Comparing Affirmative Consent Models: Confusion, Substance and Symbolism

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Abstract

Sexual assault law reform commonly involves legislating a statement of appropriate standards of sexual interaction in the form of a positive definition of consent. In jurisdictions contemplating a legislated definition, the question of whether to adopt an orthodox attitudinal or unorthodox expressive definition must be confronted. Discussion around the adoption of an unorthodox consent model, commonly known as 'affirmative consent', has been beset by confusion, caused in part by the diversity of legal models to which this label has been applied. This article sets out a detailed comparison of the doctrinal mechanisms in jurisdictions commonly identified as having adopted some version of affirmative consent. The analysis sheds light on the variety of ways rape law can be reconstructed to reflect the aspiration of communicative sexuality, while also highlighting the core unifying objective of transforming the legal meaning of passivity. From the comparative analysis, four key points of divergence are highlighted, alongside the implications of those points of divergence for jurisdictions contemplating affirmative consent reform. Finally, the article notes the paucity of evidence on the substantive impacts of affirmative consent, and discusses the potential educative and symbolic functions of embracing such a model, despite ongoing uncertainty as to its practical effects.

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I Introduction

Sexual violence law typically adopts consent as the principal benchmark for demarcating legally permissible from legally impermissible sex (for better or worse). In early rape law, a male-imagined conception of consent emerged that was frequently harmful to women. At common law, 'consent' could be given 'tearfully', 'reluctantly', even 'unwillingly';[1] and it could be assumed unless there was clear communication to the contrary.[2] This resulted, in practice, in strong rights of male access to female[3] bodies. Over time, different conceptions of consent emerged in law, conceptions which more meaningfully aligned with the experiences of women, and went further towards ensuring a rape law premised on sexual equality.

This evolution has taken place in tandem with societal shifts. Increasingly, a 'yes means yes' model of sexual intimacy has gained greater visibility and legitimacy in sexual politics, as compared to a 'no means no' model (see, for example, the #MeToo movement and North American college campus sexual assault training and disciplinary codes). The 'yes means yes' movement recognises that there might be something problematic and suspect about assuming an internal attitude of consent in the absence of an external expression thereof, and advocates a communicative model of sexuality.[4]

'Yes means yes', it has been pointed out, is not a legal standard.[5] As a slogan, it is broadly associated with 'affirmative consent', a construction of consent as an attitude of willingness that must be actively expressed or communicated to generate permission to proceed with sexual contact. This contrasts with the traditional common law understanding of consent as an internal attitude of willingness that can, in certain contexts, be assumed to be present, even in the absence of any active communication thereof.[6]

While affirmative consent is rightly described as unorthodox,[7] it is no longer a radical proposition. Affirmative consent as a legal standard has been adopted, in varying iterations, in a number of reformist jurisdictions. In jurisdictions contemplating legislative change to the law of consent — such as New Zealand, where sexual consent is not positively defined in legislation, and the government has indicated an intention to adopt a long-term work program directed at 'transformative

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1 See, eg, *Holman v The Queen* [1970] WAR 2, 6 (finding consent can be 'hesitant, reluctant, grudging or tearful'); *R v Cook* [1986] 2 NZLR 93, 97 (finding consent can be 'reluctant or even … unwilling').

2 See generally Anna High, 'The "Classical" Conception of Rape, and Its Partial Reform, in Aotearoa New Zealand' [2022] (2) *New Zealand Law Review* 173.

3 Rape was historically a gendered crime; today, rape law tends to be constructed in gender-neutral terms. Nonetheless, it is important to acknowledge that this article adopts a heteronormative perspective on the law of rape. For discussion of the implicit heterosexual bias in affirmative consent policies and discourse generally, see Jacob W Richardson, '"It Doesn't Include Us": Heterosexual Bias and Gay Men's Struggle to See Themselves in Affirmative Consent Policies' (2022) 5(1) *Sexuality, Gender & Policy* 69.

4 Jonathan Witmer-Rich, 'Unpacking Affirmative Consent: Not As Great as You Hope, Not As Bad as You Fear' (2016) 49(1) *Texas Tech Law Review* 57, 65.

5 Ibid.

6 High (n 2) 178.

7 Jesse Wall, 'Justifying and Excusing Sex' (2019) 13(2) *Criminal Law and Philosophy* 283, 283–6.

options' for the law of consent[8] — the question of whether to adopt a reformist approach to consent must be confronted.

It is easy to take for granted the idea of 'affirmative consent in law'. In media reports of consent reform, and indeed also in academic scholarship, affirmative consent is frequently described as a 'yes means yes' approach to sexual violence.[9] This is problematic: as noted above, 'yes means yes' is a slogan, not a legal standard. 'Yes means yes' is a rejection of assumed consent in the bedroom; *consent* (verbal, sober, enthusiastic, honest) *is sexy*,[10] we implore. The hope is that emphasising active, meaningful communication will allow for greater mutuality, respect and equality in sexual intimacy. That is a laudable ideal, and hopefully not a particularly contentious one, as far as modern sexual politics go. The rejection of assumed consent as a sexual norm is increasingly seen as important for protecting people — particularly young women — from 'bad sex', sex they are not enthusiastically welcoming. But in law, a construction of consent as affirmative, for the purposes of demarcating lawful from unlawful sexual contact, is rather more complex. As Witmer-Rich notes, there is a cluster of substantive and procedural rules associated with the goal of affirmative consent.[11] And even zeroing in on substantive rules — more specifically, the definition of consent as an element of sexual assault — there are numerous iterations of and ways of tinkering with 'classic' rape law to attempt to move socio-sexual behaviour away from self-serving assumptions and towards mutual communication.

This lack of clarity manifests in commentary and scholarship on affirmative consent. Arguments are put forward about 'affirmative consent in law' without specifying the precise mechanisms of merit or concern. Once we unpack the divergence of those mechanisms, we can in turn be more precise about the issues under debate, and the specific trade-offs and benefits that might be associated with affirmative consent, depending on how it is legally constructed. It will also begin to make sense how, for example in Victoria, the very same reforms to consent were described by various informed commentators as delivering affirmative consent,[12]

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8 Cabinet Social Wellbeing Committee, Parliament of New Zealand, *Improving the Justice Response to Victims of Sexual Violence* (Cabinet Minute, 3 April 2019) 3 [17.3] <https://www.justice.govt.nz/assets/7236-Proactive-release-SV-response-final2.pdf>; Office of the Under-Secretary to the Minister of Justice (Domestic and Sexual Violence Issues), *Improving the Justice Response to Victims of Sexual Violence* (Cabinet Paper, April 2019) 13 [81] <https://www.justice.govt.nz/assets/7236-Proactive-release-SV-response-final2.pdf>.
See also Department of Justice and Attorney-General (Qld), *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice: Report Two — Women and Girls' Experiences across the Criminal Justice System* (Report, November 2022) 19 <https://www.publications.qld.gov.au/dataset/wsjtaskforceresponse> (supporting recommendation to amend the *Criminal Code* to legislate an affirmative model of consent in Queensland).

9 See, eg, Alicia Vrajlal, 'What Do the New Affirmative Consent Laws Actually Mean?', *Refinery29* (online, 24 November 2021) <https://www.refinery29.com/en-au/2021/11/10771181/affirmative-consent-laws-australia>.

10 Toma, 'Consent is Sexy', *Respect Me* (Blog Post) <https://respectme.org.au/consent-sexy>.

11 Witmer-Rich (n 4) 59.

12 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 August 2022, 2899 (Sonya Kilkenny) (second reading speech for the Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022 (Vic)).

failing to go far enough to deliver affirmative consent,[13] and going further than needed to deliver affirmative consent.[14]

This article seeks to bring clarity to the terms of the affirmative consent debate by way of a detailed comparison of the doctrinal mechanisms at play in jurisdictions commonly identified as having adopted some version of 'affirmative consent'. The comparative doctrinal analysis of affirmative consent jurisdictions fills a descriptive void while raising a number of important points in terms of options for doctrinal reform. As the analysis will show, there is a variety of ways to attempt to reconstruct rape law that reflect and reach for the aspiration of communicative sexuality. It is important, in jurisdictions contemplating consent reform, that critics and proponents do not talk past one another based on different assumed legal models. The adoption of 'affirmative consent laws' is often put forward as a simple, presumably progressive step. After all, who doesn't believe in the importance of communicative sex as a means to promoting autonomy, dignity and mutuality? But even assuming communicative sex is the ideal, there are implications to the precise legal route we adopt to work towards that ideal.

From the comparative doctrinal analysis it is possible to identify four key points of divergence among the surveyed 'affirmative consent' jurisdictions: first, whether consent is defined as internal or external vis-à-vis actus reus; second, to what extent affirmative consent laws proscribe the words/actions that suffice to communicate consent; third, whether a 'mistake of law' can be exculpatory[15] in cases involving a mistaken belief in silent passivity as consent; and fourth, whether mens rea is defined as a lack of reasonable belief in communicated consent or as a failure to ascertain consent. In relation to each, there are trade-offs and possible pitfalls; various concerns can justifiably be raised such as facial overreach, the potential for backlash and ineffectualness. In discussing the possible merits of affirmative consent reform — including substantive outcomes, educative effect and symbolism — it is essential to engage, in a granular way, with the specific doctrinal mechanisms at play, rather than glossing over these identified points of divergence within the affirmative consent law reform movement.

A *Outline of Article*

The article begins in Part II by discussing the general usage of 'affirmative consent' as a term in society / sexual politics, before turning to 'affirmative consent' as a legal standard. Whereas the common law embraced assumed consent, the core defining premise of affirmative consent is the rejection of assumed consent. Over time, in many jurisdictions, a gradual but incomplete evolution away from assumed consent

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13 Rachel Eddie, '"No Room for Victim-Blaming": Affirmative Consent to Become Law', *The Age* (online, 31 August 2022), quoting Dr Rachael Burgin, Chief Investigator, Rape and Sexual Assault Research and Advocacy <https://www.theage.com.au/politics/victoria/no-room-for-victim-blaming-affirmative-consent-to-become-law-20220831-p5be5w.html>.

14 Tania Wolff, President of the Law Institute of Victoria, argued the reforms would complicate matters, as affirmative consent *already* exists in Victorian law: Eddie (n 13).

