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Barriers to Affirmative Consent Policies and the Need for Affirmative Sexuality

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Barriers to Affirmative Consent Policies and the Need for Affirmative Sexuality

Kristen N. Jozkowski, Ph. D.*

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I. SEXUAL ASSAULT AND SEXUAL CONSENT ON COLLEGE CAMPUSES: WHY ARE WE DISCUSSING SEXUAL ASSAULT AND CONSENT NOW?

Sexual assault continues to be a salient public health issue with approximately one in five college women experiencing sexual assault or attempted sexual assault.¹ Although sexual assault has been a persistent problem for several decades, public interest in the issue seems to have been recently re-ignited by a series of events, including various steps taken by the United States federal government to address the problem nationally.² For example, in 2011, the Department of Education's Office for Civil Rights (OCR) issued a "*Dear Colleague Letter*" aimed at addressing sexual assault under Title IX of the Education Amendments of 1972 (Title IX).³ Title IX prohibits gender-based discrimination in education programs and associated activities for universities that receive federal financial assistance.⁴ In this *Dear Colleague Letter*, sexual violence was defined as "a form of sex discrimination prohibited by Title IX," and acts of sexual violence, including sexual assault and sexual harassment, are considered forms of discrimination prohibited by Title IX.⁵ Accordingly, the letter stated: "If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects."⁶

Additionally, in 2014, President Barack Obama created the White House Task Force to Protect Students from Sexual Assault.⁷ According to President

1. Christopher P. Krebs et al., *College Women's Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College*, 45 J. OF AM. COLL. HEALTH 639, 639 (2010); BONNIE S. FISHER ET AL., NAT'L INST. OF JUSTICE, THE SEXUAL VICTIMIZATION OF WOMEN 22 (2000).

2. Leah R. Daigle et al., *The Violent and Sexual Victimization of College Women*, 23 J. OF INTERPERSONAL VIOLENCE 1296, 1296 (2008); See Clifford Kirkpatrick & Eugene Kanin, *Male Sex Aggression on a University Campus*, 22 AM. SOC. REV. 52 (Feb. 1957) (responding to two of the most highly cited articles from *Psychology of Women Quarterly* concerning the topic of rape and the victim's experience and attitudes); Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Student*, 55 J. OF CONSULTING AND CLINICAL PSYCHOL. 162 (1987); see also CHRISTOPHER P. KREBS ET AL., DEP'T OF JUSTICE, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY FINAL REPORT (2007).

3. Letter from Russlynn Ali, Asst. Sec'y. for Civil Rts., Office for Civil Rts., to Colleagues (April 4, 2011) (on file with *The University of the Pacific Law Review*).

4. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 [hereinafter "Title IX"].

5. Letter from Russlynn Ali, supra note 3; Title IX, supra note 4.

6. Letter from Russlynn Ali, supra note 3.

7. Memorandum, U.S. Off. of the Press Sec'y, Establishing White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014), <https://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a> (on file with *The University of the Pacific Law Review*).

Obama, the Task Force's mission is to "help schools do a better job of preventing and responding to sexual assault on their campus."⁸ In April 2014, the Task Force released *Not Alone*, a report addressing the state of sexual violence among college students, as well as recommendations for how to best address sexual violence on campus.⁹ Following the establishment of the Task Force, the United States Department of Education also released a list of institutions under investigation for mishandling or inappropriately handling cases of sexual violence in accordance with Title IX.¹⁰ This list started with fifty-five institutions in May 2014 and has since grown to over one hundred institutions.¹¹ The number of institutions on this list is in constant flux as institutions are added and removed from the investigation.¹²

II. AFFIRMATIVE CONSENT POLICIES

In response to the increased publicity regarding sexual assault on college campuses, universities have been examining and refining their own sexual assault policies and programming.¹³ Policymakers have also become more aware of sexual assault on college campuses and have begun to take action. Of note, in September 2014, the California state legislature passed Senate Bill 967, which directed the state's public higher education institutions receiving state funds for student financial assistance to implement an affirmative consent policy in regard to sexual encounters among students.¹⁴ According to this legislation:

Affirmative consent means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent.¹⁵

8. *Id.*

9. *Id.*

10. Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> (on file with *The University of the Pacific Law Review*).

