

# Affirmative Consent and Due Diligence

## I. INTRODUCTION

One of the most striking recent developments in sexual offence policy has been the proliferation of affirmative consent policies. These policies vary in their details but share the common theme of prohibiting sexual activity with someone who has not acted in a way that expresses their consent. Yale University's is a representative example:

Sexual activity requires consent, which is defined as positive, unambiguous, and voluntary agreement to engage in specific sexual activity throughout a sexual encounter. Consent cannot be inferred from the absence of a "no"; a clear "yes," verbal or otherwise, is necessary.

While a decade ago, affirmative consent definitions were rare, nowadays they feature in the campus codes of over 1,400 universities in the United States.<sup>1</sup> However, the criminal law has mostly bucked this trend. In the

For helpful comments and discussions, I would like to thank Renee Bolinger, David Braddon-Mitchell, Rowan Cruft, Garrett Cullity, Luara Ferracioli, Dan Halliday, Karen Jones, Jessica Keiser, Simon Keller, Holly Lawford-Smith, Luke Russell, Samuel Shpall, Nic Southwood, Caroline West, two Associate Editors of *Philosophy & Public Affairs*, and audiences at the University of Canterbury, the University of Otago, Victoria University of Wellington, the University of Adelaide, the University of Melbourne, the Australian National University, the University of Sydney, and the University of Stirling. The research for this essay was financially supported by an Early Career Leadership Fellows Award from the Arts and Humanities Research Council, Council Reference: AH/N009533/1.

1. The statistic is from the National Center for Higher Education Risk Management as quoted by Deborah Tuerkheimer in her "Affirmative Consent," *Ohio State Journal of Criminal Law* 13 (2016): 441–68. Besides the issue of how to define consent, there are other debates about how these policies should be framed, for example, to protect respondents and afford complainants due process. Should complaints be adjudicated on the basis of a preponderance of evidence standard or a beyond reasonable doubt standard? Should respondents have a right to have an attorney present and the right to cross-examine witnesses, including

United States, a few states' rape law does include an affirmative consent definition, and one was considered in the ongoing revisions to the American Law Institute's Model Penal Code.<sup>2</sup> But these revisions ended up defining consent in terms of someone's willingness to engage in sexual activity.<sup>3</sup> On that definition, someone's communicative behavior is relevant only as evidence about what they are willing to do.

Insofar as affirmative consent policies have received philosophical attention in print, this has occurred in the context of a longer standing debate about what is required for morally valid consent.<sup>4</sup> In a formidable

---

complainants? For a discussion surveying concerns, see Erin Collins, "The Criminalization of Title IX," *Ohio State Journal of Criminal Law* 13 (2016): 365-95, at p. 378.

2. Tuerkheimer describes these states' laws as follows:

In Wisconsin, consent "means 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." ... In Vermont, consent "means words or actions by a person indicating a voluntary agreement to engage in a sexual act." ... Finally, in New Jersey, the definition of affirmative consent is found not in the statute itself, but in the state Supreme Court's interpretation of it. In the much-discussed case of *State of New Jersey in the Interest of M.T.S.*, the court held that consent requires "permission to engage in sexual penetration [that] must be affirmative and it must be given freely.

Tuerkheimer, "Affirmative Consent," p. 451, respectively citing WIS. STAT. ANN. § 940.225(4), VT. STAT. ANN. tit. 13, § 3251(3), and *State ex rel. M. T. S.*, 609 A.2d 1266, 1277 (N.J. 1992).

3. The model penal code is formulated by the American Law Institute (ALI). Stephen Schulhofer and Erin Murphy had the responsibility of proposing revisions to the code's Section 213, which concerns sexual offenses. This had been last updated in 1962. As well as felonies, with maximum sentences ranging from 10 years to life imprisonment, successive drafts included a misdemeanor of "sexual intercourse without consent," with maximum imprisonment of 1 year, where consent was defined as "a person's positive agreement, communicated by either words or actions, to engage in sexual intercourse or sexual contact." This proposal was rejected by the ALI Council at the 2016 annual meeting of the ALI. Instead, consent was defined as "a person's willingness to engage in a specific act of sexual penetration or sexual contact." Jennifer Moringo, "Updated 'Consent' Definition, December 19, 2016, <http://www.thealiadviser.org/sexual-assault/updated-consent-definition/> <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/>. Accessed April 1, 2017.

4. In an excellent essay that is currently undergoing revision, Alexander Guerrero defends affirmative consent policies on epistemic grounds. Drawing on recent work in epistemology, Guerrero argues that because sexual consent is particularly important, an agent needs a significant amount of evidence of their partner's consent in order either to justifiably believe that their partner consents or to non-culpably act on their belief that their partner consents. While I have not been able to engage with Guerrero's essay at the length that it deserves, I note that our accounts are importantly similar in that both defend evidence-based rationales for affirmative consent policies, while remaining neutral about whether a mental choice

critique of these policies, Kimberly Ferzan has defended the “Mental View” that valid consent requires only an inner mental choice or intention.<sup>5</sup> According to this view, so long as uncommunicative sexual partners have made these choices, each would act permissibly. But an encounter without communication would be a sexual offence according to affirmative consent policies, and this concerns Ferzan:

If...potential defendants are punished in order to cause social change or to protect women by creating prophylactic rules, then we are punishing individuals who are nonculpable as to what we really care about (nonconsensual sex) in order to accomplish our goal (better and more accurate communication about consent). We are punishing the morally innocent. We should pause before punishing the innocent for the collective good.<sup>6</sup>

But the Mental View of consent is not the only game in town. Its rival is the “Behavioral View,” according to which someone gives valid consent

---

is sufficient for valid consent. Our views differ in that Guerrero’s view focuses on what it is to wrongfully act without a partner’s sexual consent, while my view is neutral on the question of what constitutes culpability for sexual offences, focusing instead on a separate duty of due diligence to investigate a partner’s consent. Outside of the context of discussing affirmative consent policies, others have argued that someone can be culpable for committing a sexual offence in light of an unreasonable belief in a partner’s consent. For example, see Lois Pineau, “Date Rape: A Feminist Analysis,” *Law and Philosophy* 8 (1989): 217–43; David Archard, “The Mens Rea of Rape: Reasonableness and Culpable Mistakes,” in *A Most Detestable Crime: New Philosophical Essays on Rape*. ed. K. Burgess-Jackson. (Oxford: Oxford University Press, 1999), pp. 213–29; Marcia Baron, “I Thought She Consented,” *Philosophical Issues 11 Social, Political and Legal Philosophy* (2001): 1–32; Helen Power, “Towards a Redefinition of the Mens Rea of Rape,” *Oxford Journal of Legal Studies* 23 (2003): 379–404; Alexander Guerrero, “The Epistemology of Consent,” in *Applied Epistemology*, ed. Jennifer Lackey. (Oxford University Press) (forthcoming).

