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### Reexamining the Consent Definition Under Article 213: Sexual Assault and Related Offenses of the Model Penal Code and Its Troubling Influence on Affirmative Consent Definition States

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# Reexamining the Consent Definition Under Article 213: Sexual Assault and Related Offenses of the Model Penal Code and Its Troubling Influence on Affirmative Consent Definition States

## Cover Page Footnote

\* J.D. 2023, Villanova University Charles Widger School of Law.

## REEXAMINING THE CONSENT DEFINITION IN ARTICLE 213: SEXUAL ASSAULT AND RELATED OFFENSES OF THE MODEL PENAL CODE AND ITS TROUBLING INFLUENCE ON AFFIRMATIVE CONSENT DEFINITION STATES

*Samantha Newman\**

*In the past decade, and in response to criticism surrounding Article 213 Sexual Assault and Related Offenses of the 1962 Model Penal Code (MPC), the American Law Institute (ALI) sought to re-examine these specific provisions. In doing so, the ALI attempted to incorporate a more modern standard of sexual behavior and consent, without making the model code too punitive. Recently in 2022, the ALI approved revisions to Article 213 MPC, referred to in this Article as the “Revised Code,” including the rejection of an affirmative consent definition. This Article argues that despite the noble intentions of revising an outdated code, these new revisions—that dive into the heart of the debate surrounding consent and sexual offenses—ultimately are a backward step that will add to the burdens imposed on sexual assault and rape victims. By scrutinizing each step in the reexamining of Article 213, specifically Section 213.0, the currently approved definition of consent, this Article shows how the Revised Code could negatively impact states’ affirmative consent definition statutes as well as the nation as a whole. This Article concludes by recommending that both the 1962 Article 213 and the current 2022 Revised Code be disregarded. Instead, a new project to reexamine the 1962 Article 213, specifically 213.0, should be undertaken, one that specifically includes an affirmative consent definition.*

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## I. INTRODUCTION

In 2013, S.S. was asleep at her home in Idaho.<sup>1</sup> As she was sleeping, Elias, one of her acquaintances, entered her home.<sup>2</sup> S.S. awoke to a feeling of a “razor cut kind of burning feeling” in her vagina just to find Elias penetrating her vagina with his fingers.<sup>3</sup> After Elias left, S.S. called the police to report the incident.<sup>4</sup> Elias was subsequently arrested and charged with burglary and forced penetration; the case eventually went up to the Idaho Supreme Court.<sup>5</sup> On appeal, the court applied the state’s rape statute force requirement,<sup>6</sup> which stated that a rape conviction must be based on both an act against the will of the victim and the use of force, not including the force of penetration itself.<sup>7</sup> The court held that the circumstances in the case did not constitute force under the statute and thus Elias’s conviction was vacated.<sup>8</sup> Given this verdict, it is apparent that the court evaluated the victim’s experience as, “neither a violation of her self, nor a cognizable wrong of sexual assault.”<sup>9</sup>

Considering this case, and countless other cases across the nation that have applied a force requirement and subsequently acquitted the defendant (despite a clear lack of consent from the victim), legal scholars and feminist reformers began to reevaluate and scrutinize the statutory language surrounding consent, sexual assault, and related offenses.<sup>10</sup> In this reevaluation, scholars found that the Model Penal Code (MPC) Article 213, drafted in the 1950s and published in 1962,

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<sup>1</sup> State v. Elias, 337 P.3d 670, 672 (Idaho 2014).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 673 (citing IDAHO CODE ANN. § 18-6608).

<sup>7</sup> See *id.* at 676 (applying the extrinsic force standard and stating any other reading of the statute would make force requirement “mere surplusage”).

<sup>8</sup> *Id.*

<sup>9</sup> Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 19 (2015) (showing that nonconsensual penetration undoubtedly occurred, just not by force).

<sup>10</sup> For a discussion of reevaluating consent and rape law, see *infra* notes 38–41 and accompanying text.

desperately needed updated revisions.<sup>11</sup> The 1962 MPC “centered on the idea that rape is a crime of violence,” whereas modern society views sexual assault as “a crime against the victim’s sexual autonomy.”<sup>12</sup> Consequently, and after years of debate and discussion, the ALI approved a new version of Article 213 in 2022.<sup>13</sup>

This Article argues, however, that despite the good intentions of the ALI, the revision process ultimately produced a “Revised Code” that will make it harder for victims of rape and sexual assault to obtain justice.<sup>14</sup> Although it is clear that the 1962 Article 213 of the MPC is problematic and outdated, the one silver lining of the 1962 Article 213 MPC is that it is so understandably antiquated that many states and legal scholars have often disregard these older provisions.<sup>15</sup>

Specifically pertinent to this Article is *Section 213.0. General Principles of Liability; Definitions* of Article 213, which is

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<sup>11</sup> See Stephen Schulhofer, *Reporter’s Memorandum for Model Penal Code: Sexual Assault and Related Offenses Tentative Draft No. 6*, The ALI Advisor (May 4, 2022), <https://www.thealiadviser.org/sexual-assault/reporters-memorandum-for-model-penal-code-sexual-assault-and-related-offenses-tentative-draft-no-6/>. The revisions to Article 213 also include revisions to other substantive areas of law such as sex trafficking, grading classifications, and sexual offender registries, yet the scope of this Article only focuses on the definition of consent in Section 213.0. See *id.*

<sup>12</sup> *American Law Institute Members Approve Model Penal Code on Sexual Assault, Drafted by Stephen Schulhofer and Erin Murphy*, NYU L. News (Aug. 24, 2021), <https://www.law.nyu.edu/news/stephen-schulhofer-erin-murphy-model-penal-code-sexual-assault-ali-approval>.

<sup>13</sup> Since writing and publishing this Article, the ALI has approved Tentative Draft No. 6. According to the ALI, “The Reporter has revised the black letter of Tentative Draft No. 6 as a result of discussion and motions at the 2022 Annual Meeting, and the Council has approved the revisions.” See *Status Details*, American Law Institute, <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/>, (last visited July 3, 2023). See also *id.*

<sup>14</sup> Letter from Bipartisan Coal. of Att’ys Gen. to the Am. L. Inst. (Dec. 9, 2021).

<sup>15</sup> See Joint Memorandum from Lynn Hecht Schafran, Michelle M. Dempsey, Ronald Eisenberg, Terry L. Fromson, Fatima Goss Graves, Jennifer Long, Nancy E. O’Malley, & Jay W. Waks to Am. L. Inst. (Jan. 17, 2022). The Joint Memorandum explains that “[a]s the ALI neither followed through on its stated objectives for this project or followed the lead of forward-thinking state reforms, this “revised” MPC is an anachronism that, if published, will only serve to move the law backwards in a way that the original 1962 Section 213.0 could no longer do.” See also *id.*

included in the most recently 2022 revised and approved Tentative Draft No. 6, referred to in this Article as the “Revised Code;” this Article argues Section 213.0 will be a backward step in sexual assault and rape law that may also problematically influence states to change their criminal statutes.<sup>16</sup> States with an affirmative consent definition, arguably the most victim-protecting consent standard, requires that by overt words or actions, the consenter express their willingness to allow the conduct.<sup>17</sup> This Article will closely examine Section 213.0 and stress the risk that states, specifically affirmative consent states, will adopt the Revised Code’s definition of consent and subsequently change their statutes. Given these concerns, this Article suggests a fundamental rethinking of the approved Revised Code, that is, to acknowledge the flaws that led to the adoption of the currently approved consent definition and its potential harmful consequences. As such, this Article concludes by offering that the Revised Code should include an affirmative definition of consent. Thereby recognizing the urgency to protect sexual assault and rape victims and balancing the concerns of modern criminal law.

With this new proposal, this Article contributes to some of the timeliest and controversial issues in the law of sexual assault and related offenses. Significantly, this Article hopes that policy makers and states will not simply adopt the Revised Code because has been recently approved in 2022.<sup>18</sup>

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<sup>16</sup> For a discussion of issues with the Revised Code, see *infra* notes 136–54 and accompanying text. Tentative Draft No. 6 was most recently revised as a result of the discussions and motions at the 2022 Annual Meeting, and the Council approved the revisions. An official text is expected to be published in 2024. See *Status Details*, ALI, <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/> (last visited July 3, 2023). See also MODEL PENAL CODE: SEXUAL ASSAULT & RELATED OFFENSES app. § 213.0(e)(i-iv) (AM. L. INST., Tentative Draft No. 6, 2022).

<sup>17</sup> See STEPHEN SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (Harvard University Press, ed. 1998) [hereinafter UNWANTED SEX].

<sup>18</sup> See Ira Ellman, *Following Delays, American Law Institute Gives Final Approval to Model Penal Code Revisions Regarding Sex Offense Registries*, MITCHELL HAMLINE SCHOOL OF LAW: SEX OFFENSE LITIGATION AND POLICY RESOURCE CENTER (June 3, 2022), <https://mitchellhamline.edu/sex-offense-litigation-policy/2022/06/03/following-delays-american-law-institute-gives-final-approval-to-model-penal-code-revisions-regarding-sex->



Thus, this Article concludes that a third option should be pursued, one that rejects the outdated 1962 MPC Article 213, embraces the progressive outlook that motivated the Revised Code project, however, specifically bolsters an affirmative consent definition to best protect victims of rape and sexual assault.

