in an ever-more-intimate way may not *inevitably* signal willingness to proceed to intercourse, but it can be sufficiently clear to leave little doubt about the intentions of the person actively initiating these steps.").

68. See, e.g., *id.* at 54 (discussing how the draft "places the onus on the sexually more aggressive party to ensure that each new act is welcome and desired"); *id.* at 127 ("If the actor honestly and sincerely believes the date went well and a sexual overture is welcomed, there should not be liability even if the other person in fact found the date insufferable, and yet continued to be politely accommodating.").

69. For a review of some of the approaches, and criticisms of their workability as legal standards, see SCHULHOFER, *supra* note 24, at 82–88.

70. See Larry Alexander, *The Ontology of Consent*, 55 ANALYTIC PHIL. 102, 108 (2014) (consent is the mental state of waiving one's rights, and waiving means "mentally accepting without objection another's crossing one's moral or legal boundary"); see also Kenneth W. Simons, *The Conceptual Structure of Consent in Criminal Law*, 9 BUFF. CRIM. L. REV. 577, 583 (2006) ("[O]ne can easily fall into the mistake of thinking that legally valid consent to x requires that S eagerly embrace x as that which she desires or chooses in an unqualified way, i.e., that which she would also desire or choose if she believed she was facing a different and more favorable set of options. But this view is too narrow, Westen emphasizes, for it would entail that a woman does not legally consent to sex if she chooses it only because she prefers this to her partner breaking up with her, or even if she merely prefers this to waiting until later in the evening and thereby temporarily disappointing her partner. (For in each case, she does not obtain what she most prefers—the ability to decline intercourse without suffering the loss of the relationship, or the ability to decline intercourse at a particular time without suffering the emotional harm of upsetting her partner.)" (reviewing PETER WESTEN, *THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT* (2004)).

71. APRIL DRAFT, *supra* note 1, § 213.9(5).

72. For example, one could conceptualize the Intimate Partners provision as establishing an overbroad rule—requiring welcomeness—to guard against sex acts the unconscious partner was not willing to tolerate, in light of the special risks of error in this setting.

On the other hand, the provision on Sexual Penetration by Coercion presupposes that positive agreement can be established by acts that signal something less than enthusiasm for the sexual encounter.<sup>73</sup> It criminalizes sex acts obtained by employing certain threats, like a threat to accuse the partner of a criminal offense, but the statute applies only when the actor “obtains the [partner’s] consent” by such a threat.<sup>74</sup> If “consent”—defined as “positive agreement”—required indicia of enthusiasm for the sex act, the crime of Sexual Penetration by Coercion presumably would not apply to most sexual acts induced by threats. Accordingly, the provision implies that “positive agreement” is established by a partner’s simple willingness to go along with a sex act, in preference to a bad alternative or as an accommodation to a more eager partner.<sup>75</sup>

For simplicity, the remainder of this Article assumes that the draft consent provisions are designed to guard only against sex acts imposed on an unwilling partner.

### *C. The Draft’s Confusing Hints About Certainty*

Alternatively, “positive” in “positive agreement” might be read to convey something about how certainly the partner’s words and actions convey willingness to engage in a sex act. One dictionary definition of “positive” lends support to this construction.<sup>76</sup>

The strongest argument against this interpretation, in its strongest version, is that it is impossible to achieve perfect certainty in discerning the wishes of others. Even if remote, a possibility exists that a person who says, “I would like to be penetrated now,” has misspoken or does not understand the meaning of “penetration.” The less direct manifestations cited by the commentary as establishing “positive agreement” inject an even greater possibility that the actor is not actually willing to proceed with additional sex acts. It notes some commentators’ argument that “explicit verbal assent” should be required because “body language is inevitably ambiguous and a potential source of many false positives.”<sup>77</sup> However, it rejects the

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73. See APRIL DRAFT, *supra* note 1, § 213.4(1).

74. *Id.* § 213.4(1)(a).

75. To similar effect is the provision on Criminal Sexual Contact Without Consent, which punishes an actor who “engages in sexual contact with consent” when “that consent was given” in response to threats. See *id.* § 213.6(3).

76. See *supra* note 66 for the definition of “positive.”

77. APRIL DRAFT, *supra* note 1, at 54–55.



requirement of affirmative verbal authorization—implicitly accepting “ambiguous” evidence of intent. To require verbal assent would “depart[] too far from current social practice,” the commentary correctly notes.<sup>78</sup> And it continues:

Body language such as taking off the other party’s clothes and aggressively touching him or her in an ever-more-intimate way may not *inevitably* signal willingness to proceed to intercourse, but it can be sufficiently clear to leave *little doubt* about the intentions of the person actively initiating these steps. Of course, this is particularly true between persons who have previously been intimate . . . .<sup>79</sup>

Regrettably, the commentary does not speak with a single voice on this issue either, though the contrary language does not appear in the commentary most directly related to the “positive agreement” standard. In the commentary to the intoxication provision, the draft states:

[A]s discussed more fully in the Comment to Section 213.2(2), unwillingness to accept sexual penetration is *always* a significant possibility when a person is silent, passive, or otherwise conveying ambiguous signals. Because the harm of erroneously presuming willingness in such cases vastly outweighs the harm of erroneously presuming unwillingness, the law should never treat ambiguous behavior as equivalent to consent, whether the individual in question is intoxicated or not. Section 213.2(2) proceeds on this premise in imposing criminal liability for Sexual Penetration Without Consent whenever an actor has sexual intercourse with a person who has not given affirmative consent.<sup>80</sup>

Perhaps the drafters mean “ambiguous” in less than its strongest sense. Perhaps they intend to signal that words or actions can signal positive agreement if they “leave little doubt,” though some doubt, about a partner’s willingness to proceed. If that is the case, however, the point could easily be made more clearly in the statutory text than through use of the phrase “positive agreement.” Making the point clearly could prompt objections from those who view the requirement of “substantial” risk in the Code’s definitions of “recklessness” and “negligence” to have normative dimensions, but that concern would not be a legitimate one in drafting statutory language. Indeed, when the drafters thought the Code’s approach to intoxication was ill-advised in this setting, they explicitly stated their deviation from the rule.<sup>81</sup>

Consider how this “certainty” reading would differ from simply saying that an actor is liable if negligent about whether the partner has consented to the sex act in question. The Code’s negligence standard imposes

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78. *Id.* at 54.

79. *Id.* (second emphasis added).

80. *Id.* at 65–66.

81. *See id.* § 213.0(4) (“[T]he provisions of Model Penal Code § 2.08(2) shall not apply” to definition of “recklessly” under the proposed sexual assault provisions).

liability only when an actor's failure to perceive a risk "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."<sup>82</sup> Reading "positive" in "positive agreement" to mean simply that words and actions "leave little doubt" about willingness lacks that requirement. Moreover, requiring that words or actions "leave little doubt" about willingness deviates from the threshold requirement that negligence liability only be imposed when an overlooked risk is "substantial and unjustifiable." Arguably, a risk of unwillingness could be less than "substantial" but still enough to leave more than "little doubt" about willingness.

If "positive" is meant to bear this meaning, one would expect some explanation of why the negligence definition considered sufficient when the result is death is insufficient when the result is a sex act with an unwilling partner but occurring without prior objection and with neither force nor threat. Additionally, one would expect that this difference would be highlighted in the commentary that contrasts the "positive agreement" standard with negligence liability.<sup>83</sup>

The requirement that a risk be "substantial and unjustifiable" and that ignoring it constitute a "gross deviation" from acceptable conduct appears not only in the Code's "negligence" definition, but also in its "recklessness" definition. Thus, even if the draft is thought to require recklessness, it may extend liability to those who are consciously aware of a smaller risk of social harm than would have been the case under the general approach of the Code.

#### *D. The Draft's Confusing Hints About Foresight*

Most adults do not need a law professor to tell them that an element of surprise is welcome in intimacy, but such authority exists. In prior work, the draft's reporter cautioned that requiring express authorization before intercourse would introduce "a degree of formality and artificiality on

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82. See CODE, *supra* note 3, § 2.02(2)(d).

83. On the other hand, the draft does not explicitly state that it is adopting a *mens rea* standard that is significantly objective. That fact, rather than a desire to require more certainty about "consent" than might be imposed by a negligence standard, could explain why the commentary does not address this point in connection with its discussion of negligence.

human interactions in which spontaneity is especially important.”<sup>84</sup> Others have expressed similar views.<sup>85</sup>

However, some isolated language in the commentary implies that the partner must anticipate sex acts in a way inconsistent with even pleasant surprise. It states that the draft “places the onus on the sexually more aggressive party to ensure that *each new act* is welcome and desired.”<sup>86</sup> The question is whether an act not anticipated can be “welcome and desired.” Perhaps the “positive” in “positive agreement” was initially intended to suggest that the answer is “no.” Although the word does not strongly convey that suggestion, the notion may be captured in the April draft’s addition of language requiring that a person’s positive agreement must reach “a specific act of sexual penetration or sexual contact.”<sup>87</sup>

When viewed against the environment in which a “no” could be legally disbelieved, one can appreciate the desire to clarify that consent to some sex acts does not constitute consent to all sex acts. Date rape usually involves some voluntary intimacy, after all. But by giving independent legal significance to a partner’s “no,” the draft substantially reduces the potential benefit in a rule that requires that each new sex act be anticipated. Already precluded is the argument that the partner’s pre-“no” consent to heavy petting implies legal consent to penetration. However, while the benefits of a rule requiring complete foresight are diminished, the toll on spontaneity of an overly exacting requirement remains.

Though language in the draft arguably exacerbates the problem of consent to unanticipated acts, the problem is not unique to the draft. Even a rule forbidding sex acts by an actor reckless or negligent regarding the partner’s

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84. SCHULHOFER, *supra* note 24, at 272.

85. See, e.g., Simons, *supra* note 70, at 588 (“Although Westen does not develop this point, I believe that this idea of delegation of decision making helps explain why it can be acceptable for a couple that has agreed to a certain level of sexual intimacy to permit one party to initiate a surprising and novel form of sexual encounter (such as a different mode of sexual contact or of intercourse).”). Professor Donald Dripps has also expressed his views on the problem with overly formal rules for consent to intercourse:

What would be lost is some of the spontaneity, some of the intensity, that gives sex its special pleasure. It is possible, after all, to be too diffident or too analytic in bed, whatever our gender or orientation. Call it “eroticized domination,” call it the “robust, uncomplicated lay”—call[] it whatever you like, but don’t deny that, from whatever causes, the loss of control is a central feature of sexual experience.

See Donald Dripps et al., Panel Discussion, *Men, Women and Rape*, 63 FORDHAM L. REV. 125, 147 (1994).

86. APRIL DRAFT, *supra* note 1, at 54 (emphasis added).

87. *Id.* § 213.0(3). Of course, if that is all that “positive” was intended to convey, it could now be eliminated from the definition of “consent.”

willingness would raise the issue. Such a rule, however, would have at least a small buffer to permit some unanticipated acts.<sup>88</sup>

Regardless of whether one takes a subjective or an objective approach to consent, the best resolution is to recognize that a partner will often be willing to be surprised, and that even if the partner is not, an actor might not be culpable with respect to the partner's willingness to be surprised. Professor Simons has referred to the idea as "delegation of decision making" authority, and the challenge under the draft is to determine whether the language about foresight precludes this sensible answer.<sup>89</sup>

The need to construe "positive agreement . . . to engage in a specific act of sexual penetration or sexual contact" to include an agreement to be surprised is made more important by the vast array of sexual conduct covered by the standard under the April draft. Any touching of any body part of the partner done "for the purpose of sexual gratification . . . or sexual arousal" counts as "sexual contact,"<sup>90</sup> and such contact is a petty misdemeanor if accomplished without positive agreement.<sup>91</sup> Unless the draft is intended to embrace as law the parodies of the infamous Antioch College sex code, some room must exist to conclude that a partner willing to be kissed on the lips might also be kissed on the neck, even if the idea never occurred to the partner.<sup>92</sup> Indeed, the draft at times comes close to recognizing this idea. It stresses that "'consent' need not be *verbal* assent" and declares that "breathless first kisses or 'stealing second' are welcome and cherished parts of many consensual courtship stories, and are not intended to be penalized by the imposition of a consent requirement."<sup>93</sup> Whether the partner must legally "welcome" the steal of second *ex ante* will be especially important in encounters in which people may have different conceptions about elements as basic as the order of the bases.

