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The Tension Between Traditional Consent and Affirmative Consent: A Kantian Solution

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In February of 2014, State Senators Kevin de Leon and Hannah-Beth Jackson introduced the bill SB 967 into the California Senate which sought to establish a standard of affirmative consent, otherwise known as "yes means yes", at colleges and universities across the state. (Peterson) This has created much controversy. Until now the "no means no" standard or the traditional standard has been used to determine if a sexual act was consensual. I will examine the philosophical issues present in both the "no means no" and the "yes means yes" standard of consent. I will then offer a Kantian solution of consent and morality to address societal issues that may prevent "yes means yes" from functioning as desired.

1. No Means No

Many issues arise under the "no means no" standard of consent. In this section I review the generalization and assumption of consent; the force and resistance requirement; post-penetration withdrawal of consent; and, finally the definition of consent. As described by the Vanderbilt Law Review, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, despite its simplicity, "no means no" has not provided the protection to victims that was anticipated. Many still believe that a verbal rejection of a sexual advance does not create a case of rape against a man who engages in sexual intercourse with the woman anyway.[1] [2] As a result, no does not actually mean no in rape law. Debate still remains

[1] From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law, 58 Vdbt. L. Rev. 1322 (2005).

[2] This claim is based on the idea that women do not always mean no when they say no. Such opinions are based on findings in surveys such as one done in 1988 at Texas A&M University where 39.3 percent of female undergraduates that were surveyed sometimes said no in cases where they had intention to and were willing to engage in sexual intercourse. Such surveys show that

over whether a woman has been raped if she explicitly states a lack of consent but is ignored by her partner.[3] This shows that "no means no" has failed to come into mainstream belief. It is clear that the "no means no" standard of consent is far from being the accepted legal standard because court decisions are still acquitting men of rape where there was no doubt that the woman said no to sexual intercourse.[4]

The issue of generalization of consent is expounded upon in the Harvard law review, *Acquaintance Rape and Degrees of Consent: "No" Means "No," but What Does "Yes" Mean?*. The notion of generalized consent exists in rape law, and as a result, prior sexual intercourse either indicates consent to subsequent intercourse or suggests that the defendant reasonably believed that the victim consented to later sexual encounters. This is problematic because it creates a presumption of consent that the victim must negate.[5]

Most states allow previous consent to be considered relevant to the determination of present consent by providing a rape shield exception that allows for previous consent to be taken into account.[6] This is essentially equivalent to saying that someone who consents to some sexual activity should assume the risk of injury or violence of a possible rape.[7]

The voluntary social companion defense says: "that the victim voluntarily induced the performance of the ultimate sexual act by (i) being voluntarily present as a social companion, and (2) permitting sexual contact, short of the sexual act, itself, to occur". This defense works to

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most women mean "no" when they say "no" but some use this evidence to say that the word "no" does not mean "no" or that it confuses men (Vanderbilt Law Review 1322).

[3] This is shown by court decisions acquitting men of rape where there is no doubt that the woman has indeed said no to sexual intercourse by which it indicates that "no means no" is far from being the accepted legal standard (Vanderbilt Law Review 1322).

[4] Ibid 1322

[5] Acquaintance Rape and Degrees of Consent: "No" Means "No," but What Does "Yes" Mean?, 117 Hvd. L. Rev. 2342 (2004).

[6] Ibid 2343

[7] Ibid 2345

protect the defendant by suggesting that by permitting sexual contact in a voluntary social relationship, the victim is leading the defendant to believe that there is consent to the performance of the act of sexual intercourse.[8] This idea also manifests itself through judges, juries, and prosecutors and through the resistance factor in rape law.[9] [10] Switching to "the acknowledgment of specific, rather than generalized, consent would prompt courts to engage in a more explicit dialogue attempting to articulate and define such distinctions".[11]

We can presume that people engage in petting, or touching short of sexual intercourse, with greater frequency than sexual intercourse or prior to sexual intercourse; so petting alone does not show consent to sex. Because it can operate as foreplay to sexual intercourse, it may be interpreted as consent to sex. Either of these situations may be at play, so courts could require the jury to consider whether sexual intercourse escalated consensually from petting to the act of intercourse. The requirement of an affirmative standard would require that consent was given voluntarily. Asking the jury to consider the case in this manner highlights the fact that consent is specific rather than generalized and cannot guarantee consent to sex. Further disrobing or a willing move to a more intimate location can indicate an escalation of consent but focusing on what these acts mean rather than simply if they occurred is a crucial issue.[12] By showing consent was

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[8] Ibid 2345
[9] Ibid 2346
[10] The legal rule of resistance in rape law was formally abolished but is still functionally operational. Traditionally, rape law required "resistance" or "resistance to the utmost". This concept signaled to juries, judges, and prosecutors that any indication of consent - even consent

to casual companionship - would preclude the required level of resistance from being met. Most states have eliminated this requirement, however, resistance is still relevant to finding a lack of consent and use of force. Rape law generally requires affirmative dissent, resistance, in situations where some consensual contact has taken place. Resistance still remaining present in rape law requires the victim to assume risk in order to fulfill current standards of definition, rape meaning resistance and force are present (Harvard Law Review 2348).

[11] Ibid 2354
[12] Ibid 2355

present in one act due to cues or affirmation that took place, we can see where consent was present at one moment while also recognizing a lack of consent to a following act. This frees us from using consent as a general notion.

In *No Means No?: Withdrawal of consent during intercourse and the continuing evolution of the definition of rape,* Matthew Lyon argues that because courts consider force the defining feature of rape rather than non-consent, they apply a resistance standard rather than a consent standard (285).[13] Lyon says that, "as a result, some defendants who clearly forced intercourse onto women without their consent had their convictions overturned because their victims were not able to show beyond a reasonable doubt the requisite amount of physical resistance" (285). In this sense a requisite amount would result in bruising or injuries showing physical resistance. According to Decker and Baroni, in *"No" Still Means "Yes": The Failure of The "Non-consent" Reform Movement in American Rape and Sexual Assault Law",* resistance and force are still relevant to finding a lack of consent.

