Rethinking Sexual Consent: Why "Yes Means Yes" is not Enough

An Honors Thesis for the Department of Philosophy

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"If sex is normally something men do to women, the issue is less whether there was force than whether consent is a meaningful concept."
— Catharine A. MacKinnon (1989)[1]

1. Introduction

In recent years the problem of sexual assault on college campuses has come to the forefront of the national media. According to one recent survey, as many as one third of college women may be victims of "nonconsensual sexual contact" during their time at college,[2] and documentaries depicting the struggles that victims face when reporting cases of sexual assault to campus officials, as well as widely-covered controversial cases involving big name universities, have painted a troublesome picture of how colleges and universities handle reported cases of sexual assault.[3] Although the problem of sexual assault on college campuses is by no means new, legislative measures—including Title IX and the Clery Act—are now forcing schools to take proactive steps to address the issue of campus sexual assault.[4] Many schools have focused their reform measures on the standard of sexual consent. At the criminal level, lack of consent is merely one component of a rape, since most statutes require the presence of physical force (or at the very least threats of physical violence) for non-consensual intercourse to be considered rape.

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[1] Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989), 178.

[2] David Cantor and Westat Bonnie Fisher, "Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct Assault and Sexual Misconduct," 2015.

[3] See, for example Brooks Barnes, "An Unblinking Look at Sexual Assaults on Campus," The New York Times, January 25, 2015, accessed April 23, 2016, http://www.nytimes.com/2015/01/26/movies/the-hunting-ground-a-film-about-rape-culture-at-colleges.html?_r=0, and Emma Sulkowicz,"'My Rapist Is Still on Campus,'" Time, May 15, 2014, accessed April 23, 2016, http://time.com/99780/campus-sexual-assault-emma-sulkowicz/.

[4] I will say more about Title IX later on when I talk about current reforms to campus sexual assault policies, however the Clery Act is also worth mentioning because it requires schools participating in federal aid programs to disclose campus crime reports upon request—including statistics about the prevalence of sexual assault and rape on campus—as well as publish and distribute an annual crime report. The Clery Act thus places pressure on institutions to decrease rates of rape and sexual assault (as well as other crimes) on their campuses.

At the college and university level, however, many schools define sexual assault solely on the basis of non-consent. For this reason, a school's definition of sexual consent (and schools do, in fact, get to *choose* how they define consent) plays an essential role in determining and adjudicating the conduct of its student body.

In response to pressure from student activists, as well as the measures imposed on schools by the U.S. federal government, the trend has been for schools to adopt so-called affirmative consent policies, also known as the "yes means yes" approach, and to adjudicate cases using a preponderance of evidence standard.[5] According to affirmative consent policies sexual consent cannot be inferred from silence or lack of resistance, and only positive verbal communication or unequivocal body language can count as consent. According to the preponderance of evidence standard, meanwhile, a finding of guilt only requires that the evidence indicates that it is more likely than not that the defendant committed the alleged acts.

Both of these changes have received substantial criticism, particularly from those who fear that the new standards will turn innocent men into convicted rapists.[6] In this paper, I will explore the justifications for affirmative consent policies and for lowering the burden of proof standards. I will argue that the burden of proof standards employed by educational institutions

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[5] In 2011 the U.S. Department of Education issued a document that later became known as the "Dear Colleague Letter" (DCL). The DCL outlined the measures that schools must take to prevent and respond to sexual assault on campus, and one of these measures was that schools must use the preponderance of evidence standard when adjudicating cases of alleged sexual assault. Prior to the DCL most schools had used a clear and convincing standard, according to which the evidence must indicate that it is *significantly* more likely than not that the defendant committed the crime in question. U.S. Department of Education Office for Civil Rights, "Dear Colleague Letter," April 4, 2011, accessed June 5, 2016, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

[6] Many men are also victims of sexual violence, and in no way do I intend to undermine this fact by using non-gender-neutral pronouns in my discussion; however, most perpetrators of rape and sexual assault are men (approximately 99%), and for this reason—as well as to stay consistent with the literature—I have chosen to use non-gender-neutral pronouns in my discussion of rape and sexual assault. Lawrence A. Greenfeld, "An Analysis of Data on Rape and Sexual Assault: Sex Offender and Offenders," *US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics* (1997).

are not unjust and will not necessarily lead to higher false convictions of rape. I will also argue, however, that in order to justify using lower burden of proof standards we need to make sure that genuine misunderstandings that could, under an affirmative consent standard, be categorized as sexual assault, are avoided. To this end, I propose that consent is not the best model for avoiding such misunderstandings. Instead, I will build upon Michelle Anderson's "negotiation model" and outline a version of the negotiation model that could help eliminate communicative misunderstandings *in addition to* protecting against unwanted sex and promoting female sexual autonomy.[7] Finally, I will explore the ways in which my version of the negotiation model would not only prevent communicative misunderstandings in the sexual domain, but would also facilitate the type of perspective shift needed if we, as a society, want to to stop thinking of sex as something that one person does *to* another.

2. Contextualizing the Problem

In order to understand the current sexual assault policy reforms and the present discussion about sexual consent and sexual communication, it is necessary to have a basic understanding of the long and overwhelmingly patriarchal history of rape law. Traditionally, rape was considered a property crime against a woman's husband or father. As Deborah Rhode writes, "Historically, rape [was] perceived as a threat to male as well as female interests; it… devalued wives and daughters and jeopardized patrilineal systems of inheritance."[8] As Joan McGregor explains, "female chastity was worth a lot to fathers interested in marrying off their daughters

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[7] In this paper, I use the term 'sex' mainly to refer to sexual penetration and sexual intercourse; at times in my discussion, however, it may also be useful to construe a broader definition of sex and apply the term to other sexual acts such as oral sex and sexual petting.

[8] Deborah L. Rhode, *Justice and Gender: Sex Discrimination and the Law* (Cambridge, MA: Harvard University Press, 1989), 244.

and to husbands wishing to ensure that children were biologically theirs."[9] Rape laws were, and to a great extent continue to be, designed to protect the interests of men over the sexual autonomy of women.[10]

In addition to protecting the proprietary interests of men, rape laws were also largely influenced by British common law. According to common law, rape is defined as "the carnal knowledge of a woman forcibly and against her will."[11] Broken down, this definition requires that in order for a rape to have occurred, a man must have employed *physical force* to have *vaginal intercourse* with a woman *without her consent*. By this definition, if a man uses only *threats* of physical violence to obtain intercourse it is not rape. Neither is it rape if a man employs physical force and the woman does not resist *to the utmost*.[12] The reasoning behind the resistance requirement was that "a woman should protect her chastity with her life"; however this meant that "women who didn't protect [their chastity] with their lives must have consented to the sexual activity."[13]

According to the common law definition of rape, consent plays only a small role in defining the crime of rape and an even smaller role in determining whether or not a rape has occurred in cases that come before the courts. For example, in 1947 the Nebraska Supreme Court held that "submission… no matter how reluctantly yielded," can be construed as consent, and

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[9] Joan McGregor, *Is It Rape?: On Acquaintance Rape and Taking Women's Consent Seriously* (Aldershot, Hampshire, England: Ashgate, 2005), 29.

[10] Some feminists have even argued that, "far from protecting women, the rape laws… actually serve to enhance male opportunities for sexual access." Ibid., 35. See also MacKinnon, *Toward a Feminist Theory of the State.*

[11] Sir William Blackstone, 4 *Commentaries on the Laws of England* (London: A. Strahan, 1825), 209-210.

[12] Another problem with this definition of rape is that it does not concede that men can be raped, or that forcible penetration using an object should be considered rape.

[13] Joan McGregor, *Is It Rape?,* 29.

"carnal knowledge, with the voluntary consent of the woman, *no matter how tardily given or how much force had hitherto been imposed,* is not rape [italics mine]."[14] To show a lack of consent, a woman must resist physical violence "as long as she has the power to do so."[15] This meant was that "no matter how strenuously a woman had protested, her assailant's success in achieving penetration [would show] that she must have been willing."[16]

Although the Nebraska Supreme Court's ruling is not representative of how all legal bodies view consent, it nevertheless shows how little meaning lack of consent can have in many cases of alleged rape and sexual assault. The Nebraska Supreme Court's assertion that consent, "no matter how tardily given," is still consent also raises a number of important questions about the ontology of consent. The law holds that there is a necessary mental component for the culpability of *rape* (i.e., the *mens rea* of the crime), but one might also argue that there is a necessary mental component for the validity of consent (call this the "attitudinal view" of consent). Heidi Hurd, for example, posits that the "moral magic of consent"—that is, the power that consent has to transform actions that would otherwise be considered criminal into perfectly legal and acceptable acts—depends on mental and not behavioral tokens of consent.[17] Larry Alexander is also a proponent of this view, holding that "consent *is* a mental state, and its signification is merely evidence of its existence, which bears on culpability but not on

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[14] State v. Cascio, 147 Neb. 1075, 1078-79 (1947).

[15] Ibid.

[16] Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Cambridge, MA: Harvard University Press, 1998), 20.

[17] Heidi M. Hurd, "The Moral Magic of Consent," *Legal Theory* 2 (1996): 121-46.

wrongdoing."[18]

Other philosophers, meanwhile, assert that consent is purely a behavioral act (call this the "behavioral" or "performative view"). Tom Dougherty, for example, argues that "a private intention is insufficient for morally valid consent," and that "morally valid consent always requires public behavior"[19] Alan Wertheimer also "opts for a performative account of consent," explaining that "tokens of consent are morally significant precisely because they are reliable *indications* [italics mine] of desires, intentions, choices, and the like."[20]

Another possibility is that consent is a mental state *accompanied* by certain actions tokening consent (some refer to this as the "hybrid view"). Emily Sherwin, for example, "argues that consent is both a 'subjective decision' and a 'social act.'[21] Patricia Kazan, meanwhile, "argues that consent must include a performative component if we are to avoid focus on the victim's attitude towards sex, but the subjective component is necessary if we are to distinguish between valid and invalid consent."[22] Although the hybrid view may seem appealing, most philosophers favor either the performative or the attitudinal view of consent. Although giving a comprehensive account of the various ontological theories of consent is beyond the scope of this paper, it is nevertheless worth recognizing that in the past the courts have paid little attention to any possible mental facets of consent, asserting that yielding to knife wielding attacker can

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[18] Larry Alexander, "The Ontology of Consent," *Analytic Philosophy* 55, no. 1 (2014): 102.

[19] Tom Dougherty, "Yes Means Yes: Consent as Communication," *Philosophy & Public Affairs* 43, no. 3 (2015): 227.

[20] Alan Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003), 147.

[21] Ibid., 145.

