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All Rape is Not Created Equal: A Cure for the Ambiguity of Consent in Louisiana's Third-Degree Rape Statute

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INTRODUCTION

“His life will never be the one that he dreamed about and worked so hard to achieve. . . . That is a steep price to pay for 20 minutes of action

out of his 20 plus years of life.”¹ So Dan Turner argued as to why his son, Brock Turner, should receive probation instead of jail time for a brutal sexual assault that left the victim hospitalized in January 2016.² Dan Turner’s letter caused significant outrage at the “lack of self-awareness” and “tone-deafness” expressed throughout his plea.³ But the plea worked.⁴ Brock Turner received only six months in jail and three years of probation⁵ after a judge worried a stiffer sentence would have a “severe impact” on him.⁶

Just a year after his release, Brock Turner is already a textbook case of how the criminal justice system fails sexual assault victims.⁷ In the second edition of Callie Marie Richardson’s *Introduction to Criminal Justice*, a photo of Turner appears next to the definition of rape with a caption that reads:

Brock Turner, a Stanford student who raped and assaulted an

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1. Michael E. Miller, ‘A steep price to pay for 20 minutes of action’: Dad defends Stanford sex offender, WASH. POST (June 6, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/06/06/a-steep-price-to-pay-for-20-minutes-of-action-dad-defends-stanford-sex-offender/?utm_term=.ff8f238296fc [https://perma.cc/XYF3-B6GX] (internal quotation marks omitted).

2. *Id.*

3. See, e.g., *id.*; Emma Gray, *This Letter From The Stanford Sex Offender’s Dad Epitomizes Rape Culture*, HUFFINGTON POST (June 6, 2016, 1:07 PM), https://www.huffingtonpost.com/entry/brock-turner-dad-letter-is-rape-culture-in-a-nutshell_us_57555bace4b0ed593f14cb30 [https://perma.cc/3D5T-GUHD]; Suzannah Weiss, *Brock Turner’s Dad’s Statement Is Exactly What Rape Culture Looks Like*, BUSTLE (June 6, 2016), <https://www.bustle.com/articles/165050-brock-turners-dads-statement-is-exactly-what-rape-culture-looks-like> [https://perma.cc/H2GV-E7HG]; Rachel Paula Abrahamson, *Outraged Dad Responds to Stanford Rapist’s Father in Powerful Open Letter: ‘Brock Is Not the Victim Here’*, US WEEKLY (June 9, 2016), <https://www.usmagazine.com/celebrity-news/news/outraged-dad-responds-to-stanford-rapists-father-in-powerful-letter-w209565/> [https://perma.cc/55XP-DX PT].

4. Miller, *supra* note 1.

5. The jury convicted Turner on three counts: (1) assault with intent to commit rape of an intoxicated or unconscious person; (2) sexual penetration when the victim was intoxicated; and (3) sexual penetration where the victim was unconscious of the nature of the act. See *People v. Turner*, No. B1577162, 2016 WL 3442307 (Cal. Super. May 30, 2016).

6. Miller, *supra* note 1.

7. Kris Seavers, *Brock Turner is ‘the definition of rape’ in this criminal justice textbook*, DAILY DOT (Sept. 12, 11:14 AM), <https://www.dailydot.com/irl/brock-turner-already-textbook-case-criminal-justice-system-fails-rape-survivors/> [https://perma.cc/8NTS-P8NZ].

unconscious female college student behind a dumpster at a fraternity party, was recently released from jail after serving only three months. Some are shocked at how short this sentence is. Others who are more familiar with the way sexual violence has been handled in the criminal justice system are shocked that he was found guilty and served any time at all.⁸

In addition to addressing public outrage over the short prison sentence, Turner's inclusion in the textbook asserts that Brock Turner is the definition of rape; in other words, Brock Turner's brutal sexual violence is the standard definition of rape offenses.⁹ One of the major issues with narrowly defining rape as brutal sexual violence is the definition's eclipse of the wider category of nonviolent sexual assault. Although the Turner case represents a horrific miscarriage of justice, it nonetheless confronts society with important questions: what qualifies as sexual assault? How should the law develop to create a modern regime governing one of the most sickening and painful forms of violence?¹⁰

In Louisiana, the law governing third-degree rape does not lessen the disparity between brutal sexual violence and nonviolent sexual assault.¹¹ Louisiana Revised Statutes § 14:43 defines third-degree rape as sex without the victim's consent.¹² The statute does not define consent or provide adequate guidance for individuals contemplating sexual conduct to be sure of compliance with the statute, or for law enforcement charged with investigating guilt or innocence to clearly determine probable cause.¹³ Inevitably, many third-degree rape cases go before a factfinder who must

8. *Id.* Rennison explained that her textbook attempted to change the dialogue about victims of crime as well as its perpetrators within the criminal justice community. See John Merritt, *Callie Rennison Receives National Victimology Award*, VIEWS FROM WEST: CU DENVER SCH. PUB. AFF. (Nov. 15, 2016), <https://spaviews.ucdenver.edu/2016/11/15/callie-rennison-receives-national-victimology-award/> [<https://perma.cc/2SPR-4BZ3>] ("Existing criminal justice books have focused on three elements: cops, courts, and corrections. They speak little about victims, reflecting how they have effectively been in the shadows of our criminal justice system.").

9. Seavers, *supra* note 7.

10. Miller, *supra* note 1.

11. See LA. REV. STAT. § 14:43 (2018).

12. *Id.* ("Third-degree rape is rape committed when the anal, oral, or vagina sexual intercourse is deemed to be without the lawful consent of a victim because it is committed under any one or more of the following circumstances . . . [w]hen the offender acts without the consent of the victim.").

13. *Id.*

determine whether the parties consented.¹⁴ In third-degree rape cases, the factfinder attempts to determine whether consent was given by adopting a “totality of the circumstances” approach and deciding if the circumstances of the alleged crime lead to the “reasonable” inference that consent was present beyond a reasonable doubt.¹⁵ Because of mass confusion about the meaning of consent¹⁶ and inherent jury bias stemming from an exposure to rape culture,¹⁷ the formation of a personal standard for every factfinder results in inequitable and inconsistent results throughout Louisiana courtrooms.¹⁸

The solution to the ambiguity of the meaning of consent in Louisiana Revised Statutes § 14:43 is to adopt a legislative “affirmative consent” standard.¹⁹ When third-degree rape cases are brought to trial and consent is ambiguous, the factfinder should apply the affirmative consent standard in light of the “reasonableness” principle established by *State in the Interest of M.T.S.*: a leading case in rape law reform.²⁰

Part I of this Comment discusses the recent shift in rape law from a narrow definition—that only a forcible component satisfies—to a more expansive affirmative permission scheme. Part I also addresses the development of Louisiana’s current third-degree rape regime and introduces the expansion of the “consent clause.” Part II analyzes the ambiguity in Louisiana’s third-degree rape law and examines how consent is defined in Louisiana’s courtrooms. Part III highlights the need for a clear definition of “consent” by addressing the prominence of sexual assault in modern culture and on Louisiana college campuses. Part IV proposes a

14. Interview with Angel Monistere, Assistant District Attorney, 21st Judicial District Attorney’s Office, in Amite, La. (Sept. 22, 2017).

15. *Id.*

16. Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 417 (2016) (providing that there are a variety of views on what equals consent, ranging from mental willingness to an enthusiastic “yes”).

17. Meagen M. Hildebrand & Cynthia J. Najdowski, *The Potential Impact of Rape Culture on Juror Decision Making: Implications for Wrongful Acquittals in Sexual Assault Trials*, 78 ALB. L. REV. 1059, 1061 (2015) (providing that rape culture negatively impacts juror decision making in sexual assault trials by not only increasing the likelihood that jurors will endorse erroneous beliefs about rape and sexually objectify women, but also by non-consciously influencing the types of evidence jurors attend to and the extent to which they blame the parties involved).

18. Interview with Angel Monistere, *supra* note 14.

19. “Affirmative consent” requires an affirmative and voluntary agreement to engage in sexual activity from a fully capacitated conscious person. *See infra* Part IV.A.

20. *See generally* *State in the Interest of M.T.S.*, 609 A.2d 1266 (N.J. 1992).

clear legislative standard for affirmative consent in Louisiana that responds to the needs of the criminal justice system. Part IV also responds to common criticisms of the affirmative consent movement and raises the possibility of unconstitutional vagueness in Louisiana Revised Statutes § 14:43's "consent clause." Part V proposes a method for resolving circumstantial ambiguity that may remain even with the adoption of an affirmative consent standard—the canon of judicial interpretation of "reasonableness." This Comment concludes by illustrating three aims the "affirmative consent" standard achieves: (1) providing adequate notice as to what constitutes sexual assault; (2) providing guidance to law enforcement charged with determining whether probable cause for culpability to the commission of sexual assault exists; and (3) providing justice to victims of sexual assault and individuals falsely accused of sexual assault.

I. THE CHANGE THAT HINDERED, RATHER THAN HELPED

Traditionally, what rape scholar Susan Estrich described as "boys' rules" defined American rape laws.²¹ Although legislatures have not eradicated the inevitable gender-based inequities in the law that grew from "boys' rules" everywhere, rape law has undergone significant reform in the past few decades, leading to a more modern—and less biased—approach.²²

A. From Tradition to Modernity: Rape Law Through Time

Until recent years, state laws often stacked the law against women who asserted they had been raped.²³ Blackstone, one of the preeminent legal authorities, defined rape as "carnal knowledge of a woman *forcibly* and against her will."²⁴ Thus, sexual intercourse without the consent of the

21. Susan Estrich, *REAL RAPE* 60 (1987). One need not agree with the view that rape law was devised for the misogynistic purpose of "embodying and ensuring male control over women's sexuality" to agree with the assertion that the common law approach to rape was male-centered. Joshua Dressler, *Where We Have Been, And Where We Might Be Going: Some Cautionary Reflections On Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 410 (1998). After all, the law of rape developed during a time when women played no role in legal affairs, even as to offenses that affected them intimately. *Id.*

22. Dressler, *supra* note 21.

23. *Id.* at 415.

24. *Id.* at 416.

victim did not constitute rape unless the intercourse was forcible.²⁵ The force requirement led to an “odd and dangerous principle”—the resistance requirement.²⁶ A woman had to physically resist her attacker, often “to the utmost”; otherwise, a rape conviction would fail.²⁷ The resistance requirement enhanced the possibility that the male aggressor would escalate his violence to overcome the victim’s resistance and, in the process, aggravate the victim’s physical injuries.²⁸ Thus, the traditional definition of rape was exceedingly narrow, and the resistance requirement heightened the risk of serious harm to the victim.²⁹

In many jurisdictions, substantive rape law has evolved from Blackstone’s definition.³⁰ While some of the changes are positive, some ambiguous developments are troubling.³¹ The primary change in forcible rape law pertains to the resistance required to overcome the requisite force.³² Some states abolished the resistance requirement completely.³³ Other states no longer require the woman to resist “to the utmost,” and instead only demand that resistance be reasonable under the circumstances.³⁴ Perhaps the most significant change in judicial attitudes concerning forcible rape is the finding of rape in more ambiguous circumstances that extend beyond brutal sexual violence.³⁵

Some states are taking rape reform to an elevated level, eradicating the requirement of force through statutory construction or interpretation.³⁶ In *State in the Interest of M.T.S.*, the court convicted a defendant in New Jersey of forcible rape under a statute that required sexual penetration resulting from “physical force or coercion.”³⁷ Although no party alleged coercion or violence regarding intercourse, the court found that the defendant had used enough physical force to engage in intercourse, thereby committing rape.³⁸ What differentiates rape, then, from consensual

25. *Id.* at 417.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 418.