In some states, such as Georgia, the offense of rape requires force but sexual battery only requires a lack of consent (Decker, Baroni, 1100). Non-consent standards have not made much progress since many states still require a showing of forcible compulsion or a victim's incapacity to consent for a sex crime conviction (Decker et al. 1101). Even in states where there is no resistance requirement, the victim's resistance still determines if they consented and whether or not the defendant used force. Furthermore, looking to resistance to determine non-consent puts all of the focus on the victim (Decker et al. 1112). This is the case because we require the victim to re-

13 A resistance standard defines non consent solely in terms of physical evidence in resistance to the attacker (Lyon286). A consent standard defines non consent on the victim's mental condition if it was such as to withhold their consent (Lyon 285).

sist to the point that there is physical evidence of a fight to prove that rape occurred. If we required that consent be the determining factor the victim would still need to prove that they did not consent but we would not require them to put themselves in harms way to do so. This also ignores cases where the victim is too afraid to resist and reveals society's views that if the victim does not want sexual intercourse to take place, they should be willing to physically fight an aggressor likely bigger and stronger. This expectation shows that the law does not consider consent to be sufficient. Many states still define force and consent in terms of the victim's resistance. In states that do not specify whether or not resistance is required, the common law rule demanding the victim's resistance applies (Decker et al. 1119).[14] According to Decker, "today's sex offense laws largely require the victim to vigorously assert non-consent or resist, rather than require the defendant to obtain consent before committing a sexual act" (1119). However, "when a victim says "no" to a sexual overture, it clearly indicates that individual's lack of consent. Consequently, lawmakers who recognize this point should immediately move to amend their states' rape laws to protect their citizens from unwanted sex" (Decker et al. 1119). We can see this issue taken further with post-penetration withdrawal of consent.

Typically in rape law, the act of penetration is seen as completing the offense so lack of consent and the use of force must occur before the act of penetration for an act to be considered rape by the law.[15] If consent is withdrawn that too must occur before penetration.[16] Consent can, however, and has been revoked after penetration.

[14] Some states still have explicit requirement of resistance in rape law. In states where no mention of resistance is included, the common rule is followed, meaning resistance is still required to prove rape occurred (Decker et al. 1119).
[15] Ibid 2348
[16] Ibid 2349

Some states have explored the issue of whether or not to recognize post-penetration rape. Consent is revocable but does it become revocable during a sexual encounter? Some of these states have argued that rape does not result when withdrawal of consent occurs after penetration.[17] Continuation under compulsion is considered the critical element in establishing rape in cases of post-penetration withdrawal of consent. Reportedly, only several courts that recognize post-penetration rape have attempted to define the nature of compulsion that would constitute rape in these cases.[18] [19]

The California Supreme Court overruled a case and established that the continuation of sexual intercourse after post-penetration withdrawal of consent does constitute rape. They did so by holding "that a revocation of consent during the act of intercourse effectively nullifies any earlier consent and subjects a male to forcible rape charges if he persists".[20] Lyon gives an in depth look into this case in *No Means No?: Withdrawal of consent during intercourse and the continuing evolution of the definition of rape*. In California, rape is defined as "an act of sexual intercourse... accomplished against a person's will by means of force, violence, duress, menace,or fear of immediate and unlawful bodily injury on the person or another"' (279). The court interpreted the statue to include situations that begin as consensual but consent is subsequently withdrawn even though consent is not explicitly mentioned (279). In People v John Z., John Z. argued: that sexual intercourse cannot be started and stopped immediately.[21] When a female initially consents to the act, the male's primal urge to reproduce is aroused so it is only just and fair

[17] Ibid 2356
[18] Ibid 2359
[19] The nature of compulsion that would constitute rape in these cases is defined as the transformation that takes place when the defendant continues intercourse "for a period" of time after the victim revokes original consent. The persistence in unwanted intercourse satisfies the element of compulsion (Harvard Law Review 2359).
[20] Ibid 2360
[21] In "People v John Z.", the victim withdrew consent after penetration had occurred and the defendant continued to have sexual intercourse with the victim. The question asked in this case was, "Is the crime of forcible rape committed when consent is given

that the male be given a reasonable amount of time to satisfy the primal urge that was aroused when consent occurred (Lyon 302). The court rejected his primal urge theory on the grounds that it had no supporting evidence. The state's rape statue also contained no language suggesting that the defendant is entitled to continue with the sexual act once consent is withdrawn. Furthermore, the record suggests that John had ample time to withdraw from the act but chose not to (Lyon, 302). Despite the trouble with producing a reasonable amount of time for the sexual act to end once consent is withdrawn, the court adopted the rule that, "when consent is withdrawn, continuing sexual intercourse for five to ten minutes is not reasonable and constitutes rape" (Lyon 305). California is one of seven states that consider the withdrawal of consent after penetration as rape. As a result, the prosecution and conviction of John Z. in the People v John Z. case was possible (Lyon 279). The problem lies in the states where the common law is accepted and therefore, "still adhere to the common law principle that once consensual intercourse begins, a man cannot be prosecuted for rape even if the woman withdraws her consent during the act" (Lyon 291). Under the common law, rape must include force by the attacker and non-consent by the victim; so, the victim revoking consent is not enough to establish rape.

"According to this definition of post penetration rape, persistence is sufficient to satisfy the requirement of force after penetration has occurred, and yet appears to be insufficient before penetration".[22] This is because when consent is not present prior to penetration and the defendant ignores the victim, the court looks to force rather than persistence but persistence becomes the

to initial penetration but later withdrawn?" Nothing in California's statue entitles the defendant to continue after consent it withdrawn (OneLBriefs).