This Article proceeds with Part II examining the history and purpose of the American Law Institute (ALI) and exploring the history of the MPC.<sup>19</sup> Next, Part III will engage with the relevant academic literature and evaluate the debate surrounding differing consent definitions, highlighting affirmative consent legal discourse.<sup>20</sup> Part IV will detail the drafting process of the Revised Code, specifically highlighting when the consent definition departed from the initially proposed affirmative consent language.<sup>21</sup>

Part V will outline the key issues with the Revised Code, specifically highlighting the burdens imposed on rape and sexual assault victims.<sup>22</sup> Part VI will take a closer look at state affirmative consent statutes and discuss cases in those jurisdictions that illustrate victim-protecting outcomes and measures for rape and sexual assault victims.<sup>23</sup> Next, Part VII will discuss and rebut various counterarguments to affirmative consent.<sup>24</sup> Lastly, Part VIII will conclude by recommending that the 1962 MPC Article 213 should be disregarded as its force

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offense-registries/ (emphasizing most recent approval of Tentative Draft No. 6). It is important to note that it was surprising that the ALI went on to consider Tentative Draft No. 6 as “The membership had given what at the time was assumed to be final approval to an earlier version of these provisions at its meeting in May of 2021, pending the normally pro forma approval by the ALI Council, at its meeting in January 2022. But in a highly unusual departure from ALI process, the Council sent the draft back to the membership asking it to approve changes to May 2021 draft (“T.D. 5” in ALI parlance—Tentative Draft 5). *Id.*

<sup>19</sup> For a discussion of the history of the ALI, see Part II and accompanying text.

<sup>20</sup> For a discussion of the debate of different definitions of consent, see Part III and accompanying text.

<sup>21</sup> For a discussion of the Revised Code drafting process, see Part IV and accompanying text.

<sup>22</sup> For a discussion of the key issues of the Revised Code, see Part V and accompanying text.

<sup>23</sup> For a discussion of affirmative consent states, see Part VI and accompanying text.

<sup>24</sup> For a discussion of counterarguments, see Part VII and accompanying text.

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requirement is antiquated and archaic, and the Revised Code project should be withdrawn, because as adopted, will only serve to move rape and sexual assault law backwards.<sup>25</sup>

## II. THE HISTORY AND COMMITMENT OF THE AMERICAN LAW INSTITUTE AND THE PURPOSE OF THE MODEL PENAL CODE

In the early 1920's, prominent American judges, lawyers, and law professors formed The Committee on the Establishment of a Permanent Organization for the Improvement of the Law.<sup>26</sup> Through the creation of this Committee, these scholars noted that the current American "law is unnecessarily uncertain and complex," and as a result, there is a "general dissatisfaction with the administration of justice."<sup>27</sup> Thus, in an attempt to address these issues, the Committee proposed the formation of The American Law Institute (ALI) in order "to promote the clarification and simplification of the law and its better adaptation to social needs."<sup>28</sup> The American Law Institute was then founded in 1923.<sup>29</sup>

Today, the ALI's main initiatives include drafting, discussing, revising, and publishing Restatements of the Law, Model Codes, and Principles of Law.<sup>30</sup> These projects are incredibly significant for the courts, legislatures, legal scholarship, and legal education.<sup>31</sup> Specifically, the ALI undertakes projects that examine and revise model statutory code, including the Model Penal Code (MPC).<sup>32</sup>

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<sup>25</sup> For a discussion of conclusions and recommendations, see Part VIII and accompanying text.

<sup>26</sup> See *The Story of ALI*, AMERICAN LAW INSTITUTE, <https://www.ali.org/about-ali/story-line/> (introducing historical underpinnings of ALI) (last visited Feb. 5, 2023).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See *About ALI*, AMERICAN LAW INSTITUTE, <https://www.ali.org/about-ali/> (last visited Feb. 5, 2023).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (introducing ALI's relationship to MPC).

Presently, the MPC is the “most successful attempt to codify American criminal law.”<sup>33</sup> With the American criminal codes in a poor and disorganized state, the ALI launched the MPC project in 1951 to promote guidance and uniformity.<sup>34</sup> Effective in 1962, the MPC influenced a wide range of state code reforms in the 1960s and 1970s as well as thousands of court opinions that have “cited the Model Penal Code as persuasive authority for the interpretation of an existing statute or in the exercise of a court's occasional power to formulate a criminal law doctrine.”<sup>35</sup> The MPC is not simply a criminal code, but rather includes provisions that outline fundamental aspects of criminal law.<sup>36</sup>

### III. THE DEBATE OVER CONSENT: EXPLORING DIFFERING ARGUMENTS SURROUNDING CONSENT, CULPABILITY, SEXUAL ASSAULT, AND RAPE

Notably, a newfound understanding of the realities of rape and sexual assault emerged in the twenty-first century.<sup>37</sup> One of the most striking features has been the increased awareness concerning the prevalence of non-stranger or acquaintance rape, instead of rape from a forceful “weapon-wielding stranger.”<sup>38</sup> As a result, there has been a profound shift to remove “force” as a necessary element of rape as well as recognize sex without consent as a serious crime.<sup>39</sup> Given this modernized recognition, legal scholars have focused their attention on the role and

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<sup>33</sup> See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 320 (2007) (“[T]he Model Penal Code is the closest thing to being an American criminal code.”).

<sup>34</sup> See *id.* at 323 (calling the current state of the law “too chaotic and irrational to merit ‘restatement’”).

<sup>35</sup> See *id.* at 326–27 (highlighting MPC influence on states).

<sup>36</sup> *Id.* at 324.

<sup>37</sup> See Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 397–98 (2016) (emphasizing reconsiderations of rape and sexual assault law).

<sup>38</sup> Tuerkheimer, *supra* note 10, at 2 (emphasizing that “the most pervasive danger” in rape and sexual assault is both different and “more widespread than ever perceived”).

<sup>39</sup> See, e.g., *id.* at 1–5 (arguing for this key shift in rape and sexual assault law on college campuses).

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definition of consent, which has become a central issue around sexual assault and rape discourse.<sup>40</sup> These contentious debates have served as the backdrop to the revisions put forth in the Revised Code, thus, it is essential to evaluate these different arguments.

A. STEPHEN J. SCHULHOFER: FIRST DISCUSSING  
AFFIRMATIVE CONSENT AS A REVOLUTIONARY IDEA

In his 1998 book, Schulhofer asserts that United States laws against rape and sexual harassment fail to protect women from sexual overreaching and abuse.<sup>41</sup> Schulhofer discusses date rapes, stranger assaults, and various power dynamics to exemplify that past reforms of rape and sexual assault law were inadequate.<sup>42</sup> Through various case law examples, Schulhofer illustrates how the force requirement in rape and sexual assault state statutes is outdated and flawed.<sup>43</sup> Provided the observable lack of comprehensive protection for sexual assault and rape victims, Schulhofer argues for a, at the time, radically different approach to define consent.<sup>44</sup> This vision helped to lay the groundwork for an affirmative definition of consent.<sup>45</sup>

In his proposition for an affirmative consent definition, Schulhofer asserts in his book that:

Sexual intimacy involves a profound intrusion on the physical and emotional integrity of the individual. For such intrusions, as for property transfers or for surgery, consent cannot simply be the absence of clearly

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<sup>40</sup> See *id.* at 4 (introducing the key and contentious issue of defining consent).

<sup>41</sup> See UNWANTED SEX, *supra* note 18, at 2 (“Penal law standards remain extraordinarily murky, especially for determining when a man’s behavior amounts to prohibited force and when a woman’s conduct signals her consent.”).

<sup>42</sup> *Id.* at 75 (detailing cases where women were sexually assaulted or raped but courts failed to convict because no explicit force was used).

<sup>43</sup> *Id.* at 17–29.

<sup>44</sup> *Id.* at 271.

<sup>45</sup> *Id.*

crystallized, clearly expressed opposition. For such intrusions actual permission –nothing less than positive willingness, clearly communicated –should ever count as consent.<sup>46</sup>

The requirement of actual permission arguably would not presuppose the defendant was culpable.<sup>47</sup> Here, a defendant would only be convicted if they did not have affirmative permission to engage in the sexual conduct or acted criminally negligent in thinking that there was consent in the first place.<sup>48</sup> Through overt words or conduct, an actor who wants to engage in a sexual activity must obtain a clear indication of the other actor’s consent.<sup>49</sup> The significance of Schulhofer’s definition also highlights that “silence, ambiguous behavior, and the absence of clearly expressed unwillingness are evidence that affirmative consent was absent.”<sup>50</sup>

Affirmative consent, namely actions or body language used to express consent, still could lead to uncertainties during a sexual encounter.<sup>51</sup> Schulhofer argues, however, that only unambiguous body language should suffice to signal affirmative consent.<sup>52</sup> Further, if an actor consents to one sexual activity, it does not and should not imply permission to engage in another.<sup>53</sup> Thus, affirmative consent, specifically verbal-permission (a “verbal-yes rule”), would reduce the risk of misunderstanding.<sup>54</sup> Schulhofer also acknowledges that this would impose a degree of “formality” or “artificiality” in sexual activity, which is often a space that

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<sup>46</sup> *Id.*

<sup>47</sup> *See id.* (reassuring that this affirmative consent definition would not presuppose defendant’s guilt by requiring “doubts to be resolved against him.”).