15 In discussing a defence argument of 'mistaken belief in consent' (which can be a mistake of fact or law, as discussed in this article), I use 'exculpatory' to accommodate both those jurisdictions in which the 'defence' is a failure-of-proof argument, and jurisdictions in which it is an affirmative defence.

has occurred, even in the absence of an express, legislated affirmative consent standard. This has resulted in what I call 'partial' or 'category-based' affirmative consent. This is compared to what I call a 'full' or 'strong' affirmative consent schema in which law more consistently rejects assumed consent as a basis for permission to engage in sexual contact. This is achieved by transforming the legal meaning of passivity generally rather than on a case-by-case basis.

In Part III, I illustrate the various ways jurisdictions have attempted to reshape the law of sexual assault such that the legal meaning of passivity is generally transformed. This is done with reference to 'full' affirmative consent jurisdictions in North America and Australia, in roughly chronological order. This detailed doctrinal analysis allows for a more precise discussion, in Part IV, of four key points of divergence across the surveyed jurisdictions in terms of how a redefined concept of consent as an external phenomenon impacts the actus reus and mens rea elements of sexual assault. The analysis shows that it matters, and matters a great deal, precisely how affirmative consent is constructed in law; there are implications and trade-offs relating to the choice of construction.

I conclude in Part V with discussion of the implications of the analysis for the political choice facing jurisdictions which have committed to exploring 'transformative options' for the law of consent. I conclude that while the symbolic and educative effects of affirmative consent–minded reforms might allow for an easy political win and have flow-on effects in sexual politics/norms, it remains unclear whether and to what extent such reforms will meaningfully shift the needle in practice. That being said, the possible symbolic and educative impacts might yet justify some form of affirmative consent law reform, provided there is care and precision in the doctrinal tinkering.

II The Diversity of 'Affirmative Consent'

A *Affirmative Consent in Society / Sexual Politics*

Societally, affirmative consent is associated with a 'yes means yes' model of sexuality, in which the onus is on participants to obtain a clear expressive act of communication (verbal or non-verbal) from other participants. As Witmer-Rich notes, 'yes means yes' is not an actual legal standard or explanation thereof.[16] It is, nonetheless, a slogan that has achieved a strong hold in sexual politics, and may be a useful educational tool when it comes to challenging problematic sexual scripts. 'Yes means yes' contrasts with a 'no means no' model of sexuality, according to which an attitude of consent can legitimately be presumed or inferred unless and until unwillingness is expressed in a sufficiently clear way. The 'yes means yes' movement is closely associated with higher education in the United States, where college sexual assault disciplinary standards have over time converged on a requirement for some affirmative expression of consent.[17]

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16 Witmer-Rich (n 4) 58.

17 Deborah Tuerkheimer, 'Rape on and off Campus' (2015) 65(1) *Emory Law Journal* 1, 3–4.

An immediate and obvious question about 'yes means yes' arises: *what sort of yes* means yes? What acts or omissions amount to a sufficient communication of consent? Must the 'yes' be verbal, or can actions suffice? Must the 'yes' be given enthusiastically, or can it be given reluctantly or begrudgingly? Must the 'yes' be contemporaneous, or can it be given in advance? Is an external 'yes' invalidated by an internal opposition, or by certain forms of coercion? A range of responses is possible to these questions, and so a range of approaches to regulating sexual intimacy can be advocated for under the slogan of 'yes means yes'.

More broadly, the primacy of consent (whether affirmative or otherwise) in sexual politics has been criticised as a problematic 'valorisation', in that consent may be an unreliable marker for sexual equality and wellbeing.[18] As Fischel has argued, '[b]ad sex, *even if consensual*, can be really bad, and usually worse for women: not just uninspired, unenthusiastic, or boring, but unwanted, unpleasant, and painful'.[19] The extent to which affirmative consent is capable of reducing the risk of consent to 'bad sex' is unclear. It is possible that the adoption of affirmative consent as an educative standard or social norm might go some way towards ameliorating the coercive societal forces that cause people to consent to unwanted sex.[20] It is also possible that, by continuing to place primacy on consent, an affirmative consent model of sexuality is not sufficiently transformative when it comes to the promotion of sexual equality, mutuality and empowerment.[21]

B *The Emergence of Affirmative Consent as a Legal Standard*

1 *Orthodox Approach: No (General) Requirement to Communicate*

Consent has traditionally been constructed in sexual assault law, and indeed elsewhere in the law,[22] as an internal phenomenon: 'an internal attitude of

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18 Robin West, 'Sex, Law, and Consent' in Franklin G Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (Oxford University Press, 2010) 221, 224, 232, 239; John Gardner, 'The Opposite of Rape' (2018) 38(1) *Oxford Journal of Legal Studies* 48, 53–4. A related critique of consent is its construction of a model for heterosexuality, in that consent is understood as something given by women (gatekeepers) to men (initiators): see generally Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape' (2011) 57(1) *Modern Law Review* 10.

19 Joseph J Fischel, *Screw Consent: A Better Politics of Sexual Justice* (University of California Press, 2019) 4 (emphasis added). See also Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge, 2nd ed, 2019) ch 5.

20 See, eg, Rebecca Ortiz, 'Explicit, Voluntary, and Conscious: Assessment of the Importance of Adopting an Affirmative Consent Definition for Sexual Assault Prevention Programming on College Campuses' (2019) 24(9) *Journal of Health Communication* 728; Abigail R Riemer, Kathryn Holland, Evan McCracken, Amanda Dale and Sarah J Gervais, 'Does the Affirmative Consent Standard Increase the Accuracy of Sexual Assault Perceptions? It Depends on How You Learn about the Standard' (2022) 46(6) *Law and Human Behavior* 440, 440 (finding that exposure to consent standards sometimes aids sexual assault decision-making, but also leads to confusion).

21 See, eg, Brandie Pugh and Patricia Becker, 'Exploring Definitions and Prevalence of Verbal Sexual Coercion and Its Relationship to Consent to Unwanted Sex: Implications for Affirmative Consent Standards on College Campuses' (2018) 8(8) *Behavioural Sciences* 69.

22 See, eg, *R v Middleton* (1873) LR 2 CCR 38, 62 (Brett J): 'Consent or non-consent is an action of the mind; it consists exclusively of the intention of the mind.'

willingness, intention, waiver, or acquiescence'.[23] Such an emphasis on consent as attitudinal does not mean that the law is uninterested in whether and how that internal attitude is communicated. Rather, it means that there is no general *requirement* that internal willingness is affirmatively (actively, positively) communicated in order to generate permission to proceed. As such, the common law of rape has traditionally accommodated the possibility that an instigator can legitimately *assume or infer* internal willingness, even where there is no external communication of that assumed internal state.

The result of this accommodation in the common law of rape was that, absent some external indication of non-consent, sexual contact was (often) functionally treated as consensual or not 'really rape'[24] despite a person's internal unwillingness. This was so by virtue of one of two mechanisms. The law either (i) required some manifestation, beyond mere silence or passivity, of non-consent as an evidentiary matter in order to prove the actus reus of 'no consent';[25] or (ii) deemed a purportedly honest but mistaken belief in consent, where that belief was based on either a *lack of* or *insufficiently clear* external indication of non-consent, to be credible such that the mens rea of 'no belief in consent' was not established.[26]

2 *'Partial' Affirmative Consent, or Affirmative Consent by Category*

Over time, there have been incremental developments in relation to both (i) and (ii) above. As a result, in many common law jurisdictions, there has been a shift in the direction of a more communicative construction of consent in law. This occurs where the orthodox 'consent as attitudinal' construction is retained generally but certain categories of sex come to be treated as non-consensual in the absence of some form of communication. This can occur by way of statutory reform or by shifts in the interpretation of the fault standard (that is, changing norms of reasonableness, particularly vis-à-vis passive/non-communicative sex) or some combination of the two. I consider each in turn.

(a) *Legislated Categories of 'No Consent'*

First, in many jurisdictions the law has been amended to provide that for certain categories of sex (for example, where a complainant is asleep, unconscious or substantially intoxicated) there is no consent, meaning the actus reus element of non-consent is established regardless of whether non-consent was actively

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[23] Wall (n 7) 284. Gruber notes that the terms used to describe the internal attitude(s) denoted by 'consent' — such as desire, want, willingness — are often used interchangeably, but can mean quite different things: Aya Gruber, 'Consent Confusion' (2016) 38(2) *Cardozo Law Review* 415, 423. The parsing of those distinctions is beyond the scope of this article.

[24] Susan Estrich, 'Rape' (1986) 95(6) *Yale Law Journal* 1087.

[25] Lois Pineau, 'Date Rape: A Feminist Analysis' (1989) 8(2) *Law and Philosophy* 217, 217 (noting that 'physical injury is often the only criterion that is accepted as evidence that the actus reus is nonconsensual'). At its extreme, this mechanism required a victim to show evidence of physical resistance 'to the uttermost': see, eg, *Moss v State*, 45 So 2d 125, 126 (Alexander J) (Miss, 1950).

[26] At its extreme, this mechanism allowed for exculpation of a defendant on the basis of a mistake as to consent, even despite vehement physical resistance on the part of the complainant: see, eg, *DPP (UK) v Morgan* [1976] AC 182, 191C–E (Bridge J for the Court) (House of Lords) ('*Morgan*').

communicated by resistance. This is sometimes referred to as a 'negative' approach to defining consent, in that the law sets out circumstances where there is *no* consent, rather than defining what consent *is*. Such 'negative' definitions of consent amount to a partial rejection of 'no means no', but only in relation to certain specified categories of sex. For example, in New Zealand the *Crimes Act 1961* (NZ) ('*NZ Crimes Act*') was amended[27] in 2005 to provide that a person does not consent to sexual activity if the activity occurs inter alia while she is asleep, unconscious or sufficiently affected by alcohol.[28] Likewise, in England and Wales the *Sexual Offences Act 2003* (UK) sets out two circumstances in which there is a conclusive presumption that the complainant did not consent and the defendant did not reasonably believe in consent — namely, where the defendant intentionally deceived the complainant as to the nature or purpose of the act, or intentionally induced 'consent' by impersonating a person known to the complainant.[29]

Of note here is that issues can arise as to whether a 'no consent where X' definition applies only vis-à-vis actus reus, or also vis-à-vis mens rea (such that a mistaken belief in consent in such 'no consent' contexts is not exculpatory). In some cases, a 'belief in consent' defence has been allowed even in relation to an enumerated category of 'no consent'. For example, in the New Zealand case of *Tawera*, sex with a passive teenager was found not to be consensual, as s 128A(1) of the *NZ Crimes Act* provides that passivity alone is not consent.[30] However, the Court of Appeal found that a mistaken belief in consent, based on passivity alone, was reasonable and therefore exculpatory. In so finding, the Court arguably wrongly permitted a 'mistake of law' defence.[31] Similarly, in the Western Australian case of *WCW* the Court of Appeal found there was an evidential foundation for an honest and reasonable mistaken belief in consent, based on passivity alone,[32] even though the Western Australian *Criminal Code* provides that passivity alone is not consent.[33]

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27 *Crimes Amendment Act 2005* (NZ).