5. Kimberly Ferzan, “Consent, Culpability, and the Law of Rape,” *Ohio State Journal of Criminal Law* 13 (2016): 397–439. On Ferzan’s view, a consent-giver must decide that another person’s action is “okay with them.” As alternative answers that the Mental View should give to the question of what constitutes consent to an action, Heidi Hurd proposes intending that someone perform the action, Larry Alexander proposes intending to forswear objecting to the action, Peter West proposes, at different points, desiring the action, mentally acquiescing to the action and choosing the action, and Victor Tadros proposes attempting to communicate that someone may perform this action (allowing that this attempt could be entirely mental if someone thought that they were telepathic). Heidi Hurd, “The Moral Magic of Consent,” *Legal Theory* 2 (1996): 121–46; Larry Alexander. “The Moral Magic of Consent II,” *Legal Theory* 2 (1996): 165–74; Larry Alexander, “The Ontology of Consent,” *Analytic Philosophy* 55 (2014): 102–13; Peter Westen, *The Logic of Consent* (Ashgate: Ashgate Publishing, 2004); Victor Tadros, *Wrongs and Crimes*, (Oxford: Oxford University Press, 2016).

6. Ferzan, “Consent, Culpability and the Law of Rape,” p. 421.

[Correction added on October 3, 2018 after online publication: the reference: “Alexander Guerrero, “The Epistemology of Consent,” in *Applied Epistemology*, ed. Jennifer Lackey. (Oxford University Press) (forthcoming).” was added on footnote 4.]

only if they have indicated with behavior that they have chosen to permit the action in question.<sup>7</sup> On that view, encounters without clear communication would be morally impermissible, and in previous work, I have provided a partial defense of affirmative consent policies on these grounds.<sup>8</sup>

So far, the debate over affirmative consent policies is yet to explore the possibility that these policies might have a rationale that is acceptable to adherents of both the Mental View and the Behavioral View. In this essay, I articulate this independent rationale: each of us has a “Duty of Due Diligence” to take adequate measures to investigate whether our sexual partners are willing to engage in sexual activity. But on the assumption that someone had adequate evidence that their partner is willing to have sex only if their partner has clearly expressed this willingness, the Duty of Due Diligence would imply that affirmative consent policies need only be

7. A proponent of the Behavioral View can further require that the consent-receiver successfully interpret this behavior as indicating consent. The proponent can also hold that a mental choice or intention is necessary for valid consent. For views that endorse the Behavioral View, see Joel Feinberg, *Harm to Self* (New York: Oxford University Press, 1986); Pineau, “Date Rape,”; Heidi Malm, “The Ontological Status of Consent and its Implications for the Law on Rape,” *Legal Theory* 2 (1996): 147–64; David Archard, *Sexual Consent* (Oxford: Westview Press, 1998); Baron, “I Thought She Consented”; Alan Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003); Joan McGregor, *Is It Rape? On Acquaintance Rape and Taking Women’s Consent Seriously* (Ashgate: Ashgate Publishing Limited, 2005); Seana Shiffrin, “Promising, Intimate Relationships and Conventionalism,” *Philosophical Review* 177 (2008): 481–524; Franklin Miller and Alan Wertheimer “Preface to a Theory of Consent Transactions: Beyond Valid Consent,” in *The Ethics of Consent: Theory and Practice*, ed. Franklin Miller and Alan Wertheimer (Oxford: Oxford University Press, 2010), pp. 79–106; Japa Pallikkathayil, “The Possibility of Choice: Three Accounts of the Problem with Coercion,” *Philosophers’ Imprint* 11 (2011): 1–20; Govert Den Hartogh, “Can Consent Be Presumed?” *Journal of Applied Philosophy* 28 (2011): 295–307; David Owens, *Shaping the Normative Landscape* (Oxford: Oxford University Press, 2012); Richard Healey, “The Ontology of Consent: A Reply to Alexander,” *Analytic Philosophy* 56 (2015): 354–63; Tom Dougherty, “Yes Means Yes: Consent as Communication,” *Philosophy & Public Affairs* 43 (2015): 224–53; Neil Manson, “Permissive Consent: A Robust Reason-Changing Account,” *Philosophical Studies* 173 (2016): 3317–34.

8. One of the shortcomings of my previous discussion of affirmative consent policies was that I failed to address the issue of the appropriate sanctions for violating these policies. Dougherty, “Yes Means Yes.” While Ferzan appeals to the Mental View to provide her central line of argument against affirmative consent policies rests, she also argues that proponents of the Behavioral View should be worried about some of these policies, given that omissions can constitute communication in certain circumstances. This argument would cause trouble for policies that disallowed any omission to count as unambiguous communication, but not for policies that only require unambiguous communication (whether by action or omission). I return to this issue in Section V when discussing modifications of extant affirmative consent policies. Ferzan, “Consent, Culpability and the Law of Rape,” p. 412.

sanctioning behavior that is wrong in itself: the policies would sanction people who have wrongfully failed to ascertain that their partners are willing to engage in sexual activity. As long as these policies' sanctions for this behavior are suitably proportionate to its wrongfulness, this provides a defense of these policies wherever that assumption holds. But by reflecting on the exceptions where the assumption does not hold, the Duty of Due Diligence suggests an alternative way of formulating sexual offence policies to achieve goals of affirmative consent policies: these policies could simply codify an institutional analogue of the Duty of Due Diligence itself. In other words, these policies could directly sanction someone for engaging in sexual activity without adequately investigating that their partner was willing to engage in this activity.