[22] Ibid.

constitute consent to sexual intercourse.[23]

In addition to the common law definition of rape as "carnal knowledge of a woman forcibly and against her will," the ideas of Sir Matthew Hale, a 17th century judge, were also particularly influential in defining the crime of rape and determining how alleged cases would be prosecuted. According to Hale, "[a] husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract."[24] Although marital rape is now considered a crime in all U.S. states, it wasn't until the mid-1970's and early 1980's that states began to reexamine the marital exemption laws.[25]

In addition to claiming that a man could not be found guilty of raping his wife, Hale also advised courts that rape cases must be treated with particular scrutiny, as rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused…"[26] Hale's cautionary instructions later took the form of cautionary instructions issued to judges and juries adjudicating sexual assault cases. Although only nine U.S. states still require these

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[23] In one well-known case a man entered a woman's apartment and "demanded sex at knife point.". The woman persuaded the man to use a condom (and provided said condom) and the grand jury initially argued that this was enough to constitute consent to sexual intercourse. For a more detailed description of this case see: Alan Wertheimer, *Consent to Sexual Relations,* 29.

[24] 1 Sir Matthew Hale, *Historia Placitorum Coronæ: The history of the pleas of the crown,* vol. 1, ed. Solum Emlyn (London: Printed by E. and R. Nutt, and R. Gosling, 1736), 629.

[25] Lily Rothman, "When Spousal Rape First Became a Crime in the U.S," Time, July 28, 2015, accessed April 16, 2016, http://time.com/3975175/spousal-rape-case-history/. See also Jill E. Hasday, "Contest and Consent: A Legal History of Marital Rape," *California Law Review* 88, no. 5 (2000): 1373-505.

[26] Sir Matthew Hale, *History of the Pleas of the Crown* (London 1971 ed.) 635, cited in Julie Taylor, ''Rape and Women's Credibility: Problems of Recantation and False Accusations Echoed in the Case of Cathlees Crowell Webb and Gary Dotson'' 10 *Harvard Women's Law Journal* 59 (1987): 75.

cautionary instructions (and many prohibit them),[27] Harvard University, in 2002, released new procedures for handling cases of sexual assault and "cautioned officials against pursuing reports in which the complainant's 'credible account' of her sexual abuse was the only evidence she had."[28] Although the cautionary principle may be on its way out, its remnants still remain and continue to affect how judges, juries, *and* university officials treat cases of alleged sexual assault, especially when the complainant's testimony is the primary source of evidence.

Another English common law legacy is that of the prompt-complaint requirement, according to which victims of sexual assault must report the assault "forthwith and whilst the act is fresh."[29] Many statutes formally defined the allowable timeframe for reporting complaints of rape and sexual assault as three months. According to the 1962 Model Penal Code, "No prosecution may be instituted or maintained under this Article [that is, the article relating to sexual assault and related offenses] unless the alleged offense was brought to the notice of the public authority within [3] months of its occurrence…"[30] Today only a few states still have in place versions of the prompt-complaint requirement, and typically these requirements only apply in the context of marital rape allegations or when a victim's testimony is uncorroborated.

A final aspect of rape law that is often discussed alongside the prompt-complaint

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[27] See generally § 213.6(4) and § 213.6(5) in Stephen J. Schulhofer and Erin E. Murphy, *Model Penal Code Sexual Assault and Related Offenses: Tentative Draft No. 1* (Philadelphia, Pa: American Law Institute, 2014), 89.

[28] Michelle J. Anderson, "The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault," *BUL Rev.* 84 (2004): 945.

[29] Henry De Bracton, *Henrici de Bracton De legibus et consuetudinibus Angliæ: Libri quinque in varios tractatus distincti. Ad diversorum et vetustissimorum codicum collationem typis vulgati,* ed. Travers Twiss, vol. 3, no. 70 (London: Longman & Company, 1879), 483.

[30] American Law Institute, *Model Penal Code and Commentaries: Official Draft and Revised Comments* (Philadelphia, PA: Institute, 1980), § 213.6(4). Although the Model Penal Code is not a legally binding document, it is highly influential within the American penal system and its recommendations are taken very seriously by state legislatures.

requirement and the cautionary instructions is the corroboration requirement. Unlike the prompt-complaint requirement and the cautionary principle, the corroboration requirement made its debut in American law. According to the corroboration requirement, "No person shall be convicted of any felony [i.e. rape or sexual assault]… upon the uncorroborated testimony of the alleged victim."[31] Like the prompt-complaint requirement and the cautionary instructions issued to judges and juries, the rationale behind the corroboration requirement was to try to eliminate convictions based on false accusations of rape.

Although the 1962 Model Penal Code imposed the prompt-complaint, corroboration, and cautionary-instruction requirements, a more recent revision to the Model Penal Code's section on Sexual Assault and Related Offenses (§ 213) has taken a different stance:

> The prompt-complaint, corroboration, and cautionary-instruction practices are interrelated. This trio of requirements raised hurdles to the successful prosecution of rape claims by imposing burdens on the sexual-assault complainant. They emerged from a cultural and legal landscape in which the chief concern was the protection of chaste white women, and that sought safeguards against the perceived likelihood that women would lodge a false complaint.[32]

The authors of the draft therefore strike down the corroboration requirement, the prompt-complaint requirement, and the cautionary-instruction practices, and remove all three from Article 213 [§ 213.6(4) and § 213.6(5)] of the MPC.

As I have already mentioned, the corroboration requirement, prompt-complaint requirement, and cautionary-instruction practices are no longer in place in most U.S. states. Even

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[31] Ibid. Today only 13 states maintain versions of the corroboration requirement, and these versions are primarily applicable in cases where there are problems with the victim's testimony. See footnotes 21 and 23 in the commentary to § 213.6(4) and § 213.6(5) of *Model Penal Code Sexual Assault and Related Offenses: Tentative Draft No. 1*, 88.

[32] Schulhofer and Murphy, *Tentative Draft,* § 213.6(4) and § 213.6(5), 86.

though the laws have changed, however, the way that cases of alleged sexual assault and rape are handled by the police and the courts has largely remained the same. I will return to this issue later on, when I discuss the limitations of policy change; however, my goal thus far has simply been to illustrate the historical context of rape law as it relates to correct sexual assault policy reform.

3. Current Reforms

Despite the disappointing history of rape law in the United States, recent attempts have been made to increase the efficacy of the procedures used to handle allegations of rape and sexual assault, both in the courts and by schools. In 2011, the U.S. Department of Education's Office for Civil Rights (OCR) issued a "Dear Colleague Letter," in which it outlined the measures and procedures that schools must take in order to prevent and handle sexual assault and harassment as part of their obligation to comply with Title IX.[33] Among the "recommendations" made by the OCR were the demands that schools "take proactive measures to prevent sexual harassment and violence" and that schools respond swiftly to reported cases of sexual assault and harassment.[34] A further stipulation of the Dear Colleague Letter was that schools must use a "preponderance of the evidence" standard when investigating alleged cases of sexual harassment and assault, rather than the "beyond a reasonable doubt" standard used in criminal courts or the previously employed clear and convincing standard. According to a preponderance of the

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[33] Title IX is a piece of legislation that was passed by the US government in 1972 that outlaws gender discrimination at any educational institution receiving federal funding. Initially applied primarily to spending on college athletics, the Courts later ruled that "'hostile environment' sexual harassment is a form of sex discrimination that is actionable under Title VII of the Civil Rights Act of 1964 (*Meritor Savings Bank v. Vinson*, 1986).

[34] Although the OCR frames the measures set out in the Dear Colleague Letter (DCL) as recommendations, schools are at risk of losing all federal funding if they do not adopt the recommended measures (and are thereby found noncompliant with Title IX), and therefore I think it is more appropriate to think of the measures set out in the DCL as demands rather than recommendations.

evidence standard, the evidence presented in any given case must simply indicate that it is "more likely than not" that the defendant committed the crime, whereas by a clear and convincing standard the evidence must indicate that it is *significantly* more likely (often conceptualized as more than a 75% chance) that the defendant committed the crime. In addition to switching to a preponderance of evidence standard, many schools have also chosen to adopt affirmative consent policies.

Both of these measures are intended to decrease the prevalence of sexual assault on college campuses, as well as increase the number of cases of sexual assault that are reported and prosecuted.[35] Cases of rape and sexual assault that are handled by the criminal justice system rarely lead to conviction (approximately 2%),[36] and therefore universities are encouraged (and required by the federal government) to handle their own cases internally. Although many have argued that colleges and universities are not equipped to handle cases of rape and sexual assault as well as police or the criminal justice system, others have argued that schools have the potential to respond to cases of campus sexual assault more quickly and with greater attention to the victim's needs than the justice system.[37]

While there is some controversy about which burden of proof standard should be used in

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[35] Most sources estimate that only between 10-20% of victims report what happened to them to the police or university officials. See, for example, the Bureau of Justice Statistics' National Crime Victimization Survey.

[36] "Reporting Rates | RAINN | Rape, Abuse and Incest National Network," Reporting Rates | RAINN | Rape, Abuse and Incest National Network, accessed April 16, 2016, https://rainn.org/get-information/statistics/reporting-rates.

[37] Schools can, for example, modify living arrangements such that victims need not reside in the same dorm as their alleged assailants while cases are being adjudicated. Many schools also offer counseling and academic support for those who have been affected by sexual assault.

university sexual assault cases,[38] most of the discussion about campus sexual assault policy has focused on the standard of consent. Until recently, the most widely held consent standard was a "no means no" approach, whereby only physical struggle or a verbal "no" could signal a lack of consent. According to a "no means no" standard, consent can be inferred from silence or a lack of struggle. Given what we know about the psychological symptoms that rape victims often experience—including physical paralysis and mental dissociation—the "no means no" model fails to characterize many instances of sexual assault and rape as such. For this reason, many anti-rape advocates and student activists favor the "yes means yes" approach, whereby anyone initiating sex must obtain voluntary, affirmative consent in the form of a verbal "yes" or unequivocal body language.[39]

According to Stephen J. Schulhofer, the creator of the "yes means yes" model, "Consent for an intimate physical intrusion into the body should mean in sexual interactions what it means in every other context—affirmative permission clearly signaled by words or conduct,"[40] and "For [sexual] intrusions actual permission—nothing less than positive willingness, clearly communicated—should ever count as consent."[41] According to Schulhofer, affirmative consent need not be communicated verbally, however, as "There are many ways to make permission clear

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[38] See, for example, Amy Chmielewski, "Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault," *BYU Educ. & LJ* (2013): 143-174, Stephen Henrick, "A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses," *N. KY. L. Rev.* (2013): 49-92, and Lavinia M. Weizel, "The Process That Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student SexualAssault Complaints," 53 *B.C. L. Rev*. (2012): 1613-1655.

[39] I use the terms "affirmative consent" and "yes means yes" interchangeably to refer to consent standards that require affirmative consent in the form of verbal discourse or clearly interpretable body language.

[40] Stephen J. Schulhofer, "The Feminist Challenge in Criminal Law," *University of Pennsylvania Law Review* 143, no. 6 (1995): 2181.

