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### Not Affirmative Consent

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# Not Affirmative Consent

Aya Gruber\*

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## I. INTRODUCTION

Professor Stephen Schulhofer, leading scholar of rape law, reporter for the Model Penal Code (MPC) Sexual Assault Project, and founding father of the yes-means-yes effort,<sup>1</sup> argues that it is high time, indeed “past time,” for U.S. criminal law to require “affirmative consent” to sex.<sup>2</sup> I have been asked to counter this assertion and make the case that sex without affirmative consent should not be an activity regulated by the government through criminal punishment. It is reasonable to understand the affirmative consent standard to mean: (1) sex must proceed in an artificial, overly cautious manner, involving a specific consent script, for example, asking for and receiving a “yes,” and (2) if

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\* Professor of Law, University of Colorado Law School. I express special gratitude to Stephen Schulhofer for being an advocate of fairness and reason in the criminal code, a tireless law reformer, and an ethical and formidable debate opponent. Thanks also to Mike Vitiello and The University of Pacific Law Review for arranging this timely conversation.

1. Schulhofer does not, himself, endorse “only yes means yes,” but his writings on affirmative consent certainly helped pave the way for that movement. See generally Stephen J. Schulhofer, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998) [hereinafter UNWANTED SEX]; Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151 (1995) [hereinafter *The Feminist Challenge*].

2. See Stephen Schulhofer, *Consent: What It Means and Why It’s Time to Require It*, 47 THE U. OF PAC. L. REV. 665 (2016) [hereinafter *Affirmative Consent*]. Professor Schulhofer’s position has been evolving during the drafting and editing process of this Essay. Thus, this Essay responds to the November 2015 draft of his symposium essay, which is on file with the law review and author, and the pages referred to herein correspond to that draft.

sex does not proceed in such a manner, one or both parties risk incarceration with inmates who might care little about consent, affirmative or not.<sup>3</sup> There are many compelling critiques of this type of broad sex regulation, but I need not articulate them here.<sup>4</sup> Professor Schulhofer's proposal for this symposium and the related revisions to the MPC's sexual assault provisions (hereinafter "MPC Draft 5"),<sup>5</sup> which I refer to interchangeably as the "expressive consent" proposal, do not in fact endorse this narrow vision of affirmative consent. Instead, they do something else altogether—something that is not extremely radical, does not upend sexual communication norms, and is not the embodiment of feminists' radical views of sex.

Schulhofer's affirmative consent formulation is quite modest and unlikely to seize headlines: sex must occur with consent, which the defendant may determine from all the circumstances, including words, conduct, and overall context.<sup>6</sup> Specifically, Schulhofer's expressive consent proposal criminalizes sexual penetration without "consent," defined as "a person's freely given agreement to engage in a specific act of sexual penetration or sexual contact, communicated by conduct, words, or both."<sup>7</sup> Importantly, the provision clarifies that "consent may be explicit or it may be inferred from the totality of the circumstances."<sup>8</sup> Thus, in order to find guilt, the jury must find beyond a reasonable doubt that, given the *entire* picture of the situation, the defendant believed the sex was not consensual.

It might make for a more interesting read were I to level charges of prudishness against Professor Schulhofer and call him the sex police who is going to stamp out exciting ambiguity and make sex boring and vanilla, but I cannot do so. The expressive consent proposal is light years away from schemes involving sex contracts, a verbal "yes," or even "clear" consent. It ultimately allows for ambiguous communication and even the much-maligned traditional sex script,<sup>9</sup> so long as, in the end, the jury finds that the defendant honestly and non-recklessly believed the complainant agreed to sex.

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3. See *infra* notes 36–46 and accompanying text (discussing common interpretations of affirmative consent).

4. See *infra* notes 47–59 and accompanying text (briefly explaining debate over affirmative consent).

5. See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Preliminary Draft No. 5, October, 2015) [hereinafter MPC Draft 5] (on file with *The University of Pacific Law Review*). The MPC sexual assault project is ongoing, and there have been many different drafts with changing concepts of consent since the writing of this Essay.

6. See *Affirmative Consent*, *supra* note 2, at 5.

7. *Id.* at 4; see also MPC Draft 5, *supra* note 5, at 32 (providing that "[c]onsent means a person's positive, freely given agreement to engage in a specific act of sexual penetration" which must be "communicated by conduct words, or both").

8. MPC Draft 5 treats sex without consent as a misdemeanor and sex in the face of an "expressed . . . refusal to consent" as a felony. *Id.* at 52. It is not entirely clear that Schulhofer's essay differentiates between sex without consent and sex in the face of refusal. See generally *Affirmative Consent*, *supra* note 2. Consequently, I leave discussion of that disparity for another day.

9. See *Affirmative Consent*, *supra* note 2, at 7 (critiquing gendered sexual interaction); cf. Annika M. Johnson & Stephanie M. Hoover, *The Potential of Sexual Consent Interventions on College Campuses: A*

This Essay argues that, while Schulhofer's formulation avoids the popular critiques—or more accurately ridicule—of strict affirmative consent standards, the proposal is problematic in other ways. The formulation is abstruse, perhaps cleverly duplicitous, and it unnecessarily complicates the legal inquiry over consent. First, by using the term “affirmative consent” and making arguments about unambiguous green lights,<sup>10</sup> stopping and clarifying,<sup>11</sup> and moving social norms,<sup>12</sup> Professor Schulhofer tacitly endorses, but does not ultimately have to defend, the more radical and regulatory formulations of affirmative consent. Second, the content of the formulation, perhaps because it seeks to straddle the line between ordinary consent and yes means yes, is confusing and its manner of application is not entirely clear.

The Essay proceeds in three parts. First, it will demonstrate that Schulhofer's proposal is, in fact, *not* affirmative consent, as the term is popularly understood.<sup>13</sup> Second, it will argue that Schulhofer's expressive consent proposal does not necessarily fill the legal gaps he hopes it will, if indeed such gaps exist.<sup>14</sup> Third, it will critique the project, both in terms of its choice of labels and its internally mystifying nature.<sup>15</sup> In the end, the Essay asserts that the expressive consent revision is not an improvement on, and in fact may be less desirable than, more straightforward articulations of consent in rape law.<sup>16</sup>

## II. NOT AFFIRMATIVE CONSENT

In order to establish that Professor Schulhofer's proposal is *not* affirmative consent, some mapping is necessary. Accordingly, this Section provides a working understanding of various meanings of “consent” and “affirmative consent” to sex. It bears noting that this entire discussion sets aside the issue of whether the criminal law should define acceptable and unacceptable sex in terms of the complainant's state of mind rather than in terms of the coercive means by which the defendant procures sex. Schulhofer's starting point is that the criminal law has an interest whenever sex is unconsensual, regardless of *why* it is

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*Literature Review on the Barriers to Establishing Affirmative Sexual Consent*, 4 PURE INSIGHTS 2–3 (2015), available at <http://digitalcommons.wou.edu/cgi/viewcontent.cgi?article=1050&context=pure> (on file with *The University of the Pacific Law Review*) (noting extensive findings that young people continue to regard men as sexual proponents and women as sexual gatekeepers and citing studies).

10. See MPC Draft 5, *supra* note 5, at 65 (asserting that silence should not be equated with a green light to engage in penetration).

11. See *Affirmative Consent*, *supra* note 2, at 12 (stating that sex proponents have a “burden of inquiry” as to sexual consent but indicating that the burden can be satisfied through “ascertain[ing] whether the other party is willing”); see also *infra* notes 64–66 and accompanying text (discussing the expressive consent standard's connection to stop and ask).

12. See *Affirmative Consent*, *supra* note 2, at 14; see also *infra* notes 140–42 and accompanying text.

13. *Infra* Part II.

14. *Infra* Part III.

15. *Infra* Part IV.