[22] Ibid 2363

focus when consent is withdrawn after penetration. The victim's shift from a voluntary to involuntary participation and the defendant's disregard of the withdrawal of consent allow us to recognize post-penetration, non-consensual sex as rape.[23]

If we truly accepted that "no means no", we would need to reject the idea that consent to a specific act or consent to sexual intercourse is general and nonspecific. We must be able to accept that a victim can consent to a sexual act without the assumption that they have consented to sexual intercourse. And in a case where consent has been granted and then revoked, the victim maintains the right to revoke that consent.[24] Even in states where post-penetration rape is recognized, some states require continuation under compulsion rather than just a revocation of consent (Lyon 297). This is because some states are still looking to force as proof of rape rather than lack of consent. If the court looked to lack of consent to prove rape, they would also look to lack of consent as proof in post-penetration withdrawal of consent. In these cases, they are once again requiring that the victims put themselves in harms way to prove that there was a lack of consent. It is problematic that the court would not consider rape, a situation where the victim withdrew consent and the defendant continued but did not use force (Lyon 176). With this in mind, more state court decisions have relied less on force and more on consent in order to protect victims of non-consensual sex (Lyon 297). Concluding that men cannot recognize when an act becomes non-consensual or that they cannot stop because they must finish what was started is to say that men cannot act rationally. However, "men are just as capable as women of acting rationally during sexual intercourse, and of knowing exactly when sex crosses the line from a consensual act to an act of force" (Lyon 269). To say that this is impossible is to deny the opportunity for

[23] Ibid 2364
[24] Ibid 2364

healthy and consensual relationships (Lyon 270). Despite John Z.'s claim, "the act of penetration does not transform the male into an animal, incapable of self-control, any more than it changes the female's status from an equal and willing partner to one who exists solely to "quell" the male's "primal urge" (Lyon 310).

One last problem we have under the no means no standard of consent is the use of deception. As Decker and Baroni demonstrate, many sexual encounters involve the use of deception to gain consent. "Use of deception is another tolerated mechanism for achieving sex. A majority of the states do not criminalize the use of deception in any way" (Decker et al. 1167). An example of the use of deception could be one partner asserting that they do not want to have sexual intercourse unless in the context of a relationship and the other partner portrayed these intentions in order to gain sexual access with no intention to actually continue a relationship after sexual intercourse has taken place. This should not be tolerated as a means to achieve sex. Some types of deception used to gain property are criminalized in every state, however, deception when used to obtain sex, is legal. Essentially a piece of fruit stolen from a grocery store is considered more valuable than someone's sexual integrity under the current law (Decker et al. 1168). "The solution is to establish a sex-by-deception crime prohibiting the use of deception with the intent to engage in sexual activity" (Decker et al. 1168).

Due to reform efforts, some types of non-consensual sex have become criminalized, yet most states still do not criminalize conduct of this sort or only do so limitedly. Using force to obtain sex is criminal but could be punished to a greater degree and non-consensual acts should be criminalized as well. We must recognize the victim that, through fear, does not fight back despite a lack of consent (Decker et al. 1167).

> "Sex should be based on a freely given agreement between adults. In other words, sex cannot rightly occur unless each party consents before the act takes place. Establishing an objective manifestation of that agreement, and placing the onus on the aggressor to obtain consent before sex, would fix the problem. This freely-given-agreement approach relieves the victim of a burden to verbally or physically "resist" in order for non consensual sex to be criminal. It also allows flexibility in prosecutorial charging decisions by simplifying proof requirements" (Decker et al. 1167).

Prosecutors would only have to show that consent was obtained before any act occurred and that the defendant proceeded without that agreement. "A freely-given-agreement requirement eliminates confusion and ambiguity as to the legal application of "no means no"" (Decker et al. 1167). This leads us to the "yes means yes" standard of consent.

2. Yes Means Yes

"Yes means yes" is being adopted precisely because of the failings in the "No Means No" standard, where it seems too often, no does not mean no. "No means no" did not fix the problem it aimed to fix. The amount of campus sexual assault is still alarmingly high, as 1 in 4 women and 1 in 20 men on college campuses are sexually assaulted.

So what is "Yes means yes"? "Under the new California law, postsecondary schools that participate in state student financial aid programs will be required to adopt a policy that defines consent as an "affirmative, conscious, and voluntary agreement to engage in sexual activity" (Peterson). The policies also define what consent is not. Consent under "yes means yes" is not lack of objection, resistance or silence. Consent is only an affirmative agreement. It can be revoked at any time and is not considered present merely due to an existing dating relationship or previous sexual relations between the persons involved. The law does not excuse someone for believing that someone consented who was asleep, unconscious, incapacitated by alcohol or drugs to the point that they did not understand the fact, nature, or extent of the conduct, or someone who is unable to communicate because of a mental or physical condition (Peterson).

Under an affirmative standard of consent, silence and indifference do not count as consent. Only a freely given yes counts as consent and if one is not sure if their partner consents, one must ask. "Yes means yes" offers many positive effects. It shows that a good partner wants to know what your limits are and that you cannot make assumptions about what a sex partner wants. It shows that there is no right answer to what everyone should want when it comes to sex and it encourages healthy conversation with partners about what we do want. This helps young people to get to know their own needs and limits (Friedman).

The "yes means yes" standard is quite controversial and there are many arguments against it. The first argument is that requiring an affirmative consent prior to sex would de-romanticize adult sexual relationships. There is no evidence, however, given to show how acquiring consent before sexual activity occurs is unromantic. If anything, communication regarding each partners desires and wishes will only improve what is to take place (Decker et al. 1168). Even if an affirmative standard of consent were to de-romanticize sexual relationships, we should be willing to give up romance in order to combat the serious sexual assault epidemic we face. Sexual assault law does not seek to increase values of romance nor should its focus be on any possible decreases in romance. Opponents also suggest that the "yes means yes" standard will cause sex partners to lie about a sexual encounter. This can already be done, however, under the current law in all states. Likewise, "one cannot automatically assume the likelihood of false charges…will increase due to non-consent or anti-deception law changes" (Decker et al. 1168). Some argue that these new laws are not necessary because current law criminalizes sex crimes. This argument blatantly ignores the epidemic of sexual assault in our society that the no means no standard has failed to correct (Decker et al. 1168). Only establishing an affirmative standard of consent will make "it clear to the citizenry that society will not tolerate any form of unwanted

sex [and will] send a message to the fraternity pledges and Joe Sixpacks: no means no, and deception, non-physical coercion, or taking advantage of one's superior position cannot be the means of sexual conquest" (Decker et al. 1169). By establishing an affirmative standard of consent we will begin to address the problem of those who choose to take advantage of the gaps in current rape law (Decker et al. 1169).