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88. As discussed previously, an actor would be liable only for running a substantial risk that the act was not anticipated, and punishment would be appropriate only when running the risk was a gross deviation from social norms. Moreover, the definitions of "reckless" and "negligent" both take account of whether there was a "justification" for running the risk. Arguably, some risk of undertaking a sex act without the partner's willingness might be justified by a desire for spontaneity in the bedroom. Of course, the analysis would be different if the actor "surprised" a partner with an act exceeding limits the partner had already placed on the sexual encounter.

89. See *supra* note 85.

90. APRIL DRAFT, *supra* note 1, § 213.0(5).

91. *Id.* § 213.6 (3)(a).

92. 'Ask First' at Antioch, N.Y. TIMES (Oct. 11, 1993), <http://www.nytimes.com/1993/10/11/opinion/ask-first-at-antioch.html>.

93. APRIL DRAFT, *supra* note 1, at 127.

It bears noting, however, that the problem survives the draft's decision to limit the "agreement" standard to offenses involving penetration. Focusing solely on the prohibition on sexual penetration without consent, a partner might wish to be penetrated during a particular sexual encounter without knowing exactly when it would happen, or a partner might not have given any thought during a particular bout of sexual activity that the partner might be digitally penetrated, which constitutes "penetration" under the Penetration Without Consent provision and is readily established.<sup>94</sup> However, the partner may not subjectively feel violated in such cases, even if the partner decides to terminate the encounter. The partner might find the activity unpleasant—for example, because it was undertaken before the partner was ready—but understand that some miscalculation is the price of beneficial spontaneity in lovemaking. Additionally, even if a particular partner did not subjectively hold a willingness to be surprised, the possibility means that an actor might sometimes lack culpability in being mistaken on that score.

Of course, the possibility of consent to surprise does not validate all sex acts. Suppose a partner had stated a desire not to engage in vaginal intercourse prior to marriage, or a partner reported disliking a particular form of intimacy. An actor who proceeds in these situations would face a high burden in claiming a non-culpable belief that the partner would be willing to be surprised by an act of vaginal intercourse—in the first case—or by the disfavored form of intimacy—in the second. Indeed, the draft's "no" provision might well subject such an actor to felony liability. Other cases will be more contestable. An actor who attempts to proceed directly from "first base" to "home" will have a harder time defending the action than the actor who tries to "steal second," especially if no prior activities with the partner have proceeded past first. Likewise, an actor who quickly escalates a sexual encounter in a way that does not provide the partner even a brief opportunity to object will have a harder time claiming the action was undertaken without some awareness of a substantial and unjustified risk that the action was too surprising. It might be fair to think, in the usual

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94. See *id.* § 213.0(6)(a). In responding to criticism that the provision on sexual contact carries penalties too low for the most serious kinds of sexual contact, the commentary underscores the breadth of the *penetration* provision:

[R]easonable people might argue that physical contact with a person's anus or genitals, even if non-penetrative, merits greater punishment than contact with the mouth or other body part, or than undressing. Although such arguments are compelling, it is ultimately too difficult and unwieldy a task to classify all the permutations of offensive sexual touching into varying degrees of severity. To be sure, contact with unclothed genitals perhaps rates the most serious, but given the low standard for "penetration," much of such contact will likely meet the definition of sexual penetration given in 213.0(6).

*Id.* at 125.

case, that a partner is willing to be surprised by acts of the same general kind as those clearly welcomed, but less fair to hold that view when the acts differ more radically. Ultimately, however, law will be a clumsy way to deter the clumsy lover. The partner's willingness to end the encounter, and end the relationship, plays some role, as does the actor's desire in—one hopes—most cases to please the partner. Empowering the partner to end the exchange with a “no” is a sound reform, but accomplishing more through rule is difficult.

Whether the April draft's “positive agreement” requirement and the current draft's “agreement” requirement criminalize a welcome degree of surprise in sexual relations is unclear in light of the text and commentary. What is clear, however, is that some unanticipated acts should be regarded as permissible in sexual encounters, and that the draft provides no clear indication of recognizing that fact, and includes some hints that it does not.

The notion that one might be viewed as consenting to unforeseen or only dimly foreseen conduct is commonplace. The reporter has been criticized for analogizing sexual activity to a medical procedure for which informed consent is needed.<sup>95</sup> But even in medical procedures, patients consent to the exercise of delegated decision making by their doctors. Consent may be obtained without describing the gory, step-by-step details of a planned procedure. A general description suffices.<sup>96</sup> Moreover, consent-to-treatment forms often explicitly authorize a surgeon to undertake undescribed procedures if considered medically desirable during surgery.<sup>97</sup> Likewise, the idea of

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95. David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 402–05 (2000).

96. See, e.g., GA. CODE ANN. § 31-9-6.1 (West 2015) (stating that a patient “must consent to such procedure and shall be informed in general terms of . . . [t]he nature and purpose of such proposed surgical or diagnostic procedure”); N.C. GEN. STAT. ANN. § 90-21.13 (West 2015) (stating that there is no recovery for failure to obtain informed consent if a “reasonable person . . . under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities”).

97. See, e.g., *Conte v. Girard Orthopaedic Surgeons Med. Grp., Inc.*, 132 Cal. Rptr. 2d 855, 858 (Ct. App. 2003) (form stated, “I further authorize the doctor to do any procedure that his judgment may dictate to be advisable for my well-being”); *Hoofnel v. Segal*, 199 S.W.3d 147, 149 (Ky. 2006) (form stated, “I understand that, during the course of the procedure(s) or operation(s), unforeseen conditions may require additional or different procedures than those listed above. I, therefore, authorize and request that the above-named physician, his/her associates, assistants, or consultants, perform such additional procedures as are deemed necessary in their professional judgment. This may include, but is not limited to, procedures involving pathology and radiology.”). For a discussion outside the setting of a

“agreement,” standing alone, does not preclude delegation of decision-making. The large majority of us engage in this conduct whenever we accept the terms—without reading them—that accompany a software update, and we will usually be bound by them.<sup>98</sup> Although the reasons for these rules might not apply to sexual activity, the rules show that nothing inherent in “consent” or “agreement” precludes an otherwise sensible accommodation of surprise in sexual relations.<sup>99</sup>

Arguably, the Code recognizes, if only dimly, the problems of applying an overly exacting notion of “consent” or “willingness” to sexual activity. The Code does set forth a consent defense that applies to crimes generally; the provision appears to focus on the victim’s subjective mental state, which would pose fewer obstacles to recognizing delegated decision-making than does the current draft.<sup>100</sup> Even so, the drafters carefully hedged the sexual offense in which something like “consent” plays a central role. The provision on Sexual Assault applies when an actor has sexual contact with a partner and “he knows that the conduct is offensive to the other person.”<sup>101</sup> In addition to clearly focusing on the actor’s mental state with regard to the partner’s mental state, the provision’s focus on “offensiveness” is narrow enough that an actor could defend the permissibility of a sexual act even if the actor thought that the partner did not anticipate it. Obviously, the provision does not view any sexual act as implicitly authorizing any

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medical consent form, see DOBBS ON TORTS § 108 (“Possibly also a consent to operate on the right ear is not consent to operate upon the left one, but it is not impossible to believe that a patient about to undergo an operation consents by implication to extensions of the operation that become medically desirable and certainly to extensions needed because of medical emergency.” (footnotes omitted)).

98. See RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. B (AM. LAW INST. 1981) (“*Assent to unknown terms.* A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms. One of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms. Employees regularly using a form often have only a limited understanding of its terms and limited authority to vary them. Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated. But they understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose.”).

99. For another example, see CODE, *supra* note 3, § 2.11(2)(b) (consent extends to conduct and injury that are “reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law”).

100. See *id.* § 2.11.

101. *Id.* § 213.4(1).

conceivable escalation in intimacy, but it does permit room for desirable spontaneity—perhaps too much room.<sup>102</sup>

The extent to which a partner subjectively wishes to delegate sexual decision making to an actor will vary from partner to partner, from actor to actor, and from time to time. Additionally, the partner's subjective wish to be surprised often will not be expressly communicated to the actor in advance. Sometimes an actor will engage in sexual contact that a partner does not desire but was willing to have undertaken—for example, the partner might be willing to let the actor try to steal second base and rely on saying “no” as a way to keep the partner from third. But sometimes the partner will view the undesired act more negatively. A subjectivist approach to the problem would ask whether the actor was consciously aware of a substantial and unjustified risk that the particular conduct exceeded what the particular partner was willing to engage in, taking account of the possibility that the partner might enjoy some unpredictability in the sexual encounter. A conventional criminal negligence approach would ask whether an actor was grossly negligent in not perceiving a substantial and unjustifiable risk that the actor's conduct fell outside this permissible range. Either approach would be flexible enough to allow desirable spontaneity in lovemaking; especially if coupled with the draft's “no-means-no” provision, either would also permit punishment of those who exceeded acceptable bounds. It is substantially less certain that the same can be said of the April draft's requirement of a “positive agreement, communicated by either words or

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102. It is fair to ask why the Code's drafters required the actor's knowledge when recklessness is the usual default position for liability. Certainly, if the notion of “offensiveness” were defined carefully enough, a person reckless as to offensiveness would deserve punishment. The provision may be the opposite of the current draft's overinclusive rules for consent—an underinclusive rule chosen to reduce the risk of convicting those who are not culpable, at the cost of allowing some culpable actors to escape punishment. Just as overinclusive rules require special attention, so do underinclusive rules. We should ask whether the risks of erroneous culpability determinations are sufficiently unusual in this setting, or whether some other factor is in play, so as to justify the potential deterrent loss in an underinclusive rule.

The crime of sexual assault was not generally recognized in the United States prior to the Code. MODEL PENAL CODE AND COMMENTARIES (AM. LAW INST., Official Draft and Revised Comments 1980), § 213.4 cmt. n.1. But another of the Code's innovations created a special need for the crime. The Code limited the crimes of assault and battery to cases involving “bodily injury,” CODE, *supra* note 3, § 211.1, a standard that would often not be met by unwanted sexual contact. Recklessness suffices for liability under Section 211.1, however, and the commentary to Section 213.4 provides no explanation for the heightened mental state applicable to sexual touchings. CODE, *supra* note 3, §§ 211.1, 213.4.



actions, to engage in [every] specific act of sexual penetration or sexual contact.”<sup>103</sup>

#### IV. COVERT NEGLIGENCE LIABILITY

The draft commentary endorses the Code’s general rejection of negligence liability and insistence on at least recklessness to justify criminal liability.<sup>104</sup> To see the risk that negligence liability will become the rule in applying the positive agreement standard in the usual case requires attention to three separate issues. First, one needs to look not at the clear poles of the “agreement” continuum but at the vast and vague middle that will apply in the normal case. Second, one needs to distinguish between the historical facts related to consent on a particular occasion, on the one hand, and the *interpretation* of whether those facts constitute “agreement.” Finally, one needs to see that mistake-of-law doctrine cannot comfortably support punishment of those who are mistaken about what constitutes “agreement.”