30. *Id.* at 418–19.

31. *Id.*

32. *Id.*

33. *Id.* at 419.

34. *Id.* Even where resistance is only required to be reasonable, a woman is still not required to resist if the male uses or threatens to use serious force. *Id.*

35. *Id.* at 419. *See also* *State v. Rusk*, 406 A.2d 624 (Md. Ct. Spec. App. 1979), *rev’d*, 424 A.2d 720 (Md. 1981).

36. Dressler, *supra* note 21, at 421.

37. *State in the Interest of M.T.S.*, 609 A.2d 1266, 1269 (N.J. 1992).

38. *Id.* at 1277.

sex is just that—consent—or more so, “affirmative and freely-given permission . . . to the specific act of penetration.”³⁹ Thus, the New Jersey Supreme Court birthed the “affirmative consent” standard that fueled the fire of rape law reform,⁴⁰ and although slowly walking the reformative road, Louisiana sexual assault laws have stumbled behind states engaged in progressive reform.⁴¹

B. The Expansion and Modernization of Louisiana Revised Statutes § 14:43 Through the “Consent Clause”

In 2015, the Louisiana Legislature standardized rape laws to mirror those of other state and federal rape statutes.⁴² Governor Bobby Jindal signed legislation into effect that changed the terminology associated with Louisiana’s rape statutes: “aggravated rape” became “first-degree rape”; “forcible rape” became “second-degree rape”; and “simple rape” became “third-degree rape.”⁴³

Louisiana Revised Statutes § 14:42 defines first-degree rape as sexual intercourse without the lawful consent of the victim only when certain conditions are met.⁴⁴ The circumstances that vitiate consent include when the victim resists to the utmost but is overcome by force and when the offender is armed with a dangerous weapon.⁴⁵ Louisiana Revised Statutes § 14:42.1 defines second-degree rape in a similar fashion: intercourse

39. Dressler, *supra* note 21, at 421.

40. *Id.*

41. See CAL. PENAL CODE §§ 261–69 (West 2017); 18 PA. STAT. AND CONS. STAT. ANN. §§ 3121–26 (West 2017); VA. CODE ANN. §§ 18.2-61 to 18.2-67.5 (West 2017); N.Y. PENAL LAW §§ 130.25–130.70 (McKinney 2017); N.C. GEN. CODE ANN. §§ 14-27.20 to 14-27.27 (West 2017) (listing states engaged in more progressive rape reform law).

42. Emily Lane, ‘Nothing Simple About Rape’: Bill Changes Terminology in Louisiana’s Rape Laws, TIMES-PICAYUNE (June 1, 2015, 5:47 PM), http://www.nola.com/politics/index.ssf/2015/06/simple_rape_louisiana_law_term.html [<https://perma.cc/4F9G-GVPY>].

43. *Id.*

44. LA. REV. STAT. § 14:42(A) (2018).

45. *Id.* Circumstances under which consent to intercourse is not present include: (1) when the victim resists the act to the utmost but the resistance is overcome by force; (2) when the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution; and (3) when the victim is prevented from resisting the act because the offender is armed with a dangerous weapon. *Id.* § 14:42(A)(1)–(3).

without the lawful consent of the victim only when certain conditions—less violent than those required for first-degree rape—are satisfied.⁴⁶

Prior to legislative reform, Louisiana's third-degree rape statute⁴⁷ mirrored the pattern of defining sexual consent solely in the negative.⁴⁸ Pre-revision Louisiana Revised Statutes § 14:43 defined third-degree rape as intercourse without the consent of the victim when committed *only under* certain conditions listed in the statute.⁴⁹ Consent was not present when the victim was incapable of resisting or unable to understand the nature of the act by reason of an abnormal condition of mind, and the offender knew or should have known of the victim's incapacity.⁵⁰ Furthermore, consent was not present when a *female* victim submitted under the belief that the person committing the act was her husband, and the offender's artifice, pretense, or concealment intentionally induced such belief.⁵¹

In 2015, a legislative revision expanded the substance of Louisiana Revised Statutes § 14:43.⁵² The revision added a circumstance under which third-degree rape occurs that the legislature did not recognize until 2010.⁵³ In addition to the preexisting conditions that vitiate consent, third-degree rape now occurs when sexual intercourse is committed without the lawful consent of the victim because it is committed "when the offender acts without the consent of the victim."⁵⁴ In other words, instead of being defined *only* by conditions that also must be present to vitiate consent, third-degree rape is *simply* intercourse without consent.⁵⁵ Although circular and initially confounding, this "consent clause" appears to act as an umbrella to

46. *Id.* § 14:42.1(A). Circumstances under which consent to intercourse is not present include: (1) when the victim is prevented from resisting the act by force or threats of physical violence under circumstances where the victim reasonably believes that such resistance would not prevent the rape; and (2) when the victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by a narcotic or anesthetic agent or other controlled dangerous substance administered by the offender and without the knowledge of the victim. *Id.* § 14:42.1(A)(1)–(2).

47. *Id.* § 14:43(A) (2010).

48. *Id.*

49. *Id.*

50. *Id.* § 14:43(A)(1) (2010).

51. *Id.* § 14:43(A)(3).

52. *Compare id.* § 14:43 (2010), with *id.* § 14:43 (2015).

53. *See id.*

54. *Id.* § 14:43(A)(4) (2018).

55. *Id.*

catch cases of nonconsensual sex that did not fit squarely within one of the preexisting circumstances expressly negating sexual consent.⁵⁶

Although the “consent clause” attempts to catch cases of rape that do not fit within the traditional framework established prior to the 2015 legislative revision, the “consent clause” presents an incongruous problem.⁵⁷ Despite the added requirement of unfettered consent, the simple nature of Louisiana Revised Statutes § 14:43’s “consent clause” creates significant ambiguity regarding how to determine consent—as the statute provides no definition, explanation, or standard—leading to significant inconsistencies in the law’s interpretation and application.⁵⁸

II. LOUISIANA’S LACK OF STANDARDIZED CONSENT FOR THIRD-DEGREE RAPE

Contrary to multiple states that statutorily define sexual consent in a clear fashion,⁵⁹ Louisiana lacks an explicit definition for sexual consent or how a court should determine it.⁶⁰ In fact, no definition of “consent” exists *anywhere* in the Louisiana Criminal Code.⁶¹

A. *The Ambiguous Consent Clause and the Troubles It Brings*

Louisiana’s lack of a definition for sexual consent stands in stark contrast with other states.⁶² California defines consent as “positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.”⁶³ Montana defines sexual consent as “words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact,” and other qualifiers further define but do

56. *Id.*

57. *Id.*

58. *Id.* § 14:43; *see also* Doe v. State, 623 So. 2d 72 (La. Ct. App. 1993); L.K. v. Reed, 631 So. 2d 604 (La. Ct. App. 1994); Penny v. State, 702 So. 2d 1173 (La. Ct. App. 1997).

59. *See, e.g.*, CAL. PENAL CODE § 261.6 (West 2017); MON. CODE ANN. § 45-5-501 (West 2017); OKL. STAT. ANN. § 113 (West 2017); WIS. STAT. ANN. § 940.225 (West 2017).

60. *See* LA. REV. STAT. § 14:43.

61. *See generally* LA. CRIM. CODE.

62. *See, e.g.*, CAL. PENAL CODE § 261.6; MON. CODE ANN. § 45-5-501; OKL. STAT. ANN. § 113; WIS. STAT. ANN. § 940.225.

63. CAL. PENAL CODE § 261.6.

not limit it.⁶⁴ Wisconsin defines sexual consent⁶⁵ as “words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.”⁶⁶ Oklahoma also provides a brief statutory definition of sexual consent, in that consent requires “the affirmative, unambiguous and voluntary agreement to engage in a specific sexual activity during a sexual encounter which can be revoked at any time.”⁶⁷ As opposed to Louisiana law, which provides no definition of consent, these laws provide standards to determine whether a sexual act is consensual.⁶⁸

In the absence of a statutory definition of sexual consent in Louisiana, civil jurisprudence sheds light on the meaning of the term.⁶⁹ In *Doe v. State*,⁷⁰ the Louisiana First Circuit Court of Appeal identified one factor that vitiates consent.⁷¹ In *Doe*, a mother sued the State of Louisiana, an employee of a state school, and the employee’s insurers for damages arising out of the alleged molestation of a mentally handicapped adult

64. MON. CODE ANN. § 45-5-501. Other qualifiers defining consent include: (1) an expression of lack of consent through words or conduct means there is no consent or that consent has been withdrawn; (2) a current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent; and (3) lack of consent may be inferred based on all of the surrounding circumstances and must be considered in determining whether a person gave consent. *Id.*

65. 2017 Wisconsin Assembly Bill No. 425 proposed legislation to be considered during the 2017–2018 Regular Session modifying the definition of “consent” for sexual assault. 2017 Wisconsin Assembly Bill No. 425, Wisconsin One Hundred Third Legislature–2017–2018 Regular Session, 2017 WI A.B. 425 (NS). Under the Bill, if an actor removes a sexually protective device, such as a condom before or during sexual intercourse or other sexual contact without his or her partner’s permission, there has been no valid consent to the sexual act. *Id.* The Bill ultimately failed. *Id.*

66. WIS. STAT. ANN. § 940.225.

67. OKL. STAT. ANN. § 113.

68. See, e.g., CAL. PENAL CODE § 261.6; MON. CODE ANN. § 45-5-501; OKL. STAT. ANN. § 113; WIS. STAT. ANN. § 940.225.

69. See, e.g., *Doe v. State*, 623 So. 2d 72 (La. Ct. App. 1993); *L.K. v. Reed*, 631 So. 2d 604 (La. Ct. App. 1994); *Penny v. State*, 702 So. 2d 1173 (La. Ct. App. 1997). Because of the lack of reported rapes and the gray area in which the reported cases fall, most third-degree rape cases in which the issue is solely whether consent existed absent any other telling circumstances rarely rise through the criminal court docket on appeal. Interview with Angel Monistere, *supra* note 14.