11. Tyler Kingkade, *106 Colleges are under Federal Investigation for Sexual Assault Crimes*, HUFFINGTON POST (Apr. 6, 2015), http://www.huffingtonpost.com/2015/04/06/colleges-federal-investigation-title-ix-106_n_7011422.html (on file with *The University of the Pacific Law Review*).

12. *Id.*

13. Elizabeth Yeater & William O'Donohue, *Sexual Assault Prevention Programs: Current Issues, Future Directions, and the Potential Efficacy of Interventions with Women*, 19 CLINICAL PSYCHOL. REV. 739, 740 (1999).

14. 2014 STAT. CH. 748.

15. *Id.*

The legislation also states “[a]ffirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.”¹⁶ The New York state legislature passed a similar bill requiring state institutions in New York to implement an affirmative consent policy.¹⁷ Similar to California’s policy, the New York legislation defined affirmative consent as:

A knowing, voluntary, and mutual decision among all participants to engage in sexual activity. 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. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant’s sex, sexual orientation, gender identity, or gender expression.¹⁸

III. CRITIQUES OF AFFIRMATIVE CONSENT

Although some have been advocating for affirmative consent for a while,¹⁹ there are certainly several critiques of the legislation passed in California and New York. First, some argue that these states’ governments are infringing on people’s rights by dictating how people should communicate about sex.²⁰ Second, some maintain that requiring affirmative consent will ruin the mood or spontaneity of a sexual experience.²¹ Third, affirmative consent laws do not address sexual assaults that occur under the influence of alcohol or other drugs.²² For example, according to Kathleen A. Bogle, California’s affirmative consent policy will not change “he said/she said” situations of sexual assault, because the accused individual will report that “she said yes” instead of “she didn’t say no.”²³ Additionally, the legislation does not adequately address how to distinguish between someone who has consumed alcohol but can still reasonably

16. *Id.*

17. SB 5965, 2016 Leg., 2015–2016 Reg. Sess. (N.Y. 2016).

18. *Id.*

19. See, e.g., JACLYN FRIEDMAN & JESSICA VALENTI, YES MEANS YES! VISIONS OF FEMALE SEXUAL POWER & A WORLD WITHOUT RAPE, 39–40 (2008) (describing that looking for “affirmative participation” in sex is built into the performance model of sex, and arguing that such a model should be adopted because affirmative consent would then be engrained into adolescent boys and many kinds of rape accepted today would cease to exist).

20. Kristen N. Jozkowski, ‘Yes Means Yes’? *Sexual Consent Policy and College Students*, CHANGE: THE MAG. OF HIGHER LEARNING (Mar. 2015), available at http://www.changemag.org/Archives/Back%20Issues/2015/March-April%202015/yes_full.html (on file with *The University of the Pacific Law Review*) [hereinafter Jozkowski, *Yes Means Yes*].

21. *Id.*

22. Kathleen A. Bogle, ‘Yes Means Yes’ Isn’t the Answer, CHRON. OF HIGHER EDUC. (Oct. 27, 2014), <http://chronicle.com/article/Yes-Means-Yes-Isnt-the/149639/> (on file with *The University of the Pacific Law Review*).

23. *Id.*

communicate and interpret consent, and someone who is too intoxicated to consent to sex.²⁴

In order to assess the extent to which affirmative consent is helpful, hurtful, or neutral, it is important to understand the research underlying sexual consent. As such, the purpose of this article is to provide a context for affirmative consent. In order to do this, I first outline some of the research that affirmative consent is based on followed by criticisms of this perspective.²⁵ Second, I address some of the factors that complicate consent communication among college students from a socio-cultural perspective.²⁶ Finally, I conclude with recommendations for how affirmative consent can be helpful in a multi-prong initiative to address sexual assault among college students.²⁷