16. *Infra* Part V.

unconsensual.<sup>17</sup> In fact, he regards the requirement of force as so passé and archaic as to barely merit mention.<sup>18</sup>

The force-versus-consent debate is important, and something I take up elsewhere.<sup>19</sup> For now, however, I will assume the liberal position that choice is the dividing line between acceptable and criminal sex.<sup>20</sup> Of course, the philosopher in me queries, “Do we truly have free will?” And, the critical theorist in me is sympathetic to the view that structural inequality renders choice as an illusion and tool that preserves hierarchy. Indeed, radical feminists like Catharine MacKinnon argue that given oppressive patriarchy, women rarely have sex freely.<sup>21</sup> However, this Essay puts aside critiques of liberalism and the larger debate of how sex fits into a feminist vision of state and society. Most proponents of affirmative consent, Professor Schulhofer included, do not indulge the belief that women’s consent to sex is always illusory.<sup>22</sup> Instead, they adhere to the liberal notion that women authentically choose things, including sex, but debate over how to ensure that sex is in fact consensual.<sup>23</sup>

#### A. Consent

So what does it mean to say that sex must be “consensual?” Lawyers, philosophers, and social scientists are in fair agreement that there are different but related ways to look at consent.<sup>24</sup> Consent can either be an internal mental state of agreeing or being willing to do something, an external act of expressing agreement to something regardless of internal feelings, or both internal agreement and external communication.<sup>25</sup> For many, the lynchpin of consent is an internal decision, and they balk at the notion that sex might be called

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17. *Affirmative Consent*, *supra* note 2, at 1–2.

18. *See id.* at 1 (putting aside the force issue because the “unmistakable trend” toward consent).

19. *See* Aya Gruber, *Consent Confusion*. \_\_ CARDOZO L. REV. \_\_ (forthcoming 2016) [hereinafter Gruber, *Consent Confusion*].

20. *See* Morrison Torrey, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, 2 WM. & MARY J. WOMEN & L. 35, 38 (1995) (observing that “liberal feminism” shaped rape reform in the “classic liberal ideology of privacy, autonomy, and individual choice”); *See generally* Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 L. & PHIL. 35 (1992).

21. *See* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 647 (1983) [hereinafter *Toward Feminist Jurisprudence*] (stating “the conditions of male dominance” in both rape and “consensual” intercourse make distinguishing the acts difficult; thus, “free consent” to sex is rare for women); *see also* Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO STATE L.J. 1081, 1088 (2004) (remarking more recently that “unequal sex can flourish and masquerade as equal sex, as sex as such, with the result that sex that is forced, coerced, and pervasively unequal can be construed as consensual, wanted, and free”).

22. *See Affirmative Consent*, *supra* note 2, at 2.

23. *See infra* note 33 (asserting that the consent debate cannot avoid the issue of constraints on free choice).

24. *See Affirmative Consent*, *supra* note 2, at 3–5.

25. *Id.* at 5. For a more extensive discussion of consent and affirmative consent, *see* Gruber, *Consent Confusion*, *supra* note 19.

“unconsensual” when both parties, in fact, mutually desired it.<sup>26</sup> Others feel that asking a jury to divine the intent of a rape complainant sets up a difficult task that jurors will fulfill simply by applying stereotypes or unreflectively embracing the defendant’s version of events.<sup>27</sup> Thus, the jury should be directed to look at what the complainant and defendant did, and not what the complainant thought.

Schulhofer’s proposal is a purported advance from the ordinary internal consent inquiry in the sense that it explicitly embraces external consent and specifies that “communication” of agreement is a necessary ingredient of lawful sex.<sup>28</sup> The proposal makes it a crime to knowingly or recklessly engage in sexual intercourse without “consent,” which “means a person’s freely given agreement to engage in a specific act of sexual penetration or sexual contact, communicated by conduct, words, or both.”<sup>29</sup> Although the meaning of this language is not entirely self-evident, I think it is fair to interpret Schulhofer’s consent as having two necessary components: (1) an uncoerced internal agreement/willingness to engage in the relevant sex act, and (2) words, actions, or both that communicate this agreement.<sup>30</sup>

Rape reformers embrace expressive consent requirements believing such requirements foreclose the distasteful argument, “she really wanted it despite what she said.”<sup>31</sup> Critics reject expressive constructions because they criminalize wanted sex in the absence of specific communication.<sup>32</sup> However, a careful examination of the dynamics of consent as they play out in rape trials reveals this debate may be much ado about nothing. Upon close analysis, it is clear that there is little difference between applying internal and expressive consent. The real debate lies in whether and how to limit *what* counts as evidence of internal or external consent. Merely specifying that internal agreement also be communicated, standing alone, does not greatly alter the rape consent inquiry.

In a rape trial with an internal consent standard, jurors will come to a conclusion, not by speculating about the complainant’s internal state in the abstract, but by considering the entire “consent transaction” between the defendant and complainant. Let us take a very straight-forward internal consent sexual assault provision: “It is a crime to knowingly or recklessly have sex without consent.” How will the jury decide whether sex between two people, A

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26. See, e.g., Kim Ferzan, *Consent and Culpability*, \_\_ OHIO ST. J. CRIM. L. \_\_ (forthcoming 2016) (draft on file with author).

27. See generally MPC Draft 5, *supra* note 5.

28. See *Affirmative Consent*, *supra* note 2, at 5 (“‘Consent’ means a person’s freely given agreement to engage in a specific act of sexual penetration or sexual contact, communicated by conduct, words, or both.”).

29. *Id.*

30. See Susan E. Hickman & Charlene L. Muehlenhard, *By the Semi-Mystical Appearance of a Condom: How Young Women and Men Communicate Sexual Consent in Heterosexual Situations*, 36 J. SEX RES. 258, 259 (1999) (defining “consent” as “the freely given verbal or nonverbal communication of a feeling of willingness”). Schulhofer’s definition appears nearly identical to this definition.

31. See *Affirmative Consent*, *supra* note 2, at 4 (expressing this concern).

32. See *id.* at 5 (discussing artificiality argument); see also *infra* notes 71–73 and accompanying text.

& B, was consensual? I assert that the common view of a sexual consent transaction involves the following three steps: (1) A internally decides to have sex with B; (2) A displays external manifestations of that agreement; and (3) from these external manifestations and the context, B concludes that A has internally agreed to sex, and vice versa.<sup>33</sup> Thus, in a case where internal consent is disputed, the prosecution will assert that A did not internally agree to sex; the defense will respond that A did internally agree or B (reasonably) believed A did;<sup>34</sup> and the jury, not being mind-readers, will resolve the issue by looking at A's external manifestations in context.<sup>35</sup>

Thus, in a purely internal consent inquiry, the jury will ultimately look at A's and B's external behaviors in context to determine their respective intents regarding the sex. One might wonder, then, whether requiring consent to be communicated changes anything. If *any type* of external manifestation combined with *any type* of context evidence can count as communication, the answer is, "no." In other words, the world of evidence that the jury can consider in determining internal agreement is co-extensive with the world of evidence that the jury can consider in determining expressive consent. Thus, expressive consent simply collapses into the indications of consent the jury would look at to determine A's mental state. However, not all expressive consent proposals allow all external manifestations and all context evidence to count toward consent.

### B. Affirmative Consent

Affirmative consent standards generally seek to limit both the world of external manifestations that express consent and the ways in which those external manifestations can be contextualized. The Venn diagrams on the following page provide a sense of the difference between saying that "A must express internal consent" and "A must give affirmative consent."

The Affirmative Consent circle can be larger or smaller depending on the strictness of the affirmative consent rule. The narrowest construction of affirmative consent discussed—and frequently scorned—by the public is the signed, notarized contract. Only a miniscule subset of sexual communication, if any at all, involves this particular external manifestation. However, as Professor Schulhofer points out, the contract version of affirmative consent is largely a

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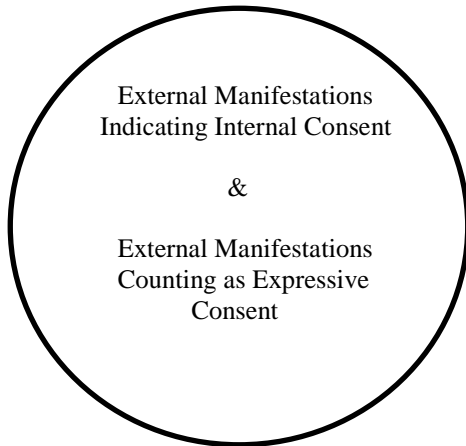
33. In this symposium, Schulhofer does not really take up the issue of what "free" agreement means, so although it is a hotly debated issue within the American Law Institute (ALI), I leave that debate for another day. For a deeper inquiry into consent and a diagram of the "consent transaction," see Gruber, *Consent Confusion*, *supra* note 19.

34. See MPC Draft 5, *supra* note 5, at 52 (specifying a *mens rea* of knowledge or subjective recklessness for sexual assault, in contrast to the many jurisdictions that adopt a negligence).