70. See generally *Doe v. State*, Dep’t of Health & Human Res., 623 So. 2d 72 (La. Ct. App. 1993).

71. *Id.* at 72.

student.⁷² The court found that having a mental age of approximately 6–7 years voided consensual capacity, even though the victim was approximately 29 years old at the time of the offense.⁷³ One year later, Louisiana’s Third Circuit Court of Appeal rendered a similar verdict, upholding the absence of sexual consent in the civil action, *L.K. v. Reed*.⁷⁴ The trial court determined that a 13-year-old special education student consented to sexual intercourse with an 18-year-old special education student; however, her consent was meaningless given her legal status as a minor.⁷⁵ The Third Circuit disagreed, ruling that age alone cannot fully invalidate consent to sexual intercourse; instead, the court rendered the child’s consent meaningless from a legal standpoint because of her family stress, age, intellect, and social skills.⁷⁶

Four years after *Doe*, in *Penny v. State*,⁷⁷ the plaintiff alleged that while she was a prison inmate, a maintenance employee raped and impregnated her.⁷⁸ Over the course of the proceedings, the parties stipulated that the employee “never physically or verbally threatened, coerced, forced, or intimidated [the plaintiff] into any sexual relationship.”⁷⁹ Furthermore, the plaintiff was aware that the employee had no power to change any condition of her incarceration.⁸⁰ The plaintiff argued that the circumstances of her imprisonment, the prison environment, and the attendant emotional and psychological stresses rendered her “consent” invalid.⁸¹ In defining consent, the Louisiana First Circuit Court of Appeal turned to the definition in *Black’s Law Dictionary*: “[an] agreement, approval, or permission as to some act or purpose, esp[ecially] given voluntarily by a competent person.”⁸² The plaintiff contended that consent, from a legal standpoint, is mutable and variable.⁸³ The court chose neither to confirm nor deny this argument.⁸⁴ Though the court recognized that certain stressors may render

72. *Id.*

73. *Id.* at 74.

74. *See L.K.*, 631 So. 2d at 608.

75. *Id.*

76. *Id.*

77. *See generally Penny v. State*, 702 So. 2d 1173 (La. Ct. App. 1997).

78. *Id.*

79. *Id.* at 1174.

80. *Id.*

81. *Id.* at 1175.

82. *Id.* at 1174 (citing BLACK’S LAW DICTIONARY 126 (Pocket Ed. 1996)). This definition is troublesome because of the emphasis placed on consent existing “especially” when given voluntarily, implying consent can exist in narrow circumstances when it is not given voluntarily. *Id.*

83. *Id.*

84. *Id.*

consent legally void,⁸⁵ the stresses attendant to incarceration did not rise to a level that would render the plaintiff, an adult with normal mental capacity, incapable of consenting to sexual relations.⁸⁶

Louisiana's appellate courts provide little explanation as to what valid consent looks like.⁸⁷ Although the cases acknowledge that certain attendant circumstances can vitiate consent, jurisprudence does not account for what the necessary circumstances are aside from tender age and mental disability.⁸⁸ Furthermore, no indication exists as to how to determine consent—whether through words, actions, or inferences.⁸⁹ Finally, the courts provide no guidance as to whether and when one may withdraw consent.⁹⁰

Jury instructions on third-degree rape provide no better understanding of the standard for consent in deciding purely nonconsensual sexual assault cases under Louisiana Revised Statutes § 14:43.⁹¹ The instructions define third-degree rape as “the act of anal, oral, or vaginal sexual intercourse with a victim without the victim’s lawful consent.”⁹² Thus, the instructions provide that emission is not necessary, and any sexual penetration, “when the rape involves vaginal or anal sexual intercourse, however slight, is sufficient to complete the crime.”⁹³ The instructions close with what is needed to convict the defendant of third-degree rape, requiring that the defendant had intercourse with the victim, “[t]hat the victim did not consent to the sexual intercourse,” and that the defendant knew or should have known that the victim did not consent to the act of sexual intercourse.⁹⁴ Such instructions do not clarify *how* the defendant should know the victim did not consent to the act of sexual intercourse—only that he should.⁹⁵

85. See *L.K. v. Reed*, 631 So. 2d 604 (La. Ct. App. 1994).

86. *Penny*, 702 So. 2d at 1175.

87. See *L.K.* 631 So.2d 604; *Doe v. State*, 623 So. 2d 72, 72 (La. Ct. App. 1993); *Penny*, 702 So. 2d at 1174; BLACK’S LAW DICTIONARY, *supra* note 82, at 126.

88. See *supra* note 87.

89. See *supra* note 87.

90. See *supra* note 87.

91. CHENEY C. JOSEPH & P. RAYMOND LAMONICA, CRIMINAL JURY INSTRUCTIONS § 10:60:50, in 17 LOUISIANA CIVIL LAW TREATISE (3d ed. 2016).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

Reading the jury instructions *in pari materia*⁹⁶ with Louisiana Revised Statutes § 14:43, one can infer that consent is not present under the circumstances listed in the statute:

(a) when the victim is incapable of resisting or of understanding the nature of the act by reason of a stupor or abnormal condition of mind produced by an intoxicating agent or any cause and the offender knew or should have known of the incapacity; (b) when the victim, through unsoundness of mind, is temporarily or permanently incapable of understanding the nature of the act and the offender knew or should have known of the victim's incapacity; and (c) when the victim submits under the belief that the person committing the act is someone known to the victim, other than the offender, and such belief is intentionally induced by the offender.⁹⁷

Although this language provides specific examples of what consent is *not*, it does not provide further clarification of what consent *is*.⁹⁸ Legislative history can be helpful for statutory interpretation, but it does not always solve the problem.⁹⁹ Louisiana Civil Code article 10 acknowledges that “[w]hen the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law.”¹⁰⁰ If the text does not reflect the purpose of the law, interpreters may attempt to discover the particular problem the legislature intended to address.¹⁰¹

On May 20, 2015, Senate Bill 117 passed through the House Committee on Administration of Criminal Justice.¹⁰² The bill proposed multiple revisions to Louisiana Revised Statutes § 14:43, including the adoption of the “consent clause.”¹⁰³ Although the “consent clause” passed the muster of the legislators present for the hearing, it seems to have almost

96. *In pari materia* refers to the legal canon of interpretation providing that laws on the same subject matter must be interpreted in reference to each other. See LA. CIV. CODE art. 13 (2018).

97. LA. REV. STAT. § 14:43(A)(1)–(3) (2018).

98. *Id.* § 14:43(A).

99. P. RAYMOND LAMONICA & JERRY G. JONES, LEGIS. LAW & PROC. § 7:8, in 20 LOUISIANA CIVIL LAW TREATISE (2016 ed.).

100. LA. CIV. CODE art. 10.

101. LAMONICA & JONES, *supra* note 99.

102. *House Committee on Administration of Criminal Justice*, 2015 Reg. Sess. (May 20, 2015).

103. *Id.*

gone unnoticed.¹⁰⁴ A presenter of Senate Bill 117 mentioned the inclusion of the “consent clause” in the Bill for a brief moment and moved on to a discussion of sexual battery; no questions were asked, and no discussion followed.¹⁰⁵ The only indication of the purpose behind the “consent clause” was Representative Barbara Norton’s generalized statement, in which she stated that she believed Senate Bill 117 to be “a great bill,” and that there is “more to be done” in the legislative arena of sexual assault reform.¹⁰⁶ Representative Norton told the Committee, “At the end of the day, I just believe that bringing forth as many opportunities that we get as legislators . . . to put laws on the books of this magnitude, I think that it can [not] only help women but . . . men as well.” Although Representative Norton’s statement encouraged the advancement of rape law reform generally, it failed to provide meaningful context regarding the specific purpose of the “consent clause.”¹⁰⁷

B. The Picture of Consent in a Louisiana Courtroom

When issues of nonconsensual sex go before a factfinder in a Louisiana courtroom, the court must define consent in some fashion to guide the verdict—but the simple fact is that courts do not define consent.¹⁰⁸ Instead of adhering to a clear standard of consent, the courts typically tell juries in closing arguments to determine whether consent exists by using a “totality of the circumstances” approach and decide if the conditions surrounding the sexual encounter lead to the reasonable conclusion that the encounter was consensual.¹⁰⁹ Essentially, the courts tell the jurors to “just figure it out,”¹¹⁰ which requires the jury to formulate a standard to analyze the particular facts and then attempt to apply those facts based on a personal and subjective understanding of its quickly framed standard.¹¹¹ There is, however, another problem with this setup: “rape culture” and its impact on juror decision-making creates profoundly unreasonable biases.¹¹²

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Monistere provides that there is no one way a court defines consent, and the totality of the circumstances approach is gray. Interview with Angel Monistere, *supra* note 14.

109. *Id.*

110. *Id.*

111. *Id.*

112. Hildebrand & Najdowski, *supra* note 17, at 1061.

Rape culture negatively impacts juror decision-making in sexual assault trials not only by increasing the likelihood that jurors will endorse erroneous beliefs about rape,¹¹³ but also by unconsciously influencing the types of evidence jurors attend to and the extent to which they blame the parties involved.¹¹⁴ Rape culture leads individuals to endorse rape myths,¹¹⁵ sexually objectify women, and perceive sexual violence against women as normative.¹¹⁶ Evidence suggests that rape culture increases the likelihood that potential jurors will be indoctrinated to endorse the cultural narrative narrowly defining rape as forcible sexual assaults that strangers perpetrate and women resist.¹¹⁷

113. Rape culture is an environment in which rape is prevalent, typically because of the way in which sexual violence against women is normalized and excused in the media and popular culture. *Rape Culture*, MARSHALL U., <http://www.marshall.edu/wcenter/sexual-assault/rape-culture/> [<https://perma.cc/8LZZ-83Z2>] (last visited July 20, 2018). Rape culture is perpetuated through the use of misogynistic language, the objectification of women's bodies, and the glamorization of sexual violence, thereby creating a society that disregards women's rights and safety. *Id.* Examples of rape culture include: blaming the victim; trivializing sexual assault by saying, "Boys will be boys"; using sexually explicit jokes; inflating false rape report statistics; publicly scrutinizing a victim's dress, mental state, motives, and history; showing gratuitous gendered violence in movies and television; defining "manhood" as dominant and sexually aggressive; defining "womanhood" as submissive and sexually passive; pressuring men to "score"; pressuring women to not appear "cold"; assuming only promiscuous women get raped; assuming that men do not get raped or that only "weak" men get raped; refusing to take rape accusations seriously; and teaching women to avoid getting raped instead of teaching men not to rape. *Id.* If rape is the violation of another person's autonomy—the use of another person's body against their wishes—then it should not matter what the victim was wearing, if she was drinking, how much sexual experience she has had before, or whether she fought hard enough to get bruises on her knuckles and skin under her fingernails. KATE HARDING, *ASKING FOR IT: THE ALARMING RISE OF RAPE CULTURE—AND WHAT WE CAN DO ABOUT IT*, 12 (Da Capo Press 2015). What matters is that the attacker deliberately ignored another person's basic human right to determine what she does with her own body. *Id.*

114. Hildebrand & Najdowski, *supra* note 17, at 1061.

115. Rape myths include, among others, beliefs that women incite men to rape, that men cannot be raped, that a rapist can be determined by the way he looks, and that women often make false reports of rape. *List of Rape Myths*, U. MINN. DULUTH, <http://www.d.umn.edu/cla/faculty/jhamlin/3925/myths.html> [<https://perma.cc/5KFT-JFN8>] (last visited July 20, 2018).