##### A. “Positive Agreement’s” Clear Poles and Vague Middle

The April text makes clear that “positive agreement” cannot be inferred from pure passivity, that an express “no” cannot be undone by pure passivity, and that “positive agreement” is certainly established by express verbal authorization of a sex act—although the commentary makes clear that something less can also suffice.

But what of the common situation, in which the partner is not purely passive, but the partner does not verbally authorize the specific sex act initiated by the actor? For example, what of the situation in which the partner actively initiates some intimate conduct? The variety of conduct between a partner’s pure passivity and verbal authorization is vast. And so is the coverage of the draft. The draft defines penetration expansively and requires agreement for each specific act of penetration. The variety of ways that sexual encounters proceed means that no simple and clear rule will define “agreement” in a way that everyone will understand.

##### B. The Short Path from “Agreement” to “Negligence”

The “positive agreement” or the “agreement” standard can devolve into a negligence standard in either of two ways. The first can occur whenever

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103. APRIL DRAFT, *supra* note 1, at 1.

104. Some theorists would have conscious choice play a smaller role than under the Code. For a discussion of the alternatives, see Guy Ben-David, *Cognitive Void in Relation to Attendant Circumstances as Subjective Mens Rea*, 18 NEW CRIM. L. REV. 418, 458–70 (2015).

a criminal prohibition includes a vague term. The second is specific to the idea of “agreement.”

In the examples that follow, the important focus is on how a reasonableness test might apply to the interpretation or application of even uncontested historical facts. Just as the draft leaves room for disagreement about whether stipulated historical facts establish “agreement,” any vague statutory term will need to be interpreted or applied by someone, even as to historical facts that are not in dispute, much as agreed words in a contract need to be given meaning. The draft makes plain that a recklessness standard applies to the historical facts from which one might infer “agreement.” However, the discussion below shows how giving meaning to “agreement” in actual cases will likely incorporate a negligence standard, regardless of what an actor believes about the historical facts of the case.

### *1. The General Collapse of Vague Standards into Negligence Liability*

A vague provision like the requirement of an “agreement” will either be supplemented by jury instructions that clarify it or presented to the jury in the same vague terms that appear in the statute. In either case, if an actor does not anticipate either a new jury instruction or how a jury will proceed in the face of vague guidance, convicting the actor is likely to amount—at best—to punishing the actor’s negligence, even indulging the heroic assumption that the actor is aware that the law speaks in terms of “agreement.”

Judges almost always interpret statutes in a reasonable way.<sup>105</sup> Multiple interpretations may be reasonable, but it will be the unusual jurist who does not choose from the reasonable alternatives. Likewise, a jury of twelve laypeople will usually interpret vague jury instructions in a way that reasonably implements the law’s purpose, as they discern it. The sheer number of people who must agree will focus the jury on reasonable applications of the law.

Any individual actor, on the other hand, might act unreasonably in perceiving no significant risk that a vague provision would apply to the actor’s conduct, either through judicial action or jury deliberation. Such an actor could be fully aware that the law requires “agreement” as a predicate to sexual contact but see no risk at all that the partners’ conduct would be

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105. See William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L. J. 1361, 1368 (1988) (discussing the rarity in having a judge’s statutory interpretation be overturned).

deemed by judge or jury to fall short of the required standard. If we punish that actor, we are punishing the actor for negligence even if the judge and jury both acted reasonably—that is, we are punishing the actor for failing to appreciate how a reasonable actor—either judge or jury—would interpret the historical facts.

Of course, in the unusual case, a judge or jury might proceed unreasonably in the face of a vague provision. Moreover, while a judge might behave as a reasonable, legally trained jurist in interpreting a vague provision, even a reasonable layperson might not anticipate the interpretation.<sup>106</sup> In these cases, punishing the actor means punishing someone who was not even negligent. If the drafters wish to impose negligence liability, they could do so without this risk of punishing even the reasonable—simply by replacing the “agreement” standard with a straightforward standard punishing those negligent about their partners’ willingness.

## 2. “Agreement” as Tilted Toward Negligence Liability

Putting to one side the general tendency of judges and juries to give reasonable constructions to vague laws, the “agreement” language employed by the draft is especially likely to be given an objective gloss. However, the lack of clarity in the draft about the harm it seeks to avoid makes the application of that standard more difficult than it would be if the negligence standard were explicitly elaborated.

In the civil setting, “agreement” implies a reasonableness inquiry. The Restatement of Contracts defines “agreement” as “a manifestation of mutual assent,”<sup>107</sup> and assent is defined in objective terms: “The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows *or has reason to know* that the other party may infer from his conduct that he assents.”<sup>108</sup> The Restatement directly discusses in objective terms how to resolve cases in which the parties attach different meanings to the manifestations of assent: “The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if . . . that party has *no reason to know* of any different meaning

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106. A similar analysis explains why punishing an actor for not being aware of a legal prohibition at all may often punish those who are not even negligent. Legislators have access to information about risks that will not be as readily available to normal citizens. So it may almost always be reasonable for legislators to regulate in such areas but far from negligent for any individual to be unaware of the risks that give rise to regulation.

107. RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. LAW INST. 1981) (“An agreement is a manifestation of mutual assent on the part of two or more persons.”).

108. *Id.* § 19 (emphasis added).

attached by the other, and the other has *reason to know* the meaning attached by the first party.”<sup>109</sup>

The temptation to cash out the “agreement” standard in reasonableness terms—or less—is verified by jurisdictions with some experience in the matter. Some of the jurisdictions cited by the commentary as embracing a requirement of “some form of express agreement or positive cooperation”<sup>110</sup> instruct juries simply in abstract language like that in their statutes.<sup>111</sup>

109. *Id.* § 20(2) (emphasis added); *see also id.* § 19 cmt. b (“A person has reason to know a fact, present or future, if he has information from which a person of ordinary intelligence would infer that the fact in question does or will exist. A person of superior intelligence has reason to know a fact if he has information from which a person of his intelligence would draw the inference. There is also reason to know if the inference would be that there is such a substantial chance of the existence of the fact that, if exercising reasonable care with reference to the matter in question, the person would predicate his action upon the assumption of its possible existence.”).

110. *See* APRIL DRAFT, *supra* note 1.

111. *Compare, e.g.,* VT. STAT. ANN. tit. 13, § 3251(3) (West 2015) (“‘Consent’ means words or actions by a person indicating a voluntary agreement to engage in a sexual act.”), with *CR27-211*, VERMONT MODEL CRIMINAL JURY INSTRUCTIONS (Oct. 19, 2013), <http://www.vtjuryinstructions.org/criminal/MS27-211.htm> [<https://perma.cc/R68X-T2NM>] (“Consent means words or actions by the other person, indicating a voluntary agreement to engage in a sexual act. [There is a significant legal difference between consenting to something, and submitting because of force or fear of harm, or for some other reason.] ‘Consent’ means consent of the will. [Submission under the influence of fear or pressure is not consent.] [Lack of consent may be shown if (Def) \_\_\_\_\_ had sexual contact with (victim) \_\_\_\_\_ without the opportunity for [him] [her] to consent.] Lack of consent may be shown without proof of resistance.”).

The Vermont jury instruction discusses the *mens rea* requirement without making clear whether it applies to the interpretive question of whether the historical facts constitute “agreement.” *See id.* (“The last essential element is that (Def) \_\_\_\_\_ acted intentionally. [He] [She] must have acted purposely, and not inadvertently, because of mistake, or by accident. You may find that (Def) \_\_\_\_\_ acted intentionally if it was [his] [her] conscious objective to compel (victim) \_\_\_\_\_ to participate in the sexual act without [his] [her] consent.”).

The Wisconsin statute defines “consent” as “words or overt actions by a person . . . indicating a freely given agreement to have sexual intercourse or sexual contact.” WIS. STAT. ANN. § 940.225(4) (West 2016). The Wisconsin jury instruction is similar. *See* 2 WIS. JURY INSTRUCTIONS—CRIMINAL § 1201, at 2 (“‘Did not consent’ means that [name of victim] did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether [name of victim] did not consent, you should consider what [name of victim] said and did, along with all the other facts and circumstances. This element does not require that [name of victim] offered physical resistance.”). The commentary explains its modest “rephras[ing]” of the statute as follows:

First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions

However, others explicitly embrace a reasonableness inquiry. Consider the state that gave us the famous *M.T.S.* decision: New Jersey.<sup>112</sup> The opinion itself includes language that imposes a negligence standard in a way that does not clearly distinguish between historical facts and interpretation.<sup>113</sup> The model jury instruction in New Jersey, however, makes clear that the “reasonableness” inquiry includes the interpretation of historical facts as generating permission:

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 contact, and freely given permission means the victim agreed of (his/her) own free will to engage in the act of sexual contact. 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 contact had been given.<sup>114</sup>

The District of Columbia explains the inquiry as follows:

The correct standard under the new statute is *whether a reasonable person* would think that the complainant’s “words or overt actions indicate[d] a freely given agreement to the sexual act or contact in question.”<sup>115</sup>

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rather than to reiterate the statute which refers to consent as “words or overt actions indicating a freely given agreement.”

*Id.* at 3–4.

The commentary also notes that if the victim did not consent, defendant has no defense on the grounds of mistake. *Id.* at 4 (“If the jury finds that the jury did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant’s belief is reasonable. This is the case because [the statute] uses none of the ‘intent words’ which indicate that the defendant’s knowledge of no consent is an element of the crime . . .”).

112. State in the Interest of *M.T.S.*, 609 A.2d 1266 (N.J. 1992).

113. See *id.* at 1277 (physical force is established “in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act of sexual penetration”). The court noted: “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.” *Id.*

114. *Criminal Sexual Contact*, NEW JERSEY CRIMINAL MODEL CHARGES (June 11, 2012) (emphasis added), <http://www.judiciary.state.nj.us/criminal/charges/sexual014.pdf> [<https://perma.cc/HM5M-7UGA>].

The draft lists New Jersey and the District of Columbia as jurisdictions employing an affirmative consent model implemented through negligence standards. APRIL DRAFT, *supra* note 1, at 151 n.476. The discussion does not distinguish between historical facts and their interpretation, and it is attached to a textual discussion focused on claiming that the draft eliminates the need to draw inferences from objective facts to the partner’s subjective mental state.

115. Russell v. United States, 698 A.2d 1007, 1016 n.12 (D.C. 1997) (emphasis added).

The contracts approach has influenced courts even when construing a sexual assault statute couched in terms of “consent” rather than the draft’s even more suggestive “agreement.”<sup>116</sup>

### C. *The Normative Limits of Mistake-of-Law Doctrine*

The current draft purports to reject negligence liability under its consent rules, but it does so by claiming that the consent rules are clear. It then relies on the Code’s acceptance of conventional mistake-of-law doctrine. Essentially, the draft claims that it respects the Code’s commitment to subjectivism but also accepts its strict-liability rules regarding mistake of law. In other words, to the extent that the draft does not require recklessness, it claims that those instances fall within the domain governed by the mistake-of-law rules.

Indeed, the Code did leave the core of common-law mistake-of-law doctrine largely undisturbed, but two aspects of the Code limit the impact of its mistake-of-law doctrine. First, the Code generally followed a simple formula of criminalization. It identified widely understood and serious social harms and forbade bringing them about with a particular level of culpability. The Code largely rejected over-inclusive proxy crimes like the draft’s consent rules, and proxy rules are the ones about which generally law-abiding persons are most likely to be unaware.<sup>117</sup> Those who are truly

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116. See *State v. Smith*, 554 A.2d 713, 717 (Conn. 1989) (“While the word ‘consent’ is commonly regarded as referring to the state of mind of the complainant in a sexual assault case, it cannot be viewed as a wholly subjective concept. Although the actual state of mind of the actor in a criminal case may in many instances be the issue upon which culpability depends, a defendant is not chargeable with knowledge of the internal workings of the minds of others except to the extent that he should reasonably have gained such knowledge from his observations of their conduct. The law of contract has come to recognize that a true ‘meeting of the minds’ is no longer essential to the formation of a contract and that rights and obligations may arise from acts of the parties, usually their words, upon which a reasonable person would rely. E. Farnsworth, *Contracts* § 3.6. Similarly, whether a complainant has consented to intercourse depends upon her manifestations of such consent as reasonably construed. If the conduct of the complainant under all the circumstances should reasonably be viewed as indicating consent to the act of intercourse, a defendant should not be found guilty because of some undisclosed mental reservation on the part of the complainant. Reasonable conduct ought not to be deemed criminal.”).