As proponents of the Mental View can accept that we each have the Duty of Due Diligence, I intend to remain neutral on the debate between that view and the Behavioral View. In other words, I do not aim to resolve here what morally valid consent is. Also, as my interest concerns which actions should be prohibited by laws and codes, I intend to remain neutral on the orthogonal question of what constitutes culpability for the purposes of punishing someone who engages in prohibited behavior. Everyone agrees that someone can be culpable in virtue of *knowingly* engaging in this behavior or in virtue of *recklessly* being aware that they are taking an excessive risk of engaging in this behavior. But controversy breaks out over when, if at all, it is appropriate to punish someone who does wrong *negligently*. Roughly, someone does wrong negligently when they are unaware that there is at least a significant risk that they are acting impermissibly, but they ought to have been aware of this risk.<sup>9</sup> While most people have the intuition that we can at least sometimes be culpable for acting negligently, some argue that this intuition misleads. For example, on the

9. Most theorists agree with Section 2.02 (2)(d) of the Model Penal Code (1985) in defining negligence in terms of inadvertently taking risks. However, others conceive of negligence as covering some forms of advertent risk-taking. See Michael Moore and Heidi Hurd, "Punishing the Awkward, the Stupid, the Weak and the Selfish: The Culpability of Negligence," *Criminal Law and Philosophy* 5 (2011): 147–98, p. 150; Kenneth Simons, "When is Negligent Inadvertence Culpable? Introduction to Symposium, Negligence in Criminal Law and Morality," *Criminal Law and Philosophy* 5 (2011): 97–114, at p. 106. Ferzan claims that "recklessness is the default mens rea in the Model Penal Code," and punishment of the negligent runs against criminal law principles in her "Consent, Culpability and the Law of Rape," pp. 416, 427. Kenneth Simons notes that the Model Penal Code includes an offence for negligent homicide in his "When is Negligent Inadvertence Culpable?" at p. 108.

grounds that culpability always requires a choice to take risks, Larry Alexander and Ferzan argue that “culpability-based criminal law will not include liability for negligence.”<sup>10</sup> Even among the majority who believe that some forms of negligence ground culpability, there is further debate about which forms of negligence do.<sup>11</sup> Personally, I am sympathetic to the claim that someone can be culpable for committing an offense out of ignorance that results from their failing to take due care to ensure that they do not commit this offense. If that claim is right, then culpably violating the Duty of Due Diligence could make someone culpably negligent for engaging in nonconsensual sex. But I will not insist on this claim, as it is unnecessary for my central argument. Even if it turned out that only knowledge or recklessness are grounds of culpability, someone could still be appropriately punished for knowingly or recklessly failing to carry out the Duty of Due Diligence.

## II. AFFIRMATIVE CONSENT

Let us start by looking more closely at the details of affirmative consent policies, using the previously quoted policy of Yale as our guide. It contains a characteristic feature of an affirmative consent policy, namely that

10. Larry Alexander and Kimberly Ferzan, *Crime and Culpability: A Theory of the Criminal Law* (Cambridge, Cambridge University Press, 2009), at pp. 71, 85. See also Matt King, “The Problem with Negligence,” *Social Theory and Practice* 35 (2009): 577–95.

11. Some hold that negligence is also culpable only when it can be traced back to a prior culpable choice or act. Holly Smith, “Culpable Ignorance,” *Philosophical Review* 92 (1983): 543–71; Michael Zimmerman, “Negligence and Moral Responsibility,” *Nous* 20 (1986): 199–218; Gideon Rosen, “Culpability and Ignorance,” *Proceedings of the Aristotelian Society* 103 (2003): 61–84; Neil Levy, “Culpable Ignorance and Moral Responsibility: A Reply to Fitzpatrick,” *Ethics* 119 (2009): 729–41; Moore and Hurd, “Punishing the Awkward.” Others take a more expansive view of culpable negligence. Victor Tadros, Kenneth Simons, and William Fitzpatrick hold that negligence is also culpable when it results from certain character flaws; H.L.A. Hart and Steven Garvey hold that negligence is also culpable when it results from a failure to exercise a capacity, and Joseph Raz holds that negligence is also culpable when it results from rational malfunctioning. Victor Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005), p. 254; Kenneth Simons, “Punishment and Blame for Culpable Indifference,” *Inquiry* 58 (2014): 143–67; William Fitzpatrick, “Moral Responsibility and Normative Ignorance: Answering a New Skeptical Challenge” *Ethics* 118 (2008): 589–613; H.L.A. Hart, “Negligence, *Mens Rea* and Criminal Responsibility,” in his *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1968); Steven Garvey, “What’s Wrong with Involuntary Manslaughter?” *Texas Law Review* 85 (2006): 333–83; Joseph Raz, “Responsibility and the Negligence Standard,” *Oxford Journal of Legal Studies* 30 (2010): 1–18.

consent cannot be inferred from the mere fact that someone is not expressly refusing sex. (“Consent cannot be inferred from the absence of a ‘no’.”) Instead, someone must actively indicate their willingness to have sex. Yale’s policy is flexible in one respect about the form that this behavior may take, as it flags that the behavior need not be verbal. As a result, body language, gestures, or actions could count as ways by which we communicate consent. That is a sensible feature of the policy, given that we communicate nonverbally in various contexts. We frown to show that we disagree with someone’s proposal, and we shuffle along a public transport seat to indicate that we are happy for another passenger to sit next to us. But there is also a respect in which the policy is demanding: it requires that this communication be clear or unambiguous. So if someone mumbled or if they could reasonably be interpreted in more than one way, then there would be no consent according to the policy.

Affirmative consent policies can be seen as the latest instances of a progressive trend away from the idea that victims have responsibilities to resist sexual assault. Against the historical backdrop of policies that implied that no offence had been committed unless a victim resisted—and policies that recognized an offence only when a victim “resisted to the utmost”—affirmative consent policies take the stance that a victim does not even have to indicate that they are unwilling to have sex. Instead, the default is always that it is impermissible to make sexual contact with someone, unless that person has clearly indicated that it is permissible.