[41] Schulhofer, *Unwanted Sex,* 271.

without verbalizing the word 'yes.'"[42] Without a verbal requirement for affirmative consent, however, it becomes—at least in certain situations—difficult to differentiate the "yes means yes" model from the "no means no" model. Consider, for example, the following case:

> **Dorm room:** A and B live on the same floor of their college dorm. B gets home late from a party and finds A and his friends playing poker in the common room. B has been drinking but is not overtly intoxicated. B sits down next to A and after awhile rests her head in A's lap and closes her eyes. A begins stroking B's hair, B says nothing. The poker game ends and A asks B if she'd like to come back to his room and watch a movie. B agrees. A and B go back to A's room and begin watching the movie in A's bed. A few minutes later, A puts his hand on B's thigh. B says nothing but moves closer to A. A leans in to kiss B and the two begin making out. A and B continue making out while also engaging in heavy sexual touching and undressing each other. Eventually A takes out a condom and puts it on. Without asking B if it is alright, A penetrates B and A and B have sex. Afterwards, B gets out of bed, puts her clothes on, and says she had better go back to her room or her roommate will wonder where she is. A asks B if everything is alright and B says that everything is fine. A few weeks later A gets a call from an administrator at the university and is told that someone has filed a complaint of sexual assault against him.

Now, before we jump to conclusions about whether or not what A did should be classified as sexual assault, let us first imagine that most people in A's position would have interpreted B's behavior in the same way that A did, and assumed that B wanted to have sex. Let us even imagine that B had even given some signals that could have been interpreted as tokens of consent. Based on B's subsequent reaction to her sexual encounter with A, it is clear that B either regrets the intercourse or did not want to have sex with A in the first case, and feels that she has been violated because A did not verbally consult with her before sexually penetrating her. According to 'Schulhofer, however, A may have done no wrong by having sex with B without her explicit consent. As Schulhofer puts it, "If she doesn't say 'no,' and if her silence is combined with passionate kissing, hugging, and sexual touching, it is usually sensible to infer actual

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[42] Schulhofer, "The Feminist Challenge in Criminal Law," 2181.

willingness."[43] I will return to **dorm room** later on, when I discuss the *mens rea* of rape and mistaken belief in consent; for the time being, however, suffice it to say that there are many cases where body language can be ambiguous. If we allow non-verbal behaviors to count as tokens of affirmative consent, then we are still left with many situations where one person can think that sex is consensual while the other feels like she's being violated.

To combat the possibility that someone will misread someone else's body language, and perhaps engage in sexual intercourse that was in fact unwanted by one or more of the parties involved, some schools require verbal tokens of affirmative consent. The majority of schools implementing affirmative consent policies, however, concede (as Schulhofer does) that affirmative consent need not be obtained verbally. This leads to the possibility that someone may think that they have obtained affirmative consent (and arguably they have) even in a situation where sex is unwanted. Many of the complaints against universities from students who feel that they have been wrongfully accused or that their cases have been wrongfully handled relate to situations where the accused feel like they were given the go ahead and had no reason to believe that the sex was unwanted. Although affirmative consent is designed to prevent scenarios where it is not clear who wanted what, such misunderstandings can still occur under affirmative consent policies that do not require verbal consent.

In addition to revising consent standards, all schools and universities are now required under Title IX to use a preponderance of evidence standard when evaluating cases of alleged sexual assault. The preponderance of evidence standard, also known as the more likely than not standard, provides that the evidence must indicate that it is more likely than not (i.e., there is at

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[43] Ibid., 272. Schulhofer acknowledges, however, that "Sexual petting does not in itself imply intercourse" and "A woman who engages in intense sexual foreplay should always retain the right to say 'no.'"

least a fifty percent chance) that the defendant committed the crime. The preponderance of evidence standard is employed in most civil cases, but it differs significantly from the beyond a reasonable doubt standard employed by criminal courts when investigating alleged cases of rape and sexual assault. Prior to the Dear Colleague Letter (2011), most schools used a clear and convincing standard, according to which the evidence must show that it is *substantially* more likely than not that the defendant committed the crime. The shift away from a clear and convincing standard in favor of a preponderance of evidence standard has received substantial criticism, particularly from those who fear that it will lead to more false convictions—i.e., cases where a defendant is convicted but either did not commit the crime in question or lacked *mens rea* and therefore should not be held liable—that could have devastating consequences for the accused.

So far I have given an overview of the types of affirmative consent policies that most schools have adopted and explained why schools must now use a preponderance of evidence standard to adjudicate cases of alleged sexual assault.[44] In the next section, I will explore in depth the most prominent criticisms against using a lower evidentiary standard and a more stringent definition of consent when adjudicating cases of alleged sexual assault that occur on college and university campuses. I will argue that the solution is not to revert to higher evidentiary standards and more traditional definitions of rape and consent, but rather to abandon the consent model altogether and adopt a different model that I refer to as the "dual-

[44] As already mentioned, all schools are now required to use a preponderance of the evidence standard, and as of 2014 more than 800 colleges had adopted affirmative consent policies. Jake New, "Colleges across Country Adopting Affirmative Consent Sexual Assault Policies," Inside Higher Ed, October 17, 2014, accessed April 30, 2016, https://www.insidehighered.com/news/2014/10/17/colleges-across-country-adopting-affirmative-consent-sexual-assault-policies.

responsibility negotiation model." I will argue that the dual-responsibility model protects against unwanted sex while at the same time preventing genuine misunderstandings that could lead to wrongful convictions of sexual assault.

4. False Accusations, False Convictions, and the *Mens Rea* of Rape

One of the main criticisms against both affirmative consent and using the preponderance of evidence standard is that these standards turn most sexual encounters into cases of sexual assault. Many believe that affirmative consent policies constitute "the criminalization of what we think of as ordinary sex" and "make sex a crime under conditions of poor communication."[45] The affirmative consent standard also "shifts the burden of proof from the accuser to the accused," as it means that rather than the accuser needing to provide evidence that the accused *didn't* obtain consent, the accused will be required to provide evidence that he did.[46] According to some, including the prominent legal scholar Alan Dershowitz, this undermines the "innocent until proven guilty" standard and violates the rights of the accused. With regards to affirmative consent and the preponderance of evidence standard, Dershowitz believes that "punishing alleged violations of such stringent rules without due process may tarnish our principles of fairness."[47]

Although affirmative consent standards *would, prima facie*, classify more scenarios as rape and sexual assault than "no means no" policies do, it does not necessarily follow from this

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[45] Judith Shulevitz, "Regulating Sex," The New York Times, June 27, 2015, accessed April 15, 2016, http://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html.

[46] Alan Dershowitz, "Innocent until Proven Guilty? Not under 'yes Means Yes.'," Washington Post, October 14, 2015, accessed April 15, 2016, https://www.washingtonpost.com/news/in-theory/wp/2015/10/14/how-affirmative-consent-rules-put-principles-of-fairness-at-risk/.

[47] Ibid.

that affirmative consent policies would classify more *cases* (i.e., cases brought to court or to university tribunals) as rape and sexual assault. When considering the claim that affirmative consent policies would "make sex a crime under conditions of poor communication,"[48] we must first clarify what constitutes a *crime* according to standard criminal law doctrine. According to the criminal law, a crime consists of two parts: the *actus reus* of the crime and the *mens rea* of the crime. The *actus reus* of a crime is simply the commission of the acts considered to constitute the crime in question, whereas the *mens rea* of a crime is the possession of the necessary knowledge or intention at the time of the crime in order to be held liable. In other words, "The law requires for criminal conviction that the defendant be *at fault* for the offense; and he is only at fault if his mental state includes an awareness of wrongdoing."[49] According to this conception of a crime, someone may have committed the *actus reus* of a crime without having possessed the necessary *mens rea* for that crime. Having committed the *actus reus* of rape, for example, is not sufficient to establish criminal culpability for rape. Therefore, with regards to situations of disputed consent, "criminal law looks to what the *man believes* about the situation" to determine whether or not a crime was committed.[50] In other words, whether or not a woman consented—even according to an affirmative consent standard—becomes irrelevant if the man can prove that

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[48] Shulevitz, "Regulating Sex."

[49] Joan McGregor, *Is It Rape?,* 9.

[50] Ibid.

he *believed* the woman to be consenting at the time of sex.[51]

It may be useful at this point to think about the difference between a false accusation and a false conviction of rape. False accusations of rape occur when a woman falsely accuses a man of rape. That is to say, a woman accuses a man even though he did not rape her,[52] or a woman accuses the wrong man of the crime in question. False accusations of rape are rare, with most studies citing only 2-10% of allegations as false[53]; however, many people still believe that women frequently "cry rape" when in fact no such crime occurred. Although even a small percentage of rape allegations being false is not insignificant, it is worth noting that estimates of false allegations are often estimates of both false accusations and as well as rape cases judged by police officers as unfounded. Because the law "presumes a single underlying reality, rather than a reality split by the divergent meanings inequality produces,"— i.e., a reality divided along gender lines—the law considers cases where the woman cannot prove beyond a reasonable doubt (or by a preponderance of evidence, in a university case) that she did not consent to have never

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[51] There are certain types of crimes, called strict liability crimes, where the necessary *mens rea* component does not apply. Statutory rape, for example, is treated as a strict liability crime in a number of states and some feminists have argued that all cases of rape should be treated as strict liability crimes because it is so easy for the accused to use mistaken belief in consent as a defense. Although it is certainly true that "A law that punished men for making mistakes about women's consent to sex with them would encourage men 'to take more care in forming their beliefs [about women's consent] or in acting upon them,'" the view that rape should be a strict liability crime is an unpopular one and "it is standardly argued that negligence should not amount to the *mens rea* that is a necessary condition of criminal culpability." David Archard, "The Mens Rea of Rape: Reasonableness and Culpable Mistakes," *A Most Detestable Crime: New Philosophical Essays on Rape* (1999): 213-229.

[52] A common belief is that women often do this to justify adultery or pregnancy out of wedlock, or when they have post hoc regrets about the event in question.

[53] See, for example, David Lisak, Lori Gardinier, Sarah C. Nicksa, and Ashley M. Cote., "False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases," *Violence Against Women* 16, no. 12 (2010): 1318-1334, and Philip Rumney, "False Allegations Of Rape," *The Cambridge Law Journal* 65, no. 01 (2006): 128-158.

occurred.[54] Because many sources consider unfounded cases to be false, when in fact a rape might (and is statistically likely to) have occurred, the number of false accusations is likely to be considerably lower than most sources cite. With regards to campus sexual assault, there is both a fear that new consent standards and adjudication policies will lead to higher false conviction rates (recall Dershowitz's concerns), as well as to more false accusations. I will now proceed to assess whether or not such fears are justified.

According to a website started by mothers who claim that their sons were falsely accused of rape, women falsely accuse men of rape because "they are addicts for victim hood [sic]."[55] This website claims to be "dedicated to the families whose college sons have been falsely accused of sexual misconduct,"[56] which presupposes that false accusations of rape are widespread. According to one article on the site, "our college sons endure extreme feminist oppression" and "once you understand Intersectional Feminism you'll have a sense of why false accusations are a campus trend."[57] Although the fear that women frequently and maliciously accuse men of rape and sexual assault is widespread, it is largely unfounded. As already mentioned, false accusations of rape are rare, and due to the fact that "lodging a sexual-assault complaint exposes a complainant to scrutiny and skepticism," the premise "that rape is 'an

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[54] See MacKinnon, *Towards a Feminist Theory of the State,* 180. According to MacKinnon, the man's perspective "becomes the single reality of what happened," and therefore "When a rape prosecution is lost because a woman fails to prove that she did not consent, she is not considered to have been injured at all."