116. Hildebrand & Najdowski, *supra* note 17, at 1071.

117. *Id.*

Perhaps the bigger problem with allowing factfinders to construct their own standard regarding consent, however, is that hardly anyone agrees on what “consent” means.¹¹⁸ As one scholar explained, “The current state of confusion [about consent] is evident in the numerous competing views about what constitutes mental agreement . . . and what comprises performative consent.”¹¹⁹ One view is that sexual consent is present when parties are mentally willing to engage in sexual activity, although there are ranging interpretations as to what constitutes a consensual mental state, from “enthusiastic to grudging, from hedonistic to instrumental, from sober to quite inebriated.”¹²⁰ Another view focuses on the external indicators of consent, such as what parties say and do; even under this view, there remains considerable variation on what constitutes performative consent.¹²¹ Yet another view provides that engaging in sexual activity without protest equals consent, while others favor affirmative expression.¹²² To complicate matters further, what constitutes affirmatively expressed consent differs depending on whom is asked, ranging from nonverbal foreplay to “an enthusiastic yes.”¹²³ Criminal codes do little to simplify matters.¹²⁴ Accordingly, “[i]t is no wonder that people come to wholly different conclusions about how consent and affirmative consent standards actually impact legal decisions and human behavior.”¹²⁵

Because of this “consent confusion” juries typically resolve these issues by looking at the victim’s external manifestations in circumstantial context, that is, what she did, what she said, and how she behaved.¹²⁶ Nonetheless, the method of looking to the victim’s external manifestations is imprecise since decisionmakers harbor such a wide spectrum of views as to what constitutes internal willingness, how that willingness is or should be externally manifested, and how a person should interpret those external manifestations.¹²⁷ Inconsistency in such interpretations results from a lack of information and misguided beliefs.¹²⁸

118. Gruber, *supra* note 16, at 415.

119. *Id.*

120. *Id.* at 417.

121. *Id.* “Performative consent” is consent inferred by the actions of an individual. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 418.

125. *Id.*

126. *Id.* at 429.

127. *Id.*

128. Shannon E. Mackey, The roots and implications of rape myth acceptance in public discourse: the Steubenville, Ohio rape case 5 (2015) (M.S.W. thesis, Smith College).

Particularly in Louisiana, a widespread concern exists that allegations of third-degree rape typically arise after a night of intoxication.¹²⁹ Erroneous support for the idea that false rape claims are a common problem fuels the belief that women claim rape after regretting a night of consensual sex.¹³⁰ A review of the National Sexual Violence Resource Center's findings found the prevalence of false reporting to be between 2%–10%.¹³¹ The report concluded, however, that rates of false reporting are frequently inflated, in part because of inconsistent definitions and protocols, or a weak understanding of sexual assault.¹³² Misconceptions about false reporting rates have direct, negative consequences and contribute to why many victims do not report sexual assaults.¹³³ To improve reporting and response, the justice system needs a thorough understanding of sexual violence and consistency in its definitions, policies, and procedures.¹³⁴

According to a Louisiana prosecutor, the concern about false reports of rape is misguided.¹³⁵ Rather than fabricating rapes, victims are more likely to avoid reporting assaults—in part because of the low conviction rates obtained in sexual assault cases.¹³⁶ Consider the following all-too-common situations: (1) the victim is so scared that she says nothing; (2) the victim is forced to express consent;¹³⁷ or (3) the victim says “yes” to sexual conduct with one person, and it is assumed she has consented to sexual conduct with others.¹³⁸ Because a defense in these cases is based purely on consent and does not require DNA or physical evidence, these are the “absolute hardest” to convict.¹³⁹ As one scholar reiterates, the

129. Interview with Angel Monistere, *supra* note 14.

130. *False Reporting Overview*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf [<https://perma.cc/KXM4-RAFT>] (last visited July 20, 2018).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Interview with Angel Monistere, *supra* note 14.

136. *Id.*

137. *Id.* These cases occur when the defendant, for whatever reason, has convinced himself that the victim truly wants the sexual contact, wants to hear the victim expressly communicate this desire, overpowers the victim due to the inherent violent nature of taking someone's bodily autonomy, and forces the victim to express “consent.” *Id.*

138. *Id.*

139. *Id.* While purely nonconsensual sexual assault cases are included in this category, all rape cases prove difficult to obtain convictions. *Id.* Although this generality exists, because of the lack of DNA and physical injury requirements,

reality for many victims is the little chance of obtaining a prosecution and conviction for a rape allegation when the victim knows the defendant or when alcohol is involved without extrinsic physical injuries.¹⁴⁰ Juries' ideas of what a rapist should look like further complicate obtaining convictions—the idea being a stranger who inflicts clear physical injuries and leaves DNA evidence.¹⁴¹ The whole trial becomes about convincing the jury that this idea is not reality and that a rapist is someone who simply does not stop.¹⁴² Most of the cases within the gray area of purely nonconsensual sexual assault¹⁴³ therefore result in plea agreements and never go to trial.¹⁴⁴

III. THE SIGNIFICANCE OF AN INDETERMINATE UNDERSTANDING OF CONSENT

Because of the confusion about the meaning of consent and the inequitable results that follow, the prevalence and social impact of sexual assault on a national and local scale requires lawmakers to take a closer look at sexual assault and create a better solution.¹⁴⁵

nonconsensual sexual assault is different from other rape cases and makes the case more difficult to prove. *Id.*

140. See Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 235–44 (2015).

141. Interview with Angel Monistere, *supra* note 14.

142. *Id.*

143. *Id.* In addition to purely nonconsensual sexual assault cases, other cases that also exist in this gray area are those in which both parties are intoxicated, and the question then becomes: is neither party a rapist or are both parties rapists? *Id.*

144. *Id.*

145. See, e.g., *Who are the Victims?*, RAINN, <http://www.rainn.org/get-information/statistics/sexual-assault-victims> [<https://perma.cc/WG62-CQT3>] (last visited July 25, 2018); LA. FOUND. AGAINST SEXUAL ASSAULT (LAFASA), ANNUAL REPORT 15 (2014); Myka Held & Juliana McLaughlin, *Rape & Sexual Assault*, 15 GEO. J. GENDER & L. 155, 157 (2014); U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, SEXUAL VIOLENCE ON CAMPUS: HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS 1 (July 9, 2014), <https://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf> [<https://perma.cc/27VF-QE2X>]; Mary Graw Leary, *Affirmatively Replacing Rape Culture with Consent Culture*, 49 TEX. TECH L. REV. 1, 10 (2016).

A. A Broad Context of Sexual Assault

Every 98 seconds, someone in the United States is sexually assaulted.¹⁴⁶ One in four girls and one in six boys will be sexually victimized before their eighteenth birthday.¹⁴⁷ Further, approximately two-thirds of sexual assaults are committed by someone the victim knows.¹⁴⁸ Up to 40% of victims become infected with a sexually transmitted disease, and four out of five victims report suffering from chronic physical or psychological conditions.¹⁴⁹ Sexual assault also creates an economic burden on the surrounding environment;¹⁵⁰ every rape costs the United States an average of \$151,423.¹⁵¹ According to The American Institute on Domestic Violence, victims lose nearly 8 million days of paid work each year, equaling more than 32,000 full-time jobs.¹⁵²

Perhaps the most striking statistics regarding sexual assault are those concerning the justice system's response to sexual assault offenses.¹⁵³ According to the Bureau of Justice Statistics' National Crime Victimization Survey, police responded to only 84% of reported sexual assaults from 2005 to 2010,¹⁵⁴ and only a quarter of the sexual assault

146. *Who are the Victims?*, *supra* note 145.

147. LA. FOUND. AGAINST SEXUAL ASSAULT (LAFASA), *supra* note 145.

148. Held & McLaughlin, *supra* note 145.

149. Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study 1*, NAT'L INST. JUST. (Oct. 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [<https://perma.cc/7RC2-9JGM>].

150. *See Sexual Violence Statistic*, LAFASA, http://lafasa.org/main/sexual_violence_statistics [<https://perma.cc/GS9V-8UP3>] (last visited July 20, 2018); Leah Eichler, *Domestic Violence: Rape Hurts Our Economy Too*, HUFFINGTON POST (Mar. 16, 2018, 8:18 AM), http://www.huffingtonpost.ca/leah-eichler/domestic-violence_b_3086940.html [<https://perma.cc/U737-UW59>].

151. *Sexual Violence Statistic*, *supra* note 150. The above-mentioned cost includes the initial police response, medical care, property loss, time lost from work, productivity, and pain and suffering. It does not include the investigation, prosecution, and incarceration. *Id.*

152. Eichler, *supra* note 150.

153. *See, e.g., Police Response to Domestic Violence, 2006–2015*, BUREAU JUST. STAT. (May 2, 2017), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5907> [<https://perma.cc/BS98-UYGZ>]; Elizabeth Pelletier & Janine M. Zweig, *Who Do Rates of Sexual Assault Prevalence Vary from Report to Report?*, URB. INST. (July 27, 2015), <https://www.urban.org/urban-wire/why-do-rates-sexual-assault-prevalence-vary-report-report> [<https://perma.cc/88QX-UN9F>].

154. Leary, *supra* note 145, at 28 (citing Pelletier & Zweig, *supra* note 153). Police response to sexual assault reports mirrors police response to domestic violence reports. *Police Response to Domestic Violence, 2006–2015*, *supra* note

victimizations from the survey sample generated a police report.¹⁵⁵ Judicial response does not differ significantly.¹⁵⁶ Out of every 100 rapes, 10 lead to an arrest, and 3 perpetrators spend a day in prison.¹⁵⁷ Ultimately, 97 perpetrators “walk away free.”¹⁵⁸

In Louisiana, victims reported 1,244 rapes to law enforcement in 2013 using a more traditional definition of rape, whereas other victims reported 1,619 rapes using the Federal Bureau of Investigation’s new definition of rape¹⁵⁹ that acknowledges gender does not limit who can be a victim or offender and offers protection for those who cannot give consent because of temporary or permanent incapacity.¹⁶⁰ Despite over 1,000 rape reports, police made only 263 arrests,¹⁶¹ of which 65 of the defendants were

153. In only 39% of reported domestic violence victimizations, police arrested an offender or the victim filed charges. *Id.*

155. Leary, *supra* note 145. More than half of the nation’s violent crimes—defined as rape or sexual assault, robbery, or aggravated assault—or nearly 3.4 million violent victimizations per year, went unreported to the police between 2006–2010. *Nearly 3.4 Million Violent Crimes Per Year Went Unreported to Police From 2006 To 2010*, BUREAU JUST. STAT. (Aug. 9, 2012), <https://www.bjs.gov/content/pub/press/vnrp0610pr.cfm> [<https://perma.cc/GV7B-PYXL>]. Among unreported violent victimizations, the percent of victims who believed the police would not or could not help doubled, from 10% in 1994 to 20% in 2010. *Id.* Among unreported crimes, the most common reason for the lack of reporting was fear of retaliation or getting the offender in trouble. *Id.* When someone the victim knows—such as a neighbor, coworker, or teacher, or a casual acquaintance perpetrated the crimes—they were more likely to go unreported than if a stranger committed the crimes. *Id.*

156. See *Sexual Violence Statistic*, *supra* note 150.

157. *Id.*

158. *Id.* Although a perpetrator convicted of rape has to register as a sex offender, lose certain legal freedoms, and face a stigma for being classified a rapist, this pales in comparison to the lifetime of trauma rape victims endure, especially when their perpetrators do not receive adequate legal punishment.