But in trying to protect individuals’ sexual autonomy, affirmative consent policies catch in their wake mutually welcome encounters like the following:

*Unexpressed.* A and B are both willing for B to sexually penetrate A. However, A and B are inexperienced and nervous and so they do not attempt to communicate that they are both willing. While B thinks that, most likely, A is willing for B to penetrate A, B is not fully confident about this. However, B is apprehensive about asking, and worried that doing so will indicate inexperience. Moreover, B assumes that A will expressly refuse if A is unwilling. B penetrates A.

If this interaction occurred on Yale’s campus, then the campus code would imply that B has made sexual contact without A’s consent, even though A was willing for the sexual encounter to take place. Of course, A’s

willingness may make it the case that A is less likely to make a complaint. But if the relationship between A and B took a turn for the worse, then A would be within their rights to make this complaint. Similarly, as Yale's code requires unambiguous communication, it implies that an offence has also been committed in a case like this:

*Ambiguity.* C attempts to communicate that they are willing for D to sexually penetrate C. But because C is inexperienced and nervous, C's attempts to communicate are ambiguous. While D thinks that, most likely, C is willing for D to penetrate C, D is not fully confident about this. However, D is apprehensive about asking, and worried that doing so will indicate inexperience. Moreover, D assumes that C will refuse if C is unwilling. D penetrates C.

As C has failed to communicate unambiguously, Yale's policy implies that D lacks C's sexual consent, despite C having attempted to communicate their willingness for the sexual activity to take place.

These implications call into question affirmative consent policies, as these cases do not seem to involve serious sexual assault. Yet, sexual consent policies' gravitas derives from their role in preventing and sanctioning sexual assaults. A paradigm of such an assault is not exemplified in the *Unexpressed* and *Ambiguity* cases, but in a case like this:

*Unwilling.* E is willing to engage in minor sexual activity with F, but is unwilling for F to penetrate E. But because E is inexperienced and nervous, E does not express to F the types of sexual activity that E is willing to take part in. While F thinks that, most likely, E is willing for F to penetrate E, F is not fully confident about this. However, F is apprehensive about asking, and worried that doing so will indicate inexperience. Moreover, F assumes that E will refuse if E is unwilling. F penetrates E.

In this case, E is subject to sexual penetration against their will. This is a gross violation of their personal autonomy, and will no doubt also be a distressing experience that leads to serious psychological harm.

By contrasting the *Unwilling* case with the *Ambiguity* and *Unexpressed* case, I aim to make a point about which types of sexual offence, if any, have been committed. It is worth stressing that these points do not concern the agent's culpability for their behavior. As the cases are sketched, B, D, and F



all have a similar epistemic situation. As an agent's culpability depends on her epistemic situation, it may be that each agent is culpable to the same degree. But it does not follow that the conduct of each is morally equivalent. F has penetrated E against E's will, while neither B nor D has penetrated anyone against their will. Penetrating someone against their will is a distinctively serious wrong. We would miss this feature if we evaluated each agent's conduct purely from their own evidential situation. This evaluation would miss the differing effects on the victim, and these effects bear on the extent to which the victim is wronged.

So the *Unwilling* case exemplifies the most serious forms of sexual offence. But to sanction a sexual offence in the *Unwilling* case, an affirmative consent policy is not necessary. Because E is not willing for F to penetrate E, we can explain the wrong of F's conduct in terms of E's mental states. For example, the proposed revisions to the Model Penal Code would deem this interaction nonconsensual in light of the absence of E's "willingness to engage in a specific act of sexual penetration or sexual contact."<sup>12</sup> So the worry that affirmative consent policies are overly broad would be compounded by a worry that these policies are unnecessary to sanction serious sexual assaults.

### III. THE DUTY OF DUE DILIGENCE

Even those of us who are broadly supportive of affirmative consent policies should acknowledge a central insight at the heart of this critique: there is a clear moral difference between the *Unexpressed* and *Ambiguity* cases, on the one hand, and the *Unwilling* case, on the other. Whatever we think of B's and D's behavior in the *Unexpressed* and *Ambiguity* cases, F commits a much more serious wrong in the *Unwilling* case. To deny this is to implausibly maintain that the seriousness of a wrong does not depend on the victim's attitudes toward the encounter, the victim's experience during the encounter, and the effects that the encounter has on the victim. We will return to this point later, but for now, let us note that if a wrong has been committed in the *Unexpressed* and *Ambiguity* cases, then it is not the most serious type of sexual offense, and any policy's sanctions should reflect this.

This point is well taken, but it does not by itself show that an affirmative consent policy is unjustifiable on the grounds that the policy sanctions

12. Moringo, "Updated 'Consent' Definition."

morally permissible behavior. There remains the possibility that B and D have still committed a more minor offence.<sup>13</sup> Indeed, I will argue that this is the case.

I suggest that we should be perturbed by how B and D act in these cases—we would hope that no one we cared about acted in this way, or was in the position of A and C, for that matter. When we consider what is awry with each agent's conduct, the natural candidate is that the agent has proceeded without ascertaining that their partner is willing to have sex. While their partner has not clearly indicated that they are willing, the agent does not know that their partner consents. For B or D to know that A and C are willing to engage in sexual activity, A and C would need to express this willingness through behavior. In turn, each consent-receiver's failure to ascertain that their partner is willing suggests that the consent-receiver is not acting in a way that expresses a sufficient concern with whether their partner is willing. If the consent-receiver acted in a way that expressed more concern, then they would have made greater efforts to establish whether their partner is willing to have sex. Following this line of a thought, we should conclude that the consent-receiver has acted impermissibly by failing to express proper concern for the other person's authority over their personal boundaries.

