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### United States

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# United States

Aya Gruber\*

## A. Background

### I. Attitudes in the United States toward Sex Crimes and Sex Crime Laws<sup>1</sup>

Most Americans, even sophisticated and critical analysts, believe that adding sex to a criminal law scenario radically changes the substantive law and state power equations. People across the ideological spectrum hold that sexual assault is of a totally different magnitude and character than nonsexual assault, that uninvited sexual compliments are more harmful than nonsexual insults, and that sexual commerce is distinct from nonsexual commerce. A person who commits a nonsexual assault during a fight is a hothead; a person who commits a sexual assault—sex without consent or even without an “affirmative expression of consent”—is a rapist. I have previously observed, “There is a deeply entrenched belief that sex is inherently more important than other forms of human labor, other endorphin-producing physical actions, and other human interactions that risk disease, injury, and pregnancy.”<sup>2</sup>

Criminal law in the United States carves out the specific category, “sex crimes,” and fits within that category diverse harmful behaviors—assaults, bribes, extortions, and commercial transactions. The criminal law’s structure unites diverse misconduct involving sex under one umbrella and keeps the focus squarely on the “sex” and less on the “misconduct.” Once conduct is characterized as *sexual* harm, it warrants a wholly different legal and sociocultural treatment than all nonsexual harm. Once a person is categorized as a *sex* offender, that person occupies a wholly different legal and sociocultural world than the one occupied by the most heinous nonsexual criminal actors. Furthermore, the problem of sex crime resonates

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1 The analysis and history here are drawn directly from Aya Gruber, *Sex Exceptionalism in Criminal Law* (article in progress, forthcoming *Stanford Law Review* 2023).

2 Aya Gruber, *Sex Wars as Proxy Wars*, 6 Critical Analysis L. 102, 106 (2019).

on the right and left and has become an indispensable trope supporting the carceral status quo. Thus, sex offenses and offenders are exceptional in several senses: worse than their nonsexual counterparts, punished more severely, and frequently exorcized from the progressive mass-incarceration critique.

For social conservatives, the sex-sin connection is both subconsciously felt and consciously defended. Modern progressives also maintain a reflexive position that sex crimes are the worst of the worst. Alternatively, progressives adhere to a canonical feminist view that sex crimes are particularly bad because they subordinate women, and the patriarchal state has long tolerated them. In the canonical progressive account, the history of American sexuality is one of ubiquitous predatory male libido celebrated by sexist society and enabled by feckless law enforcement. The underenforcement account resonates precisely because it reflects a modern conception of rape law as a subset of assault and battery law meant to protect people from private violence, based on gender-neutral principles of bodily integrity. Within this paradigm, the harm of rape is physical and psychological injury, and sex operates like any other aggravating factor that increases the severity of a physical assault. Indeed, the logic of battery law—that individuals have a right to be free from physical injury or offensive contact—has always been relatively uncontroversial.

However, from its inception in American criminal codes, sex-crime law was completely separate from assault and battery law, with a very different underlying structure and set of animating principles. Illegal sexual contact was not assault at all; it was “rape,” “deviate sexual intercourse,” “sodomy,” “fornication,” “adultery,” “lewdness,” and the like. In fact, in the nineteenth century, the word “rape” was not often uttered, the preferred parlance being that the man “outraged” or “ravished” the proper woman.<sup>3</sup> The crux of sex crime was not preventing physical injury but an array of goals, including vindicating religious mores, cabining nonmarital sex, and suppressing hedonism. Far from being a device to control male violence and liberate women, criminal rape law was born of the patriarchy and structured to control female sexuality. Indeed, when legal actors dis-

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3 See Cyril J. Smith, *History of Rape and Rape Laws*, 60 *Women Law. J.* 188, 190 (1974); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 *Iowa L. Rev.* 1253, 1260–62 (2009) [hereinafter Murray, *Strange Bedfellows*] (lawmakers resisted term “marital rape” because marital sex was consensual per se); Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 *Colum. L. Rev.* 573, 578–84 (2016) [hereinafter Murray, *Rights and Regulation*] (discussing the “marriage-crime binary”).

missed the rape claims of “unchaste” women, they did not fail to enforce rape law; they *enforced* it consistent with its purpose of policing female virtue. Chastity controlled rape’s contours, creating a simple dichotomy: outraging a chaste woman was the worst crime imaginable, while forcing sex on an unchaste woman was nothing.

After the Civil War, controlling Black men’s sexuality and providing cover for terroristic lynching campaigns also became primary influences on rape law.<sup>4</sup> Indeed, criminal sex law’s substance and enforcement adapted to the sexual anxieties of the times: the post-Civil War fear of Black-male sexuality, the turn-of-the-century concern with urban vice, the Progressive-era preoccupation with hygiene, and the mid-century panic over “sexual psychopathy” and homosexuality. Over time, exceptional status extended from sex crimes to sex offenders, who became a discrete pathological subclass.

It was not until the late twentieth century that lawmakers and theorists began to rename “rape” and “deviate behavior” as “sexual assault and battery” and reconceptualize sex crime as nongendered physical violence rather than offenses to chastity, morality, and marriage. Civil libertarians and liberal feminists championed these changes to *separate* sex-crime law from its ancient patriarchal roots. Nevertheless, the canonical view that *the* problem with the criminal sex regime was sexist underenforcement prefigures a modern sensibility that liberation means constantly expanding criminal rape law to cover more types of harmful, even imperfect, sexual conduct. The move from force to consent was a manifestation of this sensibility.

During the so-called second wave of American feminism, beginning in the late 1960s, the sense that criminal law had always tolerated indiscriminate rape of women put rape law at the top of their agenda. From the 1970s to the 1990s, rape reformers highlighted cases in which rape-permissive courts, jurors, and lawmakers narrowly defined force to prohibit violently compelled sex but permit a wide variety of otherwise coerced sex (i.e., subtle intimidation, “pinning,” or capitalizing on scary

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4 See generally Estelle Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation*, chs. 5–6, 89–124 (2013); Hazel V. Carby, “On the Threshold of Woman’s Era”: *Lynching, Empire, and Sexuality in Black Feminist Theory*, 12 *Critical Inquiry* 262, 270 (1985); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581, 600 (1990); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 *Harv. Women’s L.J.* 103, 118–21 (1983).

circumstances).<sup>5</sup> Thus, advocates sought to broaden the category of sexual incidents subject to criminal regulation. Some jurisdictions did this by expanding force to include more situations, for example, “emotional” or “moral” coercion.<sup>6</sup> Other jurisdictions broadened regulation by defining rape as sex without consent, rendering the defendant’s coercive behavior (or lack thereof) mere circumstantial evidence of consent or irrelevant.

Feminists were concerned that so-called “date rapes” were underenforced, and they argued that nonconsensual sexual penetration with a date is as bad or *worse* than violent and forcible stranger rape and should be met with all the moral and penal reprobation directed at the latter.<sup>7</sup> The effort to elevate date rape to “real rape” upset the liberal program of grading rape along an injury and coercion axis, rather than a sexual-activity-specific axis with penetration on top. Reform transformed rape into a big-tent category covering forcible penetration, emotionally coercive penetration, noncoercive but nonconsensual penetration, and eventually penetration without affirmative consent.<sup>8</sup>

## II. U.S Criminal Laws that Punish Sex without Consent

According to a recent survey by the reporters of the Model Penal Code (MPC) Sexual Assault Project,<sup>9</sup> thirty-six out of the fifty-three penal codes

5 Two Pennsylvania cases figure prominently in that critique. See *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1347 (Pa. Super. Ct. 1992) (holding no “forcible compulsion” when complainant repeatedly said “no”), *aff’d in part*, 641 A.2d 1161 (Pa. 1994); *Commonwealth v. Mlinarich*, 498 A.2d 395, 396 (Pa. Super. Ct. 1985) (holding that adult guardian’s threat to return fourteen-year-old to juvenile detention was not “forcible rape”), *aff’d*, 542 A.2d 1335 (Pa. 1988).