Critics assume that the standard is intended to punish men and protect women. While it does seek to combat an issue that is largely done towards women, by men, this argument overlooks the ways in which the standard protects men as well. The assumption ignores cases in which the perpetrator is not male in which the male victim would be protected by the affirmative consent standard. Men are also more likely to be raped than they are to be targeted with a false allegation. This means even if false allegations take place, it helps male victims more often than it can hurt a man that did not commit an offense. The standard requires affirmative consent from both partners. This sends the message that men's needs, desires and boundaries matter too and their victimization is just as serious as women's victimization. "Yes means yes" focuses on the male on female issue of sexual assault but will also encompass victims of both sexes by function. It teaches all parties involved that it is easy to make sure you are not hurting anyone; just ask what they want or if what you want is acceptable. This is especially helpful for young men and young women who may worry about what their partner really wants. (Friedman)

The Foundation for Individual Rights in Education (FIRE) says SB 967 "would render a great deal of legal sexual activity into 'sexual assault' and imperil the futures of all students across California" (Peterson). FIRE argues there is "no practical, fair, or consistent way" to determine if the legal requirements for consent were met" (Peterson). However, all that needs to be proved was if consent was absent, not that force was used and resistance occurred. The defendant

is still innocent until proven guilty. It is still the responsibility of the plaintiff to show that consent was absent. Through the law we are trying to broaden the scope of what is considered rape, not in order to criminalize an act that we do not think is wrong, but to capture circumstances that we think are problematic that the current law fails to include. Another criticism is that "the new law is a victory for some campus feminist activists but an ill-conceived detour for feminism, because making consent the only consideration ignores the misogyny, gender inequality, alcohol, race, and class that make up the rape culture on campuses" (Peterson). The reality is the misogyny, gender inequality, alcohol, race and class are present whether the "no means no" or the "yes means yes" standard is implemented. However, the "yes means yes" standard solves the problems of showing whether something was resisted to the by the "right" degree or the "right" amount of force was applied even though consent was already absent. (Peterson) This is done by eliminating the force and resistance requirement.

Radical feminists argue that consent is not possible and cannot be considered genuine in a male dominated society.[25] They claim that because women are oppressed and subordinated their consent cannot be a valid expression of their willingness to take part in sexual activity.[26] To say that no woman in a male dominant society can consent to sex ignores individual cases where a male and his female partner reject the male dominated society they live in and live their lives in a manner they consider equal. Katie Roiphe, following the views of Catharine Mackinnon, says that affirmative consent standards are demeaning to women and that it portrays the belief that women have trouble communicating what they want.[27] However, "to suggest that one should not act in recognition of an imperfect world and that society should not criminalize as much non-

[25] Supra 1324
[26] Ibid 1361
[27] Ibid 1362

consensual sexual intercourse as possible, appears to be sacrificing the happiness of many women for an ivory-tower ideal that can only be achieved over many generations".[28] Furthermore, affirmative consent is based on the fact that current laws do not protect victims or result in convictions where consent was not present. It is not based on the idea that women cannot communicate what they want.[29] Affirmative consent ensures that both partners are equal and both partners are required to consent. It will incentivize men and women to behave rationally and give words their normal or suggested meaning when used in a sexual context.[30] This feature is a response to the idea that women often say no when they mean yes. By adopting the affirmative consent standard, any truth that this argument holds will likely disappear. By saying no in situations where the answer is yes, the likelihood of receiving what one wants will decrease. So in situations where the answer is yes, it will be more likely that yes will be used. In the majority of cases where a woman uses no and means no her wishes will be more likely accepted and this argument will not be used against her.[31]

Opponents argue that affirmative consent laws will cause an increase in false accusations. "Susan Brownmiller states that the deeply held fear that women frequently and vindictively falsely accuse men of rape "is based on the cherished male assumption that female persons tend to lie".[32] We can see this view reflected in the force and resistance requirements discussed earlier where women must sustain physical harm in order for their rape accusation to be believed. Yet, "four out of five rapes go unreported, so it is hard to see how it would be an easy accusation to make".[33]

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[28] Ibid 1362
[29] Ibid 1363
[30] Ibid 1364
[31] Ibid 1354
[32] Ibid 1331
[33] Ibid 1331

Opponents claim that consent will destroy sexual relationships between men and women are not supported. The affirmative consent standard will likely change present behavior but it does not entail that these changes will result in less romance. As Pineau's (qtd in Vdbt. L. Rev.) work suggests, an increase in communication will improve sexual intimacy not squander it. Pineau says, "it is counter-intuitive to suggest that an absence of communication will produce better sexual results than two partners willingly discussing their individual preferences and desires".[34]

Finally, opponents claim that requesting consent is either difficult or inappropriate. Whether this is true or not, making it a legal requirement to ask for consent makes it easier and more appropriate, actually necessary, to ask. If affirmative consent is required by the law, stigma surrounding it should disappear over time.[35]

What will an affirmative consent standard include? There is no one standard of affirmative consent but it is at the most basic level, a requirement that the initiator receive permission from the other party. All supporters of affirmative consent insist that the standard require more than the absence of a no. The Antioch College Sexual Offense Policy, for example, requires students to obtain consent for every act or stage in the process.[36] Some forms of affirmative consent include non-verbal signs.

> "This inclusion of non-verbal signals under the banner of affirmative consent can be viewed in two ways. On the one hand, it can be seen as a return to focusing on the actions of the victim. The court did make clear, however, that the supposedly consenting actions of the victim were to be viewed under an objective standard. Permission is demonstrated when the evidence, in whatever form, is sufficient to

[34] Ibid 1360
[35] Ibid 1353
[36] Ibid 1348

> demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act".[37]

Outside of the campus setting, in established relationships for example, we can see that a lesser form of affirmative consent may be plausible.[38] More importantly, affirmative consent both off and on the campus setting needs to include certain non-verbal signs to make it possible for individuals with disabilities to be abel to consent affirmatively. Otherwise, affirmative consent would need to be considered ableist. These forms of communicating can and should be included in a standard of affirmative consent. Pineau argues that communicative sex is better sex because partners are communicating what they want not just what they do not want. As understanding in a relationship grows more emphasis could be placed on non-verbal and less explicit forms of communication.[39] This makes it possible for individuals with disabilities to consent affirmatively and it gives couples in established relationships the opportunity to broaden how they express consent. A broad concept of what is viewed as consent can be positive. What will the effects of the affirmative consent standard include?