[55] "Want to Know Why College Girls Accuse? They Are Addicts for Victim Hood," Save Our Sons, April 2, 2016, accessed April 15, 2016, http://helpsaveoursons.com/want-to-know-why-college-girls-accuse-they-are-addicts-for-victim-hood/.

[56] "Save Our Sons," Accessed April 15, 2016, http://helpsaveoursons.com/.

[57] "Want to Know Why College Girls Accuse? They Are Addicts for Victim Hood," Save Our Sons.

accusation easily to be made,' is demonstrably false."[58] If we define a false accusation of rape as "the description of an event that the complainant knows never actually occurred,"[59] and perhaps expand that definition to include non-malicious false allegations (such as when the alleged victim is psychologically disturbed or when a victim misidentifies her assailant), then it is hard to see how affirmative consent policies and lower burden of proof standards will lead to an increase in false allegations.

With regards to false convictions of rape, which seems to be what Dershowitz is more concerned about, the story gets a little bit more complicated. False convictions for rape can occur for one of two reasons. First, a false conviction of rape can occur when someone makes a false accusation of rape that leads to a conviction. If we accept the argument that revised sexual assault policies are unlikely to lead to an increase in false allegations, then this first type of false conviction could only increase due to the revised burden of proof standards. The second type of false conviction occurs when the allegation in question is not false, per se, but the defendant is nevertheless not culpable for the alleged crime. Recall that in the criminal law someone may have committed the *actus reus* of a particular crime—that is, the acts considered to constitute the crime in question—but they may not have possessed the necessary knowledge or intention (the *mens rea*) at the time of the crime in order to be held liable. By this definition, someone should only be convicted of a crime if, at the time at the crime, they realized and intended their wrongdoing. With regards to sexual assault, particularly when the offense is defined primarily on the basis of non-consent, this second criteria is often lacking. In other words, cases frequently

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[58] Schulhofer and Murphy, *Tentative Draft No. 1* § 213.6(4) and § 213.6(5), 90.

[59] Rumney, "False Allegations Of Rape," 130.

arise where one party believes that a sexual encounter was consensual when in fact the other party gave no signs of consent.[60]

As many studies have noted, men and women often interpret non-verbal behaviors differently, and therefore it is easy to have situations where one party in a sexual encounter mistakenly interprets another party's conduct as indicating consent.[61] Looking back at the case I described earlier, **dorm room**, it is clear that body language can be misread and mistakenly interpreted as consent. Consider the following case discussed at length by David Archard in his chapter on "The *Mens Rea* of Rape."[62]

(1) Smith had sex with Jones.

(2) At the time of this sex, Jones did not consent to sex with Smith.

(3) Smith would not have had sex with Jones had he believed (2).

(4) At the time of this sex, Smith did not believe (2).

(5) In some sense, it may be appropriate to describe Smith's cognitive state as specified in (4) as unreasonable.

In considering the case above it is necessary to ask in what sense Smith's cognitive state may be considered unreasonable. By this token, we may also want to ask what constitutes a reasonable belief in consent, generally speaking, and what measures one must take for their belief in another's consent to be deemed reasonable. With regards to the case described above, (4) could

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[60] Or at least did not *intend* to give signs of consent.

[61] See, for example: Kristen Lindgren, Michele Parkhill, William George, and Christian Hendershot, "Gender Differences In Perceptions Of Sexual Intent: A Qualitative Review And Integration," *Psychology of Women Quarterly* 32, no. 4 (2008): 423-39; Antonia Abbey and Christian Melby,"The Effects of Nonverbal Cues on Gender Differences in Perceptions of Sexual Intent," *Sex Roles* 15, no. 5-6 (1986): 283-98.

[62] Archard, "The Mens Rea of Rape: Reasonableness and Culpable Mistakes."

be true for a variety of reasons. The strongest of these reasons, and the version of the scenario in which we may not want to hold Smith liable, is that Smith forms the opinion that Jones is consenting. That is, Smith does not fail to consider the issue of consent or refuse to accept the possibility that Jones is not consenting. Rather, Smith acknowledges that Jones may or may not be a consenting party to sex, but for whatever reasons genuinely believes that Jones is in fact consenting at the time of sex. This version of the "honest mistake" of consent is the version that is "most favorable to the view that someone who makes such a mistake should not be held culpable."[63]

According to Archard, we should nevertheless hold Smith and others like him culpable because "culpability lies in 'the choice to supplant what one knows to be an authoritative rule with a different authority that sanctions the act one wishes to make.'"[64] In the case of sexual consent, the risk of mistakenly believing that the other party is consenting is always there; however, "It is always open to a man, at no great cost to himself, to gain assurance that a woman is consenting by seeking a verbal affirmation of consent."[65] According to Archard, seeking verbal confirmation of consent offers "greater assurance than nonverbal behaviors whose meaning is open… [to] interpretation."[66] The reason that Smith should be held liable, according to Archard, is that "Smith relies on conventions under which Jones's behavior may be interpreted as indicating her consent" and thereby "supplants the authoritative voice of Jones with the authority

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[63] Ibid., 215.

[64] Ibid., 222, quoting Jean Hampton, "Mensrea," *Social Philosophy and Policy,* 7, no. 2 (1990): 16.

[65] Ibid., 220.

[66] Ibid. Note, however, that Archard does *not* subscribe to an affirmative consent standard, and holds that "The presumption that consent needs to be given in each and every sexual encounter for that encounter legitimately to be accounted consensual seems to be insensitive to the different kinds of sexual relationship there can be."

of convention."[67] By this token, A would be considered culpable for raping B in **dorm room** given that A used his own judgments rather than B's authority to judge whether or not the sex was consensual.

If we agree with Archard and posit that Smith (and A) should be held liable, then we are perhaps challenging a commonly held definition of culpability (namely that culpability requires knowledge of wrongdoing). Whether or not we agree with Archard on the matter of honest mistakes of consent or with Dershowitz's fear about punishing the innocent, this discussion was meant to highlight the epistemic issues that come up when thinking about affirmative consent and burden of proof standards.

One issue with holding that unreasonable mistakes of consent should be punishable is that "the negligence standard does little to solve the enforcement problems that antirape [sic] reformers are concerned about."[68] In other words, if the beliefs of the jury are heavily influenced by cultural stereotypes, particularly the belief that certain behaviors (including reluctance or even verbal protests) can still mean "yes," then the reasonableness will do little to protect women whose assailants claim that they thought they had consent. One possible way to address this problem would be to implement a "reasonable woman" standard.[69] As Joan McGregor writes, such a standard would ask the question of whether or not it would be "reasonable for a woman to be fearful or feel threatened" in the circumstances relating to case where consent is disputed. In other words, "The fact that the 'reasonable man' would not be afraid should not be relevant since

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[67] Ibid., 222. Recall that culpability can be thought of as "the choice to supplant what one knows to be an authoritative rule with a different authority that sanctions the act one wishes to make."

[68] Schulhofer, *Unwanted Sex,* 259.

[69] Joan McGregor, "Force, Consent, and the Reasonable Woman" in *In Harm's Way,* ed. Jules Coleman and Allen Buchanan (Cambridge: Cambridge University Press, 1994), 231-254.

what we want to know is when a woman has consented."[70]

Consider the following well-known case, where several men were acquitted of the charge of rape based on their defense of mistaken belief in consent. In *Regina v. Morgan*, Morgan told three men that his wife wanted to have sex with them, and that although she would resist and protest, this was just part of the act and she was really consenting. Morgan and the three men forcibly had sex with Morgan's wife while she protested and struggled; however the three men were acquitted based on the grounds that they believed Morgan's wife to be consenting.[71] In the House of Lords' initial decision it was held that an honest mistaken belief in consent, no matter how unreasonable the grounds for said mistaken belief, is a defense to rape. Even if a reasonableness standard had been implemented in *Regina v. Morgan,* the House of Lords might have still reached the conclusion that the three men had a reasonable belief in Ms. Morgan's consent (although most would dispute such conclusion). If a reasonable woman standard had been imposed, however, perhaps the jury would have reached a different conclusion; namely the conclusion that most women would *not* have consented to sexual intercourse with three strange men, and would not have protested vehemently if they were consenting.

With regards to the fear that affirmative consent policies and lower burden of proof standards will lead to higher rates of false accusations and false convictions, the question remains as to how we should define a false conviction. As I have already mentioned, I do not think that affirmative consent policies or using a preponderance of the evidence standard will result in higher false accusations or convictions that result from false information. The possibility

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[70] Ibid., 246.

[71] Director of Public Prosecutions v. Morgan, 2 All E.R. 347 (H.L. 1975), cited in Wertheimer, *Consent to Sexual Relations,* 24-25.

remains, however, that affirmative consent policies still allow for situations where "one person can think he's hooking up while the other feels she's being raped,"[72] and that shifting the burden of evidence onto the accused makes it more likely that university tribunals will favor the account of the victim, rather than the accused, and convict the accused even if the accused genuinely believed he had consent.

There are certainly cases where the defense argues that the accused interpreted the victim's body language as consent, when in fact the victim gave no active signs of consenting. The cases that concern me most, however, are cases (such as **dorm room** and the case discussed by Archard) that involve honest but mistaken beliefs in consent. These are cases where the victim did, in fact, give signs of consent but did not intend for those actions to count as consent, or where the accused erroneously believed the victim to be consenting at the time of intercourse despite no apparent signs of consent.

To prevent against such cases where one party feels violated while the other party justifiably had no idea they were doing anything wrong, I propose a departure from consent-based definitions of sexual assault. Both the "no means no" and the "yes means yes" model allow for genuine misunderstandings about consent to occur, and although Schulhofer holds that "[a] world without ambiguity in erotic interaction might be a very dull place,"[73] we need more than erotic excitement to justify using standards that allow for one party to feel violated while the other party feels like it's just another Saturday night [consensual] hookup.[74]

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[72] Judith Shulevitz, "Regulating Sex."

[73] Schulhofer, *Unwanted Sex,* 272.

[74] Schulhofer himself acknowledges that "…ambiguity is also dangerous, especially for women who justifiably want the freedom to explore intimacy and sexual contact without losing their right to stop matters short of intercourse." Ibid.

5. The Negotiation Model

In the previous section I discussed current sexual assault policy reforms and the major criticisms that those reforms have received. I will now put forward an alternative model in place of consent-based models for sexual communication. I believe that this model could better prevent misunderstandings in sexual communications as well as target the underlying problem of sexual assault. The model that I put forward is a version of Michelle Anderson's "negotiation model."[75] I refer to my version of Anderson's negotiation model as the dual-responsibility negotiation mode, for reasons that I will explain below.

At its most basic level, "[a] negotiation model requires consultation, reciprocal communication, and the exchange of views before a person initiates sexual penetration."[76] Whereas synonyms for consent include "yield to," "give in to," and "submit to," synonyms for negotiate are not one-way or submissive and include "discuss," "confer," and "consult." Anderson's negotiation model therefore has mutuality and reciprocity at its foundation—just as many theories of rights do—whereas models of sexual consent presuppose that sex is something that one party does *to another.* This underlying facet of consent, whether it be imposed by a "no means no" or a "yes means yes" model, encourages objectification, which in term facilitates sexual assault. As Anderson describes, "A negotiated agreement, by contrast, is a concurrence of the wills through mutual consideration and reciprocity of concern."[77] In a negotiation model, "Instead of obtaining 'acquiescence' or 'compliance,' one should have to 'arrive through

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[75] Michelle J. Anderson, "Negotiating sex," *S. Cal. L. Rev.* 78 (2004-2005): 1401.