To develop this idea, let us start with the big picture thought that responsible moral agency does not just involve acting in ways that we believe are morally permissible. It also involves aiming at forming accurate beliefs about which actions are morally permissible. This would plausibly involve thinking a priori about what morality requires of us, as well as empirically investigating the effects of our actions. That big picture thought applies to everything we morally ought to do. So if we have a duty to preserve the Great Barrier Reef for the sake of its intrinsic value, then we ought to consider whether our actions contribute to coral-bleaching. This impersonal investigative duty would not be owed to anyone in particular. However, when our actions affect other people, we do not just have

13. This is a point that an advocate of the Behavioral View should agree with. The Behavioral View advocate should hold that in order for A and C to validly consent it must be the case that A and C both decided to permit sexual activity, and that they have expressed this decision. Having taken this position, the Behavioral View advocate is free to hold that it is wrong to engage in sexual activity with someone who has decided to consent without expressing this decision, but it is much worse to engage in sexual activity with someone against their will.

an impersonal investigative duty to discover what we ought to do. We also have specific investigative duties owed to these individuals. If your action might harm Jane or infringe her rights, then you owe it to Jane to gather evidence about whether your action does so. More generally, for every duty we have to respect another person's rights, we have a correlative duty to investigate whether our action would respect their rights. This is not just to say that someone who had failed to carry out these investigations would have a bad character. It is also to say that these investigations are required of them. If they asked us whether to investigate the moral status of their actions, then we would advise them that they ought to do so, and if they seemed reluctant, then we would demand that they did.

We can apply this idea to consent. Suppose an agent is considering whether to perform an action for which they need another person's consent. The agent would have an investigative duty to ascertain whether the other person is consenting. The agent also ought to find out what the other person is consenting to. A plausible ground of this duty is that its breach is a form of disrespect. As Peter Westen puts the point,

Defendants can inflict two kinds of wrongful harms upon victims of offences of non-consent: the primary harm of subjecting them to conduct without their having subjectively and voluntarily chosen it for themselves; and the lesser, dignitary harm of manifesting a *readiness* or *willingness* to subject them to that primary harm.<sup>14</sup>

In this context, a dignitary harm is the harm of being treated disrespectfully—in a way that subjects the victim to an indignity. While Westen focuses on a dignitary harm of manifesting a willingness to subject someone to nonconsensual activity, the dignitary harm would plausibly also be inflicted by an agent who acts as though they are willing to subject this person to nonconsensual activity.<sup>15</sup> Now if an agent fails to investigate properly whether a partner is willing to engage in this activity, then the agent would be acting as though they are willing to subject this person to nonconsensual activity. So this agent would have a duty to investigate, assuming that the agent plans on performing the action for which the consent is required. If instead the agent chooses to walk away and do nothing, then they would

14. Westen, *Logic of Consent*, p. 161.

15. Thanks to an Associate Editor for this point.

have no duty to investigate whether the other person is consenting. So the investigative duty has a disjunctive form: it requires either inaction or investigation. To capture this idea, we should formulate the duty along the following lines:

Duty of Due Diligence

If X needs Y's consent to perform action A, then X has a duty of due diligence owed to Y regarding X's performance of A. X avoids breaching this duty if and only if

Either (i) X refrains from performing A;

Or (ii) X has adequately investigated that Y has decided that they are willing for X to perform A

I include the qualification "regarding X's performance of A" to acknowledge that there may be other ways that X could disrespect Y by failing to take due care toward Y.<sup>16</sup> Perhaps, there is room for further debate about the details of how the principle should be formulated. But the central idea is that for any action for which someone's consent is required, the principle gives the relevant agent a Duty of Due Diligence. The agent breaches this duty by performing the action without having adequately investigated whether the person is willing for them to perform this action.

The phrase "adequately investigated" is deliberately vague, in light of the fact that the appropriate forms of investigation will be context-sensitive. This would depend on whether we are dealing with "low stakes" consent, such as consent to minor uses of each other's property, or "high stakes" consent, such as invasive medical surgery. What counts as adequate investigation would also depend on the costs of investigating. Suppose an agent has good evidence about whether the other person is consenting. If it will be onerous for her to investigate further, then she may count as having adequately investigated the matter. But if further investigation were costless, then the agent would need to carry it out.

16. Thanks to an Associate Editor for pointing out that this qualification is needed because an agent can treat someone disrespectfully by disregarding whether they consent to a possible action, even if the agent does not end up performing the action.

Defenders of the Mental View of consent can posit the Duty of Due Diligence. Like the Behavioral View, the Mental View only concerns what it takes for someone to give valid consent that releases someone from a primary duty not to interfere with another's person or property. By contrast, the Duty of Due Diligence is a secondary duty governing the steps that someone should take to ensure that they are complying with the primary duty. One could hold that valid consent is mental, and still hold that we have a further duty to adequately investigate that the other person has the requisite mental states. Indeed, if anything, positing the Duty of Due Diligence helps the Mental View in the debate with the Behavioral View in the following respect. In that debate, the Behavioral View is sometimes motivated on the grounds that consent must be public to provide the consent-receiver with epistemic access to the consent.<sup>17</sup> But this motivation is undermined by positing the Duty of Due Diligence. If the consent-receiver complied with this duty, then this compliance would improve their epistemic access to the consent. So insofar as we think it a virtue of a set of normative principles governing consent that these principles make it more likely that all parties have common knowledge of whether each is willing to permit an encounter, this can be realized by including the Duty of Due Diligence within this set, without embracing the Behavioral View.

Let me clarify my proposal by comparing it with a different idea. I noted at the outset that in addressing which actions should be prohibited by laws or codes, I am remaining neutral on the controversy over what it takes for someone to be culpable for performing a prohibited action. Engaging in that controversy, some people have argued that if an agent unreasonably believes that their partner consents to sex, then the agent can be appropriately punished for sexual assault. Their proposal is motivated by a concern for cases like *Unwilling*, in which F commits the sexual offence of penetrating E against their will, while believing that E is willing. The proposal would be that if F holds this belief in E's consent negligently, then F is culpable for the sexual offence and may be punished. While this argument resonates with many people's intuitions, it depends on a controversial view of culpability. As we saw, some philosophers deny that negligence is an appropriate ground of culpability for punishment.<sup>18</sup> We need

17. Healey "The Ontology of Consent,"; Dougherty, "Yes Means Yes."

18. In the context of critiquing affirmative consent policies, Ferzan criticizes this proposal at length in her "Consent, Culpability and the Law of Rape."

not take any stance on this controversy when endorsing the Duty of Due Diligence as a duty that we owe to each other. By endorsing this duty, we are taking a stance on when someone has behaved in a morally acceptable way, and when their behavior is morally impermissible. As the permissibility of an action is distinct from the agent's culpability for performing this action, we are not thereby taking a stance on when someone is behavior is culpable. As a result, the Duty of Due Diligence is acceptable even to theorists who take a narrow view of culpability, as grounded only in either knowledge or recklessness.

