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# Affirmatively Replacing Rape Culture with Consent Culture

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# AFFIRMATIVELY REPLACING RAPE CULTURE WITH CONSENT CULTURE

Mary Graw Leary\*

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“[C]ampus rape is not an academic puzzle to be parsed. It is a terrible reality.”<sup>1</sup>

## I. INTRODUCTION

Sex. Alcohol. Assault. Campus Rape. Rape. Alone, these are charged words and phrases. The combination of some or all of them transforms this list into a toxic mix that leaves countless victims in its wake and a similarly toxic collection of rhetoric.

The issue of sexual assault has been a polarizing one since, if not prior to, its recognition as a crime and destructive form of victimization.<sup>2</sup> Although originally this type of crime was not openly discussed, research has provided a greater understanding of the offense, its devastating effects, and the social forces that continue to create an ecosystem where it can thrive.<sup>3</sup> This ecosystem exists as a place where significant numbers of people are sexually assaulted, victims often feel silenced, and when they do speak, their voices frequently fall on deaf ears.

Most recently, research and the media have increased social awareness of the scope of sexual assault on college campuses.<sup>4</sup> The spotlight on this issue has triggered numerous responses, including a renewed demand for transparent sexual assault rate disclosures, restructured reporting and adjudication measures, and the elimination of the force component of rape in criminal law.<sup>5</sup> Additionally, another movement has emerged with some success—the movement to require affirmative consent prior to engaging in sexual conduct.<sup>6</sup> That is to say, momentum is gaining for a movement in which the law does not presume that individuals are available for

1. Tyler Kingkade, *Yale Law Students: Professor's Campus Rape Op-Ed Gets It Wrong*, HUFFINGTON POST (Nov. 17, 2014, 2:52 PM), [http://www.huffingtonpost.com/2014/11/17/yale-law-students-campus-rape\\_n\\_6172410.html](http://www.huffingtonpost.com/2014/11/17/yale-law-students-campus-rape_n_6172410.html) (illustrating that sexual violence stems from systemic sexual inequality felt by actual students).

2. See, e.g., Kristine Kilanski, *Changing Definitions of Rape and Citizenship*, CLAYMAN INST. FOR GENDER RES. (May 26, 2016, 9:07 AM), <http://gender.stanford.edu/news/2016/changing-definitions-rape-and-citizenship>.

3. See Roni Caryn Rabin, *Nearly 1 in 5 Women in U.S. Survey Say They Have Been Sexually Assaulted*, N.Y. TIMES (Dec. 14, 2011), <http://www.nytimes.com/2011/12/15/health/nearly-1-in-5-women-in-us-survey-report-sexual-assault.html>. See generally CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>; Aya Gruber, *Anti-Rape Culture*, 64 U. KAN. L. REV. 1027 (2016); Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 6–8 (2015).

4. See, e.g., Kristina Mastropasqua, *Sexual Assault and Rape on U.S. College Campuses: Research Roundup*, JOURNALIST'S RESOURCE, <http://journalistsresource.org/studies.society/public-health/sexual-assault-rape-us-college-campuses-research-roundup> (last updated Sept. 22, 2015).

5. Zoe Ridolfi-Starr, *Transformation Requires Transparency: Critical Policy Reforms to Advance Campus Sexual Violence Response*, 125 YALE L.J. 2156, 2158–59 (2016) (discussing how sexual assault on campus can be combatted if the reporting and adjudication processes are restructured).

6. Jake New, *The 'Yes Means Yes' World*, INSIDE HIGHER ED (Oct. 17, 2014), <http://www.insidehighered.com/news/2014/10/17/colleges-across-country-adopting-affirmative-consent-sexual-assault-policies> (discussing how over 800 colleges in the United States have adopted affirmative consent policies).

penetration or sexual contact unless they state they do not want it. This is a movement asserting that silence—often due to incapacitation, fear, or unconsciousness—does not constitute consent to sexual contact.<sup>7</sup> Although this movement is increasingly the social preference both with college students and the greater public, it has been met with significant resistance and the national dialogue has been vitriolic at times.<sup>8</sup> Those in favor of affirmative consent assert that affirmatively establishing a sexual partner’s desire to engage in sexual contact should be the standard.<sup>9</sup> Opponents offer numerous objections, recognizing that affirmative consent is not the panacea that some of its proponents purport it to be.<sup>10</sup>

This Article argues that the debate on such a level is far too simplistic. In this Article, I argue that the movement toward affirmative consent as an element of our contemporary understanding of sexual assault is a positive movement in the effort to reduce the occurrence of sexual assault. However, it cannot exist in a vacuum and is often too narrowly articulated. Rather, the notion of affirmative consent must be grounded in two critical concepts. First, affirmative consent must be examined as it relates to the purpose of criminal law. Second, affirmative consent must be proposed as part of a larger multidisciplinary constellation of measures to address sexual assault. This position seeks not only to adopt the more appropriate criminal definition of sexual assault that affirmative consent supplies. But it also asserts that affirmative consent is a positive contribution to rape reform when considered a component of a climate of consent—a “consent culture.” This approach not only addresses the appropriate role of consent and nonconsent in rape litigation but also transforms the contemporary understanding of consent norms.

This position is premised on certain first principles. The first is that any adjustment to criminal law in this area must be responsive to the purpose of criminal law. The second is that society cannot criminalize its way out of any complex social problem, which includes sexual assault. These principles form the basis for the proposition that any adjustment to criminal law must be a component of a larger multidisciplinary response and an outgrowth of our collective growing body of research on the breadth and harm of sexual assault. Third, the history of sexual assault law is fraught with a legacy of

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7. Tuerkheimer, *supra* note 3, at 39 (“Society is in the midst of a consent revolution. . . . [O]verall, a basic idea has taken hold: sex without consent is rape.”).

8. *Compare* CAL. EDUC. CODE § 67386 (West 2014) (describing the necessity of the receipt of state funds for student financial assistance in California schools adopting an affirmative consent standard), and N.Y. EDUC. LAW § 6441 (McKinney 2015) (mandating that every institution adopt an affirmative consent standard in its code of conduct), with Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), [www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html](http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html) (arguing that it is illogical to have an affirmative consent standard because it perpetuates false reporting and encourages victims to believe they were raped when they actually were not).

9. *See* Tuerkheimer, *supra* note 3, at 9–13.

10. *See id.*

treating sexual assault victims differently than victims of other crimes. This reality is connected to a host of reasons rooted in our distinct treatment of gender-based violence, bias against sex crime victims, and a history of the elite shielding themselves from criminal liability. The result of this has been an over-theorized body of rhetoric and law that fails to serve victims and those accused of these crimes, thereby perpetuating criminal victimization of vulnerable people, women, people of color, children, and those in lesbian, gay, bisexual, and transgender (LGBT) communities, who the criminal justice system already poorly serves.

With that backdrop, this Article proceeds in four parts. Part I offers a comprehensive definition of affirmative consent. Part II examines the social harm of sexual assault and the purpose of criminal law. Part III asserts that an affirmative consent culture can be understood to serve the greater purpose of the criminal law system. It outlines what an affirmative consent culture would look like and points to historical precedent. In doing so, this Article asserts that the idea of creating such a culture is not new. Indeed, such shifts have occurred previously in our history when society has taken a three-pronged approach to a rampant social ill. These prongs have included education about actual harms, criminal law adjustment, and stigmatization. Tracing the development of our societal response to driving while intoxicated, the Article details these three steps and argues how the same model could apply in the context of affirmative consent. Part IV explores some of the critiques of affirmative consent. In doing so, it notes that the main line of critiques mirrors the historical narrative surrounding sexual assault. This is a narrative of treating sexual assault differently than any other crime and placing unrealistic burdens on it. This Part further explores some possible motivations for this history, including an ongoing effort to insulate privileged persons and institutions from the accountability that could be established through a functioning affirmative consent regime.

## II. A WORKABLE DEFINITION OF AFFIRMATIVE CONSENT

The topic of sexual assault is a difficult one for many reasons.<sup>11</sup> The crime itself is horrific, which results in the traumatization of the victim or the

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11. See generally Brian Palmer, *What's the Difference Between "Rape" and "Sexual Assault"?*, SLATE (Feb. 17, 2011, 3:59 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2011/02/whats\\_the\\_difference\\_between\\_rape\\_and\\_sexual\\_assault.html](http://www.slate.com/articles/news_and_politics/explainer/2011/02/whats_the_difference_between_rape_and_sexual_assault.html). One of the many challenges of sexual assault is language. *Id.* Often, mainstream media uses the terms "rape" and "sexual assault" interchangeably. *See id.* However, this Article follows the legal framework in which these terms have distinct meanings. This Article uses the word rape to signify a crime of sexual penetration vaginally, anally, or orally. *See Rape*, BLACK'S LAW DICTIONARY (10th ed. 2014). Sexual assault is a larger umbrella term that includes not only rape but also sexual battery or sexual touching as well as attempted rapes and sexual touchings. *See Sexual assault*, BLACK'S LAW DICTIONARY (10th ed. 2014).

defendant if wrongly accused.<sup>12</sup> Consequently, the debate surrounding affirmative consent or other sexual assault law reform is highly charged.<sup>13</sup> The debate is further complicated by the reality that participants come from a variety of perspectives and stridently hold their views.<sup>14</sup> Some of this vigor reflects the honest, passionate belief in the proper treatment of sexual assault cases.<sup>15</sup> However, the debate, as is often the case in criminal law debates, is also obfuscated by those with other agendas. For example, gun rights advocates often hijack crime bills to advance the rights of gun owners, opposing groups often use issues surrounding prostitution or trafficking to advance their versions of feminism, and corporate or union trade organizations infiltrate environmental debates.<sup>16</sup> The affirmative consent debate is no different. It suffers, however, from other aspects that further cloud the discussion of these complex legal and social issues, which demand the expertise from many fields.<sup>17</sup> Additionally, the mainstream media also interjects itself into this complex arena and inaptly summarizes nuanced positions into useless sound bites of “no means no,” “yes means yes,” and

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12. See Gideon, *‘Yes Means Yes’ Bill Would Eliminate Due Process on Campuses*, CONN. L. TRIB. (Feb. 22, 2016), <http://www.ctlawtribune.com/id=1202750338193/Yes-Means-Yes-Bill-Would-Eliminate-Due-Process-on-Campuses?mcode=0&curindex=0&curpage=ALL> (discussing how the affirmative consent standard in California is a blight on due process rights and arguing that it should not be replicated in Connecticut).

13. *Id.*; Kevin de León & Hannah-Beth Jackson, *Why We Made ‘Yes Means Yes’ California Law*, WASH. POST (Oct. 13, 2015), [http://www.washingtonpost.com/news/in-theory/wp/2015/10/13/why-we-made-yes-means-yes-california-law/?utm\\_term=.4f119fe1f175](http://www.washingtonpost.com/news/in-theory/wp/2015/10/13/why-we-made-yes-means-yes-california-law/?utm_term=.4f119fe1f175) (citing the number of campus sexual assaults as a clear reason for an affirmative consent standard).

14. *Compare, e.g.,* de León & Jackson, *supra* note 13 (showing support for affirmative consent legislation in California), with Robin Wilson, *Presumed Guilty: College Men Accused of Rape Say the Scales Are Tipped Against Them*, CHRON. HIGHER EDUC. (Sept. 1, 2014), <http://chronicle.com/article/Presumed-Guilty/148529> (outlining the accounts of males accused of sexual assault and the hasty procedural actions taken by their respective universities).

15. See Wilson, *supra* note 14; Press Release, Office of the Press Sec’y, The “It’s On Us” Campaign Launches New PSA, Marks One-Year Since Launch of “It’s On Us” Campaign to End Campus Sexual Assault, (Sept. 1, 2015), <http://www.whitehouse.gov/the-press-office/2015/09/01/fact-sheet-its-us-campaign-launches-new-psa-marks-one-year-launch> (outlining the strides that the Obama Administration has made since 2009 to find a solution to sexual assault); see also 34 C.F.R. § 668.46 (2015) (expanding the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (the Clery Act) to include reporting incidents of stalking); THE HUNTING GROUND (Chain Camera Pictures 2015) (depicting sexual assault victim activism strategizing to employ Title IX to combat the onslaught of sexual assaults on college campuses).

16. Emily Bazelon, *Should Prostitution Be a Crime?*, N.Y. TIMES MAG. (May 5, 2016), <http://www.nytimes.com/2016/05/08/magazine/should-prostitution-be-a-crime.html> (illustrating the divide within feminist ranks and how sex workers and activists are working towards the decriminalization of prostitution); Rowland Benjamin, *Corporate Responsibility and the Environment*, EVAN CARMICHAEL, <http://www.evancarmichael.com/library/rowland-benjamin/corporate-responsibility-and-the-environment.html> (last visited Oct. 6, 2016) (describing how corporations use environmental debates); Chris W. Cox, *Gun Laws Don’t Deter Terrorists: Opposing View*, USA TODAY (June 14, 2016, 1:01 AM), <http://www.usatoday.com/story/opinion/2016/06/13/gun-laws-deter-terrorists-opposing-view/85844946/> (shifting the problem of gun violence to radical Islam rather than to lax American gun laws).

17. See generally Gideon, *supra* note 12; Wilson, *supra* note 14.

“burden shifting.”<sup>18</sup> This can ultimately result in people speaking at cross-purposes and past each other.<sup>19</sup>

Therefore, a clear definition is a threshold requirement to a fruitful discourse. This Article asserts that the affirmative consent requirement is a positive movement in sexual assault law reform.<sup>20</sup> However, it underscores that affirmative consent means more than “yes means yes.”<sup>21</sup> For a definition, I turn to two states that have consciously adopted affirmative consent standards for their public universities.<sup>22</sup> In October 2015, California required the governing bodies of each of the state’s higher educational institutions to adopt certain policies regarding sexual assault.<sup>23</sup> This legislation was part of a multidisciplinary effort to address issues involving domestic violence, dating violence, sexual assault, and stalking.<sup>24</sup> Regarding sexual assault, the legislation required the policies to include an affirmative consent standard.<sup>25</sup> It defines “affirmative consent” as an “affirmative, conscious, and voluntary agreement to engage in sexual activity.”<sup>26</sup> The policy explicitly states that each person is responsible to ensure that he or she has affirmative consent to engage in a sexual act.<sup>27</sup> California provides even more guidance by adding that lack of protest, lack of resistance, or silence does not constitute affirmative consent.<sup>28</sup> Moreover, it requires that the affirmative consent be ongoing throughout the sexual encounter, the affirmative consent can be revoked at any time, and a dating relationship or past sexual relationship cannot “by itself be assumed to be an indicator of consent.”<sup>29</sup>

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18. See de León & Jackson, *supra* note 13; Samantha Harris, *University of Miami Law Prof: Affirmative Consent Effectively Shifts Burden of Proof to Accused*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Sept. 11, 2015), <http://www.the-fire.org/university-of-miami-law-prof-affirmative-consent-effectively-shifts-burden-to-accused/>.

19. See generally Monica Wang, *State Passes Affirmative Consent Legislation*, YALE DAILY NEWS (May 9, 2016), <http://www.yaledailynews.com/blog/2016/05/09/state-passes-affirmative-consent-legislation/>.

20. *Id.*

21. *See id.*

22. At the time of this writing, the American Law Institute (ALI) was in the process of attempting to redraft the Model Penal Code’s (MPC) sexual assault provisions. See *Model Penal Code: Sexual Assault and Related Offenses*, AM. L. INSTITUTE, <https://www.ali.org/projects/show/sexual-assault-and-related-offenses> (last visited Oct. 6, 2016). This effort has been ongoing for several years and has been fraught with controversy. See, e.g., Kevin Cole, *Backpedalling in Place: The ALI’s Move from “Affirmative” to “Contextual” Consent*, 54 SAN DIEGO L. REV. (forthcoming 2016); Kevin Cole, *The Latest Iterations of the ALI Draft Provisions on Sexual Assault*, CRIMPROF BLOG (Jan. 11, 2016), [http://lawprofessors.typepad.com/crimprof\\_blog/2016/01/the-latest-iterations-of-the-ali-draft-provisions-on-sexual-assault.html](http://lawprofessors.typepad.com/crimprof_blog/2016/01/the-latest-iterations-of-the-ali-draft-provisions-on-sexual-assault.html).

23. CAL. EDUC. CODE § 67386 (West 2014).

24. *Id.* § 67386(a).

25. *Id.* § 67386(a)(i).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

In that same month, New York also amended its education laws to require institutions of higher education to adopt an affirmative consent standard as part of their codes of conduct.<sup>30</sup> New York defines “affirmative consent” slightly different than California: “[A] knowing, voluntary, and mutual decision among all participants to engage in sexual activity.”<sup>31</sup> New York addresses what consent might look like and states that it “can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.”<sup>32</sup> New York also shares California’s warning that silence or lack of resistance does not demonstrate consent, that prior consent to a sexual act does not demonstrate consent to another act, and that consent can be withdrawn.<sup>33</sup> Regarding the specific problem of parties being under the influence of alcohol, New York notes that the element of consent is not removed because one party is intoxicated, that consent must still be obtained when the potential offender is under the influence of alcohol, and that someone who is incapacitated cannot give affirmative consent.<sup>34</sup> Furthermore, New York notes that consent is not voluntary if it is the product of coercion, intimidation, force, or threats.<sup>35</sup> Finally, New York explicitly directs the action to take when consent can no longer be given or is withdrawn—the sexual activity “must stop.”<sup>36</sup>

Although these statutes approach the definition differently, they adhere to certain touchstones, including requirements that consent for specific sexual contact be voluntary, mutual, and clear; that past consent is not perpetual; that consent must be freely given and not the product of force, intimidation, or coercion; and that consent cannot be the result of mental or physical incapacitation or impairment.<sup>37</sup> These flow from the April 2014 First Report of the White House Task Force to Protect Students From Sexual Assault (the Task Force), which included a checklist for universities to utilize in developing their own sexual assault policies.<sup>38</sup>

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30. N.Y. EDUC. LAW § 6441(1) (McKinney 2015).

31. *Id.*

32. *Id.*

33. *Id.* § 6441(1), (2)(a)–(c).

34. *Id.* § 6441(2)(b)–(d). The statute defines “incapacitation” as lacking the ability to knowingly participate, a lack of consciousness, being asleep, being restrained, or other inability to consent. *Id.* § 6441(2)(d). Furthermore, the statute warns that a person may be incapacitated if under the influence of alcohol. *Id.*

35. *Id.* § 6441(2)(e).

36. *Id.* § 6441(2)(f).

37. NAT’L SEXUAL VIOLENCE RES. CTR., WHAT IS HEALTHY SEXUALITY AND CONSENT? (2015), [http://www.nsvrc.org/sites/default/files/saam\\_2015\\_what-is-healthy-sexuality-and-consent.pdf](http://www.nsvrc.org/sites/default/files/saam_2015_what-is-healthy-sexuality-and-consent.pdf).

38. White House Task Force to Protect Students from Sexual Assault, *Checklist for Campus Sexual Misconduct Policies*, U.S. DEP’T JUST. 4–5 (2014), <https://www.justice.gov/ovw/page/file/910271/download> (“At minimum, the definition should recognize that: . . . consent is a voluntary agreement to engage in sexual activity; . . . someone who is incapacitated cannot consent; . . . past consent does not imply future consent; . . . silence or an absence of resistance does not imply consent; . . . consent to engage



As will be discussed *infra*, the notion that people who engage in a sexual act have a mutual desire to do so seems beyond reproach but, paradoxically, has been met with resistance.<sup>39</sup> Some of that is due to a misunderstanding of what affirmative consent actually means.<sup>40</sup> Under current law, passivity—regardless of whether it is due to sleep, incapacitation, or unconsciousness—can be sufficient to establish consent because the victim did not assert nonconsent.<sup>41</sup> The burden is on the victim to ward off a sexual assault rather than on the perpetrator to ascertain the agreement of another to engage in a sexual act.<sup>42</sup>

This Article shares in the rejection of such a regime. It builds on both the New York and California statutes, many of the approximately 800 affirmative consent standards that universities have adopted, and the suggested language of the National Sexual Violence Resource Center.<sup>43</sup> It defines affirmative consent through common elements found in many of these sources and utilizes the following definition. Affirmative consent has four main components. First, it means that all people engaging in sexual acts must obtain an affirmative, conscious, and voluntary agreement in words or actions by all parties to engage in sexual activity. Second, this standard must not be met by silence, a lack of protest, or a previous dating or sexual relationship. Third, it is also not met if the person is unconscious, asleep, incapacitated, or otherwise unable to consent. Fourth, consent can be withdrawn at any time.