6 See, e.g., *State v. Eskridge*, 526 N.E.2d 304, 306 (Ohio 1988) (“Force... can be subtle and psychological.”); *Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1986) (rape may involve “moral, psychological or intellectual force”). Many feminists prefer the move toward broad coercion, rather than liberal consent.

7 See e.g., Vernon R. Wiehe & Ann L. Richards, *Intimate Betrayal: Understanding and Responding to the Trauma of Acquaintance Rape* 43–45 (1995).

8 For proposals to scale rape law on a force/injury axis, see Meredith J. Duncan, *Sex Crimes and Sexual Miscues: The Need for a Clearer Line Between Forcible Rape and Nonconsensual Sex*, 42 Wake Forest L. Rev. 1087, 1112 (2007); Ian Ayres & Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. Chi. L. Rev. 599 (2005); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 Colum. L. Rev. 1780, 1785 (1992).

9 The Model Penal Code (MPC) is a model legislation promulgated by the American Law Institute (ALI). The MPC influences legislatures and courts, and some

in the United States (the codes of fifty states, Washington D.C.'s code, the federal code, and the uniform code of military justice) punish sexual penetration in the absence of consent, without requiring any showing of force, vulnerability, or refusal.<sup>10</sup> Three of these jurisdictions have felony provisions that appear to require the victim to communicate unwillingness. Twelve jurisdictions do not define consent, making it plausible that they require refusal or some other circumstances, leaving twenty-four that treat sex as a crime when there is lack of consent as determined under the totality of the circumstances ("contextual consent") or when the victim has not outwardly manifested affirmative agreement ("affirmative consent"). Of these twenty-four jurisdictions, fourteen designate the crime of nonconsensual sex a felony with penalties varying from five years in prison to life imprisonment, and ten make the crime a misdemeanor, with penalties ranging from ninety days in jail to one and a half years.

American sentences for nonconsensual sex, which range from a few months to presumptive life in prison, are not necessarily reflective of differences in levels of culpability. They are products of political priorities, drafting, and the idiosyncrasies of legislating. Consider, for example, that Vermont employs an affirmative consent standard that requires "*words or actions* indicating a voluntary agreement" and prescribes up to life in prison whenever there is sex without such words or actions,<sup>11</sup> while in Kansas, subjecting "another person to sexual contact without [their] consent" is a misdemeanor with a maximum of 90 days in jail.<sup>12</sup>

As indicated above, American jurisdictions define consent in varied and disparate manners. Some definitions of consent narrow the scope of the criminal offense and some make criminal liability extremely broad and therefore mediated only by prosecutorial discretion. The narrowest construction of nonconsent, and thus the standard most favorable to defendants, is one that requires the *victim* to communicate some unwillingness or refusal. In New York, for example, sex without express or implied

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jurisdictions like New York and New Jersey have adopted it nearly in full. Scholars and lawmakers have long criticized the sexual assault provisions of the Code as badly outdated. The project to revise and update those provisions began in 2012 and ended in 2021 with a final draft approved by the ALI membership. I was one of about 40 advisers to the project.

10 Stephen J. Schulhofer & Erin E. Murphy, Current State of the Law-- Consent-Only Offenses (July 2017) (on file with author). See also Model Penal Code: Sexual Assault and Related Offenses 268–70 (Am. L. Inst., Tentative Draft No. 5 2021, membership approved) [hereinafter MPC TD 5].

11 Vt. Stat. Ann. tit. 13, §§ 3251–3252, 3271 (West 2022).

12 Ky. Rev. Stat. Ann. §§ 510.130, 532.090 (West 2022).

consent is a misdemeanor,<sup>13</sup> but sex when “the victim clearly expressed that he or she did not consent” is a felony.<sup>14</sup> Ten of the twenty-four jurisdictions that outlaw nonconsensual sex permit the jury to determine whether the victim has consented from the totality of the circumstances. In these jurisdictions, the focus is often not on the victim’s language (whether they expressly refused or agreed) but on the victim’s state of mind. The circumstance that renders sexual activity a crime is the lack of *internal* willingness on the part of the victim. Of course, factfinders determine whether the victim was internally willing by looking at what both parties said and did in context.<sup>15</sup> Nevertheless, contextual consent standards depart significantly from affirmative consent standards that focus solely on whether agreement to sex has been sufficiently *communicated*, not whether it internally exists. The difference between contextual and affirmative consent will be discussed in detail further below.

The newly approved Model Penal Code sexual assault provisions criminalize sex without consent as a 5<sup>th</sup> degree felony (maximum three years). Section 213.6, Sexual Assault in the Absence of Consent, provides that a person is guilty when the person “causes another person to submit to or perform an act of sexual penetration or oral sex, and the other person does not consent.”<sup>16</sup> The penalty goes up to five years if, in addition, “the other person has, by words or actions, expressly communicated unwillingness to submit to or perform the act, or the act is so sudden or unexpected that the other person has no adequate opportunity to express unwillingness before the act occurs.”<sup>17</sup> The MPC adopts a contextual consent approach

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13 N.Y. Penal Law § 130.20 (McKinney 2022).

14 N.Y. Penal Law § 130.05(2)(d) (McKinney 2022); *see also* Neb. Rev. Stat. Ann. §§ 28–318(8), 319(1) (2022).

15 I use the term “victim” to refer to the person who claims to have been the subject of the criminal sex act and the term “accused” to refer to the person who is accused of committing the criminal sex act. I realize that both terms are problematic. Some would, for example, prefer that the person I am labeling a “victim” be referred to as an “alleged victim,” “complainant,” or “accuser,” while others would say that such terms presume that women do not tell the truth about rape. Some prefer the term “survivor” to “victim” for political reasons. I choose the word “victim” for clarity purposes *only* and not to comment on either the credibility of those who claim to have been subject to sexual crimes or how those crimes affect people’s lives. Similarly, some would say that “accused” is depersonalizing and dehumanizing language, while others would prefer more reprobative language like “offender” or “perpetrator.” I use “accused” simply to designate the person who is alleged to be the sexual wrongdoer.

16 MPC TD 5, *supra* note 10, § 213.6(1).

17 *Id.* at § 213.6(1).

and defines consent, not as an expression, but as “willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact.”<sup>18</sup>

Unlike affirmative-consent statutes that specify that there cannot be consent unless the victim engages in a sufficient “affirmative expression,” the MPC provides that “consent may be express or it may be inferred from behavior—both action and *inaction*—in the context of all the circumstances.”<sup>19</sup> However, the MPC also adopts a controversial “no means no” interpretation of consent. It states, “A clear verbal refusal—such as “No,” “Stop,” or “Don’t” —establishes the lack of consent.”<sup>20</sup> This means that even if a jury could reasonably conclude that, in the context of the specific sexual encounter, the person who said “no” did not mean it (e.g., the encounter otherwise appeared mutually agreeable and the person was laughing when they said “no”), the mere utterance of the word “no” compels the jury to find that consent was lacking. While this may seem unfair, the standard does have the benefit of controlling sexist jurors who are inclined to always believe that “no means yes.”

