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Paul H. Robinson

*University of Pennsylvania Carey Law School*

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COMMENTARY

## The Legal Limits of 'Yes Means Yes'



Alex Williamson for The Chronicle

By Paul H. Robinson | JANUARY 10, 2016

**D**ebate grows over the use of "yes means yes" as a sexual-consent policy on college campuses. As opposed to "no means no," which directs sexual initiators to halt their advances if the other person struggles or says to stop, "yes means yes" or "affirmative consent" states that sexual initiators have to

actually get consent from the other person before proceeding to the next step. California and New York have recently mandated such policies, yet many people oppose them. Carol L. McCoy, a chancery-court judge in Nashville, last summer overturned a decision by the University of Tennessee at Chattanooga to expel a student under such a policy, holding that it had violated due process.

On one side of the debate are those unhappy with the culture on many campuses that seems to allow men to bully women into intercourse, putting the burden of ambiguous situations entirely on the woman. In this culture, ambiguity is taken as a green light.

On the other side are those who see the affirmative-consent rule as a violation of the basic principles of American criminal justice. As Nadine Strossen, a former president of the American Civil Liberties Union, recently noted: "These affirmative-consent rules violate rights of due process and privacy. They reverse the usual presumption of innocence. Unless the guy can prove that his sexual partner affirmatively consented to every single contact, he is presumed guilty of sexual misconduct."

While these two sides may seem to be in irresolvable conflict, they are not. The public discussion about affirmative consent seems to have mixed two quite different issues. Most criminal-law theorists would point out that there is a crucial difference between what they would call in legal jargon an *ex ante* rule of conduct — that is, telling people beforehand what the law requires of them — and an *ex post* principle of adjudication — setting the rules by which a violation of the rules of conduct is to be judged.

I think there is little dispute about the value of "yes means yes" as a rule of personal conduct understood beforehand by both parties; the only dispute is whether it is an appropriate standard to determine liability and punishment if those rules are violated.

We ought to all agree that there is value in colleges' promoting "yes means yes" as the proper means by which students deal with one another. That announcement and its regular public affirmation can help change the culture. What is doing the work here is not the occasional

disciplinary case litigated out of the public

eye, but rather the student body, men and women both, seeing that others accept the "yes means yes" standard as proper conduct. Indeed, the unanimity that one can get in support of "yes means yes" as a proper rule of conduct will do more toward securing the needed cultural shift than the divisive debates now going on, which serve only to generate opposition and confusion.

The source of disagreement — what people are objecting to — is not affirmative consent as the announced rule of proper conduct, but rather as the rule of *ex post* adjudication, that is, as the standard by which alleged violations are to be tried. One can readily understand the fears. Opponents of affirmative consent say it impermissibly shifts the burden of proof to the defendant.

Some people, though, are not willing to take a win by having affirmative consent accepted as the rule of proper conduct. They insist that unless the rule is used to determine liability and punishment, then it has no teeth.

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**A criminal law that earns moral credibility with the community is one that has the power to persuade people to internalize its norms.**

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But this tension exists in every aspect of criminal law with regard to every prohibited offense. For example, the criminal law's rules of conduct prohibit causing another person's death. Does it undercut that prohibition if we acquit someone who causes another person's death accidentally under circumstances in which a reasonable person might have done the same?

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**Ambiguity is taken as a green light in the current college culture.**

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Modern American criminal law has almost always chosen to require not only proof of the harm — causing another's death, or having intercourse when the partner is not in fact affirmatively agreeing — but also

to require that there was some minimum level of culpability or blameworthiness in the defendant.

Indeed, it is this aspect of criminal law — its commitment to imposing liability only when there is sufficient personal blameworthiness — that has given it the moral prescriptive power that it has. The criminal law that punishes without regard to blame loses moral credibility with the community it governs and is discredited and ignored. A criminal law that earns moral credibility with the community is one that has the power to persuade people to internalize its norms.

Ironically, it is the reformers seeking to change existing norms — such as the norms of sexual consent on college campuses — who would most benefit from a criminal law that has earned moral credibility. It is their reform efforts that are most injured when the law's credibility is damaged by using affirmative consent as a standard when determining guilt.

The most promising path to changing the culture of sexual consent on college campuses is to adopt and regularly reaffirm "yes means yes" as the rule of proper conduct, but to reject it as the principle of adjudication.

*Paul H. Robinson is a professor of law at the University of Pennsylvania. He is the co-author, with Sarah Robinson, of Pirates, Prisoners, and Lepers: Lessons From Life Outside the Law (Potomac Books, 2015).*

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