By utilizing this definition and these four components, parties engaged in sexual conduct have a clearer understanding of what is required of them. The definition contains the important aspects of affirmative mutuality, voluntariness, consciousness, and an ability to withdraw. As part of a larger culture of consent, this can be a positive development.

### III. THE PURPOSE OF CRIMINAL LAW AND THE SOCIAL HARM OF SEXUAL ASSAULT

Many have criticized the over criminalization of heretofore legal acts.<sup>44</sup> This critique has grown more recently in the late 20th and early 21st centuries, when legislatures expanded criminal codes to cover a wide breadth

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in sexual activity with one person does not imply consent to engage in sexual activity with another; . . . consent can be withdrawn at any time; and . . . coercion, force, or threat of either invalidates consent.”)

39. Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1979 (2016).

40. *See id.*

41. *See* Tuerkheimer, *supra* note 3, at 16.

42. *See id.* at 3 (discussing the need for the modernization of rape law).

43. New, *supra* note 6.

44. *E.g.*, Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191, 1184 (2015); Ellen S. Podgor, *Introduction, Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 530 (2012).

of behaviors.<sup>45</sup> Conversely, many have challenged developments in criminal law as being underinclusive or unresponsive to the actual criminal behaviors.<sup>46</sup> Therefore, it is essential that any proposed adjustment to criminal law actually serves the purpose of criminal law.

What is this purpose? Why do we have criminal law? At first blush, it appears that its purpose is to prevent harm to society by punishing wrongdoers.<sup>47</sup> Wayne LaFave noted that it exists “more specifically[] to prevent injury to the health, safety, morals and welfare of the public.”<sup>48</sup> This goal is accomplished by punishing those who cause harmful results or engage in harmful conduct.<sup>49</sup> It also places a potential wrongdoer on notice of what society deems harmful.<sup>50</sup> Paul Robinson outlined a more specific exploration of the purposes of criminal law.<sup>51</sup> He suggests criminal law should serve three functions.<sup>52</sup> The first is rule articulation—criminal law should define and announce what conduct is prohibited.<sup>53</sup> The second function is liability assignment—criminal law should determine whether a violation merits criminal punishment.<sup>54</sup> Henry Hart described this as determining whether a violation of the rule demands the “condemnation of the community.”<sup>55</sup> Finally, Robinson stated that criminal law serves a grading function in which it assesses “the relative seriousness of the offense, [which is] usually a function of the relative blameworthiness of the offender.”<sup>56</sup>

Therefore, to determine whether affirmative consent serves the purposes of criminal law, we must assess whether there is an injury to the health and safety of the public and, if so, whether affirmative consent serves the function of articulating a rule and assists in assigning liability related to the seriousness of the offense.

### *A. The Health, Safety, and Welfare Problem of Sexual Assault*

#### *1. Quantitative Harm—Recent Studies*

A growing body of research regarding the frequency of sexual assault has emerged in recent years.<sup>57</sup> Indeed, the claimed finding that one in five

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45. Haugh, *supra* note 44, at 1210.

46. *See, e.g.*, SUSAN ESTRICH, *REAL RAPE* (1987).

47. WAYNE R. LAFAVE, *CRIMINAL LAW* § 1.2, at 8 (5th ed. 2010).

48. *Id.* § 1.2(e), at 11–12.

49. *Id.*

50. *Id.* § 1.5, at 26–27.

51. Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 *Nw. U. L. REV.* 857, 857 (1994).

52. *Id.*

53. *Id.*

54. *Id.*

55. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 412 (1958).

56. Robinson, *supra* note 51.

57. *See generally* BONNIE S. FISHER ET AL., *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>; KREBS ET AL., *supra* note 3.

college women reported being the victim of unwanted sexual contact or an attempted sexual assault while in college was central to the Task Force's report and action items.<sup>58</sup> Similarly, the finding that two-thirds of college students experienced sexual harassment and that sexual harassment can include sexual violence was central to the 2011 "Dear Colleague Letter" from the Department of Education to American universities.<sup>59</sup> These and other findings suggested a landscape of more frequent sexual assault and harassment than previously understood, a climate of under reporting, and a strong role of alcohol in the sexual assaults.<sup>60</sup> Yet, as research was revealing a prevalence of sexual assault, universities remained in denial. A United States Senate Subcommittee report determined that during this same time period of frequent sexual assault, 40% of colleges and universities reported that they did not investigate even one sexual assault in the previous five years.<sup>61</sup>

As this research took on a more prominent role in the national dialog, the mainstream media, at times, over generalized these findings. Some valid critiques of the media's broad-brush description of these studies emerged.<sup>62</sup> Although some dispute may exist as to the exact number of victims in certain studies, the broader reality is that "when it comes to rape, the most pervasive danger is different from what once was most feared and the problem is more widespread than ever perceived."<sup>63</sup>

The dialog surrounding the research has obfuscated this well-accepted fact. A review of some of the more prominent and recent studies is necessary to add clarity to a fractured discussion, which can help erase any misleading suggestion that this consensus is not well-founded.

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58. White House Task Force to Protect Students from Sexual Assault, *supra* note 38, at 6; *see also* WASHINGTON POST-KAISER FAMILY FOUND., SURVEY OF COLLEGE STUDENTS ON SEXUAL ASSAULT 18 (2015), <https://www.washingtonpost.com/apps/g/page/national/washington-post-Kaiser-family-foundation-survey-of-college-students-on-sexual-assault/1726/>.

59. Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP'T EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

60. *E.g.*, FISHER ET AL., *supra* note 57; CATHERINE HILL & ELENA SILVA, DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 19–21 (2005), [history.aauw.org/files/2013/01/DTLFinal.pdf](http://history.aauw.org/files/2013/01/DTLFinal.pdf); WASHINGTON POST-KAISER FAMILY FOUNDATION, *supra* note 58, at 19–21. *See generally* Mary P. Koss et al., *Stranger and Acquaintance Rape: Are There Differences in the Victim's Experience*, 12 PSYCHOL. WOMEN Q. 1 (1988) (finding that 55% of college rape victims and 74% of perpetrators were intoxicated).

61. U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, SEXUAL VIOLENCE ON CAMPUS: HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS 1 (2014), <https://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf>.

62. *E.g.*, Tyler Kingkade, *There's No More Denying Campus Rape Is a Problem. This Study Proves It.*, HUFFINGTON POST (Jan. 20, 2016, 10:08 AM), [http://www.huffingtonpost.com/entry/college-sexual-assault-study\\_us\\_569e928be4b0cd99679b9ada](http://www.huffingtonpost.com/entry/college-sexual-assault-study_us_569e928be4b0cd99679b9ada); Christopher Krebs & Christine Linnquist, *Setting the Record Straight on '1 in 5'*, TIME (Dec. 15, 2014), <http://time.com/3633903/campus-rape-1-in-5-sexual-assault-setting-record-straight/>.

63. *See* Tuerkheimer, *supra* note 3, at 2.

The literature has discussed many surveys.<sup>64</sup> Critical to a contemporary analysis of sexual assault are surveys and research that reflect a more modern understanding of rape and sexual assault than that traditionally acknowledged.<sup>65</sup> The original and traditional conceptualization of rape was very narrow: “[C]arnal knowledge of a woman forcibly and against her will.”<sup>66</sup> This framework, which inhibited the obtainment of convictions, has been outdated for some time, and sexual assault law has evolved. Michelle Anderson outlined a history of rape law, including obstacles that were created to inhibit victims.<sup>67</sup> She detailed several original components that caused rape convictions to be almost impossible to successfully obtain.<sup>68</sup> These included procedural requirements present only in rape cases as well as unique evidentiary requirements reserved for rape cases, such as prompt complaints, corroborating evidence, evidence of force, and gender-specific language.<sup>69</sup> These elements were obstacles to justice because they demanded evidence of rape that rarely existed and reflected a misconception of rape as solely a violent stranger abduction.

A watershed moment, however, occurred in 1986 with the publication of Susan Estrich’s book, *Real Rape*, which distinguished between stranger rape and the more commonly experienced but less legally recognized problem of acquaintance rape.<sup>70</sup> This emphasis on unconsented-to sex, rather than solely on the more narrow violent forcible sex, emerged within legal scholarship, but the law lagged behind.<sup>71</sup> In more recent years, many states have expanded their panoply of sexual assault crimes to include not only forcible rape but also other forms of sexual crimes.<sup>72</sup> A significant debate continues regarding the adequacy of society’s consent definitions, but the adoption of a broader definition of rape than what Blackstone offered is beyond dispute.<sup>73</sup> Historical changes have occurred not only in our collective

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64. See *supra* note 57 and accompanying text (noting that the body of research on sexual assault is growing).

65. Compare KREBS ET AL., *supra* note 3, with 4 WILLIAM BLACKSTONE, COMMENTARIES \*210.

66. BLACKSTONE, *supra* note 65.

67. Anderson, *supra* note 39, at 1946–48.

68. *Id.*

69. *Id.* at 1946–47.

70. See generally ESTRICH, *supra* note 46.

71. Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 150 (2011).

72. See CAL. PENAL CODE §§ 261–269 (West 2012); 18 PA. STAT. AND CONS. STAT. ANN. §§ 3121–3126 (West 2016); VA. CODE ANN. §§ 18.2-61 to 18.2-67.5 (West 2016); N.Y. PENAL LAW §§ 130.25–130.70 (McKinney 2016); N.C. GEN. CODE ANN. §§ 14-27.20 to 14-27.27 (West 2016). See generally Keith B. Lofland, *The Neglected Debate over Sexual Assault Policy in the Department of Defense*, 55 NAVAL L. REV. 311 (2008); Jennifer L. Miller, *Criminal Procedure: Sentence Enhancements*, 25 PAC. L.J. 630, 631 (1994); Amanda Peters, *Reconsidering Federal and State Obstacles to Human Trafficking Victim Status and Entitlements*, 2016 UTAH L. REV. 535.

73. See Buchhandler-Raphael, *supra* note 71, at 150–51.

understanding of sexual assault but also in our demand for appropriate responses to it.<sup>74</sup>

In 1990, an emphasis on disclosure and transparency also arose in sexual assault law history after the rape and murder of Jeanne Clery by a fellow student at Lehigh University. Congress enacted the Clery Act, which required colleges and universities that receive financial aid to disclose campus safety information and the handling of sexual violence incidents.<sup>75</sup> However, colleges and universities failed to accurately report the incidents of sexual violence on their campuses.<sup>76</sup>

While research existed prior to the last decade, this Article will focus on some of the more recent studies of sexual violence that reflect the more modern definition of sexual assault and an increase in transparency.<sup>77</sup> These studies, in general, paint a picture of campus sexual violence against college-age women as a significant problem.<sup>78</sup> This Article echoes observations of the American Association of Universities (AAU), which has observed that many of these studies

illustrate that estimates such as “1 in 5” or “1 in 4” as a global rate, across all [institutes of higher learning are] at least oversimplistic, if not misleading. None of the studies that generate estimates for specific [institutes of higher learning] are nationally representative. . . . [R]ates vary greatly across institutions.<sup>79</sup>

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74. *Id.* at 210–13.

75. 20 U.S.C. § 1092(f) (2016). This Act was amended in 2013 by the Campus Sexual Violence Elimination (SaVE) Act of 2013. Campus Sexual Violence Elimination Act of 2015, 20 U.S.C. § 1092(f) (2016).

76. Madison Pauly, *Here's What's Missing from the Stats on Campus Rape*, MOTHER JONES (Oct. 8, 2015, 6:00 AM), <http://www.motherjones.com/politics/2015/10/campus-crime-statistics-undercount-sexual-assaults>.

77. In 2000, the Bureau of Justice Statistics (BJS) released the National College Women's Sexual Violence Survey (NCWSV), which was a nationally conducted telephone survey of college women eighteen to twenty-four years of age. *See generally* FISHER ET AL., *supra* note 57. The survey found that 2.8% of women in college experienced a completed or attempted forced penetration. *Id.* However, this survey did not ask questions about incapacitation. *Id.* In 2007, the National Institute of Justice released the Campus Sexual Assault Study. *See* KREBS ET AL., *supra* note 3. In 2014, the BJS released an additional study of sexual assault on college-age women. *See* SOFI-SINOZICH & LYNN LANGTON, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013, at 2 (2014), <http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>. In 2015, the AAU reported a campus climate survey of sexual assault. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT xv (2015), [https://www.aau.edu/uploadedFiles/AAU\\_Publications/AAU\\_Reports/Sexual\\_Assault\\_Campus\\_Survey/AAU\\_Campus\\_Climate\\_Survey\\_12\\_14\\_15.pdf](https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_12_14_15.pdf). Many universities have also published their campus surveys. For example, in 2014, the Massachusetts Institute of Technology (MIT) released the results of an online survey of their campus finding that 17% of undergraduate women experienced sexual contact by force or incapacitation. MASS. INST. OF TECH., SURVEY RESULTS: 2014 COMMUNITY ATTITUDES ON SEXUAL ASSAULT 5 (2014), <http://web.mit.edu/surveys/health/MIT-CASA-survey-summary.pdf>.

78. *See generally id.*

79. CANTOR ET AL., *supra* note 77.

However, while placing these numbers in context, this Article also shares the conclusion expressed by all of them that a more rampant sexual assault problem exists than previously understood.<sup>80</sup> These numbers can be put in context by examining the specific purpose of each individual report, their specific scope, and the definitions used in questioning participants. Such an analysis, found below, will help clarify the atmosphere surrounding differing specific results but similar conclusions.

*a. The National Institute of Justice*

In 2007, the National Institute of Justice released the Campus Sexual Assault Study (CSA).<sup>81</sup> This study reflected a multidisciplinary view of sexual assault occurrences and prevention, examining it not solely as a criminal law issue.<sup>82</sup> The purpose of this study was “[t]o examine the prevalence, nature, and reporting of various types of sexual assault experienced by university students in an effort to inform the development of targeted intervention strategies.”<sup>83</sup> The CSA examined the issue of sexual violence on campus not only as a public safety issue but also as a social and public health issue.<sup>84</sup> The study was based on a web survey of over 5,400 women at two large American universities (one in the South and one on the West Coast).<sup>85</sup>

This research defined the term “sexual assault” rather broadly to include rape and “other types of unwanted sexual contact.”<sup>86</sup> These behaviors included physically forced sexual assault.<sup>87</sup> “Force,” in this context, was defined as force, threats, and coercion (both verbal and emotional).<sup>88</sup> “Sexual contact” included both rape and sexual battery.<sup>89</sup> This definition is consistent with the contemporary understanding of sexually forced contact, including both penetration and other forced sexual acts, and defining force to include not only physical force, but also other types of threats and coercion.<sup>90</sup> “Emotional force” remains undefined.<sup>91</sup> However, the impact on the number

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80. *Id.*

81. *See generally* KREBS ET AL., *supra* note 3.

82. *Id.*

83. *Id.* at vii.

84. *Id.* at 6–7.

85. *Id.* at x.

86. *Id.* at vii–ix.

87. *Id.* at ix.

88. *See id.* at 1–3.

89. *Id.* at 1–2. Rape often refers to penetrative sexual crimes (i.e., unlawful penetration of the vagina, anus, or orifice by another). Sexual battery connotes an unlawful sexual touching that is not penetrative.

90. SINOZICH & LANGTON, *supra* note 77.

91. KREBS ET AL., *supra* note 3, at 1-3. This could mean the type of force understood to be coercion, such as a threat to circulate images of the victim, a threat to terminate employment, or an abuse of authority. Without a more clear definition, it could mean something so limited that it would not be considered coercive under traditional criminal law concepts. This is unknown.

of sexual assaults due to emotional force is limited because the majority of sexual assaults reported involved incapacitation.<sup>92</sup> This study defined “incapacitated sexual assault” as “unwanted sexual contact occurring when a victim is unable to provide consent or stop what is happening because she is passed out, drugged, drunk, incapacitated, or asleep.”<sup>93</sup>

The CSA found that 19% of the women surveyed experienced a completed or attempted sexual assault since entering college.<sup>94</sup> 4.7% of women in college were forcibly sexually assaulted, and 11% of the women reported experiencing a sexual assault while incapacitated—the vast majority of which were rapes (8.5%).<sup>95</sup> The study noted that the prevalence of sexual assault was higher in college than before college.<sup>96</sup> Once in college, the risk was greater for freshmen and sophomores than juniors and seniors.<sup>97</sup> The study further concluded that the true rate of sexual assault was likely higher because some of the students questioned were only freshmen, sophomores, and juniors; therefore, they had more years of college during which they were at risk for sexual assault.<sup>98</sup> Further, the vast majority of victims reported being victimized by men they knew and trusted.<sup>99</sup>

The CSA also confirmed the long-held finding that sexual assault is underreported.<sup>100</sup> A very small percentage of sexual assaults were reported to law enforcement (2% of incapacitated and 13% of forced rape victims).<sup>101</sup> Most striking, when asked why they did not report the crimes, 56% of forced sexual assault victims and 67% of incapacitated sexual assault victims said they did not think it serious enough, and 35% expressed that they did not report to police because it was unclear a crime occurred or unclear it was intended.<sup>102</sup>

Therefore, the CSA suggested that sexual assaults, defined to include forcible rapes and sexual batteries, encompassing those occurring when the victims are incapacitated, are a significant issue for college women and affect the youngest women.<sup>103</sup> Importantly, this study also reflected the notion of rape culture from a victim’s perspective, noting that—even though women would factually describe their experience as being penetrated or sexually battered while in a state of unconsciousness, sleep, or incapacitation due to

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92. *See id.* at 1-4.

93. *Id.* at ix. This included drug-facilitated sexual assault, suspected drug-facilitated sexual assault, alcohol or drug-enabled sexual assault, and other situations, such as being asleep or unconscious. *Id.* at 1-5 to 1-6

94. *Id.* at xii, xvii.

95. *Id.* at 5-1.

96. *Id.* at 6-1.

97. *See id.* at 6-1 to 6-2.

98. *Id.* at xviii, 6-1.

99. *Id.* at xviii.

100. *See id.*; ESTRICH, *supra* note 46, at 10.

101. KREBS ET AL., *supra* note 3, at xvii.

102. *Id.*

103. *See generally id.*

alcohol or drugs—some were unclear whether it was a crime or a serious matter and desired that no one learn of their victimization.<sup>104</sup> While some have pointed to this finding about victim perception to argue the events were indeed not serious, such a position is somewhat misleading. The study’s participants were not ambiguous about what occurred; they were clear that they were unable to consent and a person they knew and trusted still penetrated or touched them sexually without obtaining their consent.<sup>105</sup> Their confusion, a confusion that education and an affirmative consent standard can assist with, was regarding whether this was a criminal act—in other words, whether they deserved to consider it a serious matter.<sup>106</sup> Therefore, the conclusion of the CSA seems supported—“women at universities are at considerable risk for experiencing sexual assault, especially sexual assault occurring after the voluntary consumption of alcohol.”<sup>107</sup>

*b. The Bureau of Justice Statistics Study*

In 2014, the BJS released another study (the BJS Study) analyzing sexual assault rates among college-age women.<sup>108</sup> The purpose of this study was to make a comparison between student and nonstudent women.<sup>109</sup> Utilizing the National Crime Victimization Survey (NCVS), this study analyzed eighteen years of data, and the numbers found reference the average throughout those years.<sup>110</sup> The NCVS, conducted by the BJS, is an annual telephone and in-person survey to households.<sup>111</sup> Due to the source, the definition of rape in this study more narrowly included the federal criminal definition of rape, thus that which requires force.<sup>112</sup> Consequently, the definition included only forcible rape.<sup>113</sup> However, because it was a survey of victim households, it attempted to capture both reported and unreported crimes.<sup>114</sup>

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104. *See generally id.* at 2-9.