### III. *The Legal Operation of Consent in American Criminal Law*

As observed above, the lack of consent frequently operates as substantive element of the crime of sexual assault (also called rape, sexual battery, gross sexual imposition, and other names). Nonconsent, standing alone, renders sexual activity a crime. Consent can also be a defense to rape and sexual assault crimes that require physical force or compulsion. The law on when consent can be used to negate the actus reus of force or when the accused’s belief that there is consent can negate mens rea regarding force is sparse and often contradictory. One well-known 1989 case from Connecticut, *State v. Smith*,<sup>21</sup> involved a man who imposed sex on a woman despite her saying “no,” kicking him, and spitting on him. He was convicted of first-degree sexual assault, which required “compel[ling]” sex by “threat” or “use of force.” The man argued that he believed the victim consented to the sexual intercourse. On appeal, the court observed that “[a] finding that the complainant had consented would implicitly negate a claim that the actor had compelled the complainant by force or threat

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18 *Id.* at § 213.0(2)(c).

19 *Id.* (emphasis added).

20 *Id.*

21 554 A.2d 713 (Conn. 1989).



to engage in sexual intercourse.” Because consent operated to negate the element of compulsion by force, the prosecution had an obligation to prove beyond a reasonable doubt that the victim did not consent to the sex. The court nonetheless upheld the conviction because there was “more than sufficient” evidence to conclude that the victim did not consent.

Cases like this left open the question of what to do about consent to force in cases where it was plausible that the victim agreed to a degree of force beyond that inherent in the sexual activity. In another well-known case, the 1998 Pennsylvania case *Commonwealth v. Fischer*,<sup>22</sup> the accused was convicted of aggravated indecent assault, which required proof that the accused used “forcible compulsion” to obtain sex. The incident involved the accused physically restraining the victim and forcing her to engage in oral sex. Both parties testified that a couple of hours prior to the incident, the two were in the accused’s dorm room engaging in sexual activity. The accused characterized the prior encounter as “rough sex” where the victim restrained him and engaged in various forceful activities. He argued that this, along with the victim saying she had time for “a quick one,” reasonably led him to believe the victim wanted to engage in a similarly rough second encounter. The court, expressing some discomfort with their ruling, held that under the legislative scheme a reasonable belief that the sex (and the physical force accompanying it) were consensual was immaterial to the charge. Thus, no matter the strength of the evidence that a victim consented to “rough sex,” the very fact that the accused used physical violence was enough to sustain the criminal charge.

By contrast, in the New York case *People v. Jovanovic*,<sup>23</sup> the accused was convicted of sexual assault and other crimes arising from an incident where he tied up the victim, poured hot wax on her, and subjected her to forcible penetration. The appellate court reversed the conviction because the trial court had excluded emails in which the victim expressed interest in BDSM,<sup>24</sup> noting that such evidence was relevant to “complainant’s state of mind on the issue of consent, and [the accused’s] own state of mind regarding his own reasonable beliefs as to the complainant’s intentions.” Still, the cases that outright declare that consent is a defense to forceful and even injurious sex are few.

The MPC draft addresses this gap in the law by creating a novel, and very detailed, “Affirmative Defense of Explicit Prior Permission”:

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22 721 A.2d 1111 (Pa. Super. 1998).

23 700 N.Y.S.2d 156 (N.Y. App. Div. 1999).

24 Bondage, Discipline, Sadism, and Masochism.

## Section 213.10. Affirmative Defense of Explicit Prior Permission

(1) It is an affirmative defense to a charge under this Article that the actor reasonably believed that, in connection with the charged act of sexual penetration, oral sex, or sexual contact, the other party personally gave the actor explicit prior permission to use or threaten to use physical force or restraint, or to inflict or threaten to inflict any harm otherwise proscribed by Sections 213.1, 213.2, 213.4, 213.7, or 213.9, or to ignore the absence of consent otherwise proscribed by Section 213.6.

- (2) Permission is “explicit” under subsection (1) when it is given orally or by written agreement:
- (a) specifying that the actor may ignore the other party’s expressions of unwillingness or other absence of consent;
  - (b) identifying the specific forms and extent of force, restraint, or threats that are permitted; and
  - (c) stipulating the specific words or gestures that will withdraw the permission.

Permission given by gestures or other nonverbal conduct signaling assent is not “explicit” under subsection (1).

- (3) The defense provided by this Section is unavailable when:
- (a) the act of sexual penetration, oral sex, or sexual contact occurs after the explicit permission was withdrawn, and the actor is aware of, yet recklessly disregards, the risk that the permission was withdrawn;
  - (b) the actor relies on permission to use force or restraint or ignore the absence of consent at a time when the other party will be unconscious, asleep, or otherwise unable to withdraw that permission;
  - (c) the actor engages in conduct that causes or risks serious bodily injury and in so doing is aware of, yet recklessly disregards, the risk of such injury...

## *B. Requirements for Valid Consent*

### *I. Consent and Capacity*

In the United States, the law generally categorizes the conditions that negate capacity to consent—youth, physical helplessness, mental incapaciti-

ty, intoxication—as specific crimes or crimes of “incapacity,” rather than nonconsent crimes. The laws in the United States that regulate sex between minors and adults and among minors are many, divergent, and too detailed to report here. In addition, intoxication can operate as an independent circumstance that renders sex illegal. Finally, various other incapacities, both internal and external, physical and mental, render sex a crime and are often criminalized under blanket incapacity provisions.

### Age

It would be misleading and inaccurate to describe the operation of age in U.S. sex-crime law simply as a circumstance that negates the capacity of the victim to consent to sex. Were it so, laws in the U.S. would designate a threshold age of capacity and designate sex with anyone under that age as sex without consent. This is *not* what most U.S. laws do. Although some jurisdictions define age-based crimes solely by reference to the victim’s age, especially for very young victims, most states’ sex-crime laws contain a variety of age-based crimes that involve different age cliffs for victims and accuseds and intricate schemes for when sex between people of different ages is prohibited. The age of victim, accused, or both can be independent grounds for criminal liability, or they may serve as aggravators that enhance the penalties of other sex crimes.

There is no coherent logic in the operation of age in American sex-crime law. As the MPC reporters note:

A comprehensive review of all existing law governing sexual offenses committed by and against minors, as well as of secondary sources compiling and analyzing this material, reveals a body of law that defies logic. Jurisdictions exhibit marked variation in the structure of their schemes, the ages for liability, the use of defenses versus elements in defining applicable age thresholds and age gaps, the penalties imposed, the use of specialized statutes (such as “continuous sexual abuse”) and the manner in which prohibited behavior is defined.<sup>25</sup>

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25 MPC TD 5, *supra* note 10, at 399.