IV. WHERE DOES AFFIRMATIVE CONSENT COME FROM? EXAMINING THE MISCOMMUNICATION THEORY

Affirmative consent is similar to other consent promotion-based initiatives that encourage and promote explicit, ideally verbal, communication of consent to sexual activity as the main mechanism to prevent sexual assaults.²⁸ Neither California nor New York's legislation regarding affirmative consent require that consent be exclusively provided verbally.²⁹ However both states require that consent be communicated clearly.³⁰ Such initiatives are predicated on the miscommunication theory or miscommunication hypothesis.³¹ The miscommunication theory states that sexual assault generally occurs as a result of a misunderstanding or miscommunication between parties involved in sexual activity regarding sexual consent.³² According to the miscommunication theory, at least some men do not understand that they need to obtain consent from a sexual partner and/or do not understand what obtaining consent looks like;³³ this can result in a miscommunication or a misinterpretation that can then lead to

24. *Id.*

25. *Infra* Parts III–IV.

26. *See infra* Part V (discussing the factors that complicate communication about sex and sexual consent amongst college students).

27. *See infra* Parts VI (suggesting that affirmative consent may be a helpful factor in a multi-prong initiative to address the issue of sexual assault among college students).

28. Jozkowski, *Yes Means Yes*, *supra* note 20.

29. *See* 2014 STAT. Ch. 748 (defining affirmative consent as an “affirmative, conscious, and voluntary agreement to engage in sexual activity”); SB 5965, 2016 Leg., 2015–2016 Reg. Sess. (N.Y. 2016) (describing that affirmative consent can be given by words or actions).

30. 2014 STAT. Ch. 748; SB 5965, 2016 Leg., 2015–2016 Reg. Sess. (N.Y. 2016).

31. Jodee M. McCaw & Charlene Y. Senn, *Perception of Cues in Conflictual Dating Situations*, 4 VIOLENCE AGAINST WOMEN 609, 609 (Oct. 1998).

32. *Id.* at 610–11.

33. Susan E. Hickman & Charles L. Muehlenhard, “By the Semi-Mystical Appearance of a Condom”: How Young Women and Men Communicate Sexual Consent in Heterosexual Situations, 36 THE J. OF SEX RES., 258, 270 (1999).

sexual assault. As such, if men and women more clearly communicate their sexual consent, or agreement to engage in sexual activity via more explicit communication of affirmative consent, meaning yes means yes, or through strong assertive refusals, meaning no means no, incidents of nonconsensual sex—or sexual assault—would be reduced.

The miscommunication theory is largely based on research suggesting that men broadly see the world as more sexual than women do.³⁴ In lab-based studies, men perceived a female target as displaying more sexual interest and intent than women perceived the female target to be displaying.³⁵ Such research suggests that men misperceive women's friendly behavior as expressing an interest in sex or as women expressing an intent or willingness to engage in sexual activity.³⁶ In the same studies, women perceived the same behavior as indicators of friendliness and/or being polite, not as indicators of sexual interest.³⁷ Researchers deduced that these discrepancies in interpretation of cues can result in the occurrence of sexual assault because a man might assume that a woman was sending signals of sexual intent, whereas women intended to be friendly and polite.³⁸ Furthermore, alcohol consumption magnifies these misinterpretations.³⁹ When under the influence of alcohol, men are more likely to inaccurately interpret women's behavior and may believe that a woman's alcohol consumption suggests her sexual intent.⁴⁰

The miscommunication theory is also supported by research that suggests that men sometimes interpret women's sexual refusals as "token resistance."⁴¹ Token resistance is the term applied to situations in which women say no to sex, but really mean yes and ultimately intend on consenting to sex.⁴² Although women generally do not engage in token resistance in high frequency,⁴³ some

34. McCaw & Senn, *supra* note 31, at 611–12.

35. Coreen Farris et al., *Sexual Coercion and the Misperception of Sexual Intent*, 28 *CLINICAL PSYCHOL. REV.*, 48, 49–50 (2008).

36. *Id.* at 50.

37. *Id.*

38. *Id.* at 60.

39. *Id.* at 59.