28 *Crimes Act 1961* (NZ) ss 128A(3)–(4) ('*NZ Crimes Act*').

29 *Sexual Offences Act 2003* (UK) s 76(2) ('*UK Sexual Offences Act*'). See also *R v Jheeta* [2008] 1 WLR 2582, 2590 [24] (Judge P for the Court) (Court of Appeal). The Act also sets out, in s 75, a number of circumstances in which there is a rebuttable presumption that the complainant did not consent and that the defendant did not reasonably believe in consent — such as where the complainant was asleep, unconscious, threatened, unlawfully detained, or unable to communicate consent due to a disability. As noted by Gunby, Carline and Benyon, the categories set out in s 75 'are considered to represent those situations in which most people would agree that consent was not present': Clare Gunby, Anna Carline and Caryl Beynon, 'Alcohol-Related Rape Cases: Barristers' Perspectives on the Sexual Offences Act 2003 and Its Impact on Practice' (2010) 74(6) *Journal of Criminal Law* 579, 583–4. However, in practice, the provisions have 'had little impact on the prosecution of rape cases': at 592.

30 *R v Tawera* (1996) 14 CRNZ 290, 293 (Henry J for the Court) ('*Tawera*').

31 High (n 2) 202 n 160.

32 *WCW v Western Australia* (2008) 191 A Crim R 22, cited in Jonathan Crowe, Rachael Burgin and Holli Edwards, 'Affirmative Consent and the Mistake of Fact Excuse in Western Australian Rape Law' (2022) 50(1) *University of Western Australia Law Review* 284, 296.

33 *Criminal Code Act Compilation Act 1913* (WA) sch ('*Criminal Code*') s 319(2)(b). Crowe and Lee have similarly noted that in Queensland a lack of resistance by the complainant 'can provide the basis for the defence to argue a mistaken and reasonable belief in consent', despite the *Criminal Code 1899* (Qld) providing in s 348(3) that a person does not consent only because they do not 'say or do anything to communicate that the person does not consent': Jonathan Crowe and Bri Lee, 'The

Contra Tawera and *WCW*, I would submit that a 'negative' approach to consent should work to foreclose the possibility of 'assumed or implied' consent in relation to those enumerated categories of 'no consent' (and subsequent New Zealand law has adopted this position).[34] Importantly, a 'mistake of law' defence (disguised in 'mistake of fact' clothing) has also apparently been relied on in Australian 'full' affirmative consent jurisdictions,[35] a point I return to in Part IV(C) below.

(b) *Changing Norms of 'Reasonableness'*

Second, in response to the infamous House of Lords decision of *Morgan*,[36] many jurisdictions[37] have enacted reforms requiring a belief in consent to be reasonable in order to be exculpatory. A reasonableness requirement does not of itself necessarily preclude an argument of belief in consent based on the complainant's passivity. However, as the standard of reasonableness has evolved, it is plausible that a belief in consent based on passivity alone is less and less likely to be seen as reasonable. Admittedly, empirical evidence on changing standards of reasonableness is scant, but detailed jurisdictional analyses could be of use here. For example, Witmer-Rich, reviewing cases from US jurisdictions that have not adopted affirmative consent standards, notes that there are many cases affirming rape convictions on evidence of a purely passive complainant.[38] My own review of key appellate rape law decisions in New Zealand since the reasonableness standard was introduced shows a retreat from the 'sex as prima facie consensual' logic which infused earlier decisions involving passive victims.[39] On the other hand, also in Aotearoa, a recent analysis conducted by McDonald shows, dispiritingly, that even in cases where there was evidence of a clearly expressed lack of consent (by way of verbal or physical resistance) from the victim, acquittals were occurring on a regular basis.[40] This would suggest the 'reasonable belief in consent' argument is succeeding even in cases where there was verbal resistance.[41] Likewise, in England and Wales, research suggests that introduction of the reasonable belief standard had not resulted (by

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Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform' (2020) 39(1) *University of Queensland Law Journal* 1, 12.

34 See *Ah-Chong v The Queen* [2016] 1 NZLR 445, 463–4 [54]–[57] (McGrath, Glazebrook and Arnold JJ); *Christian v The Queen* [2018] 1 NZLR 315, 327–31 [25]–[46] (William Young, Glazebrook, O'Regan and Ellen France JJ), discussed in High (n 2) 201–3.

35 See below Parts III(C) and (D).

36 *Morgan* (n 26). *Morgan* was met with widespread disapproval and 'hailed as the "rapists' charter"': Jennifer Temkin, *Rape and the Legal Process* (Routledge, 2nd ed, 2002) 119.

37 See, eg, *NZ Crimes Act* (n 28) s 128(2)(b), amended by *Crimes Amendment Act (No 3) 1985* (NZ) s 2 (to set out a mens rea of not believing on reasonable grounds that the complainant was consenting); *UK Sexual Offences Act* (n 29) s 1(1)(c) (setting out a mens rea of not reasonably believing in consent). See also below Part III.

38 Witmer-Rich (n 4) 77–8.

39 High (n 2) 201.

40 Elisabeth McDonald, 'Communicating Absence of Consent Is Not Enough: The Results of an Examination of Contemporary Rape Trials' (2020) 46(2) *Australian Feminist Law Journal* 205, 217–23. It should be noted here that 'forcible' is not an element of sexual violence in New Zealand, or indeed in any of the jurisdictions surveyed in this article (functionally, see below n 52). As such, acquittals typically relate to the 'no consent' or 'no reasonable belief in consent' elements.

41 Ibid. See also Dan M Kahan, 'Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases' (2010) 158(3) *University of Pennsylvania Law Review* 729.

2013) in an increase in rape conviction rates.[42] And in both Queensland and Western Australia, detailed jurisdictional analyses show that complainant passivity continues to be cited as enlivening the 'reasonable mistaken belief in consent' defence.[43] Further, as Witmer-Rich points out, we simply do not know, and perhaps are unable to assess, how often in practice police, prosecutors or fact finders continue to require clear evidence of a 'no' from the complainant, as compared to applying a more progressive reasonableness standard which looks instead for a 'yes'.[44]

In the face of entrenched and arguably outdated ideas about passivity as an indication of consent, some jurisdictions have legislated provisions which specify that the reasonableness of a belief in consent is to be determined having regard to whether the defendant took steps to ascertain whether the complainant consented.[45] Such provisions require fact finders to consider whether a defendant engaged in communication to discern consent, rather than assuming consent based on a lack of communication of 'no' from the complainant. Again, empirical evidence on the impact of these provisions is scant.[46] But they represent an attempt to shift the needle on the reasonableness standard. To whatever extent norms of reasonableness are changing, moving away from 'assumed consent' and towards an obligation to communicate, it could be argued that a full affirmative consent standard would not be particularly radical. Nevertheless, these efforts to shift the dial might still have educative and symbolic functions, as well as impacts on decisions to report, investigate, and prosecute.

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42 Clare McGlynn, 'Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle?' in Clare McGlynn and Vanessa E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010) 139, 142–3; Vanessa E Munro and Liz Kelly, 'A Vicious Cycle? Attrition and Conviction Patterns in Contemporary Rape Cases in England and Wales' in Miranda AH Horvath and Jennifer M Brown (eds), *Rape: Challenging Contemporary Thinking* (Routledge, 2013) 281, 282–3; Anna Carline and Clare Gunby, '"How an Ordinary Jury Makes Sense of It Is a Mystery": Barrister's Perspectives on Rape, Consent and the Sexual Offences Act 2003' (2011) 32(3) *Liverpool Law Review* 237, 248. See also Louise Ellison and Vanessa E Munro, 'Better the Devil You Know? "Real Rape" Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17(4) *International Journal of Evidence & Proof* 299.

43 Crowe and Lee (n 33); Crowe, Burgin and Edwards (n 32).

44 Witmer-Rich (n 4) 75.

45 See, eg, *UK Sexual Offences Act* (n 29) s 1(2); *Crimes Act 1958* (Vic) s 36A ('*Victoria Crimes Act*'), inserted by *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s 5, substituted as of July 2023 by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5 ('*Sexual Offences and Other Matters) Act*') (see below n 88 and accompanying text). See also *Crimes Act 1900* (NSW) s 61HE(4)(a) ('*NSW Crimes Act*'); this provision, now repealed, was prima facie similar to the provisions mentioned earlier in that it required consideration of any steps taken to ascertain consent in assessing reasonableness of belief in consent. However, it was weakened in practice by the New South Wales Court of Criminal Appeal decision in *R v Lazarus* (2017) 270 A Crim R 378, 407 [147] (Bellew J, Hoeben CJ at CL and Davies J agreeing) ('*Lazarus*') (holding that an accused could take a 'step' without performing any physical or verbal act).

46 For a significant and detailed analysis of a 'taking steps to ascertain' provision in a 'full' affirmative consent jurisdiction, see Helen Mary Cockburn, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials' (PhD Thesis, University of Tasmania, 2012) <https://eprints.utas.edu.au/14748> (finding that affirmative consent reforms in Tasmania are not being implemented as intended).

In sum, it is increasingly common for 'assumed consent', as accommodated in the traditional common law of rape, to be displaced in practice, either by enumerating certain categories of sex as presumptively non-consensual, or by way of changing norms of 'reasonableness' vis-à-vis belief in consent. However, in the absence of a general affirmative consent standard, the law still accommodates the possibility of an incorrect but exculpatory assumption of consent, rather than requiring consent to be ascertained by way of communication.