The MPC reporters offer the following illustration of states' age-based laws:

Colorado has a general sexual-assault provision that punishes sexual penetration of a person younger than 15 where the actor is at least four years older, or 15 to 17 where the actor is at least 10 years older. The under-15 offense is a felony punishable by up to six years in prison; the 15-to-17 offense is a misdemeanor. The state punishes sexual contact with a minor under 15, where the actor is four or more years older, with up to six years in prison. Colorado courts have upheld strict liability for age-based offenses....<sup>26</sup>

Montana provides that persons younger than 16 are generally incapable of consent. It then penalizes sexual intercourse with a person younger than 16. If the actor is 18 or older, and the complainant 12 or younger, the offense is a 100-year felony. If the complainant is at least 14 and the actor is 18 or younger, then the offense is a five-year felony. The statutory scheme also penalizes sexual contact with a person younger than 14 by an actor three or more years older as a six-month misdemeanor. The scheme also punishes incest, which includes siblings of the whole or half-blood, ancestors, descendants, and stepchildren, as well as adoptive relationships, with life imprisonment or 100 years.... Montana permits a defense of reasonable mistake for statutory cases that depend on the victim being younger than 16, but forecloses it if the complainant is younger than 14.<sup>27</sup>

Delaware provides that generally children under 16 cannot consent to sex with a person more than four years older, and that children under 12 cannot consent at all. Generally there is no mistake-of-age defense, but an actor no more than four years older than a complainant aged 12 to 16 may offer a defense of the complainant's consent. The most serious statutory offense permits a life maximum for intercourse with a complainant under 12 by an actor 18 or older under specific aggravating circumstances. Next is a 25-year felony for sexual penetration of a complainant under 12 by an actor 18 or older, as well as for intercourse between a complainant not yet 16 with an actor 10 years

26 *Id.* at 400 (first citing Colo. Rev. Stat. § 18-3-402(1)(d)-(e) (2018); then citing § 18-3-402(2)-(3); then citing § 18-3-405(1)-(2); then citing *People v. Salazar*, 920 P.2d 893, 895-896 (Colo. App. 1996)).

27 *Id.* (first citing Mont. Code Ann. § 45-5-501(b)(iv) (2019); then citing § 45-5-503(1)-(2), (4)(a)(i), (5); then citing § 45-5-502(2)(a), (5)(a)(ii); then citing § 45-5-507(1)-(3); then citing § 45-5-511(1)).

older, or a complainant not yet 14 with an actor 19 or older; then a 15-year felony for intercourse or penetration of a complainant under 16, or intercourse with a complainant not yet 18 and an actor 30 or older.<sup>28</sup>

The MPC draft’s new scheme is no less complicated, although it is quite a bit more permissive of teenage sex than other schemes. The following charts out the MPC’s age scheme:

AGE of CW	Liability	Penalty	Provision
Over 18	<i>Can consent to sexual penetration, oral sex, or sexual contact with any person</i>		
16 to 18	Can’t consent to penetration or oral sex by parental figures, grand parental figures, guardians over 18	3 <sup>rd</sup> degree felony	213.8(2)
	Can’t consent to penetration or oral sex with authority figures exploiting their authority who are more than 5 years older	5 <sup>th</sup> degree felony	213.8(3)
	Aggravated punishment for sexual contact when actor more than 5 years older, and contact occurs in circumstances akin to 213.1 – 5 or 213.8(2) or (3) (force, vulnerability, extortion, incest, authority role)	4 <sup>th</sup> degree felony	213.8(5)
	<i>Can consent to sexual penetration, oral sex, and sexual contact with persons any age, other than parental or authority figures.</i>		
12 to 15	Can’t consent to penetration or oral sex by an actor more than 5 years older	Actor 21+, 4 <sup>th</sup> degree felony Actor 17–21, 5 <sup>th</sup> degree felony	213.8(1) 213.8(1)
	Can’t consent to penetration or oral sex by parental figures, grand parental figures, guardians, etc. over 18	3 <sup>rd</sup> degree felony	213.8(2)
	Can’t consent to penetration or oral sex with authority figure exploiting authority and more than 5 years older	5 <sup>th</sup> degree felony	213.8(3)
	Can’t consent to fondling by an actor more than 7 years older	5 <sup>th</sup> degree felony	213.8(4)
	Aggravated punishment for sexual contact when actor more than 5 years older, and contact involves circum-	3 <sup>rd</sup> degree felony	213.8(5)

28 *Id.* at 401–02 (first citing Del. Code Ann. tit. 11, § 761(l) (2019); then citing § 762(a), (d); then citing § 777(a); then citing § 773(a)(5), (c); then citing 772(a)(2) (g); then citing § 4205(b); then citing § 771(a)(1); then citing § 770; then citing §§ 768–769; then citing § 766).

	stances akin to 213.1 – 5 or 213.8(2) or (3) (force, vulnerability, extortion, incest, authority role)		
	Can't consent to sexual contact, including tongue touches, with actor more than 7 years older	misdemeanor	213.8(6)
	<i>Can consent to penetration and oral sex with peers within 5 years and fondling and sexual contact with peers within 7 years</i>		

Under 12	Can't consent to penetration or oral sex by any person more than 5 years older	Actor 21+, 3 <sup>rd</sup> degree felony	213.8(1)
	Can't consent to penetration or oral sex by parental figures, grand parental figures, guardians, etc. over 18	3 <sup>rd</sup> degree	213.8(2)
	Can't consent to fondling by an actor more than 5 years older	Actor 21+, 4 <sup>th</sup> degree felony Actor under 21, 5 <sup>th</sup> degree felony	213.8(4)
	Aggravated punishment for sexual contact when actor 5+ years greater, and contact involves circumstances akin to 213.1 – 5 or 213.8(2) or (3) (force, vulnerability, extortion, incest, supervisory role)	4 <sup>th</sup> degree felony	213.8(5)
	Can't consent to sexual contact, including tongue touches, with actor more than 5 years older	Actor 21 or more, 5 <sup>th</sup> degree felony; Actor 12–21, misdemeanor	213.8(6)
	<i>Penetration, oral sex, fondling, and sexual contact with peers within 5 years are not punished, but may be subject to other regulatory systems (e.g., family welfare etc.)</i>		

### Reminders:

- For all offenses under section 213.8, section 213.0(2)(g) requires the actor be 12+ years of age.
- For any offenses that uses force or threats, causes serious bodily injury, or occurs in any condition or circumstances covered by 213.1–.7 (including lack of consent), those offenses and their associated penalties apply.
- Section 213.8(9) provides a defense of marriage for offenses based solely on age.

*Intoxication*

Like age, intoxication is frequently an independent ground for criminal sex liability. Some jurisdictions have specific sections that specify when intoxication renders sex a crime, while in others, intoxication is one of several conditions that make a person “physically helpless” or “mentally incapacitated.” Twenty-four jurisdictions have dedicated provisions for “involuntary intoxication,” that is, situations where a person surreptitiously administered intoxicating substances to the victim for the purpose of causing the victim’s submission to sex.<sup>29</sup> Intoxication can also be a condition rendering a person “incapacitated” under sex-crime incapacity statutes. Some of those statutes require that the intoxication be involuntary, for example, Connecticut, which defines “mentally incapacitated” as “temporarily incapable of appraising or controlling such person’s conduct owing to the influence of a drug or intoxicating substance administered to such person without such person’s consent, or owing to any other act committed upon such person without such person’s consent.”<sup>30</sup> Others extend the criminal liability to cases involving “voluntary intoxication.” For example, Alabama defines “incapacitated” as “temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or intoxicating substance.”<sup>31</sup>

In jurisdictions that criminalize sex with a voluntarily intoxicated person, the inevitable question is “How drunk is too drunk?”. Sex with a person who is intoxicated to the point of unconsciousness is clearly a crime under the provisions that prohibit sex with an unconscious or sleeping person. The harder line to draw is when sex with an intoxicated but still conscious person should garner criminal penalties. Many statutes define the threshold level of intoxication as the person being *unable* to resist, communicate consent, control their actions, or “appraise the situation.” Others hold that the intoxication need only “substantially impair” the

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29 See, e.g., Colo. Rev. Stat. § 18–3–402(4)(d) (2018) (“The actor has substantially impaired the victim’s power to appraise or control the victim’s conduct by employing, without the victim’s consent, any drug, intoxicant, or other means for the purpose of causing submission.”); Del. Code Ann. tit. 11, § 761(k)(5) (2019) (“The defendant had substantially impaired the victim’s power to appraise or control the victim’s own conduct by administering or employing without the other person’s knowledge or against the other person’s will, drugs, intoxicants or other means for the purpose of preventing resistance.”).