105. *Id.*

106. *Id.*

107. *See id.* at xx.

108. *See SINOZICH & LANGTON, supra* note 77, at 1.

109. *Id.* The BJS Study’s definition of “student” was broader than the CSA’s definition because it included students enrolled in college, university, trade school, or vocational school. *Id.* at 2. Thus, although the report compares students and nonstudents, the number attributable to students should not be read to solely include campus situations typically discussed in college campus rape rates. *Id.*

110. *Id.* at 1.

111. *Id.* at 3.

112. *Id.* at 11. “Rape” was defined as the unlawful penetration (with anything) of a person (vaginally, anally, or orally) against the victim’s will with the use or threat of force. *Id.* Also consistent with the NCVS definition, the term “force” included psychological and physical coercion as well as physical force. *Id.* “Sexual Assault” referred to crimes that involve unwanted sexual contact between a victim and an offender, including grabbing and fondling. *Id.* The survey also included attempted versions of these crimes. *Id.*

113. *Id.*

114. *Id.*



The BJS Study noted that eighteen- to twenty-four-year-old females have the highest rate of rape and sexual assault with the offender known to the victims 80% of the time.<sup>115</sup> The rape rate was 7.6/1000 for nonstudents and 6.1/1000 for students.<sup>116</sup> An important contribution of this survey is that women ages eighteen to twenty-four who were not registered in school reported experiencing sexual assault at a higher rate than students of their age cohort.<sup>117</sup> Many have argued that it is important not to lose this subgroup in the discussion of sexual assault.<sup>118</sup> Furthermore, some scholars point to this fact to support the argument that criminal law should be changed to mirror new campus definitions of consensual sex, thus allowing for an act of nonconsensual sex that is considered rape on campus to be considered rape off campus.<sup>119</sup>

These figures of 7.6/1000 and 6.1/1000 are outliers among most of the surveys of sexual assault regarding this population.<sup>120</sup> Some opponents to the other studies point to it as proof that the concerns regarding nonconsensual sex or campus sexual assault are exaggerated.<sup>121</sup> Others challenge the methodology of this survey.<sup>122</sup> Conflict about which survey is more accurate, to some degree, is a red herring.<sup>123</sup> The vast majority of research confirms what many have also observed: women of this age group experience significant occurrences of sexual assault disproportionality to other groups.<sup>124</sup> Moreover, these other surveys offer important insight into the climate for young people of this age, especially young people on college campuses, who rely on those institutions to protect them and maintain safe environments.

Regarding the lower rates of rape and sexual assault, the BJS Study noted that the NCVS is one of several surveys that examined sexual assault among this age cohort and that the distinctions among them are due to the surveys' contexts and scopes; definitions of rape and sexual assault; and question wording.<sup>125</sup> Specifically, NCVS is a survey about crime while the others are mainly public health surveys.<sup>126</sup> Second, the NCVS is very narrow in its definition of rape and sexual assault in several ways; most significantly,

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115. *Id.* at 1.

116. *Id.* at 1, 4.

117. *Id.*

118. *E.g.*, Callie Marie Rennison, *Privilege, Among Rape Victims: Who Suffers Most from Rape and Sexual Assault in America?*, N.Y. TIMES (Dec. 21, 2014), <http://www.nytimes.com/2014/12/22/opinion/who-suffers-most-from-rape-and-sexual-assault-in-america.html>.

119. *See* Gruber, *supra* note 3, at 104, 111.

120. *Id.* at 109.

121. *Id.*

122. *Id.* at 107, 117.

123. *Id.* at 109.

124. *See* SINOZICH & LANGTON, *supra* note 77, at 3.

125. *Id.* at 2 (“The three surveys differ in important ways in how rape and sexual assault questions are asked and victimization is measured . . . . The NCVS, NISVS, and CSA target different types of events.”).

126. *Id.*

the NCVS has a more narrow definition of rape that does not include situations in which the victim was unable to consent due to incapacitation.<sup>127</sup> As discussed, this comprises the vast majority of campus sexual assaults.<sup>128</sup>

Similarly, the Urban Institute analyzed the BJS Study and the National Intimate Partner and Sexual Violence Survey (NISVS) of the Center for Disease Control (CDC), offering a comprehensive analysis of the difference.<sup>129</sup> Not only did it note the important distinction between the two definitions, but it also expounded upon why that matters: “[I]t is widely believed that the NCVS underestimates prevalence of sexual violence because it focuses on crimes and criminal behavior. Respondents may not always think about experiences of sexual violence as criminal incidents, or be willing to label themselves as victims of rape or sexual assault.”<sup>130</sup> The Urban Institute went on to note that the NISVS’s approach is “considered a best practice in measuring sexual victimization.”<sup>131</sup> This approach found that 19% of women and nearly 2% of men have been sexually assaulted during their lifetimes.<sup>132</sup>

The BJS Study findings are consistent with other measures regarding the reporting of rape and sexual assault. Approximately 50% of victims knew their offenders as a friend or an acquaintance.<sup>133</sup> Only 20% of student rapes and sexual assaults were reported to police.<sup>134</sup> Furthermore, the reasons for not reporting underscore the misinformation about victim rights.<sup>135</sup> While approximately 25% of students did not report the crime because it was a personal matter, approximately 10% of students did not report because they did not think the matter serious enough, and another 9% assumed the police would not assist them.<sup>136</sup> Thus, these findings reflect a belief that this victimization will not be addressed.<sup>137</sup>

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127. *Id.* at 11.

128. *See infra* Section III.A.4.

129. Elizabeth Pelletier & Janine M. Zweig, *Why Do Rates of Sexual Assault Prevalence Vary from Report to Report?*, URB. INST. (July 27, 2015), <http://www.urban.org/urban-wire/why-do-rates-of-sexual-assault-prevalence-vary-report-report>; *see also* Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization — National Intimate Partner and Sexual Violence Survey, United States, 2011*, 63(8) MORBIDITY & MORTALITY WKLY. REP. 1 (2014), available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm>. This report found that 19% of women report experiencing sexual violence in their lifetime. Breiding et al., *supra*, at 4.

130. *See* Pelletier & Zweig, *supra* note 129.

131. *Id.*

132. *See* Breiding et al., *supra* note 129, at 1.

133. *See* SINOZICH & LANGTON, *supra* note 77, at 7.

134. *Id.* at 9.

135. Gruber, *supra* note 3, at 1043.

136. *See* SINOZICH & LANGTON, *supra* note 77, at 4, 9.

137. *Id.*

c. *The Association of American Universities Campus Climate Survey on Sexual Assault and Sexual Misconduct*

In September 2015, the AAU released its report assessing “the incidence, prevalence, and characteristics of incidents of sexual assault and misconduct” at institutions of higher learning.<sup>138</sup> The purpose of this report is distinct from both previously discussed reports. This report was designed to provide institutions of higher education with information to supplement their policies to prevent and respond to campus sexual assault and misconduct.<sup>139</sup> In addition to measuring incidents of sexual assault and misconduct, the survey also sought to assess the overall campus climates regarding perception of risk, knowledge of resources, and perception of institutional response to such incidents.<sup>140</sup>

This online survey reached students at twenty-seven different universities and was completed by 150,072 undergraduate and graduate students.<sup>141</sup> Although that is a significant number of students and institutions, the survey’s coprincipal investigator noted that there was a relatively low response rate of 19.3% with over 750,000 students receiving the survey.<sup>142</sup> Therefore, he noted that there was a risk that those who responded may have been more likely to have experienced some form of sexual assault or misconduct.<sup>143</sup> Nonetheless, the survey’s results, as with all the surveys, offer some insight into the climate of sexual assault and misconduct on college campuses.

The AAU’s survey was broader than the CSA and the BJS Study. The survey defined sexual assault and misconduct to include the legal definition of rape and sexual battery as well as other actions that violate student codes of conduct.<sup>144</sup> The latter includes “coercive threats of non-physical harm or promised rewards” as well as a failure to obtain affirmative consent.<sup>145</sup> While this survey offers insight into sexual assault, it also examined the culture found on campuses.<sup>146</sup> It measured for “sexual harassment, stalking, and intimate partner violence.”<sup>147</sup>

Regarding sexual assault and misconduct, it found that 21.2% of seniors reported being victims of sexual assault since enrolling and one-third of

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138. CANTOR ET AL., *supra* note 77, at 1.

139. *Id.* at 1–2.

140. *Id.* at 1.

141. *Id.* at 4.

142. *Id.* at 5–6.

143. Emily Yoffe, *The Problem with Campus Sexual Assault Surveys*, SLATE (Sept. 24, 2015, 3:34 PM), [http://www.slate.com/articles/double\\_x/doublex/2015/09/aa\\_u\\_campus\\_sexual\\_assault\\_survey\\_why\\_such\\_surveys\\_don\\_t\\_paint\\_an\\_accurate.html](http://www.slate.com/articles/double_x/doublex/2015/09/aa_u_campus_sexual_assault_survey_why_such_surveys_don_t_paint_an_accurate.html).

144. CANTOR ET AL., *supra* note 77, at 11.

145. *Id.* Examples include threats or promises of good grades as well as threats to share or post damaging information about the victim. *Id.* at 19.

146. *Id.* at 1.

147. *Id.* at 11.

senior women reported being the “victim of nonconsensual sexual contact at least once” with at least half of those involving penetration.<sup>148</sup> Mirroring the CSA, the risk of physical force or incapacitated sexual contact was highest in the early years of college and decreased over time, thus suggesting that perpetrators are targeting the youngest and most vulnerable students.<sup>149</sup> Female along with transgender, genderqueer, questioning, and nonconforming (TGQN) students experienced the highest rates of nonconsensual sexual contact.<sup>150</sup>

Also consistent among these surveys is a lack of reporting. Only 25% of the victims of forced penetration, and less than 10% of those who experienced sexual touchings reported the event.<sup>151</sup> The AAU’s survey found that over half of the victims said they did not report because they did not consider it serious enough, and one-third said it was because they were embarrassed or ashamed.<sup>152</sup> This survey also examined how students perceived the institutional response if they were to report—63.3% felt that the school would take it seriously, but only 49.2% thought a fair investigation would take place.<sup>153</sup>

#### *d. Other Surveys*

These are not the only surveys that discuss the climates facing people today both on and off campus. MIT’s Community Attitude on Sexual Assault Survey found that 35% of undergraduate women experience sexual harassment, rape, sexual assault, or unwanted sexual behaviors, and 17% of undergraduate women experience sexual contact by force or through incapacitation.<sup>154</sup> Rutgers University reported that 24% of students experienced sexual violence prior to attending college and 20% while enrolled.<sup>155</sup> A review of the individual college responses to the AAU’s survey indicates that while the average is approximately 23%, the range is 13%–30%.<sup>156</sup> Finally, research continues to emerge that suggests these numbers are in line with what women experience in their lifetime although the role of alcohol, and sexual assault while incapacitated may be particularly aggravated in the college setting.<sup>157</sup>

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148. *Id.* at 23.

149. *See id.* at 50.

150. *Id.*

151. *Id.* at 35.

152. *Id.* at 36.

153. *Id.* at 38–39.

154. MASS. INST. OF TECH, *supra* note 77.

155. SARAH MCMAHON ET AL., #ISPEAK STUDENT EXPERIENCES, ATTITUDES, AND BELIEFS ABOUT SEXUAL VIOLENCE 1, 5 (2015), <https://socialwork.rutgers.edu/file/1637/download>.

156. Yoffe, *supra* note 143.

157. Maria Testa & Jennifer A. Livingston, *Alcohol Consumption and Women’s Vulnerability to Sexual Victimization: Can Reducing Women’s Drinking Prevent Rape?*, 44 SUBSTANCE USE & MISUSE 1349, 1353 (2009).

The picture some of these surveys create is even more troubling for victims of color, men, or those in the lesbian, gay, bisexual, transgender, and questioning (LGBTQ) community.<sup>158</sup> In 2009, the BJS noted that African American females ages twelve and older were raped and sexually assaulted at a rate of 2.9/1000 compared to 1.2 for Caucasian females and 0.9 for females of other races.<sup>159</sup> The CDC found that “[a]bout one in three gay men, one in five bisexual men and one in [ten] heterosexual men reported experiencing unwanted sexual contact during their lifetime.”<sup>160</sup> In a research study conducted by the National Gay and Lesbian Task Force and the National Center for Transgender Equality, 78% of respondents identifying as transgender or gender nonconforming during grades K–12 reported harassment, 35% reported physical assault, and 12% reported sexual violence.<sup>161</sup> For women of color, the statistics are equally alarming. The Women of Color Network noted that “[a]pproximately 40% of [African American] women report coercive contact of a sexual nature by age 18.”<sup>162</sup> Further, “18.8% of African American women reported rape in their lifetime.”<sup>163</sup> A Department of Justice study of on-campus sexual assaults at historically black colleges and universities found that 14.2% of women experienced a rape or sexual battery while in college and 14.9% prior to college; however, the incidence of sexual assault while incapacitated almost doubled while in college—6.2% as compared to 3.4%.<sup>164</sup>

These numbers indicate not only that college-age women are vulnerable but also that the youngest and newest on campus are most at risk.<sup>165</sup> Of the college women who reported experiencing a sexually coercive situation, 84% of them indicated it occurred during their freshman or sophomore year.<sup>166</sup>

Furthermore, research regarding alcohol use further supports the finding of the above studies that alcohol plays a significant role in these cases. A

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158. ANN FLECK-HENDERSON, BEYOND TITLE IX: GUIDELINES FOR PREVENTING AND RESPONDING TO GENDER-BASED VIOLENCE IN HIGHER EDUCATION 5 (2012), <http://www.bjs.gov/content/pub/pdf/fvv.pdf>.

159. SHANNAN CATALANO ET AL., BUREAU OF JUSTICE STATISTICS: SELECTED FINDINGS: FEMALE VICTIMS OF VIOLENCE 1, 5 (2009), <http://www.bjs.gov/content/pub/pdf/fvv.pdf>.

160. Dave Gustafson, *By the Numbers: Sex Crimes on Campus*, AL JAZEERA AM.: FLAGSHIP BLOG (Oct. 29, 2014, 12:30 PM), <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/10/28/by-the-numbers-sexcrimesoncampus.html>.

161. JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 33 (2011), [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf).

162. WOMEN OF COLOR NETWORK, FACTS & STATS COLLECTION: SEXUAL VIOLENCE IN COMMUNITIES OF COLOR 2 (2006), [http://www.doj.state.or.us/victims/pdf/women\\_of\\_color\\_network\\_facts\\_sexual\\_violence\\_2006.pdf](http://www.doj.state.or.us/victims/pdf/women_of_color_network_facts_sexual_violence_2006.pdf).

163. *Id.*

164. CHRISTOPHER P. KREBS ET AL., THE HISTORICALLY BLACK COLLEGE AND UNIVERSITY CAMPUS SEXUAL ASSAULT (HBCU-CSA) STUDY, at ES-3 (2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/233614.pdf>.

165. CANTOR ET AL., *supra* note 77, at iv.

166. KREBS ET AL., *supra* note 3, at 2-7.

report in the *Journal of Studies on Alcohol* found that nearly three-quarters of college rape victims were intoxicated to such a degree that they could not consent.<sup>167</sup> It further found that students who were Caucasian, minors, heavy drinkers, and illegal drug users in high school faced a higher risk of sexual assault while intoxicated.<sup>168</sup> The report concluded “alcohol use is a central factor in most college rapes.”<sup>169</sup> In sum, the picture for women ages eighteen to twenty-four shows that they are at substantial risk of sexual assault.

## 2. *Qualitative Harm*

Crime itself is comprised of a voluntary act that causes a social harm.<sup>170</sup> Determining the existence of a social harm requires more than merely examining numbers.<sup>171</sup> It is also necessary to examine the qualitative nature of the injury.<sup>172</sup> Essential in any discussion of sexual assault is not only the breadth of the problem but also the depth of the harm that the victim experiences.<sup>173</sup>

Sexual violence causes long-term physical, psychological, and emotional harm to its victims.<sup>174</sup> Physically, up to 40% of victims become infected with a sexually transmitted disease.<sup>175</sup> Four out of five victims report suffering from chronic physical or psychological conditions.<sup>176</sup>

The emotional effects of sexual assault are well documented. Women who have experienced sexual violence may constitute the single largest group of people affected by posttraumatic stress disorder (PTSD).<sup>177</sup> For example, a range of U.S. studies have found that 31%–57% of community-based rape victims suffer from PTSD at some point in their lifetimes.<sup>178</sup> Significantly, the effects of this are far from finite. “[U]p to 16.5% of survivors meet PTSD

167. Meichun Mohler-Kuo et al., *Correlates of Rape While Intoxicated in a National Sample of College Women*, 65 J. STUD. ON ALCOHOL & DRUGS 37, 42 (2004).

168. *Id.* at 41.

169. *Id.* at 43.

170. *Actus reus*, BLACK’S LAW DICTIONARY (10th ed. 2014).

171. *Id.*

172. *Id.*

173. See sources cited *supra* note 3; see also Jill Astbury, *Services for Victim/Survivors of Sexual Assault: Identifying Needs, Interventions and Provision of Services in Australia*, ACSSA ISSUES NO. 6, Dec. 2006, at 1.

174. Cameron Boyd, *The Impacts of Sexual Assault on Women*, ACSSA RESOURCE SHEET NO. 2, Apr. 2011, at 1, <https://aifs.gov.au/sites/default/files/publication-documents/rs2.pdf>.

175. See KREBS ET AL., *supra* note 3, at 1-1.

176. *Id.*

177. Astbury, *supra* note 173, at 3–4.

178. Matthew Tull, *PTSD After Sexual Assault: Just How Common Is It?*, VERYWELL, <https://www.verywell.com/rates-ptsd-rape-2797435> (last updated Oct. 10, 2016); see also DEAN G. KILPATRICK, *THE MENTAL HEALTH IMPACT OF RAPE* (2000), <https://mainweb-v.musc.edu/vaw-prevention/research/mental-impact.shtml>; NICOLE P. YUAN ET AL., *THE PSYCHOLOGICAL CONSEQUENCES OF SEXUAL TRAUMA* (2006), [http://www.vawnet.org/sites/default/files/materials/files/2016-09/AR\\_PsychConsequences.pdf](http://www.vawnet.org/sites/default/files/materials/files/2016-09/AR_PsychConsequences.pdf).

criteria an average of 17 years post-assault.<sup>179</sup> Additionally, rape victims are thirteen times more likely to attempt suicide than victims of other crimes.<sup>180</sup>

Annually, rape is believed to be the most expensive crime victims experience, with some estimating a societal cost of over \$120 billion each year.<sup>181</sup> The National Institute of Justice (NIJ) summarized the quantitative harm well by asserting, “Sexual assault is a public health and public safety problem with far-reaching implications.”<sup>182</sup> It also poignantly captured the qualitative harm by noting that “[b]eing a victim of sexual assault is one of the most violating experiences anyone can endure and can cause immediate, as well as long-term, physical and mental health consequences.”<sup>183</sup>

### 3. *Legacy of Unresponsiveness to These Harms*

Notwithstanding the broad agreement regarding the significant personal injury sexual assault causes, the reaction to these different surveys indicating the prevalence of sexual assault has been mixed. Not surprisingly, some have challenged the surveys as inaccurate based on having too few participants or definitional differences.<sup>184</sup> In truth, many of the criticisms lodged at the surveys are more appropriately aimed at mainstream media, which covers the surveys with sensational headlines and simplistic reporting.<sup>185</sup> In fact, many of the surveys have, in their own analyses, cautioned against reading too much into these numbers but direct the reader to utilize them as a piece of a larger picture regarding sexual assault climates both on and off university campuses.<sup>186</sup> Nonetheless, the NIJ best summarized the landscape of these studies, stating, “[S]everal studies indicate[d] that a substantial proportion of

179. See Boyd, *supra* note 75 (citation omitted).

180. NAT’L VICTIM CTR. & CRIME VICTIMS RESEARCH TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 7 (1992), <http://www.evawintl.org/Library/DocumentLibraryHandler.Ashx?id=538>.