159. In 2013, the FBI changed the Uniform Crime Reporting definition for rape from “carnal knowledge of a female forcibly and against her will” to “penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” *Rape*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/rape> [<https://perma.cc/GBH3-SGWY>] (last visited July 25, 2018). The new definition effectively removes the requirement of extrinsic force. *Id.*

160. LA. FOUND. AGAINST SEXUAL ASSAULT (LAFASA), *supra* note 145.

161. A lack of arrests concerning violent crimes is nothing new to criminal law. The number of murder arrests in the U.S. fell by half between 1990–2010. Howard N. Snyder, *Arrest in the United States, 1990–2010*, U.S. DEP’T JUST.—

younger than 18, evidencing that the problem of sexual assault has not escaped Louisiana's backyard.¹⁶²

B. A Narrow Illustration of a Broader Problem: The University Campus

A notable example of the significance of sexual assault is its explosion on college campuses nationally and locally.¹⁶³ Seven percent of college men admitted to committing rape or attempted rape, and 63% of these men admitted to committing multiple offenses, averaging six rapes each.¹⁶⁴ The prevalence of sexual assault on campuses across the nation has been a

BUREAU OF JUST. STAT. (Oct. 2012), <https://www.bjs.gov/content/pub/pdf/aus9010.pdf> [<https://perma.cc/JC95-C38B>]. The adult and juvenile arrest rates dropped substantially in the 1990s, while both continued to fall about 20% between 2000–2010, reaching their lowest levels since at least 1990. *Id.* While the aggravated assault arrest rate fell 31% between 1990 and 2010, the simple assault arrest rate remained essentially unchanged over the period. *Id.* In 2010, the simple assault arrest rate for females was at its highest level in at least two decades, up 75% since 1990; in contrast, in 2010, the male arrest rate was at its lowest level in two decades, 12% below its 1990 level. *Id.* This article does not attempt to compare and contrast the arrest rates between different violent crimes. The problem of decreasing arrests in other areas of violent offenses does not lessen the problem of decreasing arrests for sexual assault offenses.

162. LA. FOUND. AGAINST SEXUAL ASSAULT (LAFASA), *supra* note 145. The sexual victimization of minors is especially significant in the cycle of revictimization—sexual victimization in childhood or adolescence increases the likelihood of sexual victimization in adulthood between 2 and 13.7 times. *Sexual Revictimization Research Brief*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., https://www.nsvrc.org/sites/default/files/publications_NSVRC_ResearchBrief_Sexual-Revictimization.pdf [<https://perma.cc/F3LJ-JUX9>] (last visited July 20, 2018).

163. See U.S. SENATE SUBCOMM., *supra* note 145; see also Leary, *supra* note 145, at 10.

164. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists, Violence, and Victims*, 17 VIOLENCE & VICTIMS 1, 73–84, <http://www.davidlisak.com/wp-content/uploads/pdf/RepeatRapeinUndetectedRapists.pdf> [<https://perma.cc/ZEY8-92LG>] (2002). Lisak and Miller pooled data from four samples in which 1,882 men were assessed for acts of interpersonal violence. *Id.* They reported on 120 men whose self-reported acts met legal definitions of rape or attempted rape, but whom criminal justice authorities never prosecuted. *Id.* A majority of these undetected rapists were repeat rapists, and a majority also committed other acts of interpersonal violence. *Id.* The repeat rapists averaged 5.8 rapes each. *Id.* The 120 rapists were responsible for 1,225 separate acts of interpersonal violence, including rape, battery, and child physical and sexual abuse. *Id.* These findings mirror those from studies of incarcerated sex offenders, including high rates of both repeat rape and multiple types of offending. *Id.*

problem most universities have turned a blind eye to—at least until recently.¹⁶⁵ A United States Senate Subcommittee Report determined that despite the prevalence of campus sexual assaults, about 41% of colleges and universities reported that the universities did not investigate a single sexual assault in the previous five years.¹⁶⁶ More than 20% of the nation's largest private universities conducted fewer investigations than the number of incidents they reported to the Department of Education, with some institutions reporting as many as seven times more incidents of sexual violence than they have investigated.¹⁶⁷

In response to the U.S. Senate investigation that found several colleges and universities nationwide in violation of federal law by failing to investigate sexual assault on campus, in July 2014, Louisiana State Senator J.P. Morrell requested information from the Louisiana Board of Regents¹⁶⁸ regarding sexual violence on Louisiana's public college campuses.¹⁶⁹ The report contained data from the four state collegiate systems: the Louisiana State University System, the Southern University

165. See U.S. SENATE SUBCOMM., *supra* note 145.

166. *Id.* This report assesses how colleges and universities report, investigate, and adjudicate sexual violence. *Id.* The report is based on a survey of 440 four-year institutions of higher education, which includes a national sample and separate samples of the nation's largest public and private universities. *Id.* The findings show that more than 81% of private for-profit schools and 77% of institutions with fewer than 1,000 students have not conducted any investigations. *Id.* Surprisingly, approximately 6% of the nation's largest public institutions also have not conducted any investigations in the last five years. *Id.* Overall, the Subcommittee found that 9% of schools in the national sample conducted fewer investigations of forcible and non-forcible sexual offenses in the past five years than they reported to the Department of Education. *Id.* The Subcommittee also found that 21% of the nation's largest private institutions conducted fewer investigations than the number of incidents reported to the Department of Education, with some institutions reporting as many as seven times more incidents of sexual violence than they have investigated. *Id.*

167. *Id.*

168. The Louisiana Board of Regents is the governing body of Louisiana's colleges and universities. LA. BOARD REGENTS, <https://regents.la.gov> [<https://perma.cc/3ACF-936E>] (last visited July 20, 2018).

169. Julia O'Donoghue, *Louisiana campus sexual assault report released - Read the document*, TIMES-PICAYUNE (Sept. 15, 2014, 5:38 PM), http://www.nola.com/politics/index.ssf/2014/09/read_the_document_louisiana_ca.html [<https://perma.cc/X6LA-B8LG>].

System, the University of Louisiana System, and the Louisiana Community and Technical College System.¹⁷⁰

The report first noted that Louisiana does not currently have a uniform policy governing the issue of sexual assault on campuses.¹⁷¹ The lack of a uniform policy can be partly attributed to the Board of Regents' lack of constitutional or statutory authority to adopt statewide policies concerning sexual assault.¹⁷² The Board's lack of authority exists because campus sexual assault is a student affairs issue, traditionally within the purview of an institution's management board, such as a board of supervisors, which has jurisdiction over the day-to-day operation and management of its member institutions.¹⁷³ Consequently, there are currently no state laws or statewide policies on the matter.¹⁷⁴ Regardless, the Board stated that it is ready and willing to launch a statewide effort in collaboration with the four systems and other stakeholders to combat the problem of campus sexual assault.¹⁷⁵

The results of the Board's report seem misleadingly optimistic at first glance.¹⁷⁶ Overall, Louisiana's public colleges and universities have low rates of reported sexual assaults compared to national statistics of reported college sexual assaults,¹⁷⁷ which indicate that one in four college students

170. LA. BOARD OF REGENTS, LA. BOARD OF REGENTS' RESPONSE TO SENATOR JEAN-PAUL MORRELL'S REQUEST FOR A COMPREHENSIVE REPORT ON SEXUAL ASSAULT ON CAMPUSES 1 (Sept. 15, 2014).

171. *Id.*

172. *Id.*

173. *Id.*

174. LA. BOARD OF REGENTS, *supra* note 170. In fact, the only legal requirements applicable to all state institutions are compliance with federal statutes: Title IX and 20 U.S.C.A. § 1092, the Clery Act. *Id.* In September 2017 the Education Department announced that it is formally rescinding Obama-era guidance on how schools should handle sexual assaults under Title IX, a federal law that prohibits discrimination based on sex for schools and programs that receive federal funding, including protection from sexual harassment. See Sophie Tatum, *Education Department withdraws Obama-era campus sexual assault guidance*, CNN POLS. (Sept. 22, 2017), <http://www.cnn.com/2017/09/22/politics/betsy-devos-title-ix/index.html> [<https://perma.cc/65E8-28AT>]. Although advocacy groups and lawmakers quickly responded to this announcement with backlash, it is unclear what the future of Title IX holds. *Id.* See also 20 U.S.C.A. § 1092 (West 2017) (providing for institutional and financial assistance information for students).

175. LA. BOARD OF REGENTS, *supra* note 170.

176. *Id.* at 3–4.

177. See *id.* One hundred and five sexual assaults were reported from 2009 to 2013 with an average population of 206,372 people. *Id.*

encounter a rape or attempted rape.¹⁷⁸ Although the lack of reported incidents may look positive initially, the Board noted that victims only report 5% of rapes and attempted rapes on college campuses.¹⁷⁹ Reasons for this discrepancy may include victim confidentiality, the victim's hesitation to participate in the adjudication process, the relationship between the victim and perpetrator, a lack of education resources for victims, or a culture of "victim-blaming" on campuses and surrounding communities.¹⁸⁰ Universities' failure to encourage reporting of sexual violence can also contribute to the failure to report sexual assault on college campuses.¹⁸¹ Only 51% of institutions in the national sample provided a hotline to survivors, and only 44% of institutions in the national sample provided the option to report sexual assaults only, instead of sexual assault with another offense.¹⁸² Approximately 81% of institutions did not allow confidential reporting.¹⁸³

If the Board's finding that national statistics place the national average of reported rapes and reported attempted rapes at 5%,¹⁸⁴ simple mathematics reveals that 105 reported sexual assaults is 5% of 2,100; therefore, although victims reported 105 sexual assaults or attempted sexual assaults from 2009 to 2013, approximately 1,995 others went unreported.¹⁸⁵ After analyzing multiple surveys,¹⁸⁶ Professor Mary Graw Leary concluded that despite disputes as to the exact number of sexual assault victims, the reality is that when it comes to rape, the most

178. *Id.*

179. *Id.* at 4.

180. *Id.*

181. U.S. SENATE SUBCOMM., *supra* note 145.

182. *Id.*

183. *Id.*

184. LA. BOARD OF REGENTS, *supra* note 170, at 3–4. According to the most recent report that the Department of Justice conducted, less than 5% of rape victims attending college report their attack to law enforcement. U.S. SENATE SUBCOMM., *supra* note 145. Although experts agree that annual climate surveys—confidential surveys regarding behaviors that constitute or are associated with sexual assault—are one of the best ways to get an accurate picture of sexual assault on campus, only 16% of the institutions in the Subcommittee's national sample conducted climate surveys. *Id.*

185. LA. BOARD OF REGENTS, *supra* note 170, at 3–4.

186. The surveys include the Campus Sexual Assault Study by the National Institute of Justice, the BJS Study by the Bureau of Justice Statistics, the Association of American Universities Campus Climate Survey on Sexual Assault and Sexual Misconduct, and MIT's Community Attitude on Sexual Assault Survey. Leary, *supra* note 145, at 10.