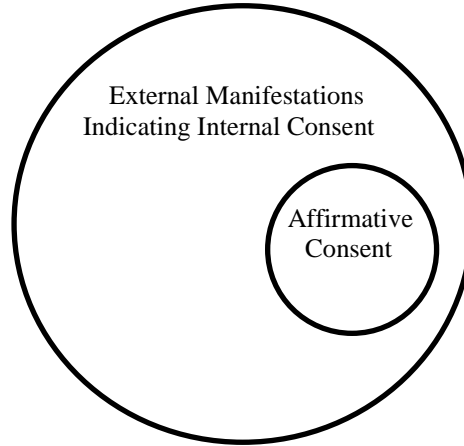
35. A and B will likely diverge in their accounts of the external manifestations and the context, in which case the jury will consider evidence corroborating or undermining the parties' factual claims and other indicia of credibility, as in any other type of trial.

product of the derisive discourse of reform opponents who seek to make a mockery of the standard.<sup>36</sup>

1. Broad Expressive Consent



2. Narrow Affirmative Consent



More realistically, affirmative consent can be understood as requiring A, the sex acceptor, to utter the word “yes.”<sup>37</sup> This definition is reflected in the common sentiment, expressed in the blogosphere, on college campuses, and by some legal reformers, that “only yes means yes.”<sup>38</sup> Despite the “yes” requirement’s benefit of administrability, many acknowledge that insisting on a specific word to legitimize sex is artificial and unrealistic, given the heterodoxy of intimate signaling.<sup>39</sup> Consequently, common forms of affirmative consent allow for some interpretive license in determining what amounts to a “yes.”

From my perusal of the web, college regulations, and affirmative consent statutes, it seems that there is a burgeoning consensus on what affirmative consent requires: a person seeking intercourse must stop, explicitly seek

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36. See *Affirmative Consent*, *supra* note 2, at 3 (chiding the “popular media” for describing affirmative consent in “preposterous” terms of written contract); see also Callie Beusman, ‘Yes Means Yes’ Laws will Not Ruin Sex Forever despite Idiotic Fears, JEZEBEL (Sept. 8, 2014, 5:00 PM), <http://jezebel.com/yes-means-yes-laws-will-not-ruin-sex-forever-despite-i-1630704944> (on file with *The University of the Pacific Law Review*).

37. See *Affirmative Consent*, *supra* note 2, at 2 (noting this argument).

38. See, e.g., *Student Rights and Policies, Appendix B: College Sexual Misconduct Policy*, AMHERST COLL., available at <https://www.amherst.edu/mm/77199> (last visited Apr. 17, 2016) (on file with *The University of the Pacific Law Review*) (“Relying on non-verbal communication can lead to misunderstanding...in the absence of an outward demonstration, consent does not exist.”); cf. Tovia Smith, *Campuses Consider Following New York’s Lead On ‘Yes Means Yes’ Policy*, NPR (July 8, 2015, 6:34 PM) <http://www.npr.org/2015/07/08/421225048/campuses-consider-following-new-yorks-lead-on-yes-means-yes-policy> (on file with *The University of the Pacific Law Review*) (quoting the governor as characterizing NY’s affirmative consent bill as requiring “[t]he other person...to say yes. It’s yes on both sides.”).

39. See *Affirmative Consent*, *supra* note 2, at 10 (calling it “absurd” to “insist[] that nothing except the word ‘yes’ can establish consent”).



permission, and obtain permission in some “clear” form.<sup>40</sup> This stop-and-ask approach puts a legally enforceable obligation on the sex proponent (often imagined as male) to seek and obtain a “yes”—or perhaps its functional equivalent—from the sex acceptor (imagined as female).<sup>41</sup> Many affirmative consent formulations also specify that affirmative consent be ongoing.<sup>42</sup> Taken literally, this might require the sex acceptor to utter an extended “yyeeeeesssss” throughout a make-out session and sexual intercourse. However, the “continuous” and “ongoing” language likely means that the stop-and-ask performance must be repeated at certain critical times throughout a sexual encounter, whatever those may be.<sup>43</sup>

Consequently, a common understanding of what affirmative consent requires is something like this: (1) A and B are kissing or making-out; (2) B stops and forthrightly asks for permission to have intercourse (“Do you want to do it,” “Let’s have sex,” etc.); and (3) A clearly responds in the affirmative (“I want to have sex,” “Let’s get it on,” etc.). There is no question that partners sometimes communicate sexual consent using such a script. However, the existing social science tells using this type of a script is more exception than rule.<sup>44</sup> Thus, even the less rigid forms of affirmative consent make up a small subset of the universe of ways in which consent is currently communicated.<sup>45</sup> Consent to sex is often expressed through a fluid series of actions. Mutually agreeable sex often involves no direct questioning. Consent is often understood through ambiguous statements and context. Professor Schulhofer acknowledges as much, stating that “increasingly intimate foreplay” can sufficiently signal agreement.<sup>46</sup>

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40. See, e.g., WESLEYAN UNIV., 2015–2016 UNIVERSITY STANDARDS AND REGULATIONS 23 (2015), available at <http://www.wesleyan.edu/studentaffairs/studenthandbook/20152016studenthandbook.pdf> (on file with *The University of the Pacific Law Review*) (“Consent must be freely and affirmatively communicated between all individuals in order to participate in sexual activity or behavior. It can be expressed either by words or clear, unambiguous actions. It is the responsibility of the person who wants to engage in sexual activity to insure consent of their partner(s)”).

41. See S.B. 967, 2014 Leg., 2013–2014 Leg. Sess. (Cal. 2014) (enacted by Ch. 748) (requiring the sex proponent to “ensure” that there is affirmative consent).

42. See *Yale Sexual Misconduct Policies and Related Definitions*, YALE UNIV., <http://smr.yale.edu/sexual-misconduct-policies-and-definitions> (last visited Aug. 1, 2014) (on file with *The University of the Pacific Law Review*) [hereinafter “*Yale Sexual Misconduct Policies*”] (“Consent must be ongoing throughout a sexual encounter.”).

43. Cf. *Affirmative Consent*, *supra* note 2, at 4 (requiring consent to a “specific act”); MPC Draft 5, *supra* note 5, at 32 (requiring consent for “each act”). For a more in depth discussion of specific affirmative consent rules and the arguments for and against them, see Gruber, *Consent Confusion*, *supra* note 19.

44. See Johnson & Hoover, *supra* note 9, at 2–3 (noting extensive findings that young people continue to regard men as sexual proponents and women as sexual gatekeepers and citing studies).

45. Cf. *Affirmative Consent*, *supra* note 2, at 3 (acknowledging that the “absence of any sign of unwillingness is a common way to communicate receptivity”).

46. *Id.*

Affirmative consent proponents seek to limit the world of consent indicators for a variety of reasons.<sup>47</sup> Proponents characterize reform as necessary to counter state actors' and jurors' mistaken, or worse sexist, beliefs that anything and everything counts as consent.<sup>48</sup> Moreover, when the law allows ambiguous behavior to be explained by context, it invites the jury to look at prejudicial things like "promiscuity," manner of dress, and past sexual behavior.<sup>49</sup> The corresponding contention is that affirmative consent rules make factual determinations of actual agreement more accurate.<sup>50</sup> Critics respond that juries are not necessarily retrogressive and may actually be accurate,<sup>51</sup> given that sexual consent is often nonverbal, ambiguous, and signaled through passive engagement.<sup>52</sup> Further, evidentiary rules, including specialized ones, already exist to control prejudicial context evidence.<sup>53</sup> In any case, highly sexist state actors and jurors prone to nullification can disregard an affirmative consent law just as easily as they can ordinary consent laws.<sup>54</sup>

Affirmative consent reformers rejoin that even if people do not currently perform consent affirmatively, they *should*.<sup>55</sup> The criminal law, they argue, expresses a behavioral norm that people must conform to, even if common practice is to do otherwise. So long as individuals have notice of the proscription,

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47. Since Schulhofer does not in fact endorse a narrow affirmative consent requirement, these reasons do not really apply to his proposal. See *infra* notes 78–83 and accompanying text. Thus, my discussion of arguments in favor of affirmative consent here is brief. For a fuller catalogue of the pro and con arguments in the affirmative consent debate. See Gruber, *Consent Confusion*, *supra* note 19.

48. See *Affirmative Consent*, *supra* note 2, at 6 (characterizing open communication as normal); Beatrice Diehl, *Affirmative Consent in Sexual Assault: Prosecutors' Duty*, 28 GEO. J. LEGAL ETHICS 503, 508 (2015) (stating that an affirmative consent standard will combat jurors' adherence to "rape myths" about how women communicate about sex and clarify the "confusion" by establishing that only yes means yes); cf. *Toward Feminist Jurisprudence*, *supra* note 20, at 652–54 (opining that reasonable consent will reflect a male-oriented point of view).