40. Antonia Abbey et al., *Alcohol's Effects on Perceptions of a Potential Date Rape*, 64 *J. STUD. ALCOHOL* 669 (2003); Farris et al., *supra* note 35; William H. George et al., "Self-Reported Alcohol Expectancies and Postdrinking Sexual Inferences about Women," 25(2) *J. OF APPLIED SOC. PSYCHOL.* 164 (1995); Kristen P. Lindgren et al., *Gender Differences in Perceptions of Sexual Intent: A Qualitative Review and Integration*, 32 *PSYCHOL. OF WOMEN Q.* 423 (2008).

41. Farris et al., *supra* note 35, at 60.

42. Charlene L. Muehlenhard & Carie S. Rogers, *Token Resistance to Sex, New Perspectives on an Old Stereotype*, 22 *PSYCHOL. OF WOMEN Q.* 443 (1998).

43. R. Lance Shotland & Barbara A. Hunter, *Women's 'Token Resistant' and Compliant Sexual Behaviors Are Related to Uncertain Sexual Intentions and Rape*, 21 *PERSONALITY AND SOC. PSYCHOL. BULL.* 226, 230 (1995); Muehlenhard & Rogers, *supra* note 42.

men endorse the belief that women do not mean no when they say no,⁴⁴ and instead are “playing hard to get.” If men believe women frequently engage in token resistance, it is no surprise that they would ignore refusals.

Finally, gender differences in consent communication style have also been attributed to the miscommunication theory. Kristen N. Jozkowski and colleagues found that heterosexual men and women favor different types of cues--nonverbal v. verbal--when communicating and interpreting consent.⁴⁵ Specifically, men reported more frequently utilizing nonverbal cues when communicating consent to and interpreting consent from a sexual partner.⁴⁶ Alternatively, women reported commonly providing consent via responding to a man’s verbal initiation.⁴⁷ This dynamic, in addition to supporting the traditional sexual script in which men must act as sexual initiators and women act as sexual gatekeepers,⁴⁸ may also create an opportunity for misunderstandings between men and women.

If women are waiting to be asked verbally for their consent and men are interpreting women’s nonverbal cues as consent, there may be instances in which women do not consent to sexual activity but do not outright refuse because they are waiting for men to provide the opportunity to refuse by asking permission for sex. Women may not want to engage in sexual activity but may not outright communicate their non-agreement without being prompted by men because they do not want to upset their partner, make him think that they are not interested, or seem like a tease, especially if they are romantically interested in this person.⁴⁹ As such, women may tolerate a certain level of sexual activity like manual sex/genital touching, even surpassing a level of intimacy with which they are comfortable, hoping that men will stop at that behavior rather than progressing to more intimate behaviors such as vaginal-penile intercourse. However, given current findings regarding the types of cues men draw on to interpret consent, men may interpret that silence as permission or consent to continue engaging in increasingly more intimate behaviors and perhaps even sexual intercourse.⁵⁰ Such “situations could result in a man unintentionally having sex with an

44. See, e.g., Suzanne L. Osman, *Predicting Men’s Rape Perceptions Based on the Belief That ‘No’ Really Means ‘Yes,’* 33 J. OF APPLIED SOC. PSYCHOL., 683–92 (2003).

45. Kristen N. Jozkowski et al., *Gender Differences in Heterosexual College Students’ Conceptualizations and Indicators for Contemporary Sexual Assault Prevention Education*, 51 THE J. OF SEX RES. 904, 913 (2014) [hereinafter Jozkowski, *Gender Differences*].

46. *Id.*

47. *Id.*

48. Kristen N. Jozkowski & Zoe D. Peterson, *College Students and Sexual Consent: Unique Insights*, 50 J. OF SEX RESEARCH 517 (2013); Michael W. Wiederman, *The Gendered Nature of Sexual Scripts*, 13 THE FAM. J. 496, 497 (2005).

49. Jozkowski, *Gender Differences*, *supra* note 45; Sarah J. Walker, *When “No” Becomes “Yes”: Why Girls and Women Consent to Unwanted Sex*, 6 APPLIED & PREVENTATIVE PSYCHOL. 157, 158 (1997).