“pervasive danger” is different from what once was feared and the problem is more widespread than ever perceived.¹⁸⁷

The Board’s report did find that authorities investigated most cases reported on Louisiana’s campuses, indicating that Louisiana’s campuses were responsive to reports of sexual assault.¹⁸⁸ In addition, the investigative policies of individual campuses and the number of investigations are explained in depth throughout the report.¹⁸⁹ Lacking from the report is any mention of disciplinary action or sanctions in response to the investigations.¹⁹⁰ The Board concluded that although Louisiana’s campuses are striving to form an effective but fair response to the issue of sexual assault, “significant additional measures are necessary to ensure that college campuses are safe spaces for students.”¹⁹¹ The findings suggest that although most campuses reported investigative strategies to respond to sexual assaults, fewer preventative measures to address sexual assault appear to be in place.¹⁹² Although Louisiana may be investigating sexual assault reports on the back-end,¹⁹³ the focus needs to shift to prevention by establishing a clear definition of “consent” so that people are aware of the behaviors that violate the offense before they commit the offense inadvertently.

IV. THE LEGISLATIVE SOLUTION OF AFFIRMATIVE CONSENT

Because legislation is the principal source of law in Louisiana’s civil law jurisdiction, adopting a legislative solution to cure the ambiguity of Louisiana Revised Statutes § 14:43’s third-degree rape “consent clause” is a rational and functional approach to curing the statutory deficiency.¹⁹⁴ Adopting an affirmative consent standard will not end sexual assault, but it will act as a positive movement in the effort to reduce the offense.¹⁹⁵

187. *Id.*

188. LA. BOARD OF REGENTS, *supra* note 170, at 4. The Board of Regents noted that because of dual jurisdiction—i.e., campus administration and law enforcement—governing campus crime, it was often unclear whether law enforcement or campus administrators investigated these cases. *Id.*

189. *See generally id.*

190. *Id.*

191. *Id.* at 5.

192. *Id.*

193. *Id.* at 4.

194. LAMONICA & JONES, *supra* note 99, § 7:3.

195. Leary, *supra* note 145, at 3.

A. Establishing a Clear Definition of Affirmative Consent

Affirmative consent provides that silence—often arising out of incapacitation, fear, or unconsciousness—does not constitute consent to sexual conduct.¹⁹⁶ Instead, it requires an affirmative and voluntary agreement to engage in sexual activity from a fully capacitated and conscious person.¹⁹⁷ As is common with criminal law conversations, the debate surrounding affirmative consent is typically obfuscated by other agendas that cloud the discussion of the complex and legal issues involved.¹⁹⁸ Therefore, a clear definition is a “threshold requirement” to a fruitful discourse.¹⁹⁹

Much of the progress in the affirmative consent movement is happening at the *collegiate* level, with California and New York leading the movement.²⁰⁰ In October 2015, the California Legislature passed a new law requiring the governing bodies of each of the state’s highest educational institutions to adopt certain policies regarding sexual assault, including an affirmative consent standard.²⁰¹ The legislation defines affirmative consent as an “affirmative, conscious, and voluntary agreement to engage in sexual activity,” and further states that each person is responsible for ensuring that he or she has affirmative consent to engage in sexual conduct.²⁰² Lack of protest, lack of resistance, or silence do not constitute consent; the consent must be ongoing throughout the sexual encounter.²⁰³ One may revoke the consent at any time, and a dating relationship or past sexual relationship cannot “by itself be assumed to be an indicator of consent.”²⁰⁴

Similarly, New York passed legislation in October 2015 requiring higher education institutions to also adopt an affirmative consent

196. *Id.*

197. *See id.* at 33; *see also* Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381, 437 (2005); *see also* Maya Dusenbery, “Affirmative Consent” Just Means Mutual Desire. And It Should Definitely Be The Standard., FEMINISTING (June 25, 2014), <http://feministing.com/2014/06/25/affirmative-consent-just-means-mutual-desire-and-it-should-definitely-be-the-standard/> [<https://perma.cc/WKV9-JNHU>].

198. Leary, *supra* note 145, at 5.

199. *Id.* at 6.

200. *See id.*; *see also* CAL. EDUC. CODE. § 67386–(a)(1) (West 2017); N.Y. EDUC. LAW § 6441(1)–(2) (McKinney 2015).

201. CAL. EDUC. CODE. § 67386–(a)(1). The adoption of the policy includes measures regarding sexual assault, domestic violence, dating violence, and stalking; the receipt of state funds determines enforcement of the policy. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

standard.²⁰⁵ New York's definition of affirmative consent varies slightly from California's in that it requires "a knowing, voluntary, and mutual decision among all participants to engage in sexual activity."²⁰⁶ Anticipating what consent may look like, the legislation provides that consent "can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity."²⁰⁷ Silence or a lack of resistance do not constitute consent; prior consent to a sexual act does not demonstrate consent to another act; and one may withdraw consent.²⁰⁸ Furthermore, New York specified that consent is not voluntary if it is the product of coercion, intimidation, force, or threat.²⁰⁹ Finally, the legislation explicitly states that when one can no longer give or withdraw consent, the sexual activity "must stop."²¹⁰ Although California's and New York's legislation differ slightly, both reach certain touchstones that stem from the April 2014 First Report of the White House Task Force to Protect Students From Sexual Assault, which included a minimum standard for universities to use in developing their own sexual assault policies.²¹¹

Mary Graw Leary drew on both the New York and California statutes, many of the approximately 800 affirmative consent standards that universities adopted, and the suggested language of the National Sexual Violence Resource Center²¹² to create a comprehensive definition of affirmative consent.²¹³ The definition provides that affirmative consent is

205. N.Y. EDUC. LAW § 6441(1).

206. *Id.*

207. *Id.*

208. *Id.* § 6441(1), (2)(a)–(c).

209. *Id.* § 6441(2)(e).

210. *Id.* § 6441(2)(f).

211. White House Task Force to Protect Students from Sexual Assault, *Checklist for Campus Sexual Misconduct Policies* 4–5, U.S. DEP'T JUST. (Apr. 2014), <https://www.justice.gov/ovw/page/file/910271/download> [<https://perma.cc/C63C-WWNS>] ("At minimum, the definition should recognize that: . . . consent is a voluntary agreement to engage in sexual activity; . . . someone who is incapacitated cannot consent; . . . past consent does not imply future consent; . . . silence or an absence of resistance does not imply consent; . . . consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another; . . . consent can be withdrawn at any time; and . . . coercion, force, or threat of either invalidates consent.").

212. Jake New, *The 'Yes Means Yes' World*, INSIDE HIGHER ED (Oct. 17, 2014), <http://www.insidehighered.com/news/2014/10/17/colleges-across-country-adopting-affirmative-consent-sexual-assault-policies> [<https://perma.cc/J6XU-57EE>] (discussing how over 800 colleges in the United States have adopted affirmative consent policies).

213. Leary, *supra* note 145, at 8.

an affirmative, conscious, and voluntary agreement in words or actions by all parties to engage in sexual activity that may be withdrawn at any time.²¹⁴ Silence, lack of protest, or a previous dating or sexual relationship do not constitute affirmative consent; moreover, it is not met if the person is unconscious, asleep, incapacitated, or otherwise unable to consent.²¹⁵ The Louisiana Legislature should adopt this standard in defining sexual consent in Louisiana Revised Statutes § 14:43.

By using Leary's definition, parties engaged in sexual conduct have a clearer understanding of what is required of them, as there is less ambiguity about affirmative mutuality, voluntariness, consciousness, and an ability to withdraw.²¹⁶ Leary argues that "affirmative consent culture" has a place within the legal system because it satisfies the necessary functions of criminal law: notice, clarity, and guidance.²¹⁷ Leary's standard provides adequate notice as to what constitutes third-degree rape by articulating a rule that is clear to the parties at risk of perpetrating or being victimized by sexual assault.²¹⁸ The standard provides clarity to those charged with investigating and prosecuting such cases by providing a finely-tuned framework.²¹⁹ Such clarity is relevant in light of the National Institute of Justice's Campus Sexual Assault Study, which found that 56% of forced sexual assault victims and 67% of incapacitated sexual assault victims did not report the assault because they did not think it was serious enough, and 35% did not report the assault because it was unclear whether a crime occurred or was intended.²²⁰ Leary's definition also provides more guidance as to what constitutes sexual assault,²²¹ which may result in fewer sexual assaults, more victims reporting sexual assaults, and law enforcement more adequately handling investigations.²²² Ultimately, the definition Leary provided allows victims of sexual assault *and* victims of false allegations of sexual assault a better ability to receive the appropriate legal remedy for their harm.²²³

Many opponents to sexual assault reform argue that the ambiguities present in an acquaintance rape situation merit a requirement of force in the definition of sexual assault because of the alleged difficulty in

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 32.

218. *Id.*

219. *Id.*

220. Krebs et al., *supra* note 149.

221. Leary, *supra* note 145, at 8.

222. *Id.*

223. *Id.*

verifying an assault in the absence of force or resistance.²²⁴ Despite concerns about ambiguities, implementing an affirmative consent standard makes clear not only what consent is, but also what kind of consent a person must obtain before engaging in sexual conduct.²²⁵ From the vantage point of the judicial system, having an affirmative consent standard prevents a court from speculating about whether consent occurred.²²⁶ Unlike laws that consider passivity as consent, even when the victim *could not* have articulated consent, an affirmative consent standard ensures that a potential offender knows what he or she must obtain to continue engaging in sexual conduct: an affirmative and voluntary agreement to engage in the activity from a conscious person who is not incapacitated.²²⁷

Louisiana Revised Statutes § 14:43 and its legislative history make no explicit mention of the state's preference toward or against affirmative consent.²²⁸ Regardless, neither the Louisiana Legislature nor the courts have adopted an affirmative consent standard.²²⁹ Implementing such a standard to the ill-defined "consent clause" helps further three goals: (1) providing adequate notice as to what constitutes sexual assault to those contemplating sexual activity; (2) providing guidance to those charged with determining probable cause for culpability of sexual assault; and (3) providing justice to victims of sexual assault.

B. Responding to Criticisms of Affirmative Consent

Although the affirmative consent movement is increasingly gaining public favor, it nevertheless has its critics.²³⁰ Because of the trauma to victims and defendants alike,²³¹ the debate surrounding affirmative

224. See Baker, *supra* note 140, at 232–33.

225. See Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 688 (1999) (“[G]iven the alarming frequency with which sex occurs on college campuses without a meeting of the minds on the question of consent, forcing people to focus on what consent means is not only appropriate, it is essential.”).

226. Stu Marvel, *Response to Tuerkheimer: Rape On and Off Campus: The Vulnerable Subject of Rape Law: Rethinking Agency and Consent*, 65 EMORY L.J. ONLINE 2035, 2046 (2016).

227. Leary, *supra* note 145, at 33; see also Taslitz, *supra* note 197; Dusenbery, *supra* note 197.

228. See LA. REV. STAT. § 14:43 (2018).

229. *Affirmative Consent Laws (Yes Means Yes) State by State*, AFFIRMATIVECONSENT.COM, <http://affirmativeconsent.com/affirmative-consent-laws-state-by-state/> [https://perma.cc/E2TQ-MTM4] (last visited July 20, 2018).