181. TED R. MILLER ET AL., VICTIM COSTS AND CONSEQUENCES: A NEW LOOK (1996), <https://www.ncjrs.gov/pdffiles/victcost.pdf>.

182. See KREBS ET AL., *supra* note 3, at viii.

183. See *id.* at 1-1.

184. See Glenn Kessler, *One in Five Women in College Sexually Assaulted: The Source of This Statistic*, WASH. POST (May 1, 2014), <https://www.washingtonpost.com/news/fact-checker/wp/2014/05/01/one-in-five-women-in-college-sexually-assaulted-the-source-of-this-statistic/>; Jake New, *What Does the Oft-Cited ‘1 in 5’ Campus Sexual Assault Stat Really Mean?*, PBS: THE RUNDOWN (Dec. 15, 2014, 1:48 PM), <http://www.pbs.org/newshour/rundown/critics-advocates-alike-doubt-oft-cited-1-5-campus-sexual-assault-stat/>; Ashe Schow, *No, 1 in 5 Women Have Not Been Raped on College Campuses*, WASH. EXAMINER (Aug. 13, 2014, 10:31 AM), <http://www.washingtonexaminer.com/no-1-in-5-women-have-not-been-raped-on-college-campuses/article/2551980>.

185. Ameer Wurzburg & Nadia Dawisha, *Teen Sexual Violence: What the Media Is Missing*, HUFFINGTON POST: THE BLOG (Nov. 15 2013, 11:29 AM), [http://www.huffingtonpost.com/amee-wurzburg/-teen-sexual-violence-what\\_b\\_4271318.html](http://www.huffingtonpost.com/amee-wurzburg/-teen-sexual-violence-what_b_4271318.html).

186. SARAH MCMAHON ET AL., CAMPUS CLIMATE SURVEYS: LESSONS LEARNED FROM THE RUTGERS-NEW BRUNSWICK PILOT ASSESSMENT 5 (2015), <https://socialwork.rutgers.edu/file/650/download?token=896Jpn6P>.

female students—between 18 and 20 percent—experience rape or some other form of sexual assault during their college years.”<sup>187</sup>

A dispute over whether 5% or 20% of women in college experience sexual assault misses the point. The more relevant analysis is whether a harm to health, safety, or welfare exists to which criminal law can be responsive.<sup>188</sup> If so, the next line of inquiry is whether affirmative consent is a tool that can serve as a response to that harm.<sup>189</sup> The research demonstrates that such a problem exists and that it has many facets. First, according to numerous surveys, a substantial portion of eighteen to twenty-four year olds are being victimized in the most invasive ways.<sup>190</sup> Second, this discovery translates to thousands of people, particularly marginalized individuals and women who are at an increased risk of sexual assault.<sup>191</sup> A comprehensive assessment of the problem as to why victims do not self-identify requires more than counting victims; it also requires an examination of the factors contributing to its cause. These include a climate or culture that seemingly accepts or normalizes unconsented-to sex to the victims’ detriment.<sup>192</sup> This dimension is apparent from the historical lack of action by institutions as well as the vast underreporting of the crime.<sup>193</sup>

A number of different forces influence victim underreporting. One seems to be that victims themselves do not identify their experiences as criminal.<sup>194</sup> While some might suggest that this lack of self-identification represents conclusive proof that no sexual assault took place, it would again be an instance of the law treating victims of sexual assault differently than those of other offenses.<sup>195</sup> For example, in the national movement to combat sex trafficking, it is widely acknowledged that one of the challenges to prosecutions is that many victims do not consider themselves victims.<sup>196</sup> Yet,

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187. *Sexual Assault on Campus: Measuring Frequency*, NAT’L INST. JUST. (Oct. 1, 2008), <http://www.nij.gov/topics/crime/rape-sexual-violence/campus/pages/measuring.aspx>.

188. LAFAVE, *supra* note 47, § 1.2(e), at 13–14.

189. *See* Tuerkheimer, *supra* note 3, at 10–13.

190. *See* SINOZICH & LANGTON, *supra* note 77, at 1–3.

191. CHERYL HOLM-HANSEN & LAURA MARTELL KELLY, CRITICAL ISSUES IN SEXUAL ASSAULT 10–12 (2007), <https://www.wilder.org/Wilder-Research/Publications/Studies/Crime%20Victims%20Services/Critical%20Issues%20in%20Sexual%20Assault.pdf>; *see supra* notes 150–151, 159–165 and accompanying text (discussing campus sexual assault statistics).

192. *See* Tuerkheimer, *supra* note 3, at 17.

193. *E.g., id.* at 7.

194. *See* Astbury, *supra* note 173. That is not to say that they do not identify nonconsensual sex as criminal. *Id.* As Deborah Tuerkheimer points out, the fact that society has moved to the understanding that nonconsensual sex is wrong is beyond dispute. *See generally* Tuerkheimer, *supra* note 3. But, as is often the case in sexual assaults, intimate partner violence, and human trafficking, they do not see their experiences objectively and are reluctant to self-identify as victims.

195. CASSIA SPOHN & KATHARINE TELLIS, POLICING AND PROSECUTING SEXUAL ASSAULT 4 (2011) (noting that research suggests sexual assault victims “may receive either overt or subtle messages from police regarding the difficulties that will be encountered in prosecuting the case”).

196. Chelsea Parsons et al., *3 Key Challenges in Combating the Sex Trafficking of Minors in the United States*, CTR. FOR AM. PROGRESS (Apr. 8, 2014, 9:22 AM), <https://www.americanprogress.org/>



society has not decided to no longer implement laws that protect those victims.<sup>197</sup> To the contrary, it has implemented some laws that attempt to address that reality.<sup>198</sup> For example, the Trafficking Victims Protection Act (TVPA) defines sex trafficking to include “survival sex”—sex in exchange for shelter or drugs—precisely because some victims do not understand that as commercial sex.<sup>199</sup> Similarly, in the field of domestic violence, it is again understood that many victims do not see their violent relationship objectively and therefore do not self-identify as victims. Yet, society has not let that be determinative of whether a crime has occurred.<sup>200</sup> Indeed, many states adopted policies or other mechanisms allowing them to pursue these cases notwithstanding uncooperative victims. Additionally, part of the solution includes educating women about what domestic violence looks like so they will recognize it when it becomes part of their personal experience.

Not only is there an element of acceptance of rape culture among victims but also among potential perpetrators.<sup>201</sup> Some research suggests that a significant number of men embrace this climate.<sup>202</sup> For example, David Lisak and Paul Miller found that 63.3% of men at one university who self-reported acts qualifying as rape or attempted rape admitted to committing repeated rapes.<sup>203</sup> A small study of over 300 male college athletes at one university found that a majority of them admitted to coercing a partner into sex and that there is a correlation between admitting to coercive sex acts and endorsing rape myths, such as the idea that if the victim does not fight back, no rape occurred.<sup>204</sup> Events at Baylor University,<sup>205</sup> Stanford

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issues/criminal-justice/report/2014/04/08/87293/3-key-challenges-in-combating-the-sex-trafficking-of-minors-in-the-united-states/.

197. See Katie Pedigo, *Trafficking Victims Protection Act Deserves Passage*, DALL. NEWS (June 2012), <http://www.dallasnews.com/opinion/latest-columns/20120624-katie-pedigo-trafficking-victims-protection-act-deserves-passage.ece> (indicating that Congress failed to reauthorize the TVPA in 2011).

198. See 22 U.S.C. § 7102 (2016).

199. See *id.* § 7102(9)(B); see also BEAUTIFUL ONES MINISTRIES, INC., RAPID ASSESSMENT ON DOMESTIC MINOR SEX TRAFFICKING: MISSISSIPPI HINDS, MADISON, RANKIN AND WARREN COUNTIES 20 (2015), <http://sharedhope.org/wp-content/uploads/2015/03/MS-Rapid-Assessment-22715.pdf> (explaining the common process through which minors are used in commercial sex).

200. See *infra* notes 290–300 and accompanying text (describing the societal response to domestic violence).

201. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 78 (2002).

202. See *id.* (indicating that 120 out of 1,882 men sampled (6.4%) met the criteria for rape or attempted rape).

203. *Id.* at 78–80.

204. Belinda-Rose Young et al., *Sexual Coercion Practices Among Undergraduate Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes*, VIOLENCE AGAINST WOMEN, July 9, 2016, at 1.

205. Tommy Witherspoon, *Ex-Baylor Student Testifies Football Player Assaulted Her*, WACOTRIB.COM (Aug. 18, 2015, 11:01 AM), [http://www.wacotrib.com/news/courts\\_and\\_trials/ex-baylor-student-testifies-football-player-assaulted-her/article\\_ea539beb-8160-52c2-bdf9-08483ee19c67.html](http://www.wacotrib.com/news/courts_and_trials/ex-baylor-student-testifies-football-player-assaulted-her/article_ea539beb-8160-52c2-bdf9-08483ee19c67.html).

University,<sup>206</sup> Steubenville High School,<sup>207</sup> and Brown University<sup>208</sup> all speak to a culture in which men engage in sex with incapacitated victims but characterize it as something else—something normal within their campus cultures.<sup>209</sup>

Ten years ago, society did not realize that sexual assault was a significant problem for college-age women and women in general. Schools were not reporting statistics accurately, and students were not reporting offenses.<sup>210</sup> Whether the number is 5% or 20%, women and marginalized people are experiencing sexual assault at an unacceptable level.<sup>211</sup> Moreover, the research clearly suggests that much of the assault culture is related to alcohol consumption and a climate in which offenders think about sex as an act done *to* someone as opposed to *with* someone, and some women believe that such an assault will not be taken seriously.<sup>212</sup> Therefore, the question of whether there is a risk to health and welfare is answered clearly with a “yes,” and the legacy of an unresponsive criminal justice system to this social harm is longstanding.

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206. Ray Sanchez, *Stanford Rape Case: Inside the Court Documents*, CNN, <http://www.cnn.com/2016/06/10/us/stanford-rape-case-court-documents/> (last updated June 11, 2016).

207. Richard A. Oppel, Jr., *Ohio Teenagers Guilty in Rape that Social Media Brought to Light*, N.Y. TIMES (Mar. 17, 2013), [http://www.nytimes.com/2013/03/18/us/teenagers-found-guilty-in-rape-in-steubenville-ohio.html?\\_r=0](http://www.nytimes.com/2013/03/18/us/teenagers-found-guilty-in-rape-in-steubenville-ohio.html?_r=0).

208. *Amid Stanford Sex Assault Furor, New Light Being Shed on Campus Rapes*, CBSNEWS, <http://www.cbsnews.com/news/amid-stanford-baylor-furors-new-light-being-shed-on-campus-rapes/> (last updated June 8, 2016).

209. See Nick Anderson, *These Colleges Have the Most Reports of Rape*, WASH. POST (June 7, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/06/07/these-colleges-have-the-most-reports-of-rape/>; see also Hailey Branson-Potts, *Swedish Grad Students Who Pinned Down Stanford Sex Offender Speak Out*, L.A. TIMES (June 8, 2016, 7:35 AM), <http://www.latimes.com/local/lanow/la-me-ln-stanford-rape-witnesses-20160607-snap-story.htmlstory.html>. This is most starkly demonstrated in events surrounding the sentencing of Stanford University swimmer Brock Turner, who was convicted of sexually assaulting his unconscious victim behind a dumpster. Sanchez, *supra* note 206. This crime was stopped by the intervention of two bystanders who chased and held Turner after they stopped him from continuing his penetration of the unconscious naked victim. *Id.* At his sentencing, he and his father described the event as the product of “poor decision making,” “drinking,” and a “misunderstanding.” See Tyler Kingkade, *Brock Turner’s Dad Gave Tone-Deaf Plea for Lenient Sentence in Son’s Sexual Assault Case*, HUFFINGTON POST (June 5, 2016, 7:26 PM), [http://www.huffingtonpost.com/entry/brock-turner-dad-action-stanford-sexual-assault\\_us\\_57548e2fe4b0c3752dcd574](http://www.huffingtonpost.com/entry/brock-turner-dad-action-stanford-sexual-assault_us_57548e2fe4b0c3752dcd574). The judge apparently agreed and sentenced Turner to six months in prison because anything more would have “a severe impact” on his life. See Veronica Rocha & Richard Winton, *Light Sentence for Stanford Swimmer in Sexual Assault ‘Extraordinary,’ Legal Experts Say*, L.A. TIMES (June 8, 2016, 7:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-stanford-sexual-assault-sentence-20160607-snap-story.html>. With credit for good behavior, this student athlete received a ninety-day sentence for three counts of felony sexual assault on an unconscious person. *Id.*

210. See Anderson, *supra* note 209.

211. Nick Anderson & Scott Clement, *1 in 5 College Women Say They Were Violated*, WASH. POST (June 12, 2015), <http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/> (finding that 20% of female students report being assaulted by force or while incapacitated).

212. See Tuerkheimer, *supra* note 3, at 12 n.57 (citing a University of California, Berkeley study about the impact of intoxication on consent).

### B. Liability Assignment Problem of Sexual Assault

Research also reflects that there is a liability assignment problem for criminal law to address. As discussed, one function of criminal law is liability assignment, in which the law determines who merits punishment.<sup>213</sup> However, under the current regime, this (the offender and victim) has failed.<sup>214</sup> The liability assignment problem begins with the offense (the offender and victim) and continues throughout the system, thereby creating a systemic liability assignment failure.<sup>215</sup> As discussed *supra*, many offenders and victims do not identify unconsented-to sex as a sexual assault when it occurs, and this is when liability assignment failure begins. In 2014, approximately 30% of universities provided no training to students on what constitutes sexual assault.<sup>216</sup> Moreover, emerging adults, ages eighteen to twenty-four (the parties most at risk of being involved), currently misunderstand sexual assault law.<sup>217</sup> This cohort continues to envision sexual assault as consisting primarily of a stranger-on-victim forcible rape in which the victim must fight back.<sup>218</sup>

It is beyond dispute that sexual crimes are among the most underreported.<sup>219</sup> Some research suggests that more than 90% of campus sexual assault victims do not report the event.<sup>220</sup> When they do report, however, the investigation process is characterized by attrition and it significantly fails to assign liability. The CSA found that not only did a small percentage of rape victims report their crime, but when they did, “[a] very small number of victims reported that the assailant received any disciplinary action from the university or that the assailant was arrested, prosecuted, or convicted by the criminal justice system.”<sup>221</sup> An investigation by the Center for Public Integrity concluded that colleges “almost never” expel men who are not only accused of sexual assault but also found responsible for such an assault.<sup>222</sup>

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213. See Robinson, *supra* note 51, at 257.

214. Roca & Winton, *supra* note 209 (stating that the judge mitigated the sentence because it would have a “severe impact” on the defendant’s life).

215. *Id.*; see also Robinson, *supra* note 51.

216. U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, *supra* note 61, at 7.

217. *Id.* (indicating that the majority of students are aged eighteen to twenty-four).

218. HEATHER M. KARJANE ET AL., SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 2 (2005), <https://www.ncjrs.gov/pdffiles1/nij/205521.pdf>.

219. NAT’L SEXUAL VIOLENCE RESEARCH CTR., STATISTICS ABOUT SEXUAL VIOLENCE (2015), [http://www.nsvrc.org/sites/default/files/publications\\_nsvrc\\_factsheet\\_media-packet\\_statistics-about-sexual-violence\\_0.pdf](http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf); see also CALLIE MARIE RENNISON, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000, at 2 (2002), <http://www.bjs.gov/content/pub/pdf/rsarp00.pdf> (indicating that over half of all sexual assaults go unreported).

220. FISHER ET AL., *supra* note 57, at 27 (reporting that fewer than 5% of sexual assault cases are reported to police).

221. KREBS ET AL., *supra* note 3, at xvii.

222. Joseph Shapiro, *Failed Justice Leaves Rape Victim Nowhere to Turn*, NPR (Feb. 25, 2010, 12:01 PM), <http://www.npr.org/templates/story/story.php?storyId=124052847>.

On a granular level, the ground response to reported sexual assaults on campus is inadequate.<sup>223</sup> A Senate report found that more than 20% of universities provided no training on sexual assault to their faculty or staff.<sup>224</sup> Research also suggests that campus police officers' adherence to rape myths is strongly related to their attitudes toward victims and the clearance of sexual assault cases.<sup>225</sup> The report found that the acceptance of commonly held misconceptions about rape predicted that officers' opinions of the victims were partially to blame and that intoxication minimized the credibility and seriousness of the case.<sup>226</sup>

Indeed, the evidence showing that schools are failing to properly investigate sexual assault allegations is long-standing. In 1990, Congress enacted the Clery Act in response to a concern that universities were not disclosing criminal activity on their campuses.<sup>227</sup> This Act requires universities that receive financial aid to disclose campus safety information and information regarding their handling of sexual violence incidents.<sup>228</sup>

Concern grew as more was learned about campus sexual assault. In 2013, Congress enacted the SaVE Act, which amended the Clery Act as part of the Violence Against Women Reauthorization Act.<sup>229</sup> The SaVE Act requires universities to increase transparency about the scope of sexual violence by collecting and distributing information.<sup>230</sup> It also requires improvements in systems for investigating and responding to allegations of sexual assault.<sup>231</sup> Notwithstanding the twenty years of legislation demanding universities effectively respond to campus sexual assault, a 2014 United States Senate report found that 40% of colleges had not investigated one accusation of sexual assault in the previous five years.<sup>232</sup> Indeed, the White House Task Force was a product of the realization that institutions of higher learning were doing far too little to assess their campuses for sexual violence; educate their students and staff for prevention; train their employees to

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223. Kimberly Hefling, *Justice Department: Majority of Campus Sexual Assault Goes Unreported to Police*, PBS: THE RUNDOWN (Dec. 11, 2014, 1:30 PM), <http://www.pbs.org/newshour/rundown/four-five-acts-campus-sexual-assault-go-unreported-police>.

224. U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, *supra* note 61.

225. *See generally* Molly Smith et al., *Rape Myth Adherence Among Campus Law Enforcement Officers*, 43 CRIM. JUST. & BEHAV. 539 (2016).

226. *Id.* at 553.

227. *See* 20 U.S.C. § 1092(f) (2016).

228. *See id.*

229. Rachel Marshall, *Will It Really SaVE You? Analyzing the Campus Sexual Violence Elimination Act*, 6 LEGIS. & POL'Y BRIEF 271, 278 (2014).

230. *Id.* at 281.

231. *Id.* at 278. These improvements included publishing procedures and informing students of their rights when reporting sexual violence. *Id.* The SaVE Act also required prevention and education programming. *Id.* at 278, 281.

232. U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, *supra* note 61.

recognize and respond; and implement response mechanisms that support reporting, investigating, and adjudicating offenses.<sup>233</sup>

The liability assignment problem does not end with the parties to the crime or the inadequate university response. It continues through layers of attrition throughout the system. This next layer involves the police and prosecutors. The Urban Institute documented the phenomenon of attrition that occurs at the time a sexual assault is reported:

According to the NCVS, out of the 36 percent of incidents reported to police from 2005 to 2010, police responded in only 84 percent of cases. Of those incidents that had a police response, only 86 percent involved the police taking a report. Ultimately, a police report was generated for only about a quarter of the actual rape or sexual assault victimizations reported by the entire survey sample.