50. Kristen N. Jozkowski et al., *Consenting to Sexual Activity: The Development and Psychometric Assessment of Dual Measures of Consent*, 43 ARCH. SEX. BEHAV. 437, 440 (2014) [hereinafter Jozkowski, *Consenting*].

unwilling woman without him realizing that she was not consenting to the sexual activity.”⁵¹

Sexual assault prevention initiatives that are predicated on consent promotion, like affirmative consent, endorse the miscommunication theory.⁵² Thus, if sexual assault results from a misunderstanding or misinterpretation of cues, promoting clear and explicit consent communication should alleviate such misinterpretations of consent cues and reduce the occurrence of sexual assault.

V. REFUTING THE MISCOMMUNICATION THEORY

If the miscommunication theory is accurate, affirmative-consent models such as those passed in California and New York would reduce rates of sexual assault. However, findings from several studies serve to refute the miscommunication theory.⁵³ As E. Sandra Byers stated, there is “substantial agreement between male and female college students on the methods most important to sexual communication.”⁵⁴ For example, when conducting interviews with young adults, Melanie A. Beres found that men and women reported using the same types of cues to communicate and interpret consent and refusal.⁵⁵ Furthermore, Beres’ participants reported knowing or having a sense of their partner’s consent from non-verbal cues and contextual factors associated with the interaction.⁵⁶ She labeled this form of consent communication “tactic knowledge,” and noted that young adults are fairly literate in this form of communication which includes implicit, nonverbal cues.⁵⁷

Research focused on conversational analysis also suggests that people can and do interpret each other’s implicit nonverbal cues accurately.⁵⁸ Celia Kitzinger and Hannah Frith found that people rarely make any type of refusal, including the refusal of a sexual advance, via stating “no” outright.⁵⁹ Instead, when refusals are made, they generally begin with a palliative remark to “soften the blow” followed by an excuse of why one is unable to do something rather

51. Jozkowski, *Gender Differences*, *supra* note 45, at 914.

52. *Id.* at 906.

53. *See generally* Melanie A. Beres et al., *Navigating Ambivalence: How Heterosexual Young Adults Make Sense of Desire Differences*, 51 J. OF SEX RES. 765 (2014).

54. E. Sandra Byers, *Female Communication of Consent and Nonconsent to Sexual Intercourse*, 5 J. OF THE NEW BRUNSWICK PSYCHOL. ASS’N 12, 17 (1980).

55. Melanie A. Beres, *Sexual Miscommunication? Untangling Assumptions About Sexual Communication Between Casual Sex Partners*, 12 CULTURE, HEALTH & SEXUALITY 1, 7 (2010).

56. *Id.* at 11.

57. *Id.* at 5.

58. *See generally* Beres et al., *supra* note 53.

59. Hannah Frith & Celia Kitzinger, *Talk About Sexual Miscommunication*, 20 WOMEN’S STUDIES INT’L F. 517, 518 (1997).

than an outright rejection.⁶⁰ In such instances, an overt refusal--saying "no" as many consent promotion based programs recommend, e.g., "no means no"--is avoided.⁶¹

Even without an explicit "no," findings indicate that young adults are very capable of understanding an exchange as a refusal.⁶² When conducting focus groups with young men, O'Byrne and colleagues found that the young men in their sample accurately understood women's sexual refusals, even those refusals that were communicated in subtle, implicit ways that did not include the word "no."⁶³ In fact, they stated: "refusals are not only *not* normatively achieved with a simple 'no,' but that the word 'no' is not even necessary to accomplish a refusal."⁶⁴ Findings from several other studies suggest that men and women frequently communicate sexual consent via subtle, nonverbal cues, and that they are able to accurately interpret each other's cues.⁶⁵ In fact, Kitzinger and Frith argue that subtle refusals are regularly used and understood by men and women:

Both men and women have a sophisticated ability to convey and to comprehend refusals, including refusals which do not include the word 'no,' and we suggest that male claims not to have 'understood' refusals which conform to culturally normative patterns can only be heard as self-interested justifications for coercive behavior.⁶⁶