#### IV. A NEW FOUNDATION FOR AFFIRMATIVE CONSENT POLICIES

Let us take stock. We noted that affirmative consent policies imply that offences have been committed in the *Unexpressed* and *Ambiguity* cases. So we looked for plausible wrongs committed by the relevant agents, and this led us to posit the Duty of Due Diligence. Because these agents infringe that duty, affirmative consent policies would be sanctioning wrongdoers in the *Unexpressed* and *Ambiguity* cases. Does that mean we have reached a normative foundation for these policies?

It does not. Carrying out the Duty of Due Diligence does not require expressive behavior on the part of the consent-giver. Consider the following case:

*Distraction.* Anya emails her friend Brittney to ask if she can borrow Brittney's car for the rest of the day. Brittney thinks that this is fine with her. But before Brittney can write an email in response, she gets distracted by a commotion in her office. While Brittney is attending to the commotion, Camila sneakily writes an email response from Brittney's account, saying that it is fine to use the car, and signs it "Brittney." Anya reads that email and borrows the car.

Brittney has decided to consent to Anya's action. In addition, Anya has carried out her Duty of Due Diligence, by adequately investigating whether Brittney is willing for her to take the car. Anya has a justified belief that Brittney has indicated that she is happy for Anya to use the car. However, Brittney has not indicated that she is willing for Anya to use the car, because she was distracted before she could do so. This shows that a

consent-giver's expressive behavior is not necessary for a consent-receiver to discharge their Duty of Due Diligence.

Even so, this result holds because of special features of the *Distraction* case. This case involves consent to the use of impersonal property. There are at least two distinctive features of this type of consent. First, this is a fairly low-stakes type of consent. Second, a consent-giver may use the property at distance from the consent-receiver. Together, these features make it appropriate for the consent-receiver to investigate the other person's willingness through email. Email's considerable convenience outweighs its slight unreliability. Requiring Anya to visit Brittney at the office or even to give her a call would be over the top. And even those methods might not foil Camila if she were Brittney's identical twin, or able to impersonate Brittney's voice...

Contrast this with sexual consent. In a sexual encounter, an agent is in close proximity to their partner, and so at least typically an agent's adequate investigation could not be complete without their sexual partner engaging in communicative behavior that was clear in the circumstances. Here, it is relevant that sexual consent is a paradigm of high-stakes consent, and this feature increases the investigatory burden on sexual partners to establish each other's willingness to have sex. This burden should be understood in terms of the type of evidence that they are required to seek. The agent would need to have found clear and unambiguous evidence of their partner's willingness to have sex. In addition, as Jennifer Lackey has argued, the agent would need to receive this evidence from first-hand testimony from their partner; relying on third-parties' testimony would be inappropriate, given the stakes involved.<sup>19</sup>

This is not to deny an evidentiary role for background circumstances. After all, every piece of communicative behavior is dependent for its meaning on the context in which it takes place. Even an utterance of "I want to have sex with you right now!" can only express sexual consent because of the background conventions that govern the English language. Moreover, the appropriate interpretation of implicit or nonverbal behavior is sensitive to the relationship between the communicants as well as their prior interactions with each other. For example, if two men have recently met on a smartphone app that is exclusively used for facilitating casual sexual encounters, then that evidence will bear on how to interpret their

19. Jennifer Lackey argues for this claim in her "Sexual Consent and Epistemic Agency," in *Applied Epistemology*, ed. Jennifer Lackey (Oxford University Press) (forthcoming).

subsequent communications with each other. Similarly, if it is “a central tenet of your religion that sex should take place only in the context of a marriage, which you have embraced since childhood, and you frequently speak about how your religious beliefs are central to your identity as a person,” then this would bear on how to interpret whether you are consenting to sex with any particular utterance.<sup>20</sup> In general, discharging one’s Duty of Due Diligence requires taking into account all the available evidence, including background context.

While the importance of sexual consent counts toward increasing the investigatory burden, this burden also has to take into account the costs of investigating. Some critics of affirmative consent policies object that these policies would usher in a drab sexual culture, in which sexual encounters have lost their spontaneity and thrill. The merits of this criticism are debatable, however. On the one hand, these costs seem relatively minor when compared to the costs of mistakes. Moreover, to the extent that someone has competent social skills, and can adeptly interpret and signal verbal and nonverbal cues, this person will be able to find out whether their partner is willing to have sex with them, without ruining the moment. The costs of awkwardness are born by those who have not developed these social skills, yet it is precisely these people who are most at risk of making mistakes about whether their partners are consenting. For them, there is more to be said for erring on the side of caution rather than excitement (and we might speculate that novices’ sexual encounters are often going to involve a certain amount of awkwardness anyway). As such, concerns about unexciting sexual encounters give us little reason to deny that adequate investigation would involve taking reasonable steps to assure oneself to a high degree that one’s sexual partner is consenting.

What this suggests is that much of the time an assumption like the following would hold:

*Investigation/Expression Assumption.* When engaging in a sexual encounter, a consent-receiver discharges their duty of due diligence only if the consent-giver has positively and unambiguously indicated that they agree to engage in this encounter throughout its duration. A consent-receiver has not adequately investigated this agreement if they are relying only on an absence of a “no.”

20. Lackey, “Sexual Consent.”



That assumption is deliberately formulated in the language of Yale University's policy to show how the assumption, in combination with the Duty of Due Diligence, would ensure that the policy only prohibited wrongful behavior.

#### V. TWO REVISIONS TO AFFIRMATIVE CONSENT POLICIES

The foregoing constitutes a defense for implementing affirmative consent policies like Yale's in cases where the Investigation/Expression Assumption holds. But our discussion suggests two possible revisions that we might like to make to these policies.