[76] Ibid., 1420.

[77] Ibid., 1422.

discussion at some kind of agreement' with his partner about whether sexual penetration should occur."[78] Note here that according to Anderson's model verbal communication is only required in order for penetration to occur, and not for all other sexual acts.

In many ways a sexual negotiation would be similar to a BDSM contract, in that it would require all parties involved in a sexual encounter to verbalize their sexual desires and boundaries.[79] The negotiation model differs from verbal affirmative consent, therefore, because —under the negotiation model—individuals would not merely be responding to the sexual advances of others in a yes/no manner, but rather communicating openly in order to come to a shared understanding about what both or all parties are comfortable with.

I find the negotiation model attractive because it encourages mutual communication and respect. Although proponents of the "yes means yes" model are also aiming for better communication and increased respect of sexual autonomy, the negotiation model places more emphasis on reciprocity than either the "yes means yes" or the "no means no" approach. The negotiation model therefore targets the underlying problem of sexual assault—a lack of respect for another's sexual autonomy—as well as working to overturn the presumption that sex is something that one person does *to* another. Anderson's negotiation model needs to be adapted, however, if we are to avoid the types of genuine communicative misunderstandings that could lead to wrongful convictions of sexual assault. I therefore propose a dual-responsibility negotiation model whereby sexual partners are not only responsible for communicating with

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[78] Ibid.

[79] BDSM is a type of sexual role play that involves bondage and discipline (BD), dominance and submission (DS), and sadism and masochism (SM). Within the BDSM community, contracts and safe words are used to protect the safety and sexual (as well as mental and physical) boundaries of all parties involved in a BDSM relationship.

each other in order to establish whether or not the other party or parties want to have sex, but are also responsible for communicating whether or not *they* want to have sex. This second type of responsibility—communicating one's own desires—may seem redundant, but it is important if we are to avoid the types of genuine misunderstandings that Dershowitz and others believe will lead to wrongful convictions of sexual assault.

I recognize that some may oppose my dual-responsibility function of the negotiation model on the grounds that it places responsibility on both or all parties involved in a sexual encounter. It therefore shares some features of the "no means no" model by placing some responsibility on the non-initiator. The dual-responsibility function of the negotiation model differs from the "no means no" model, however, because the responsibility to ascertain the desires of the other party or parties involved supersedes the responsibility to communicate one's own desires in instances where the first type of responsibility—that is, the responsibility to communicate with the other party or parties involved in order to ascertain their sexual desires, boundaries, and preferences—is not met. In other words, the responsibility to communicate one's own desires only comes into play when others have actively sought to ascertain what those desires are.

Replacing consent-based models with the dual-responsibility negotiation model would have several consequences, both in terms of how individuals conduct themselves in sexual encounters (call this the *conduct* aspect), as well as in terms of how sexual encounters are adjudicated in alleged cases of sexual assault (call this the *adjudication* aspect). With regards to the conduct aspect, the dual-responsibility negotiation model would encourage respect and mutual understanding between partners, as well as open and honest communication. Partners in

any sexual encounter would be responsible for using verbal communication to ascertain the desires and boundaries of their sexual partners as well as communicating their own desires and boundaries. With regards to the adjudication aspect, the dual-responsibility negotiation model would protect against retroactive accusations of sexual assault in situations where the alleged perpetrator was given untruthful or misleading information about the alleged victim's sexual desires or boundaries.

Like consent-based models, the dual-responsibility negotiation model can be undermined by the presence of force, coercion, and in some cases deception. Consider a case where a professor told a student that he would raise her grade if she agreed to have sex with him and she agreed; in this situation the sexual agreement would be compromised by the presence of coercion. Or consider a case that happened in 2008, where a woman had sex with her boyfriend's brother in a dark basement thinking that she was having sex with her boyfriend.[80] Under the dual-responsibility model, any agreement for sex that took place under these circumstances would be similarly compromised by the use of deception. The negotiation model allows for the same situational factors that constitute threats to the legitimacy of consent to count as threats to the legitimacy of sexual agreements.

The main difference between the dual-responsibility negotiation model and consent-based models is the emphasis on reciprocity and mutual responsibility. In other words, sexual communication under the negotiation model is conceptualized as the communication of desires and boundaries between parties involved in a sexual encounter, rather than a simple permission

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[80] Johanna Kaiser, "Rape 'by Deception' May Become A Crime In Massachusetts," CBSNews, February 29, 2008, accessed April 29, 2016, http://www.cbsnews.com/news/rape-by-deception-may-become-a-crime-in-massachusetts/.

seeking and granting back and forth.[81] Although Anderson only applies the negotiation model to acts of penetration, I propose expanding the negotiation model to apply to other sexual acts as well. It is not my goal to spell out exactly which acts—either intentionally or unintentionally construed as sexual advances—require verbal consultation, but I think that there are many acts in addition to penetration (such as sexual fondling etc.) that should require some sort of communication before they are considered permissible. Putting your hands down someone's pants, for example, may be unwanted and should therefore require consultation. Handholding, meanwhile, need not require consultation.[82]

Although implementing the dual-responsibility negotiation model would be similar to simply making affirmative consent require verbal communication, the negotiation model is superior to verbal consent because it does not perpetuate the belief that sex is something that men do *to* women. Furthermore, the dual-responsibility negotiation model encourages sexual partners to be clear and honest about their desires, rather than to simply acquiesce to someone else's will. According to Catherine MacKinnon, consent as a construct is useless in a world of systematic gendered inequality. MacKinnon argues that consent perpetuates the idea that female sexuality is characterized by "submission eroticized" while male sexuality is characterized by "dominance eroticized."[83] As MacKinnon writes, "consent is a communication under conditions of inequality [that] transpires somewhere between what the woman actually wanted and what the man

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[81] While the negotiation model emphasizes conversation and dialogue—in part because an agreement is something that two (or more) parties *come to,* rather than something that one party *gets*—I concede that in certain situations a sexual negotiation will look very similar to sexual communication under a verbal affirmative consent standard.

[82] We can certainly imagine a pre-handholding consultation, whereby one party asks the other party whether they prefer to have their hand "on top," however most of us can agree that such a consultation is neither legally nor morally necessary for handholding to occur.

[83] MacKinnon, *Toward a Feminist Theory of the State,* 130.

comprehended she wanted."[84] Under this model "man proposes, woman disposes. Even the ideal… is not mutual."[85]

While there is nevertheless room for discrepancies between actual desires and communicated or interpreted desires within the dual-responsibility negotiation model, the chance of such discrepancies occurring is much less because the dual-responsibility function of the negotiation model holds sexual partners responsible for communicating their own desires. Additionally, the dual-responsibility negotiation model is entirely gender-neutral and the direction of communication is reciprocal rather than one way. Therefore within the dual-responsibility negotiation model it need not be the case that "man proposes, woman disposes," as both parties are responsible for consulting with their partner(s) to ascertain and communicate sexual desires.

As with any consent-based model, a major question that needs to be considered is how allegations of sexual assault (in this case disputed sexual negotiations) would be handled and adjudicated. Specifically, it is necessary to lay out in no uncertain terms how the dual-responsibility model would function in sexual assault cases where two parties disagree about whether or not sexual negotiation took place.[86] To begin with, I will outline the types of disagreements that could occur with regards to a particular sexual negotiation that did or did not take place.

The first type of dispute that could arise is as follows: B contests that A engaged in sexual

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[84] Catharine A. MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," *Signs* 8, no. 4 (1983): 652.

[85] MacKinnon, *Toward a Feminist Theory of the State*, 174.

[86] Or in cases where both parties concede that a negotiation did take place but disagree about the terms or legitimacy of said negotiation.

relations with B without engaging in a sexual negotiation with B prior to attempting sexual acts. This type of situation is similar to a situation where A engages in sexual relations with B without obtaining or even attempting to obtain consent. In a criminal case, the burden of proof will be on the prosecutor to prove beyond a reasonable doubt that the defendant did not enter into an agreement with the victim before the sexual act in question occurred. If the case is being adjudicated by a university tribunal, then the alleged victim need only provide a preponderance of evidence indicating that no sexual negotiation took place. In cases where there is little to no evidence, as is often the case in cases of acquaintance rape, the verdict of the case will rely on the testimonies of the defendant and alleged victim.

This is similar to what the court adjudication process looks like for consent-based models, where prosecutors must prove beyond a reasonable doubt that the victim did not consent. Something that may seem like a subtle difference is whether or not terms of consent or negotiation were sought and later violated, or whether no consent or negotiation was sought whatsoever. In the majority of rape cases under any of these standards it is usually the latter; however, we can also imagine a case where consent was initially given but later revoked or where the conditions of obtained consent or negotiation were violated. We can also imagine a situation where the terms of negotiation were (allegedly) misinterpreted by one party. This is perhaps the most important and the most difficult type of case to adjudicate.

The major challenge facing the dual-responsibility negotiation model (as well as consent-based models) is what happens when alcohol is involved. To protect against intoxicated parties being sexually taken advantage of, intoxication is usually considered to be a threat to the validity of consent. It should not be permissible to have sex with someone who is passed out because

they've had too much to drink, neither should it be permissible to have sex with someone who is "blackout" drunk. But the line between drunk and too drunk to give consent is a fine line and one that is not easily discernible, especially if the person trying to determine the line has been drinking as well.

The dual-responsibility negotiation model faces a similar problem as consent models: how drunk is too drunk for a sexual negotiation to be considered valid? If one party fails to communicate with the other before initiating penetration, then that party has committed a sexual offense. If someone consults with their partner, however, and their partner unambiguously agrees to have sex or engage in some other sexual act, should that agreement be considered valid if one or both of the parties involved is voluntarily intoxicated? Alan Wertheimer frames this question well in his discussion of [voluntarily] intoxicated consent. As Wertheimer reminds us:

> [T]here is both a positive and a negative dimension to respecting an agent's autonomy. We respect an agent's negative autonomy when we protect her from interventions by others that do not reflect her will. We respect her positive autonomy when we allow her to render it permissible for others to engage in relationships with her. Although both dimensions of autonomy are important, we cannot always maximize both forms simultaneously. To the extent that we zealously protect an agent's negative autonomy by setting high standards for what qualifies as valid consent, we may encroach on her positive autonomy to realize her own goals and desires.[87]

Although it is beyond the scope of this paper to indisputably establish whether or not sexual negotiations are valid when one or more of the parties agreeing to sexual acts are voluntarily intoxicated, I raise Wertheimer's point about positive and negative autonomy to show that it is problematic to render all intoxicated sexual agreements invalid. When it comes to evaluating cases of alleged sexual assault that involve alcohol, I believe it is necessary to regard

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[87] Alan Wertheimer, "Intoxicated Consent to Sexual Relations," *Law and Philosophy* 20, no. 4 (2001): 376.

unambiguously agreed upon sexual acts as legally or institutionally permissible if we are to protect an agent's positive autonomy. So long as all parties involved are conscious and the encounter does not involve force, coercion, or certain types of deception, then it seems reasonable to judge explicitly agreed upon intoxicated sexual encounters as legitimate. Another way to put it is that "Respect for autonomy requires protecting our freedom to refuse sexual contact, but it also requires protecting our freedom to seek emotional intimacy and sexual fulfillment with willing partners,"[88] and being voluntarily intoxicated should not preclude our ability to seek physical intimacy.