49. Cf. *Yale Sexual Misconduct Policies*, *supra* note 42 (creating an affirmative consent standard to discourage "[p]resumptions based upon contextual factors (such as clothing, alcohol consumption, or dancing)").

50. See generally *Affirmative Consent*, *supra* note 2.

51. See *Affirmative Consent*, *supra* note 2, at 11 (noting this argument).

52. See Terry P. Humphreys & Mélanie M. Brousseau, *The Sexual Consent Scale-Revised: Development, Reliability, and Preliminary Validity*, 47 J. OF SEX RES. 420, 421 (2010), and studies cited therein.

53. See FED. R. OF EVID. 412; see generally Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002) (discussing rape shield laws).

54. This is actually an empirical question of whether there is a subset of sexist decision makers who would acquit under a regular consent standard but convict under an affirmative consent standard. It is difficult to imagine that this group is very big. More likely, the overtly sexist juror is a lost cause and the people affected by the change will be nonsexist jurors, who examine the evidence fairly in determining consent or lack thereof. Affirmative consent laws might make these jurors feel obligated to convict because there was no specific stop-and-ask performance, even when they conclude the complainant consented and communicated that consent.

55. See, e.g., Nicholas J. Little, Note, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1356 (2005) (analogizing affirmative consent to civil rights laws that "led popular culture").

it is fair to enforce the new norm through authoritarian means.<sup>56</sup> This is the most contested aspect of affirmative consent reform. Critics forcefully argue that it is wrong to impose radically reformist norms of sexual behavior by incarcerating those who merely engage in ordinary practices.<sup>57</sup> This makes too much typical behavior criminal and vests the government with too much prosecutorial discretion—discretion it may apply in a discriminatory manner.<sup>58</sup> Some also instinctively blanch at this vision of a sex regulatory state that mandates dispassionate negotiation over passionate desire.<sup>59</sup>

In sum, the touted benefits of affirmative consent include controlling sexist juries, reducing prejudicial and traumatizing contextual evidence, and establishing a liberatory and clear norm of sexual communication.<sup>60</sup> The purported drawbacks include punishing people who reasonably discern consent, granting too much discretionary authority to police and prosecutors, and creating a sex regulatory state.<sup>61</sup> The narrower the definition of affirmative consent, the greater the benefits and drawbacks. I believe that the critics have the better of the arguments, for reasons I explain in more detail elsewhere.<sup>62</sup> Those with a healthy skepticism of carceral authority should be very circumspect about forcing compliance with emerging sexual norms through criminal punishment. Moreover, it is fair to worry that the new-found punitive authority to prohibit a substantial amount of currently lawful sex will presage unanticipated and random, if not racialized and harmful, distributional effects.<sup>63</sup> Finally, one with feminist sensibilities can certainly question whether the stop-and-ask norm is merely a more administrable, sanitized, and legalistic form of the “traditional” sex script in which men are sexual proponents and women are gatekeepers. However, I need not belabor those arguments here, as Schulhofer’s expressive consent formulation, for the most part, creates neither the benefits nor the problems of affirmative consent.

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56. See *infra* notes 136–42 and accompanying text for discussion of this contention.

57. See, e.g., Cathy Young, *Campus Rape: The Problem with ‘Yes Means Yes’*, TIME (Aug. 29, 2014), <http://time.com/3222176/campus-rape-the-problem-with-yes-means-yes/> (on file with The University of the Pacific Law Review) (lauding the goals of affirmative consent, but stating that “having the government dictate how people should behave in sexual encounters is hardly the way to go about it”).

58. See U.S. DEP’T OF J., UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES: 2012 OVERVIEW, at Table 43, available at <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/43tabledatadecoverviewpdf>. (on file with The University of the Pacific Law Review) (demonstrating that, as with all violent crimes, the proportion of blacks arrested for sexual offenses far exceeds the proportion of black in society).

59. In turn, some affirmative consent proponents have turned to cringe-worthy public relations campaigns to establish that “affirmative consent” is sexy.

60. See generally *Affirmative Consent*, *supra* note 2.

61. *Id.* at 13.

62. See Gruber, *Consent Confusion*, *supra* note 19; Aya Gruber, *Rape Revisited*, \_\_ OHIO ST. J. CRIM. L. \_\_ (forthcoming 2016).

63. See *Affirmative Consent*, *supra* note 2, at 15–16.

C. *Expressive Consent*

Recall that Schulhofer's expressive consent standard requires A to "communicate[] [agreement] by conduct, words, or both."<sup>64</sup> In turn, B must "look for" such "affirmative indications of willingness."<sup>65</sup> Does this require B to stop, deliberately solicit, and receive clear permission? It appears not, given that B must merely "look for" signals of agreement and not actively pursue them.<sup>66</sup> The issue, then, is whether Schulhofer means to differentiate "affirmative indications of willingness" from all possible external manifestations of internal agreement. Although the use of the word "affirmative" indicates that this may be the case, Schulhofer elsewhere makes clear that he does not seek to limit *what* counts as a communication of willingness.<sup>67</sup> His definition specifically provides that consent "may be inferred from the totality of the circumstances."<sup>68</sup> Those circumstances include things like increasingly intimate foreplay, ambiguous statements rendered meaningful in context, and anything else a person with "common sense" would think communicates agreement.<sup>69</sup> Another thing that can in certain circumstances count as consent is silence.<sup>70</sup> Schulhofer explains:

[A] contextually sensitive standard of consent-by-conduct should leave room for considering silence and passivity, together with all other circumstances, in assessing whether a person's conduct communicates positive agreement. The point to stress is that while silence and passivity cannot by themselves be treated as consent, they are forms of *conduct*, and all of a person's conduct should be taken into account. This approach avoids the artificiality of positing that silent acquiescence can never constitute consent.<sup>71</sup>

Schulhofer's standard, like the internal consent inquiry, counsels decision-makers to look at all of A's external manifestations within the particular context of the case to determine whether A's state of mind was one of willingness (or B believed it was).<sup>72</sup> The standard seeks to avoid "artificiality," which is to say that it rejects an aspirational norm that strays too far from actual sexual communicative practices.<sup>73</sup> In this sense, the expressive consent standard is more properly characterized as norm-reflecting rather than norm-changing.

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64. *Affirmative Consent*, *supra* note 2, at 5.

65. *Id.* at 4.

66. *See Affirmative Consent*, *supra* note 2, at 4.

67. *See The Feminist Challenge*, *supra* note 1, at 2181.

68. *Affirmative Consent*, *supra* note 2, at 5.

69. *Id.* at 4-5.

70. *See id.* at 4.

71. *Id.* at 4.

72. *See id.* (advocating looking at the totality of a person's behavior to determine willingness).

73. *Id.* at 5.

Nevertheless, Schulhofer's resistance to artificiality has its limits. He gives the jury free reign to interpret the external manifestations in context and determine internal agreement, with one notable exception: the jury may not infer that A internally agreed if A's external manifestations include a no (a "verbal expression of unwillingness"), unless A engaged in "subsequent words or actions indicating consent."<sup>74</sup> While this formula recalls a no-means-no standard, it is actually more like "no means no unless it means yes." Any subsequent—though curiously not preceding or simultaneous—words or actions indicating consent can counter the "no." These post-"no" words or actions do not have to be of a special quality. Thus, if a jury is assessing a package of communication that happens to include a "no," its analysis remains unchanged, so long as the complainant did *something* after the no.

In any case, even with the modified no-means-no provision, the expressive consent formulation is far from yes means yes. It might be up for debate whether even this qualified no-means-no standard is too artificial and arbitrarily excludes reasonable consent scenarios,<sup>75</sup> or whether its costs are outweighed by the need to check society's tendency to think that no means yes more often than it actually does.<sup>76</sup> However, I will put the no-means-no issue aside for now. The point is that Schulhofer's version of affirmative consent bears little resemblance to sexual assault laws and policies that mandate contracts, yeses, or Q&As.<sup>77</sup>

Under his standard, people do not have to materially shift their views about manifestations that indicate agreement. The jury retains wide discretion to decide whether the external manifestations, in context, indicate internal agreement.<sup>78</sup> It remains free to look at any relevant admissible circumstance to contextualize the external manifestations.<sup>79</sup> Verdicts can reflect a range of views regarding proper sexual communication, and, indeed, such views may diverge sharply from the enlightened sex script.<sup>80</sup> Accordingly, Schulhofer's standard, properly understood, will not appeal to those who tout affirmative consent for its ability to strictly confine juror discretion, eliminate "bad" or ordeal-inducing context evidence, and establish norms of clear sexual communication.