3 *'Full' or 'Strong' Affirmative Consent: Communication Generating Permission*

As compared to the foregoing trends, a more definitive break with assumed consent can come in the form of an across-the-board adoption of affirmative consent. Affirmative consent understands consent as something that must *always* be externally[47] expressed in order to generate legally valid permission, not just in relation to certain 'suspect' categories (such as where a person is asleep or intoxicated). As Anderson puts it, affirmative consent assumes that to be meaningful, consent must be active. As a result, 'a person should have to communicate positive, verbal or nonverbal agreement to engage in penetration before someone else should be allowed to penetrate them'.[48]

Affirmative consent in law, then, is a rejection of assumed consent, and an embrace of an understanding of consent as something that must be communicated in order to generate a legally valid permission. In other words, an affirmative consent standard attempts to prohibit any and all sexual encounters to which a party has not communicated or expressed consent (the terms 'communicative' and 'expressive' consent are used interchangeably), with the goal of shifting socio-sexual intimacy into more communicative territory. To that end, consent which is not expressed is treated as legally invalid in terms of generating permission to proceed with sexual contact.[49] To give effect to this, the legal meaning of passivity must be transformed,[50] and transformed *generally* rather than on a case-by-case basis.

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47 Gruber (n 23) 438 notes that the 'affirmative consent' label is sometimes applied to a legal model which allows for communication by way of silence and passivity, notably in past drafts of the American Law Institute's Model Penal Code, which have purported to establish 'affirmative consent' but have allowed almost free reign on the interpretation of external manifestations as consent (including, sometimes, silence and passivity). By 'affirmative' I assume that something more than passivity/silence is required. Otherwise, there is no meaningful distinction between affirmative and attitudinal/assumed consent, and the traditional common law approach (allowing passivity plus context to ground an exculpatory belief in consent) remains all but untouched.

48 Michelle J Anderson, 'Campus Sexual Assault Adjudication and Resistance to Reform' (2016) 125(7) *Yale Law Journal* 1940, 1978.

49 A brief sidenote: affirmative consent assumes that communication is *necessary* to generate moral/legal permission to proceed; it does not necessarily follow that communication is *sufficient*. A victim might be internally dissenting but externally communicating consent. While it may be difficult, under either attitudinal or affirmative consent, to make out the elements of sexual assault in such cases, affirmative consent laws can be drafted in such a way that the possibility is not foreclosed (for example, in cases where it should have been apparent, to a reasonable person, that the complainant's 'yes' belied internal dissent or a lack of capacity to make or offer free and informed consent).

50 Deborah Tuerkheimer, 'Affirmative Consent' (2016) 13(2) *Ohio State Journal of Criminal Law* 441, 448.

III Transforming Passivity: Specific Affirmative Consent Legal Models

As noted in Part II, there is a cluster of substantive and procedural rules associated with the goal of affirmative consent. The focus in Part III is on rules relating to the definition of consent in sexual assault law, a concept which is pivotal in relation to both the actus reus and mens rea of rape and related sexual offences. As the discussion of exemplar jurisdictions illustrates, there is a degree of divergence in how jurisdictions have gone about redefining consent. Despite divergence in these models, the underlying goal is the same: establishing communication as a prerequisite for moral and legal permission to proceed. The broader question of how successful such doctrinal change can be in terms of shifting socio-sexual norms towards meaningful communication is one I return to below.

A *United States: 'Diluted' versus 'Pure' Affirmative Consent*

In her review of affirmative consent in the United States, Tuerkheimer notes that the majority of US jurisdictions 'still reflect traditional conceptions about the necessity of force and even resistance', but that there is a 'modern reformist trend toward consent-based formulations'.[51] Tuerkheimer surveyed a significant number of states which have legislated or judicially interpreted consent as requiring 'an affirmative gesture of willingness', thereby constructing consent as an externally communicated phenomenon. However, in the majority of these states, affirmative consent is 'diluted' by retention of the common law force requirement, meaning the element of force or threat of force must also be established. Generally, a force requirement works to put the focus firmly on resistance or the expression of non-consent, rather than on whether consent has been affirmatively expressed. By contrast, in a minority of 'pure' affirmative consent jurisdictions, force is not (functionally)[52] an element of rape, and consent is defined as requiring communication.[53]

By way of example of 'pure' affirmative consent, Wisconsin defines consent as 'words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact'.[54] The statute also sets out a number of circumstances in which consent is 'not an issue' (that is, where there is a non-rebuttable presumption of no consent). These

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51 Ibid 443.

52 See ibid 449 n 35. New Jersey maintains 'force' as an element of rape, but has interpreted the statutory force requirement as satisfied by the force inherent in sexual contact in the absence of affirmative consent; functionally, then, the force requirement has been replaced by 'no communicated consent': *State of New Jersey in the Interest of MTS*, 609 A 2d 1266, 1277 [5] (Handler J for the Court) (NJ, 1992) ('*MTS*').

53 Tuerkheimer, 'Affirmative Consent' (n 50) 447–51.

54 Wis Stat Ann § 940.225(4) (West 2022). Writing in 2016, Tuerkheimer noted two other 'pure' affirmative consent jurisdictions, Vermont and New Jersey: see Tuerkheimer, 'Affirmative Consent' (n 50) 451. In 2017, Montana passed rape law reforms bringing it into alignment with these jurisdictions: see Mont Code Ann § 45-5-501(1)(a) (West 2019) (defining consent as 'words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact'). See also Vt Stat Ann tit 13, § 3251(3) (2022) (defining consent as 'the affirmative, unambiguous, and voluntary agreement to engage in a sexual act, which can be revoked at any time').

circumstances include where the complainant was asleep or so intoxicated as to be unable to consent, so long as the defendant is aware of the qualifying circumstance, but only where the charge is second degree sexual assault. That is, consent and belief in consent may still be in issue, even in relation to such circumstances, if the charge is first degree sexual assault.

In New Jersey, the shift to affirmative consent was achieved by judicial interpretation. In the landmark case of *MTS*, the Supreme Court of New Jersey concluded that the offence of sexual assault occurs when a defendant engages in an act of sexual penetration 'without the affirmative and freely-given permission of the victim to the specific act'.[55] The Court went on to say that permission 'may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances'.[56]

B *Canada*

Legislation and case law have together moved Canadian law towards affirmative consent. Prior to 1992, Canada adopted a traditional approach to sexual assault,[57] with the actus reus based on non-consent, threat or fraud. In 1992, a definition of consent as 'the voluntary agreement of the complainant to engage in the sexual activity in question' was embedded in the *Canadian Criminal Code* for the first time.[58] Further, in relation to mens rea, the common law 'mistake of fact' defence, available for those who honestly but mistakenly believed there was consent to the touching, was limited to where the accused took 'reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting'.[59]

These amendments laid the groundwork for a shift to affirmative consent. Subsequently, in the key Supreme Court decision of *Ewanchuk*, the Court held that absence of consent vis-à-vis the actus reus of 'unwanted sexual touching' is 'subjective and determined by reference to the complainant's subjective internal state of mind towards the touching', and rejected a (failure of proof) defence of implied consent.[60] This firmly did away with the common law approach of requiring some external sign of resistance as proof of non-consent.

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55 *MTS* (n 52) 1277 [5] (Handler J for the Court).

56 Ibid.

57 While I use the term 'rape' generally in this article to refer to the crime of non-consensual sexual intercourse, much of the discussion on consent pertains also to related sexual assault offences. In Canada, the crime of rape was replaced in 1983 with the current gender-neutral, three-tier structure of sexual assault: Lise Gotell, 'Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women' (2008) 41(4) *Akron Law Review* 865, 867–8 n 9.

58 *Criminal Code*, RSC 1985, c C–46, s 273.1(1) ('*Canadian Criminal Code*'). Interestingly, as noted by Gotell (n 57), the definition was primarily intended to reduce the use of complainant sexual propensity evidence: at 867.

59 *Canadian Criminal Code* (n 58) s 273.2(b).

60 *Ewanchuk* [1999] 1 SCR 330, 346 [23], 348 [26], 349–50 [31] (Major J for Lamer CJ, Cory, Iacobucci, Major, Bastarache and Binnie JJ) ('*Ewanchuk*').

In relation to mens rea, the *Ewanchuk* Court noted the 'honest but mistaken belief in consent' defence.[61] In this context, the Court held, 'consent' is to be considered from the perspective of the accused, and means 'that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused'.[62]

In other words,

> In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant *communicated consent to engage in the sexual activity in question*. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.[63]

To create a legally valid permission, then, there must be a belief that agreement has been communicated: in other words, an honest but mistaken belief in *communicated* consent.[64] Relatedly, 'a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and no defence'.[65]

The *Ewanchuk* decision is now reflected in s 273.2(c) of the *Canadian Criminal Code*, added in 2018 to create an additional category of circumstances in which there can be no exculpatory (non-reckless) belief in consent: namely, where there is 'no evidence that the complainant's voluntary agreement … was affirmatively expressed by words or actively expressed by conduct'.[66] This provision is even more explicit than the preceding 'reasonable steps' provision in establishing communication as a prerequisite for permission, and firmly entrenches affirmative consent in Canadian legislation.

In sum, consent in Canadian sexual assault law is attitudinal vis-à-vis actus reus (did the complainant in her mind want the sexual touching?) and communicative vis-à-vis mens rea (requiring a belief that consent has been affirmatively communicated by words or conduct indicating voluntary agreement in order to exculpate). Further, both case law and legislation set out additional limits as to when consent has been validly communicated in relation to the mens rea. These limits include that consent must be ongoing throughout a sexual encounter, and that consent must be given when shifting from one form of sexual activity to another.[67]

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61 Ibid 353–4, citing *Pappajohn v The Queen* [1980] 2 SCR 120, 148 (Dickson J) (discussing mistake as a 'negation of guilty intention' (that is, failure of proof) defence).

62 *Ewanchuk* (n 60) 354–5 [49] (Major J for Lamer CJ, Cory, Iacobucci, Major, Bastarache and Binnie JJ).

63 Ibid 354–5 [46] (emphasis in original).

64 *R v Barton* [2019] 2 SCR 579, 630 [92] (Moldaver J for Côté, Brown and Rowe JJ) ('*Barton*') (noting that 'it is appropriate to refine the judicial lexicon and refer to the defence more accurately as an "honest but mistaken belief in *communicated* consent"' (emphasis in original)).

65 *Ewanchuk* (n 60) 356 [51] (Major J for Lamer CJ, Cory, Iacobucci, Major, Bastarache and Binnie JJ).

66 *Canadian Criminal Code* (n 58) s 273.2(c).