The affirmative consent standard takes the stance that rape occurs whenever a woman is subjected to sex that she does not consent to. The shift to affirmative consent will not deter what is called the simple rapist. A simple rapist is, "a man who waits in a dark alley for a passing woman so that he may compel her by violence to engage in sexual intercourse is unlikely to be swayed by a legal construct that requires that he ask permission first, and respect the answer given. Instead, it is within the dating scenario that the adoption of an affirmative consent standard will be most beneficial".[40]

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[37] Ibid 1343
[38] Ibid 1349
[39] Ibid 1344
[40] Ibid 1350

The affirmative consent standard should encourage rational behavior in situations where date rape or acquaintance rape may occur. In a dating situation a woman may think she is indicating a lack of consent. Men can place a greater emphasis on the woman's dress, her willingness to return to his apartment, and her willingness to engage in petting short of sexual intercourse. Men may take these to indicate consent in a situation where a woman perviously indicated a lack of desire to engage in sexual intercourse. He cannot take these indicators along with a lack of consent as consent under the law if the affirmative standard of consent is in place.[41]

Most men in dating situations do not want to commit rape by forcing their dates into unwanted sexual intercourse. When these situations occur it is most likely the result of misinterpretation of signals as consent or a belief that one partner knows what the other wants.[42] If men, not the simple rapists, truly wish not to force sex on an unwilling partner they should fully embrace the affirmative standard of consent. Fear that the question would seem inappropriate seems at odds with social expectations in all other areas. One would ask to borrow something from a friend and need no justification that asking permission is appropriate. In cases of uncertainty it is necessary to ask permission and give words their normal meanings.[43]

Within the affirmative consent standard, whether or not a victim consented will still come down to belief of the jury. A defendant can still claim that permission was asked and received. It is not, "a requirement that men carry permission slips that must be signed by the woman before

[41] Ibid 1351
[42] Ibid 1351
[43] Ibid 1352

sex. Instead, it holds that a man cannot take a woman's silence as indicative of a willingness to engage in sex".[44]

Affirmative consent cannot be expected to prevent all rapes and it will not result in all rapists being convicted and can still result in "he said, she said" situations.[45] These elements were present in the "no means no" standard and will always reasonably be a part of rape law. As stated in the Vanderbilt Law Review, the onus will be on the defendant to demonstrate that the victim consented rather than how much force was applied and if the victim showed enough resistance. This seems to reverse the burden of proof and conflict with the presumption of innocence. The onus will still be on the plaintiff to demonstrate that the defendant is guilty of the accusation, however, if the defendant claims that the victim's consent was demonstrated nonverbally it will still be up to them to demonstrate such nonverbal consent and the claims will be subject to cross examination.[46] Most importantly, "the focus of the law should not be any previous relationship between the man and the woman, but instead it must center on "whether she wanted the particular act of sex on that particular occasion with that particular man".[47]

A perceived issue with the "yes means yes" standard of consent is that many social factors in a rape culture, where sexual assault is so pervasive, can prevent any of the benefits of "yes means yes" from taking effect.[48] Many young men do not view a refusal to respect a woman's limits as rape. In a survey conducted in California, half of the teenage boys thought forcing a woman to have sex was acceptable if she lead him on, got him aroused, or changed her mind as

[44] Ibid 1346
[45] Ibid 1345
[46] Ibid 1346
[47] Ibid 1335
[48] Rape culture is a culture in which a set of beliefs are maintained that encourage and support male violence against women. This takes place on a continuum of sexual remarks to rape itself. Rape culture is encouraged through TV, music, laws, etc. In such a culture, rather than viewing rape as a problem it is perceived as "just the way things are" (What Is Rape Culture).

to if she wanted sex. In addition, "a 1986 survey by Neil Malamute of UCLA found that 30 percent of men admitted they would commit rape if they knew there was no chance of getting caught. Even more disturbing, when the world "rape" was changed to "force a woman into having sex," the number soared to over 50 percent".[49] These beliefs, as long as they are widely accepted in society, will continue to impact how often sexual assault takes place. Other frightening cases exhibit how the judicial system can keep rape or sexual assault cases from ever coming to court.

In New Orleans, for example, five detectives that were tasked with investigating sex crimes failed to pursue hundreds of cases. Only 14 percent of cases over three years were given follow-up efforts. Of 1,290 cases that they were assigned over three years, 840 were labeled as miscellaneous and nothing further was done. 450 cases led to an initial investigative report but no further documentation was found for 271 of them. In some of those cases a detective would mark on a report that evidence was sent to the laboratory but never send the evidence. In one case, "a 2-year-old was brought to the emergency room on suspicion of having been the victim of a sexual assault and was found to have a sexually transmitted disease. The detective did no follow-up and closed the case" (Robertson). In another of the cases, DNA evidence was collected from a victim but the detective never submitted the kit for testing because he believed the sex was consensual because she knew her attacker (Robertson).

In Memphis, 200 rape kits were found untested. There are an estimated 400,000 untested rape kits across the country. This is one look into why it is so rare that rapists get convicted. One argument is that kits are only tested if the attacker is a stranger so that they can be identified.

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[49] Ibid 1332

Most defendants will claim that they did not do what the victim claimed, so DNA is necessary to prosecute (Dickinson).

In some cases the attacker is the one who is supposed to bring justice.

> "In a yearlong investigation of sexual misconduct by U.S. law enforcement, The Associated Press uncovered about 1,000 officers who lost their badges in a six-year period for rape, sodomy and other sexual assault; sex crimes that included possession of child pornography; or sexual misconduct such as propositioning citizens or having consensual but prohibited on-duty intercourse" (Sedensky, Merchant).