30 Conn. Gen. Stat. Ann. § 53a-65(5) (2019).

31 Ala. Code § 13A-6-60(2)(b) (2019).

victim's abilities. And a few indicate that almost *any* level of intoxication can give rise to criminal liability. For example, Iowa requires only that "the other person was under the influence of [a] controlled substance."<sup>32</sup> One California court specified that a victim meets the legal definition of incapacitation by intoxication when the victim "would not have engaged in intercourse with [the defendant] had she not been under the influence."<sup>33</sup>

Courts interpret broadly the phrase "inability to appraise the situation" and require the intoxicated victim to exhibit a level of clarity about the meaning of the sex that even sober people often do not have. Such interpretations that require that the intoxicated victim exercise "reasonable judgment" about the sex can even be moralistic and puritanical. One California appeals court declared that intoxication is incapacitating unless "the woman is able to understand and weigh the physical nature of the act, its moral character, and its probable consequences."<sup>34</sup> Courts have regularly upheld convictions on the basis that a victim was too drunk to "appreciate the consequences of [her] actions."<sup>35</sup> The MPC draft sets its line for voluntary intoxication at "physically unable to communicate lack of consent."<sup>36</sup> The Reporters explain, "Someone under the influence of a heavy narcotic or sedative who is glassy-eyed, staring, and paralyzed may be 'physically unable to communicate.' But an intoxicant that renders a person's speech sloppy but not 'unable,' or that affects *mental* coherence cannot satisfy Section 213.3(1)(b)(i)."<sup>37</sup>

Finally, let me note that the accused's intoxication—even if more severe than the victim's—is *not* a defense to sex with an intoxicated and incapacitated person in most jurisdictions. Although the more liberal MPC allows a voluntary intoxication defense for crimes requiring high intent levels (purpose and knowledge), the default intent level for sex crimes is "recklessness," and the MPC declared long ago, for policy reasons, that this mental state could not be negated by the accused's intoxication.

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32 Iowa Code § 709.4(c) (2021).

33 *People v Giardino*, 98 Cal. Rptr. 2d 315, 327 (Cal. Ct. App. 2000).

34 *People v. Smith*, 120 Cal. Rptr. 3d 52, 56 (Cal. Ct. App. 2011) (internal quotations omitted).

35 *See, e.g., State v. Al-Hamdani*, 36 P.3d 1103, 1108 (Wash. Ct. App. 2001).

36 MPC TD 5, *supra* note 10, at § 213.3(1)(b)(i).

37 *Id.* at 199.



*Other incapacities*

Criminal laws in the United States outlaw sex under a variety of circumstances where the victim has an incapacity under “physically helpless,” “mentally incapacitated” and “unconsciousness” provisions. Uncontroversial situations involve persons who cannot physically communicate because of restraints or paralysis, comatose and unconscious persons, and people with extreme mental divergences that make them unable to communicate. Things get trickier, however, in specific situations. One such situation is when spouses or other long-term partners engage in “wake-up sex” or “morning sex,” that is, when one partner begins sexual intercourse with a sleeping partner with the expectation that the partner will wake up and enjoy the sexual activity. Such sex falls squarely under unconscious/sleeping provisions. Currently, only a handful of states make exceptions to the sleep provision for married couples, and none make an exception for non-married long-term couples that may have a pattern of engaging in “wake-up” sex. Still, the MPC Reporters were unmoved by the argument that there should be an exception for long-term partners with a history of wake-up sex. They explain:

“Even the act of rousing a sexual partner with a sexually intimate act is often preceded by physical touches that first stir the other person from unconsciousness. But to the extent that an actor engages in an act of sexual penetration or oral sex with a fully unconscious individual, who then awakens to the sensation of that penetration, it is the actor who assumes the risk that the penetration or oral sex is not in fact welcome.”<sup>38</sup>

Another controversy arises over the ability of people who are mentally and psychologically divergent to legally consent to—and thus be able to have—sex. On the one hand, people with physical and psychological divergences can be vulnerable to coercion and manipulation into sexual activity that physically and emotionally harms them. On the other, the presumption that differently abled people cannot choose to have sex not only denies this category of people sexual liberty it also tracks with moral and eugenic reprehension at the thought of differently abled people engaging in sex and reproduction. Nevertheless, U.S. jurisdictions widely presume that people with significant intellectual, mental, and psychological divergences cannot consent to sex. Many of these laws contained language that today is seen

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38 *Id.* at 152.

as discriminatory, ableist, and dehumanizing. Although most legislatures have eliminated use of terms like “imbecile,” “feeble minded,” “idiot,” and “retarded,” legislatures continue to widely criminalize sex with people they designate as “mentally defective.”<sup>39</sup> Moreover, case language often emphasizes that immorality is the primary reason for not allowing sex with and among the “mentally defective.” One court opined, “An understanding of coitus encompasses more than a knowledge of its physiological nature. An appreciation of how it will be regarded in the framework of the societal environment and taboos to which a person will be exposed may be far more important. In that sense, the moral quality of the act is not to be ignored.”<sup>40</sup>

## II. Consent and Coercion

### *Coercion by Physical Force or Threat*

In the Connecticut *State v. Smith* case, discussed above, the court maintained that a finding of consent to sex would impliedly negate a claim that the sex was the product of forcible compulsion. One big problem with the court’s analysis is that it did not address *timing*. A person who says “yes, yes, yes” in the face of an uplifted knife cannot be said to have consented. The issues that arise when the accused claims that the victim consented to the *force* itself (e.g., the BDSM situation) are addressed above. Nevertheless, it is well-settled in the United States that forcible compulsion negates consent, despite any appearances to the contrary. Most statutory regimes have separate provisions for forcible sex that are graded as or more seriously than nonconsensual sex. A person who compels sex by physical force or coercion can be held liable under either the force or nonconsent provisions of a criminal code.

Things get trickier, however, when the coercion is more subtle, for example, when the accused is big and intimidating looking, the victim is isolated, and the sex occurs in the middle of the night, and under other scary circumstances not necessarily related to the accused’s actions. Of course, a victim’s undisclosed fear may establish that the victim *in fact* felt coerced, but the prosecution would have a harder time proving intent—

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39 Jasmine E. Harris, *Sexual Consent and Disability*, 93 N.Y.U. L. Rev. 480, 521–22 (2018).