<sup>48</sup> *See id.* (showing how defendant could be convicted under affirmative consent).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (“But silence, ambiguous behavior, and the absence of clearly expressed unwillingness are evidence that affirmative consent was absent; they should no longer suggest, as they do in present law, that a defendant did nothing wrong in forging ahead to intercourse.”).

<sup>51</sup> *See generally id.* at 272.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

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originates from spontaneity.<sup>55</sup> Despite this counterargument, Schulhofer believes verbal-permission outweighs its drawbacks.<sup>56</sup>

Schulhofer, however, recognizes important limitations of affirmative consent, mainly that most courts and state statutes are unlikely to entertain such a high standard.<sup>57</sup> Courts have repeatedly expressed a willingness “to infer consent from passivity and silence.”<sup>58</sup> Yet, as Schulhofer has articulated above, the legal standard must move away from evidence of unambiguous protests and move towards an affirmative indication that a person’s choice is freely expressed by words or conduct.<sup>59</sup> By requiring this affirmative permission, criminal law can necessitate that any actor who engages in a sexual activity shows full respect for the other actor’s autonomy.<sup>60</sup>

#### B. DEBORAH TUERKHEIMER: EXPLORING THE SIGNIFICANCE OF AFFIRMATIVE CONSENT

Deborah Tuerkheimer, a professor at Northwestern School of Law, published her article, *Rape On and Off Campus* in 2015.<sup>61</sup> For context, Discussion Draft No. 2 of the Revised Code was also submitted in 2015.<sup>62</sup> Discussion Draft No. 2 will be explored in greater detail in Part IV, however, these dates highlight the overlap between modern consent definition discussions and the Revised Code revisions.<sup>63</sup>

In *Rape On and Off Campus*, Tuerkheimer introduces a “profound” disconnect between social norms around sex and the

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<sup>55</sup> *Id.*

<sup>56</sup> *See Id.* (explaining the necessity for shift regarding the legal standard that focuses on women’s conduct to affirmative indications).

<sup>57</sup> *See id.* (noting issues with practically implementing affirmative consent).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 273.

<sup>60</sup> *See id.* (expressing importance and necessary aspect of affirmative consent).

<sup>61</sup> Tuerkheimer, *supra* note 10.

<sup>62</sup> For a discussion of Discussion Draft No. 2, see *infra* notes 118–23 and accompanying text.

<sup>63</sup> For a discussion of Discussion Draft No. 2, see *infra* notes 118–23 and accompanying text.

legal definition of rape.<sup>64</sup> Tuerkheimer also expresses a clear divide between the newfound “commonplace” of affirmative consent in college campuses and current sexual assault and rape laws in the United States.<sup>65</sup> In 2015, a survey of state rape laws illustrate that many states define rape as requiring force, while others define rape as sex without consent, but nonetheless include force as a component of non-consent.<sup>66</sup> Similar to Schulhofer, Tuerkheimer argues that a force requirement imposes a substantial obstacle for victims, namely that it is incredibly difficult to obtain a conviction for rape.<sup>67</sup> Tuerkheimer also notes in her article that the 1962 Article 213 and a majority of states still retained a force requirement at the time.<sup>68</sup>

A central argument in *Rape On and Off Campus*, focuses on the law’s preoccupation with a force requirement and highlights situations where force and non-consent deviate.<sup>69</sup> Specifically, Tuerkheimer introduces “no-force” and “no-consent” cases where the victim was sleeping, intoxicated, or in a relationally controlled situation (fear or trust) absent of consent, yet because there was no-force, the defendant was not convicted.<sup>70</sup> In these cases, rape and sexual assault law deemed this no-consent irrelevant because the prosecution could not prove the use of force.<sup>71</sup> Given this reality, Tuerkheimer notes that criminal law and modern perceptions of sex are off-balance.<sup>72</sup> Tuerkheimer concludes that sexual agency provides the “theoretical underpinnings” to help balance criminal

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<sup>64</sup> See Tuerkheimer, *supra* note 10, at 2 (finding non-stranger rape to be the “most ubiquitous and...most hidden” form of rape).

<sup>65</sup> See *id.* at 4-9 (reporting that 800 colleges have adopted standards of affirmative consent (citations omitted)).

<sup>66</sup> See *id.* at 15.

<sup>67</sup> *Id.* at 1 (stressing that force requirements effectively place rape convictions out of reach of law).

<sup>68</sup> *Id.* at 15 (showing dominance of force requirement in criminal law); see also David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 321–22 (2000) (noting that, despite steps towards reform, force elements remain present in most states).

<sup>69</sup> See Tuerkheimer, *supra* note 10, at 16 (exploring three categories of cases, involving sleep, intoxication, and relational control).

<sup>70</sup> *Id.* at 4.

<sup>71</sup> See *id.* at 17–38 (discussing main issues with force requirements).

<sup>72</sup> For a discussion of the tensions between criminal law and modern perceptions of sexual assault, see *supra* notes 38–41 and accompanying text.

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law and modern perceptions of sex.<sup>73</sup> Indeed, Tuerkheimer posits that agency “makes consent the pivot point for distinguishing rape from sex” and affirmative consent definitions have the “greatest potential to promote agency.”<sup>74</sup> According to Tuerkheimer, “rape law should protect sexual agency.”<sup>75</sup> In theorizing sexual agency, Tuerkheimer writes:

Sexual agency entails recognition that the self is socially constructed in a ‘context of intersecting power inequalities,’ a context featuring gender as a primary locus of subordination. Unlike the traditional autonomous self, who can operate largely free of external influences, the agentic subject experiences substantial constraints. Yet, within these constraints, the agentic subject is capable of exerting a will. This phenomenon is essential to self-definition and to self-direction.<sup>76</sup>

With this theory of sexual agency, Tuerkheimer posits that agentic beings are not only capable of consent, but to consent to sex is to “assert agency.”<sup>77</sup> This agency is especially important for individuals whose sexuality has been, “variously denigrated, co-opted, denied, stigmatized, mythologized, and punished.”<sup>78</sup> Furthermore, to not consent is also to assert agency, thus distinguishing sex and rape by the presence or absence of consent affirms the actor’s agency.<sup>79</sup>

Tuerkheimer argues that affirmative consent language, one that describes consent as “words or overt actions... indicating freely given agreement” constructs sexuality in a manner that

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<sup>73</sup> For a discussion on sexual agency, see *infra* notes 74–83 and accompanying text.

<sup>74</sup> Tuerkheimer, *supra* note 10, at 41–43 (introducing important theory of agent and sexual agency).

<sup>75</sup> *Id.* at 40 (discussing importance of sexual agency in bridging gap between criminal law and modern perceptions of sex).

<sup>76</sup> *Id.* at 40–41 (discussing Tuerkheimer’s arguments about sexual agency).

<sup>77</sup> *Id.* at 41–42.

<sup>78</sup> *Id.* at 42 (furthering arguments for importance of sexual agency).

<sup>79</sup> *Id.* (examining role and relation of non-consent in sexual agency discussion).



highlights its “agentic qualities.”<sup>80</sup> This affirmative statutory language, thus, has the greatest potential to promote agency, which Tuerkheimer deems the most important aspect in redefining rape law.<sup>81</sup> Tuerkheimer concludes that affirmative consent would help to resolve many of the tensions and injustices currently found in United States rape and sexual assault law.<sup>82</sup>

C. KIMBERLY KESSLER FERZAN: NOTING THE  
OVERBEARING ASPECTS OF THE AFFIRMATIVE CONSENT

*Consent, Culpability, and the Law of Rape* is Kimberly Kessler Ferzan’s influential text published in 2016, the same year that the ALI discussed Tentative Draft No. 2.<sup>83</sup> Ferzan argues that the relationship between consent and a defendant’s culpability is important to examine, especially when overt words or actions do not align with an individual’s “internal choice.”<sup>84</sup> She explores this relationship, arguing that the best conception of consent is “willed acquiescence.”<sup>85</sup> Willed acquiescence, according to Ferzan, is an “internal choice to allow contact—a decision that ‘this is okay with me’—is all that is morally required for one person to contact another.”<sup>86</sup>

The consideration of consent as “willed acquiescence” is especially important in the greater analysis of sexual assault and rape law. Ferzan defines consent as a “normative power.”<sup>87</sup> Normative power is best described by unpacking nuances in normative relationships.<sup>88</sup> Ferzan describes:

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<sup>80</sup> See *id.* at 42–43 (quoting WIS. STAT. § 940.225(4) (2014)) (bringing affirmative consent back into focus).

<sup>81</sup> See *id.* at 43 (reasoning why affirmative consent definition is best suited to protect victims and promote sexual agency).

<sup>82</sup> *Id.* at 45.

<sup>83</sup> Ferzan, *supra* note 38, at 397.

<sup>84</sup> See *id.* at 398.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See *id.* at 403.

<sup>88</sup> *Id.* at 403.