74. *Id.* at 5.

75. For example, A says no laughingly while directing B's intimate parts towards his or hers.

76. For example, creating a social norm that no must *always* mean no.

77. *Affirmative Consent*, *supra* note 2, at 5.

78. Compare *id.* at 4–5 ("a contextually sensitive standard of consent-by-conduct should leave room for considering silence and passivity, together with all other circumstances, in assessing whether a person's conduct communicates positive agreement") with *Yale Sexual Misconduct Policies*, *supra* note 42 (requiring "direct communication" and disallowing "[p]resumptions based on contextual factors").

79. *Affirmative Consent*, *supra* note 2, at 10 (explaining that the finder of fact is free to look at the surrounding circumstances).

80. That is, unless Schulhofer here uses the word "affirmative" to mean that the indications of consent must be of a certain character (like verbal or unambiguous). However, I do not think the word is meant to manage the external manifestation analysis in this manner. Rather, I think Schulhofer is directing sex-proponents to search the liaison record for indications of consent as opposed to not caring or, worse, proceeding in the face of indications of nonconsent. Again, the word "affirmative" here is unnecessarily confounding.

At the same time, the formula avoids many of the common critiques directed at affirmative consent. The standard is not very sex regulatory. It does not require magic words, or any words, and all contextualizing evidence is fair game.<sup>81</sup> So long as there are common-sense signs of agreement, sex is beyond the purview of the criminal law.<sup>82</sup> Sex proponents may thus proceed on equivocal signals that, under the specific circumstances, indicate agreement.<sup>83</sup> Given that the proposal is virtually indistinguishable from the ordinary consent inquiry, one might be wondering whether there is a critique here. There is. Part III will discuss the costs associated with both the framing and substance of the project.<sup>84</sup> Professor Schulhofer believes his reframing of consent is a subtle but crucial reform that covers gaps created by ordinary consent laws.<sup>85</sup> However, the proposal is mystifying—an imperfect compromise. Adding unnecessary complexity to an area that demands clarity does not well serve the Model Penal Code and American Law Institute (ALI) membership.

### III. MIND THE GAPS

The expressive consent formulation purports to address a “large class of cases [that] fall[] into a grey area where a person’s willingness to accept sexual intimacy is unclear, but his or her ability to protest is also unclear”—cases including “surprise, tonic immobility, and heavy drinking.”<sup>86</sup> Apparently, the idea is that there are many situations where a victim does not protest because of a lack of sufficient time, fright (unrelated to direct coercion), and debilitating drunkenness and, in such situations, a jury applying an ordinary consent standard would reason that such passivity constitutes consent.<sup>87</sup> Schulhofer, for example, makes much of the possibility of injustice in cases involving precipitous penetration.<sup>88</sup> Although his symposium essay does not provide concrete examples, the MPC draft discusses at length a 1994 California case, *People v. Iniguez*.<sup>89</sup> In that case, the victim stayed overnight at her friend’s house and was raped by Iniguez, her friend’s fiancé, whom the victim had met that night.<sup>90</sup> The victim was asleep face down in the living room when around one or two a.m., a naked Iniguez approached her from behind, pulled down her pants, penetrated

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81. See Affirmative Consent, *supra* note 2, at 5.

82. See *id.* at 10–11.

83. See *id.* at 4 (recognizing that consent is often communicated equivocally).

84. See *infra* Part III.

85. See Affirmative Consent, *supra* note 2.

86. *Id.* at 11.

87. *Id.*

88. *Id.* at 10–11.

89. See *People v. Iniguez*, 872 P. 2d 1183 (Cal. 1994); see also MPC Draft 5, *supra* note 5, at 61.

90. *Iniguez*, 872 P. 2d at 1184.

her, ejaculated, and left.<sup>91</sup> Because of the rapidity of Iniguez's actions and the frightening circumstances, the victim was unable to actively protest.<sup>92</sup>

Why is this a highlighted example of the need for affirmative, or at least expressive, consent? Did a jury find that the victim consented because she failed to say no? Was a judge persuaded that the defendant believed there was consent because the victim did not resist or refuse? No. In fact, Iniguez's case for consent was so deficient that he conceded, on the stand no less, the victim had not consented.<sup>93</sup> Instead, Iniguez's attorney attempted to undermine the law's *force/fear* requirement by arguing that, in his drunken state, the defendant did not realize he had placed the victim in fear.<sup>94</sup> The jury rejected this argument and convicted Iniguez of rape.<sup>95</sup> And although a court of appeals reversed for lack of sufficient evidence that Iniguez used specific means to induce fear,<sup>96</sup> the Supreme Court of California reinstated the conviction on the ground that the distinctive coercive circumstances could lead the jury to reasonably conclude that Iniguez placed the victim in fear.<sup>97</sup>

The court of appeals' decision might counsel in favor of some clarity on what counts as "means of fear," when such is statutorily required, but it is difficult to see how *Iniguez* is even relevant to a debate over affirmative consent.<sup>98</sup> The jury did not find that the victim's silence and acquiescence constituted consent, and they would not likely have done so in the absence of the defendant's admission.<sup>99</sup> Instead, the jury seemed perfectly capable of looking at the situation, including the defendant's and victim's behavior in context, and finding that the victim did not agree to sex.<sup>100</sup> Now, there may be statutes that premise rape on a clear expression of *nonconsent*, and under such statutes, silence would not fulfill the *actus reus*. Schulhofer, for example, cites to a provision under New York law clarifying that a felony third-degree rape conviction requires that "the victim

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91. *Id.* at 1185.

92. *Id.*

93. *Id.*

94. *Id.* at 1185–86 (citing CAL. PENAL CODE § 261 (West 2015)).

95. *Id.* at 1186.

96. *Id.*

97. *Id.* at 1190 ("The jury could reasonably have concluded that under the totality of the circumstances, this scenario, instigated and choreographed by defendant, created a situation in which Mercy genuinely and reasonably responded with fear of immediate and unlawful bodily injury, and that such fear allowed him to accomplish sexual intercourse with Mercy against her will.").

98. The California Supreme Court favored a definition of *force* that included precipitous sex. *See id.* at 1189 ("Sudden, unconsented-to groping, disrobing, and ensuing sexual intercourse while one appears to lie sleeping is an appalling and intolerable invasion of one's personal autonomy that, in and of itself, would reasonably cause one to react with fear.").

99. *Id.*

100. Perhaps one could argue that this was just a good jury, and there are juries out there bent on acquitting in an *Iniguez* situation. However, an expressive consent rule would hardly move such a sexist jury. That jury would simply conclude that some movement or utterance by the victim expressed consent or find consent through her passivity in context.

clearly expressed that he or she did not consent.”<sup>101</sup> However, New York law elsewhere fills *that* gap with a provision making it a crime to “engage[] in sexual intercourse with another person without such person’s consent.”<sup>102</sup>

Schulhofer and MPC Draft 5 also adopt the view that there is some widespread phenomenon of women freezing in fright during intimate encounters, going lifeless during sex, and being unable to seek justice under ordinary consent standards.<sup>103</sup> Few would dispute that women who are suddenly viciously attacked or face threatening, coercive circumstances (as in *Iniguez*) might instinctively freeze or consciously decide that acquiescence is the safest route.<sup>104</sup> But, it is also fair to say that such immobilization is highly unlikely in ordinary intimate encounters.<sup>105</sup> Moreover, assume there was an unusual case where a couple were willingly kissing and the complainant suddenly became overwhelmingly frightened—say, because of past, undisclosed trauma—and thereafter acquiesced, or even feigned willingness, out of fear. One might rightly wonder whether criminally punishing the defendant is appropriate in such a case. Nevertheless, this is all somewhat beside the issue, which is whether the ordinary consent standard equips juries to determine whether a placidly acquiescent party facing an environmentally coercive situation has consented.<sup>106</sup> Simply, there is no reason to believe that juries are unable to determine when a passive person, in the given context, has agreed to sex.

The second gap that the expressive consent formula purports to fill is the space between incapacitated sex, which is criminal, and highly intoxicated sex, which may be highly disturbing, but is not illegal.<sup>107</sup> As Professor Schulhofer notes, many rape codes severely penalize defendants for having sex with incapacitated—basically unconscious—persons.<sup>108</sup> A subset of jurisdictions criminalize sex with a person who is not blackout incapacitated but meets a certain threshold of choice-defeating intoxication.<sup>109</sup> The MPC currently

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101. N.Y. PENAL LAW § 130.05 (McKinney 2013).