117. Proxy crimes can be overinclusive with respect to the social harm at issue, underinclusive, or both at the same time. Some of the Code’s provisions are best understood as being underinclusive rules, perhaps designed to provide an additional safeguard—beyond the burden of persuasion—against erroneous conviction of those the drafters regarded as not subjectively culpable. See, e.g., CODE, *supra* note 3, § 213.2(2)(a) (intercourse

ignorant of almost any of the Code's prohibitions are likely dangerous enough to require punishment notwithstanding our general commitment to subjective culpability.

Second, the Code's prohibitions are generally clear. Even as regards proxy rules, violating a known and clear rule can be viewed to demonstrate at least some level of subjective culpability. That is true even if the actor does not fully appreciate the reasons for the proxy rule—the ultimate social harm the law seeks to avoid. At the very least, by violating a known and clear rule, an actor disrespects democratic processes.<sup>118</sup> In this sense, clear and known crimes can be said to be culpa-genic.

In its comment on *mens rea*, the draft expressly disclaims the desire to impose liability based on negligence.<sup>119</sup> Its defense of the consent rules, however, expressly discusses only two of the clear rules under the draft's regime.<sup>120</sup> It claims that the draft “identif[ies] in transparent, consistently applicable terms the facts that will suffice to establish legally effective consent.”<sup>121</sup> However, its discussion ignores application of the “agreement” standard to the common situation of mutual foreplay leading to increasingly intimate conduct, focusing solely on those who ignore a “no” and those who infer consent from pure passivity:

Th[e draft's] framework largely obviates the perceived dangers of requiring proof of recklessness. In the case posited by Professor Estrich (the “man who heard her refusal or saw her tears, but decided to ignore them”), the defendant would *know* of the circumstances that the law defines as sufficient to establish nonconsent. Likewise, a defendant who chose to assume that a woman's silence and passivity indicated willingness would *know* that he lacked her positive agreement. In both cases, elusive judgments about the “reasonableness” of a defendant's beliefs would not undercut law-enforcement goals because the defendant would actually know that the decisive facts were present, and the jury would be instructed that those facts, if found beyond a reasonable doubt, would be sufficient for conviction.<sup>122</sup>

Once one moves beyond clear cases and into the vast majority of sexual conduct governed by the “agreement” standard, it is hard to claim that the

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by imposition requires threat “that would prevent resistance by a person of ordinary resolution”). Like overinclusive crimes, underinclusive ones are sometimes justified and sometimes not. See *supra* note 58 and accompanying text.

118. See Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 1 (2012). For a response to Markel's analysis, see Josh Bowers, *Blame by Proxy: Political Retributivism & Its Problems, A Response to Dan Markel*, 1 VA. J. CRIM. L. 135 (2012).

119. See, e.g., APRIL DRAFT, *supra* note 1, at 150 (“Sections 213.1 through 213.8 impose liability only when the actor is at least reckless—that is, consciously aware of the risk—with respect to each material element of the relevant offenses.”).

120. The commentary on *mens rea* does not discuss the third clear situation—verbal consent to a particular sexual act. See *id.* at 150.

121. *Id.* at 153.

122. *Id.* at 154.

draft identifies in “transparent, consistently applicable terms the facts that will suffice to establish legally effective consent.”<sup>123</sup> Whether the standard will devolve into a negligence standard or something even harder to imagine, the draft’s criticism of a negligence standard in the most common setting seems equally applicable:

[Negligence] standards can work well when they call on social norms that are widely shared, stable, and substantively just. In contrast, where even one of those prerequisites is missing, a negligence standard can become a recipe for inconsistency, lack of fair warning, and substantive unfairness. And with regard to the expression of consent in sexual encounters, *all three* of these prerequisites are lacking . . . .

. . . . The appropriate criteria for determining consent or nonconsent cannot usefully be left for resolution on an *ad hoc*, low-visibility basis through varying conceptions of “reasonableness” reached in the verdicts of individual juries. . . .<sup>124</sup>

The draft itself recognizes the importance of clarity in relying on a mistake-of-law justification for the consent rules:

The principal remaining risk of unfairness lies in the residual possibility that a defendant might in good faith believe, for example, that it was permissible to disregard a verbal “no” when other circumstances led him to infer willingness. That this misconception—a mistake of law—would afford no defense does not in itself completely answer the concern about unfairness to the defendant. But the tension between the Model Code’s twin commitments to subjective culpability and to the denial of mistake-of-law defenses pervades all of the criminal law; it cannot in itself pose a barrier to changes in the law that are well-justified on their merits. It may be assumed, moreover, that legislation addressing this subject will attract a considerable degree of public attention, so that ignorance of the law in this regard may not be long lasting.<sup>125</sup>

Obviously, legislation can dispel ignorance only if the legislation can be understood in its application to usual cases.

Because it does not defend the “agreement” standard in the usual case, the *mens rea* commentary does not explicitly state whether it would rely on mistake-of-law doctrine as justification there. To call the application of this vague standard a legal question would seem to empower courts to instruct juries to convict if certain historical facts are found. Whether such interpretive instructions could be applied retroactively raises due process questions, but it is by no means clear that the Constitution would preclude the practice.<sup>126</sup>

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123. *Id.* at 153.

124. *Id.* at 153.

125. *Id.* at 154.

126. *See supra* note 41 and accompanying text.



If the drafters instead view these questions as issues of application for the jury, even less justification exists for viewing the scheme as defensible under mistake-of-law doctrine, as opposed to raising the simple question of whether liability for negligence should be embraced in the criminal law. A jury usually decides whether an actor's conduct in a particular case was reasonable; the possibility of speaking of that question as a mixed question of fact and law has never been thought to demonstrate the justice of criminal convictions based on negligence.

The draft's implicit recognition that clarity is essential to a mistake-of-law justification for strict liability meshes with recent analysis of the problem. For example, Samuel Buell has persuasively documented how vague terms used to capture evolving "social norms" give rise to a "culpability problem that arises along the leading edges of modern crimes."<sup>127</sup> When the law's command is clear, the clarity can be thought to establish subjective culpability, at least so long as the actor is aware of the law: "notice is as profitably understood to inculcate as its absence, according to conventional accounts, is understood to exculpate."<sup>128</sup> But Buell demonstrates that the law itself does not serve this function when it is unclear. A truly subjective approach requires the actor's awareness of the risk that the vague term will be interpreted to cover the actor's conduct. As an alternative, Buell suggests that we frankly consider punishing the actor for negligence in not knowing the norms that emerge through interpretation or application of vague provisions.<sup>129</sup> He notes that the social norms influencing legal interpretation are not generally recognized as the subject of *mens rea* determinations.<sup>130</sup> However, the argument obviously connects with the frequently expressed idea that mistake-of-law doctrine is troubling in the setting of *malum prohibitum* crimes.<sup>131</sup> If we are troubled that an actor may not know an

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127. Buell, *supra* note 45, at 554.

128. *Id.* at 550.

129. *Id.* at 600.

130. *Id.* at 595 ("The book on criminal law does not include a chapter about the problem of mens rea toward social norms.").

131. See, e.g., *United States v. Wilson*, 159 F.3d 280, 295 (7th Cir. 1998) (Posner, J., dissenting) ("When a defendant is morally culpable for failing to know or guess that he is violating *some* law (as would be the case of someone who committed a burglary without thinking—so warped was his moral sense—that burglary might be a crime), we rely on conscience to provide all the notice that is required. Sometimes the existence of the law is common knowledge, as in the case of laws forbidding people to own hand grenades . . . , forbidding convicted felons to own any firearms, and requiring a license to carry a handgun. And sometimes, though the law is obscure to the population at large and nonintuitive, the defendant had a reasonable opportunity to learn about it, as in the case of persons engaged in the shipment of pharmaceuticals who run afoul of the criminal prohibitions in the federal food and drug laws. . . . We want people to familiarize themselves with the laws bearing on their activities. But a reasonable opportunity doesn't mean being able to go to the local law library and read Title 18. . . . If none of the conditions that make it reasonable to

obscure law, we should also be troubled that an actor knows but cannot be expected to understand a law that is not part of common morality.

The Code avoided this problem by largely avoiding vague criminal statutes. When it did embrace more open-ended provisions, it frankly acknowledged that they imposed a form of negligence liability. For example, on the federal level, Buell notes the vagueness of the Hobbs Act, which forbids “wrongful” threats but does not define “wrongfulness.”<sup>132</sup> Compare the Code’s treatment of “Criminal Coercion,” which raises similar problems.<sup>133</sup> Rather than forbidding “wrongful” threats, the provision prohibits certain threats unless the actor’s purpose was limited to compelling the other to behave in a way *reasonably related* to the circumstances which were the subject of the [threat], as by desisting from further misbehavior, making good a wrong done, refraining from taking any action or responsibility for which the actor believes the other disqualified.<sup>134</sup>

The Code’s provision on Theft by Deception follows a similar pattern. It applies only if the actor has a “purpose to deceive,” but deception does not include “puffing by statements unlikely to deceive *ordinary persons* in the group addressed.”<sup>135</sup>

In summary, mistake-of-law doctrine, at best, justifies imposing liability only for the few clear rules that emerge from the draft’s approach to consent—the “no-means-no provision,” and the requirement that consent be inferred from something other than passivity. Some will even object here, on the grounds noted by the draft—at least some people will surely be unaware of even the draft’s clear provisions. However, relying on mistake-of-law doctrine to provide normative justification for the vast vague

dispense with proof of knowledge of the law is present, then to intone ‘ignorance of the law is no defense’ is to condone a violation of fundamental principles for the sake of a modest economy in the administration of criminal justice.”).

*See also, e.g.,* Stephen P. Garvey, *Authority, Ignorance, and the Guilty Mind*, 67 SMU L. REV. 545, 575 (2014) (“Despite its longevity the *ignoratio maxim* is misguided. Ignorance of the law does excuse. Except when the actor’s ignorance can be traced to a prior breach itself committed with a guilty mind, or when his ignorance itself manifests the ill will that marks the presence of a guilty mind, ignorance of the law entails the absence of *mens rea*.”); Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 145 (1997) (“When a person makes the kind of error that even a morally virtuous person could make, then her ignorance of the law should be an excuse.”).

132. Buell, *supra* note 45, at 561.

133. CODE, *supra* note 3, § 212.5(1).

134. *Id.* (emphasis added).

135. *Id.* § 223.3 (emphasis added).

middle of “agreement” is normatively unattractive and exceeds the role that mistake-of-law doctrine played in the Code.

#### *D. The Draft’s Explicit Mental State Language*

It may be, as argued earlier, that vague criminal prohibitions tend toward negligence liability, and it may be that a standard written in terms of “agreement” is particularly prone to such a fate. But if the draft clearly insisted that an actor could be convicted only if reckless about whether historical facts would be interpreted not to constitute agreement, those general points would be of little significance. While an isolated passage in the commentary to the April draft states that an actor must be at least reckless about how historical facts will be interpreted, that language was omitted when the draft abandoned the idea of requiring “agreement” as necessary for sex acts short of penetration. Even in the April draft, most of the clues pointed in the other direction.

