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Regulating Sex

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THIS is a strange moment for sex in America. We've detached it from pregnancy, matrimony and, in some circles, romance. At least, we no longer assume that intercourse signals the start of a relationship. But the more casual sex becomes, the more we demand that our institutions and government police the line between what's consensual and what isn't. And we wonder how to define rape. Is it a violent assault or a violation of personal autonomy? Is a person guilty of sexual misconduct if he fails to get a clear "yes" through every step of seduction and consummation?

According to the doctrine of affirmative consent — the "yes means yes" rule — the answer is, well, yes, he is. And though most people think of "yes means yes" as strictly for college students, it is actually poised to become the law of the land.

About a quarter of all states, and the District of Columbia, now say sex isn't legal without positive agreement, although some states undercut that standard by requiring proof of force or resistance as well.

Codes and laws calling for affirmative consent proceed from admirable impulses. (The phrase "yes means yes," by the way, represents a ratcheting-up of "no means no," the previous slogan of the anti-rape movement.) People should have as much right to control their sexuality as they do their body or possessions; just as you wouldn't take a precious object from someone's home without her permission, you shouldn't have sex with someone if he hasn't explicitly said he wants to.

And if one person can think he's hooking up while the other feels she's being raped, it makes sense to have a law that eliminates the possibility of misunderstanding. "You shouldn't be allowed to make the assumption that if you find someone lying on a bed, they're free for sexual pleasure," says Lynn Hecht Schafran, director of a judicial education program at Legal Momentum, a women's legal defense organization.

But criminal law is a very powerful instrument for reshaping sexual mores. Should we really put people in jail for not doing what most people aren't doing? (Or at least, not yet?) It's one thing to teach college students to talk frankly about sex and not to have it without demonstrable pre-coital assent. Colleges are entitled to uphold their own standards of comportment, even if enforcement of that behavior is spotty or indifferent to the rights of the accused. It's another thing to make sex a crime under conditions of poor communication.

Most people just aren't very talkative during the delicate tango that precedes sex, and the re-education required to make them more forthcoming would be a very big project. Nor are people unerringly good at decoding sexual signals. If they were, we wouldn't have romantic comedies. "If there's no social consensus about what the lines are," says Nancy Gertner, a senior lecturer at Harvard Law School and a retired judge, then affirmative consent "has no business being in the criminal law."

PERHAPS the most consequential deliberations about affirmative consent are going on right now at the American Law Institute. The more than 4,000 law professors, judges and lawyers who belong to this prestigious legal association — membership is by invitation only — try to untangle the legal knots of our time. They do this in part by drafting and discussing model statutes. Once the group approves these exercises, they hold so much sway that Congress and states sometimes vote them into law, in whole or in part. For the past three years, the law institute has been thinking about how to update the penal code for sexual assault, which was last revised in 1962. When its suggestions circulated in the weeks before the institute's annual meeting in May, some highly instructive hell broke loose.

In a memo that has now been signed by about 70 institute members and advisers, including Judge Gertner, readers have been asked to consider the following

scenario: “Person A and Person B are on a date and walking down the street. Person A, feeling romantically and sexually attracted, timidly reaches out to hold B’s hand and feels a thrill as their hands touch. Person B does nothing, but six months later files a criminal complaint. Person A is guilty of ‘Criminal Sexual Contact’ under proposed Section 213.6(3)(a).”

Far-fetched? Not as the draft is written. The hypothetical crime cobbles together two of the draft’s key concepts. The first is affirmative consent. The second is an enlarged definition of criminal sexual contact that would include the touching of any body part, clothed or unclothed, with sexual gratification in mind. As the authors of the model law explain: “Any kind of contact may qualify. There are no limits on either the body part touched or the manner in which it is touched.” So if Person B neither invites nor rebukes a sexual advance, then anything that happens afterward is illegal. “With passivity expressly disallowed as consent,” the memo says, “the initiator quickly runs up a string of offenses with increasingly more severe penalties to be listed touch by touch and kiss by kiss in the criminal complaint.”

The obvious comeback to this is that no prosecutor would waste her time on such a frivolous case. But that doesn’t comfort signatories of the memo, several of whom have pointed out to me that once a law is passed, you can’t control how it will be used. For instance, prosecutors often add minor charges to major ones (such as, say, forcible rape) when there isn’t enough evidence to convict on the more serious charge. They then put pressure on the accused to plead guilty to the less egregious crime.

The example points to a trend evident both on campuses and in courts: the criminalization of what we think of as ordinary sex and of sex previously considered unsavory but not illegal. Some new crimes outlined in the proposed code, for example, assume consent to be meaningless under conditions of unequal power. Consensual sex between professionals (therapists, lawyers and the like) and their patients and clients, for instance, would be a fourth-degree felony, punishable by significant time in prison.