230. Leary, *supra* note 145, at 3.

231. See Gideon, ‘Yes Means Yes’ Bill Would Eliminate Due Process on Campuses, CONN. L. TRIB. (Feb. 22, 2016).

consent and other sexual assault reform remains extremely controversial.²³² The mainstream media's interjection of useless sound bites, such as "yes means yes,"²³³ "no means no," and "burden shifting,"²³⁴ further complicate the affirmative consent debate. Critics of the affirmative consent movement routinely express three objections to the standard: (1) it will not eliminate sexual assault; (2) it "criminalizes sex"; and (3) it shifts the burden of proof to the criminal defendant.²³⁵

In response to the critique that affirmative consent will not eliminate sexual assault, one need look no further than the old maxim: "don't reject the good for the perfect."²³⁶ Although it is true that sexual violence will continue as long as humans exist, educating people and progressively changing the law to reflect this new understanding may decrease sexual assault.²³⁷ Society recognizes that many other crimes seem insurmountable, such as terrorism, opioid epidemics, and gang violence,²³⁸ yet different solutions continue to be implemented to combat these significant social problems.²³⁹ Sexual violence should be treated no differently.²⁴⁰

The critique that affirmative consent criminalizes sex stems from the argument that prosecutors will charge defendants who did not engage in nonconsensual sex with rape because they now have the authority.²⁴¹ In

232. Leary, *supra* note 145, at 5–6.

233. See *The Affirmative Consent Standard—You Must Receive a Verbal "Yes,"* SGVNOW PROJECT, <http://sgvnowproject.weebly.com/the-affirmative-consent-standard--rape--sexual-assault-education.html> [<https://perma.cc/G5HN-EHRL>] (last visited July 25, 2018) (stating that a person must make sure he has his partner's *verbal* consent before pursuing any sex act). The "verbal requirement" approach is not only an incorrect interpretation of the affirmative consent standard, but it also works in opposition to the affirmative consent movement by creating an impractical standard of expected behavior.

234. Leary, *supra* note 145, at 5–6.

235. *Id.* at 40–51.

236. *Id.* at 42.

237. Nicholas J. Little, Note, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1355–57 (2005).

238. Gary LaFree et al., *Integrated United States Security Database (IUSSD): Data on the Terrorist Attacks in the United States Homeland, 1970 to 2011* 5–6 (2012), https://www.start.umd.edu/sites/default/files/files/publications/START_IUSSDDataTerroristAttacksUS_1970-2011.pdf [<https://perma.cc/8FH4-QQ6A>]; *What is the U.S. Opioid Epidemic?*, HHS, <http://www.hhs.gov/opioids/about-the-epidemic/> [<https://perma.cc/FB4V-TRZ3>] (last updated June 23, 2016).

239. See *supra* note 238.

240. Leary, *supra* note 145, at 42.

241. *Id.* at 47.

the sexual assault context, little support exists for an over-prosecution problem;²⁴² in fact, research points instead to a trend of under-prosecution.²⁴³ Approximately 10–12 states have affirmative consent standards in their criminal statutes,²⁴⁴ and an additional 3–4 states interpret their statutes to require affirmative consent.²⁴⁵ Although a textual commitment to affirmative consent exists, many of the states have diluted their standards by requiring “force.”²⁴⁶ Only three states that have “pure” affirmative consent standards remain: Wisconsin, Vermont, and New Jersey.²⁴⁷ If a problem with over-prosecution exists, it should have appeared in these three states.²⁴⁸ Instead, prosecution of cases where the disputed issue was solely whether consent existed was “minuscule,” and the majority of prosecuted cases always involved circumstances manifesting some element of force.²⁴⁹

Finally, in terms of burden shifting, critics of affirmative consent frequently suggest the impossibility of the defendant “proving” affirmative

242. Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 468 (2016).

243. Megan A. Alderden & Sarah E. Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 525, 525 (2012) (noting that “[r]esearch has found that the attrition rate continues to be high for sexual assault cases”).

244. See CAL. PENAL CODE § 261.6 (West 2017); COLO. REV. STAT. ANN. § 18-3-401(1.5) (West 2017); D.C. CODE § 22-3001(4) (2017); 720 ILL. COMP. STAT. 5/11-0.1, 1.70(a) (West 2017); MINN. STAT. ANN. § 609.341, subdiv. 4 (West 2017); VT. STAT. ANN. tit. 13, § 3251(3) (West 2017); WASH. REV. CODE ANN. § 9A.44.010(7) (West 2017); WIS. STAT. ANN. § 940.225(4) (West 2017). Cf. FLA. STAT. ANN. § 794.011(1)(a) (West 2017) (requiring “intelligent, knowing, and voluntary consent”); see also KY. REV. STAT. ANN. § 510.020(2)(c) (West 2017); ME. REV. STAT. ANN., tit. 17-A, § 255-A(1), 260(1) (2017); N.Y. PENAL LAW § 130.95(2) (McKinney 2017); W. VA. CODE ANN. § 61-8B-2(b)(3) (West 2017).

245. Tuerkheimer, *supra* note 242, at 448–50; see also *State v. Adams*, 880 P.2d 226, 234 (Haw. Ct. App. 1994), *cert. denied*, 884 P.2d 1149 (Haw. 1994).

246. Tuerkheimer, *supra* note 242, at 455–56.

247. *Id.* at 451. In Wisconsin, consent “means words or overt actions by a person indicating a voluntary agreement to engage in a sexual act.” WIS. STAT. ANN. § 940.225(4). In Vermont, consent “means words or actions by a person indicating a voluntary agreement to engage in a sexual act.” VT. STAT. ANN. tit. 13, § 3251(3). New Jersey’s affirmative consent regime will be explored in the following section. See discussion *infra* Part V.

248. Leary, *supra* note 145, at 48.

249. *Id.*

consent.²⁵⁰ Yet, just as with a theft charge where a prosecutor must prove that a defendant did not have the consent of the owner to take the property, a prosecutor in a sexual assault case still must prove the defendant did not have the consent to “take the victim’s sexual autonomy.”²⁵¹ The burden remains the same—the prosecutor must prove every element of the offense beyond a reasonable doubt.²⁵² The only difference is the legal significance of passivity, which no longer signifies consent and instead reflects the now-common belief that a lack of behavior suggesting a desire to engage in sexual conduct does not constitute consent.²⁵³ Multiple courts have rejected this exact burden-shifting argument, upholding affirmative consent laws against constitutional challenges.²⁵⁴

C. The Possibility of Unconstitutionality in the Absence of a “Consent” Definition

Article I, Section 2 of the Louisiana Constitution provides an equivalent to the Due Process Clause of the U.S. Constitution, in that “no person shall be deprived of life, liberty, or property, except by due process of law.”²⁵⁵ An element of due process is the required clarity in a statute criminalizing an offense.²⁵⁶ A statute is unconstitutionally vague and violates due process if people of ordinary intelligence must guess at its meaning and may come to different conclusions.²⁵⁷ A criminal statute must not contain a standard so vague that the public is uncertain as to the proscribed conduct, and the factfinder is unfettered by any legally fixed standards as to what the statute prohibits.²⁵⁸

Under Louisiana constitutional law, the “void for vagueness” doctrine provides that a criminal statute must meet two requirements to satisfy due process: (1) adequate notice to individuals that certain contemplated conduct is proscribed; and (2) an adequate standard for those charged with

250. See, e.g., *Gates v. State*, 283 N.W.2d 474 (Wis. Ct. App. 1979); *State v. Beckett*, No. 09-09-1587, 2014 WL 1419283 (N.J. Super. Ct. App. Div. Apr. 15, 2014).

251. Leary, *supra* note 145, at 50.

252. *Id.*

253. *Id.*

254. See, e.g., *Gates*, 283 N.W.2d 474; *State v. P.M.*, 2016 WL 5759456, at *4 (N.J. Super. Ct. App. Div. Sept. 19, 2016); *United States v. Birbal*, 640 Fed. App’x 278 (5th Cir. 2016).

255. LA. CONST. art. I, § 2.

256. 51 AM. JUR. 2D *Licenses & Permits* § 18 (2017).

257. *Id.*

258. *State v. Beaudette*, 97 So. 3d 600, 604 (La. Ct. App. 2012).

determining the guilt or innocence of the accused.²⁵⁹ The Louisiana Criminal Code states that the articles of the Code cannot be extended by analogy to create crimes not provided for within the Code.²⁶⁰ Still, to promote justice and to effect the objects of law, the provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision.²⁶¹

The ambiguity and vagueness as to the meaning of consent within Louisiana Revised Statutes § 14:43 creates constitutional concerns.²⁶² Louisiana Revised Statute § 14:43 appears to support the proposition for unconstitutionality, because it calls for interpretation according to the fair meaning of words in light of the purpose of the provision.²⁶³ Because no general consensus as to the meaning of consent exists,²⁶⁴ one genuine construction cannot be given to the term, further clouding the statute's meaning.

Furthermore, because of the dearth of legislative history for Louisiana Revised Statutes § 14:43, the purpose of the “consent clause” can best be boiled down to the prevention of nonconsensual sex.²⁶⁵ It follows that achieving the prevention of nonconsensual sex requires a clear definition of consent. In the absence of a defined standard, the purpose of adding the “consent clause” is rendered meaningless. The meaning of consent is not clear, so it neither provides notice to a defendant of the prohibited conduct nor an adequate standard to determine guilt or innocence.²⁶⁶ Under this analysis, the statute is unconstitutionally vague.²⁶⁷

On the contrary, ambiguity exists as to what consent means rather than whether consent must be obtained; the requirement that consent be obtained is expressly stated in the statute.²⁶⁸ Perhaps, then, the vagueness in the statute does not rise to the level of unconstitutionality, and any confusion as to what constitutes consent will be treated as a legal mistake of fact.²⁶⁹ Finding Louisiana Revised Statutes § 14:43's “consent clause”

259. *State in the Interest of L.C.*, 126 So. 3d 768, 770 (La. Ct. App. 2013).

260. *See* LA. REV. STAT. § 14:3 (2018).

261. *Id.*

262. *Id.*; *Beaudette*, 97 So. 3d at 604; *L.C.*, 126 So. 3d at 770.

263. *See* LA. REV. STAT. § 14:3.

264. *See* Gruber, *supra* note 16, at 417.

265. *See* LA. REV. STAT. § 14:43 (2010).

266. *See id.* (2018); *Beaudette*, 97 So. 3d at 604; *L.C.*, 126 So. 3d at 770.

267. *See* LA. REV. STAT. § 14:43; *Beaudette*, 97 So. 3d at 604; *L.C.*, 126 So. 3d at 770.

268. This alternative argument could not have been reached without the assistance and insight of Professor Raymond T. Diamond.