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You might have a claim right that I not harm you, to which I then have a correlative duty not to interfere with or touch your body. If one can alter these relations, one is said to have power. And if one is subject to such alternations, one has a liability. What is at stake with respect to consent is how one exercises a power.<sup>89</sup>

Ferzan concludes that normative power does not require communication, thus consent is not something that needs to be expressed to be understood.<sup>90</sup> Additionally, Ferzan posits that consent as a mental act still allows for the prosecution of culpable actors.<sup>91</sup>

Given this preference to willed acquiescence, Ferzan disagrees with an affirmative consent standard.<sup>92</sup> Ferzan notes that affirmative consent could lead to strict liability by condemning someone who is not morally culpable, but nonetheless has violated the law.<sup>93</sup> If an affirmative consent definition is adopted, however, Ferzan argues that an affirmative defense, at minimum, must be established.<sup>94</sup> Ferzan notes that allowing an affirmative defense for the defendant's honest or honest and reasonable belief could arguably lessen the impact of this "over-inclusive law."<sup>95</sup> She, furthermore, questions the practicality of placing affirmative expression requirements in criminal law.<sup>96</sup> Ferzan specifically asserts that affirmative consent fails to distinguish between actors who are acting "knowingly" and "negligently" in a sexual assault case.<sup>97</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> See *id.* at 404 (explaining reasoning for willed acquiescence consent definition).

<sup>91</sup> *Id.* at 410 (reasoning that willed acquiescence does not impact prosecuting culpable actors).

<sup>92</sup> *Id.* at 399.

<sup>93</sup> *Id.*

<sup>94</sup> Ferzan, *supra* note 38, at 435 (conceding with use of affirmative defense if affirmative consent definitions are used).

<sup>95</sup> *Id.* at 435–436 (reasoning behind inclusion of affirmative defense).

<sup>96</sup> *Id.* at 399

<sup>97</sup> *Id.* (acknowledging culpability limitation with affirmative consent).

According to Ferzan, affirmative consent also seemingly blurs the line between consent and requests.<sup>98</sup> Under an affirmative consent law, “consent is just a permission,” whereas requests are the “communication of an affirmative desire for the act.”<sup>99</sup> Ferzan argues that “consent formulations do not operate in a vacuum” and only those with a guilty mind should be subject to criminal discipline.<sup>100</sup> As a whole, Ferzan is wary about punishing individuals who do not commit morally blameworthy acts.<sup>101</sup> According to Ferzan, an affirmative consent standard would “punish actors without due regard for their culpability.”<sup>102</sup> Lastly, Ferzan asserts that unlike college campuses, which can provide notice to its community after adopting affirmative consent policies, to change to an affirmative consent definition in the United States would change the entire practice of criminal law.<sup>103</sup>

#### IV. THE HISTORY OF THE REVISED MPC ARTICLE 213: SEXUAL ASSAULT AND RELATED OFFENSES

As explained above, the MPC has been a dominant force in both United States criminal code reform and criminal scholarship.<sup>104</sup> MPC reform, however, has recently been in the spotlight as legal scholars have thoroughly debated consent definitions, along with shifting attitudes toward criminalization and punishment.<sup>105</sup> The project to revise Article 213 was adopted based on a prospectus submitted by Professor Stephen Schulhofer on May 14, 2012.<sup>106</sup> Schulhofer recognized that “Over the past two decades, American society has come to understand that this view [proof that the

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 406.

<sup>100</sup> *Id.* at 439.

<sup>101</sup> *Id.* at 423.

<sup>102</sup> *Id.* at 439.

<sup>103</sup> *Id.* at 423 (differentiating notice provided on college campuses and notice reasonably provided for criminal law).

<sup>104</sup> See Robinson & Dubber, *supra* note 34, at 340.

<sup>105</sup> *Id.* at 341 (highlighting shifting attitudes of criminalization).

<sup>106</sup> NYU L. NEWS, *supra* note 13.

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perpetrator used physical force] is much too narrow, and that sexual assault is inherently a crime against the victim's sexual autonomy."<sup>107</sup> In the 1962 version of MPC Article 213, without objective evidence of the defendant's use of force, the defendant was likely acquitted.<sup>108</sup> The goal of the Revised Code project was to incorporate a more modern standard of sexual behavior and consent that protects victims, without making the model code too punitive and contributing to the pandemic of over criminalization.<sup>109</sup>

#### A. THE FIRST OF MANY DRAFTS: DISCUSSION DRAFT (2013) AND TENTATIVE DRAFT NO. 1 (2014)

As feminist movements progressed in the 1970s, the legal and socio-cultural responses to rape and sexual assault unfolded as well.<sup>110</sup> Given the force requirement found in the 1962 MPC Article 213 and in many state sexual assault and rape statutes, absent force, defendants were often acquitted even if the victim argued lack of consent.<sup>111</sup> Understandably, this made it very hard to convict defendants in rape and sexual assault cases if the prosecutor could not satisfy this force requirement.<sup>112</sup> The Discussion Draft in 2013 addressed issues related to sexual-

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<sup>107</sup> *Id.*

<sup>108</sup> See MODEL PENAL CODE § 213.1 (1962) (Providing that “[a] male who has sexual intercourse with a female not his wife is guilty of rape if *he compels her to submit by force . . .*”) (emphasis added).

<sup>109</sup> See NYU L. NEWS, *supra* note 13. (discussing goals of updating Model Penal Code).

<sup>110</sup> See MODEL PENAL CODE, Sexual Assault & Related Offenses, cmt. II at A (AM. L. INST., Discussion Draft 2013) (examining historical underpinnings of revising sexual assault and rape law).

<sup>111</sup> See UNWANTED SEX, *supra* note 18, at 31 (finding major issues with force requirement and previous rape and sexual assault cases).

<sup>112</sup> Tuerkheimer, *supra* note 10, at 16 (showing near impossibility of rape and sexual assault convictions).

assault legal frameworks, acknowledging that many sexual assault laws were outdated.<sup>113</sup>

Specifically, the next year, Tentative Draft No. 1 in 2014 focused on expanding the criminal liability of sexual conduct.<sup>114</sup> Tentative Draft No. 1's consent definition was as follows, "Consent' means a person's positive agreement, communicated by either words or actions, to engage in sexual intercourse or sexual contact."<sup>115</sup> This was an affirmative consent definition draft, and consequently, Tentative Draft No. 1 received heightened criticism that an actor could face criminalization if there was not "positive agreement communicated by either words or action."<sup>116</sup>

#### B. A CHANGE IN PERCEPTION OF SEXUAL ASSAULT AND RAPE: DISCUSSION DRAFT NO. 2 (2015)

Discussion Draft No. 2 was submitted at the 2015 Annual Meeting.<sup>117</sup> These revisions sought to find the proper scope and criminalization of sexual assault and related offenses, while also avoiding the perpetuation of overcriminalization.<sup>118</sup> Given the previous problematic and antiquated force requirement in sexual assault and rape convictions, legal scholars noted that the perception of rape changed from an offense that concerned an

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<sup>113</sup> See MODEL PENAL CODE, Sexual Assault & Related Offenses, cmt. II at A (AM. L. INST., Discussion Draft, 2013) (assessing changes in knowledge of sexual assault and related offenses).

<sup>114</sup> See *ALI Model Penal Code for Sexual Assault*, CTR. FOR PROSECUTOR INTEGRITY, <http://www.prosecutorintegrity.org/sa/ali/> (last visited Jan 21, 2023) (summarizing developments in the Model Penal Code project, including a proposal to "enormously expand the criminal liability of sexual conduct").

<sup>115</sup> MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0(3) (AM. L. INST., Tentative Draft No. 1, 2014).

<sup>116</sup> See *ALI Model Penal Code for Sexual Assault*, *supra* note 115 ("[T]he Draft...proposed to enormously expand the criminal liability of sexual conduct at a time when the American Bar Association, lawmakers, and the American public have come to the realization that our country faces a serious problem with over-criminalization.").

<sup>117</sup> *Id.*

<sup>118</sup> MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES, cmt. II, intro. note (AM. L. INST., Discussion Draft No. 2, 2015) (weighing the criminalization of sexual assault and related offenses against issue of overcriminalization in United States).

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infliction of physical harm to one that penalized an interference with sexual autonomy.<sup>119</sup> In Discussion Draft No. 2, “Consent” means a person’s positive agreement, communicated by either words or actions, to engage in a specific act of sexual penetration or sexual contact.”<sup>120</sup> In response, however, an eight-page Memorandum from Undersigned ALI Members called for a fundamental rethinking of the revisions and argued that the revisions would worsen the issue of overcriminalization.<sup>121</sup> In turn, over 80 ALI members signed the Memorandum.<sup>122</sup>

### C. THE DEFINITION OF CONSENT SHIFTS: TENTATIVE DRAFT NO. 2 (2016)

In response to the growing criticism and contentious debate surrounding the affirmative consent definition, a different definition of consent was proposed in Tentative Draft No. 2.<sup>123</sup> The amended version was presented to the ALI Council in 2016.<sup>124</sup> The Tentative Draft No. 2 defined “consent” as “a person’s behavior, including words and conduct—both action and inaction—that communicates the person’s willingness to engage in a specific act of sexual penetration or sexual contact.”<sup>125</sup> Many

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<sup>119</sup> See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES, cmt. II, Social and Legal Dev. (AM. L. INST., Discussion Draft No. 2, 2015) (describing changed perceptions of criminalizing rape and sexual assault).

<sup>120</sup> *Id.* at § 213.0(3).

<sup>121</sup> Letter from Undersigned ALI Members and Advisers to ALI Director, Deputy Director, Project Reporters, Council and Members (May 12, 2015) (introducing opponents to drafted MPC consent definition).