It’s not that sex under those circumstances is a good idea, says Abbe Smith, a Georgetown law professor, director of the school’s Criminal Defense and Prisoner

Advocacy Clinic, and an adviser to the American Law Institute's project on sexual assault. "It's what my people would call a shanda, mental health professionals having sex with their clients," says Ms. Smith. ("Shanda" is Yiddish for scandal.) But most of these occupations already have codes of professional conduct, and victims also have recourse in the civil courts. Miscreants, she says, "should be drummed out of the profession or sued for malpractice."

It's important to remember that people convicted of sex crimes may not only go to jail, they can wind up on a sex-offender registry, with dire and lasting consequences. Depending on the state, these can include notifying the community when an offender moves into the neighborhood; restrictions against living within 2,000 feet of a school, park, playground or school bus stop; being required to wear GPS monitoring devices; and even a prohibition against using the Internet for social networking.

We shouldn't forget the harm done to American communities by the national passion for incarceration, either. In a letter to the American Law Institute, Ms. Smith listed several disturbing statistics: roughly one person in 100 behind bars, one in 31 under correctional supervision — more than seven million Americans altogether. "Do we really want to be the world leader of putting people in cages?" she asked.

Affirmative-consent advocates say that rape prosecutions don't produce very many prisoners. They cite studies estimating that fewer than one-fifth of even violent rapes are reported; 1 to 5 percent are prosecuted and less than 3 percent end in jail time. Moreover, Stephen J. Schulhofer, the law professor who co-wrote the model penal code, told me that he and his co-author have already recommended that the law do away with the more onerous restrictions that follow from being registered as a sex offender.

I visited Mr. Schulhofer in his office at New York University Law School to hear what else he had to say. A soft-spoken, thoughtful scholar and the author of one of the most important books on rape law published in the past 20 years, "Unwanted Sex: The Culture of Intimidation and the Failure of Law," he stresses that the draft should be seen as just that — notes from a conversation in progress, not a finished document.

But the case for affirmative consent is “compelling,” he says. Mr. Schulhofer has argued that being raped is much worse than having to endure that awkward moment when one stops to confirm that one’s partner is happy to continue. Silence or inertia, often interpreted as agreement, may actually reflect confusion, drunkenness or “frozen fright,” a documented physiological response in which a person under sexual threat is paralyzed by terror. To critics who object that millions of people are having sex without getting unqualified assent and aren’t likely to change their ways, he’d reply that millions of people drive 65 miles per hour despite a 55-mile-per-hour speed limit, but the law still saves lives. As long as “people know what the rules of the road are,” he says, “the overwhelming majority will comply with them.”

He understands that the law will have to bring a light touch to the refashioning of sexual norms, which is why the current draft of the model code suggests classifying penetration without consent as a misdemeanor, a much lesser crime than a felony.

This may all sound reasonable, but even a misdemeanor conviction goes on the record as a sexual offense and can lead to registration. An affirmative consent standard also shifts the burden of proof from the accuser to the accused, which represents a real departure from the traditions of criminal law in the United States. Affirmative consent effectively means that the accused has to show that he got the go-ahead, even if, technically, it’s still up to the prosecutor to prove beyond a reasonable doubt that he didn’t, or that he made a unreasonable mistake about what his partner was telling him. As Judge Gertner pointed out to me, if the law requires a “no,” then the jury will likely perceive any uncertainty about that “no” as a weakness in the prosecution’s case and not convict. But if the law requires a “yes,” then ambiguity will bolster the prosecutor’s argument: The guy didn’t get unequivocal consent, therefore he must be guilty of rape.

SO far, no one seems sure how affirmative consent will play out in the courts. According to my informal survey of American law professors, prosecutors and public defenders, very few cases relying exclusively on the absence of consent have come up for appeal, which is why they are not showing up in the case books. There may be many reasons for this. The main one is probably that most sexual assault cases — actually, most felony cases — end in plea bargains, rather than trials. But prosecutors

may also not be bringing lack-of-consent cases because they don't trust juries to find a person guilty of a sex crime based on a definition that may seem, to them, to defy common sense.

"It's an unworkable standard," says the Harvard law professor Jeannie C. Suk. "It's only workable if we assume it's not going to be enforced, by and large." But that's worrisome too. Selectively enforced laws have a nasty history of being used to harass people deemed to be undesirable, because of their politics, race or other reasons.

Nonetheless, it's probably just a matter of time before "yes means yes" becomes the law in most states. Ms. Suk told me that she and her colleagues have noticed a generational divide between them and their students. As undergraduates, they're learning affirmative consent in their mandatory sexual-respect training sessions, and they come to "believe that this really is the best way to define consent, as positive agreement," she says. When they graduate and enter the legal profession, they'll probably reshape the law to reflect that belief.

Sex may become safer for some, but it will be a whole lot more anxiety-producing for others.

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