40 *People v. Easley*, 364 N.E.2d 1328 (N.Y. 1977) (internal citation omitted).

that the accused knew or should have known that the victim felt coerced—especially if the victim feigned consent. In such cases, a jury might find that the scary circumstances did amount to force or threat, or alternatively, it might find that although not a forcible rape, the scary circumstances were evidence that the sex was not consensual.<sup>41</sup>

### *Coercion by Status*

American law recognizes that certain relational power imbalances negate a victim's ability to consent to sex. However, as with age, there are a variety of approaches regarding which relationships preclude the parties from having sex. Some laws expressly forbid sex between people in certain status relationships, while others specify that the existence of such a relationship creates a rebuttable presumption that sex is not consensual. States widely criminalize sex between people within a relationship of custodial authority. All fifty states forbid sexual intercourse between a prison guard and a person detained in prison, and they either explicitly or implicitly eliminate consent as a defense in such cases.<sup>42</sup> The MPC draft also criminalizes such relationships, prohibiting a person in a supervisory position from having sex with a person "in custody, incarcerated, on probation, on parole, under civil commitment, in a pretrial release or pretrial diversion or treatment program, or in any other status involving a state-imposed restriction on liberty." The MPC makes an exception for cases where the two people had a preexisting sexual relationship.<sup>43</sup>

States also prohibit sex between doctors and patients, between therapists and those in their care, and between care-workers and people in hospital settings.<sup>44</sup> Several jurisdictions do not criminalize sex between a therapist and patient per se, but only when the therapist "use[s] the position of trust or power to accomplish the sexual contact."<sup>45</sup> States also prohibit sexual

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41 See, e.g., *People v. Iniguez*, 872 P.2d 1183 (Cal. 1994) (finding force requirement satisfied when the accused awoke the victim, a houseguest sleeping in the living room, quickly penetrated her, ejaculated, and left); *State v. Eskridge*, 526 N.E.2d 304, 306 (Ohio 1988) (Force... can be subtle and psychological.).

42 See, e.g., Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 Colum. J. Gender & L. 185, 187–188 (2006).

43 MPC TD 5, *supra* note 10, at § 213.3(3).

44 Alaska Stat. Ann. § 11.41.420(a)(4) (West 2019); N.D. Cent. Code Ann. § 12.1 – 20–06 (West 2021).

45 Tenn. Code. Ann. § 39–13–527(a)(3) (West 2021).

relations between older teens (16, 17, and 18) and persons in a position of trust, such as a teacher, coach, cleric, doctor, or scout leader.<sup>46</sup>

### *Coercion by Deception*

Closely related to coercion by status, there are various situations where deceptions render consent to sexual activity invalid. Many jurisdictions prohibit authority figures like a clergy member, doctor, therapist, or counselor—or someone holding themselves out to be one—from falsely representing that sex is part of treatment. The Model Penal Code draft does not require that the accused be or pretend to be an authority figure but simply that the accused’s false claim that the sex “had diagnostic, curative, or preventive medical properties... caused the other person to submit.”<sup>47</sup> This would cover both “fraud in factum” cases where, for example, the victim believes they are undergoing a gynecological exam, and “fraud in the inducement,” where the victim believes that sex is part of the healing process. Another fraud commonly prohibited by criminal statutes is when the accused pretends to be the victim’s spouse, significant other, or sexual partner.<sup>48</sup> The MPC draft expresses this as “the actor caused the other person to believe falsely that the actor was someone else who was personally known to that person.”<sup>49</sup>

Increasingly, states have criminalized deceptions regarding health status, but interestingly, only one health status generally counts—HIV status.<sup>50</sup>

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46 Ohio Rev. Code Ann. § 2907.03 (West 2019).

47 MPC TD 5, *supra* note 10, at § 213.5(1).

48 *People v. Hough*, 607 N.Y.S.2d 884, 885–87 (N.Y. Dist. Ct. 1994) (accused led victim to believe he was her boyfriend, his twin brother); *Mathews v. Superior Court*, 173 Cal. Rptr. 820, 821 (Cal. Ct. App. 1981) (“[D]efendant sexually fondled and caressed a woman as she slept in the bed she usually shared with another man. The bedroom was dark and she assumed, as defendant intended, that he was the bedmate.”).

49 MPC TD 5, *supra* note 10, at § 213.5(1)(b)(ii).

50 Colo. Rev. Stat. Ann. § 18–3–415.5 (West 2018) (outlining mandatory sentences where the actor failed to disclose HIV status before committing a sexual penetration, defined pursuant to Colo. Rev. Stat. Ann. § 18–3–401(1.7), (6) (West 2018)); Mich. Comp. Laws Ann. § 333.5210 (West 2019) (defining failure to disclose HIV status to an intercourse partner as a felony if HIV is transmitted, or a misdemeanor if not); N.J. Stat. Ann. § 2C:34–5(b) (West 2019) (defining the sexual penetration of a person without “informed consent” of the actor’s known HIV status as a “crime of the third degree”).

For the most part, other contagious diseases that might be passed through the act of sex do not merit such treatment.<sup>51</sup> Because of the discriminatory origins of such laws and public health experts' criticism that such laws discourage people from knowing their serostatus, the MPC draft does not contain an HIV disclosure provision.<sup>52</sup> As for "stealth" or nonconsensual condom removal, with the revelation that there are entire Reddit threads devoted to how to "stealth," there has been a popular push to regulate surreptitious condom removal. In California, legislative analysts opined that such behavior could be prosecuted under existing sexual battery laws. However, the main reform push has been to make the act a civil wrong entitling the victim to sue for damages.<sup>53</sup>

Seduction laws that criminalized the false promise of marriage to obtain sex are largely legacies of the past.<sup>54</sup> Although there have been some commentators who want to penalize lies that induce sex more broadly, the criminal law has so far avoided criminalizing sexual deception generally. The MPC reporters explain:

"Individuals commonly lie about their age, occupation, job prospects, marital status, involvement with others, parenthood status, and whether they are interested in a serious relationship. And people pervasively lie about the state of their affection for the other party.... In sum, the policy impediments to criminalizing sexual fraud far exceed plausible concerns with criminalizing fraud in property transactions. Current law has strong grounding for its unwillingness to broadly

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51 Even when statutes criminalize deceptions regarding non-HIV sexual infections, they punish the non-disclosure of those infections less harshly than non-disclosure of HIV status. See N.J. Stat. Ann. § 2C:34-5(a) (West 2019) (treating non-disclosure of HIV status as a "crime in the third degree," but non-disclosure of gonorrhea or syphilis as a "crime in the fourth degree").

52 MPC TD 5, *supra* note 10, at 250.

53 Jonathan Edwards, *No State Has Outlawed the Secret Removal of Condoms During Sex. California Could Be the First*, Wash. Post (Sep. 9, 2021, 7:01 AM), <https://www.washingtonpost.com/nation/2021/09/09/california-secret-condom-law/> (accessed August 25, 2022).

54 See *Franklin v. Hill*, 444 S.E.2d 778, 781 (Ga. 1994) (holding the state seduction statute to be unconstitutional, partly on grounds of nonuse); *People v. Evans*, 379 N.Y.S. 2d 912, 919 (N.Y. Sup. Ct. 1975) (internal citations omitted) ("[T]his State looks with disfavor on actions for seduction since the civil action was abolished more than forty years ago... there are no presently existing penal sanctions against seduction.").

criminalize even some material misrepresentations used to induce sexual consent.”<sup>55</sup>

### *Coercion by Extortionate Threat*

Criminal law in the United States is unambiguous that sexual coercion from threats of *physical* harm are serious offenses. The law is less clear and uniform when it comes to other types of threats (extortions) and promises of benefits (bribes). Several states prohibit obtaining sex by threatening “retaliation” or “by extortion.”<sup>56</sup> Others are more specific, prohibiting, for example, a police officer from threatening to charge the victim with a crime.<sup>57</sup> Texas specifies that its force requirement covers threats of “harm,” with “harm” defined as “anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.”<sup>58</sup> Idaho broadly prohibits obtaining sex by threatening to “expose a secret... tending to subject any person to hatred, contempt or ridicule.”<sup>59</sup> Statutes and cases also criminalize official promises of benefits in exchange for sex. States, for example, commonly prosecute police for offering not to arrest in exchange for sex.