<sup>122</sup> *Id.*

<sup>123</sup> Jennifer Morinigo, *The Evolution of the Model Penal Code “Consent” Definition*, THE ALI ADVISER (Sep. 6, 2016), <https://www.thealiadviser.org/sexual-assault/evolution-of-model-penal-code-consent-definition/>.

<sup>124</sup> *Id.*

<sup>125</sup> MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0(3)(a) (AM. L. INST., Tentative Draft No. 2 2016). The definition goes on to say, “Consent may be express, or it may be inferred from a person’s behavior. Neither verbal nor physical resistance is required to establish the absence of consent; the person’s behavior must be assessed in the context of all the circumstances to determine whether the person has consented.” *Id.*

members expressed concerns that affirmative consent would result in too many unjust convictions and would criminalize defendants for failing to meet such a high standard of consent.<sup>126</sup> Tentative Draft No. 2's consent definition examines, "the parties' observable behavior in the context of all the circumstances leading up to and during the sexual act as the best way to determine whether a party consented to that act and whether the defendant exceeded lawful limits with a culpable mens rea."<sup>127</sup> This Draft, therefore, signified a step away from an affirmative consent standard.<sup>128</sup>

#### D. ADDITIONS AND DEFINITIONS: TENTATIVE DRAFT NO. 3 (2017)

Tentative Draft No. 3, in 2017, included new definitions of "Sexual Penetration" and of "Oral Sex."<sup>129</sup> It also included the substantive offenses of "Sexual Penetration or Oral Sex Without Consent" and of "Forcible Rape."<sup>130</sup> This draft included these definitions to keep up with the trend recognizing that the core of the sexual criminal offenses is the assault on sexual autonomy.<sup>131</sup>

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<sup>126</sup> See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES, Reporters' Memorandum (AM. L. INST., Tentative Draft No. 2 (2016) ("Many argued that the proposed definition of consent adopted an ideal of 'affirmative consent' at the expense of the largely tacit ways that people engage in sexual behavior in the real world."). See also *id.*

<sup>127</sup> *Id.*

<sup>128</sup> See *id.* (explaining new definition focuses less on "specific verbal or physical acts" and more on "totality of a person's behavior").

<sup>129</sup> MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0 (AM. L. INST., Tentative Draft No. 3, 2017).

<sup>130</sup> *Id.* at §§ 213.1–213.4.

<sup>131</sup> See *id.* at § 213.0 cmt. (focusing definition section on acts "that are the most invasive and potentially offensive to an individual's sense of bodily autonomy").

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#### E. THE COVID-19 HICCUP: TENTATIVE DRAFT NO. 4 (2020)

With the onset of COVID-19 pandemic, Tentative Draft No. 4 experienced setbacks.<sup>132</sup> Primary discussions related to offenses against children and sex offender registries were held over Zoom.<sup>133</sup> Additional drafts were also prepared for consideration and future discussion.<sup>134</sup>

#### V. INVESTIGATING THE ISSUES OF THE REVISED CODE: TENTATIVE DRAFT NO. 5 (2021) AND TENTATIVE DRAFT NO. 6 (2022)

Tentative Draft No. 5 was approved at the June 2021 Annual Meeting.<sup>135</sup> Tentative Draft No. 5 rejects affirmative consent in favor of a contextual consent standard.<sup>136</sup> This draft, completed by the Reporters and approved by Council, was submitted for approval by ALI members.<sup>137</sup>

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<sup>132</sup> See *ALI Model Penal Code for Sexual Assault*, *supra* note 115 (detailing how May 2020 meeting was canceled due to COVID-19 concerns).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Actions Taken at the 2021 Annual Meeting*, AM. L. INST., <https://www.ali.org/annual-meeting-2021/actions-taken/> (last visited Jan. 27, 2023). Before this Article was published, the ALI Council reviewed and approved Tentative Draft No. 6. This is seemingly the final version. At the 2022 Annual Meeting, and the Council approved the revisions to Tentative Draft No. 6. The consent definition changed slightly. According to the ALI Advisor, “TD 6 therefore simplifies the wording of Section 213.0.0(2)(e). It removes the language drawing heightened attention to failure to resist but continues to make clear that inaction can be considered, and of course inaction includes a failure to resist.” The approved consent definition is still not an affirmative consent definition. STEPHEN SCHULHOFER, *Reporter’s Memorandum for Model Penal Code: Sexual Assault and Related Offenses Tentative Draft No. 6*, THE ALI ADVISOR (May 4, 2022), <https://www.thealiadviser.org/sexual-assault/reporters-memorandum-for-model-penal-code-sexual-assault-and-related-offenses-tentative-draft-no-6/>.

<sup>136</sup> See MODEL PENAL CODE: SEXUAL ASSAULT & RELATED OFFENSES app. § 213.0(1)(a) (AM. L. INST., Tentative Draft No. 5, 2021) (specifically rejecting 1962 Model Penal Code’s definition of consent).

<sup>137</sup> MODEL PENAL CODE: SEXUAL ASSAULT & RELATED OFFENSES, Foreword (AM. L. INST., Tentative Draft No. 5, 2021).



In 2022, the Reporter later revised the black letter law of a new draft, Tentative Draft No. 6. As a result of discussion and motions at the 2022 Annual Meeting, the Council approved the revisions.<sup>138</sup> The motion to amend the definition of consent passed, while the motion to entirely remove the definition of consent failed.<sup>139</sup> According to the ALI Advisor, “TD 6 therefore simplifies the wording of Section 213.0(2)(e). It removes the language drawing heightened attention to failure to resist but continues to make clear that inaction can be considered, and of course inaction includes a failure to resist.” The full statutory language of the Tentative Draft No. 6 Revised Code’s consent definition is as follows:

(e) “Consent”

(i) “Consent” for purposes of Article 213.0 means a person’s willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact. (ii) Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.

(iii) Notwithstanding subsection (2)(e)(ii) of this Section, consent is ineffective when given by a person incompetent to consent or under circumstances precluding the free exercise of consent, as provided in Sections 213.0.1, 213.0.2, 213.0.3, 213.0.4, 213.0.5, 213.0.7, 213.0.8, and 213.0.9.

(iv) Consent may be revoked or withdrawn any time before or during the act of sexual penetration, oral sex, or sexual contact. A clear verbal refusal—such as “No,” “Stop,” or “Don’t”—establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of

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<sup>138</sup> *Status Details*, American Law Institute, <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/> (last visited July 3, 2023).

<sup>139</sup> *Id.*

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consent or revocation or withdrawal of consent may be overridden by subsequent consent given prior to the act of sexual penetration, oral sex, or sexual contact.<sup>140</sup>

The Revised Code, specifically Section 213.0, in consequence, moves the law backwards and creates new barriers for survivors of sexual assault and rape.<sup>141</sup> Given that only a tiny fraction of sexual assault perpetrators are convicted in the first place, this revised consent definition will continue to impede justice for victims.<sup>142</sup> Furthermore, a majority of sexual assault and rape crimes are never reported to police and victims who do report their assaults are often dismissed.<sup>143</sup> Thus, over-incarceration is not a result of over-criminalization or over-enforcement of sexual offenses because sexual offenses are notoriously under-enforced.<sup>144</sup>

The Revised Code fails to protect sexual assault and rape victims, including individuals from historically marginalized groups.<sup>145</sup> It also overly complicates and confuses the

<sup>140</sup> MODEL PENAL CODE: SEXUAL ASSAULT & RELATED OFFENSES app. § 213.0(e)(i-iv) (AM. L. INST., Tentative Draft No. 6, 2022).

<sup>141</sup> See *Taking the Law of Rape and Sexual Assault Backward*, LEGAL MOMENTUM (May 18, 2022), <https://www.legalmomentum.org/newsletters/taking-law-rape-and-sexual-assault-backward> (claiming the ALI's proposals "will undo the progress made by states across the country in bringing the law of rape and sexual assault into the 21<sup>st</sup> century"). See also Joint Memorandum from Lynn Hecht Schafran, Michelle M. Dempsey, Ronald Eisenberg, Terry L. Fromson, Fatima Goss Graves, Jennifer Long, Nancy E. O'Malley, & Jay W. Waks to Am. L. Inst. (Jan. 17, 2022) (outlining experts disapproval and objection of ALI's Article 213.0 project revisions).

<sup>142</sup> See Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 157 (2012) (reporting that for every "100 forcible rapes that are committed, approximately . . . 0.2 to 5.2 will result in a conviction").

<sup>143</sup> *Id.* (estimating that 80-95% of forcible rapes go unreported and that of those, only "0.4-5.4% [are] prosecuted").

<sup>144</sup> See Sharon B. Murphy et al., *Exploring Stakeholders' Perceptions of Adult Female Sexual Assault Case Attrition*,

PSYCH. OF VIOLENCE 172, 174 (2013) (describing phenomenon of attrition and how it presents hurdles to obtaining convictions for sexual assault and rape crimes).