Things only get worse at court. One national study found that only about 8 percent of rape victimizations resulted in the perpetrator being criminally prosecuted. Those who committed rape were convicted in 3 percent of cases, and incarcerated in only 2 percent of cases.<sup>234</sup>

This phenomenon once again represents a scenario in which sexual assault cases—and sexual assault victims—are treated differently than in other types of crime.<sup>235</sup> Over recent decades, crime in the United States has generally been on the decline except for sexual assault.<sup>236</sup> However, the ratio of reports to arrests is not seeing similar growth.<sup>237</sup> To the contrary, “there appears to be a consistently widening gap between the numbers of reports versus arrests for forcible rape, which differs markedly from the pattern seen with other

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233. CHRISTOPHER KREBS ET AL., CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT 1 (2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf>; Tuerkheimer, *supra* note 3, at 7–8 (arguing that institutional breakdown has contributed to a festering rape culture, including a hostile environment, inadequately trained staff, and insufficient adjudication procedures).

234. Pelletier & Zweig, *supra* note 129; *see also* Megan A. Alderden & Sarah E. Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 525, 525 (2012) (noting that “[r]esearch has found that the attrition rate continues to be high for sexual assault cases”).

235. Martha A. Myers & Gary D. LaFree, *Sexual Assault and Its Prosecution: A Comparison with Other Crimes*, 73 J. CRIM. L. & CRIMINOLOGY 1282, 1286 (1982).

236. *See* Neil Howe, *What’s Behind the Decline in Crime?*, FORBES (May 28, 2015, 5:04 PM), <http://www.forbes.com/sites/neilhowe/2015/05/28/whats-behind-the-decline-in-crime/#586ffdbc7733>; Laura Stampler, *Report Sees Surge in Sex Crimes on College Campuses*, TIME (June 10, 2014), <http://time.com/2851844/number-of-campus-sex-crimes-reported-surges-by-50/>.

237. *See infra* note 243 and accompanying text (showing that affirmative consent is not directly related to increased arrests).

violent crimes.”<sup>238</sup> Research suggests that the attrition exists at both the police and prosecution levels.<sup>239</sup>

Evidence suggests some police are wary about sexual assault crimes in general. Research about the factors considered in the arrest decision indicates this attrition is more than a natural screening function for law enforcement prior to charging individuals with crimes.<sup>240</sup> A number of factors influence their decision to arrest, including discrepancies in victim reporting, the race of the suspect, witness presence, completed rape kits, injury, victim resistance, and victim preference.<sup>241</sup> While some factors may be relevant to the decision to charge, “[a] consistent theme found in research on sexual assault outcomes is the role played by legally irrelevant factors especially the relationship between the victim and offender, the racial composition of the suspect-victim dyad, and stereotypes regarding ‘real rapes’ and ‘genuine victims.’”<sup>242</sup> The pattern that arrest rates decrease after consideration of such factors is concerning.<sup>243</sup> Moreover, many of these factors, such as injury, witness presence, and victim resistance, will not be present in what society has come to understand as some of the most common forms of sexual assault both on and off campus—acquaintance sexual assault and incapacitated sexual assault.<sup>244</sup> Therefore, these factors are not based in reality and are not functioning as considerations but as screening-out mechanisms.

This effect can be compounded when the case reaches the prosecutor. Prosecutors have the discretion to decide which cases will be charged and which will not.<sup>245</sup> Yet, such cases suffer further disproportionate attrition from the screening function of a prosecutor.<sup>246</sup> Prosecutors are less likely to prosecute a case in which the parties know each other, let alone have a prior history.<sup>247</sup> Prosecutors are also influenced by the character of the victim, the presence of a weapon, timeliness in reporting, the victim’s injury, and discrepancies.<sup>248</sup> Again, many of these influential factors are either improper or misplaced in the most common sexual assaults.<sup>249</sup>

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238. Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18 *VIOLENCE AGAINST WOMEN* 145, 149–50 (2012).

239. SPOHN & TELLIS, *supra* note 195, at 3. (“[T]here is compelling evidence that sexual assault remains a crime characterized by high rates of attrition, and that the locus of case attrition lies with the gatekeepers of the criminal justice system: police and prosecutors.”)

240. Alderden & Ullman, *supra* note 234, at 535.

241. *Id.* at 537–38.

242. SPOHN & TELLIS, *supra* note 195, at 9; Alderden & Ullman, *supra* note 234, at 544.

243. *Id.* at 540.

244. Heather Littleton et al., *Impaired and Incapacitated Rape Victims: Assault Characteristics and Post-Assault Experiences*, 24 *VIOLENCE & VICTIMS* 439, 444 (2009).

245. *See* Alderden & Ullman, *supra* note 234, at 528.

246. *Id.* at 529.

247. *Id.* at 539.

248. *Id.* at 537–38.

249. *Id.* at 530.

Nowhere in an attrition problem are police and prosecution biases more apparent than in the number of sexual assault kits that are never tested. In 2009 and 2010, national attention was brought to the fact that tens of thousands of sexual assault kits throughout the country were never tested.<sup>250</sup> The Department of Justice determined that police had not submitted forensic evidence—not just sexual assault kits but fingerprints, residue, etc.—in 18% of unsolved sexual assault cases.<sup>251</sup> Rape is a first-degree felony in most jurisdictions.<sup>252</sup> It is hard to imagine police possessing a collection of evidence in other felonies, such as homicides or kidnappings, and failing to test it to identify a perpetrator. Yet, many jurisdictions did this en masse for sexual assaults.<sup>253</sup>

Sexual assault cases are difficult to prosecute. The need for corroboration of a victim is essential in building a case.<sup>254</sup> This is especially true in sexual assault cases, in which the victim's credibility is often attacked.<sup>255</sup> The advent of forensic evidence is an important advancement in the investigation of such cases because it can provide the necessary corroboration.<sup>256</sup> Yet, in thousands of open cases in which a victim consented to a sexual assault kit, police simply failed to submit the evidence for analysis.<sup>257</sup>

It appears that victims between ages eighteen and twenty-four suffer two-fold attrition. First, there is a general attrition of sexual assault investigations and prosecutions.<sup>258</sup> Second, when police and prosecutors bring outdated perceptions of sexual assault to their work, they further discriminate against sexual assault cases.<sup>259</sup> “It remains a crime in which stereotypes of real rapes and genuine victims play a key role in determining whether the suspect will be arrested, charged, prosecuted, and convicted.”<sup>260</sup>

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250. See NANCY RITTER, NAT'L INST. OF JUSTICE, *THE ROAD AHEAD: UNANALYZED EVIDENCE IN SEXUAL ASSAULT CASES* 4–5 (2011), <http://www.ncjrs.gov/pdffiles1/nij/233279.pdf> (acknowledging there is no way to determine the exact number but noting that the number of untested sexual assault kits, at least 10,000 in Los Angeles, 12,000 in Dallas, and 10,500 in Detroit, indicated the breadth of the problem).

251. See *id.* at 1, 3.

252. See Lauren Hoyson, *Rape Is Tough Enough Without Having Someone Kick You from the Inside: The Case for Including Pregnancy as Substantial Bodily Injury*, 44 VAL. U. L. REV. 565, 576–78, 576 n.80 (2010).

253. See *id.*

254. See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 948 (2004).

255. See Alderden & Ullman, *supra* note 234, at 526–27.

256. See Myka Held & Juliana McLaughlin, *Rape & Sexual Assault*, 15 GEO. J. GENDER & L. 155, 161–62 (2014).

257. See RITTER, *supra* note 250, at 1. Of the 1,595 kits tested in Detroit, 28% “revealed the DNA identification of the perpetrator.” *Sexual Assault Investigations: Untested Evidence in Sexual Assault Cases*, NAT'L INST. JUST., <http://www.nij.gov/topics/law-enforcement/investigations/sexual-assault/Pages/unttested-sexual-assault.aspx> (last modified Mar. 18, 2016).

258. See Alderden & Ullman, *supra* note 234, at 525–26.

259. See Smith et al., *supra* note 225, at 540.

260. SPOHN & TELLIS, *supra* note 195; see Smith et al., *supra* note 225, at 540.

The NIJ report summarized the state of investigation and prosecution as follows: “[F]ew would dispute the existence of a bias in the criminal justice system — a higher priority placed on arresting a stranger who attacks an unknown victim than on a college student who rapes an intoxicated date . . . .”<sup>261</sup>

#### IV. AFFIRMATIVE CONSENT CULTURE IS RESPONSIVE TO SOCIAL HARMS AND SERVES THE PURPOSE OF CRIMINAL LAW

A social problem exists in our society: sexual assault, particularly of women, people of color, and members of the LGBTQ community. Regardless of the exact percentages, sexual assault affects a significant number of people.<sup>262</sup> It is a more prevalent form of victimization than previously understood, a particularly pernicious form of harm with long-lasting effects, and a harm plagued by a particular nonresponse problem. Affirmative consent culture speaks to these concerns and therefore serves the purpose of criminal law.

##### A. *The Criminal Law Legacy of Inadequate Response to the Social Harm of Unconsented-to Sexual Contact and Its Potential for Change*

The inadequate response of universities, police, and prosecutors to sexual assault is clear. This Section explores a distinct but equally disturbing legacy: inadequate laws regarding sexual assault. The history of sexual assault law is replete with examples of how the current structure is unresponsive to the realities of sexual assault.<sup>263</sup> This current system of laws as well as the resistance to affirmative consent standards at universities does not reflect the experiences of women who have suffered a sexual assault.<sup>264</sup> Research demonstrates that most victims know their perpetrators; that physical force is used less often than incapacitation and other forms of coercion; that physical injury is rarely caused; and that the harm of unconsented-to sex is long-term.<sup>265</sup> Regarding the eighteen- to twenty-four-year-old cohort, particularly those who are students, sexual contact with people who are incapacitated or unconscious occurs with far

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261. RITTER, *supra* note 250, at 7.

262. See Breiding et al., *supra* note 129, at 1–2.

263. See generally Anderson, *supra* note 39 (reviewing the history of sexual assault law in the United States).

264. WHITE HOUSE COUNCIL ON WOMEN AND GIRLS & THE OFFICE OF THE VICE PRESIDENT, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 7–8, 33 (2014), [https://www.whitehouse.gov/sites/default/files/docs/sexual\\_assault\\_report\\_1-21-14.pdf](https://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf) [hereinafter RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION].

265. See Anderson, *supra* note 254, at 979–80; Breiding et al., *supra* note 129, at 1–2.



more frequency than originally thought.<sup>266</sup> The law, however, continuously fails to reflect the reality of the experience of rape. As Michal Buchhandler-Raphael wrote,

[R]ape, as defined by our criminal justice system, bears little resemblance to the various forms of sexual abuses that are inflicted on victims. While rape law typically criminalizes only the physically violent sexual attack, it refuses to criminalize an array of abuses, effectively disregarding prevalent forms of sexual violence and misconceiving the crime of rape.<sup>267</sup>

Not only does the law not reflect the reality of rape in many instances, it also does not reflect social norms regarding rape. Deborah Tuerkheimer thoughtfully outlined that society has embraced the idea of unconsented-to sex as rape.<sup>268</sup> She noted, however, that criminal law says something different because it does not focus on consent but instead treats force as the central characteristic of rape.<sup>269</sup> Although some resistance remains, some scholars and commentators who are familiar with the reality of sexual assaults as they actually occur have recognized that condemnation of unconsented-to sex as rape appears to be the majority consensus.<sup>270</sup>

Therefore, an affirmative consent culture has a place within the law because it serves the functions of criminal law. It is responsive to the social harm of unconsented-to sex by articulating a rule that is clearer to the parties at risk of perpetrating or being victimized by a sexual assault. It also provides clarity to those charged with investigating and prosecuting such cases.

### B. Rule Articulation

Regarding rule articulation, an affirmative consent culture can be particularly helpful. Many opponents to sexual assault reform, in general, argue that the ambiguities present in an acquaintance rape situation merit a requirement of force in the law.<sup>271</sup> They assert that it can be unclear when a person gives consent to a potential perpetrator, particularly when under the

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266. See KREBS ET AL., *supra* note 57, at xiii (noting that intoxication plays a significant role in sexual assault cases).

267. Buchhandler-Raphael, *supra* note 71, at 151.

268. See Tuerkheimer, *supra* note 3, at 9–12.

269. See *id.* at 42. As such, Tuerkheimer argues that the criminal law should protect sexual agency and that affirmative consent standards “construct sexuality to underscore its agentic qualities.” *Id.* at 42–43.

270. See, e.g., ESTRICH, *supra* note 46; Anderson, *supra* note 39, at 1951; Tuerkheimer, *supra* note 3, at 6; Maya Dusenbery, *No, California’s New Affirmative Consent Law Will Not Redefine Most Sex as Rape*, FEMINISTING, <http://www.feministing.com/2014/10/07/no-californias-new-affirmative-consent-law-will-not-redefine-most-sex-as-rape/> (last visited Oct. 9, 2016).

271. See Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 232–33 (2015).

influence of alcohol.<sup>272</sup> This argument is concerned about labeling a person a criminal who may be reasonably mistaken on the issue of consent.<sup>273</sup> Hence, they resist any change in sexual assault law.<sup>274</sup>

However, affirmative consent standards can assist in the rule articulation aspect of criminal law.<sup>275</sup> Utilizing such a standard makes it clearer not what consent is but what kind of consent a person must obtain to engage in sexual contact.<sup>276</sup> Moreover, such a standard prevents a court from speculating about whether consent occurred.<sup>277</sup> The current law can consider passivity as consent, even when the victim could not have articulated consent.<sup>278</sup> With an affirmative consent standard, a potential offender knows what he must obtain to continue: an affirmative and voluntary agreement to engage in sexual activity from a conscious person who is not incapacitated.<sup>279</sup>

### C. Liability Assignment

Incorporating affirmative consent into the response to sexual assault also assists in the liability assignment problem. Attrition is a problem not only due to victims' frequent unwillingness to report but also to investigators' decisions to not take a report, let alone investigate a case.<sup>280</sup> These investigators would have clearer guidance in making such decisions in cases in which the victim's passivity did not manifest consent but an inability to consent.<sup>281</sup> Michelle Anderson noted in her scholarship that "frozen fright," a common response to sexual trauma, qualifies as consent under the common law.<sup>282</sup> The reality for many victims today is that there is little chance of obtaining a prosecution and conviction for a rape allegation when the victim knows the defendant or when alcohol is involved without extrinsic physical injuries.<sup>283</sup> "Disbelief and disregard are common."<sup>284</sup> Affirmative consent

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272. See *id.* at 236–37.

273. See *id.*

274. See *id.* at 244.

275. See Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 688–90 (1999).

276. *Id.* at 688 (“[G]iven the alarming frequency with which sex occurs on college campuses without a meeting of the minds on the question of consent, forcing people to focus on what consent means is not only appropriate, it is essential.”).

277. Stu Marvel, *Response to Tuerkheimer: Rape On and Off Campus: The Vulnerable Subject of Rape Law: Rethinking Agency and Consent*, 65 EMORY L.J. ONLINE 2035, 2046 (2016).

278. Tuerkheimer, *supra* note 3, at 29.

279. See Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381, 437 (2005) (noting that men should directly ask women questions); see also Maya Dusenbery, “Affirmative Consent” Just Means Mutual Desire. And It Should Definitely Be the Standard., FEMINISTING, <http://www.feministing.com/2014/06/25/affirmative-consent-just-means-mutual-desire-and-it-should-definitely-be-the-standard/> (last visited Oct. 9, 2016) (“‘Affirmative consent’ just means mutual desire. And it should definitely be the standard.”) (emphasis added).

280. See *supra* Section III.B.

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

282. *Id.* at 1432.

283. See Baker, *supra* note 271, at 235–44.

284. Anderson, *supra* note 39, at 1959.

can assist with the investigation and prosecution of cases. With the requirement of affirmative consent, an investigator would need to determine whether an affirmative act took place—for example, whether the person demonstrated voluntary consent—not the meaning of a failure to act.<sup>285</sup>

As this Article discusses below, this is not to say that the decision to prosecute is always clear and that affirmative consent removes ambiguity from every sexual assault case. Indeed, it does not. But it offers more clarity for applicable rule articulation and liability assignment. Therefore, it can assist the people involved in the sexual contact and the investigators to respond more precisely to given situations.<sup>286</sup> Thus, two functions of criminal law are better served with affirmative consent as a component of sexual assault law.

#### *D. Affirmative Consent Climate*

Of course, an affirmative consent definition within the criminal law is not the sole solution. This Article advances the idea of creating a consent climate or consent culture, not simply an affirmative consent element to sexual assault law. A component of that climate is an affirmative consent standard within criminal law. However, that is one part of a multidisciplinary response to our contemporary understanding of sexual assault.

What society needs, rather, is a cultural shift in which society deems the negative behavior no longer socially acceptable. Changes in the law may be necessary to achieve this goal, but they are never sufficient in addressing social problems with criminal dimensions.<sup>287</sup> Ultimately, the law seeks to prevent crime and, when prevention fails, respond appropriately by holding those responsible for wrongdoing accountable. This is the role an affirmative consent standard can play within a larger climate of consent by strengthening a sense of safety and order to society, and by recognizing the harm to the victim.

This Article, therefore, proposes the creation of an affirmative consent climate with three distinct prongs: (1) education, (2) social stigma, and (3) alteration of the law. What society needs is a multidisciplinary approach in which the law engages in a symbiotic relationship with society. Society is first educated about the reality of nonconsensual sex and its harm. Society then adjusts the law to reflect the understanding of that social harm. Society manifests its disapproval of the social action not only through formal condemnation under the criminal law but also through social stigma, which further deters potential offenders.

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285. *See id.* at 1978.

286. *See id.*

287. *See generally* SARAH MCMAHON WITH KAREN BAKER, CHANGING PERCEPTIONS OF SEXUAL VIOLENCE OVER TIME (2011), [http://www.vawnet.org/Assoc\\_Files\\_VAWnet/AR\\_ChangingPerceptions.pdf](http://www.vawnet.org/Assoc_Files_VAWnet/AR_ChangingPerceptions.pdf).

Society has recognized that there are few social problems it can criminalize out of existence. Most modern responses to crime involve importing a public health model into the contemporary understanding of a crime in an effort to end it.<sup>288</sup> Those three components often emerge together in combatting crime.<sup>289</sup> For example, educating many different social segments is a staple of society's response to domestic violence.<sup>290</sup> Society has been educated about the many significant harms of domestic violence, not only to the immediate victim but to the children and other stakeholders as well.<sup>291</sup> By way of prevention, society has also been educated regarding the signs of domestic violence.<sup>292</sup> This education was aimed not only at potential victims but also potential offenders and those who may witness evidence of, or be first responders to, such violence.<sup>293</sup> Social messaging changed to reflect that domestic violence is not acceptable.<sup>294</sup> Education can also trigger social stigma.<sup>295</sup> Society then amended the law to reflect this change in perspective with mandatory arrest statutes, preclusion of firearm possession statutes, and stiffer penalties for criminal acts.<sup>296</sup> Potential

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288. Todd C. Frankel, *Why the CDC Still Isn't Researching Gun Violence, Despite the Ban Being Lifted Two Years Ago*, WASH. POST (Jan. 14, 2015), <https://www.washingtonpost.com/news/storyline/wp/2015/01/14/why-the-cdc-still-isnt-researching-gun-violence-despite-the-ban-being-lifted-two-years-ago/> (discussing the CDC's attempt to classify gun violence as a national epidemic to help research and influence gun control policy).

289. Breiding et al., *supra* note 129, at 2 ("CDC seeks to prevent these forms of violence with strategies that address known risk factors for perpetration and by changing social norms and behaviors by using bystander and other prevention strategies.").

290. *Trainings*, NAT'L RESOURCE CTR. ON DOMESTIC VIOLENCE, <http://www.nrcdv.org/ta-training/> (last visited Oct. 9, 2016) (describing the initiative of the National Resource Center on Domestic Violence's response to 51,000 requests since 1994 for technical assistance relating to issues concerning domestic violence).

291. Ericka Kimball, *Edleson Revisited: Reviewing Children's Witnessing of Domestic Violence 15 Years Later*, 31 J. FAM. VIOLENCE 625, 627 (2016) (outlining the harmful psychological impacts of domestic violence on children).