The first possible revision concerns the fact that it is questionable whether the Investigation/Expression Assumption does hold universally. The most plausible counterexamples are sexual encounters within the context of established long-term relationships. Suppose, two spouses have negotiated an understanding that one person will explicitly object to sexual contact if they are unwilling to engage in it. This person is an assertive and confident member of groups that are privileged in terms of social power, and there is a solid bedrock of trust between the spouses. Would their partner be carrying out their Duty of Due Diligence by being guided by their omitting to articulate an unwillingness to engage in sex? We might be in two minds about this question. On the one hand, we might feel some pull toward thinking that as there is a chance that any agent is uncharacteristically reticent, their partner's due diligence always requires looking for unambiguous behavior that indicates their willingness to engage in a specific encounter. That thought would lead to discomfort with the idea that one can ever responsibly infer this willingness from an omission. On the other hand, there is a countervailing pull toward thinking that there are versions of this case in which the partner could know what this person was thinking in light of their omission. But if it really is true that they *know* that their sexual partner is willing to permit and engage in the sexual encounter, then it would seem that no further investigation is required.

Let us suppose for the sake of argument that in cases like these, one partner could know of the other's willingness because of their omission. This creates a problem for appealing to the Duty of Due Diligence to support an affirmative consent policy like Yale's. As Yale's policy does not recognize omission as constituting communication, and the policy is part of a general code that applies to sex within established relationships as well as

casual hook-ups, the policy would prohibit the encounter if it happened on campus. If the encounter is not wrong, then the policy looks overly broad. Here is one way to narrow it. The policy could define consent as follows:

Sexual activity requires consent, which is defined as unambiguous and voluntary agreement to engage in specific sexual activity throughout a sexual encounter.

Then, the policy could add the following guidance on how to interpret the definition when applying it in practice:

In nearly all cases—including all sexual activity between individuals who are not regular sexual partners, and all sexual activity between individuals who are partially intoxicated—this willingness cannot be inferred from the absence of a “no”; a clear “yes,” verbal or otherwise, is necessary.

As consent is defined in terms of unambiguous agreement, this definition allows that the married couple can consent in virtue of an omission, so long as in the circumstances that omission constitutes unambiguous agreement to engage in sex. Still, if a policy used this definition to prohibit nonconsensual sexual activity, then the policy would be restrictive enough to penalize individuals who relied on inadequate evidence. Further, the guidance explicitly states that relying on an absence of refusal is insufficient in casual hook-ups—the types of interaction that concern proponents of affirmative consent policies.

The second possible revision concerns the language with which the policy is phrased. Extant affirmative consent policies frame sexual offences in terms of the absence of affirmative consent. But if a campus code aims to sanction people who depart from the Duty of Due Diligence, then the code could simply codify that duty itself:

SEXUAL ACTIVITY WITHOUT DUE CARE. An actor is guilty of “sexual activity without due care,” if the actor knowingly engages in sexual activity with someone, without adequately investigating that this person is willing to engage in this sexual activity. The actor’s investigation is adequate only when it is unambiguous that this person agrees to engage in this specific sexual activity.

Again, this definition can be supplemented with guidance:

In nearly all cases—including all sexual activity between individuals who are not regular sexual partners, and all sexual activity between individuals who are partially intoxicated—this agreement cannot be inferred from the absence of a “no”; a clear “yes,” verbal or otherwise, is necessary.<sup>21</sup>

As that offense does not mention sexual consent, the policy would be reframing an affirmative consent policy as a policy requiring due care in sexual relations.

At this point, someone might object that we are no longer defending affirmative consent policies: we have simply changed the subject, and we are now proposing alternative policies that sanction a lack of due care in sexual relations. In response to this objection, I agree that a switch to *SEXUAL ACTIVITY WITHOUT DUE CARE* would at least amount to reframing extant affirmative consent policies. All the same, there remain important similarities in terms of the type of conduct required by the extant and revised policies. Like Yale University’s policy, *SEXUAL ACTIVITY WITHOUT DUE CARE* requires that it must be unambiguous that one’s partner agrees to engage in sexual activity. Also, the guidance makes clear that this at least typically requires a clear “yes,” verbal or otherwise. Do these similarities mean that we continue to categorize *SEXUAL ACTIVITY WITHOUT DUE CARE* as an “affirmative consent policy”? Or do the dissimilarities mean that we should consider it only a descendant of affirmative consent policies? I find it hard to believe that much hangs on which answer we give. The key substantive question is how to frame a sexual offence policy so that it prohibits

21. It has been suggested to me that we might prefer a policy prohibiting sexual activity without due care to a policy prohibiting sexual activity without affirmative consent on the grounds that the former policy might lead to better investigative practices. It might lead the adjudication of complaints to focus on the conduct of the person accused of the offence. (What did they do to investigate?) Meanwhile, an affirmative consent policy might lead investigators to focus on the conduct of the complainant. (Did the complainant clearly communicate?) This would be a welcome consequence, as we should minimize how distressing investigations are for victims of sexual offences. But it is not clear from the armchair which investigatory practices would emerge from the implementation of either rule, and it is hard to believe that under either policy, a complainant would entirely escape the need to provide evidence.

behavior that is morally wrong. In response to that question, I am offering SEXUAL ACTIVITY WITHOUT DUE CARE as a candidate for a policy that can be defended on the grounds that it prohibits behavior that is morally wrong in virtue of violating the Duty of Due Diligence.

#### VI. DIFFERENTIATING SEXUAL OFFENCES

To complete our discussion, we should turn to a topic that we have not yet addressed—the appropriate penalties for violating offences. A defensible sexual offence policy must sanction an offence with punishment that is proportionate to the gravity of the offence. Here, we should recall our earlier point that the misconduct in cases like *Ambiguity* and *Unexpressed* is significantly less serious than the misconduct in a case like *Unwilling*. Even if someone is wronged by their partner failing to adequately investigate their willingness to engage in sexual activity, they would be much more gravely wronged by sexual activity that was against their will. Accordingly, the sanction for sexual activity without carrying out due diligence would have to be significantly more lenient than the sanction for imposing sexual activity on someone against their will.