The language supporting application of a recklessness standard to the interpretation of historical facts appeared in the comment to the provision extending the requirement of “positive agreement” to sexual conduct short of penetration:

[T]o the extent that a consent-based provision might unfairly capture well-intentioned but mistaken actors, or unduly restrict sexual freedom, the mens rea requirement operates to ensure the moral culpability of the actor. Consider again the seemingly promising date. If the actor honestly and sincerely believes the date went well and a sexual overture is welcomed, there should not be liability even if the other person in fact found the date insufferable, and yet continued to be politely accommodating. The Code requires that the actor be at least recklessly aware of the absence of consent—in other words, aware of a risk that the other person does not in fact welcome the behavior.<sup>136</sup>

For ease of reference, let’s call this comment the “subjectivist comment.” If this language is taken seriously as regards sexual contact other than penetration, it should also apply to the provision on penetration without consent. The two provisions are in all relevant respects identical.<sup>137</sup>

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136. APRIL DRAFT, *supra* note 1, at 127.

137. One might argue that the provision on nonconsensual penetration is more thoroughly objective in orientation than the provision on nonconsensual sexual contact. The penetration provision criminalizes conduct when the partner “has not given consent to such act”; the nonconsensual sexual contact provision criminalizes conduct when the actor “engages in sexual contact without consent.” *Id.* at 2, 6. But if this modest difference in phrasing were intended to generate dramatically different results, one would expect some indication of that intention in the commentary. Moreover, the definition of “consent,” applicable to both provisions, itself includes the language that the comment describes as adopting an “objective” standard. *Id.* at 29–30.

Initially, note that this comment is in tension with the draft's definition of "consent." That definition says what "'consent' means," not what it "includes." Accordingly, it purports to exclude meanings that one might derive from the usual meanings of "consent" to the extent that the meanings are in conflict with the definition, and the remainder of the definition says that "consent" is "positive agreement, communicated by either words or actions."<sup>138</sup> For the subjectivist comment to be correct, the definition must be read to reject the view that "agreement" implies objective manifestations of assent.<sup>139</sup> Moreover, one must conclude that the requirement of objective "words or actions" is satisfied by whatever words or actions lead the actor to form non-reckless beliefs about welcomeness—or willingness. The December draft includes additional language underscoring the objective nature of the consent inquiry.<sup>140</sup>

In addition to the objective cast of the draft's definition of "consent," several other reasons would likely lead courts to discount the subjectivist comment.

### *1. Other Commentary Directly Conflicts*

First, the April draft added the following language to the comment to the definition section, which includes the definition of "consent" as "positive agreement":

In light of the difficulty in establishing subjective intentions, coupled with the importance of encouraging both the frank communication of sexual desires along with respect for that information when communicated by others, consent is defined as an action, not a state of mind. As defined, it does not require express verbal assent. But it does require some indication of positive agreement, expressed either through words or action.<sup>141</sup>

The conflict between this "objectivist comment" and the subjectivist comment is clear. If the question is as the subjectivist comment puts it—whether the actor is reckless as to whether the partner "did not welcome the behavior"—then consent is not "defined as an action, [but] a state of mind," and we have not avoided "the difficulty in establishing subjective intentions." It is true that the draft requires that the conclusion of "welcomeness" be drawn from "words or actions," but that requirement merely specifies the

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138. *Id.* at 1.

139. For a contrary argument, see *supra* Part III(B)(2).

140. See Cole, *January Draft*, *supra* note 1, at 6–8.

141. APRIL DRAFT, *supra* note 1, at 30.

evidence than may be considered if the subjectivist comment is credited. Requiring objective manifestations from which the actor draws conclusions about the partner's subjective mental state is far different from saying, as the objectivist comment does, that "consent is defined as an action."<sup>142</sup>

Because the objectivist comment is attached to the definition of consent itself, while the subjectivist comment is tucked away in a discussion of one application of the term, a court might well view the later-added objectivist comment to trump the subjectivist one.

## 2. *Indirectly Inconsistent Commentary*

If the drafters intended to have their subjectivist comment taken seriously, one would expect to find it in the commentary headed "*Mens Rea* for Sections 213.1 to 213.8."<sup>143</sup> However, under that heading is no reference to the question of whether the actor must be subjectively culpable in interpreting historical facts. The comment does, however, make clear that the defendant need not be culpable regarding the "legal" questions of whether "no" must be taken to indicate non-consent, and whether consent can be inferred from pure passivity. The draft's position on those questions lends support to the idea that an actor need not be culpable about the arguably mixed question of law and fact regarding whether historical facts constitute positive agreement.

Moreover, the commentary to Section 213.2 acknowledges the distinction between historical facts and their interpretation—without stating that the actor's *mens rea* must be shown regarding interpretation.<sup>144</sup> After initial dissemination, this comment was amended to append a footnote that also leaves this question open: "This provision requires proof that the defendant acted with recklessness or knowledge as to the lack of affirmative consent."<sup>145</sup> If the *mens rea* requirement were meant to apply to the actor's interpretation of the historical facts, the point could easily be made clearer at several points in this commentary. For example, the footnote just quoted could read:

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142. *See id.*

143. *Id.* at 150–57.

144. It states:

Accordingly, when relevant, a prosecutor's burden is to prove beyond a reasonable doubt that no affirmative words or conduct by the complainant constituted, in light of the totality of the circumstances, positive agreement to engage in the specific conduct at issue. A defendant, in turn, may defeat this evidence by raising a reasonable doubt about whether the complainant in fact did demonstrate such willingness. While any standard invites both factual disputes about what words or conduct occurred and interpretive disputes about how to understand such words and conduct, those are the proper province of the jury to resolve.

*Id.* at 54.

145. *Id.* at 54 n.158.

This provision requires proof that the defendant acted with recklessness or knowledge as to the lack of affirmative consent, and this requirement reaches defendant's beliefs about both historical facts and their interpretation.

### 3. *Ordinary Statutory Interpretation*

Putting the commentary to one side, the most likely construction of the statutory language would limit the inquiry into the actor's mental state to questions of historical fact. It would view the interpretation of whether those facts constitute "positive agreement" to be a question of law as to which the draft's mental state language would not apply. Even if the interpretive question was regarded as either a factual question or as one of the legal questions to which *mens rea* requirements might apply, two arguments would likely preclude requiring an actor's recklessness about whether historical facts would be taken as "positive agreement." If "positive agreement" is taken to have an objective component, requiring subjective culpability regarding the objective standard is in some tension with the reasons for adopting an objective standard in the first place. Regardless of whether the positive agreement standard is interpreted to have an objective aspect, the fact that the standard articulates a proxy crime risks the creation of an enforcement gap if an actor must be subjectively aware of the facts that trigger the rule, militating against the imposition of such a requirement.

#### a. *The Interpretive Question as a Question of Law*

While we commonly think of legal questions as the province of the court, juries are often called on to decide legal questions. The most obvious example might be the jury's role in deciding whether negligence is demonstrated in a particular case. The jury considers what historical facts are shown, but it then decides the legal question of whether those facts fit the general definition of negligence. Juries play similar roles whenever they are asked to apply general legal standards to specific cases—and when juries are asked to apply undefined statutory terms or terms that are defined in ways that leave room for judgment.<sup>146</sup>

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146. See Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1200 (1998) ("The label 'law application' obscures the complexity of the jury's task. The considerable recent public law literature on statutory interpretation helps to clarify the creative, normative nature of application, which inevitably entails a degree of law-creating

Under the draft, if the interpretive question is regarded as a question of law, the normal default rule would treat the interpretive question as one of strict liability—though in operation, as argued earlier, inadvertent violations would likely involve negligence. The most likely conclusion is that the question of “consent” under the draft is a mixed question of fact and law. It would likely be decided by juries through the application of the general standard to specific cases.<sup>147</sup> The draft’s *mens rea* language would apply to the historical facts argued to constitute “agreement,” but the mental state language would not modify the normative question of whether the facts constitute such agreement.

The Code follows the core of conventional mistake-of-law doctrine. The actor’s culpability is not required regarding whether “conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense . . . unless the definition of the offense or the Code so provides.”<sup>148</sup> In other words, the Code generally imposes strict liability on questions of law.

The draft provisions on sexual assault do explicitly require that the actor have a culpable mental state, but they do so in a way that could well be viewed to limit the culpability inquiry to the historical facts surrounding “consent.”<sup>149</sup> For example, the provision on sexual penetration without consent applies if an “actor knowingly or recklessly engages in an act of sexual penetration with a person who at the time of such act has not given

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and policymaking.”). One can agree with Brown’s description of what juries do without embracing his prescription for improving the process:

The moral nature of criminal judgment, in particular, implies that we should urge attention to more than literal statute application. We should consider, in effect, canons of construction that would be useful and manageable for juries, canons that better serve the normative evaluation of guilt contained in criminal verdicts.

*Id.* at 1268. One might object that the studies reviewed by Brown involve juries that were inadequately instructed by their courts—perhaps because advocates did not anticipate the ambiguities the jury would confront—or juries that were inclined to nullify the law but unwilling to admit that fact to themselves. On the other hand, certain legal standards, like negligence, inevitably leave room for juries to exercise judgment about normative questions, and canons of construction would be unlikely to assist in the process.

147. In *United States v. Gaudin*, 515 U.S. 506 (1995), the Court rejected the argument that the question of “materiality” of allegedly false statements in a matter within the jurisdiction of a federal agency is a question of law that can be decided by the trial court. *Id.* at 512. Instead, the Court concluded that the Sixth Amendment required the question to be put to the jury, stating, “‘mixed questions of law and fact’ have ‘typically been resolved by juries.’” *Id.* (citing J. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 194, 249–50 (1898)).

148. CODE, *supra* note 3, § 2.02(9).

149. See SEPT. DRAFT, *supra* note 1, at 169 (“Sections 213.1 through 213.8 impose liability only when the actor is at least reckless—that is, consciously aware of the risk—with respect to each material element of the relevant offenses.”).

consent to such act.”<sup>150</sup> However, “consent” as defined in the draft is clearly intended to include both factual and legal elements.<sup>151</sup> That much is made clear by the comment indicating that an actor may not argue that the partner’s passivity establishes consent, regardless of the actor’s personal belief about the probative force of the passivity.<sup>152</sup> The requirement of affirmative acts itself appears in the definition of “consent,” showing that the drafters did not intend the *mens rea* language in the substantive prohibitions to cover every aspect of “consent.”<sup>153</sup> Like the requirement of affirmative acts, the requirement of “positive agreement” also appears in the definition of “consent.”<sup>154</sup> The same argument that insulates the “words or actions” requirement from the arguably modifying *mens rea* language, then, is likewise available to insulate the “positive agreement” requirement.<sup>155</sup>

This limitation of *mens rea* to questions of historical fact is not unusual. For example, under the Code’s provision on choice of evils, the actor’s perception of historical facts is relevant, but the question of whether the actor’s choice actually constituted the choice of a lesser evil—a “social judgment”—cannot, of course, be committed merely to the private judgment of the actor; it is an issue for determination in the trial.”<sup>156</sup> In other words, the commentary treats the interpretation of the historical facts as a legal question to which no *mens rea* attaches.<sup>157</sup> The comment’s approach, and the view that the balance of costs and benefits is different from the kinds of facts to which mental state requirements typically apply, have lead

150. APRIL DRAFT, *supra* note 1, § 213.2(2). On subsequent placements of the *mens rea* language, see Cole, *January 2016 Draft*, *supra* note 1, at 8 n.28.

151. *See* APRIL DRAFT, *supra* note 1, § 213.0(3).

152. *See supra* text accompanying note 122.

153. *See* APRIL DRAFT, *supra* note 1, § 213.0(3).