292. *See Warning Signs and Red Flags, Is This Abuse?*, NAT'L DOMESTIC VIOLENCE HOTLINE, <http://www.thehotline.org/is-this-abuse/abuse-defined/> (last visited Oct. 9, 2016) (listing the warning signs and red flags for individuals who may be in abusive relationships); *see also Early Warning Signs of Domestic Violence*, NEW CHOICES INC, <http://www.newchoicesinc.org/help/DV/signs> (last visited Oct. 9, 2016).

293. *See Because Wanting to Stop Is NOT Enough*, EMERGE, <http://www.emergedv.com/> (last visited Oct. 9, 2016) (outlining the first abuser education program that targets individuals who are abusers and seek help to stop abusing).

294. *The Hotline Believes Abuse Is Never Acceptable*, NAT'L DOMESTIC VIOLENCE HOTLINE BLOG (Mar. 28, 2014), <http://www.thehotline.org/2014/03/the-hotline-believes-abuse-is-never-acceptable/>.

295. *See generally* Kristen Lombardi, *Biden Cites Progress on Campus Sexual Assault, but Says There's 'So Much Farther to Go'*, CTR. FOR PUB. INTEGRITY (Apr. 24, 2015, 5:00 AM), <https://www.publicintegrity.org/2015/04/24/17232/biden-cites-progress-campus-sexual-assault-says-theres-so-much-farther-go> (describing the educational community of the "It's On Us" campaign and the need to stigmatize offenders).

296. Mark A. Edwards, *Law and the Parameters of Acceptable Deviance*, 97 J. CRIM. L. & CRIMINOLOGY 49, 80 (2006) (discussing the process by which parameters of acceptable deviance are taken into account by legislators when making laws).

offenders, therefore, face stigma and criminal penalties.<sup>297</sup> Thus, a broader social safety net is woven surrounding domestic violence victims.<sup>298</sup> The same structure must be built for sexual assault.

California's Education Code offers an example of the implementation of such a multifaceted approach.<sup>299</sup> First, it includes an affirmative consent component that requires universities to develop sexual assault policies including a requirement that each party obtain affirmative, conscious, and voluntary agreement to engage in sexual contact.<sup>300</sup> Second, this amendment to the California Education Code includes education programs for all the relevant stakeholders.<sup>301</sup> These stakeholders include students, as demonstrated by the safety and responsibility component of the education programs.<sup>302</sup> It also references educating parents about how to best prepare their children for risks in the college setting.<sup>303</sup> The education program must also train faculty, staff, administration, and campus law enforcement figures on how to best respond to sexual assaults on campus.<sup>304</sup> By targeting multiple stakeholders, the educational component is designed to ensure that the risk of sexual assault decreases and that schools handle it appropriately when it occurs.<sup>305</sup>

Critical to this educational effort is not only whom the education targets but when. California includes a high school education component regarding what affirmative consent looks like and how to communicate and obtain it.<sup>306</sup> Furthermore, this education program also aims for public outreach and the dissemination of information regarding new policies.<sup>307</sup> Students are therefore put on notice of new expectations.<sup>308</sup>

Equally important is including not only what the new policies are but also why they exist.<sup>309</sup> This is where education overlaps with social stigma. In doing so, the plight of the victim is discussed and stigma is further established.<sup>310</sup> This explanation of *why* the law has changed is part of the

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297. Schwartz Law Firm, *Accused Sex Offenders Face Lifelong Stigma*, HG.ORG, <https://www.hg.org/article.asp?id=7645> (last visited Oct. 9, 2016).

298. *See generally Safety Net Project*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, <http://nnedv.org/projects/safetynet.html> (last visited Oct. 9, 2016).

299. *See* CAL. EDUC. CODE § 67386 (West 2014).

300. *Id.* § 67386(a)(1).

301. *See id.* § 67386 (qualifying the receipt of state funds for student financial assistance on California schools that adopt an affirmative consent standard).

302. *Id.* § 67386(d).

303. *Id.* § 67385(b)(7) (stating that procedures for appropriately handling requests for information from parents are necessary).

304. *Id.* § 67386(b).

305. *See id.* § 67386.

306. *Id.* § 67386(c).

307. *Id.* § 67386(d), (e).

308. *See id.*

309. *See id.* § 67386.

310. Sharyn J. Potter, *Reducing Sexual Assault on Campus: Lessons from the Movement to Prevent Drunk Driving*, 106 AM. J. PUB. HEALTH 822, 823 (2016).

social stigma.<sup>311</sup> It tethers the potential harm that could be inflicted on others to the purpose of the law.<sup>312</sup>

Education of multiple stakeholders, legal reform, and social stigma are all part of the reform reflected in California's laws and other successful models.<sup>313</sup> This form of cultural change is necessary to make significant inroads into sexual assault.

The short answer for those that suggest this will not be successful is that it has already been done. Decades ago, another highly destructive social problem was prevalent and socially acceptable: driving under the influence of alcohol. Since that time, the social and legal response has significantly shifted in ways unimaginable in previous decades. This Article advocates following the model of the anti-impaired driving movement as a blueprint for how to proceed.

#### *E. Anti-Impaired Driving Movement*

Today, driving while impaired is a criminal act and socially unacceptable behavior.<sup>314</sup> This was not always the case. In the mid-twentieth century, drunk driving was barely criminal.<sup>315</sup> Previous attempts to regulate alcohol consumption were not connected to automobile accidents but focused on temperance—a movement that did not resonate with the public.<sup>316</sup> Notwithstanding those efforts, thousands of people per year were dying in fatal automobile accidents.<sup>317</sup> The reality of this harm was not on the American consciousness.<sup>318</sup> When cases did make it to court, the sentences applied to them were lenient.<sup>319</sup> Through the three-pronged approach of education, legal reform, and social stigma, the climate around driving while impaired transformed and the public's safety increased.<sup>320</sup>

In the early 1980s, the anti-drunk driving movement emerged with new vigor.<sup>321</sup> Social science research about alcohol consumption, alcohol dependence, and the effects of alcohol had been growing, and some experts in the field recognized the connection between alcohol and highway accidents.<sup>322</sup> However, “[w]hat was certainly lacking was public concern

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311. See generally Scott Burris, *Stigma and the Law*, 367 LANCET 529 (2006).

312. See generally *id.*

313. CAL. EDUC. § 67386.

314. See James C. Fell & Robert B. Voas, *Mothers Against Drunk Driving (MADD): The First 25 Years*, 7 TRAFFIC INJ. PREVENTION 195, 210 (2006).

315. See *id.* at 195.

316. See Craig Reinerman, *The Social Construction of an Alcohol Problem: The Case of Mothers Against Drunk Drivers and Social Control in the 1980s*, 17 THEORY & SOC'Y 91, 93 (1988).

317. See generally *id.*

318. See generally *id.*

319. See Fell & Voas, *supra* note 314, at 206.

320. See *id.* at 197; see also Reinerman, *supra* note 316, at 101, 112.

321. See Reinerman, *supra* note 316, at 91.

322. See Fell & Voas, *supra* note 314, at 196.

with the drinking-and-driving problem.”<sup>323</sup> The change in public attitude and the law was largely due to citizen activism.<sup>324</sup> The emergence of grassroots organizations, such as Mothers Against Drunk Driving (MADD), and government offices, such as the National Institute of Alcohol Abuse and Alcoholism, transformed the public’s understanding.<sup>325</sup> Education regarding the danger of impaired driving included new research regarding the effects of alcohol on driving. Critically, a touchstone of the movement included a specific form of education that shared the experiences of those whose lives were catastrophically affected by impaired drivers.<sup>326</sup> This action informally educated the public about the effects of alcohol abuse and driving.<sup>327</sup> The public, in response, developed a growing social distaste for the activity.<sup>328</sup>

This education was essential on two fronts: the public at large and legislatures. By characterizing the harms of drinking and driving as a public health crisis, the public was able to see the need for action.<sup>329</sup> Moreover, by educating the public and increasing media exposure to the effects of alcohol on the safety of innocent victims, the public learned why such behavior was harmful and possessed a new, clearer understanding of the harm.<sup>330</sup> Legislators became responsive to the new public demands for legal reform and for a shifting framework of identifying the drunk driver as a criminal rather than a socially benign figure.<sup>331</sup> The movement successfully tied its goals to research and data as well as the personal stories of loss.<sup>332</sup>

This movement led to legal reform on a variety of levels. States eventually enacted laws that addressed the problem on multiple fronts, including outlawing driving while impaired, implementing license suspensions, enacting zero-tolerance laws for underage drinking, instituting sobriety checkpoints, and enacting minimum legal drinking age laws.<sup>333</sup> Among the most significant steps of the reform were laws that created a rebuttable presumption that a driver with a blood alcohol level over a certain maximum operated the vehicle in an impaired manner.<sup>334</sup> Similarly, state legislatures established mandatory minimum sentences for repeat offenders.<sup>335</sup> President Reagan, previously opposed to a national minimum drinking age of twenty-one, eventually bowed to the pressure from activists

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323. *Id.* at 206.

324. *Id.* at 197.

325. *Id.* at 207.

326. *See id.* at 197–200.

327. *Id.*

328. *Id.*

329. Reinerman, *supra* note 316, at 104.

330. *See id.* at 99; Fell & Voas, *supra* note 314, at 187.

331. *See* Fell & Voas, *supra* note 314, at 198.

332. *Id.* at 204.

333. *See id.* at 196–98.

334. *Id.* at 197.

335. *Id.* at 205.

and a newly awakened public awareness, signing a highway funding law linking funding to a minimum drinking age of twenty-one.<sup>336</sup>

This came about by marrying a grassroots movement with social science research.<sup>337</sup> Legal reform included not only changing laws but also strong enforcement, significant sanctions, and recognizing that the probability of apprehension as well as the speed and severity of sanctions are the most critical factors for deterrence.<sup>338</sup> This required the education and reform of police, judges, and court clerks.<sup>339</sup>

But, the change in climate did not end with educating policy makers and amending the criminal law. Minors were educated about the dangers of drinking and driving before they could drive.<sup>340</sup> Groups, such as Students Against Drunk Driving, emerged and created educational programs and protection strategies.<sup>341</sup> Much went into the social messaging that drinking and driving—once a socially acceptable behavior—was not only unacceptable but was also stigmatized.<sup>342</sup> Similarly, potential offenders were not the only ones educated in an effort to deter them.<sup>343</sup> Bystanders were educated to stop potential offenders from engaging in risky behaviors.<sup>344</sup> Use of a designated driver became normative behavior.<sup>345</sup> Some social institutions and organizations also backed this effort.<sup>346</sup> Bartenders and bars routinely engaged in the preventive behavior of calling taxicabs for patrons who were too intoxicated to drive.<sup>347</sup>

The grassroots movement was also met with opposition from industries that stood to lose reputation or profit, such as the alcohol industry. This was done by obfuscating the research that demonstrated the scope of the problem and by recharacterizing the purpose of the movement as prohibition.<sup>348</sup> Opponents also challenged these laws because they threatened to increase accountability for a previously underrepresented class of defendants, including the wealthy and educated.<sup>349</sup> The movement, however, refocused attention not on these defendants but on the harm they caused.<sup>350</sup>

The evolution from the socially acceptable and unthinking combination of drinking and driving to the present day stigma of drunk driving and

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336. Reinerman, *supra* note 316, at 99–100.

337. *See* Fell & Voas, *supra* note 314, at 204.

338. *Id.* at 206.

339. *Id.*

340. *Id.* at 203.

341. *Id.* at 204.

342. Potter, *supra* note 310.

343. Fell & Voas, *supra* note 314, at 203; Reinerman, *supra* note 316, at 109–11.

344. *See generally* Fell & Voas, *supra* note 314, at 204.

345. *See id.* at 208.

346. *Id.*

347. *See* Potter, *supra* note 310, at 823–26.

348. Fell & Voas, *supra* note 314, at 203.

349. *See* Reinerman, *supra* note 316, at 109–13.

350. *See id.*; Potter, *supra* note 310.



mandatory jail time offers a blueprint for the reform of sexual assault law. If one considers affirmative consent—similar to laws regarding blood alcohol levels—a *part* of the solution and not just *the* solution, then the sexual assault law reform movement shows promise. These laws are gaining acceptance because people are being educated about the real risks to health resulting from sexual contact without consent and the harm inflicted on a person victimized in this way.<sup>351</sup> This leads to a social stigma of such behavior and a recharacterization of the perpetrator as a criminal, not just a misunderstood person.<sup>352</sup> By creating a climate of consent, affirmative consent can be part of more than just a change in the law but also a social movement that actually protects more victims through the tools of education, social paradigm shifts, and criminal law.

### F. Resistance

As discussed in Parts I and II, the affirmative consent movement has made significant progress among the public. Indeed, it could be described as a grassroots movement from the public. The idea that unconsented-to sex is sexual assault is well accepted by many who live within the zone of risk.<sup>353</sup> However, there has also been pushback from certain sectors.<sup>354</sup> This Section outlines and analyzes the three main critiques of affirmative consent and suggests some of their sources.

As a threshold matter, it must be acknowledged that many of these arguments root themselves in some basic truisms, such as the goal of avoiding wrongful convictions or the desire not to transform every possible moral wrong into a criminal wrong. However, the use of these truisms to single out and obstruct sexual assault law reform when they apply equally to criminal law in general is problematic. This double standard furthers a legacy of treating sexual assault offenses differently than other offenses.

#### 1. Critique One: Affirmative Consent Will Not Eliminate Sexual Assault

This argument against progressive criminal law is not novel. In the affirmative consent context, it essentially arises in two forms. Some argue that the criminal law should not be used to change people's behavior and expect them to behave at an ideal level. This view argues that such an effort is a quixotic quest and will therefore always fall short of its intended goal.

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351. See David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 396–98, 411 (2000).

352. See Potter, *supra* note 310.

353. Bryden, *supra* note 351, at 320–21; Judith Shulevitz, *Regulating Sex*, N.Y. TIMES (June 27, 2015), [http://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html?\\_r=0](http://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html?_r=0).

354. Bryden, *supra* note 351, at 318–20; 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, 1357–63 (2005).

Another version of this argument expresses that this change in the law will make little difference because the current problems of establishing nonconsent (i.e., lack of witnesses and “he said–she said” testimony) will simply become problems in establishing a failure to obtain consent and thus is not worth pursuing.<sup>355</sup>

There are indeed more bold steps to be taken in legal reform that likely could have a more impactful effect on sexual assault, such as removing the force component from rape altogether.<sup>356</sup> Those measures are beyond the scope of this Article, which is narrowly focused on the current debate about the viability of affirmative consent as a positive development in sexual assault law.

This argument is another example of how rape and sexual assault are treated differently than other forms of crime. Several other crimes involve an element of nonconsent, such as theft, unauthorized use of property, and identity theft.<sup>357</sup> These involve the nonconsensual taking of property.<sup>358</sup> Sexual assault involves not only the violation of one’s body but also the nonconsensual taking of items far more personal: one’s sense of personal safety, sexual autonomy, and inherent human dignity, to name a few.<sup>359</sup> In these property crimes, the law does not require the owner to demonstrate an outward communication of nonconsent to the offender in order to demonstrate a lack of consent.<sup>360</sup> For property crimes, the law finds it sufficient to meet the element of nonconsent when the prosecutor presents evidence that the defendant did not have permission to take the property.<sup>361</sup> This is typically accomplished by having the owner testify that the stolen item is his, where he last left the property, how he discovered it missing, and that he never gave permission to the defendant to possess it.<sup>362</sup>

Yet for the personal crime of sexual assault, the law requires more to establish the same element of nonconsent—namely, that the victim communicated externally to the offender that her sexual autonomy was not the offender’s to take.<sup>363</sup> This distinction singles out sexual assault perpetrators for more lenient treatment even though their violation is far more personal than the taking of property.<sup>364</sup> Still, the argument persists against changing sexual assault law to match these other crimes by including an affirmative consent standard within the definition of consent.<sup>365</sup> No reason

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355. Little, *supra* note 354, at 1345.

356. Bryden, *supra* note 351, at 320–22.

357. Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1121, 1126 (1986).

358. *Id.* at 1126.

359. *Id.* at 1105, 1121.

360. *See id.* at 1121, 1126.

361. *See, e.g.*, 18A *CAL. JUR. 3D Criminal Law: Crimes Against Property* § 263 (2016).

362. *See id.*

363. *See* Bryden, *supra* note 351, at 320–22.

364. *See id.*

365. *Id.* at 400–02; Little, *supra* note 354.

exists why nonconsent should be more difficult to prove in a sexual assault than in any other nonconsent crime.

A variation of this argument is that sexual assaults will continue even after this reform effort; therefore, the effort is not appropriate. Again, this is an argument that has no traction in other crimes, so it should not be acceptable for sexual assaults. Theft still continues under its current design, but there is no legitimate movement to require an owner of a vehicle to actively resist a thief prior to the car being taken.<sup>366</sup> People continue to steal checks and utter them, but no legitimate movement exists to require true owners to prove they do not consent to that. There is no reason to keep sexual assault crimes separate from all the other crimes that have nonconsent as an element. The rejection of this argument can be boiled down to the old maxim: “Don’t reject the good for the perfect.” Yes, these crimes will continue just as theft cases continue, and the proof of consent or nonconsent must still be established.<sup>367</sup> But that is no reason to reject positive reforms and continue to treat consent in sexual assault cases differently from other cases.

Many other crimes seem insurmountable as well—terrorism continues to grow, the opioid epidemic attacks all socioeconomic classes, and gang violence has been unabated over decades.<sup>368</sup> Yet, different solutions continue to be effectuated to combat these significant social problems and criminal behaviors.<sup>369</sup> This is true even when the likelihood of being victimized by some of these persistent crimes is statistically low.<sup>370</sup> Notwithstanding that reality, lawmakers do not throw in the towel and refuse to make improvements in the law. To the contrary, as our understanding of certain crimes and their harm grows, we increase penalties, expand the scope of crimes, engage in anti-recruitment programs, and educate potential offenders about the dangers of joining such groups, the harm they caused, and the potential criminal sanctions.<sup>371</sup> While these measures will not completely eliminate such violence, they are not regarded as quixotic. Conversely, if

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366. See Press Release, Dep’t of Justice, For Second Consecutive Year Violent and Property Crime Rates Increased in 2012 (Oct. 24, 2013), [ojp.gov/newsroom/pressreleases/2013/ojppr102413.pdf](http://ojp.gov/newsroom/pressreleases/2013/ojppr102413.pdf).

367. *E.g.*, *In re E.B.*, No. 2013–255, 2013 WL 9055950, at \*3 (Vt. Dec. 1, 2013) (finding evidence concerning consent “not as strong as it could be” but finding nonconsent established by several factors, including age, contrasting roles, and versions of facts).

368. GARY LAFREE ET AL., INTEGRATED UNITED STATES SECURITY DATABASE (IUSSD): DATA ON THE TERRORIST ATTACKS IN THE UNITED STATES HOMELAND, 1970 TO 2011, at 5–6 (2012), [https://www.start.umd.edu/sites/default/files/files/publications/START\\_IUSSDDataTerroristAttacksUS\\_1970-2011.pdf](https://www.start.umd.edu/sites/default/files/files/publications/START_IUSSDDataTerroristAttacksUS_1970-2011.pdf); *About the Epidemic*, HHS, <http://www.hhs.gov/opioids/about-the-epidemic/> (last updated June 23, 2016).

369. *About the Epidemic*, *supra* note 369.

370. LAFREE ET AL., *supra* note 368. The likelihood of being killed in a terrorist attack is statistically low (about 1 in 20 million). *Id.*; Brad Plumer, *Eight Facts About Terrorism in the United States*, WASH. POST (Apr. 16, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/04/16/eight-facts-about-terrorism-in-the-united-states/>.