This only represents the officers whose license to work in law enforcement were revoked because not all states take these actions and some do not have systems to decertify officers for misconduct. The Federal Bureau of Justice Statistics does not track officer arrests and states are not required to collect or share such information. These officers only represent a small fraction of those who serve and protect. But those who do not, make it even more challenging for victims to come forward. Situations like these cause fear of those who are supposed to help victims. If a victim is assaulted by a police officer, who are they supposed to turn to? In other cases, officers encourage victims to drop cases or simply do not believe them (Sedensky, Merchant). This was the case for a 19 year old cashier in Pennsylvania who was raped while at work and was accused of lying to the police. She was put in jail for five days and waited eight months for her case to go to trial (Elliot).

Another young girl at the age of 18 woke to her attacker forcing himself on top of her. He claimed he was checking if she needed anything when she pulled him on top of her and that his penis must have been poking out of his underwear which lead to penetration. His semen and DNA were found inside the victim which he stated was probably because he had gotten it on his

hands after previous intercourse with the victim's friend. The jury acquitted the defendant after just a half an hour of deliberation (Rothkopf).

In another startling case, a man drugged and raped his wife repeatedly over an extended period of time. The jury convicted him of six counts of sexual assault. The prosecutor asked that he be given a sentence of 40 years, however the judge gave him a "20-year-sentence, 12 of which were suspended and 8 of which were to be spent in "home confinement." No treatment, no therapy, no community service" (Ryan). He even insisted that the victim forgive her husband (Ryan).

Due to the beliefs of rape myths by juries, judges, and police that produce startling cases like these, a change from the traditional consent standard to the affirmative consent standard may not receive the chance to produce the effects it is designed to create. It will make changes in the courtroom, but for all of the cases that never make it to the court rooms, these changes cannot help victims of rape and sexual assault. Even in the court rooms, beliefs held by the judge and jury can effect the outcome of a case. Whether it is a case where the police do not believe the victim, tell the victim to drop charges or happens to be the attacker, situations like these make it even harder for victims to come forward. This is only a small example of sexual assault and rape issues that take place within our society but it helps make apparent the rape culture that we live in. So how can a switch to affirmative consent standard result in more convictions on rape cases as it is designed to? I think that adopting a Kantian view of sexuality that is consistent with the affirmative consent standard will help make these new laws function as desired. This is because when we require a partner's consent and act in accordance with their humanity, we would respect their wishes regardless of the manner the in which the law decides consent should be established. If consent can be assumed or a no can be ignored under "no means no", then refusal to get a yes

can happen under "yes means yes". This is why it is important to have a Kantian view working on an individual level. I will look at how others view a Kantian form of sexual morality so I can find one that is consistent with the Categorical Imperative and the affirmative consent laws.

3. Solutions to Sexual Relationships Using the Categorical Imperative

Many have tried to answer to the issue of sexuality according Kant's second formulation of the Categorical Imperative, 'Act so that you treat humanity, whether in your own person or in the person of any other, always as an end and never merely as a means' (Shand 506).

In *Virtue Ethics, Casual Sex, and Objectification,* Raja Halwani investigates the issue of sexuality by looking at objectification. Halwani does not seem to think that casual sex is problematic to the categorical imperative. What seems to be wrong with rape and pedophilia is not that they are in a sense casual, but that they involve coercion, manipulation, deception and harm (340).

What seems to be problematic about casual sex is that you treat your partner and allow yourself to be treated as merely a means. We can also refer to this as objectification when speaking about a sexual relationship. To objectify a person is to treat him or her only as an object. In casual sex, both partners typically engine in sex only for sexual pleasure (Halwani 343). One partner, X, still objectifies their partner, Y, even if they do not intend to because X is still using Y for their own sexual pleasure (Halwani 344). Halwani, however, says in casual sex, as in other situations, we are aware of the humanity of others and we usually attempt to respect their wishes, desires, and wants (344). By taking into account our partner's wants and boundaries we consider them to have self-determination, agency and be autonomous. If we do not consider our partners

to be violable we do not treat them contrary to their wishes and desires, we in turn, treat them according to their wishes and desires and as a result, never as merely an object (Halwani 345).

According to Halwani, "instrumentality is a problem only if the person is treated merely as a tool. But people frequently use each other as tools (students use teachers for educational purposes; teachers use students for career purposes)" (345). If we use each other as tools but also at the same time act in accordance and with respect to each other's desires and wishes, objectification disappears (Halwani 345). He concludes that objectification in causal sex is much less frequent than thought and it requires morally nasty behavior that we find in rape and pedophilia, which casual sex partners usually do not engage in (Halwani 346).

Thomas A. Mappes, in *Sexual Morality and the Concept of Using Another Person*, focuses on the sense of "using another person" which is best understood by reference to the notion of voluntary consent. He follows closely along the lines of Halwani. Consent must be voluntary and informed. Coercion undermines individual autonomy. Lying and withholding information also inhibits rational decision making and thereby also undermines individual autonomy.

According to Mappes, "A immorally uses B if and only if A intentionally acts in a way that violates the requirement that B's involvement with A's ends be based on B's voluntary informed consent" (233). If A desires sexual interaction with B, we can say that sexual interaction of some form with B is A's end. Thus, "A sexually uses B if and only if A intentionally acts in a way that violates the requirement that B's sexual interaction with A be based on B's voluntary informed consent" (Mappes 233). A may sexually use B either via coercion or deception (Mappes 233). Coercion can occur in two forms. When coercion is employed though physical force, occurrent coercion is present. Dispositional coercion, on the other hand, is employed through a threat of harm (Mappes 235). Where coercion obliterates consent entirely, deception

attempts to undermine it. This takes place when one person's consent is based on false beliefs that are intentionally conveyed by one partner in order to gain the consent of the other. "False information is intentionally conveyed to win consent to sexual interaction, and the end result is the sexual using of another person" (Mappes 235). One partner can also use the other in the case where one might be impaired by drugs or alcohol (Mappes 233). Mappes' central claim is that A sexually uses B if and only if A intentionally acts in a way that violates the requirement that B's consent to sexual interaction with A is voluntary and informed (245).