269. *Id.*

constitutional remains in line with basic principles of statutory construction, in that courts are not to consider constitutional challenges lightly and “judicial self-restraint” has been deemed appropriate.²⁷⁰ Courts must uphold the constitutionality of statutes whenever possible and must read a statute so as to avoid finding unconstitutionality.²⁷¹ Poor drafting of laws may create or promote constitutional and statutory interpretation issues, which likely occur when a statute omits a definition, explanation, or standard for a vague and unambiguous phrase such as Louisiana Revised Statutes § 14:43’s “consent clause.”²⁷²

Regardless of whether the “consent clause” rises to a level of unconstitutionality, the statute is nevertheless ambiguous and vague. Such constitutional concerns further justify the adoption of an affirmative consent standard. The affirmative consent standard, in isolation, may not be enough to determine whether consent was present every time; the question then becomes one of judicial reasonableness within the affirmative consent framework.²⁷³

V. JUDICIAL INCORPORATION OF AFFIRMATIVE CONSENT IN LIGHT OF “REASONABLENESS”

Although courts may not sit as a “super legislature” to judge the policy or wisdom of legislation, courts do engage in statutory construction and interpretation when the text of a law does not provide adequate guidance to determine its meaning or intent.²⁷⁴ In fact, the affirmative consent movement began as a product of judicial statutory interpretation of an ambiguous standard of physical force.²⁷⁵ Although the judiciary has been slower to recognize affirmative consent, the evolution is alive and recognized, thanks, in great part, to *M.T.S.*—the milestone case that sparked the movement.²⁷⁶

In May 1990, 15-year-old C.G.²⁷⁷ was living with her mother, siblings, and several other people, including 17-year-old M.T.S. and his girlfriend.²⁷⁸ M.T.S. was temporarily residing at C.G.’s home with the permission of

270. LAMONICA & JONES, *supra* note 99, § 7.3.

271. *Id.*

272. *Id.*

273. See discussion *infra* Part V.

274. See LAMONICA & JONES, *supra* note 99, § 7.3; see also *id.* § 7:8.

275. See generally *State in the Interest of M.T.S.*, 609 A.2d 1266 (N.J. 1992).

276. *Id.*

277. To protect the identity of minor children involved in legal proceedings, jurisprudence refers to minors by their initials instead of their full names.

278. *M.T.S.*, 609 A.2d at 1267.

C.G.'s mother.²⁷⁹ The teenagers offered different recollections of how the events of May 21 unfolded, and the court did not credit either account fully.²⁸⁰ The record reflects, however, that prior to the incident in question, M.T.S. and C.G.'s relationship had developed past the point of formality.²⁸¹ It is undisputed that around 1:30 a.m. on the morning of the incident, M.T.S. appeared at the door of C.G.'s bedroom, and C.G., who was dressed in shorts, underpants, a shirt, and a bra, got up to go to the bathroom, passing in front of M.T.S.²⁸² C.G. claimed to have returned from the bathroom and fallen into a "heavy" sleep, only to be awoken to M.T.S. on top of her engaged in sexual intercourse.²⁸³ C.G. testified that she immediately slapped M.T.S. on the face and told him to stop and leave, after which he complied.²⁸⁴ M.T.S., on the other hand, testified that when C.G. returned from the bathroom, she and he consensually took off each other's clothing, got into bed, and began "petting."²⁸⁵ He testified that on about the fourth penetrative thrust, C.G. pushed him off and told him to stop, after which he complied.²⁸⁶ The next morning, C.G. told her mother that M.T.S. had raped her, and her mother filed a complaint with the police.²⁸⁷

The New Jersey Code of Criminal Justice defined "sexual assault" as the commission "of sexual penetration" with the use of "physical force or coercion."²⁸⁸ Finding ambiguity in the statutory language, the court explained, "[A]s evidenced by the disagreements among the lower courts and the parties, and the variety of possible usages, the statutory words 'physical force' do not evoke a single meaning that is plain and obvious."²⁸⁹ Hence, the court's task became interpreting the words "physical force."²⁹⁰ In taking on this feat, the court recognized perhaps one of the most polarizing dichotomies of the decision: "We also remain

279. *Id.*

280. *Id.* at 1267–68.

281. *Id.* at 1268. M.T.S. stated that he and C.G. had been good friends for a long time, and that their relationship "kept leading to more and more." *Id.* C.G. stated that M.T.S. had attempted to kiss her on numerous occasions and at least once had attempted to put his hands inside of her pants, but that she rejected all of his previous advances. *Id.*

282. *Id.* at 1266.

283. *Id.*

284. *Id.* at 1268.

285. *Id.*

286. *Id.*

287. *Id.*

288. N.J.S.A. 2C:14-2(a)(5)(a) (West 1982).

289. *M.T.S.*, 609 A.2d at 1270.

290. *Id.*

mindful of the basic tenet of statutory construction that penal statutes are to be strictly construed in favor of the accused. Nevertheless, the construction must conform to the intent of the Legislature.”²⁹¹

M.T.S. produced two results based on the possibility that proving the crime would turn on the victim’s state of mind or conduct, thereby putting the victim on trial instead of the criminal defendant.²⁹² The two conclusions may appear separate and distinct at first; however, they are interconnected and dependent on the existence of one another.²⁹³

The first conclusion is the intrinsic force standard.²⁹⁴ The intrinsic force standard, which the court used to find physical force, states that “physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful.”²⁹⁵ “Physical force” is to be viewed in light of a reasonableness principle; the statutory definition is met if the defendant “applies any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act of sexual penetration.”²⁹⁶

The requirement of affirmative and freely given permission in relation to physical force naturally led to the second conclusion of *M.T.S.* and the beginning of the affirmative consent movement.²⁹⁷ The court ruled that “any act of sexual penetration engaged in by the defendant without affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault.”²⁹⁸ The court noted that permission may be verbal or nonverbal.²⁹⁹

Where ambiguity remains without clearly expressed consent, *M.T.S.* imputes a *reasonableness* principle that allows an inference from “acts or statements reasonably viewed in light of the surrounding circumstances” when a reasonable person would have believed that the alleged victim had affirmatively and freely consented.³⁰⁰ The role of the factfinder is not to determine whether engaging in any act of penetration without the permission of another person is reasonable—as the court found the legislature already determined by enacting the sexual assault statute—but

291. *Id.*

292. *Id.* at 1277.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

to determine whether the defendant's *belief* that the alleged victim had freely given affirmative permission was reasonable.³⁰¹

Inevitably, ambiguous situations will arise in which one party claims consent was present, the other party claims consent was not present, and there is a lack of evidence to corroborate the conflicting testimony. To resolve this ambiguity, the *reasonableness* principle proscribed in *M.T.S.* acts as a lens through which to view the surrounding circumstances and determine whether a reasonable person, that is, the defendant, would have reasonably believed that the alleged victim had affirmatively and freely consented.³⁰² Thus, the factfinder's job is not to determine whether nonconsensual sex is reasonable, or whether the alleged victim's conduct was reasonable. The factfinder's job is to determine whether the surrounding circumstances led the defendant to reasonably believe the alleged victim consented.³⁰³

Because the standard of reasonableness articulated in *M.T.S.* looks similar to the "totality of the circumstances" approach already in use throughout Louisiana,³⁰⁴ it is tempting to question what it adds to the analysis. The response to this concern is straightforward—one may only view the reasonableness principle in light of affirmative consent. In other words, reasonableness must still fit within the framework of affirmative consent. For example, it would be unreasonable to determine that consent to sexual conduct given to one person automatically extended to multiple people because consent may not be inferred solely from a past or different relationship.³⁰⁵

To be effective, affirmative consent cannot exist in a vacuum.³⁰⁶ Instead, the standard must exist as part of a "larger multidisciplinary constellation of measures to address sexual assault."³⁰⁷ Incorporating a jurisprudential principle of reasonableness as seen in *M.T.S.*, which seems familiar to Louisiana jurisprudence, ensures the vitality of affirmative consent in Louisiana, because an affirmative consent standard alone cannot erase all ambiguity from a private encounter.³⁰⁸ Integrating the *M.T.S.* reasonableness principle into the previously defined affirmative

301. *Id.* at 1278–79.

302. *Id.* at 1277.

303. *Id.*

304. Interview with Angel Monistere, *supra* note 14. The "totality of the circumstances" approach requires the jury to determine consent by determining if the existing circumstances were reasonable. *Id.*

305. *See supra* Part III.A

306. Leary, *supra* note 145, at 3.

307. *Id.*

308. *M.T.S.*, 609 A.2d at 1277.

consent standard will increasingly adapt the standard to real-world circumstances, as integrate with Louisiana's current "totality of the circumstances" approach.³⁰⁹ *M.T.S.* may be questionable as a matter of statutory construction because the disputed statute required proof of "force or coercion," and "lack of consent" was not an express element; thus, the practical effect of the decision is to write "force or coercion" out of the statute and to replace it with an affirmative consent requirement.³¹⁰ Nevertheless, the interpretation of the New Jersey statute is consistent with the underlying principle that the core purpose of modern rape law is to protect the sexual autonomy of the female.³¹¹

CONCLUSION

The prevalence of sexual assault is a problem that society can no longer ignore, especially in light of mounting scandals centering around mainstream figures like Harvey Weinstein, Roman Polanski, Bill Cosby, and countless others.³¹² Louisiana Revised Statutes § 14:43's "consent clause" does not adequately satisfy the criminal justice system's responsibility to prevent sexual assault and creates an environment in which neither defendant nor victim can escape unscathed.³¹³ People interested in engaging in sexual conduct cannot clearly identify when their behavior will rise to the criminal charge of rape. Law enforcement cannot rely on a consistent standard that will determine when rape occurs.³¹⁴ Thus,

309. Interview with Angel Monistere, *supra* note 14.

310. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 634 (LexisNexis, 4th ed. 2006).

311. *Id.*

312. Ronan Farrow, *From Aggressive Overtures To Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017, 10:47 AM), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/38N2-LXZR>]; Samantha Cooney, *Here Are All the Public Figures Who've Been Accused of Sexual Misconduct After Harvey Weinstein*, TIME (Nov. 9, 2017), <http://time.com/5015204/harvey-weinstein-scandal/> [<https://perma.cc/HTB3-6ST8>]; Reuters, *Roman Polanski: judge rejects request from victim to dismiss rape case*, GUARDIAN (Aug. 18, 2017, 20:25 PM), <https://www.theguardian.com/film/2017/aug/19/roman-polanski-judge-rejects-request-from-victim-to-dismiss-case> [<https://perma.cc/VU5S-FW9X>]; Pamela Engel, *Bill Cosby's sexual-assault trial states today—and here's the backstory of the allegations against him*, BUS. INSIDER (June 5, 2017, 12:25 PM), <http://www.businessinsider.com/andrea-constand-bill-cosby-trial-2017-6> [<https://perma.cc/YJ7P-2VE9>].

313. See LA. REV. STAT. § 14:43 (2018).

314. *False Reporting Overview*, *supra* note 130.

victims of rape and victims of false allegations of rape slip through the cracks and do not receive justice. Adopting the affirmative consent standard in conjunction with the reasonableness principle articulated in *M.T.S.* redresses these deficits by providing clear standards of accepted conduct and prohibited conduct.³¹⁵ Although no legal definition can eliminate ambiguity in every real-life situation, affirmative consent goes beyond the norm by requiring the clear communication of willingness to engage, which better recognizes the reality and nature of sexual assault.³¹⁶

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315. *See supra* Part IV.

316. Leary, *supra* note 145, at 32.

* J.D./D.C.L., 2019, Paul M. Herbert Law Center, Louisiana State University. I would like to dedicate this work to my grandfather, Ronald A. Curet. He was my everything when I was nothing, and had it not been for his support, this Comment would not have been possible.