67 Gotell (n 57) 871 n 27, 875.

C *Tasmania*

The *Tasmanian Criminal Code*[68] was amended in 2004 to implement changes that, at the time, were 'amongst the most progressive in the common law world'.[69] At the reform Bill's second reading, the amendments were described as importing 'the notions of mutuality and reciprocity into the concept of consent', and rejecting silence or passivity as a basis for a belief in agreement.[70] To that end, two key changes were made. One was to define 'consent' as 'free agreement', with an expanded list of circumstances in which there is no consent.[71] Crucially, this list includes where a person does not say or do anything to communicate consent.[72] The other was to provide that a mistaken belief in consent is not honest or reasonable when inter alia the accused failed to take reasonable steps, in the circumstances known to them at the time of the offence, to ascertain consent.[73]

Dyer has noted that there is limited case law concerning the meaning of the 'failure to take reasonable steps' test in s 14A(1)(c).[74] However, he notes that it would seem that the requirement might be satisfied in the absence of explicitly asking for permission. The Tasmanian provision follows the Canadian provision closely; and the Canadian Supreme Court has noted, when interpreting a similarly worded provision (relating to certain online offences), that '[r]easonable steps need not be active' and may extend to 'observing conduct or behaviour'.[75] More recently, the same Court also observed that 'the reasonable steps requirement is highly contextual', while also finding that an accused cannot point to reliance on a complainant's 'silence, passivity, or ambiguous conduct as a reasonable step'.[76]

D *New South Wales*[77]

Prior to 2022, New South Wales had a 'partial' or category-based approach to affirmative consent. The *Crimes Act 1900* (NSW) provided a non-exhaustive list of factors which would render consent not freely and voluntarily given,[78] and failure to take steps to ascertain consent was a non-conclusive factor to be regarded in assessing the reasonableness of a mistaken belief in consent.[79] As such, it was still

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68 *Criminal Code Act 1924* (Tas) sch 1 ('*Tasmanian Criminal Code*').
69 Cockburn (n 46) 1.
70 Tasmania, *Parliamentary Debates*, House of Representatives, 3 December 2003, 44 (Judy Jackson, Attorney-General), quoted in Cockburn (n 46) 5.
71 *Tasmanian Criminal Code*) (n 68) s 2A(1).
72 Ibid s 2A(2)(a).
73 Ibid s 14A(1)(c).
74 Ibid; Andrew Dyer, 'Yes! To Communication about Consent; No! To Affirmative Consent: A Reply to Anna Kerr' (2019) 7(1) *Griffith Journal of Law and Human Dignity* 17.
75 *R v Morrison* [2019] 2 SCR 3, 52 [109], [112] (Moldaver J for Wagner CJ, Gascon, Côté, Brown, Rowe and Martin JJ), quoted in Dyer (n 74) 17. As Dyer also points out, this approach was taken in the 2017 New South Wales decision of *Lazarus* (n 45), discussed in text accompanying n 80 below.
76 *Barton* (n 64) 637 [107]–[108] (Moldaver J for Côté, Brown and Rowe JJ).
77 The Australian Capital Territory also reformed its consent laws in 2022: *Crimes (Consent) Amendment Act 2022* (ACT). With respect to the key points of reform in New South Wales, the Territory's reforms are equivalent, and so I do not give them separate treatment: see *Crimes Act 1900* (ACT) ss 50B, 67(5).
78 *NSW Crimes Act* (n 45) s 61HE(2) (repealed).
79 Ibid s 61HE(4)(a) (repealed).

possible for consent to be inferred, at least in some circumstances, from passivity and context. Further, the 'failure to take steps' provision was weakened, in terms of its ability to promote communication, by the finding in *Lazarus* that a defendant can be considered as having 'taken steps' to ascertain consent merely by observing the complainant's conduct and forming a belief that she is consenting.[80]

Two major reforms to the law of consent came into effect on 1 June 2022.[81] First, the law now expressly provides that consent must always be affirmatively communicated, in that a person does not consent if 'the person does not say or do anything to communicate consent'.[82] As such, silent passivity is now sufficient to establish non-consent, regardless of the complainant's internal attitude of willingness or unwillingness.

Second, the law also precludes the type of argument raised in *Lazarus* — that turning one's mind to the issue of consent amounts to taking steps to ascertain. Section 61HK(2) provides that a belief in consent is not reasonable (and therefore not exculpatory) if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity,[83] although exceptions are in place for an accused with cognitive or mental health impairment contributing to the failure.[84] As such, merely 'turning one's mind to consent' is no longer a basis for an exculpatory mistaken belief in consent.

E *Victoria*

Victoria amended the definition of consent in 2016 to provide inter alia that a person does not consent where 'the person does not say or do anything to indicate consent'.[85] Consent being so defined, this would suggest that any belief in consent formed in the face of a complainant's silence/passivity would amount to a mistake of law, and would not be exculpatory. However, the law still allowed for a belief in consent to be reasonably formed even in cases involving silence/passivity.[86] Further, there was no obligation to take active steps to ascertain consent in order for a belief to be deemed reasonable, with s 36A(2) providing that taking steps to ascertain consent is a non-conclusive factor going to the reasonableness of a belief in consent.[87]

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80 *Lazarus* (n 45) 406–7 [146]–[147] (Bellew J, Hoeben CJ at CL and Davies J agreeing).
81 *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW).
82 *NSW Crimes Act* (n 45) s 61HJ(1)(a).
83 Ibid s 61HK(2).
84 Ibid s 61HK(3).
85 *Victoria Crimes Act* (n 45) s 36(2)(l), inserted by *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s 5.
86 Rachael Burgin and Jonathan Crowe, 'The New South Wales Law Reform Commission Draft Proposals on Consent in Sexual Offences: A Missed Opportunity?' (2020) 32(3) *Current Issues in Criminal Justice* 346, 348.
87 *Victoria Crimes Act* (n 45) s 36A(2).

In August 2022, the Victorian Parliament passed amendments which became law in July 2023,[88] and have been described as an adoption of affirmative consent.[89] As in New South Wales, the 'reasonable belief' provision now specifies that a person's belief in another's consent is not reasonable if the accused did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.[90]

IV Comparative Analysis: Redefining Consent, Actus Reus and Mens Rea

The survey of affirmative consent jurisdictions in Part III shows a diversity of approaches to redefining consent, in relation to both actus reus and mens rea. In Part IV, I highlight four key points of divergence among the surveyed jurisdictions. In doing so, I point to the importance, for affirmative consent advocates and sceptics alike, of engaging with the specific implications of various doctrinal iterations of affirmative consent.

A *Actus Reus: Consent as Willingness versus Consent as Communicated Willingness*

Importantly, Canada maintains an understanding of consent as wholly attitudinal vis-à-vis establishing the actus reus element of 'no consent'. The enquiry into that element is directed solely to the internal state of mind of the complainant. In other words, consent is defined, for the purpose of actus reus, as a state of mind rather than an externalised phenomenon. As such, the law recognises that a person who is completely passive and silent throughout the touching in question may in fact be internally willing, welcoming, desiring the touching, in which case the 'no consent' element of the actus reus would not be established. The implication of maintaining consent as attitudinal vis-à-vis actus reus is immediately apparent: it risks opening the door to arguments that passivity is evidence of internal desire (or perhaps more accurately, it leaves open a door that has historically always been wide open in rape law). However, the Supreme Court has been clear that there is no place for 'implied consent' (that is, inferring consent from a failure to resist) in Canadian sexual assault law.[91]

By contrast, the remaining surveyed jurisdictions, while each setting out a 'positive' definition of consent as an *attitude* of free agreement or permission,[92] also each define consent negatively as not legally present if there are no *words or actions*

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88 *Sexual Offences and Other Matters Act* (n 45).

89 Jaclyn Symes, 'Affirmative Consent Model Now Law in Victoria' (Media Release, 31 August 2022) <https://www.premier.vic.gov.au/affirmative-consent-model-now-law-victoria>.

90 *Victoria Crimes Act* (n 45) s 36A(2).

91 *Ewanchuk* (n 60). But see below n 135 and accompanying text.

92 New Jersey ('affirmative and freely-given permission': *MTS* (n 52) 1277 [5], 1279 [9] (Handler J for the Court)); Wisconsin, Montana and Vermont ('freely given agreement' per respective criminal Codes, above n 54); Tasmania ('free agreement': *Tasmanian Criminal Code* (n 68) s 2A); New South Wales ('free and voluntary agreement': *NSW Crimes Act* (n 45) s 61HI(1)); Victoria ('free agreement': *Victoria Crimes Act* (n 45) s 36(1)).

communicating such an attitude. The New Jersey Supreme Court in *MTS* is explicit about the implications of this construction of consent as an external phenomenon:

> In [non-forcible sexual assault] cases neither the alleged victim's subjective state of mind nor the reasonableness of the alleged victim's actions can be deemed relevant to the offense. … [T]he law places no burden on the alleged victim to have expressed non-consent or to have denied permission, and no inquiry is made into what he or she thought or desired or why he or she did not resist or protest.[93]

In Wisconsin, Montana, Vermont, Tasmania, New South Wales and Victoria, the same outcome, is achieved in cases involving a silent/passive victim, by legislation specifying that consent is not legally present in the absence of words or actions indicating agreement.[94]

This divergence is at least theoretically significant. If consent is deemed in law to be absent if there are no words or actions communicating consent, this firmly closes the door on the argument that silent passivity implies desire. It ensures that an alleged victim's failure to protest or resist (which, as is now commonly known, may be due to a 'frozen in fear' reaction) cannot be offered as evidence of an attitude of consent, as the quote from *MTS* makes clear. However, it creates a concern about potential doctrinal overreach, in terms of the expansion of the bounds of the actus reus of rape. By that I mean, in cases where there were no words/actions communicating consent, the actus reus element of 'non-consensual sexual contact' is made out, regardless of whether the passive actor was indeed 'frozen in fear', or whether they were in fact internally willing, desirous, welcoming of the sexual contact.

Combined with a mens rea of no reasonable belief in communicated[95] or ascertained[96] consent, this actus reus allows for culpability in relation to sexual contact that was, in fact, internally desired on the part of the complainant. Such an allowance would seem to redefine the wrongfulness of rape from 'sex with an unwilling partner' to 'non-communicative sex'. That is quite a significant expansion of the bounds of rape law. That is not to say it is an illegitimate or irrational change, but it is a significant shift from rape as a violation of personal will. It aligns with the (contestable) idea that there is culpability[97] whenever someone *hazards* that non-communicated internal desire may be present, regardless of whether they happen to get it right. Such culpability might be controversial — particularly as it would apply to people in long-term, mutual, consensual sexual relationships, where arguably people are very likely to get it right — but it is defensible in theory. For example, we might argue that those who risk inflicting unwanted sexual contact by engaging

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93 *MTS* (n 52) 1279 [8] (Handler J for the Court).