<sup>145</sup> See Heather Littleton & David DiLillo, *Global Perspectives on Sexual Violence: Understanding the Experiences of Marginalized Populations and Elucidating the Role of Sociocultural Factors in Sexual Violence*, PSYCH. OF VIOLENCE 429, 429 (2021)

straightforward provisions that the original 1962 MPC was created to simplify.<sup>146</sup> Many national organizations, such as Legal Momentum, National Alliance to End Sexual Violence, The Rape, Abuse and Incest National Network (RAINN), the National District Attorneys Association, and the National Association of Attorneys General (NAAG) have expressed their profound concerns with these revisions.<sup>147</sup>

The Department of Justice's (DOJ) Office of Legal Policy, also wrote to the ALI on several occasions, expressing concerns about the Revised Code and urging the ALI not to adopt it.<sup>148</sup> According to the DOJ, the Revised Code does not really improve current law.<sup>149</sup> Rather, these provisions reverse related victim-protection measures and disrupt decades of bipartisan legislation.<sup>150</sup> Although there are a wide array of issues that the DOJ addresses in its letter, the DOJ specifically asserts that the Revised Code defines "consent" too broadly and effectively places the burden on the victim to evidence non-consent, rather than on the other party to secure the victim's consent.<sup>151</sup> Further, the ALI Council's most recent proposed revisions, as now seen in Tentative Draft No. 6,

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(recognizing that "those with marginalized and stigmatized identities, including LGBTQ+ individuals and racial/ethnic minority individuals experience elevated rates of sexual violence"). See also Joint Memorandum from Lynn Hecht Schafran, Michelle M. Dempsey, Ronald Eisenberg, Terry L. Fromson, Fatima Goss Graves, Jennifer Long, Nancy E. O'Malley, & Jay W. Waks to Am. L. Inst. (Jan. 17, 2022) (outlining experts disapproval and objection of ALI's Article 213.0 project revisions).

<sup>146</sup> For a discussion of the goal and purpose of the MPC, see *supra* notes 34–7 and accompanying text.

<sup>147</sup> See *Over 50 Organizations and U.S. Government Oppose American Law Institute (ALI) Proposed Changes to the Model Penal Code*, Hum. Trafficking Fusion Ctr. (May 16, 2022), <https://htfusion.org/2022/05/16/over-50-organizations-and-u-s-government-oppose-american-law-institute-ali-proposed-changes-to-the-model-penal-code/> (naming various groups who wrote in opposition to the 2021 amendments).

<sup>148</sup> See Letter of Assistant Attorney General Hampton Y. Dellinger to the ALI Council (Mar. 1, 2022) (declaring DOJ "would urge U.S. jurisdictions not to change their laws to accord with" proposed amendments).

<sup>149</sup> See *id.* (criticizing various portions of Revised Code, including definition of consent).

<sup>150</sup> See *id.* ("[T]he Current Draft runs against the historical progress in removing victim-resistance requirements from the definition of sex offenses. . . .")

<sup>151</sup> See Letter of DOJ to ALI Council (May 13, 2022) (aiming to "restore language from an earlier draft which stipulated that absence of verbal or physical resistance by victim may be considered as evidence of consent").

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“did not soften the opposition of DOJ, NCMEC, and the state AG’s, which all wrote letters reaffirming their continued opposition and urging the membership to reject T.D. 6.”<sup>152</sup>

## VI. EXAMINING AFFIRMATIVE CONSENT STATES AND THE REVISED CODE’S TROUBLING INFLUENCE

As noted above, affirmative consent is also referred to as a “yes means yes” consent standard, meaning that consent must be expressed using overt words or actions prior to and during sexual activities.<sup>153</sup> Importantly, a lack of resistance by an actor is insufficient proof of consent, consent cannot be implied, and during the sexual activity, consent can be “revoked at any time.”<sup>154</sup> Many states vary in their sexual assault and rape statutory language and definition of consent, while several states do not define consent at all.<sup>155</sup>

According to a 2015 analysis of state statutes by Deborah Tuerkheimer, Vermont, New Jersey, and Wisconsin have a “pure” affirmative consent standard, meaning that the statutory language is very clearly and strictly affirmative.<sup>156</sup> This standard requires parties in a sexual activity to use words or overt actions to say “yes,” rather than relying on the victim to say “no.”<sup>157</sup> A “no means no” definition of consent is problematic because it puts the onus on

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<sup>152</sup> Ira Ellman, *Following Delays, American Law Institute Gives Final Approval to Model Penal Code Revisions Regarding Sex Offense Registries*, MITCHELL HAMLINE SCHOOL OF LAW: SEX OFFENSE LITIGATION AND POLICY RESOURCE CENTER (June 3, 2022), <https://mitchellhamline.edu/sex-offense-litigation-policy/2022/06/03/following-delays-american-law-institute-gives-final-approval-to-model-penal-code-revisions-regarding-sex-offense-registries/> (explaining that revisions to Tentative Draft No. 6 did not address DOJ concerns).

<sup>153</sup> See Tuerkheimer *supra* note 10, at 10 (defining affirmative consent as a “conscious, and voluntary agreement to engage in sexual activity”).

<sup>154</sup> See *id.* (showing how affirmative consent requires consent to be clear and conscious to and from all parties involved).

<sup>155</sup> For a discussion of state sexual assault and rape statutory language discretion, see *infra* notes 158–66 and accompanying text.

<sup>156</sup> See Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. OF CRIM. L. 441, 451 (2016) (providing statutory language from states that have clear affirmative consent definitions).

<sup>157</sup> See *id.* at 442 (introducing overt action to say “yes” rather than stating “no”).

the victim to say “no,” which does not protect against “flagrant nonconsensual contacts” if the individual is unable to specifically communicate a “no.”<sup>158</sup>

In 2017, an ALI Report Analysis noted that “[a]t least thirty-two jurisdictions punish penetration in the absence of consent, without requiring proof of additional elements such as force, resistance, or expressed unwillingness.”<sup>159</sup> Additionally, affirmative consent has been previously adopted by nearly 2,000 universities and colleges across the country.<sup>160</sup>

Although there has been legislative reform for several other states, the statutory language and case law in Vermont, New Jersey, and Wisconsin highlight a “pure” affirmative consent definition.<sup>161</sup> Therefore, given the discretion afforded to states and the differences in sexual assault provisions, it is easiest to focus on the Revised Code’s potential impact on “pure” affirmative consent states.<sup>162</sup> Currently, it is unclear if states will adopt the Revised Code or will choose to ignore it and uphold their current statutory language. This section, however, will ultimately explore the effect that consent statutory language has on sexual assault and rape convictions.<sup>163</sup> Moreover, if the Revised Code is adopted by states, it will be much harder to get a conviction for rape and sexual assault in that jurisdiction.<sup>164</sup>

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<sup>158</sup> See Ferzan, *supra* note 38, at 428–429 (arguing major issues with “no means no” consent definitions).

<sup>159</sup> Ashe Schow, *Campus Rape Policies as Law for All? Legal Group Says No*, THE ALI ADVISER (May 31, 2017) <https://www.thealiadviser.org/sexual-assault/campus-rape-policies-as-law-for-all-legal-group-says-no/>.

<sup>160</sup> *Id.*

<sup>161</sup> For a discussion of Vermont, New Jersey, and Wisconsin sexual assault and rape statutory language, *see infra* notes 167–89 and accompanying text.

<sup>162</sup> For a discussion of Vermont, New Jersey, and Wisconsin sexual assault and rape statutory language, *see infra* notes 167–89 and accompanying text.

<sup>163</sup> For a discussion of the impact of consent statutory language, *see infra* notes 190–201 and accompanying text.

<sup>164</sup> For a discussion of the Revised Code’s theorized influence on affirmative consent states, *see infra* notes 196–201 and accompanying text.

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## A. VERMONT

In Vermont, consent means, “the affirmative, unambiguous, and voluntary agreement to engage in a sexual act, which can be revoked at any time.”<sup>165</sup> *State v. Snow* illustrates the victim-protective nature of an affirmative consent definition.<sup>166</sup> After an “alcohol-fueled New Year’s Eve party,” the victim fell unconscious in a bedroom and awoke with the defendant’s penis inside of her.<sup>167</sup> The defendant, however, asserted that the victim initiated mutual fondling.<sup>168</sup> In general, regardless of whether a defendant acknowledges a victim’s account of the incident, the affirmative consent standard underscores that total passivity (in this case, unconsciousness) cannot establish consent to engage in sexual activity.<sup>169</sup> Since unresponsiveness does not qualify as consent under an affirmative definition, the inebriated victim who does not respond, has not consented.<sup>170</sup> Under the Revised Code, however, the court in *Snow* may not have convicted the defendant, if consent could be inferred by the victim’s inaction.

## B. NEW JERSEY

In New Jersey, sexual assault is defined by actor committing an act, without the victim’s “affirmative and freely-given permission.”<sup>171</sup> In the New Jersey Supreme Court case of *State of New Jersey in the Interest of M.T.S.*, the court rejected the Model Penal Code’s definition of rape and instead brought sexual assault and rape law in line with assault and battery law.<sup>172</sup> The court further held that the victim did not express consent to intercourse,

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<sup>165</sup> VT. STAT. ANN. tit. 13, § 3251(3) (West 2011).

<sup>166</sup> *State v. Snow*, 193 Vt. 390, 391 (2013).

<sup>167</sup> *Id.* at 392.

<sup>168</sup> *Id.*

<sup>169</sup> See Tuerkheimer, *supra* note 158, at 456.