It is important to note that much of the research cited above is not based on samples from the United States, but instead include samples from other westernized countries: United Kingdom, Australia, New Zealand, and Canada.⁶⁷ However, we can certainly extrapolate findings from other westernized countries as being applicable in an American sample. Several other studies using American samples suggest that heterosexual college students commonly report communicating consent via nonverbal cues.⁶⁸ Although Jozkowski, Peterson, et

60. Celia Kitzinger & Hannah Frith, *Just Say No? The Use of Conversation Analysis in Developing a Feminist Perspective on Sexual Refusal*, 10 DISCOURSE & SOC'Y 293, 302 (1999). A palliative remark could be a statement such as, "I would really like to, but . . ." or "I really wish I could, but . . .". An outright rejection includes a statement like, "I can't because I am unavailable."

61. *Id.*

62. *See, e.g., id.*; Rachael O'Byrne et al., 'You Couldn't Say "No", Could You?': Young Men's Understandings of Sexual Refusal, 16 FEMINISM & PSYCHOL. 133 (2006).

63. O'Byrne et al., *supra* note 62.

64. *Id.*

65. *See generally* Beres, *supra* note 55, at 5; Beres et al., *supra* note 53; McCaw & Senn, *supra* note 31; Frith & Kitzinger, *supra* note 59; O'Byrne et al., *supra* note 62.

66. Kitzinger & Frith, *supra* note 60, at 295.

67. *See* Kathrin F. Stanger-Hall & David W. Hall, *Abstinence-Only Education and Teen Pregnancy Rates: Why We Need Comprehensive Sex Education in the U.S.*, 6 PLOS ONE 1 (2011); *see also* Beres et al., *supra* note 53.

68. *See, e.g.,* David S. Hall, *Consent for Sexual Behavior in a College Student Population*, ELEC. J. OF HUMAN SEXUALITY 1, 13 (1998); Hickman & Muehlenhard, *supra* note 33; Jozkowski, *Consenting*, *supra* note 50, at 444.

al. found some gender differences in the types of consent cues college students reported using most frequently, it is important to note that these differences do not automatically equate to misunderstanding in consent cues.⁶⁹ It may be the case, as Jozkowski, Peterson, et al. argue, that the different styles of consent cues reported by men and women are influenced by specific gender stereotypes and the traditional sexual script.⁷⁰ That is, “gender stereotypes suggest that men are expected to always want to engage in sexual activity, whereas women are stereotyped as being hesitant to engage in sex and thus held accountable for giving or denying permission.”⁷¹

VI. IS THE MISCOMMUNICATION THEORY ACCURATE?

It is possible that, in some instances, the miscommunication theory is accurate, as some nonconsensual sex probably results from a misunderstanding of consent. Given findings that men and women accurately understand each other’s consent and refusals cues—even those that are nonverbal and implicit—it is likely that other factors contribute to the occurrence of sexual assault.⁷² The remainder of this article outlines three specific socio-cultural factors that contribute to a rape supportive culture: (1) sexuality education, (2) college party culture, and (3) sexual ambivalence.⁷³ Specifically, this article examines how these three factors influence consent communication among college students.⁷⁴

It is important to acknowledge that sexual assault can and does occur in a variety of relationship and gender contexts (e.g., women as victims; men as victims; men as perpetrators; women as perpetrators; sexual assault perpetrated by individuals of different genders; sexual assault perpetrated by individuals of the same gender).⁷⁵ However, college women are far more likely to experience sexual assault compared to college men.⁷⁶ Additionally, gender norms, gender-based sexual scripts, and gender inequity are central to all three socio-cultural factors this article describes. As such, this article utilizes a heterosexual lens and

69. Jozkowski, *Gender Differences*, *supra* note 45, at 914.

70. *Id.* at 905.

71. *Id.* at 913.

72. *See infra* Part V (elaborating on the notion that since research shows men and women accurately understand each other’s consent and refusal cues, it is likely the case that there are other factors contributing to sexual assault)

73. *See id.* (outlining three specific socio-cultural factors contributing to a rape supportive culture: (1) sexuality education, (2) college party culture, and (3) sexual ambivalence).

74. *See id.* (examining how three socio-cultural factors influence consent communication among college students).