Although protecting positive sexual autonomy involves allowing that at least some instances of intoxicated consent should be considered valid, another way that we could approach the question of intoxicated consent is with reference to the notion of "authority" as it relates to consent and culpability. In other words, does an individual who is voluntarily intoxicated still have the relevant type of authority needed to grant consent? I do not have an answer to this question, but perhaps another follow-up question is this: who has the relevant authority to *decide* if someone has the relevant authority needed to grant consent? In other words, if there are two people in a sexual encounter and one or more of them is voluntarily intoxicated, does either of them have the relevant type of authority needed to decide if they or the other person involved in the sexual encounter are too drunk to give consent?

As I have already acknowledged, alcohol presents one of the biggest challenges to any model of sexual communication. This is especially troublesome given that the vast majority of

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[88] Schulhofer, preface to *Unwanted Sex,* x.

campus sexual assault cases involve alcohol.[89] State laws have also struggled to define the role that alcohol plays in facilitating sexual assault. In a recent case, the Oklahoma court ruled that "oral sex is not rape if [the] victim is unconscious from drinking."[90] According to the defendant's attorney, "There was absolutely no evidence of force or him doing anything to make this girl give him oral sex… other that she was too intoxicated to consent."[91] Despite the seemingly outrageous ruling in this case, Michelle Anderson believes that the ruling is "appropriate" given the way the statute is written. According to Anderson, "This is a call for the legislature to change the statute… [which currently] creates a loophole for sexual abuse that makes no sense."[92] As I noted earlier, sexual communication should not *necessarily* be invalidated by mild or even moderate intoxication; however this does not grant *carte blanche* to anyone wishing to pursue sexual intimacy with someone who is voluntarily intoxicated.

Although the dual-responsibility negotiation model would not eliminate the challenge that intoxication poses to sexual communication, it would nevertheless require that verbal communication *occur* for intoxicated sex acts to be legally permissible. It would also provide a framework for open and honest communication that would hopefully help to combat some of the communicative misunderstandings that arise when one or more parties in a sexual encounter is under the influence of alcohol.

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[89] See, for example, Antonia Abbey, Tina Zawacki, Philip Buck, Monique Clinton, and Pam McAuslan, "Alcohol and Sexual Assault," National Institute of Alcohol Abuse and Alcoholism, accessed April 24, 2016, http://pubs.niaaa.nih.gov/publications/arh25-1/43-51.htm, and Antonia Abbey, "Alcohol-related sexual assault: A common problem among college students," *Journal of Studies on Alcohol Supplement* 14 (2002): 118-128.

[90] Molly Redden, "Oklahoma Court: Oral Sex Is Not Rape If Victim Is Unconscious from Drinking," The Guardian, April 27, 2016, accessed April 28, 2016, http://www.theguardian.com/society/2016/apr/27/oral-sex-rape-ruling-tulsa-oklahoma-alcohol-consent?CMP=share_btn_link.

[91] Ibid.

[92] Ibid.

6. More Than Just a Policy Change

When it comes to addressing the issues of rape and sexual assault—particularly on college campuses—policy change can only do so much. As Stephen J. Schulhofer notes:

> When people so often disagree about what "consent" or "force" is, the rape law of statutes and court decisions often appears irrelevant or meaningless. Social attitudes are tenacious, and they can easily nullify the theories and doctrines found in the law books. The story of failed reforms is in part a story about the overriding importance of culture, about the seeming irrelevance of law.[93]

Scholhofer's point highlights the fact that although policy reforms may change the *definition* of a particular crime (in this case rape), reforms do not necessarily influence the social attitudes that lead to the perpetration of the crime in the first place. The history of rape and sexual assault is dark and complex and many of the attitudes towards women—both explicit and implicit—that lead to the perpetration of sexual violence cannot be eliminated solely through policy change.

The belief that women who dress a certain way or act a certain way are "asking for it," for example, has led many judges to conclude that a rape was not committed because the victim's behavior (or appearance, or past sexual history) gave the accused reasonable grounds to assume consent. The prompt-complaint requirement, corroboration requirement, and cautionary instructions are all examples of a deep societal distrust of women who make allegations of rape —particularly women who make allegations of acquaintance rape. Although these measures are no longer a part of most rape law statutes, the bias that they represent is still widely held and acceptance.

While biases against unmarried or highly sexually active women may have allowed many rapists to go free, policy changes such as the introduction of rape shield laws *have* attempted

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[93] Schulhofer, *Unwanted Sex,* 17.

to improve how alleged victims are treated during the prosecution of alleged rape cases. Although policy change may not be *enough* to fix the problem, it is a starting point. Along with policy change, however, we need to emphasize the role that cultural practices and beliefs play in perpetuating the problem of sexual assault. "People's attitudes about what rape is, who rapists are, and what women's responsibilities are with regard to men and sex greatly affect whether any given incident will be acknowledged, prosecuted, and found guilty."[94] Furthermore, "These social attitudes influence whether women themselves view what happens to them as rape, and how they view their own responsibility."[95]

Part of the problem with adopting a standard like affirmative consent or the negotiation model is that most sexual encounters don't involve verbal communication at every step of the way. Transitioning from a presumption of consent to a presumption of non-consent—which is essentially what we are doing by switching from a "no means no" to a "yes means yes" approach—requires a tremendous amount of work and it involves challenging cultural beliefs about what sexual encounters look like. Although revising rape laws and sexual assault policies is a start, we need to also address these issues at a cultural level.

A great deal of our information and beliefs about sexual relations comes in the form of popular media, and thus media presents both an obstacle to and an opportunity for changing our perceptions about what positive sexual experience should (or at least can) look like. Consider the famous staircase scene in Gone with the Wind, where Rhett carries a struggling Scarlett up the stairs, undressing her and kissing her roughly as he goes, and the next morning Scarlett awakes

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[94] Joan McGregor, *Is It Rape?*, 3.

[95] Ibid.

elated and looks back fondly on the night before: "….stronger than shame, was the memory of rapture, of the ecstasy of surrender. For the first time in her life she had felt alive…. When she thought of meeting him again, face to face in the sober light of day, a nervous tingling embarrassment that carried with it an exciting pleasure enveloped her."[96]

Scenes such as this one eroticize male dominance and female submission and create a certain belief about what heterosexual sex looks like.[97] Pornography also shapes our understanding about what sex looks like and influences the way that young people (and particularly young men) approach sexual encounters. If we want to seriously address the crimes of rape and sexual assault than we need to not only do a better job of prosecuting these crimes but also to find measures and implement educational programs that promote mutual respect and understanding between sexual partners. The underlying problem of sexual assault is a lack of respect for another human being, and in order to address this problem we need to consider issues such as the way the media portrays heterosexual sex.

7. Case Study

Up until this point I have discussed several issues related to how courts and universities handle disputed cases of sexual assault. I have also raised concerns about consent-based models of sexual communication and suggested that even progressive rape laws have done little to improve the way that police and the criminal justice system handle cases of alleged rape and sexual assault. To illustrate some of these issues I would like to describe a case that Jon Krakauer

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[96] Margaret Mitchell, *Gone with the Wind* (New York: Macmillan Company, 1936), 939-940.

[97] According to Catherine MacKinnon gay sex also emulates this type of power dynamic between sexual partners. As MacKinnon described it in one interview, "It's not biological. It's about sex roles. Anyone can play them." Stuart Jeffries,"Stuart Jeffries Talks to Leading Feminist Catharine MacKinnon," The Guardian, April 12, 2006, accessed April 25, 2016, http://www.theguardian.com/world/2006/apr/12/gender.politicsphilosophyandsociety.

discusses at length in his book *Missoula.*[98] I believe that this case illustrates not only the limitations of policy reform, but also some of the major differences between how courts and universities handle reported cases of rape and sexual assault and some of the major flaws within each of these two adjudication systems. The case that I would like to describe is the rape of Kaitlynn Kelly that occurred on September 30th, 2011. The quotes and passages that I will refer to are from the book *Missoula*; however, many of these quotes are direct quotes from the individuals involved in the case.

On September 30th, 2011, Kaitlynn Kelly attended a party with her friend Greg Witt (pseudonym). At the party, Kelly "knocked back some shots of tequila and cheap whiskey."[99] After the party, Kelly and Witt retired to the University of Montana's campus where they "sat down on a bench… so [that] Kelly could smoke a cigarette before returning to her room."[100] After a while, "two freshman walked by who were stinking drunk."[101] After asking the two freshman if either of them had a cigarette, "Witt struck up a conversation with the two younger students and the subject turned to sex."[102] Kelly said that she thought one of the freshman, Calvin Smith, was "a cutie," and "Witt suggested to Smith and Kelly that they ought to hook up, because [Kelly] hadn't slept with anyone in over a year and… getting laid would be good for both of them."[103] So Kelly "invited Calvin Smith up to her room" and "Smith responded

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[98] Jon Krakauer, *Missoula: Rape and the Justice System in a College Town* (New York: Anchor Books, 2016).

[99] Ibid., 71.

[100] Ibid.

[101] Ibid., 72.

[102] Ibid.

[103] Ibid.

enthusiastically."[104] When they got to Kelly's room, however, Kelly's roommate, Nancy, and her boyfriend were asleep in Nancy's bed. As Kelly recalls, she told Smith that "we could not do anything because they were [there]," but Smith said "It's okay, we'll be quiet."[105] Kelly said no, but let Smith lie down in her bed and eventually fell asleep with him there. Kelly "woke up to [Smith] repeatedly violently penetrating [her] vagina with three of his fingers."[106] She "tried to pull his hand away…. telling him, 'stop, no' multiple times." Smith then "proceeded to violently penetrate [Kelly's] anus with the same force and motion," before forcing Kelly "to perform fellatio on him by pushing [her] head down."[107] When Smith tried to force Kelly to have sex with him she recalls being in "excruciating pain."[108] When she was finally able to successfully push Smith off of her she got up and went to the bathroom. Smith "followed [Kelly] into the bathroom," where he "peeked over the stall and stared at [her]."[109] According to Kelly, that was the last she saw of him.

At this point it may be worth mentioning that the state of Montana actually has a fairly progressive definition of rape, according to which rape is "sexual intercourse without consent," where sexual intercourse includes "penetration of the vulva, anus, or mouth by the penis of another person, penetration of the vulva or anus… by a body member of another person, or penetration of the vulva or anus… by a foreign instrument or object." Furthermore, according to

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[104] Ibid.

[105] Ibid.

[106] Ibid.

[107] Ibid., 72-73.

[108] Ibid., 73.

[109] Ibid.