154. *See* DEC. DRAFT, *supra* note 1, § 213.0(3)(c).

155. The December draft does not include language requiring that consent be inferred from an act. However, the “no-means-no” rule appears in the definition of “consent” in the December draft. The Commentary makes clear that an actor is guilty of violating the “no” rule even if the actor does not know that it exists. *See supra* text accompanying note 122. Whatever argument keeps the draft’s *mens rea* requirement from requiring awareness that a “no” precludes consent would also preclude the *mens rea* language from requiring awareness of the other interpretive conclusions required to infer consent from historical facts.

156. MODEL PENAL CODE, § 3.02, Comments at 5 (Tent. Draft No. 8, 1958).

157. The commentary takes this position even though Section 3.02 itself expressly makes relevant the actor’s “belief” and Section 3.09 provides an elaborate explanation as to how varying levels of culpability, regarding historical fact, impact an actor’s liability. *See* CODE, *supra* note 3, at 12 (commenting on § 3.02); *id.* at 150–53 (commenting on § 3.09).



some commentators to argue that the actor's view that conduct is justified also does not end the inquiry under the Code's definition of "recklessness" either,<sup>158</sup> even though that definition requires that the actor "*consciously* disregards a substantial *and unjustifiable* risk."<sup>159</sup>

The Supreme Court has likewise found a single word to embrace both questions of historical fact as to which *mens rea* requirements apply and questions of law as to which they do not: an example is *Staples v. United States*.<sup>160</sup> The defendant argued that he did not know that the gun he possessed counted as a "firearm" under a federal statute requiring that firearms be properly registered.<sup>161</sup> "Firearm" was defined to include automatic weapons, and defendant's gun, while designed as a semi-automatic weapon, had been modified so as to qualify as an automatic weapon.<sup>162</sup> The Court concluded that the defendant could not be convicted if he did not know the historical facts that made his weapon count as a "firearm"—that it would fire automatically, but the Court took pains to add that the actor need not be culpable with respect to the legal consequence of those historical facts:

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158. See ALEXANDER, *supra* note 11, at 59–63 (assessing probabilities of risks and benefits from viewpoint of the actor, but "justification is objective" and "the balance of perceived risks versus reasons for imposing risks is itself a question of law"); Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 189 (2003) ("[I]t is fairly clear from the commentary (though not from the text) that the defendant needs to be aware only that the risk is substantial, not that it is unjustifiable.") (citing David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. L. 281, 362, 365 (1981)); Treiman, *supra*, at 334 ("What makes the actor's conduct justifiable is a societal judgment that the behavior is not culpable because the balance of risks and benefits was made in a manner beneficial to society. . . . To determine whether a risk is justifiable one must balance the potential harm against the potential gain. This balance must be based on societal values, not the actor's personal value." (citations omitted)).

The application of a statutory element is also generally a question of law as to which *mens rea* requirements do not apply under the Code. See, e.g., Gerald Leonard, *Rape, Murder, and Formalism: What Happens If We Define Mistake of Law?*, 72 U. COLO. L. REV. 507, 545 (2001) (in a case charging knowing killing of a human being, Code's approach would permit defense for actor who thought he killed a deer (a mistake of fact) but not for an actor who knew he killed a fetus but did not think a fetus was a "human being" under the hypothesized statute). See also PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 62(d), at 263 (1984) (noting that elements requiring *mens rea* regarding law are "rare" under the Code). But see Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447, 493 (1990) (arguing that Code permits mistake-of-law claims regarding application of an element while recognizing that this reading would greatly increase the number of exceptions to traditional mistake-of-law doctrine, a result not suggested by the commentary).

159. CODE, *supra* note 3, § 2.02(2)(c) (emphasis added).

160. 511 U.S. 600 (1994).

161. *Id.* at 603.

162. *Id.* at 602–03.

The *mens rea* presumption requires knowledge only of the facts that make the defendant's conduct illegal, lest it conflict with the related presumption, 'deeply rooted in the American legal system,' that, ordinarily, 'ignorance of the law or a mistake of law is no defense to criminal prosecution.' . . . The maxim explains why some 'innocent' actors—for example, a defendant who knows he possesses a weapon with all of the characteristics that subject it to registration, but was unaware of the registration requirement, or thought the gun was registered—may be convicted.<sup>163</sup>

Nothing in the draft's text precludes the most natural conclusion: that the interpretation of whether historical facts constitute "agreement" is a legal question to which culpability requirements do not apply. For example, while "different law" and "civil law" mistakes are sometimes recognized under conventional mistake-of-law approaches like the Code's, the draft does not closely resemble the usual examples, even accounting for the imprecision of the categories.<sup>164</sup> Nor does the draft use the word "willfully," which courts sometimes construe to require an actor's awareness of illegality.<sup>165</sup>

### *b. Stacking Objective and Subjective Standards*

Even if the draft were not so construed, however, a separate argument may militate against construing the draft to impose a requirement of subjective culpability regarding the interpretive question. The argument applies if "agreement" is interpreted, as suggested previously, to focus on how a reasonable person would interpret certain historical facts. We can think of the problem as one of stacking objective and subjective standards.

Two reasons might lead a court to avoid applying a subjective culpability standard to an objective statutory element. The first reason is that doing so seems only slightly different from simply applying a recklessness

163. *Id.* at 622 n.3 (citing *Cheek v. United States*, 498 U.S. 192, 199 (1991)). *See also* *Liparota v. United States*, 471 U.S. 419, 419, 441 (1985) (White, J., dissenting) (arguing that statute punishing one who "knowingly . . . transfers . . . [food stamps] . . . in any manner not authorized by [the statute] or the regulations" does not require knowledge that the transfer violate the law; "In relying on the 'background assumption of our criminal law' that *mens rea* is required, . . . the Court ignores the equally well founded assumption that ignorance of the law is no excuse." (citing 7 U.S.C. § 2024(b) (1982))); *id.* at 439 (citing Model Penal Code in support of argument).

164. *See generally* Leonard, *supra* note 158, at 537–65.

165. The Code explicitly defines "willfulness" so as not to carry this connotation, *see* CODE, *supra* note 3, § 2.02(8), but the draft could redefine the term for purposes of the sexual assault article, as it does with "recklessness," *see supra* note 81, if it wished to make the point plain.

requirement to the target of the objective test. If “agreement” means “what a reasonable person would take as indicating willingness,” applying a recklessness requirement would require that an actor be consciously aware of a substantial and unjustifiable risk that reasonable people would think the historical facts present a substantial and unjustifiable risk of the partner’s lack of willingness.<sup>166</sup> This is a small change from simply asking directly whether the actor was reckless regarding willingness—small enough that most courts would probably resist the conclusion that the drafters could have intended that result. To be consciously aware of a risk that most people would think the partner was unwilling will almost always mean that the actor was simply consciously aware of the risk that the partner was not consenting. If a simple recklessness standard would accomplish the same result as applying the recklessness standard to an objective requirement, then the objective component seems to be surplusage—a conclusion a court would be slow to draw. This modest shift in liability standards would require an instruction that would challenge the most perspicacious juror.

Second, the reason for adopting an objective standard might be incompatible with stacking. If the objective standard is adopted in an effort to shift behavioral norms, the process of change will be showed by allowing people to avoid conviction by showing that they were not consciously aware of a risk that they were violating the norm. The draft commentary clearly states its mission as changing social norms.<sup>167</sup> Even if applying a subjective standard to an objective statutory element might not always conflict with the reason for inclusion of the objective element, a court could well reach a contrary conclusion here.<sup>168</sup>

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166. See *supra* Section III.B.2.

167. See APRIL DRAFT, *supra* note 1, at 11, which states:

[I]t is customary—at least for serious felonies—to reserve the social opprobrium and strong penalties of the criminal law for conduct that is universally condemned as intolerable. By this measure it would be acceptable, perhaps even obligatory, to define the sexual offenses quite narrowly, restricting them to clearly aberrational behavior and declining to attach penal sanctions to conduct that significant segments of our society regard as predictable, harmless, or even valuable in some circumstances. On the other hand, a vitally important function of the criminal law is to identify and seek to deter behaviors that pose unjustifiable risks, even when those risks are not yet universally understood.

168. Professor Buell expresses some attraction to stacking in his discussion of a standard from English law, stating “[d]ecisions under English theft statutes have defined the mens rea element of dishonesty as requiring two things: that the defendant’s conduct was dishonest by the standards of ordinary people, and that the defendant knew her conduct was dishonest by the standards of ordinary people.” Buell, *supra* note 45, at 601. A subjectivist would certainly find this standard preferable to a purely objective one, but that fact does not dispense with the argument about how the draft might be construed. The Code at least once explicitly adopts a standard of this kind. See CODE, *supra* note 3, § 250.10 (forbidding treating a corpse in a way the actor “knows would outrage ordinary family

*c. The Enforcement Gap Problem*

Finally, applying the recklessness requirement to the interpretation of historical facts would create an enforcement gap that should incline courts against that interpretation—and would, relatedly, significantly undermine the reform goals of the draft. The problem is a general concern in applying a subjective culpability requirement to any criminal statute, but the problem is exacerbated when dealing with proxy crimes. It comes about because of the increased possibility that an individual actor will not think in the terms of the proxy crime even if the actor did focus on whether the conduct in question risked the underlying social harm.

The requirement that an actor be reckless regarding a statutory element means that the actor should not be convicted if the actor did not consciously reflect on the element. An enforcement gap is theoretically possible but unlikely under the general approach to criminality followed by the Code. For example, if recklessness were required regarding whether the partner was willing to engage in sexual conduct, it is possible, but unlikely, that a particular actor would not have adverted to the partner's willingness. Sex with an unwilling partner offends such widely shared social understandings that an actor who proceeded without advertising to the partner's willingness would be about as uncommon as the actor who admitted it or a jury that believed the story.<sup>169</sup>

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sensibilities"). The examples of negligence liability discussed previously—*theft by deception* does not apply to "puffing by statements unlikely to deceive ordinary persons" and *extortion* does not apply when the actor's purpose is limited to compelling a person "to behave in a way reasonably related to the circumstances which were the subject of the accusation"—may also be examples. *See also id.* § 213.1(2)(a) (suggesting question of whether an actor must be reckless regarding whether his threat would "prevent resistance by a woman of ordinary resolution").

The Code applies a specified mental state requirement to every material element in an offense "unless a contrary purpose plainly appears." CODE, *supra* note 3, § 2.02(4). One could view the inclusion of an objective statutory element as indicating such a purpose. This argument is somewhat complicated by the Code's provision requiring recklessness when no mental state language is designated in a statute; that provision lacks the proviso in section 2.02(4). *See id.* § 2.02(3). Of course, if the objective element is viewed as involving a question of law, sections 2.02(3) and (4) would need to be read in light of the Code's general acceptance of mistake-of-law doctrine.

169. Some counterexamples can be found. For a discussion, see Ben-David, *supra* note 104, at 424 (discussing *R v. Kimber*, [1983] 1 W.L.R. 1118 (HL) (appeal taken from UK)).