94 Wis Stat Ann § 940.225(4) (West 2022); Mont Code Ann § 45-5-501(1)(a) (West 2019); Vt Stat Ann tit 13, § 3251(3) (2022); *Tasmanian Criminal Code* (n 68) s 2A(2)(a); *NSW Crimes Act* (n 45) s 61HJ(1)(a); *Victoria Crimes Act* (n 45) s 36(2)(l).

95 See Wisconsin, Vermont, Montana and New Jersey (above nn 54, 55 and accompanying text).

96 See Tasmania, New South Wales and Victoria (above nn 68, 83, 87 and accompanying text).

97 Culpability for rape or its analogues, and not merely for attempted rape; for discussion of whether attempt liability is more appropriate in cases where consent was internal, and no belief in consent is present, see Kimberly Kessler Ferzan, 'Consent, Culpability, and the Law of Rape' (2016) 13(2) *Ohio State Journal of Criminal Law* 397.

in sex with a non-communicative partner are acting wrongfully, in that by doing so they participate in a problematic, chauvinistic culture which is harmful to women generally.[98] Or we might argue that because sex is a high-stakes context, an external or public act of communication resulting in common knowledge is always required for consent to be morally transformative.[99] In this view, simply taking a punt and assuming internal consent is present is itself morally pernicious, and an affront to dignity and autonomy, even if one happens to get it right on a particular occasion.

Whether such culpability for desired but non-communicative sex aligns with community expectations of how rape laws will be constructed and used is debatable (and shifting those expectations would presumably require a concerted effort, and take time). It also means that any interest in engaging in sex with a non-communicative but internally desirous partner is not accommodated in law, although such sex would presumably be unlikely to lead to a criminal complaint. Indeed, as Gruber points out, the response to this overreach concern is frequently that 'affirmative consent laws won't be used in this way':

> Affirmative consent critics decry the risk that a willing sexual partner will report rape, for whatever reason, and unless there was a 'yes', the accused is guilty. Advocates respond that this vision of a world full of vindictive or unreasonable complainants utilizing broad affirmative consent standards to punish ordinary sexual actors is nothing more than men's persistent 'nightmare'.[100]

I am in agreement with Gruber that fears of malicious false complaints are exaggerated.[101] However, such a radical reconstruction of the actus reus of rape, even if it will not in practice lead to liability for sexual contact that was internally desired, might give pause. If one of the strongest arguments for affirmative consent reform is that it will bring our laws into alignment with norms and aspirations of communicative socio-sexual behaviour, to the end of giving greater effect to sexual autonomy, the Canadian example shows that is possible to achieve this without also criminalising *desired* sexual contact along the way and thereby impinging on sexual autonomy.[102]

On the other hand, the obvious concern about continuing to conceive of consent as entirely attitudinal vis-à-vis actus reus is that, in cases of a silent and passive complainant, juries (and before them, investigators and prosecutors) will inevitably continue to make inferences about the complainant's internal state of mind based on such silent passivity. We can posit that this is likely to be so, regardless of judicial admonishment against implied consent, and there is Canadian

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98 See, eg, Pineau, 'Date Rape' (n 25); Lois Pineau, 'A Response to My Critics' in Leslie Francis (ed), *Date Rape: Feminism, Philosophy, and the Law* (Pennsylvania State University Press, 1996) 63, 84.

99 Tom Dougherty, '"Yes Means Yes": Consent as Communication' (2015) 43(3) *Philosophy & Public Affairs* 224. See further Mollie Gerver, 'Inferring Consent Without Communication' (2020) 46(1) *Social Theory & Practice* 27.

100 Gruber (n 23) 453–4.

101 Ibid 453. See generally Philip NS Rumney, 'False Allegations of Rape' (2006) 65(1) *Cambridge Law Journal* 128.

102 On consent as an internal phenomenon, as it relates to autonomy, see Ferzan (n 97).

research showing this play out.[103] Further, by externalising consent vis-à-vis actus reus, not just mens rea, the law sends a clear message that it is a wrongful act to engage in sexual conduct in the absence of overt communication. Arguably that will ultimately serve sexual autonomy more effectively on the whole, despite the non-accommodation of the choice to engage in desired but non-communicative sex.

B *Actus Reus: Words/Actions Indicating Consent*

Affirmative consent is often touted as bringing greater clarity to sexual intimacy, and to some degree it does. In jurisdictions which define consent as requiring some words or actions indicating agreement, at a minimum silent passivity is no longer legally congruent with consent. Instead, unless there is some form of verbal or non-verbal communication in the form of words or actions, the 'no consent' element is made out. However, this raises the question: what sort of words/actions suffice to communicate consent?

Confusion on this point can arise because in the 'yes means yes' social movement, as discussed above, a spectrum of formulations is available as to 'what sort of yes means yes'. As Gruber has canvassed, the meaning of communicated consent can range from 'narrow communicative prescriptions (contract, verbal yes) to any behavior that conveys internal agreement (foreplay, acquiescence)'.[104] For example, we might imagine a legal rule that there is no consent unless there are words/actions that *unambiguously* communicate *enthusiasm* for the sexual contact in question. 'Clear/unambiguous consent' and 'enthusiastic consent' are ideals often held up in the 'yes means yes' movement. But I am not aware of any criminal models of affirmative consent that require words/actions that unambiguously communicate permission, or that communicate enthusiastic agreement/permission. Such requirements might be common on college campuses[105] and useful for educative/political purposes[106] but are not (yet) features of affirmative consent legal models.

Indeed, to require enthusiastic and/or unambiguous agreement to sexual contact would be an extreme intervention in private sexual intimacy. On enthusiasm: free and voluntary consent to sexual intimacy can be, and very often is, given reluctantly, including to sex that may not be particularly desired but is, nonetheless, welcomed.[107] In sexual politics, there is an understandable push to counteract the coercive societal forces that lead many, especially women, to consent to sex that is not fully desired, but to deem such sex non-consensual would represent a remarkable and significant widening of the actus reus of rape law. Despite this, in some jurisdictions affirmative consent law reform has been described as requiring

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[103] See, eg, Rakhi Ruparelia, 'Does No "No" Mean Reasonable Doubt? Assessing the Impact of *Ewanchuk* on Determinations of Consent' (2007) 25(1) *Canadian Woman Studies* 167.

[104] Gruber (n 23) 430.

[105] Jacob Gersen and Jeannie Suk, 'The Sex Bureaucracy' (2016) 104(4) *California Law Review* 881.

[106] Gruber (n 23) 432.

[107] See generally Anna High, 'Reluctant Consent' [2022] (9) *New Zealand Law Journal* 310, 311–12; Dyer (n 74) 3, 22. See further Ferzan (n 97) 406.

'enthusiastic consent',[108] a description which I suggest conflates law's aspirations (in terms of encouraging and incentivising certain ideal sexual norms) and law's actual doctrinal effects (in terms of what is criminally sanctioned).

As to whether affirmative consent means unambiguous consent: from the comparative review, we see that at most affirmative consent forecloses the argument that silence/passivity is a form of communication that suffices to convey consent.[109] Affirmative consent does not require unambiguous consent; it simply forecloses the argument that 'her *silent passivity* was ambiguous, and I got it wrong'. Provided there were words or actions that could plausibly be construed as communicating consent, there will still be scope in law for an exculpatory (failure of proof) defence based on a mistaken belief in communicated consent, even in affirmative consent jurisdictions, and even where the communication was ambiguous.[110] This will always be so, unless the law takes a more regulative approach and rejects sexual ambiguity entirely by specifying precisely what form of words/actions will suffice as an indication of consent.[111] But that would raise competing concerns about undue infringement on sexual liberty[112] and associated backlash.[113]

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[108] See, eg, Victoria: 'simply, it must be a clear and enthusiastic go-ahead': Symes (n 89) (discussing the *Sexual Offences and Other Matters Act* (n 45)).

[109] Canada and Vermont might give us pause here. In *Ewanchuk* (n 60) 356, the Court stated that a belief that 'silence, passivity or ambiguous conduct constitutes consent is a mistake of law'. However, the subsequent and corresponding legislative amendment simply requires evidence that voluntary agreement 'was affirmatively expressed by words or actively expressed by conduct', with no requirement that the expression be unambiguous: *Canadian Criminal Code* (n 58) s 273.2(c). Further, Witmer-Rich (n 4) 69 notes that Canadian case law does not appear to require unambiguous consent. In Vermont, the definition of consent includes 'unambiguous': Vt Stat Ann tit 13, § 3251(3) (2022). However in practice, it is difficult to see how an 'unambiguous' standard could be workable in law, unless the precise nature of 'unambiguous consent' is set out (for example, 'there must be a verbal "yes" in response to a verbal request'): see Witmer-Rich (n 4) 68–74 (discussing the conflation in commentary and scholarship of affirmative and unambiguous consent).

[110] As Anderson has noted, an affirmative consent model 'relies on a man's ability to infer actual willingness from a woman's body language' but does not necessarily account for his misinterpretation of non-verbal behaviour: Michelle J Anderson, 'Negotiating Sex' (2005) 78(6) *Southern California Law Review* 1401, 1406. See further Ferzan (n 97) 432; Philip Rumney, 'The Review of Sex Offences and Rape Law Reform: Another False Dawn?' (2001) 64(6) *Modern Law Review* 890, 900.

[111] Wall describes this as one of two horns of the inherent dilemma of affirmative consent: Jesse Wall, 'The Expressive Consent Dilemma' (Conference Paper, Perspectives on the Law of Sexual Violence, 8 December 2022) (on file with author).

[112] Stephen J Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press, 1998) 272 (suggesting that a 'world without ambiguity in erotic interaction might be a very dull place'); Tuerkheimer, 'Affirmative Consent' (n 50) 445 n 16 (noting arguments about the 'cost of doing away with [sexual] ambiguity'); Melissa Hardesty, Sarah R Young, Allison M McKinnon, Ann Merriwether, Richard E Mattson and Sean G Massey, 'Indiscrete: How Typical College Student Sexual Behavior Troubles Affirmative Consent's Demand for Clear Communication' (2022) 19(3) *Sexuality Research and Social Policy* 1114, 1127 (noting that mandating specific words or actions as the only means to communicate consent might be seen as an unacceptable intrusion into private lives as it 'amounts to telling [people] how to have sex'). For a brief survey of empirical research on the diversity of ways that people in fact communicate about consent, see Mark A Levand, 'Consent as Cross-Cultural Communication: Navigating Consent in a Multicultural World' (2020) 24(3) *Sexuality & Culture* 835, 837–8.