371. See, e.g., Fell & Voas, *supra* note 314.

each measure taken assists—even in a small way—in decreasing the risk of this victimization, society believes it a well-devised reform.<sup>372</sup>

The same is true regarding sexual violence. An affirmative consent climate will not solve the problem of sexual assault. This crime, just as with all other crimes, will continue to occur as long as humans exist. But, this measure of educating people about harm and risk and then progressively changing the law to reflect this understanding will likely decrease sexual assaults.<sup>373</sup> Just as with other crimes, it should not be ruled out because it is not a complete solution.<sup>374</sup> As President Barack Obama remarked, “We know we can’t stop every act of violence . . . . But maybe we could try to stop one act of evil, one act of violence.”<sup>375</sup>

The other version of this argument—that we should not legislate to ideal behaviors—is also misplaced.<sup>376</sup> The short answer is that society does this with regularity. Here, the example of the anti-impaired driving movement is most instructive in its parallels to sexual assault. Prior to the 1980s, society had a problem with people—many of whom were law-abiding in other contexts of their lives—driving while impaired and harming others.<sup>377</sup> This was due to a variety of reasons, ranging from a total disregard for others to a lack of judgment and awareness. At that time, the public did not understand the relationship between consuming alcohol, driving, and accidents. This resulted in drinking and driving being socially tolerated, if not accepted.<sup>378</sup> In the late 1970s and 1980s, the relationship between these became better understood.<sup>379</sup> An awareness emerged that a socially acceptable behavior was causing significant social harm.<sup>380</sup> As with affirmative consent, substantial resistance to legal changes arose.<sup>381</sup> Arguments trying to distort these progressive steps and equate them to the temperance movement or prohibition were common.<sup>382</sup> Opponents also argued that people will always

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372. See RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION, *supra* note 264. A more cynical view might note who the potential victims of these crimes are. Terrorism, drug addiction, and, to a lesser degree, gang violence are all crimes that could indiscriminately affect anyone regardless of their socioeconomic status. Sexual assaults disproportionately affect women, people of color, and the LGBT community. *Id.* One could argue that the distinction in approaches may be borne out of a deep concern that those with social power could be victimized but a lesser concern that those victimized are more marginalized.

373. See Little, *supra* note 354, at 1355–57.

374. *Id.* at 1345.

375. Barack Obama, Remarks by the President on Common-Sense Gun Safety Reform, (Jan. 5, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/05/remarks-president-common-sense-gun-safety-reform>.

376. Cf. Shulevitz, *supra* note 353.

377. See Reinerman, *supra* note 316, at 98.

378. See *id.*

379. See *id.* at 96.

380. *Id.*

381. *Id.* at 100.

382. See *id.* at 96.

drink alcohol, so trying to legislate against it would not be effective.<sup>383</sup> However, groups, such as MADD, set out to educate people about the social harm with a focus on the individual offender.<sup>384</sup> Through mothers openly discussing the pain of losing a child to a drunk driving accident, a social stigma emerged in what was formerly an acceptable behavior.<sup>385</sup> The law followed, criminalizing impaired driving with blood alcohol limits and mandatory sentences.<sup>386</sup> While criminal law alone cannot change exploitive behaviors into ideal ones, a social climate shift can alter expectations and decrease social harms.

## 2. Critique Two: Affirmative Consent “Criminalizes Sex”

This argument takes many forms, including a claim that affirmative consent redefines drunk sex as rape, “encourages people to think of themselves as sexual assault victims when there was no assault,” or leads to the prosecution of people who did not mean harm.<sup>387</sup> Another subtle version of this argument relates to the quality of a sexual encounter, arguing that it is unrealistic and overburdensome to require sexual permission with every sexual touching.<sup>388</sup> Steven Schulhofer responded to this line of argument directly, noting that affirmative consent law may require an awkward conversation but it is better than becoming a victim of rape.<sup>389</sup> At their essence, these arguments center around a concern that prosecutors will charge more defendants with rape when there is no “real” criminality.<sup>390</sup> This line of reasoning is wrong, both philosophically and practically.

As a preliminary matter, society should design a criminal law system that avoids criminal convictions of those not engaged in criminal acts. A valid concern, therefore, exists in not casting a criminal liability net so widely

383. *See id.*

384. *Id.* at 98.

385. *Id.* at 98–99.

386. *Id.* at 100; ARTHUR GOODWIN ET AL., COUNTERMEASURES THAT WORK: A HIGHWAY SAFETY COUNTERMEASURE GUIDE FOR STATE SAFETY OFFICES 3 (8th ed. 2015), [www.nhtsa.gov/staticfiles/nti/pdf/812202-CountermeasuresThatWork8th.pdf](http://www.nhtsa.gov/staticfiles/nti/pdf/812202-CountermeasuresThatWork8th.pdf).

387. Rubenfeld, *supra* note 8; *see* Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 958 (2008) (asserting that affirmative consent risks conviction of rape when a defendant acts without conscious wrongdoing); *see also* Megan McArdle, *‘Affirmative Consent’ Will Make Rape Laws Worse*, BLOOMBERGVIEW (July 1, 2015, 4:40 PM), <https://www.bloomberg.com/view/articles/2015-07-01/-affirmative-consent-will-make-rape-laws-worse> (arguing that the Model Penal Code’s draft of affirmative consent will make touching any body part a sexual assault); Ashe Schow, *Connecticut Senate Passes Affirmative Consent Bill*, WASH. EXAMINER (May 5, 2016, 6:20 PM), <http://www.washingtonexaminer.com/connecticut-senate-passes-affirmative-consent-bill/article/2590533>.

388. *See* Robert Carle, *How Affirmative Consent Threatens Liberty*, REASON.COM (Feb. 3, 2015), <https://reason.com/archives/2015/02/03/how-affirmative-consent-rules-threaten#.jnkixd:jW12> (“Affirmative consent laws turn normal interactions into sexual offenses.”).

389. Shulevitz, *supra* note 353.

390. *See* Dripps, *supra* note 387, at 962–63.

that it encompasses behavior that lacks a *mens rea* of criminality or envelops permissible actions.<sup>391</sup> However, these arguments are again ones that could be lodged against our entire criminal law system but seem to be singled out for application only to sexual assault proposals.<sup>392</sup> Sexual assault law should not be treated differently than other crimes.

Criminal law is an imperfect mechanism. Among other things, it regulates behaviors through its rule articulation function.<sup>393</sup> But, no rule—even if drafted by Thomas Jefferson himself—can be drafted to perfectly address every one of the infinite number of factual scenarios that will occur. Society does not, however, fail to draft accurate criminal statutes because of this challenge.<sup>394</sup> To the contrary, it drafts clear statutes to balance the risk of victimization with the risk of casting too wide a net.<sup>395</sup> For example, homicide is a terrible event to occur. However, we can imagine situations in which a person causes a homicide but did not intend to kill the other person.<sup>396</sup> Manslaughter statutes exist for such occurrences.<sup>397</sup> While it is true that there are times when a manslaughter occurs and it is tragic for all people involved—the victim and his family as well as a defendant who did not intend to kill his victim—society has weighed the tragic consequences of a human life lost against the tragic consequences of a terrible decision or error and decided the harm of being killed is a worse harm that merits some criminal sanction.<sup>398</sup> Consequently, a person can be properly convicted of manslaughter for punching another if the punching causes the requisite social harm: death.<sup>399</sup> The same is true in the sexual assault context. Criminal law is about allocating risks and costs, and at some point, the social harm caused by a behavior outweighs the burden on the individual to comply with that law.<sup>400</sup> While an awkward conversation may not be ideal, it is a reasonable burden when weighed against the consequence of a rape or sexual assault.<sup>401</sup>

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391. See STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW 94–98 (Cynthia Harrison ed., 1998) (critiquing *MTS. v. State* and its lack of guidelines and perhaps the criminalization of sexual submission influenced by social pressure).

392. *Id.* at 4.

393. See *supra* Section IV.B.

394. See SCHULHOFER, *supra* note 391, at 3–4.

395. See *id.* at 4.

396. See *Manslaughter*, BLACK'S LAW DICTIONARY (10th ed. 2014).

397. *Id.*

398. Cf. Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 51 (1967) (explaining how social change molds the law to reflect societal values and ideals).

399. E.g., Fox Butterfield, *Man Convicted in Fatal Beating in Dispute at Son's Hockey Game*, N.Y. TIMES (Jan. 12, 2002), <http://www.nytimes.com/2002/01/12/us/man-convicted-in-fatal-beating-in-dispute-at-son-s-hockey-game.html>.

400. Friedman & Ladinsky, *supra* note 398.

401. Ezra Klein, *What People Get Wrong About the Yes Means Yes Law*, VOX (Oct. 16, 2014, 11:40 AM), <http://www.vox.com/2014/10/16/6982559/yes-means-yes-ezra-klein-people-wrong>. Ezra Klein analogizes this to condom use: “[P]eople need to believe – really, deeply believe – that they can misread someone’s sexual signals, and if that happens, the consequences can be severe. No one likes condoms,

Philosophically, the suggestion that no “real” criminality occurs when the *defendant* feels there is no real criminality is deeply flawed. First, this is cloaked language for actually saying that the defendant “did not mean it” or that “he is really a good person.” Such a perspective is inappropriately narrow. It defines whether a crime has taken place solely from the perspective of the offender. This perspective ignores the actual crime suffered by the victim who was penetrated or sexually battered without consent. The claim that the perpetrator did not *mean* to do so does not change the fact that the victim was penetrated or sexually battered without consent.

In criminal law, what carries the most legal significance is not what the defendant meant to do but whether his actions and mental state met the *actus reus* and *mens rea* of the crime.<sup>402</sup> Sexual assault crimes should be no exception.

Moreover, such a position—e.g., “he did not mean it”—begs the question: He did not mean what? To offend by way of nonconsensual sexual contact does not require that an offender intend to have unconsented-to sex, but it does require him to have a culpable state of mind regarding his indifference to the victim’s consent.<sup>403</sup> Affirmative consent standards actually assist the offender who does not mean to cause harm but does so anyway.<sup>404</sup> It demands he request and obtain consent.<sup>405</sup> If the prosecutor has evidence that the defendant did so, then evidence of consent exists and the defendant who is not culpable will be exonerated.<sup>406</sup> If the offender fails to obtain it, then the government has evidence there was no consent and the offender’s indifference to the issue of consent meets the elements of the crime.<sup>407</sup>

This line of argument again is an example of rape being treated differently from other crimes in at least two ways. First, other areas of the law do not emphasize whether the defendant meant to hurt another.<sup>408</sup> For example, the law does not ask whether an offender intended to kill his passenger when his dangerous driving caused the passenger’s death.<sup>409</sup> It

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just as no one particularly wants to interrupt a . . . sexual encounter to take a quick survey. But the alternative is worse.” *Id.*

402. See LAFAVE, *supra* note 47, § 1.2(b), at 10.

403. *Id.* § 17.2(b), at 898–99.

404. Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 451–53 (2016).

405. *Id.* at 441 n.1.

406. *Id.* at 448–49.

407. See *State v. Jama*, 2016 WI App. 26 ¶ 14, 367 Wis. 2d 748, at \*3 (Wis. Ct. App. 2016) (“The reason the sexual assault statute defines consent is so that a fact finder can determine whether *consent is absent*. . . . To state the obvious, ‘consent’ is absent when an alleged sexual assault victim does not give any indication of consent, regardless whether the victim is competent or incompetent to consent.”).

408. LAFAVE, *supra* note 47, § 5.4, at 277.

409. See *id.*

certainly does not forbid criminal charges if he did not.<sup>410</sup> He is still charged with the homicide even though it is clear that he not only did not intend to kill his companion but suffers himself because of his actions.<sup>411</sup> Sexual assault law should be treated similarly. The claim that a defendant did not mean to have unconsented-to sex is not determinative. What is determinative is whether he had unconsented-to sex and possessed the required *mens rea*.<sup>412</sup> If he thought he had consensual sex, then he has an opportunity to put forth the reasonable mistake defense.<sup>413</sup> The law allows for acquittal in situations in which there was no consent but the defendant reasonably believed there was consent.<sup>414</sup> Affirmative consent provides a concrete method to demonstrate whether a mistake is reasonable: the presence of affirmative consent being obtained. In fact, a prosecutor has an ethical duty to not proceed if evidence of affirmative consent is uncovered in the investigation because at such point, the defendant had a reasonable belief he was engaging in consensual sex and therefore had no culpable state of mind.<sup>415</sup> Affirmative consent puts sexual assault in line with other criminal charges in which the harm of a mistake is not reasonable because an offender failed to take the reasonable steps required of him to eliminate risk, which falls on the offender and not the victim—who is often incapacitated at the time of the crime.<sup>416</sup>

The second way this critique illustrates rape being treated differently is what it suggests about prosecutors. This line of argument suggests that prosecutors will suddenly begin charging defendants who did not engage in nonconsensual sex with rape because they can. This critique of affirmative consent is actually a critique of prosecutorial discretion—something present in every criminal case.<sup>417</sup> Sexual assault cases should not be treated any different than other crimes. The decision to prosecute is a decision resting solely with the executive branch.<sup>418</sup> It is, indeed, a great power and can be abused.<sup>419</sup> In ambiguous factual scenarios, it is incumbent upon prosecutors to understand the facts as best as they can to determine whether criminal conduct occurred.<sup>420</sup> But this is true of every crime. Every bar room brawl, conspiracy case, and white-collar crime case involves some sort of

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410. *See id.* Of course, a defendant's *mens rea* is relevant to determine which homicide charge is appropriate. *Id.* § 837. But, if he possesses the *mens rea*, whether he meant to cause the harm is not determinative of whether a crime occurred at all. *Id.* § 838.

411. *Id.*

412. Tuerkheimer, *supra* note 404, at 445.

413. *Id.* at 467.

414. LAFAVE, *supra* note 47, § 17.2(b), at 899.

415. *Id.*

416. Tuerkheimer, *supra* note 404, at 447 n.27.

417. Buchhandler-Raphael, *supra* note 71, at 178–79.

418. *United States v. Nixon*, 418 U.S. 683, 693 (1974).

419. *Id.*

420. Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 337 (2001).



ambiguous facts and requires a similarly detailed analysis.<sup>421</sup> Yet, we do not preclude the prosecution from performing this analysis in those contexts. Similarly, we also do not resist legal definitions that clarify the obligations of the parties in question.<sup>422</sup> However, prosecutorial discretion is seemingly singled out as inappropriate and highly risky in the sexual assault context.<sup>423</sup>

Beyond philosophy, there are several practical objections to this critique. First, there is no evidence of over criminalization.<sup>424</sup> “[M]ass incarceration has not been caused by overly vigorous pursuit of sex crimes.”<sup>425</sup> Affirmative consent has been the law in at least three states.<sup>426</sup> If a problem existed with over prosecution, it would have appeared in these three states. Tuerkheimer analyzed all of the published judicial opinions in those jurisdictions and examined cases in which the presence or absence of affirmative consent was an issue.<sup>427</sup> Rather than finding a large number of cases in which the people involved simply had a different perspective of a sexual encounter, she found the vast majority of cases prosecuted were situations in which the victims were asleep, unconscious, or could not consent due to fear.<sup>428</sup> Rather than finding a large number of cases in which the people involved simply had two different versions of a confusing situation due to alcohol, Tuerkheimer found that the cases prosecuted almost always manifested some element of force and that “mixed signals” are not a warranted concern.<sup>429</sup> Her analysis concluded that the cases chosen to be prosecuted, all of which resulted in convictions and many of which were affirmed on appeal, “quite rarely present[ed] a tenable claim to a belief [of] consent.”<sup>430</sup> Indeed, the cases central to the opposition of rape reform—those presenting a tenable claim of a belief of consent—were minuscule.<sup>431</sup>

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421. *Id.* at 341.

422. *Id.* at 313.

423. Buchhandler-Raphael, *supra* note 71, at 179. Embedded in this line of argument is a subtle suggestion that ambiguous facts equate to false reports. *See id.* They do not. Ambiguous situations are still situations in which a victim’s bodily integrity is violated. *Id.*

424. *Delineating “Yes”: Stephen Schulhofer and Erin Murphy Are Revising the Model Penal Code on Sexual Assault*, NYU L. NEWS (May 26, 2015), <http://www.law.nyu.edu/news/ideas/ali-penal-code-sexual-assault>.

425. *See id.*

426. Tuerkheimer, *supra* note 404, at 451–54. Tuerkheimer approximates ten to twelve states with affirmative consent standards in their text and an additional three to four states that interpret their statutes to require affirmative consent. *Id.* However, she observes that many of them have been “diluted” by requiring force. *Id.* at 455–56. Only three states remain that she labels “‘pure’ affirmative consent”: Wisconsin, Vermont, and New Jersey. *Id.* at 451. Buchhandler-Raphael notes that sixteen states allow for prosecution of nonconsensual sex without force; however, in all but six states, it is a lesser crime with a lesser punishment. Buchhandler-Raphael, *supra* note 71, at 158.

427. Tuerkheimer, *supra* note 404, at 446. This work explicitly acknowledged that published court opinions are not a numerically accurate measure of which crimes go forward and which do not; however, they offer insight into patterns of prosecution and judicial reaction. *Id.*

428. *Id.* at 457–58.

429. *Id.* at 456.

430. *Id.* at 464.

431. *Id.* at 446.

The concern of over prosecution is always one to be attentive to, and systems must be vigilant in resisting it. However, in the sexual assault context, there is little support for the claim that sexual assault cases are overprosecuted.<sup>432</sup> To the contrary, the research points not to an over prosecution problem but to an attrition problem.<sup>433</sup> While over prosecution of sexual assault is not documented, attrition of sexual assault cases is clearly documented at every level of investigation, prosecution, and judicial decision making.<sup>434</sup>

### 3. *Critique Three: Burden Shifting*

The allegation that an affirmative consent standard is burden shifting has some appeal for the anti-progressive law movement. It is a catchy phrase that is easily repeated by the mainstream media. It also suggests an inherent unfairness in process and even implies a constitutional level of unfairness. However, it is also misplaced.<sup>435</sup>

The concern about burden shifting in any criminal action is paramount in the American criminal justice system, which explicitly places the burden of proof completely on the prosecution.<sup>436</sup> Erosion of this principle is an erosion of one of the bedrocks of American criminal procedure and the Constitution.<sup>437</sup> However, affirmative consent, as proposed and defined in this Article, does not involve burden shifting.

This argument confuses criminal law with criminal procedure. Affirmative consent is about the substantive criminal law and the presence of an element of the crime—namely, unconsented-to sexual contact.<sup>438</sup> It has nothing to do with the procedures necessary in a courtroom or lessening the burden of proof for the prosecution. The argument is usually phrased to

432. *Id.* at 468.

433. *See* Alderden & Ullman, *supra* note 234, at 525.

434. *See* Section III.A.3. It is even documented in whether police take an initial report with a finding that, at times, they refuse to do so. *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 249–56 (2010) (statement of Carol Tracy, Executive Director, Women’s Law Project in Philadelphia); Tuerkheimer, *supra* note 404, at 451.

435. Some critiques of campus sexual assault policies do focus on the procedures of campus adjudication. These procedures are obviously not what affirmative consent means and therefore are beyond the scope of this Article. However, it does bear mentioning that a critique of the burden of proof seeks to separate sexual violations from other school violations. While the preponderance of evidence standard is used for some campus adjudication of sexual assault (and this is the same standard the Office for Civil Rights uses for Title IX violations), this is the same standard used for all student violations resulting in expulsion. If this standard is sufficient for plagiarism, vandalism, and cheating, it is appropriate for sexual offenses as well.

436. LAFAVE, *supra* note 47, § 1.8(a), at 58.

437. *See id.*

438. *Id.* §§ 1.8(b), 17.4.

suggest the impossibility of a defendant “proving” affirmative consent.<sup>439</sup> Under an affirmative consent standard, it remains the case that the defendant need not prove consent.<sup>440</sup> Affirmative consent does nothing to affect *procedural* law and burdens of proof.