<sup>170</sup> *Id.*

<sup>171</sup> N.J. STAT. ANN. § 2C:14-2 (West 2021). New Jersey has interpreted their sexual assault statute to include an affirmative consent element. *Id.*

<sup>172</sup> *State in Interest of M.T.S.*, 129 N.J. 422, 443 (1992).

either through her words or actions, thus the defendant's conviction was proper.<sup>173</sup>

*State in Interest of K.B.* highlights a case where a victim is paralyzed by the “effects of an abrupt assault.”<sup>174</sup> In *State in Interest of K.B.*, D.J. testified that she was hanging out after school with K and K told her that K.B. wanted to talk to her.<sup>175</sup> The two went into the bathroom and then K.B. vaginally penetrated her.<sup>176</sup> D.J. did not say anything, “because he [K.B.] had his hand over her mouth, although she made noises that were like ‘moaning and screaming put together.’”<sup>177</sup> In an affirmative consent jurisdiction, however, a victim's passivity is “legally insufficient to constitute consent.”<sup>178</sup> Yet, under the Revised Code, passivity and inaction could still infer consent.<sup>179</sup> Thus, under the Revised Code, the defendant in *State in Interest of K.B.*, might have been acquitted.

### C. WISCONSIN

Under Wisconsin law, third degree sexual assault is committed by, “whoever has sexual intercourse with a person without the consent of that person” and then 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

<sup>173</sup> *Id.* at 450.

<sup>174</sup> *State in Interest of K.B.*, No. A-2001-11T2, 2013 WL 3340654 at \*1 (N.J. Super. Ct. App. Div., 2013); *see also* Tuerkheimer *supra* note 158, at 462.

<sup>175</sup> *State in Interest of K.B.*, No. A-2001-11T2, 2013 WL 3340654 at \*1 (N.J. Super. Ct. App. Div., 2013).

<sup>176</sup> *Id.* at \*2.

<sup>177</sup> *Id.* (portraying fear and aggressiveness during this assault).

<sup>178</sup> *See* Tuerkheimer, *supra* note 158, at 459 (explaining strength of affirmative consent in protecting victims).

<sup>179</sup> MODEL PENAL CODE: SEXUAL ASSAULT & RELATED OFFENSES app. § 213.0(e)(i-iv) (AM. L. INST., Tentative Draft No. 6, 2022). 213.0 (stating that consent can be expressed or inferred from “both action and inaction”); *see also* Erin E. Murphy & Jennifer Morinigo, *An Overview of Tentative Draft No. 5 of the Model Penal Code: Sexual Assault and Related Offenses*, THE ALI ADVISER (June 22, 2021), <https://www.thealiadviser.org/sexual-assault/an-overview-of-tentative-draft-no-5-of-the-model-penal-code-sexual-assault-and-related-offenses/> (including a video discussing changes made to every provision of Tentative Draft No. 5).

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sexual contact.”<sup>180</sup> *State v. Perkins* exemplifies a case where the defendant sexually assaults a sleeping victim.<sup>181</sup> Antonio Perkins and Deanna T. were both college students and spent an evening together with mutual friends in their student lounge.<sup>182</sup> Around 2:00a.m., Deanna fell asleep on a couch, and then awoke to the sensation of someone on her back and “simultaneously became aware that both her pants and underwear had been pulled down to her thighs and her bra was unhooked.”<sup>183</sup> Perkins “portrayed the encounter as consensual,” “yet this impression was not based on any conduct or communication on Deanna’s part,” as Deanna was inert throughout the entire event.<sup>184</sup> Given “Wisconsin’s affirmative consent definition, Deanna did not provide ‘freely given agreement’ to engage in sexual contact.”<sup>185</sup> “The affirmative consent standard functioned to relieve the victim of the burden of expressing her lack of consent while in a dead sleep.”<sup>186</sup> Under the Revised Code, however, a defendant that engages in nonconsensual activity with a victim who is inert may not be culpable if they were able to argue that they still inferred consent through the victim’s inaction.<sup>187</sup>

#### D. SYNTHESIS OF STATES’ STATUTES

These states’ statutes merely act as a snapshot of affirmative consent statutory language.<sup>188</sup> Given that the MPC is highly influential and often motivates states to adopt certain statutory language, the revised MPC Article 213 provisions will

<sup>180</sup> Wis. Stat. Ann. §§ 940.225(3)(a)–(4) (West 2022).

<sup>181</sup> *State v. Perkins*, No. 95-1353-CR, slip op. at 1 (Wis. Ct. App. Aug. 7, 1996); *see also* Tuerkheimer *supra* note 158, at 453.

<sup>182</sup> *State v. Perkins*, No. 95-1353-CR, slip op. at 1 (Wis. Ct. App. Aug. 7, 1996).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*; *see also* Tuerkheimer *supra* note 158, at 453.

<sup>185</sup> Tuerkheimer, *supra* note 158, at 453.

<sup>186</sup> *Id.*

<sup>187</sup> Tuerkheimer, *supra* note 158, at 448; *see also infra* notes 190–201 and accompanying text for a further discussion of the possible impacts of the Revised Code.

<sup>188</sup> For a further discussion of affirmative consent state statutes, *see supra* notes 167–89 and accompanying text.



undoubtedly influence legislative word choices, statute construction, and proposed amendments to current law.<sup>189</sup> Additionally, the Revised Code Section 213.0 stipulates that consent may be inferred from a victim's "inaction."<sup>190</sup> If affirmative consent states were to amend their consent definitions and sexual assault and related offenses statutes in accordance with the Revised Code Section 213.0 then it would effectively place the onus on the victim to show physical or verbal non-consent, rather than on the actor to secure the victim's consent.<sup>191</sup> This will namely create the risk that the jury or judge will erroneously conclude that an unresponsive victim, such as a victim who was frozen by fear, was consenting.<sup>192</sup> Tuerkheimer further emphasized these concerns when she discussed cases involving sleep, intoxication, and relationally controlled situations that were nonconsensual, yet were not considered rape under certain state sexual assault and rape statutes.<sup>193</sup>

In sum, the Revised Code Section 213.0 proposes statutory language that will make it harder for victims to achieve justice.<sup>194</sup> Additionally, only a small percentage of sex offenders are prosecuted in the first place, with even smaller percentage convicted and imprisoned.<sup>195</sup> Given this reality, the Revised Code

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<sup>189</sup> For a further discussion of impact of MPC on state statutory language, *see supra* notes 34–7 and accompanying text.

<sup>190</sup> MODEL PENAL CODE: SEXUAL ASSAULT & RELATED OFFENSES app. § 213.0(e)(ii) (AM. L. INST., Tentative Draft No. 6, 2022).

<sup>191</sup> Letter Hampton Y. Dellinger, *Assistant Attorney General to The American Law Institute* (Jan. 19, 2022).

<sup>192</sup> *See id.* (illuminating consequences for frozen in fear victim and subsequent mistreatment in legal system); *see also* BESSEL VAN DER KOLK, M.D., *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* 54 (2015) (emphasizing helplessness and immobilization may keep victims from utilizing a fight or flight response to defend themselves during attack).

<sup>193</sup> For a discussion of Tuerkheimer's arguments regarding the divergence of force and non-consent, *see supra* notes 64–83 and accompanying text.

<sup>194</sup> *See Taking the Law of Rape and Sexual Assault Backward*, *supra* note 143.

<sup>195</sup> *Id.* (emphasizing current sexual assault and rape law issues regarding convictions and providing justice to victims).

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will continue to obstruct justice for sexual assault and rape victims.<sup>196</sup>

There are several states that do not define or interpret consent in their sexual assault and rape statutes.<sup>197</sup> Although the MPC is merely suggestive, it is still highly influential and may ultimately influence such statutory reforms.<sup>198</sup> Thus, it is likely that this overbroad consent standard will influence states and will add to the burdens imposed on sexual assault victims who seek to bring their complaints to the criminal legal system.<sup>199</sup>

## VII. EVALUATING AND RESPONDING TO AFFIRMATIVE CONSENT COUNTERARGUMENTS

The abovementioned discussion outlined several arguments in favor of an affirmative consent definition, however, there is much opposition to affirmative consent.<sup>200</sup> Many critics discuss the impossibility of interpreting a party's signal in a sexual encounter, creating a hopelessly confusing and ambiguous situation.<sup>201</sup> For example, opponents to affirmative consent question whether a gesture could signify consent and what that gesture would have to be in order for it to be unambiguous.<sup>202</sup> Does a "yes" count for the whole sexual activity or just one sequence or act? Ferzan herself argues that "given that conduct is prone to ambiguity and interpretation, the only way to make sure that we set clear consent standards may be then to stipulate the exact sorts of conduct that 'count'

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<sup>196</sup> For a further discussion of impact of the Revised Code on sexual assault victims, see *supra* notes 196–201 and accompanying text.

<sup>197</sup> See Jocelyn Noveck, *What is Consent? Many States Don't Have a Definition*, PORTLAND PRESS HERALD (Dec. 16, 2017), <https://www.pressherald.com/2017/12/16/what-is-consent-many-states-dont-have-a-definition/>

<sup>198</sup> For a further discussion of MPC's highly influential effect on state statutory language, see *supra* notes 34–7 and accompanying text.

<sup>199</sup> See *Taking the Law of Rape and Sexual Assault Backward*, *supra* note 143 (theorizing influence and impact of Revised Code on states).

<sup>200</sup> For a discussion of arguments against affirmative consent, see *infra* notes 203–13 and accompanying text.

<sup>201</sup> See Ferzan, *supra* note 38, at 430.

<sup>202</sup> *Id.*

as a yes or no.”<sup>203</sup> Agreeably, sex does not operate in a vacuum and certain gestures could be prone to ambiguity. However, that does not mean that overt words and actions are unattainable elements in sexual interactions. Clearly obtaining and securing consent must be integral to sexual activity itself.