Proxy crimes, on the other hand, occupy a different position, especially when the rules focus on non-intuitive facts or conclusions. Suppose that the *actus reus* of sexual assault under the draft is something like “sexual contact when the partner’s words and actions would not lead a reasonable person to believe that the partner was willing to engage in that contact.” An actor might very well not have adverted specifically to how a *reasonable* person would interpret the facts. Indeed, it would probably be the unusual actor who would think in such terms. Entirely law-abiding actors would likely focus on the simpler question of whether the partner was willing to engage in the sex acts in question. While it is plausible to think that publicity could lead actors to take a “no” seriously, as the draft argues, many people would probably not understand if told that they must focus not on what they think their partner desires, but rather on how a reasonable person would decode the situation.<sup>170</sup>

Consider another example: Assume the April draft were interpreted so as to require that “positive agreement” be inferred *solely* from a partner’s words or actions, with no consideration of the partner’s lack of objection. Part V below argues that the draft should not be so construed, and some of those reasons suggest why many actors might not think in those terms.<sup>171</sup> Education might incline actors not to infer agreement from pure passivity—it is likely the rare actor who needs education on that point anyway—but it would be considerably more difficult to induce actors to ignore clearly probative evidence in making decisions about their partners’ attitudes. Accordingly, if these actors were required to be reckless regarding whether “positive agreement” had been shown based on words and actions *alone*, they could truthfully and plausibly respond, “I didn’t think that way.” This enforcement gap is avoided if subjective culpability is not required regarding the question of whether the partner’s words and actions *alone* met the standard of agreement—the “factfinder” would simply determine whether the words and actions, standing alone, met the general standard embraced by the law.<sup>172</sup>

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170. Clearer indications of what the actor must hear or see are conceivable. But they would quickly become too complex to be communicated generally or too rigid to capture norms of acceptable and even welcome behavior, as they would need to apply to a vast array of different conduct arising in a vast array of circumstances.

171. The December draft’s extended definition of “consent” recognizes the relevance of passivity. *See supra* note 26.

172. A similar problem arises if nonintuitive temporal limits are placed on the words and actions that may be considered in inferring positive agreement. And while the December draft acknowledges the relevance of passivity, the January 2016 memorandum might support the idea that temporal limitations still constrain the facts that can be considered in assessing agreement. *See supra* note 27.

The Code has been faulted for failing to recognize this problem with subjective culpability, both regarding recklessness<sup>173</sup> and regarding self-defense.<sup>174</sup> As to self-defense, the Code requires that an actor have certain beliefs to benefit from the defense. Some of the requisites seem unlikely to cross the mind of a person under the stress of an assault, for example. Juries likely ignore the law when it insists that a defendant have certain beliefs when responding to attacks.<sup>175</sup> Courts cannot avoid putting the jury into this situation under the self-defense provisions, given how they are drafted.

When it comes to interpreting the vague provisions of the draft, however, a court might well wisely wish to avoid the enforcement gap that would be caused by asking whether an actor was consciously aware that “agreement” might be lacking. The actor who responds, “I never heard of ‘agreement’ before; I just thought that my partner was OK with what we were doing,” should be acquitted if recklessness applies to the interpretive question of what historical facts constitute “agreement.” Especially given the natural view that “agreement” involves a mixed question of fact and law, courts would likely avoid the enforcement gap by interpreting the *mens rea* language in the draft as not applying to the interpretive question.

#### *E. Negligence Under the Code*

The criticism that the draft would likely impose negligence liability on the question of whether historical facts are interpreted to constitute “agreement” raises two questions. The first is whether negligence liability in this setting is justified by analogy to the other settings in which the Code imposed negligence liability. The second is how to defend imposing liability for simple negligence as opposed to the gross negligence requirement usually imposed when the Code opted for an objective standard.

There is, however, a third question that is easy to overlook, because the Code might be read, on some occasions, to embrace a simple negligence liability standard. The instances of negligence liability identified by the draft commentary do not fall into this category. The draft notes two instances—homicide and justifications—in which the Code requires gross

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173. See Simons, *supra* note 158, at 194.

174. See Kenneth W. Simons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control?*, 11 NEW CRIM. L. REV. 51, 51, 60–63 (2008).

175. *Id.* at 57.

negligence to convict.<sup>176</sup> There are others as well. For example, the Code rejected most jurisdictions' strict liability rule<sup>177</sup> to create a defense of mistake of fact in statutory rape cases where the actor "reasonably believed" the partner was above the age of consent.<sup>178</sup> "Reasonably believes" is defined to be a belief that the actor is not "negligent" to hold,<sup>179</sup> and "negligence" is defined as requiring a showing of "gross" negligence.<sup>180</sup> The Code also imposes assault liability on those who are grossly negligent in causing bodily injury with a deadly weapon.<sup>181</sup>

A few other provisions in the Code, however, arguably impose liability based on simple negligence.<sup>182</sup> For example, if an actor "ought to know" a substance's tendency to cause intoxication, then the special rules that impute culpable mental states to an intoxicated actor apply to the actor who ingests the substance.<sup>183</sup> The duress defense can be lost if the actor was "negligent in placing himself" in the situation—language that incorporates the gross negligence standard—but the defense is not available unless a "person of reasonable firmness" would be unable to resist the threat, a standard that arguably does not incorporate the gross negligence standard. Likewise, as noted before, the provision on criminal coercion does not apply if the actor's "purpose was limited to compelling the other to behave in a way *reasonably related* to the circumstances which were the subject of the [threat]"; theft by deception applies when an actor has a "purpose to deceive," but deception does not include "puffing by statements unlikely to deceive *ordinary persons* in the group addressed."<sup>184</sup>

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176. See APRIL DRAFT, *supra* note 1, at 153 ("Negligence standards are of course pervasive in the law; in the criminal law they are particularly common in the jurisprudence of homicide and self-defense."). The Code's provision on mistakes regarding self-defense also applies to the other justification defenses. See CODE, *supra* note 3, § 3.09.

177. See CODE, *supra* note 3, at 413 (commenting on § 213.6).

178. *Id.* § 213.6(1).

179. *Id.* § 1.13(16).

180. *Id.* § 2.02(2)(d). See also *id.* § 213.6 cmt. at 416 (noting that section 1.13(16) defines "reasonable belief" in terms of "negligence" definition). The new draft would go even further, limiting liability to those who are reckless regarding the partner's age. See APRIL DRAFT, *supra* note 1, § 213.7 & commentary at 156.

181. See CODE, *supra* note 3, § 211.1(1)(b).

182. While Section 1.13(16) defines "reasonably believes" and "reasonable belief" in a way that incorporates the gross negligence standard, it does not so define "reasonableness" and its variants discussed in the text. Some provisions use a reasonableness standard, but in a setting that has no plausible connection to the mental state required for a conviction. See, e.g., *id.* § 303.9(1) ("When a defendant is sentenced or committed for a fixed term of one year or less, the Court may in its order grant him the privilege of leaving the institution during necessary and reasonable hours" for certain purposes, like employment).

183. *Id.* § 2.08(5)(b).

184. See *supra* notes 133–44, and accompanying text.

Consent to sex is more like the examples in which the Code requires gross negligence than those in which it might be read to permit conviction for a simple lack of reasonableness. The draft itself recognizes the extraordinary nature of the intoxication provision by explicitly rejecting its application to the proposed new provisions on sexual assault. The requirement that a “person of reasonable firmness” be unable to resist coercion does not address the actor’s cognition, as the consent question does; its arguably grudging approach to volitional forces might also reflect a compromise thought necessary given the Code’s expansion of the common law approach to duress.<sup>185</sup> Moreover, provisions for criminal coercion and theft by deception, mentioned above, might be thought primarily to provide guidance for those engaged in commercial enterprises—regulating, for example, when an attorney can threaten a lawsuit, what a salesperson can say in selling a car, and the like. Perhaps these arguable and rare examples of liability based on simple negligence under the Code reflect the view that businesspeople can fairly be held accountable for knowing the norms of their industries. One can disagree with this view but still see these instances as distinguishable from the draft’s positive-agreement standard, which is the predicate to labeling a person as a sex offender.

Accordingly, even on closer inspection, the Code almost always requires gross negligence when it imposes an objective standard. This essay will not rehearse the arguments for and against negligence liability for sex offenses. However, the draft does not make the case for such liability by arguing—as it does—against such liability, and nowhere does it recognize the heightened negligence standard customarily applied in criminal cases.

#### V. RESISTANCE, PASSIVITY, INTOXICATION, AND PROXY RULES

The draft wisely notes the “impossible task of drawing an identifiable line between intoxication that makes compliant behavior inauthentic and intoxication that does not.”<sup>186</sup> Instead of embarking on this task—which has led to “the vagueness of applicable law in this area”—the April draft focuses on the answerable question of whether the partner is “unable to express by words or actions his or her refusal to engage in” the sex act in

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185. For example, the Code does not preclude the defense in homicide cases. *See* CODE, *supra* note 3, § 2.09 cmt. at 368.

186. APRIL DRAFT, *supra* note 1, at 65.



question “because of intoxication.”<sup>187</sup> The offense is a felony in the third degree if the actor engages in penetration.<sup>188</sup>

But there is more. The commentary states that the “positive agreement” provision will also come into play in cases involving lesser levels of intoxication. The analysis, however, unwisely implies that passivity plays no role in determining a partner’s willingness to engage in sexual activity, that passivity’s role is the same in cases regarding intoxicated and sober partners, and that “positive agreement” will mean the same thing regardless of the apparent intoxication or sobriety of the partner.

The draft states:

The law’s predicament in this area . . . is largely self-inflicted, not inescapable. The complexity of identifying nonconsent in cases of heavy drinking flows directly from one fundamental but entirely unnecessary commitment—the law’s prevalent assumption that passive or ambiguous behavior ordinarily can be treated as *consent* to have sex, until an individual has taken clear steps to indicate the contrary. Because the passive behavior of a sober person traditionally has been equated with consent and because the passive behavior of an extremely intoxicated person cannot be, the law imposes upon itself the nearly impossible task of determining the *genuine* meaning of a person’s behavior when docile or unresponsive actions occur under the influence of alcohol or drugs. . . .

. . . When individuals who have consumed alcohol fail to protest verbally or resist physically, there is no need to determine whether they are “*incapable* of giving consent” because, whatever their capacities, they clearly *have not* given consent.<sup>189</sup>

This analysis is compelling in the rare case when a partner is entirely passive, but those cases are uncommon. The complicated question, when a partner is not actively assisting in the now-disputed sex act, is how to interpret the meaning of passivity in that context, in light of the words or actions that came before. Whether one focuses on the various forms of penetration covered by the draft or on the other kinds of sexual contact addressed, scenarios are easy to imagine in which the partner is not an active party at the moment the contact occurs.

Under the December draft, the relevance of passivity is explicitly recognized in the definition of consent.<sup>190</sup> Considering the April draft is still useful, however, to demonstrate how little the December draft really changed matters. Moreover, even under the December draft, passivity does not automatically equal consent, and so the Commentary’s suggestion that passivity be given the same effect regardless of whether the partner is intoxicated remains important.

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187. *Id.* at 64.

188. *See* CODE, *supra* note 3, § 213.2(2)(c).

189. *Id.* at 65–66.

190. *See supra* note 26.

Under the April draft, the answer cannot be that an actor may not consider a partner's failure to object in determining whether "positive agreement" to the sex act exists. Even express verbal agreement to engage in a sex act might be rescinded; "positive agreement" at one time cannot entail a right to specific sexual performance. If we expect an actor to stop when a partner expresses a change of heart, we are requiring the actor to take account of whether the partner resists, and if resistance is relevant, then passivity—its absence—must be relevant too.

One might respond that passivity should only be considered once the point of agreement has been reached, that the failure to resist is germane only if prior words or actions have already signaled "positive agreement." The implausibility of such an approach becomes clear when one attempts to explain what it would mean. Perhaps it would be cashed out along the following lines: Based solely on the partner's words and actions, would a reasonable person predict that the partner would be willing to engage in the act in question beyond some specified level of certainty within the time frame contemplated by the actor?<sup>191</sup> Thinking in these terms is challenging to a reader and impractical to expect of those in the throes of passion, whether or not they are also in the throes of alcohol.