Montana's definition of rape, "[A]ny penetration, however slight, is sufficient."[110] Despite this relatively comprehensive definition of rape, however, the Montana Code fails to specify what counts as "consent."

For most of us, reading about what happened to Kaitlynn Kelly is horrifying, but what is perhaps even more horrifying is how this case was handled by the police. When Kelly returned to her room she found her roommate Nancy staring in shock at her blood-soaked sheets. As Kelly later told a detective at the Missoula Police Department, "there was blood on the pillow I was laying on… blood on my wall above my head… and there was blood all over my sheets."[111] Kelly threw out her blood-soaked sheets in disgust (an act that would later come back to haunt her when she attempted to take the case to court); however, she did give the police "[her] bloody shorts, [her] bloody underwear, [and her] bloody T-shirt."[112] According to Kelly, "They also took [her] two-inch-thick memory-foam mattress that was soaked all the way through with blood."[113] In addition, a physician at Curry Health Center conducted a rape kit for Kelly after the incident and "documented severe vaginal and rectal pain, vaginal bleeding, and abrasions to her inner thighs and vaginal vault."[114]

Despite all of this, Kelly was told by Detective Connie Brueckner at the Missoula Police Department that "the case was going to be tricky to prosecute because both Kelly and Calvin

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[110] MT Code § 45-2-101 (2015).

[111] Ibid., 74.

[112] Ibid., 75.

[113] Ibid., 75-76.

[114] Ibid., 74.

Smith were drunk."[115] Brueckner attempted to console Kelly, saying "I'm sorry he didn't hear you [when you said no],"[116] and "You seem like a strong girl. I think you can hang in there and get through it."[117] In the end, Kaitlynn Kelly was told that there was insufficient evidence to move forward with her case.[118]

The University of Montana, meanwhile, came to a very different conclusion about what happened to Kaitlynn Kelly on the evening of September 30th. On October 20th, 2011, Calvin Smith received a letter informing him that the University of Montana had "initiated an investigation into the allegation that [he had] violated Section V.A. 18 of the University of Montana Student Conduct Code… [when he] reportedly, on October 1, 2011… raped Kaitlynn Kelly, in her room in Turner Hall."[119] Before a university hearing took place, Smith met with the UM Dean of Students, Charles Couture, alone. According to Smith, Couture "just kept going on and on about how [Smith] needed to tell the truth, and it would just be faster if [he] told the truth. and then the very end, he was like, 'Yeah, you're guilty…. Yup, yeah, you're going to get expelled."[120]

Kirsten Pabst, the Chief Deputy County Attorney who had refused to prosecute Kelly's case, testified at the University Court hearing on behalf of Calvin Smith. Dean Couture thought

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[115] Ibid., 80.

[116] Ibid.

[117] Ibid., 82.

[118] Ibid., 86.

[119] Ibid., 88.

[120] Ibid., 89.

that Pabst's presence at the hearing was "totally out of place" and "not appropriate."[121] Pabst described the case as "'clean-cut,' [since] 'according to all of the witnesses, Mr. Smith and the alleged victim' agreed to have sex."[122] According to Pabst, because Kelly and Smith had initially agreed to have sex, "we don't have the whole really blurry consent issue that we normally do."[123] Furthermore, Pabst asserted that "Once there was an affirmative agreement to have sex… it's not fair for us as prosecutors to expect a suspect to read someone's mind when they're verbally given consent."[124]

After the rest of Smith's witnesses had finished testifying, Smith "asked the University Court to continue the hearing at a later date, so he could have more time to present his case."[125] The chairwomen of the hearing promptly denied Smith's request for more time, and when asked if he could like make a statement Smith declined, saying "I've given my statement to the police… On my lawyer's advice, I plead the Fifth."[126] At this point "David Aronofsky, the University of Montana's legal counsel, who had been silently observing the hearing and was not supposed to address the University Court," raised some concerns about how the hearing was proceeding: "I don't care if the court gives me permission or not. As the chief legal officer of this university, I have some concerns about assuming this proceeding has to end today. If there is

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[121] Ibid., 98.

[122] Ibid., 99.

[123] Ibid.

[124] Ibid., 100.

[125] Ibid., 108.

[126] "Pleading the Fifth" refers to a defendant's right not to answer questions if the answers to those questions might later be used against them.

material evidence—"[127] Dean Couture cut Aronofsky off, reminding him that he was not supposed to participate in the hearing. Aronofsky, noting that he was speaking "without authorization," responded to Couture by reminding him that "part of [his] responsibility as chief legal officer is to make sure that all of the parties are compliant with the law." Furthermore, Aronofsky argued that "if there is material evidence that this court can receive that could influence the decision that could result in the remedy of expulsion… [then] there is an obligation by the university for this court to consider it."[128] Dean Couture and the chair of the University Court refused to continue the hearing at a later date, relying on the justification that "neither the criminal investigation by the Montana Police Department nor Kirsten Pabst's determination that there was insufficient probable cause to prosecute Calvin Smith should have any bearing on the university's disciplinary proceeding."[129]

The University of Montana found Smith guilty for violating the Student Conduct Code, Section V.A. 18, citing as evidence the fact that "Ms. Kelly removed consent at three different points" during the encounter.[130] The university handled Kelly's case very differently than the Montana Police Department, and also relied on a different definition of consent and a different burden of proof standard to reach their conclusion. According to UM's sexual misconduct policy, consent involves "Clear, informed, and voluntary communication of intent," and "Clear

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[127] Ibid., 109.

[128] Ibid.

[129] Ibid., 110.

[130] Ibid., 112.

and informed disallows agreement by inference from silence [or] past consent."[131] So even if Kelly initially agreed to have sex with Smith, her consent was invalidated when she told Smith that she didn't want to anymore.

In addition to highlighting the differences between university and court adjudication systems, this case also highlights a number of other important issues related to sexual assault. First, this case calls attention to the need for a more nuanced legal definition of what should count as an agreement to sex. This case also demonstrates the role that intoxication can play in undermining (in the court's opinion) a victim's non-consent. Additionally, this case shows how unreasonable mistaken belief in consent claims can be. Despite the fact that Kelly repeatedly told Smith to stop and tried to push his hand away, Smith claimed that his sexual encounter with Kelly was consensual and that he did stop when Kelly said that she had to go to the bathroom.

If the courts had adjudicated this case using the dual-responsibility negotiation model, then perhaps things would have turned out differently. According to the dual-responsibility mode, even if Smith *hadn't* heard Kelly say "no, stop," he would have still been liable on the grounds that he did not engage in a sexual negotiation with Kelly prior to engaging in various sex acts with her. In other words, after Kelly revoked her agreement to the initial sexual negotiation, Smith would have needed to engage in further discourse with Kelly to find out if she was interested in engaging in sexual foreplay and (eventually) sexual intercourse. Given that Smith never did engage in such discourse, the fact that Kelly's protests may have been inaudible to Smith is irrelevant.

Although consent-based standards would, in theory, classify what Smith did to Kelly as

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[131] The University of Montana, "Sexual Misconduct Resources - Definitions," accessed April 28, 2016, http://www.umt.edu/sexualmisconduct/definitions/default.php.

rape, there is clearly a gap between how consent is defined (or how we might assume that it is defined) and how it is interpreted by law enforcement officers. Implementing the dual-responsibility negotiation model could help to emphasize the need for a valid verbal agreement *at the time that sex acts are performed.* The dual-responsibility negotiation model would also clearly establish that mistaken beliefs in valid agreements to sexual acts are only excusing if the party holding the mistaken belief took active steps to ascertain the sexual desires and boundaries of the other party involved *and* if the other party involved gave false or misleading information about said desires and boundaries.

8. Conclusion

In discussing sexual consent and possible alternative models what we are really trying to do is figure out a system of communication that will prevent sexual assault as well as protect both positive and negative sexual autonomy. In order to do this we need a system that encourages partners in a sexual encounter to communicate their desires and boundaries openly, as well as be sensitive and respectful towards the sexual desires and boundaries of the other party or parties involved. One possible objection to the dual-responsibility model that I have not yet discussed is its reliance on the idea that women should be encouraged to know and communicate their sexual desires. As Schulhofer points out, "in order to make her desires clear, [a] woman herself must know what they are," and "If she isn't sure, her efforts to say 'no' will almost invariably send—and be intended to send—a mixed signal."[132] In cases where a woman isn't clear what her desires or boundaries are, and hence does not clearly communicate them, we have two choices: we can hold the woman responsible for this, or we can hold the man accountable for continuing despite

[132] Schulhofer, *Unwanted Sex,* 261-262.

the somewhat ambiguous communication. Currently, the criminal justice system takes the first approach, granting the benefit of the doubt to the accused in cases where consent (or lack thereof) was not clearly communicated.

Although a woman needing to know her desires and boundaries in order to communicate them poses a major challenge to the dual-responsibility negotiation model, this challenge is not unique to this model. Under a "no means no" standard, a woman who does not know what she wants will either submit to sex or will protest in a way that will most likely be interpreted as consent. Under a "yes means yes" standard, meanwhile, a woman's mixed signal will most likely also be interpreted as consent unless her partner refuses to proceed in the absence of enthusiastic consent.[133] The dual-responsibility negotiation model differs from these other two models in that it encourages women to *think* about what their own sexual desires and boundaries are, rather than merely responding to the sexual desires of others. Although this may seem like a positive endeavor, and I believe it is, it is by no means without its faults. Schulhofer, for example, criticizes Naomi Wolf for asserting that "women have 'the *responsibility* [her emphasis] to be clear about [out sexual boundaries] to ourselves and to others."[134] Schulhofer's complaint is not based on a belief that women should not voice their sexual desires and boundaries, however, but rather on the aforementioned worry that "In order to make her desires clear, the woman herself must know what they are."[135]

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[133] Some have argued that rather than affirmative consent we should be looking for *enthusiastic* consent. For example one journalist writes that enthusiasm is "is harder to mistake for anything else" and consent is "too easily confused with well-she-didn't-exactly-say-no." Gaby Hinsliff, "Consent Is Not Enough: If You Want a Sexual Partner, Look for Enthusiasm," The Guardian, January 29, 2015, accessed April 17, 2016, http://www.theguardian.com/commentisfree/2015/jan/29/rape-consent-sexual-partner-enthusiasm.

[134] Schulhofer, *Unwanted Sex,* 261.

[135] Ibid.

While Schulhofer's worry about the "take responsibility" approach is legitimate, the dual-responsibility model would create the space for women to think about their sexual desires and boundaries. Such a space for consideration is simply not there under either the "no means no" or the "yes means yes" approach, as "the law seldom affords any space within which the woman's need for time and reflection must be respected".[136] Although adopting the dual-responsibility negotiation model would create more space for women (and men) to reflect on their sexual desires and boundaries, I nevertheless concede that "in a world of mixed messages, wishful thinking, and male assumptions about what women's reluctance means, 'being clear' is easier said than done."[137]

Thus far I have tried to argue that the dual-responsibility negotiation model is superior to consent-based models not only in terms of how it would positively affect sexual behavior (the conduct aspect), but also in terms of improving the equity of how cases of alleged sexual assault are adjudicated (the adjudication aspect). With regards to the conduct aspect, the dual-responsibility negotiation model would encourage mutual respect between partners and thereby target the underlying problem of sexual assault. With regards to the adjudication aspect, the dual-responsibility negotiation model would allow for a dual function of responsibility that would prevent situations where one party was given misleading information about the other's sexual desires or boundaries and then was later accused of sexual assault. Using less stringent standards of consent or higher burden of proof standards would not eliminate the types of misunderstandings whereby someone incorrectly discerns another's willingness for sex. The

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[136] Ibid., 262.