102. *Id.* § 130.20.

103. See *Affirmative Consent*, *supra* note 2, at 11; MPC Draft 5, *supra* note 5, at 62 (calling “frozen fright” a frequently recurring problem[“]).

104. The studies on freezing cited by the MPC Draft all discuss “paralysis,” “infantilism,” and “tonic immobility” as responses to an extreme fear situation. See MPC Draft 5, *supra* note 5, at 62.

105. Cf. Brian P. Marx et al., *Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivors*, 15 CLINICAL PSYCHOL.: SCI. & PRAC. 74, 79 (2008) (theorizing that sexual assault may produce an involuntary passive response like those seen in animals facing extreme conditions, but postulating that “[tonic immobility] ought to be more likely only after several behavioral strategies (i.e., escape, screaming, and fighting back) have failed and general feelings of fear have escalated into extreme fear or panic”).

106. The case highlighted by MPC Draft 5 to illustrate this point, *People v. Warren*, 446 N. E. 2d 591, 593 (Ill. App. Ct. 1983), is inapposite. In that case, a stranger quickly carried the victim to the bushes, undressed her, and had sex with her. The jury convicted, but the court of appeals reversed based on the antiquated requirement of *resistance*, not because of its reading of consent. See MPC Draft, *supra* note 5, at 61.

107. *Affirmative Consent*, *supra* note 2, at 6.

108. See MPC Draft 5, *supra* note 5, at 81 & nn. 220–21 (citing cases).

109. See *id.* at 81–82 (discussing the different approaches and their complexities).



prohibits sex with an intoxicated, but not unconscious, person only when the defendant surreptitiously drugged the victim for the purpose of imposing sex.<sup>110</sup> MPC Draft 5 significantly expands the intoxication provision and prohibits intoxicated sex whenever the victim is in a state of “torpor,” that is, “laps[ing] in and out of consciousness.”<sup>111</sup> The draft thus covers both intoxicated passed-out victims and nearly passed-out victims, but Schulhofer worries that even the broadened draft provision is under inclusive.<sup>112</sup> He envisions situations where the complainant is conscious and not in a state of torpor, but is nonetheless intoxicated enough that s/he does not or cannot meaningfully agree to sex, for example, when the complainant is vomiting, moaning, and curling into a ball, but not passing out.<sup>113</sup>

In an ordinary consent inquiry, the jury will look at the totality of the circumstances, including vomiting, moaning, and curling into a ball, etc., to determine the complainant’s internal agreement or lack thereof. Depending on what else is going on, a jury might find consent despite the complainant’s significant intoxication, or nonconsent despite the complainant’s relative sobriety.<sup>114</sup> Frankly, it is difficult to understand how an expressive consent formula, or even a yes-means-yes standard, would helpfully intervene in the drunkenness inquiry. Drunk complainants will likely exhibit a range of behavior from “no” to “yes, yes, yes.” Whether “yes” is uttered says nothing about the capacity of the utterer/non-utterer. There is no particular reason to believe that in the universe of drunken sex, the cases involving a lack of affirmative expression meaningfully overlap with the cases involving severe, consent-defeating, but not unconscious or semiconscious, intoxication. Thus, affirmative consent only fills the intoxication gap by perhaps putting more defendants in jail—some of whom had sex with those who were too drunk to meaningfully consent and some of whom did not.<sup>115</sup>

Expressive consent will fare even worse at managing drunkenness cases than stronger affirmative consent formulations. Instructing the jury to look for expressions of consent will not do much to increase the conviction rate of those who have sex with intoxicated individuals, given that in the vast majority of

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110. MODEL PENAL CODE § 213.1.

111. MPC Draft 5, *supra* note 5, at 85.

112. *Affirmative Consent*, *supra* note 2, at 6.

113. *See id.* (intending the expressive consent rule to address intoxication cases not covered by incapacity, or even “torpor” rules).

114. Some universities policies indicate that in cases of mutual intoxication, even the more passive party would be liable—a suggestion that should give all of us pause. *See, e.g.*, COLUMBIA UNIV., GENDER-BASED MISCONDUCT POLICY FOR STUDENTS (POLICY) 20–21 (revised Aug. 1, 2014) (on file with *The University of the Pacific Law Review*).

115. *See supra* notes 108–14, and accompanying text (explaining it does not necessarily make the drunkenness inquiry more accurate).

cases there will be *something* that counts as expression.<sup>116</sup> In fact, an explicit directive to look at expressions could have the effect of leading the jury to focus on the fact of communication rather than the intoxicated origin of it.

In the end, the gap-filling arguments demonstrate Schulhofer's skepticism of people's ability to divine the true meaning of silence and passivity. The requirement of communicative consent is meant to push back against the assumption that consent to sex is perpetually present until an unequivocal refusal.<sup>117</sup> We would not assume that the person sitting next to us in a conference room consents to sex with us just because s/he hasn't expressed a lack of desire, he explains, so we should not assume that complainants consent to defendants just because they do not protest.<sup>118</sup> But, this argument collapses two very distinct scenarios. Of course, most ordinary citizens would say it is outrageous for individuals to presume that anyone and everyone in proximity wants to have sex them. And a person who acted on such a presumption by, for instance, following another from the conference room to the bathroom and precipitously penetrating them, would almost certainly be convicted under any consent standard.

However, disputed consent cases present a different scenario altogether: Defendants assume consent, not because of the complainant's bare existence, but because of specific interactions on the relevant occasion. The thorny issue is the intricacy of sexual interaction—the many interpretable things that happen between sitting in a conference room and lying naked on a hotel bed.<sup>119</sup> We do not have to worry about the Iniguez's, the crawl-through-the-window surprise attackers, or the bathroom stalkers being exonerated. They will be convicted under ordinary consent laws. Today's controversies involve deciding exactly when a person is permitted to conclude that consent exists based on pre-sex intimate interactions—what occurs in between the boardroom and the bedroom.<sup>120</sup>

The expressive consent proposal largely does not weigh in on how to interpret various external manifestations.<sup>121</sup> Indeed, it is difficult to envision how the proposal will fill a passivity-silence gap when it allows omissions, in context, to count as consent. Ultimately, the law directs the jury to look at both parties'

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116. MPC Draft 5 cites the infamous St. John's rape case as a situation in which the expressive consent formula might helpfully intervene. MPC Draft 5, *supra* note 5, at 62. In that case, the victim was extremely intoxicated when several men performed sex acts on her. The men argued that she actively consented to the incident and lied about it later to protect her reputation. The jury ultimately sided with the defense due to "inconsistencies" in the prosecution's case. See E.R. Shipp, *Sex Assault Cases: St. John's Verdict Touches Off Debate*, N.Y. TIMES (July 25, 1991), available at <http://www.nytimes.com/1991/07/25/nyregion/sex-assault-cases-st-john-s-verdict-touches-off-debate.html?pagewanted=all> (on file with *The University of the Pacific Law Review*). How would the requirement that the complainant express consent have changed the outcome?

117. See *Affirmative Consent*, *supra* note 2, at 4 (critiquing the presumption that silence equals consent).

118. Conversation with Schulhofer at MPC Sexual Assault Project Advisers' meeting (Oct. 2015).

119. See *supra* notes 102–07 and accompanying text (discussing context).

120. See *supra* notes 108–14 and accompanying text.

121. See *supra* notes 115–19 and accompanying text.

actions and inactions before intimate contact, during foreplay, and after intercourse to determine whether there was consent.<sup>122</sup> The fact that the expressive consent standard does not resolve difficulties in interpreting passivity and silence is evidenced elsewhere in Schulhofer's proposal.<sup>123</sup> To check juries' tendency to think failure to protest *always* equates with consent, Schulhofer adds this specific provision: "Lack of physical or verbal resistance does not *by itself* constitute consent."<sup>124</sup>

Consequently, the expressive consent formulation has a solution-in-search-of-a-problem quality: It seeks to fill nonexistent gaps, and those that cannot be filled merely by requiring communicative consent. This, combined with the observation in Part I that Schulhofer's formula is not a radical departure from ordinary internal consent standards, appears to render the formula neutral—neither a radically progressive reform, nor a disastrous mistake. However, the fact that the expressive consent proposal avoids some popular critiques of affirmative consent does not mean it is beyond reproach. The next Section discusses the problems with both the framing and the substance of the proposal.