Putting practicality to one side, even this standard slights the significance of resistance, and hence the logically related relevance of passivity. Suppose a partner initially demurs when invited up to the actor's apartment after a night at the movies, but agrees after being assured, "We'll just have a cup of coffee and talk." Or suppose that, during intimacy, a partner pushes the actor's hand away from the partner's genitals. If, in either case, the partner later speaks or acts in ways that might signal willingness to engage in particular sexual activity, the prior acts of resistance would certainly be relevant in determining how to assess those signals. In other words, the prior demurrals rationally shape how we view the later signals. An actor concerned about the partner's willingness, as all should be, will be concerned that even what appears to be a clear signal might not be so clear after all, in light of the partner's prior conduct. And if this prior resistance is probative, then so too would be a lack of prior resistance.

The final problem in trying to cabin the effect of resistance relates to its role in ordinary conduct. How often do actors discern their partners'

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191. The "time frame" language is not included to make the inquiry appear unduly complicated. Rather, it seems clear that a partner might even give verbal permission for penetration, for example, but not wish to be penetrated abruptly.

receptivity to “scoring” by seeing whether their partners object as the actor takes a lead off third base? If this approach is common, or even welcome to some degree, that fact would counsel against any attempt to exclude the failure of resistance from consideration in determining whether positive agreement exists. The draft’s reporter recognized this fact in previous work. The reporter—whose scholarship led one author to call him the “architect of the Yes Model”<sup>192</sup>—has acknowledged the continued relevance of the failure to resist under an affirmative consent model. He wrote, “[c]onsent for an intimate physical intrusion into the body should mean in sexual interactions what it means in every other context—affirmative permission clearly signaled by words or conduct.”<sup>193</sup> Later, he provided the following example making clear the continued role of passivity in establishing consent:

[R]esistance will still be relevant, in some cases, to determining whether consent was given at all. A couple sits side by side necking on a sofa. While kissing his date, the man presses his body forward, so that the woman is pushed back to a reclining position. He then reaches under her dress to touch her genital area. The woman might or might not be consenting to these sexual contacts. If she says “no,” tries to sit up, and pushes his hands away, we are more likely to think she is unwilling than if she does none of these things. Resistance remains relevant when we are not sure whether the woman gave consent.<sup>194</sup>

Moreover:

Only unambiguous body language should suffice to signal affirmative consent, of course. Sexual petting does not in itself imply permission for intercourse, any more than does inviting a man in for coffee or permitting him to pay for dinner. A woman who engages in intense sexual foreplay should always retain the right to say “no.” If she doesn’t say “no,” and if her silence is combined with passionate kissing, hugging, and sexual touching, it is usually sensible to infer actual willingness.<sup>195</sup>

The Reporter also cautioned that requiring authorization before intercourse would introduce “a degree of formality and artificiality on human interactions in which spontaneity is especially important.”<sup>196</sup> Others have expressed similar views.<sup>197</sup> That position is not offended by a requirement that some affirmative words or conduct suggest that intercourse is welcome—a position that is likely widely accepted and important to affirm to those who do not accept it. A rigid requirement that lack of resistance not be

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

193. Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2181 (1995).

194. SCHULHOFER, *supra* note 24, at 131.

195. *Id.* at 272.

196. *See supra* note 24.

197. *See supra* note 85.

considered in conjunction with the partner's affirmative words or actions, however, would introduce a counterintuitive legalism into intimate relations.

While passivity is thus relevant to the question of whether the partner is willing to engage in a sex act and should be relevant to whether positive agreement has been shown, an actor concerned about the partner's willingness would give different weight to passivity in different settings. Whether sober or not, a partner's passivity just before penetration doesn't say much about the partner's willingness to be penetrated in cases in which the actor achieves penetration by ambush. On the other hand, when an actor and a sober partner are engaged in mutual foreplay, the actor moves slowly and obviously towards an act of penetration, and the partner is sufficiently attentive and sexually experienced to be clearly aware of what is happening and not in fear, an inference that the partner is willing to be penetrated may well be justified.

If the same partner were severely intoxicated, however, the inference of willingness is weaker. Seriously intoxicated persons are less likely to infer an actor's next moves than a sober or less intoxicated person will be, other things being equal. Accordingly, one would expect the same combination of acts and passivity that is adequate to signal consent when a partner is sober not to be sufficient when the partner is seriously intoxicated. No matter how high the degree of certainty required regarding consent, some cases will fall on either side of the line.

The Commentary, however, suggests that some magic combination of words and actions, and arguably passivity, is required regardless of whether the partner is known to be sober and experienced, on the one hand, or drunk and inexperienced on the other. However, if that is the case, then the draft's over-inclusive rules on consent illustrate one problem with proxy crimes. A proxy crime aggregates and treats facts identically when the facts correlate differently with the social harm sought to be avoided. The broader the scope of the rule, the greater the number of cases in which a vague proxy crime will work an injustice.

Proxy crimes do not merely treat some people too harshly. Sometimes they treat the culpable too leniently. For example, the draft sets the sanction for sex without positive agreement in light of the understanding that some people who violate the provision will be, even in the draft's view, only mildly culpable. But that means that the person who proceeds in the absence of affirmative consent also gets the same punishment even if subjectively aware that the partner was unwilling to engage in the acts in question. Only if the actor violates some independent provision, by threatening

the partner, proceeding with an unconscious partner, or the like, is the greater punishment imposed.<sup>198</sup>

However, the draft provision also carries an increased risk to the subjectively innocent if a singular rule establishes how to treat sober and intoxicated actors. A proxy rule requiring the set of words and actions, and arguably passivity, that would suffice to protect the intoxicated partner—the implication of the Commentary—will require more than would be necessary to assure the same degree of protection to a sober partner. Given the lack of specificity in the rule, actors involved with relatively sober, experienced partners, including those with whom they have had prior intimate relationships, would be more likely to violate a “positive agreement” standard fleshed out to protect more vulnerable partners, even if they were unaware of any risk that their partner was unwilling.

These observations do not apply if the “positive agreement” standard is in fact interpreted as requiring words or actions, in conjunction with a lack of resistance, that would lead a reasonable person to think a partner *in the partner’s situation* was willing to engage in the sexual activity in question. In that case, the objection is simply whether simple negligence should suffice for criminal liability. However, if the standard is interpreted to require a singular kind of authorization to sex acts that applies across the board, the standard will meet the aspirations of the intoxication commentary only if it increases the risk to subjectively innocent actors whose partners are not extremely intoxicated.

One might argue that these problems do not occur if the standard for positive agreement is set so that there is almost no chance that it could be satisfied when a sober partner was actually unwilling to engage in particular sex acts. The requirement of affirmative verbal authorization for a specific act of penetration might be thought to describe such a standard. Even though there is an increased chance that a severely intoxicated person would be confused and give verbal consent when actually unwilling to engage in a sex act, the risk might still be thought to be small enough that a single standard could govern all cases.

Of course, a hypothetical requirement of affirmative verbal authorization does not suffer from the vagueness that increases the risk associated with setting the “positive agreement” standard so high as to deviate from average persons’ intuitions about appropriate conduct. But in rejecting a requirement

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198. The scope of the problem will depend on a jurisdiction’s approach to sentencing. Regardless of that approach, both of the actors discussed in the text would be convicted of the same crime. In a jurisdiction that allows sentencing discretion, a judge might distinguish among the actors by giving sentences at the top of the range to the “culpable” offenders and lower sentences to the “nonculpable.”

of affirmative verbal authorization, the draft notes why it would be objectionable: such a standard “finds no support in existing law and departs too far from current social practice.”<sup>199</sup> Perhaps “existing law” would support requiring a set of actions admitting of little more doubt than that entailed by a verbal authorization standard; after all, other jurisdictions have adopted vague “affirmative consent” provisions that remain to be interpreted. However, at some point, the same social norms at odds with a verbal agreement standard will also conflict with a requirement of aggressive behavior by all sex partners throughout each part of a sexual encounter. The case in favor of such a standard is weakened by the draft’s adoption of the “no-means-no” rule, which screens out a large number of troubling cases.

## VI. CONCLUSION

The draft’s consent provisions make their intended point about the perils of coy sex while making an unintended point about the perils of coy legislation. Law that accommodates those who prefer to have sex while protesting will pose dangers to those whose protests are genuine. But law that seeks to prevent unwanted sex through ill-defined prohibitions essentially delegates the criminalization decision to prosecutors, judges, and juries. Even when those actors exercise their power in good faith, improper considerations have more room to influence their decisions when the legal standard is vague. The problem is inherent in the use of proxy crimes to regulate sexual relations. Clear provisions—like a requirement that a “no” be honored—can be defended. To regulate sex more closely will either require clear rules that many will find objectionable—like a requirement of an affirmative “yes” as a predicate to every sex act—or vague “rules” that can accommodate the variety of sexual conduct that most people find acceptable.

The best case scenario may be that the draft’s “positive agreement” standard will turn on whether a reasonable person would think that a partner’s words and actions demonstrated willingness to engage in the sexual conduct in question. However, the Code generally required subjective culpability—not negligence—as a predicate to criminal liability, and when it did permit liability without subjective culpability, it insisted on a showing of gross negligence rather than simple or tort negligence. It may

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199. APRIL DRAFT, *supra* note 1, at 54.

be, as some have argued, that sexual assault is a special case that requires an exception to the Code's general preference for subjective liability. Because the draft obscures its negligence standard in the vague "positive agreement" standard, it never defends "positive agreement" as an example of when the criminal law should employ a negligence standard. And the question is hotly contested.

Moreover, the draft's discussion of sex while intoxicated suggests an interpretation of "agreement" that illustrates one of the risks of proxy crimes—that the crimes will apply a single rule of conduct to widely varying situations. The objective indicia of consent necessary to prevent unwanted sex with a highly intoxicated and inexperienced partner will be greater than that necessary to prevent unwanted sex with a sober and mature partner who has frequently engaged in sexual relations with the actor in the past. If the draft is interpreted in line with its suggestion that the same standard apply in both cases, it poses a risk of punishing non-culpable actors with relatively sober partners, under-protecting highly intoxicated partners, or a little of both.

Of course, every statute will pose interpretive problems at its boundaries. The problem with the draft's "agreement" standard is that the interpretive problems occur in the routine situations to which the provision applies—determining when mutual sexual conduct is an invitation to further sexual conduct. The draft could accomplish much good without taking on the problems of the "positive agreement" standard. The draft could forbid sex undertaken by an actor who was reckless as to whether the partner was willing or by an actor who was grossly negligent as to that fact. Either general rule could be supplemented by the clear aspects of the draft's proxy crimes—that willingness may not be inferred solely from passivity, and that a "no" must be respected unless rescinded by subsequent words or actions.

Applying the April draft's "positive agreement" standard to all manner of sexual contact was so obviously impractical that it drew considerable criticism, and it even prompted the drafters to adopt commentary stating that the actor must be subjectively culpable about the question of whether the historical facts of a particular encounter should be interpreted as "positive agreement"—commentary that is likely to be discounted, in light of contrary indicia of how the draft should be interpreted. The ALI should not be content simply to cabin the draft's new "agreement" standard. It risks unfairness and remains unnecessary even as to the sexual penetration offenses and not only because of how broadly those offenses are defined. Penetration is different from other forms of sexual contact, but those differences would be reflected by asking whether the actor was reckless or grossly negligent as to whether the partner was willing to be penetrated. The evidence from which one would infer a willingness to be kissed falls

far short of the evidence from which one would infer the willingness to be penetrated.

The draft's problems are particularly troubling given the stigma associated with labeling an actor as a sex offender. Reserving the term for the culpable will preserve the stigma. Particularly if the "no" rule is adopted, education can help avoid both unfair convictions and unwanted sex. Educating actors that a "no" must be respected is helpful for those who aren't already aware. And educating partners about when to use "no" under the new legal regime would blame victims no more than advising vacationers not to let mail accumulate while they are away from home. Fearing the accusation that we are blaming the victim should not be an excuse for creating more of them—who are not really made whole by punishing those who may have harmed them inadvertently.