The MPC draft, in addition to covering the crime-threat scenario and official misconduct scenarios, contains a non-specific provision covering extortions of all types that are difficult to resist. It prohibits sexual intercourse obtained by a threat:

“(i) to accuse that person or anyone else of a criminal offense or of a failure to comply with immigration regulations; or (ii) to take or withhold action as an official, or cause an official to take or withhold action, whether or not the purported official has actual authority to

55 MPC TD 5, *supra* note 10, at 246–48.

56 Mich. Comp. Laws §§ 750.520d(1)(b), 750.520b(f)(iii) (2022) (“extortion”); N.H. Rev. Stat. § 632-A:2(I)(d)–(e) (2021) (“submits under circumstances involving... extortion” or a threat “to retaliate against the victim”); N.M. Stat. Ann. § 30–9–10(A)(3) (2018) (defining force to include “extortion or retaliation”); S.C. Code Ann. § 16–3–651(b) (2018) (defining impermissible coercion to include “extortion”).

57 Del. Code Ann. tit. 11, § 774(4) (2021).

58 Tex. Penal Code Ann. § 22.011(b)(2) (2021) (compelling another to submit by threatening “to cause harm” to the other person constitutes sexual assault); *id.* § 1.07(a)(25) (defining “harm”).

59 Idaho Code Ann. § 18–6101(10) (West 2021).

do so; or (iii) to take any action or cause any consequence that would cause submission to or performance of the act of sexual penetration or oral sex by someone of ordinary resolution in that person's situation under all the circumstances.”<sup>60</sup>

### III. *Consent and Communication*

As indicated in the last Part, the notion of what it means to consent to sex varies by jurisdiction and by statute. Refusal statutes, which are few, establish that sex is consensual so long as the victim did not expressly communicate refusal to the act. More common is what the MPC draft calls the “contextual-consent standard” where consent is a matter of the internal willingness of the victim and a jury may determine if that internal state existed through examining all the circumstances, including the parties’ communications, in context.

There is little controversy when the actors’ communications correspond to their internal states. For example, if a person really did not want sex and candidly expressed that lack of desire, the sex is uncontroversially nonconsensual. Controversy arises, however, when there is mismatch between the internal state and external manifestations. An accused person might argue that despite the victim’s utterance of a “no” or ambivalent attitude toward sex, the victim nonetheless consented. Under a contextual consent standard, the accused can make such an argument, and the jury could find that, in fact, the victim did consent or that the accused had reasonable grounds to believe there was consent. But under “no means no” formulations, like the Model Penal Code draft’s, “no” conclusively establishes nonconsent. Nevertheless, under the MPC, juries can find that a wholly passive and seemingly ambivalent person who never said “yes” nonetheless consented to sex.

Rape reformers were rightfully concerned that decision-makers could make bad calls by, for example, finding subtly coerced agreements valid, always deriving willingness from silence, or allowing the defendant too much leeway to interpret anything as consent. To reduce the risk of bad calls, reformers advocate for affirmative consent. Affirmative consent laws direct decision-makers to focus on *communication* what the victim said or did that communicated agreement—and not on what the victim internally desired. This is not necessarily such a radical change, given that jurors in

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60 MPC TD 5, *supra* note 10, at § 213.4(1)(b).

contextual consent cases would in fact look to the parties' communications to determine whether the victim internally agreed. The affirmative consent standards become more controversial when they seek to *narrow* the world of external manifestations that count as a consent communication. Say, for example, that a jury decides a sexual encounter is consensual (internally wanted), despite the victim having said "no" while laughing because there was increasingly intimate foreplay. The question becomes whether the foreplay and the "no" can also constitute an "affirmative expression of consent"? If they can, then affirmative consent does little to avoid the problems of contextual consent because it too allows defendants to argue that "no means yes" and passivity equals consent. If they cannot, then the law must delve into the tricky issue of *what* counts as affirmative consent.

A popular stance today is that "only yes means yes," so that in the absence of a verbal and clear expression of agreement, the sex is criminal. A big drawback of this standard, however, is that many couples, especially those in established relationships, have sex without practicing such communicative rituals. Thus, affirmative consent turns a lot of regular folks into rapists. Back in the 1980s, some states already defined consent by terms like "active cooperation" and "free agreement" (today, fourteen jurisdictions adopt affirmative consent language).<sup>61</sup> Decades ago, courts grappled with whether this language meant to criminalize just unwanted sex or all sex without a sufficient consent performance. Unsurprisingly, courts punted—and they continue to do so, leaving the affirmative consent standard perpetually shrouded in mystery.

The 1980 Wisconsin case *State v. Lederer* involved a defendant's constitutional challenge to Wisconsin's sexual assault statute, which required "words or overt actions... indicating a freely given agreement to have sexual intercourse."<sup>62</sup> Lederer argued that the statute was overbroad because it outlawed mutually desired sex when the statutorily required "words or overt actions" were absent. The Wisconsin appeals court disagreed, arguing that it was impossible for a person to have desired sex without "manifest-

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61 The MPC reporters surveyed rape statutes in every jurisdiction and determined that nine jurisdictions – Florida, Hawaii, New Jersey, Oklahoma, Oregon, Pennsylvania, Vermont, Wisconsin, and the UCMJ – had felony statutes that expressly require affirmative permission, positive agreement, or active cooperation, and five – Colorado, D.C., Kansas, Minnesota, and the United States – had misdemeanor affirmative consent statutes. Model Penal Code: Sexual Assault and Related Offenses 41 N. 93 (Am. l. inst., Tentative Draft No. 3, April 6, 2017).

62 Wis. Stat. § 940.225(4) (1980); *State v. Lederer*, 299 N.W. 2d 457, 459–60 (Wis. Ct. App. 1980).



ing freely given consent through words or acts.” The court explained, “We know of no other means” by which “two parties may enter into consensual sexual relations.”<sup>63</sup> The court avoided the overbreadth objection by characterizing affirmative consent as exhaustive of the ways people agree to sex. However, if “words or overt actions” include *every* way of agreeing to sex, then “words or overt actions” necessarily include silence and inaction. Sexual consent researchers find that “many men and women passively indicate their consent to sexual intercourse by not resisting, such as allowing themselves to be undressed by their partner, not saying no, or not stopping their partner’s advances.”<sup>64</sup>

Today, in criminal codes, popular discourse, and college discipline cases, the meaning of affirmative consent ranges from the very restrictive—a thoughtful, enthusiastic, and ongoing “yes”—to the more permissive—any words or conduct that indicate the person’s sexual willingness. The potential breadth of the standard combined with the indeterminacy of its application poses unique dangers in a country where criminal law enforcement is marked with racial and other biases. When sex without a yes is criminal, police and prosecutors may use their broad authority to pursue a subset of cases where sufficient consent communication is lacking. Charges may arise when the prosecutor instinctively views the defendant as a true criminal (not a regular guy), when the prosecutor regards the victim as “credible,” or when the victim is vehement. These discretionary prosecutions might meaningfully overlap with the type of cases scholars think should be brought, but they might not. Prosecutors’ views of true criminality may be influenced more by racial and socioeconomic characteristics than by the nature of the sexual event.<sup>65</sup> Similarly, assessments of victims’ credibility may involve race, class, or gender stereotyping. Moreover, the most vehement victims may also be the most biased and unbelievable.