Affirmative consent is a substantive, not a procedural, concept. It affects the elements of a crime.<sup>441</sup> Just as with a theft charge, in which a prosecutor must prove that the defendant did not have the consent of the owner to take the property, a prosecutor in a sexual assault case must still prove the defendant did not have the consent to take the victim’s sexual autonomy.<sup>442</sup> With affirmative consent, prosecutors can prove nonconsent just as they do in a theft case by having the victim testify that she did not give consent to the defendant for his actions.<sup>443</sup> Indeed, the burden remains the same: the prosecutor must prove every element beyond a reasonable doubt. What is different is the legal significance of passivity. It no longer signifies consent. Rather, passivity reflects the now-common belief that a lack of behaviors suggesting a desire to engage in sexual activities does not constitute consent.<sup>444</sup>

This exact burden shifting argument was rejected over three decades ago by the Wisconsin Court of Appeals, in *Gates v. State*, as the court upheld Wisconsin’s affirmative consent law.<sup>445</sup> *Gates* argued that Wisconsin’s statutory definition of consent—“words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact”—shifted the burden of proving consent to him.<sup>446</sup> The court rejected this, noting that the prosecution must still introduce evidence that there was no consent beyond a reasonable doubt and that the definition of consent did not relieve the State of its burden of showing there is not consent.<sup>447</sup> In other words, the state must prove that the victim did not, through words or actions, express agreement to the sexual contact.<sup>448</sup> This is not a burden shift. It is an articulation that an absence of

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439. See *Gates v. State*, 283 N.W.2d 474 (Wis. Ct. App 1979); *State v. Beckett*, No. 09–09–1587, 2014 WL 1419283 (N.J. Super. Ct. App. Div. Apr. 15, 2014).

440. See *Gates*, 283 N.W.2d at 474; *Beckett*, 2014 WL 1419283.

441. See LAFAVE, *supra* note 47, § 17.4(a), at 914–17.

442. See *id.*

443. See *id.*

444. Tuerkheimer, *supra* note 404, at 453 n.34; see also *State v. W.R., Jr.*, 336 P.3d 1134, 1140 (Wash. 2014) (en banc) (holding that the State could not require the defendant to prove consent at trial when nonconsent is an element of the offense).

445. *Gates*, 283 N.W.2d at 477.

446. *Id.* at 478.

447. *Id.*; see also *State v. Beckett*, No. 09–09–1587, 2014 WL 1419283, at \*3 (N.J. Super. Ct. App. Div. Apr. 15, 2014) (noting that the instruction—the State bears the burden of proving sexual penetration—was accomplished without the affirmative and freely given permission of the alleged victim and it is not burden shifting).

448. *Beckett*, 2014 WL 1419283, at \* 3.

conduct or words conveying consent to sexual contact cannot be presumed to indicate consent because it manifests a lack of resistance.<sup>449</sup>

In fact, again utilizing the drunk driving regime, changes in the law that look more like burden shifting have occurred and survived.<sup>450</sup> Within this regime, a prosecutor must prove that a defendant drove a vehicle while impaired.<sup>451</sup> Impairment is an ambiguous area that differs from person to person.<sup>452</sup> The prosecution can prove it with circumstantial evidence, but all states have enacted laws that presume impairment when a defendant's blood alcohol level is above a certain limit.<sup>453</sup> This presumption can, however, be rebutted.<sup>454</sup> Not only is this permissible, but it actually has been useful in decreasing criminal actions.<sup>455</sup> Coupled with education and the certainty of prosecution, such "campaigns have been successful in saving lives. The key appears to lie not in increasing the severity of punishment but in increasing the certainty of detection and conviction. Publicity is a critical factor."<sup>456</sup> Affirmative consent is certainly a less radical proposal than a presumption of impairment. If this presumption is allowed, it seems reasonable to simply place the crime of sexual assault on the same footing as other offenses that require proof of nonconsent.

#### 4. *Resistance as Part of a Legacy of Protection*

Given that sexual assault remains a pernicious form of harm against women, people of color, and traditionally marginalized communities, the acceptance of basic concepts, such as that sexual contact should be engaged in by agreeing persons and that unconsented-to penetration or sexual touching is rape or sexual battery, would seem noncontroversial. Also, given that the law is replete with examples of multidimensional responses to criminal action, such as drunk driving, one might expect little resistance to this affirmative consent proposal. Yet, resistance has been significant.

Michelle Anderson has artfully commented, "Whenever there is progressive movement in the law, one might predict a backlash designed to

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449. Tuerkheimer, *supra* note 404, at 453 n.34.

450. *See supra* Section IV.D.

451. *See* TEX. PENAL CODE ANN. §§ 49.01(2), 49.04 (West 2002).

452. *Id.*

453. *See Alcohol Impaired Driving*, GOVERNORS HIGHWAY SAFETY ASS'N, [http://www.ghsa.org/html/stateinfo/laws/impaired\\_laws.html](http://www.ghsa.org/html/stateinfo/laws/impaired_laws.html) (last visited Dec. 16, 2016) (showing the various limits across states).

454. *See, e.g.,* *People v. Pritchard*, 209 Cal. Rptr. 314, 315 (Cal. App. Dep't Super. Ct. 1984), *superseded by statute*, 2016 Cal. Legis. Serv. ch. 765 (West), *as recognized in* *People v. McNeal*, 210 P.3d 420 (Cal. 2009).

455. *See, e.g.,* *People v. Blair*, 799 N.E.2d 748, 748 (N.Y. 2002).

456. Lewis R. Katz & Robert D. Sweeney, Jr., *Ohio's New Drunk Driving Law: A Halfhearted Experiment in Deterrence*, 34 CASE W. RES. L. REV. 239, 284 (1984) (footnote omitted).

secure the privilege that the law is in the process of disrupting.”<sup>457</sup> That has certainly unfolded in the national discussion of affirmative consent.<sup>458</sup> Not surprisingly, those who stand to lose position or privilege have been a source of much resistance.<sup>459</sup> Universities—whose reputations will be tarnished by the disclosure of sexual assaults and the prevalence of hostile atmospheres to women—fraternities, and some academics pushed back on progressive rape law reforms both formally and informally. An example of this has been how the policies have played out at certain universities.<sup>460</sup>

In 2014, the Department of Education released a list of over sixty universities under investigation for failing to properly handle allegations of sexual assault and harassment.<sup>461</sup> That list has since grown to nearly 200.<sup>462</sup> This coincided with the Task Force launching its website regarding campus sexual violence; numerous lawsuits by victims and survivors; and a growing grassroots movement for safer climates on campuses.<sup>463</sup>

Resistance remained and was often verbalized by academics and institutions. In the form of open letters, faculties or individual faculty members cautioned against such progressive movements.<sup>464</sup> Conversely, the students, who helped draft these policies and who stand to be the most directly affected by them, continue to be in support.<sup>465</sup> For example, in 2014, law professors wrote a letter opposing the movement by Harvard University

457. Anderson, *supra* note 39, at 1958; *see also* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 587 (2009) (arguing that one goal of rape law is to further solicit white male domination over women).

458. Anderson, *supra* note 39, at 1958.

459. *Id.*

460. *See supra* note 222 and accompanying text (describing the investigation by the Center for Public Integrity). A Center for Public Integrity study found that not only do the universities expel less than 25% of the men found responsible for a sexual assault but that the Department of Education has failed to sanction universities for not reporting such crimes. John D. Foubert et al., *Behavior Differences Seven Months Later: Effects of a Rape Prevention Program*, 44 J. STUDENT AFF. RES. & PRAC. 728, 739–42 (2007).

461. Kirk Carapazza & Mallory Noe-Payne, *Department of Education Releases List of Schools Under Investigation for Sexual Assault*, WGBH NEWS: ON CAMPUS (May 1, 2014), <http://blogs.wgbh.org/on-campus/2014/5/1/what-schools-are-under-title-ix-investigation/>.

462. Jodi S. Cohen & Stacy St. Clair, *Federal Authorities Investigating Sexual Violence Complaints at Several Area Colleges*, CHI. TRIB. (Mar. 1, 2016, 6:17 PM), <http://www.chicagotribune.com/news/local/breaking/ct-universities-sexual-violence-investigations-20160301-story.html>.

463. *See* White House Task Force to Protect Students from Sexual Assault, *supra* note 38.

464. Matthew Q. Clarida, *Law School Profs Condemn New Sexual Harassment Policy*, HARV. CRIMSON (Oct. 15, 2014), <http://www.thecrimson.com/article/2014/10/15/law-profs-criticize-new-policy/>.

465. *E.g.*, Ariel Edwards-Levy, *Most Americans Support ‘Yes Means Yes’ Sexual Consent Rule*, HUFFINGTON POST (Oct. 6, 2014, 2:49 PM), [http://www.huffingtonpost.com/2014/10/06/yes-means-yes-poll\\_n\\_5940510.html](http://www.huffingtonpost.com/2014/10/06/yes-means-yes-poll_n_5940510.html); Jaclyn Friedman, *Adults Hate ‘Yes Means Yes’ Laws. The College Students I Meet Love Them*, WASH. POST (Oct. 14, 2015), [https://www.washingtonpost.com/posteverything/wp/2015/10/14/adults-hate-affirmative-consent-laws-the-college-students-i-meet-love-them/?utm\\_term=.407794f98fa4](https://www.washingtonpost.com/posteverything/wp/2015/10/14/adults-hate-affirmative-consent-laws-the-college-students-i-meet-love-them/?utm_term=.407794f98fa4); Kathleen Megan, *Students Support ‘Yes Means Yes’ Sexual Assault Law*, HARTFORD COURANT (Mar. 1, 2016, 7:51 PM), <http://www.courant.com/news/connecticut/hc-affirmative-consent-hearing-0302-story-20160301-story.html>.

to make serious changes in its approach to campus sexual assault responses.<sup>466</sup> This was a policy that students participated in drafting and one in which some students wanted a more explicit definition of affirmative consent than was adopted.<sup>467</sup> Many students expressed concern that this policy lacked explicit affirmative consent language and wanted the policy to more clearly note that silence does not equate with consent.<sup>468</sup> Students noted that many come to campus from different backgrounds, cultures, and countries and that this situation needed a campus where “mutual expectations for what it means to treat one another with full respect” was clearly established.<sup>469</sup> Consequently, those most affected by the change favored it, but resistance was from elsewhere.

Similarly, nearly 100 students signed an open letter responding to a professor’s New York Times op-ed critiquing these policies.<sup>470</sup> These students found the academic approach to their plight deeply offensive.<sup>471</sup> In critiquing the professor’s op-ed, one student remarked, “He suggests that the notion that sexual intimacy should be voluntarily and affirmatively agreed to by both parties is, at best, an idealized, unattainable ideal, and at worst, a destructive boogeyman . . . . But in fact, it is a basic right.”<sup>472</sup>

In some ways, the level of resistance to progressive change in sexual assault policies and laws is curious. This is particularly true considering that the proposals reflect changing social norms, recent research on this form of victimization, and heightened protections for traditionally marginalized people.<sup>473</sup> But when examining the other side of the equation—not who is protected but who is at risk of criminal sanctions—possible reasons for resistance emerge.

Anderson observed that the resistance comes from those who were able to act with privilege prior to rape reform. Beverly Ross articulated a similar explanation, suggesting that this phenomenon is not new to the history of rape law.<sup>474</sup> She noted that sexual assault law has consistently reflected an outsized concern for the accused rather than the victimized.<sup>475</sup> Whether the marital exception, requirement of prompt complaint, or requirement of

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466. Tovia Smith, *Harvard Law Professors Say New Sexual Assault Policy Is One-Sided*, NPR (Oct. 15, 2014, 6:44 PM), <http://www.npr.org/2014/10/15/356424999/harvard-law-professors-say-new-sexual-assault-policy-is-one-sided> (noting that professors called it “overwhelmingly stacked against the accused”).

467. *Id.*; *Call to Action on the Adoption of an Affirmative Consent Policy*, HARV. STUDENTS FOR AFFIRMATIVE CONSENT (Oct. 8, 2014), <https://harvardstudentsforaffirmativeconsent.wordpress.com/>.

468. *Call to Action on the Adoption of an Affirmative Consent Policy*, *supra* note 467.

469. *Id.*

470. Kingkade, *supra* note 1.

471. *Id.*

472. *Id.*

473. Anderson, *supra* note 39, at 1958.

474. Beverly J. Ross, *Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape*, 100 DICK. L. REV. 795, 821–23 (1996).

475. *Id.* at 812–40.

corroboration, these legal principles and resistance to reform reflect the values of the dominant group.<sup>476</sup> Sexual assault law manifests this to an extreme.<sup>477</sup> “[T]raditionally the person accused of rape was always a member of the dominant group in society—men, while the accuser was always a member of a subordinate group—women.”<sup>478</sup> That is to say, one of the reasons for resistance to rape reform is that such reform movements threaten to hold accountable those previously unaccountable for their victimization of a subordinate group.<sup>479</sup>

This narrative could apply to the resistance of an affirmative consent culture. Although the public seems to understand that sex without consent is rape, institutions and individuals at risk of accountability have resisted.<sup>480</sup> The current status quo protects universities and their privileged population.<sup>481</sup> An affirmative consent culture stands to hold one subgroup of people, previously immune from accountability, responsible for its exploitive actions.<sup>482</sup> This group is predominantly male and in the university setting—the arena in which affirmative consent debate has played out most dramatically—affluent, educated, and Caucasian.<sup>483</sup> These social groups face accountability for the first time.<sup>484</sup>

Regardless of the exact rape rates, it is irrefutable that college-age women are at an increased risk of sexual assault and that their perpetrators are often emerging-adult men.<sup>485</sup> The Department of Justice noted that rape victims identify their perpetrators as predominantly Caucasian men between

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476. *Id.* at 827–31.

477. *Id.* at 855.

478. *Id.* at 802.

479. *Id.* Stanford Professor Michele Dauber commented in the wake of the Brock Turner case and the failure of Stanford University to respond appropriately that leadership at some universities appears to subscribe to the belief that sexual assaults involving alcohol are merely the product of misunderstandings. Michele Dauber, *Stanford Ban on Hard Liquor at Parties Doesn't Address Deeper Issues, Professor Says*, WBUR 90.9 (Aug. 30, 2016), <http://www.wbur.org/hereandnow/2016/08/30/stanford-alcohol-policy>.

480. See Xiaofan Pan, *Holding Campuses Accountable in Reporting Sexual Assault*, NAT'L WOMEN'S HEALTH NETWORK (2012), <https://www.nwhn.org/holding-campus-accountable-in-reporting-sexual-assault/>.

481. *Id.*; THE PELL INST. & PENNAHEAD, INDICATORS OF HIGHER EDUCATION EQUITY IN THE UNITED STATES 10 (2016), [www.pellinstitute.org/downloads/publications\\_Indicators\\_of\\_Higher\\_Education\\_Equity\\_in\\_the\\_US\\_45\\_Year\\_Trend\\_Report.pdf](http://www.pellinstitute.org/downloads/publications_Indicators_of_Higher_Education_Equity_in_the_US_45_Year_Trend_Report.pdf) (documenting the wealth gap among college students).

482. See generally Rachel Anderson, *Affirmative Consent – Reforming American Rape Laws*, ODYSSEY (June 14, 2016), <https://www.theodysseyonline.com/affirmative-consent-reforming-american-rape-laws>.

483. *Id.*

484. Larry Shaughnessy & Barbara Starr, *Sex Assault at Military Academies Underreported, Survey Finds*, CNN: SECURITY CLEARANCE BLOG (Dec. 19, 2012, 8:46 PM), <http://security.blogs.cnn.com/2012/12/19/reports-of-abuse-at-army-day-care-spurs-call-from-obama/> (noting the resistance of military academies to create a culture of reporting sexual assaults when so many of their students are “the cream of the crop”).

485. See SINOZICH & LANGTON, *supra* note 77, at 8.

eighteen and twenty-nine.<sup>486</sup> Moreover, it seems that with universities' failure to enforce Title IX and other basic protections for women up until this movement, these perpetrators have been able to act within a climate of impunity—where unconsented-to sexual contact or alcohol-infused contact has been accepted as something less than rape.<sup>487</sup> Alcohol's involvement in sexual assault has been traditionally used in two ways to injure the victim.<sup>488</sup> It is used to blame women and excuse men for the sexual assault that occurs.<sup>489</sup> In an affirmative consent culture, the role of alcohol—significant in many sexual assaults—will no longer alone offer offenders the type of protection previously provided.

With the creation of an affirmative consent culture, this provision will hopefully help close this loophole, although surely not completely.<sup>490</sup> Affirmative consent will likely continue to expand as additional states adopt some form of it in their education codes and as its public support continues to grow.<sup>491</sup> Research will continue to expand our knowledge about the prevalence and characteristics of sexual assault. While Robinson properly warns of using criminal law to change public morality, the current trajectory suggests that among the public, understanding consent as affirmative is becoming “commonplace.”<sup>492</sup> Thus, the law is in a position in which it must catch up with contemporary standards, not obstruct them. Moreover, if the law is only one part of the creation of a climate of consent where sexual contact without consent is stigmatized, the law will more likely reflect this belief.<sup>493</sup> This journey, however, requires that the dominant and privileged be exposed to liability in ways unfamiliar to them, and thus, this meets resistance.<sup>494</sup>

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486. *Id.* (finding that 66%–68% of college-age women who identify as sexual assault victims describe their attacker as white and 91%–97% as male).

487. See Antonia Abbey, *Alcohol-Related Sexual Assault: A Common Problem Among College Students*, 14 J. STUD. ON ALCOHOL SUPPLEMENT NO. 14 118, 121 (2002).

488. See *id.* at 119–24.

489. *Id.* Human rights lawyer, Amanda Taub labeled this the “consent tax.” Kevin Drum, *We Require Affirmative Consent for Most Things. Why Not Sex?*, MOTHER JONES (Oct. 16, 2014, 1:21 PM), <http://www.motherjones.com/kevin-drum/2014/10/we-require-affirmative-consent-most-things-why-not-sex>. She describes it as the judging of everything a woman does to “misclassif[y] a whole range of behavior as sexually inviting.” *Id.*

490. Marvel, *supra* note 277, at 2049 (arguing that the emergence at some universities of a culture of institutional responsibility is why rape rates on campus may be lower than those off campus).

491. *Affirmative Consent Laws (Yes Means Yes) State by State*, AFFIRMATIVE CONSENT, <http://affirmativeconsent.com/affirmative-consent-laws-state-by-state/> (last visited Oct. 9, 2016). Connecticut and Michigan followed New York and California's lead. *Id.*

492. Tuerkheimer, *supra* note 3, at 5, 9 (noting that affirmative consent is becoming commonplace on campuses and this consent culture must migrate to the criminal justice system); Paul H. Robinson, *The Legal Limits of 'Yes Means Yes'*, CHRON. OF HIGHER EDUC. (Jan. 10, 2016), <http://www.chronicle.com/article/The-Legal-Limits-of-Yes/234860>.

493. See Anderson, *supra* note 39, at 1958.

494. *Id.*



## V. CONCLUSION

Sexual assault is one of the most terrible crimes to be victimized by or accused of. It is often committed against the most vulnerable in society by those with power.<sup>495</sup> Recent research and efforts by the government have illuminated its extent and characteristics.<sup>496</sup> To end this cycle of violence, sexual assault should follow the path of previously complex social ills. It should not solely seek to change the standard for consent, but it should also enact such a reform within a constellation of actions aimed at shifting the culture to one of consent.<sup>497</sup> This shift is currently underway.<sup>498</sup> However, resistance by those most at risk is great.<sup>499</sup> As such, the movement should seek to educate all relevant stakeholders on the harm of sexual assault and focus on the effect on victims.<sup>500</sup> In doing so, it will create a three-pronged approach to sexual assault, which holds more promise than merely amending criminal law. Like the anti-impaired driving movement, this can transform behavior that is overlooked by those dominant in the culture to behavior that is condemned.<sup>501</sup> Accordingly, it will become socially unacceptable and be deterred.

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495. *Myths and Facts About Sexual Violence*, GEO. LAW, <https://www.law.georgetown.edu/campus-life/advising-counseling/personal-counseling/sarvl/general-information.cfm> (last visited Oct. 9, 2016).

496. *Id.*

497. *See* Anderson, *supra* note 39, at 1958.

498. *Id.*

499. *See id.*

500. *See* Potter, *supra* note 310, at 822–23.

501. *See* Fell & Voas, *supra* note 314, at 202–06.