Critics of an affirmative consent may also argue the “unsexiness” of affirmative consent rules and how these rules detract from spontaneity.<sup>204</sup> These arguments stem from the concerns over “diminished sexual pleasure” or the “greater awkwardness” resulting from “communication around sex.”<sup>205</sup> In response to these arguments, there is no reason that sexual pleasure is or must be diminished by talking about sex. Sexual partners, already in an arguably intimate and vulnerable situation, should take the proper measures to communicate and establish consent.

Furthermore, critics of affirmative consent are troubled by the prospect of criminalizing and penalizing individuals who fail to conform to such a high standard of consent.<sup>206</sup> The ALI specifically emphasized these concerns in the Revised Code drafting process.<sup>207</sup> Specifically, the ALI abandoned an affirmative consent definition after fears that it would lead to overcriminalization.<sup>208</sup>

Ferzan further argues that an individual might reasonably believe that the other individual is assenting, despite an “expression of nonconsent.”<sup>209</sup> As such, if these defendants are punished in the name of promoting social change or protecting victims, society may end up criminalizing nonculpable

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<sup>203</sup> *Id.*

<sup>204</sup> See Tuerkheimer, *supra* note 10, at 12.

<sup>205</sup> *Id.* at 13.

<sup>206</sup> *Id.*

<sup>207</sup> For a discussion of concerns by the ALI membership when drafting the Revised Code, see *supra* notes 105–10 and accompanying text.

<sup>208</sup> See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES, cmt. II, intro. note (AM. L. INST., Discussion Draft No. 2, 2015) “Nearly all law-reform efforts addressed to the sexual offenses are met at some point by the objection that they go beyond social standards currently accepted by a good many law-abiding citizens.” *Id.*

<sup>209</sup> See Ferzan, *supra* note 38, at 421 (worrying about punishing non-culpable actors).

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actors.<sup>210</sup> Ferzan concludes that “we should pause before punishing the innocent for the collective good.”<sup>211</sup>

These arguments do carry a great deal of weight as criminal convictions for the morally innocent are devastating and unjust. However, the systemic and prolonged issue of sexual assault and rape and its disturbing treatment in the in the United States legal system is also devastating and unjust.<sup>212</sup> Provided how difficult and traumatic it is to bring a sexual assault or rape conviction forward, an affirmative consent definition may ultimately empower victims to pursue justice. Researchers have documented biases against victims and have noted that these biases impact the decisions of those in the criminal law process, which lead to high attrition rates for rape and sexual assault reports.<sup>213</sup> Given the overwhelming epidemic of rape case attrition in the United States, it is essential that laws and statutory language focus on protecting victims.<sup>214</sup> Arguably, affirmative definitions of consent provide the most protection for victims and construct the most individual sexual agency.

Lastly, another notable criticism is that an affirmative consent definition dramatically departs from reality and seek to acutely change current practices of sexual assault and rape law.<sup>215</sup> Without notice, Ferzan specifically argue it is wrong to adopt a only “yes means yes” code and then proclaim to “justly punish those who violate it.”<sup>216</sup> Ferzan discusses that notice, more readily available on college campuses, is not as easily

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.* (promoting concerns before embarking on large criminal law shifts).

<sup>212</sup> For a discussion of sexual assault and rape convictions in the United States, see *supra* notes 38–41 and accompanying text.

<sup>213</sup> See Sharon Murphy et al., *Exploring Stakeholders’ Perceptions of Adult Female Sexual Assault Case Attrition*, 3(2) PSYCHOL. VIOLENCE 172–84 (2013) (clarifying those in criminal law process include, but are not limited to police, prosecutors, jurors, and judges).

<sup>214</sup> See Deborah Tuerkheimer, *Underenforcement as Unequal Projection*, 57 BOSTON COLL. L. REV. 1287 (Sept. 28, 2016).

<sup>215</sup> See Ferzan, *supra* note 38, at 423 (noting affirmative consent shift realities if applied in criminal law today).

<sup>216</sup> *Id.*

feasible in United States criminal law.<sup>217</sup> In response, it is important to note that for a majority of criminal law offenses, ignorance to the law is not a defense.<sup>218</sup> It is important for defendants to know the standards of the law, however, progress should not be delayed simply because it is not as easy to provide quick notice.<sup>219</sup> If the purpose of rape law is to protect an individual's sexual agency; an agency that "contemplates the interaction of sexual subjects" with the intention of engaging in sexual conduct, then an affirmative consent definition arguably has the greatest potential in promoting and securing this agency.<sup>220</sup>

#### VIII. CONCLUSION: THE CURRENT STATE OF THE ISSUE AND RECOMMENDATIONS

At the time this Article was written, there were ongoing edits to the Revised Code, thus this issue was and still is timely and dynamic. Legal scholars and academics have been working to not only make the code more succinct, but also, to remove arguably problematic sections.<sup>221</sup> However, with the recent approval of Tentative Draft No. 6, the Revised Code is still a backwards looking and problematic revision of sexual assault and related offenses.

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<sup>217</sup> *Id.*

<sup>218</sup> See generally Phil Dixon Jr., *When is Ignorance of the Law an Excuse?*, NC CRIM. L. BLOG (June 20, 2017), <https://www.sog.unc.edu/blogs/nc-criminal-law/when-ignorance-law-excuse> (discussing a North Carolina case and its finding that *Lambert* exception does not apply to conduct that was not "wholly passive").

<sup>219</sup> For a further discussion of "notice," see *supra* note 104 and accompanying text.

<sup>220</sup> See Tuerkheimer *supra* note 10, at 43.

<sup>221</sup> See Stephen Schulhofer, *Reporter's Memorandum for Model Penal Code: Sexual Assault and Related Offenses Tentative Draft No. 6*, THE ALI ADVISOR (May 4, 2022), <https://www.thealiadviser.org/sexual-assault/reporters-memorandum-for-model-penal-code-sexual-assault-and-related-offenses-tentative-draft-no-6/>. The Revised Code, Tentative Draft No. 6, was discussed and approved in 2022. The revisions will be consistent to the black letter, and the Reporter will prepare the official text of the project. An official text is expected to be published in 2024. See *Status Details*, ALI, <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/> (last visited July 3, 2023).

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The 1962 version of MPC Article 213 is outdated and antiquated. Given the problematic force requirement in the code, it fails to protect most survivors of rape and sexual assault.<sup>222</sup> Although, this Article has criticized and rejected the Revised Code, it does not suggest that the 1962 MPC Article 213 version should remain the discretionary code as default. Instead, a third option must be considered. One that rejects both the 1962 MPC Article 213 and the 2022 Revised Code. This option would be a completely “new draft” to the Revised Code that would still maintain the progressive and modern motivations of the Revised Code’s project inspirations. However, this “new draft” would incorporate these modern realizations of criminal sexual assault and rape law, but also specifically include an affirmative consent definition in Section 213.0.

Notably, the Revised Code should have maintained and upheld the original proposed affirmative consent definition.<sup>223</sup> The Revised Code began with an affirmative definition of consent and then subsequently abandoned the definition during ALI discussions.<sup>224</sup> As a result, the consent definition in the Revised Code does little to protect or ensure justice for victims of sexual assault and rape.<sup>225</sup>

An affirmative consent definition, however, protects an individual’s sexual agency.<sup>226</sup> Affirmative consent, “yes means yes,” better suits this modern age and sexual revolution.<sup>227</sup> Instead of relying on the inaction of an actor or necessitating a showing of force or resistance, affirmative consent stresses

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<sup>222</sup> UNWANTED SEX, *supra* note 18, at 271.

<sup>223</sup> For a discussion of the definition of affirmative consent, see *supra* note 18 and accompanying text.

<sup>224</sup> For a discussion of the arguments surrounding affirmative consent, see *supra* notes 46–83 and accompanying text.

<sup>225</sup> For a discussion of the definition of affirmative consent, see *supra* note 18 and accompanying text.

<sup>226</sup> For a discussion of sexual agency, see *supra* notes 74–83 and accompanying text.

<sup>227</sup> For a discussion of the definition of affirmative consent, see *supra* note 18 and accompanying text.

actual permission, showing willingness to engage in a certain act that is clearly communicated.<sup>228</sup>

This timely discussion surrounding consent definitions has been, and remains to be, a contentious and prolonged debate.<sup>229</sup> The arguments set forth above, contribute to this debate in three major ways: 1) it underscores the significance of affirmative consent in the law; 2) it argues against the current state of the Revised Code by detailing the history of the Revised Code drafts as well as engaging with and highlighting relevant legal scholarship; and 3) asserts a “new draft” option that encourages the withdrawal of the Revised Code as well as rejects the 1962 Article 213. Given the ongoing discussions regarding the Revised Code, the prolonged focus on affirmative consent, and the importance of consent definitions in criminal convictions, these revisions will continue to be at the center of debate and controversy. Thus, with more legal scholarship outlining the major concerns and limitations of the Revised Code, there is hope that the Revised Code will be withdrawn, and a “new draft” put in its place.

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<sup>228</sup> For a discussion of the definition of affirmative consent, see *supra* note 18 and accompanying text.

<sup>229</sup> For a discussion about the debate surrounding consent definitions, see *supra* notes 46–83 and accompanying text.