In *Sexual Exploitation and the Value of Persons*, Howard Klepper claims that this reduction of the second formulation of the categorical imperative is incomplete and he attempts to show that a person may be treated as a mere means sexually without coercion or deception being used (250). Kleppter thinks that Mappe's account of the concept of using another person is not broad enough. An explicit, voluntary, and informed agreement can be insufficient to justify behavior that amounts to using another person according to Klepper. A person who has voluntarily consented to sex can be used sexually during and after the acts (252). He exemplifies this issue with the norm in contemporary Western culture that partners will be mutually concerned with each other's wishes and desires. In most cases both partners will be aware of the norm and will justifiably assume their partner is aware of the norm without explicit mention of the norm. This implicit agreement will be included in their agreement to have sex. Therefore, failing to keep this implicit agreement is a form of deception and is considered using another as a mere means.

In the case where one partner is from another culture and therefore unaware of the norm they are still considered to be using the other as a mere means as using another person is not a

culturally relative notion.[50] We should say that it is the norm in this culture that one partner may use the other as a mere means (Klepper 252). If the partner being used is aware of this cultural difference, they agreed to the actions (Klepper 253). Keeper says that, "treating another as a mere means includes treating the other as an object, and not at the same time as an intrinsically valuable moral subject; this is not negated by the other's explicit consent to such treatment" (253) This partner is also treating his or herself as a means as well (Klepper 256). This is one way in which Klepper thinks that sexual use is present despite consent being present.

Alan Soble, in *Sexual Use,* looks at how others attempt to satisfy the second formulation and examines how sexual acts can be moral while taking Kant's description into account. On Kant's view, "a person who sexually desires another person objectifies the other both before and during sexual activity. Manipulation and deception- primping, padding, making a good first impression- are so common as to seem natural to human sexual interaction. Moreover, a person who willingly complies with another person's request for a sexual encounter voluntarily makes an object of himself or herself" (260). Can one really reduce oneself to merely an object by willing compiling to a request for a sexual encounter? This is a controversial claim, which I think is eradicated by the person's willingness. One can not reduce oneself to merely an object in willingly compiling to an act because they affirm their autonomy in choosing wether or not to comply in the act.

Michael Ruse explains how a moral problem can arise in acting on sexual desire which is that the starting point to sex is the desire for the other person's body. If this is not considered

[50] Klepper thinks that implicit and explicit agreements do not justify behavior that he believes amount to using one another as merely means to an end. In Western culture it is a norm that sexual partners will be mutually concerned with each others sexual needs. Agreement to have sex is therefore an implicit agreement to uphold the other's needs. Failure to uphold this agreement is considered deceit under Klepper's view. In the case that one partner is from another culture where this norm is not present and the partner is aware of the cultural norm but says nothing regarding their intent to honor the expectations is guilty of deceit. If one partner is unaware of the norm and fails to uphold it, Klepper believes the individual is still guilty of using their partner. (253)

treating another as a means to an end it is very close (qtd in Soble 261). Permissible is treating ourselves and others as means as long as we treat ourselves and others humanity as an end (Soble 262). Free and informed consent is necessary for satisfying the second formulation but it is not sufficient. Treating someone in respect with their humanity means at least taking on their ends as if they were one's own (Soble 262).

Goldman on the other hand, thinks that we can use others for our personal benefit as long as the acts are not one sided and the benefits are mutual. He proposes that even during an act that objectifies by nature such as sexual intercourse, one recognizes their partner as an autonomous human being with wishes and desires, respects those wishes and desires and attempts to fulfill them to the best of their ability (qtd in Soble 264). "Sharing the ends of the other person means viewing these ends as valuable in their own right" (Soble 265).

Martha Nussbaum thinks that the Kantian sex problem is solved by keeping sexual activity confined to mutually respectful and loving relationship. The context of a mutually respectful, loving relationship makes harmful objectification during sexual activity morally permissible and further it can turn that harmful objectification into something good (qtd in Soble 272). Soble says this means that what Nussbaum finds problematic is not instrumentalization, but merely using someone as an instrument and the context of the relationship becomes imperative because she thinks this overrides the harm (qtd in Soble 273). This means that Nussbaum must accept,

> "that a loss of autonomy, subjectivity and individuality in sex, and the reduction of a person to his or her sexual body or its parts, in which the person is or becomes a tool or object, are morally acceptable if they occur within the background context of a psychologically healthy and morally sound relationship, and abiding relationship in which one's personhood- one's autonomy, subjectivity, and individuality- is generally respected and acknowledged" (qtd in Soble 273).

This is inconsistent with the second formulation because Kant insists that we should never treat someone as a mere means, instrumentally or as an object. He does not say that these

occurrences are fine as long as the individual is not treated as a mere means at other times in the relationship (Soble 274). Kant makes this same mistake himself when he stated that sexual activity with its essential sexual objectification is only morally permissible in marriage because only in this context can persons engage in sexual activity without losing their own personhood (Soble 278). This is a huge assumption that people, especially women cannot lose their personhood though sexual activity within a marriage. Kant never denies that objectification still occurs within the context of marriage but he says it is permissible or authorized (Soble 281). This violates the "always" aspect of the second formulation. If we must always treat ourselves and others as an end and never merely as a means, marriage or any other loving relationship cannot be the solution while we acknowledge that objectification can still take place in these contexts.

Robin West, author of *The Harms of Consensual Sex,* explores the harms of consensual sex. West assumes that many heterosexual, active women consent to sex that they do not want and have a good deal of sex that it consensual but not pleasurable (318). West asserts that "a young woman or teenager, may consent to sex she does not want because of peer expectations that she be sexually active, or because she cannot bring herself to hurt her partner's pride, or because she is uncomfortable with the prospect of the argument that might ensue, should she refuse" (318). She lists four ways in which consensual, yet unpleasureable sex, may be damaging to a woman's sense of selfhood. They may suffer damage to their ability for self-assertion or also their sense of self-possession due to defining themselves as "for others". Their sense of autonomy is damaged when they consent to unpleasrureable sex due to a dependency on a partner's affection or economic status. Lastly, women who engage in unpleasureable, consensual sex damage their sense of integrity when they lie to themselves in that they enjoyed the whole experience (West 319).