#### IV. WHAT'S IN A NAME?

In his essay, and in MPC Draft 5, Schulhofer discusses and dismisses many of the common criticisms of affirmative consent—criticisms that affirmative consent is artificial, regulatory, punitive, and potentially discriminatory.<sup>125</sup> He argues that *his* formulation of affirmative consent is not artificial, carceral, etc.<sup>126</sup> However, this argument is not a defense of affirmative consent so much as confirmation that Schulhofer's formula is *not* affirmative consent. It is because expressive consent is virtually indistinguishable from ordinary consent, that it is not prone to the artificiality critique.<sup>127</sup> It is because expressive consent is far broader than affirmative consent that it does not amplify the regulatory authority of the state or grant greater discretion to police and prosecutors.<sup>128</sup> As a result, one cannot accuse Professor Schulhofer of setting up a radical carceral standard that greatly diverges from ordinary cultural practices. My critique of his modest proposal is, therefore, modest.

Simply put, Schulhofer's expressive consent standard is unduly confusing and not an improvement on straightforward sexual assault laws that prohibit sex

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122. See *Affirmative Consent*, *supra* note 2, at 4.

123. *Id.* at 4–5.

124. *Id.*

125. See *id.* at 15; *supra* notes 55–65 and accompanying text.

126. See *Affirmative Consent*, *supra* note 2, at 5.

127. Save, perhaps, for the no-means-no provision. See *supra* notes 64–72 and accompanying text.

128. See *Affirmative Consent*, *supra* note 2, at 11–13.

“against the will” or “without consent” in the ordinary meaning of those terms.<sup>129</sup> The problems with Schulhofer’s standard are both external—a matter of labeling—and internal—a matter of the actual operation of the standard. Externally, the term “affirmative consent” may confuse people about the nature of the expressive consent proposal and lead them to believe that the MPC is adopting some form of a yes-means-yes or stop-and-ask standard. Internally, it will be practically difficult for jurors and jurists to apply a consent standard unmoored from complainants’ intent and tethered to an undefined communicative threshold.

Turning to the external issues, Schulhofer and MPC Draft 5 refer to expressive consent as “affirmative consent,” with all that implies, rather than “consent” or even “expressive consent.”<sup>130</sup> When those versed in sexual assault issues confront the term “affirmative consent,” they get an idea of what the law involves. Some will think contract or verbal yes.<sup>131</sup> Many will think the standard entails something slightly less onerous. Again, I believe the burgeoning consensus is that affirmative consent requires something like stopping and asking.<sup>132</sup> In any case, I would venture that the vast majority of knowledgeable commentators understand affirmative consent to, at some level, regulate the *type* of communication that counts as consent.

Calling the proposal “affirmative consent” may have been a strategic attempt both to gain support from affirmative consent-loving prosecutors and feminist activists and to satisfy more skeptical defense attorneys and libertarians with the actual substance of the provision. One should not, however, achieve by artifice that which he cannot through political consensus. In any case, the taxonomical move has resulted in considerable confusion. As it stands, American Law Institute members on both sides of the debate have different notions of what the MPC Draft 5 provision entails, and many appear under the mistaken impression that the provision limits, in some fashion, the external manifestations that count as communicative consent.<sup>133</sup> Anti-rape activists who laud the draft for including “affirmative consent” understand it to preclude defendants from arguing that kissing or even making-out, without more direct communication, counts as consent.<sup>134</sup> Civil libertarians who critique the draft fear that it requires a contract, a verbal “yes,” or at least stopping and asking.<sup>135</sup>

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129. See MPC Draft 5, *supra* note 5, at 58–60, and n. 150 (listing jurisdictions that adopt a definition of sexual assault as sex without consent, including those that, as opposed to specifying that there must be verbal agreement, allow the jury to determine consent in its “ordinary usage”).

130. See *Affirmative Consent*, *supra* note 2, at 3–5.

131. See *supra* notes 107–13 and accompanying text.

132. See *supra* notes 114–16 and accompanying text.

133. See *infra* text accompanying notes 134–35.

134. Conversation with former prosecutors at MPC Sexual Assault Project Advisers’ Meeting (Oct. 2015).

135. See Janet Halley, *The Move to Affirmative Consent*, SIGNS (Nov. 10, 2015), <http://signsjournal.org/currents-affirmative-consent/halley/> (on file with *The University of the Pacific Law Review*); Judith Shulevitz,

Furthermore, Schulhofer's substantive comments and the MPC Draft 5 commentaries appear to defend more robust versions of affirmative consent.<sup>136</sup> Schulhofer is sometimes careful to distance his proposal from narrow affirmative consent programs in order to demonstrate that a given critique is inapposite.<sup>137</sup> His response to the artificiality concern, for instance, distinguishes broad expressive consent from "written contracts, artificial verbal formulas or any other unrealistic behavioral ritual."<sup>138</sup> Other times, Schulhofer makes arguments that defend the narrowest and most contrived versions of affirmative consent, like the contract.<sup>139</sup> Consider his argument on social norms: "Using criminal law to discredit widespread but harmful social norms can be fair and effective."<sup>140</sup> This argument could apply with equal force to a "nudge" and a "shove" that diverges greatly from existing practice.<sup>141</sup> In fact, MPC Draft 5 forcefully argues that criminal law's punitive nature makes it a *particularly appropriate* tool of radical social change:

Because criminal law is the site of the most afflictive sanctions that public authority can bring to bear on individuals . . . it must often be called upon to help shape [social] norms by communicating effectively the conditions under which commonplace or seemingly innocuous behavior can be unacceptably abusive or dangerous.<sup>142</sup>

Those who consider sex-without-a-yes a dangerous, though commonplace, social practice can easily invoke Schulhofer's argument that the criminal law should be used to "discredit" it.

Perhaps more troubling is Schulhofer's treatment of the incarceration and discretion arguments. In response to the contention that his proposal can exacerbate the problems of severe criminal punishment and mass incarceration, the Professor asserts that concerns over harsh sentencing "should not drive . . . substantive offense definitions,"<sup>143</sup> and that "sexual offense policy is [not] a cause" of mass incarceration.<sup>144</sup> The disaggregating of sexual assault liability from high sentences and the human rights nightmare that is mass incarceration—

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*Regulating Sex*, N.Y. TIMES (June 27, 2015), <http://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html> (on file with *The University of the Pacific Law Review*).

136. See, e.g., *Affirmative Consent*, *supra* note 2, at 10-11 (requiring more than passive silence for consent).

137. See *id.* at 3 (calling the contract version of affirmative consent "preposterous").

138. *Id.* at 16.

139. See *infra* text accompanying note 142.

140. *Affirmative Consent*, *supra* note 2, at 14.

141. See Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 619 (2000).

142. MPC Draft 5, *supra* note 5, at 15.

143. *Affirmative Consent*, *supra* note 2, at 15.

144. *Id.* at 13.

a questionable tactic in and of itself—immunizes *any* sex regulation from structural and consequentialist critique. One could, for example, defend outlawing sex without a contract or even prohibiting sex during college by postulating that such laws could carry modest sentences and speculating that they would not significantly increase the incarcerated population.

Similarly, Schulhofer writes off worries over prosecutors using broad affirmative consent laws to coerce pleas in cases of weak evidence because, given numerous existing “fallback” charges, such a “troublesome dynamic” will inevitably persist.<sup>145</sup> These arguments about norm-shaping, the liability-punishment divide, and prosecutorial discretion rationalize, or minimize the costs of, expanding criminal liability in general. They are not tailored justifications of the more modest expressive consent proposal. Accordingly, such contentions typically presage radical punitive reform and often appear in the debate over norm-changing affirmative consent provisions, like yes means yes.

To be sure, Schulhofer’s use of the “affirmative consent” label may simply reflect some Machiavellian genius in crafting a law that at first glance appears to, but does not actually, impose a yes-means-yes requirement, in order to further its adoption as a social norm without the cost of incarcerating reasonable actors. But this is a dangerous tactic. Jurisdictions may adopt, and prosecutors, police, and jurors may apply the MPC provisions in their apparent form—requiring an unequivocal, if not verbal, communication of agreement.<sup>146</sup> Moreover, those with more regulatory notions of affirmative consent will draw on the many pro-reform arguments in Schulhofer’s essay and MPC Draft 5’s commentary, like the argument that norm shifting is worth carceral costs, to support more radical and punitive reform.<sup>147</sup>

The problems are not resolved merely by renaming the proposal “consent” rather than the more freighted “affirmative consent.” There are complexity issues created by unmooring the consent inquiry from the complainant’s mental state and mandating a communication threshold without specifying what it is. To begin, let us look at an internal consent standard and Schulhofer’s expressive-consent formulation side by side, highlighting the differences:

Penetration without Consent: It is a crime for an actor to knowingly or recklessly engage in an act of sexual penetration with a person who has not consented [internally agreed] to an act of sexual penetration.