[113] See generally Gruber (n 23) 446 (discussing the risk of attempting to 'shove' through societal change using 'radical behavioral prescriptions').

As such, it would overstate the effect of affirmative consent to say that it removes scope for exculpation based on genuine sexual miscommunication; it would still be possible, in an affirmative consent schema, for two parties to a sexual encounter to construe certain words or actions differently, in terms of whether those words or actions are understood to represent communication or willingness to engage in the sexual activity. Nonetheless, while affirmative consent does not completely do away with the possibility of sexual miscommunication based on ambiguous words/conduct, it at least represents a decisive break from the common law understanding of silent passivity as evidence of internal desire. Common law deemed silent passivity to be ambiguous. That approach historically served men well, in terms of preserving rights of access to female bodies, and relates to an understanding of sex as prima facie consensual.[114] Affirmative consent rejects the idea that silent passivity is ambiguous by requiring some words/actions as communication of consent; silent passivity plus context would not suffice. But that is not, in my view, the same as requiring that those words/actions be unequivocal.

C *Mens Rea: Disallowing or Allowing the 'Mistake of Law' Defence*

In Canada and the surveyed US jurisdictions, the mens rea of sexual assault can be satisfied inter alia by showing absence of belief in communicated (whether by words or actions) consent. This construction of mens rea forecloses the possibility of an exculpatory mistaken belief in internal consent formed on the basis of silent passivity as such a mistake would be a 'mistake of law'. As the Canadian Supreme Court explained in *Ewanchuk*, because (Canadian) law defines consent, for the purpose of mens rea, as something 'affirmatively communicated by words or conduct', it is a mistake of law — and therefore no defence — to form a belief in consent based on anything less than words or conduct.[115] This judicial dictum was subsequently legislated into s 273.2(a), added in 2018, which expressly provides that there can be no exculpatory (non-reckless) belief in consent where there is no evidence of an affirmative expression, by words or conduct, of voluntary agreement on the part of the complainant.[116]

By contrast, a 'mistake of law' defence seems to have been accommodated in the surveyed Australian jurisdictions. In Tasmania, New South Wales and Victoria, the law provides that a person does not legally consent where they do not say or do anything to communicate consent. This should have the effect of foreclosing a 'belief in consent' defence, if such a belief is based on the complainant's silence/passivity, as such a belief would amount to a mistake of law. However, in Victoria, Burgin and Crowe have noted that, despite this, a defendant can argue mistaken belief in consent based on silent passivity.[117] In New South Wales, the 'no consent if no words/actions to communicate consent' provision only came into effect in June 2022, but I have not found any case law to suggest the

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[114] See generally High (n 2).
[115] *Ewanchuk* (n 60) 356 (Major J for Lamer CJ, Cory, Iacobucci, Major, Bastarache and Binnie JJ).
[116] *Canadian Criminal Code* (n 58) s 273.2(a).
[117] Burgin and Crowe (n 86) 348.

Victorian approach would not be followed. Finally, in Tasmania, Cockburn has noted that consent is legally defined as not present where a person does not say or do anything to communicate consent;[118] therefore, in the absence of any such words or actions from the complainant, a defence of mistaken belief in consent should be precluded as a mistake of law. However, she also notes it is 'by no means clear' that this is the case in practice.[119]

D *Mens Rea: Failure to Ascertain Desire versus No Reasonable Belief in Communicated Desire*

Following on from this: in jurisdictions such as Victoria which have (wrongly, in my view) allowed for 'mistake of law' arguments, a consequence is that despite a clear definition of consent as affirmative, it has remained possible for a defence of mistaken belief in consent to be raised, even in cases involving a silently passive victim. Rather than recognising this as a mistake of law that should not be accommodated, New South Wales and Victoria have further reformed the mens rea of sexual assault. Their latest round of reforms provide that a belief in consent is not reasonable (and therefore not exculpatory) if the accused person did not, within a reasonable time before or at the time of the sexual activity, *say or do anything* to find out whether the other person consents to the sexual activity.

These 'failure to ascertain' provisions would seem to preclude any argument of reasonable belief in consent based on silent passivity, as they require the accused to have actively communicated, by way of words or actions, with the complainant before a mistaken belief in consent can be deemed reasonable. It is no longer reasonable, in law, to simply turn one's mind to the question of consent, and to make assumptions based on an absence of resistance / verbal objection.[120]

On the face of the New South Wales and Victoria 'failure to ascertain' laws, mens rea is established whenever an accused fails to use some form of words or some type of conduct to ascertain consent. This apparently requires, in order for an exculpatory state of mind to exist, that a sexual agent 'stop and ask', by way of words or gestures, *even if* their partner has already communicated and continues to communicate consent. In this, the reforms arguably have overshot, risking redundancy and backlash. The concern I raise is admittedly largely theoretical, in that if consent has been communicated and is continuing, actus reus is not made out, and no criminal liability would ensue (unless, as above, we assume vindictive false complaints). But by requiring all agents to always 'stop and ask', the law gives rise to a 'not raped, but by a rapist scenario' — by which I mean, a mind is deemed guilty due to failure to take steps to ascertain, despite such steps being redundant if consent is being clearly communicated during the encounter in question. Admittedly, 'stop and ask' might be the safest and most prudent way to ensure sex is mutually and genuinely welcomed, and as such is useful as an educative socio-sexual script. However, it is an overly prescriptive and inappropriate expansion of the mens rea of rape to require active ascertainment in all cases, and at every step of a sexual

[118] Cockburn (n 46) 31.
[119] Ibid.
[120] Cf the approach taken in *Lazarus* (n 45), discussed above in n 80 and accompanying text.

encounter, where consent continues to be actively communicated by one's partner. This mens rea expansion arguably represents a sacrifice of sound legal doctrine for the sake of an educative and/or symbolic function, and therefore risks backlash once those precise doctrinal bounds are pointed out.

By contrast, in Canada and the surveyed US jurisdictions, an absence of belief in *communicated* consent satisfies mens rea, but there is no general and additional 'stop and ask' obligation to actively ascertain where consent has been communicated (although again, that is not to say that 'stop and ask' might not be prudent, and a useful script to promote in sexual education). The possible drawback of this approach, as compared to that of New South Wales and Victoria, is that it keeps the evidentiary emphasis on what the complainant did or said by way of communication, whereas the 'failure to ascertain' approach puts the emphasis on what the *accused* did or said by way of communication. As noted in *MTS*, advocates for rape reform have long argued that one of the key problems is how law tends to focus on victim behaviour rather than defendant conduct.[121]

V Discussion and Conclusions

At the outset of this article I noted that consent is here to stay, for better or worse, as a key concept in sexual violence law. Valid concerns have been raised about the valorisation of consent in law, but this article assumes that it will continue to be a key marker for delineating morally/socially/legally permissible from impermissible sex. But that is only the beginning of the discussion. For legislators contemplating whether the legal meaning of consent is fit for purpose in the modern context, and in light of the well-documented problems with preventing and prosecuting sexual violence, the question arises: what values will we imbue in consent in law? As Cowan has argued:

> Consent is a concept which we can fill with either narrow liberal values, based on the idea of the subject as an individual atomistic rational choice maker, or with feminist values encompassing attention to mutuality, embodiment, relational choice and communication.[122]

When affirmative consent law reform is promoted politically, it is often framed by proponents as a straightforward value judgment. By choosing affirmative consent, we purport to affirm a communicative model of intimacy, to better give effect to the values of mutuality, respect, autonomy and dignity. Assuming, rather than ascertaining, consent, involves regarding the bodies of others as in a perpetual state of consent unless or until they clearly state otherwise, and is rightly rejected as antithetical to communicative values.

As discussed in Part III, even in the absence of an express affirmative consent standard, Anglo-American jurisdictions have trended broadly away from the common law's uncritical embrace of assumed consent and towards ascertained

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[121] *MTS* (n 52) 1274 [1] (Handler J for the Court).

[122] Sharon Cowan, '"Freedom and Capacity to Make a Choice": A Feminist Analysis of Consent in the Criminal Law of Rape' in Vanessa E Munro and Carl F Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish, 2007) 51, 53.

consent. Over time, the scope of rape law has expanded such that the legal legibility of unwanted sex has at least theoretically improved. Affirmative consent, some might say, is simply the natural next step in our progression away from assumed consent and towards a model that requires active, meaningful, reciprocal ascertainment of desire.

Indeed, in all of the surveyed jurisdictions, there has been a stated, express intention, in shifting towards affirmative consent, to import certain values into law. Landmark affirmative consent cases such as *Ewanchuk* and *MTS*, in interpreting consent as requiring communication, point to autonomy, privacy, dignity and bodily control as interests at stake and more fully protected by affirmative consent.[123] The Tasmanian legislature described its 2004 amendments as importing 'the notions of mutuality and reciprocity into the concept of consent'.[124] The 2022 reforms in New South Wales included legislating an objective of the subdivision on consent as the recognition of the right to choose whether or not to participate in sexual activity.[125] And the most recent Victorian reforms were described as promoting 'healthy sexual relationships that are based on the principles of mutual respect and bodily autonomy'.[126]

However, it is reductive to set up the legal debate about affirmative consent as a matter of whether one is for or against communicative sexuality. As Gruber argues, it is common and uncontentious to hope that over time, norms of sexual behaviour and communication will change such that 'harmful sex is reduced and the costs and benefits of sex are distributed more equally between men and women'.[127] But to speak vaguely of values such as autonomy, equality, dignity and mutuality as justification for affirmative consent rather glosses over a number of important points of theory, doctrine and practice. This comparative analysis has sought to shed greater light on a number of doctrinal issues raised by affirmative consent. It does not purport to resolve the normative issues raised by affirmative consent, nor to advocate or argue against a reconstruction of consent in law, but to bring clarity to the debate in terms of the doctrinal repercussions and trade-offs associated with reform.

A *Doctrinal Trade-offs of Affirmative Consent*

Despite this aim of clarity, the comparative analysis might raise more questions than it answers. It certainly shows that there are different versions of affirmative consent in law, and the need to be specific about those versions. We cannot debate, critique or defend affirmative consent as a legal model without establishing the doctrinal mechanisms under discussion. Further, the comparative analysis has shed light on four key points of divergence. These are granular but important points, and they must be confronted, because if affirmative consent is the goal of legislative reform, there

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123 *Ewanchuk* (n 60) 348 ('Having control over who touches one's body, and how, lies at the core of human dignity and autonomy'); *MTS* (n 52) 1277 [6] (discussing rape as it relates to bodily integrity, autonomy and privacy).