This means that an appropriately nuanced sexual offence policy cannot contain only one offence.<sup>22</sup> Instead, it must recognize important gradations in sexual misconduct. I suggest that a policy should posit a “greater offence” of engaging in sexual activity against another person’s will. But it should also posit a “lesser offence” of engaging in sexual activity without one’s partner unambiguously indicating their willingness. How we view each offence will depend on which position we take in the debate between the Mental View and the Behavioral View. If we adopt the Mental View, then we will consider the greater offence as the offence of imposing non-consensual sex, and we will consider the lesser offence as a separate offence, for example, SEXUAL ACTIVITY WITHOUT DUE CARE. Meanwhile, if we adopt the Behavioral View, then we will consider the lesser offence as the offence of imposing nonconsensual sex. But even so, we should still consider the greater offence as a more serious offence for example,

22. A related problem with a single offence is that it is likely either to over-punish some offenders or under-punish other offenders. See Ferzan, “Consent, Culpability and the Law of Rape,” pp. 433–5.

“aggravated non-consensual sexual activity” or “sexual activity against someone’s will.”<sup>23</sup> These points notwithstanding, it should be common ground between the Behavioral View and the Mental View that a policy should distinguish at least two offences that are sanctioned with different amounts of punishment.

Once these offences are distinguished, we should acknowledge that there are various ways that offenders could be punished. First, an offender’s behavior could comprise the lesser offence, without comprising the greater offence. That is the lesson we learn from considering cases like *Ambiguity* and *Unexpressed*, in which both partners willingly engage in sexual activity, without adequately communicating their willingness. Second, even if an offender’s behavior constitutes both offences, it is a further question whether the offender is culpable for each offence. Importantly, it may be that the offender is not culpable in the same way for each offence. Suppose the offender knows that their partner has not clearly communicated their willingness to engage in sexual activity, and consequently is aware that there is a significant risk that their partner is unwilling to engage in this activity. The offender would be culpable for the lesser offence in virtue of *knowingly* committing this offence but would be culpable for the greater offence in virtue of *recklessly* committing that offence.

What about someone who commits the greater offence of having sex with someone against their will, but does so negligently? In particular, what is the appropriate punishment for someone who mistakenly believes that their partner consents as the result of culpably failing to carry out their Duty of Due Diligence? Our answer will depend on where we stand in the debate I bracketed at the outset concerning when, if ever, negligence is a ground of culpability. Some people deny that negligence is ever a ground of culpability. They will say that the negligent offender cannot be appropriately punished for the greater offence of having sex against someone’s will, although they can be appropriately punished for the lesser offence of having sex with someone who has not unambiguously indicated their willingness to have sex. Others think that negligence can be grounds for punishment when the negligence can be traced to a previous moral failure for which the agent is culpable. Along these lines, consider the following principle:

23. Plausibly, there are other aggravating conditions. For example, the proposed revisions to the Model Penal Code include a more serious offence of “aggravated rape” which is committed when for example, a lethal weapon is used to coerce.

PROTECTIVE DUTY NEGLIGENCE. If a duty, D, has the purpose of providing an actor with information that would prevent the actor from inadvertently committing a wrong, W, then the actor is negligently culpable for committing W as the result of ignorance that resulted from the actor culpably breaching D.

This principle applies to an agent who is culpable for failing to follow the precautionary rule, for example, because the agent knowingly or recklessly failed to follow the rule.<sup>24</sup> The principle states that this agent thereby becomes culpably negligent for unwittingly committing the wrong that the rule aims to prevent. The rationale would be that by culpably disregarding the precautionary rule for avoiding ignorance, the actor would assume responsibility for mishaps that resulted from their ignorance. Plausibly, the actor would be less culpable for the wrong than they would be were they acting recklessly, by advertently posing a risk of committing the wrong.<sup>25</sup> If so, the actor may be punished less for negligently committing the wrong than for doing so recklessly. This strikes me as a plausible view of culpable negligence. But it is not universally shared and I will not argue for it here.<sup>26</sup> Instead, I will merely point out how this principle bears on our topic of culpability for the aforementioned greater and lesser sexual offences. The principle would imply that someone could be culpably negligent for the greater offence of sex against someone's will in virtue of knowingly or recklessly committing the lesser offence of sex with someone who has not unambiguously indicated that they are willing to have sex.

24. In theory, it might be possible that an actor is negligently culpable for failing to follow a precautionary rule in virtue of culpably failing to follow yet another precautionary rule, but it is hard to imagine this circumstance arising.

25. Holly Smith argues that this is a general feature of culpability, and Kenneth Simons notes that in the Model Penal Code “[n]egligent homicide is the lowest level of homicide, below reckless manslaughter, which is below murder (requiring purpose, knowledge, or extreme indifference).” Holly Smith, “Negligence,” in *The International Encyclopedia of Ethics*, ed. Hugh LaFollette (Oxford: Wiley-Blackwell, 2013), pp. 3565–3571. Simons, “When is Negligent Inadvertence Culpable?” at p. 108.

26. Endorsing a similar view of culpability, Moore and Hurd note the worry that substituting culpability for knowing violating a rule for culpability for a different offence “smacks of strict liability, for it substitutes for a serious mental state (the contemplation that one will cause death) a potentially less culpable mental state (the contemplation that one's conduct violates a rule).” Moore and Hurd, “Punishing the Awkward,” pp. 186–91. Ferzan pursues this line of objection against negligence-based rationales for affirmative consent policies. Ferzan, “Culpability, Consent and the Law of Rape,” p. 424.

This completes our discussion of issues of substance. I will end by considering a terminological question concerning how to use the word “consent.” This issue is simple for proponents of the Mental View—they should use “consent” only to pick out a certain mental attitude. But our discussion implies that the terminological issue is more nuanced for the Behavioral View. While cases like *Unexpressed* and *Ambiguity* involve sexual misconduct, this misconduct is not among the most serious sexual offences. (In particular, it is less serious than sexual activity against someone’s will, as exemplified by the *Unwilling* case.) This means that if a Behavioral View proponent adopts a single definition of consent as affirmative consent, then they cannot say that nonconsensual sexual activity is sufficient for the most serious type of sexual offence. To avoid this result, I suggest that proponents of the Behavioral View do not talk simply about consent, but instead talk both of mental consent and affirmative consent. They could then say that engaging in sexual activity without affirmative consent is sufficient for committing a sexual offence but engaging in sexual activity without mental consent is sufficient for committing a particularly serious type of sexual offence.