[137] Ibid., 264.

dual-responsibility negotiation model, meanwhile, would target such misunderstandings and would also reframe the problem of sexual assault in a way that would target the underlying issue. While I understand that replacing the concept of sexual consent entirely would be a massive undertaking, the problem of sexual assault is too big and the consequences of wrongful convictions are too great to justify relying on a framework that allows for such injustices to occur.

The case from *Missoula* that I described in the previous section provides a useful framework for thinking about the need for a model like the dual-responsibility negotiation model. In that case, something similar to a sexual negotiation (albeit a very minimal sexual negotiation) took place between Kelly and Smith before they went back to Kelly's room. Kelly soon revoked her agreement to the sexual negotiation, however, and at that point the negotiated agreement became invalid (this is similar to what happens in BDSM when one partner uses a "safe word"). Before Smith engaged in any sexual acts with Kelly, therefore, he should have first re-instigated the (slightly lacking) sexual negotiation that took place earlier in order to see if Kelly was comfortable engaging in sexual acts in the presence of Kelly's roommate and her roommate's boyfriend. Given that this initial step never took place, and in fact Kelly very clearly stated that she was not comfortable engaging in sexual acts in the presence of Kelly's roommate and her roommate's boyfriend, the fact that Smith claims he did not hear Kelly saying "no, stop" would be irrelevant under the dual-responsibility model.

Although it is important to address the legislative and procedural issues that hinder the successful prosecution of rape and sexual assault, there are also larger cultural and societal problems that not only lead to the perpetration of rape and sexual assault in the first place, but

also obstruct the prosecution of these crimes. The longstanding belief that most accusations of rape are fabricated, along with the reasonableness standard in judging mistaken belief in consent, leads to a system that values protecting men against false accusations more than it values protecting women (and men) against sexual assault. One way in which we can combat these entrenched societal beliefs and values is through sexual education in schools. In typical sex education classes students are taught about the physiology of sex, not the ethics of sex. In addition to teaching about how sex works at the physiological level, sex education should also address the interpersonal aspects of sex. As Michelle Anderson writes,

> Not only must sex education teach teens to identify and articulate their sexual boundaries, it has to teach them how to *engage* with potential sexual partners on the question of sexual boundaries. It has to teach that it is everyone's responsibility to elicit, honor, and abide by their partner's sexual boundaries. As part of that instruction, sex education has to give students language and practice for how to conduct these dialogs or negotiations.[138]

As Anderson suggests, one way to teach sexual negotiation is through role-playing. Another interesting approach is being piloted by students at the University of Calgary law school. The University of Calgary's "Yes Means Yes" project "helps high school students understand their sexual rights and responsibilities,"[139] by having students be mock adjudicators of sexual assault cases and try to determine for themselves whether or not what occurred was consensual. Both of these approaches to thinking about sexual communication could prove incredibly useful in the classroom. Furthermore, conversations about sexual negotiations, respect for sexual autonomy, and what constitutes sexual assault needs to start much earlier than freshman year of college.

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[138] Michelle J. Anderson, "Sex education and rape," *Mich. J. Gender & L.* 17 (2010): 107.

[139] Ali Abel, "Law Students Teach Teenagers about Sexual Consent," University of Calgary, February 5, 2016, accessed April 19, 2016, https://www.ucalgary.ca/utoday/issue/2016-02-05/law-students-teach-teenagers-about-sexual-consent.

Although I have argued that adopting more stringent consent standards and lowering the burden of proof standard will not necessarily lead to higher false conviction rates, the challenge remains that adopting a standard like affirmative consent or the negotiation model nevertheless threatens the interests of men. As Jeffrie Murphy writes, "I fear the desexualization of human interaction. I am thus initially ill-disposed toward… that strand of grim feminism that seems to have forgotten the beauty and ecstasy of abandon that can be (even if it is not) at the core of heterosexual intercourse."[140] Although one might argue that affirmative consent standards and the negotiation model protect certain male interests—namely the interest to clarify whether or not sex is wanted and thus prevent situations where one party feels violated while the other party (mistakenly) believes that the situation was consensual—there is nevertheless a tension between male [positive] sexual autonomy and female [negative] sexual autonomy. For this reason, "…too stringent constraints on male sexuality [such as affirmative consent standards] have been [viewed as] threatening to male policy makers."[141]

As Murphy's fears suggest, codifying sexual behavior may be seen as a threat to individual liberty. In another article that I wrote, I defended affirmative consent on the grounds that asking for consent "shows that you respect the sexual autonomy of your partner" and "has the potential to be incredibly sexy when done in the right way."[142] One of the comments that I received on the article was that by imposing affirmative consent policies universities are

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[140] Jeffrie G. Murphy, "Women, Violence, and the Criminal Law," in *In Harm's Way ,* ed. Jules Coleman and Allen Buchanan (Cambridge: Cambridge University Press, 1994), 209.

[141] Rhode, *Justice and Gender*, 244.

[142] Tala Brewster, "Let's Talk about Consent," The Tufts Daily, November 02, 2015, accessed April 23, 2016, http://tuftsdaily.com/opinion/2015/11/02/lets-talk-about-consent/.

"attempting to regulate communication during sex" and that that "forcing large numbers of people to behave in a way they normally wouldn't almost always results in unintended consequences."[143] Rather than "attempting to regulate communication during sex," my commenter argues, universities should "let the students decide what's best for themselves and let them be 'terribly, terribly wrong' if they want to."[144] Although there *may* be certain situations or relationships where partners *decide* that verbal communication is not necessary before every sexual act,[145] that does not mean that universities should simply "let the students decide" and "be 'terribly, terribly wrong' if they want to [to be]."

Although "no means no" policies may do a better job of protecting individual liberty and the pursuit of the "ecstasy of abandon," there is nevertheless a problem with this approach. The problem is one of distributive injustice, as the people "deciding" and "getting it wrong" have tended to be men, and the people having their [negative] sexual autonomy encroached upon have tended to be women. As Murphy reminds us, "the exhilarating life of liberty is fraught with risks and dangers." According to a libertarian, "The benefits [of liberty] outweigh the costs." If the costs of liberty are unequally distributed, however—i.e., if "the dangers attendant to sexual liberty and excitement fall mainly on women"—then "males should at least *pause* [emphasis in original] before glibly trotting out slogans about danger being the necessary price of liberty."[146]

As I have tried to show throughout this paper, there are a great many factors that need to

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[143] See Piers Echols-Jones' comments on Brewster, "Let's Talk about Consent."

[144] Ibid.

[145] And such a decision would still need to be *communicated* between partners.

[146] Murphy, "Women, Violence, and the Criminal Law," 210.

be considered when thinking about sexual consent and sexual assault policy reform. These factors, furthermore, are often at odds with each other. For example, there is a tension between protecting the rights of the accused and protecting the rights of victims and potential victims. There is also a tension between protecting positive and negative sexual autonomy in intoxicated sexual encounters, and in balancing liberty and (negative) sexual autonomy. One theoretical method that we could use in order to choose consent and burden of proof standards that most fairly and adequately balance all of these factors would be to imagine that we know nothing about our position in society as it relates to sexual assault. In other words, we could approach sexual assault policy reform from behind a Rawlsian veil of ignorance.[147] Imagine yourself trying to choose the consent and adjudication standards for university sexual assault cases and not knowing if you were going to be placed in the position of a wrongly accused defendant or of a victim who'd suffered severe sexual victimization at the hands of someone she knew. According to the Rawlsian approach, choosing laws and policies in this way will result in standards that are fair to all parties involved.[148]

Although I have touched on a number of the issues that are at stake when thinking about sexual communication and sexual assault policy reform, there are still a great many questions that I have left unanswered. For example, should coercive offers invalidate consent/sexual negotiations in the same way that threats do?[149] What is the difference between seduction and

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[147] I thank George Smith for suggesting this approach.

[148] Rawls describes the "veil of ignorance" as it pertains to the original position in his seminal work *A Theory of Justice.* John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 1999), 15-18.

[149] Victor Tadros, "Chapter 11: Threats and Consent," in *Wrongs and Crimes* (unpublished), accessed April 25, 2016, https://www.law.upenn.edu/live/files/5058-tadrosthreats-and-consent.

coercion?[150] What forms of deception (if any) should undermine sexual negotiations?[151] There are many more questions that we can ask when thinking about sexual communication and sexual assault; however, the underlying question that has motivated a great deal of my discussion is this: there is an epistemic concern about how to determine, post hoc, whether consent was given in a particular situation or whether a particular accusation of rape or sexual assault is false; given this unsolvable problem, should consent standards and rape laws be more focused on protecting the rights of victims or protecting the rights of the accused?

Traditionally, rape laws focused more on protecting men against false accusations than on protecting women from unwanted sexual advances. Although protecting the innocent from punishment is central to most theories of punishment,[152] this concern has created a landscape where it is hard to convict even guilty rapists by the standards of the criminal justice system. Although schools have more liberty to adjust their definitions of sexual offenses as well as their burden of proof standards, this results in the concern that doing so will result in a system that is unjustly stacked against the accused.[153]

In order to create a cultural environment and a system that protects the rights of the

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[150] For an interesting discussion of the difference between seduction and coercion, see Murphy, "Women, Violence, and the Criminal Law," 218-221.

[151] See Alan Wertheimer's discussion of deception in "Consent to Sexual Relations," in *The Ethics of Consent,* ed. Franklin G. Miller and Alan Wertheimer (New York: Oxford University Press, 2010), 204-207, and his chapter on deception in Wertheimer, *Consent to Sexual Relations,* 193-214.

[152] Particularly retributive theories of punishment.

[153] In October, 2014, a number of professors at Harvard Law School published a letter in the Boston Globe that criticized the university's new sexual assault policy for being "overwhelmingly stacked against the accused." The Boston Globe, "Rethink Harvard's Sexual Harassment Policy," BostonGlobe.com, October 15, 2014, Accessed April 25, 2016, http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html?p1=Article_Trending_Most_Viewed.

accused as well as the sexual autonomy of potential victims I have suggested adopting a negotiation model rather than a consent-based model. The negotiation model, similar to a BDSM contract, gives all parties involved in a sexual encounter the responsibility of determining (and respecting) the desires and boundaries of their sexual partners, as well as the responsibility of communicating their sexual and desires and boundaries openly. In this way, the negotiation model not only protects against encroachments on individuals negative sexual autonomy, but also provides a space and a platform for the expression of positive sexual autonomy. Finding a perfect balance between these two constructs will always present a challenge to theories of sexual communication. The negotiation model, however, does a better job than consent-based models of protecting both positive and negative sexual autonomy while at the same time minimizing genuine misunderstandings that could result in disputes about the status of certain sexual acts.

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