West concludes by saying we must not glorify consensual sex due to its damaging effects "in order to make out a case for strengthening the criminal sanction adjacent coercive sex" (321).

4. My Take on a Kantian Solution

I think that Halwani and Mappes' accounts are in line with the requirements of the Categorical Imperative. To say that consent is necessary but not sufficient I think is to miss what the notion of consent carries with it. By requiring our partner's consent we are recognizing their humanity, autonomy and ability to make their own decisions. It is impossible to treat someone as merely a means while thinking of them in this way which is what the Categorical Imperative requires of us in any interactional situation. The individual who would ignore their partner's wants and boundaries is the same individual that would ignore another individual's will and choice in any other situation because they do not view others with inherent worth and therefore worthy of respect. By violating the requirement of voluntary informed consent, one violates the categorical imperative by treating the other as simply a means because they have no regard for the other's permission or denial as they consider their will to be more important than the other's.

Klepper's example of how one may use another during sex does not show that sexual morality cannot be maintained through the categorical imperative, it simply shows the example was not following what the categorical imperative required of him. Klepper gave the example of one individual not fulfilling a norm where both partners' desires and wishes are taken into account by the other partner. This results in sexual use despite the presence of consent. I would argue that requiring consent means taking into account a partner's wishes and desires and as an extension the things they do not wish and desire, so this partner was not only taught that it is appropriate to

use another as a mere means but also that the consent of the partner is not of high importance because the same individuals that violate another's expressed lack of desire or consent are those that do not consider the requirement of much value.

Nussbaum thinks that keeping sexual intercourse refined to a loving relationship solves the Kantian sex problem. She thinks that the context of the relationship makes the objectification that necessarily takes place allowable. The Categorical Imperative does not allow us to pick and choose when we fulfill it. It should be fulfilled through every act, so the context of the relationship does not determine if the sex problem is solved.

West asserts several ways in which consensual acts can be harmful. Yet in the cases she proposed the women were treating themselves as merely means. West did not try to show how the categorical imperative could be followed in cases where the women consented to sex that they did want.

John Shand, in *Kant, Respect, and Hypothetical Acts*, addresses the objection to the categorical imperative that, "when no actual acts that are supposedly derived from the Categorical Imperative are involved in the relations between people, it may be questioned whether the Categorical Imperative is involved in the relation at all. This, however, is a mistake, and results from the exclusive tendency to see the principle of the Categorical Imperative as existing in relations between people only if there are actual acts indicting or displaying its presence. This is to completely ignore the role of hypothetical acts that would indicate that the Categorical Imperative is in play" (Shand 506). It may further be objected that since hypothetical acts are not acts, they have no way of determining if the categorical imperative is at play. Hypothetical acts may embody the attitudes that people carry towards other people even when no acts are taking place, but

these attitudes determine how people will respond during actual acts when the Categorical Imperative is involved. "The appropriate attitude according to the Categorical Imperative is one of respect. Having the right attitude to another is indeed the essence of the Categorical Imperative. That the right attitude of respect is present, even when no actual acts are displaying it" (Shand 507). The respect towards others required by the second formulation means that we should not assume that our will can take precedence over the will of others (Shand 511). Shand says this is tantamount to saying that we should not use others as mere things (512).

Shand exhibits the role of hypothetical acts with the scenario of a taxi driver. Taking into account the Categorical Imperative though hypothetical acts, one considers an array of situations where one would stop using the taxi driver as a means by respecting his will "to go to his mother, dropping me off at the road-side to take my chances hailing another taxi to the university – should certain situations arise" (Shand 516). These hypothetical acts are embodied in the attitude toward the taxi driver and the respect towards his will and while treating him as a means, one does not treat him merely as a means by recognizing situations where his services may need to end. In this sense we can see how one may treat someone as a means but not simply as a means without any action to demonstrate this until these hypotheticals may come into play (Shand 516). "This pervasive attitude – perhaps held in place as a habit of thought – connected to hypothetical acts leaves one primed to act in morally appropriate ways should events turn out in any one of an array of particular ways" (Shand 516).

> "In our dealings with others we show that we respect them in accordance with the principle by having these hypothetical acts running, usually silently and tacitly, in the background in all our dealing with others. It is in this way, through our willingness to do morally appropriate hypothetical acts, along with the ways we actually act morally, that we may always treat others always as ends, even granted that what we actually appear to be doing is relatively slight" (Shand 518).

It is easy to see how hypothetical acts would especially come into play during sexual intercourse. Throughout sexual encounters, less communication is normally used. So we must take into consideration our responses to various issues that could arise. The Kantian attitude that is present at all times helps determine if the categorical will be followed and if it is being followed. If our partner withdraws consent after sexual intercourse has begun, and we continue to view them as an end and not merely as a means we would respect their wishes and their revocation of consent. If the Kantian view was accepted broadly, the need for "yes means yes" in response to sexual assault prevalence probably would not be needed. Because we do have an alarming sexual assault epidemic, we should adopt the Kantian view and the affirmative consent standard so that the two can work together to eliminate the problem. The Kantian view would do so by creating an ethics of respect between individuals where it would be reasonable and expected to obtain consent from a sexual partner, because doing otherwise would be treating one's partner as means to an end.

5. Conclusion

In section one, I examined the philosophical issues present in the "no means no" standard of consent. Here I found the force and resistance standards in current rape law to be problematic for the victim. In section two I analyzed the issues present in the "yes means yes" standard of consent. "Yes means yes" is a response to the sexual assault epidemic that is taking place under a "no means no" standard of consent. Expectations and desires become more clear under a "yes means yes" standard. Here I found that an affirmative standard of consent would get rid of the issues of force and resistant and also include as rape, cases of post-penetration withdrawal of consent. Affirmative consent did have the issue of being ableist which I think would need to be addressed through the law. I then accounted for different societal factors that would prevent an

affirmative consent standard from functioning ideally, such as beliefs present in rape culture. Finally, I examined different uses of the categorical imperative and suggested it as a moral solution for the rape culture we live in. Through this I aim to give a solution that would allow the affirmative standard of consent to function fully in the law and courts.

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