Schulhofer’s Penetration without Affirmative Consent: It is a crime for an actor to knowingly or recklessly engage in an act of sexual penetration with a person who has not “freely given agreement to engage in a

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145. *Id.*

146. UNWANTED SEX, *supra* note 1, at 27.

147. *See Affirmative Consent*, *supra* note 2, at 14–15 (explaining that criminal laws can promote social change).

specific act of sexual penetration, [and] communicated [that agreement] by conduct, words, or both.”<sup>148</sup>

In the ordinary consent inquiry, the *actus reus* is satisfied when the complainant has not internally agreed to have sex. To be sure, the factfinder will ultimately look at external manifestations to determine the complainant’s mental state, as explained in Part I.<sup>149</sup> However, if the jury is convinced that the complainant did agree, there is no further actus reus inquiry, and the defendant is not guilty. Schulhofer’s standard, by contrast, requires two conditions for lawful sex: internal agreement *and* external communication.<sup>150</sup> Consequently, the defendant commits a crime if the complainant did not freely mentally agree *or* if the free mental agreement was not communicated. I have argued in Part I that Schulhofer means these two requirements to be coextensive, that is, a jury can use the very same evidence and analysis it would use to determine the complainant’s mental state to determine whether there is communication.<sup>151</sup> This is made clear by Schulhofer’s comment that communication “need not take any particular form.”<sup>152</sup> Given that all signs of willingness count as expressions of consent, it is difficult to imagine a scenario in which the jury has enough evidence to determine that the complainant internally agreed, but does not have sufficient evidence to find communication. Therefore, Schulhofer’s second prong, properly understood, is fairly superfluous.<sup>153</sup>

The problem is that the expressive consent proposal, *on its face*, seems to require the jury to make an additional factual determination that the complainant engage in a certain package of external manifestations that meets some threshold for sufficient communication. The requirement of “communicat[ion] by conduct, words, or both” can easily be interpreted to limit the world of external manifestations that properly communicate agreement to only positive and active signals.<sup>154</sup> Thus, although Schulhofer intends things like omissions, contextualized passivity, and foreplay to count as “communication,” this is not apparent from the proposed language.<sup>155</sup> I believe that Schulhofer put in the phrase “words, actions, or both” as a defendant-friendly maneuver to clarify that sufficient communication is not limited to words, but also includes nonverbal signals. Nevertheless, one could very well reason that the standard would not insist on “words, actions, or both” if silence and passivity could sufficiently

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148. *Id.* at 5 (emphasis added). I do not make much of the fact that the affirmative consent formula uses the word “given.” See *supra* notes and accompanying text.

149. See *supra* notes and accompanying text.

150. See *Affirmative Consent*, *supra* note 2, at 5.

151. See *supra* Part I.

152. *Affirmative Consent*, *supra* note 2, at 4.

153. The prong does not greatly risk that a defendant who engaged in wanted sex will be punished for failing to receive magic words.

154. *Affirmative Consent*, *supra* note 2, at 5.

155. *Id.* at 4–5.

communicate agreement. Correspondingly, Schulhofer's formulation could leave a jury with the impression that consent must be expressed through *specific types* of signals, although it is not totally evident which ones. If the objective is simply to ensure that legal actors' and factfinders' inquiries involve "ordinary" and "common sense" notions of consent based on a sincere evaluation of the entire situation, the requirement of communication through words or actions confuses and even undermines this objective.<sup>156</sup>

A similar confusion will be present in cases that hinge on defendants' *mens rea*. In an ordinary consent inquiry, once again, the jury will look at external manifestations in context, along with evidence about the defendant's mental constitution, to determine whether the defendant knew or realized the substantial risk that the complainant did not internally agree to sex.<sup>157</sup> Schulhofer's definition of consent has the additional requirement that the internal agreement be communicated.<sup>158</sup> The defendant must therefore argue both that s/he believed that the complainant internally agreed *and* that s/he believed the complainant sufficiently communicated that agreement through words, actions, or both.

Parsing the difference, if any, between the belief that one's partner is agreeing to sex and the belief that one's partner is expressing agreement to sex is confusing, to say the least. Do defendants come to different conclusions about whether a complainant internally consented and whether s/he engaged in behavior that sufficiently expressed consent? Probably not. A person who sincerely believes that a sexual partner is consenting is very likely to also believe that the partner is expressing consent.

Nevertheless, let us try to imagine the operation of this perplexing dual *mens rea* inquiry at trial. Take, for example, a case involving "increasingly intimate foreplay" between A and B that culminates in sexual penetration.<sup>159</sup> At trial, the prosecution asserts that A did not want to have sex. The defense responds that, given A's energetic foreplay, B believed A wanted to have sex. After an examination of the details of the liaison, the jury concludes that B honestly and even reasonably believed A wanted to have sex. However, the following exchange occurs at trial:

Prosecution: You testified that you believed A wanted to have sex, but isn't it true that A never said anything to the effect of, "I want to have sex?"

B: That's true.

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156. *Id.* at 4.

157. The expressive consent proposal does not adopt a negligence *mens rea*. See *supra* note 34.

158. See *Affirmative Consent*, *supra*, note 2, at 5 (requiring conduct show consent).

159. *Id.* at 4.



Prosecution: So you inferred that A consented, but A actually never communicated the agreement.

B: Yes.

Now, in Schulhofer's view, the defense has every right to argue that inferring agreement from foreplay is perfectly acceptable under the expressive consent law. But the point is that the defender, prosecutor, jury, judge, complainant, and defendant could very well believe that whether the defendant inferred internal agreement from the totality of the circumstances is a *different* question from whether the defendant believed the complainant sufficiently communicated that agreement through words or actions. Thus, in the example above, the jury could conclude both that the defendant reasonably believed that the complainant agreed to sex *and* that the defendant realized a substantial risk that "communication" of the consent was insufficient. I think it is unwise to have jurors engage in the oblique inquiry of whether the defendant believed, not that the complainant agreed to sex, but that the complainant engaged in a package of behavior that amounts, under some objective but undefined standard, to communicative consent.

## V. CONCLUSION

Stephen Schulhofer, along with his co-reporter Erin Murphy, has engaged in an impressive and important effort to reform the sorely outdated MPC provisions on sexual assault.<sup>160</sup> I believe that Professor Schulhofer is earnest in his effort to draft criminal laws that reflect societal views of acceptable and unacceptable sex and protect the vulnerable from harmful sexual aggression, without punishing acceptable sexual practice. Moreover, I take Schulhofer's point that there is a histrionic verve to the accusations that his proposal requires contracts, is fascistic regulation, or incorporates a presumption of guilt. Nevertheless, Schulhofer makes a mistake by seeking to exploit the energy of the popular affirmative consent reform juggernaut, without reckoning with the fact that the contours and values of that reform movement differ substantially from his own.

Engaging in the affirmative consent debate *is* to talk of contracts, yes means yes, and express permission. If Schulhofer's desire is to avoid those types of "artificial" requirements, he should not use the word "affirmative" in conjunction with his proposal. Given that Schulhofer intends to craft a sexual assault law that incorporates a common sense and intuitive version of sexual consent, the language of his proposal should just say so.<sup>161</sup> It should simply prohibit sex without consent as a baseline, leaving room for increasing the penalty for

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160. See generally MPC Draft 5, *supra* note 5.

161. *Affirmative Consent*, *supra* note 2, at 4.

aggravated forms of sexual misconduct (acting in the face of active resistance, taking advantage of fear, using force, etc.). Abandoning the affirmative consent label and its communicative directives provides an additional benefit: it relieves Schulhofer of the need to defend criminal law as an appropriate means to shift sexual norms and to downplay the problems of high sentences, prosecutorial coercion, and mass incarceration. The history of U.S. mass incarceration counsels that reformers should exercise caution when using criminal law to regulate risk, achieve aspirational goals, and vindicate even feminist-progressive ideals. Professor Schulhofer is clearly a judicious superintendent of punitive authority and accordingly should not communicate an enthusiastic “yes” to affirmative consent.