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63 *Lederer*, 299 N.W.2d at 460.

64 Terry P. Humphreys and Mélanie M. Brousseau, *The Sexual Consent Scale – Revised: Development, Reliability, and Preliminary Validity*, 47 J. Sex Rsch. 420, 421 (2010). See also Charlene L. Muehlenhard et al., *The Complexities of Sexual Consent Among College Students: A Conceptual and Empirical Review*, 53 J. Sex Rsch. 457 (2016).

65 Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 Ariz. L. Rev. 305, 360 (2009); Jeffrey J. Pokorak, *Probing the Capital Prosecutor’s Perspective: Race of the Discretionary Actors*, 83 Cornell L. Rev. 1811, 1815, 1819–20 (1998) (both discussing race and prosecutorial discretion in capital punishment).

## C. Other Legal Parameters of Consent

### I. Consent and Timing

A common formulation of consent requires that a person consent to “each specific act” of sexual penetration or oral sex. Now, this is not necessarily meant to convert one incident of sexual intercourse into multiple crimes of nonconsensual penetration. Rather, it is meant to express that consent to one sexual activity like oral sex, even in the same intimate encounter, does not automatically mean there is consent to another sexual activity like penetration. Indeed, laws and cases commonly specify that consent to one act or consent to past sexual activity does not necessarily mean there is consent to the present activity. Under the Model Penal Code standard of contextual consent, the factfinder is permitted to look at *all* the circumstances, including past sexual interactions and present sexual interactions, in determining whether the victim consented to the specific act of sex at issue. In an affirmative-consent jurisdiction, the jury may be required to focus solely on the communication immediately preceding the sex act to determine consent.

Most jurisdictions provide that consent may be revoked or withdrawn at any time. The Model Penal Code draft further specifies that “revocation or withdrawal of consent may be overridden by subsequent consent given prior to the act of sexual penetration, oral sex, or sexual contact.”<sup>66</sup> The MPC and many criminal codes contemplate a situation where consent can be given, withdrawn, given again and so forth. College codes and laws regulating college disciplinary procedures have taken a more regulatory approach, and many require “ongoing” consent throughout an entire sexual encounter.<sup>67</sup> In terms of *internal* consent, continuous agreement is epistemologically problematic if it renders sex criminal whenever a party has a fleeting second thought. The requirement of ongoing *external* consent is similarly confounding. What exactly does a continuous communication of agreement look, or sound, like? More plausible is that persistent consent means there must be an overall mental state of agreement and the victim is free to change their mind and revoke the consent.

66 MPC TD 5, *supra* note 10, at § 213.0(2)(e).

67 See, e.g., S.B. 967, 2014 Leg., 2013–2014 Reg. Sess. (Cal. 2014) (“Affirmative consent must be ongoing throughout a sexual activity”).

## II. Consent and Burdens

The lack of consent is an element of the sexual assault offense, which means that the prosecution always bears the burden to prove lack of consent beyond a reasonable doubt. Consent rarely operates as an affirmative defense, the exceptions being for some age-based and status-based sex crimes. The MPC draft has an explicit prior permission affirmative defense that can apply to certain forcible and incapacitation sex crimes. In those cases, the burden of proof and production could shift to the accused. Now, some theorists have critiqued affirmative consent as “burden shifting,” because it presumes that the accused is guilty. But this is not technically the case. The prosecution still bears the burden of proving that there was no affirmative expression of consent. The substance of the critique is really about *what* the prosecution must prove. Critics worry about a standard in which all the prosecution has to prove is that “yes” was not uttered.

## III. Consent and Mens Rea

The criminal law disfavors punishing people who did not intend the criminal act. There is a small carve out for “regulatory” or “public welfare,” like toxic dumping and product tampering, that cause widespread and indiscriminate harm. However, for “garden variety” offenses like rape, assault, and homicide there must be some unity of act and intention. Generally speaking, the most serious crimes require knowledge or purpose on the defendant’s part. The Model Penal Code specifies that the lowest level of mens rea required for criminal liability is subjective recklessness, that is, a person’s *conscious* disregard of a substantial and known risk that they are engaging in the crime. Per the MPC, there is generally no criminal liability when the actor has no awareness of the risk of criminality, even if a reasonable person would be aware of a high risk. The Supreme Court, disapproving of the trial court’s imposition of a negligence (unreasonableness) standard in a criminal threats case, observed, “[w]e ‘have long been reluctant to infer that a negligence standard was intended in criminal statutes.’”<sup>68</sup> The Court emphasized that “wrongdoing must be conscious to be criminal.”<sup>69</sup>

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68 *Elonis v. United States*, 575 U.S. 723, 738 (2015) (quoting *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring)).

69 *Id.* at 734 (quoting *Morrisette v. United States*, 342 U.S. 246, 252 (1952)).

Despite this well-settled criminal law principle, when it comes to sex crimes, jurisdictions regularly employ a negligence standard, requiring that people's conclusions about consent be reasonable. Regarding age-based crimes, some courts have upheld strict liability, permitting a finding of guilt even when the accused reasonably believed that the victim was old enough to consent. The Model Penal Code, following its established scheme, generally prescribes recklessness for sex crimes. Thus, to be guilty of nonconsensual sexual assault, a person must be aware of the substantial risk that the victim is not a willing party. This is true of most of the other MPC sex crimes (e.g., the defendant must be aware of a substantial risk that the victim is incapacitated).

Some theorists have called affirmative consent "substantive strict liability" because it renders a person criminal even when they reasonably believed the victim consented. Like the burden shifting argument, the main objection is that affirmative consent standards substantively punish conduct that people commonly engage in (sex with passive consent communication/sex without a "yes"). Still, the prosecution is required to prove that the accused did not reasonably believe there was "yes." Thus, technically, affirmative consent does not create strict liability.

#### *D. Other Peculiarities of American Sex-Crime Law*

Sex-crime cases are treated quite differently than non-sex criminal cases. Examples of differential treatment include:

- **Special Evidentiary Rules:** Rape shield laws make the victim's past and current sexual behavior, even behavior that could be relevant to a particular defense, presumptively inadmissible. There are also exceptions to the general evidentiary ban on prior-crimes and bad-acts evidence for those accused of sex crimes. Unlike other defendants, their prior charged and uncharged misconduct, so long as it is sexual, is presumptively admissible.
- **Sex Offender Registration and Notification Laws:** The United States has a notoriously draconian post-sentencing system that purports to "manage" sex offenders in the name of treatment and security, but is in fact criminogenic, sadistic, and bad policy born of societal sex panic. The MPC reporters observe, "there is clear evidence, widely acknowledged by professionals in the field, that these laws are seriously counterproductive. They are expensive for local police to administer, unduly hinder the rehabilitation of ex-offenders, and ultimately defeat

their own central purposes by *impeding* law enforcement and *increasing* the incidence of sexual offenses.”<sup>70</sup>

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<sup>70</sup> MPC TD 5, *supra* note 10, at 485–86.