124 Tasmania, *Parliamentary Debates*, House of Representatives, 3 December 2003, 44 (Judy Jackson, Attorney-General), quoted in Cockburn (n 46) 5.

125 *NSW Crimes Act* (n 45) s 61HF(a).

126 Victoria, *Parliamentary Debates* (n 12) 2900.

127 Gruber (n 23) 445. See also Dyer (n 74).

are trade-offs and compromises to be made, depending on which version is adopted. It will not do to obfuscate or gloss over those trade-offs and compromises.

'Consent' is pivotal to the definition of both the actus reus and mens rea of rape. In relation to actus reus, if consent is defined as not legally present in the absence of active communication, this gives rise to potential culpability for sexual contact that was, in fact, internally desired. This is a profound expansion of the harmfulness and wrongfulness that rape law has traditionally sanctioned, and might be critiqued as facially over-broad. On the other hand, if consent is defined as wholly internal vis-à-vis actus reus, as in Canada, do we risk juries (and police, prosecutors, sexual actors) continuing to assume, despite judicial admonishment, that a failure to protest or resist is evidence of internal assent or acquiescence?

Relatedly, where actus reus is defined as satisfied by sexual contact in the absence of words or actions indicating consent, questions remain about the precise nature of words/actions that will suffice. Should we attempt to regulate ambiguity away, going further than 'silent passivity does not suffice' and specifying other ways in which words/actions will fall short of the requirement for an active indication of consent (for example, consent provided in advance, ambiguous consent, unenthusiastic consent)? To what extent should the law be more stipulative, and therefore regulative, about how we communicate sexually?

In relation to mens rea, I have argued that if consent is defined as something that must be communicated, then it is doctrinally unsound to allow for a 'mistake of law' defence, where a belief in consent is based on silent passivity. In other words, affirmative consent law reform, if properly applied, essentially transforms a 'mistake of fact' into a 'mistake of law'. Mistakes of law are classically not accommodated in criminal law because our laws are assumed to align with social/moral norms, such that ignorance of the law is no excuse for morally suspect behaviour. A concern with affirmative consent is that it may not align with prevalent social/moral norms about assuming versus ascertaining consent.[128] If that is so, will affirmative consent create ignorant 'sacrificial lambs' as we wait for socio-sexual norms catch up with the law? If the broader criminal system is discriminatory, who are those sacrificial lambs most likely to be? The question is essentially 'whether criminal law … is an appropriate tool of … cultural transformation'.[129]

Also relating to mens rea, the most recent reforms in New South Wales and Victoria raise questions. By providing for a 'failure to ascertain' as satisfying mens rea, these reforms arguably overshoot in that they amount to a 'stop and ask' requirement in all cases, including when consent has already been actively communicated. On the other hand, the reforms may in time prove to be more successful, as compared to efforts in other jurisdictions, in shifting the focus of the legal enquiry from complainant behaviour and towards defendant conduct.

Turning again to the bigger picture of affirmative consent reform: the analysis also illustrates that affirmative consent is not necessarily a radical shift in rape law doctrine, depending on how it is constructed. But neither is it necessarily a silver

[128] Ferzan (n 97) 444–7.
[129] Gruber (n 23) 445.

bullet, either in terms of actually shifting norms of sexual behaviour towards 'more communicative terrain',[130] thereby reducing harmful sex, or in terms of addressing the structural barriers to criminal justice for victims.

B *Affirmative Consent Is Not (Necessarily) Radical*

In light of the more general shift in rape law away from assumed consent, it is possible that legislating affirmative consent represents more of a symbolic gesture, rather than a meaningful shift in doctrine. As discussed in Part III, there is already, frequently, liability in law for assuming rather than ascertaining consent, at least on paper. Even in jurisdictions that have not established an across-the-board rule that communication is required to generate legal permission to engage in sexual contact, it is very often the case that the law finds blame where there is an absence of active communication. This can be so by way of certain categories of sex being deemed presumptively or conclusively non-consensual in the absence of communication. Additionally, we might posit that fact finders will over time become less likely, in light of growing societal acceptance of 'yes means yes', to find a belief in consent reasonable if based on something less than active communication (although I admit that I might justly be accused of undue optimism on this point).

In reviewing US state jurisdictions on this point, a number of commentators have similarly made the observation that affirmative consent is not necessarily a radical shift. The shift in legal standard away from requiring a clear 'no' and towards requiring an affirmative 'yes' has been underway for decades in most US jurisdictions, regardless of whether affirmative concept is expressly invoked.[131] As such, affirmative consent 'does not represent a meaningful departure from the existing law of consent in most jurisdictions',[132] and will directly impact relatively few cases — primarily those in which one party to an encounter is entirely passive and silent, and there is a plausible narrative of belief in consent (that is, factors such as sleep, intoxication or fear are not at play).[133] It will not make a difference, doctrinally, in cases where there is an active expression of 'no' by way of words or conduct, or in cases in which there is an active expression of 'yes', but reason to doubt the freedom or capacity to consent.

C *Shifting towards Communicative Sexuality: No Silver Bullets*

Witmer-Rich, in making this point about affirmative consent, describes it as 'not as bad as you fear', meaning fears of a radical departure from 'rape as we know it' are overblown (although I have argued above that there is a danger of overshooting or overreaching, depending on how the model is implemented). His focus is doctrinal, as mine has been, and he acknowledges that doctrine and practice are distinct. In practice, regardless of doctrine, it might frequently be the case that complainants are still required to say 'no' in order for their cases to be investigated, prosecuted and

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130 Vanessa E Munro, 'Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy' (2008) 41(4) *Akron Law Review* 923, 925.

131 Witmer-Rich (n 4) 58.

132 Ibid 80.

133 Ibid 88; Tuerkheimer, 'Affirmative Consent' (n 50); Anderson, 'Negotiating Sex' (n 110).

result in conviction; but to the extent this is true, this is an issue of procedure rather than doctrine:

> In practice, it may be true that some prosecutors, judges, and juries are reluctant to find guilt in cases involving a complainant who is silent or passive rather than one who affirmatively expresses her nonconsent. This practice question is different, however, from the substance of the existing legal doctrine.[134]

On this, Witmer-Rich possibly glosses over the potential of doctrinal reform to effect systemic changes, in terms of the decisions made by those procedural actors. It is certainly possible that a clearer embrace, in doctrine, of affirmative consent could have flow-on effects in terms of decisions to report, investigate, prosecute and convict. On the other hand, while affirmative consent is a relatively recent legal development there are already studies demonstrating that doctrinal rules have been inconsistently and incorrectly applied, lessening the impact of affirmative consent reform in practice.[135]

It is unclear, and we may never have empirical evidence, as to whether and to what extent redefining consent vis-à-vis actus reus and/or mens rea improves the reporting, prosecution and conviction of unwanted sex. Cynically, then, we might say that affirmative consent in law is a cheap political win, one that glosses over the fact that it is likely to impact relatively few cases, while also glossing over the various ways that affirmative consent doctrine will be undermined in practice, in terms of reporting, investigating, prosecuting and fact finding. The problem of vindicating rape victims by way of legal processes runs deep and wide, and there is a multitude of ways that affirmative consent doctrine can be abrogated in practice. Most obviously, the inherent 'he said / she said' nature of most rape trials will remain unchanged, no matter how we tinker with the law of consent. Will affirmative consent simply reformulate the defence script that needs to be advanced in these contests of credibility — from 'she didn't resist, how was I to know?' to 'she said yes'? In other words, affirmative consent reform might assist with questions of interpretation (such as, in law, how is silent passivity to be interpreted vis-à-vis the actus reus and mens rea of rape). But it will not assist with factual disputes, in terms of whose version of events to accept. Neither will it solve the perennial issue of juror bias against 'imprudent, norm-violating women'.[136]

It is equally unclear whether legislating affirmative consent has a tangible impact outside of courtrooms. Research in this space is limited and in its early

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134 Witmer-Rich (n 4) 75.

135 See, eg, Ruparelia (n 103) (demonstrating that the *Ewanchuk* (n 60) rules have been inconsistently applied, and in some cases misapplied, at trial); Elaine Craig, 'Ten Years after *Ewanchuk* the Art of Seduction Is Alive and Well: An Examination of the Mistaken Belief in Consent Defence' (2009) 13(3) *Canadian Criminal Law Review* 247 (finding that *Ewanchuk*'s rejection of the doctrine of implied consent has not been consistently followed by lower courts); Cockburn (n 46) (finding that affirmative consent reforms in Tasmania are not being implemented as intended, due to reluctance or inability of lawyers and judges to engage with the new concept of consent).

136 David P Bryden, 'Redefining Rape' (2000) 3(2) *Buffalo Criminal Law Review* 317, 425.

stages.[137] Optimistically, we might argue that affirmative consent allows the law to be reformulated in a way that reflects the communicative socio-sexual norms to which we aspire. This does not need to be dismissed as 'mere symbolism'; symbolism might be powerful in terms of shifting society's 'moral posture'.[138] Legislative change might eventually have flow-on effects in terms of shifting socio-sexual behaviour, encouraging greater attention to communicative values, and reducing opportunity for sexual miscommunication. But even adopting this optimistic position, such change will inevitably take time and will require proactive educative measures. Perhaps in the meantime, affirmative consent really is about a political decision: what are the norms and values we choose to be symbolised in our legal construction of consent?

[137] Ibid 419 (noting the paucity of social-scientific research on the educational and deterrent effects of redefining rape). See further Riemer et al (n 20) (finding that affirmative consent policies, if properly communicated, may shape perceptions of assault in scenarios involving physical, but not verbal, coercion); Monica K Miller, 'Judgments about Sexual Assault Vary Depending on Whether an Affirmative Consent Policy or a "No Means No" Policy Is Applied' (2020) 12(3) *Journal of Aggression, Conflict and Peace Research* 163. On the impact of sexual assault education programs generally, see Lauren A Wright, Nelson O O Zounlome and Susan C Whiston, 'The Effectiveness of Male-Targeted Sexual Assault Prevention Programs: A Meta-Analysis' (2020) 21(5) *Trauma, Violence, & Abuse* 859, 866 (concluding that 'there is little evidence that sexual assault prevention programs reduce the incidence of sexual assault').

[138] Susan Caringella, *Addressing Rape Reform in Law and Practice* (Columbia University Press, 2009) 203.