75. *See* Nancy D. Brener et al., *Forced Sexual Intercourse and Associated Health-Risk Behaviors Among Female College Students in the United States*, 67 *J. OF CONSULTING AND CLINICAL PSYCHOL.* 252, 254 (1999).

76. *Id.*; DAVID CANTOR ET AL., *REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT* viii (2015); Koss et al., *supra* note 2.

primarily considers sexual assaults in which men perpetrate and women are victims.

VII. FACTORS COMPLICATING CONSENT: IF IT IS NOT MISCOMMUNICATION,
THEN WHAT IS GOING ON?

A. *Sexuality Education in the United States*

According to the Centers for Disease Control and Prevention and data from the National Survey of Family Growth, approximately nine million teens are sexually active and sixty-two percent of high school seniors have engaged in sexual intercourse.⁷⁷ Although the majority of American teens are sexually active, adolescent sexuality itself remains controversial.⁷⁸ America's discomfort with adolescent sexuality is reflected in the United States' approach to sexuality education.⁷⁹ For example, the United States has significant barriers to accessing sexuality information, including limited funding and the expectation that states apply for funding on an annual basis.⁸⁰ Unlike other industrialized countries like Denmark and Sweden, the United States does not have federal requirements for public schools regarding sexuality or HIV education.⁸¹ Instead, each state may or may not mandate that public schools provide sexuality and/or HIV education.⁸² By not requiring that sexuality or sexual health be addressed as part of public school education, young people may interpret that sex is off-limits, and thus, must be bad, wrong, or shameful and something that should not be discussed. Undoubtedly, such implicit messages influence how young people feel about sex and how they might approach communicating about sex--including consent--with their sexual partners.

Twenty-two states plus the District of Columbia require that sexuality education be provided in public schools;⁸³ California is *not* among those states.⁸⁴ However, California is one of only thirteen states that requires sexuality education be medically accurate if it is taught and is one of only eight states that requires sex education be culturally appropriate and unbiased.⁸⁵

77. Danice K. Eaton et al., *Youth Risk Behavior Surveillance—United States, 2011*, 61 SURVEILLANCE SUMMARIES 1 (2012); Gladys M. Martinez & Joyce C. Abma, *Sexual Activity, Contraceptive Use, and Childbearing of Teenagers Aged 15–19 in the United States*, NCHS DATA BRIEF No. 209 2 (2015).

78. ADVOCATES FOR YOUTH, *THE TRUTH ABOUT ABSTINENCE-ONLY PROGRAMS* 2 (2007).

79. Laina Y. Bay-Cheng, *The Trouble of Teen Sex: The Construction of Adolescent Sexuality Through School-Based Sexuality Education*, 3 SEX EDUC. 61 (2003).

80. Stanger-Hall & Hall, *supra* note 67.

81. *Id.* at 9.

82. *Id.* at 1.

83. GUTTMACHER INST., *STATE POLICIES IN BRIEF: SEX AND HIV EDUCATION* (2016).

84. *Id.*

85. *Id.*

If taught, sexuality education curricula is typically defined as either (1) abstinence-only or abstinence-only until marriage education (AOE), or (2) comprehensive sexuality education (CSE).⁸⁶ Abstinence-only programs aim to prevent teens from engaging in sexual activity by emphasizing abstaining from sexual behavior; sometimes these programs present abstinence as the only appropriate choice for adolescents.⁸⁷ Despite evidence to the contrary, some AOE programs advocate that sex prior to marriage will result in negative health outcomes and generally exclude information regarding other sexual and reproductive health issues, such as birth control, condom use, and sexual communication.⁸⁸ With respect to sexual consent, AOE programs often focus on teaching refusal skills, but usually do not address consent in general or how to consent to sex specifically.⁸⁹ Alternatively, CSE generally covers a range of sexual and reproductive health topics, which may include birth control, condom use, abstinence, and information about healthy relationships and sexual communication.⁹⁰

In addition to being ineffective in preventing pregnancy and delaying sexual initiation,⁹¹ AOE programming may actually be emotionally and psychologically damaging to young people.⁹² “Young people are being instructed [via AOE programs] continually to believe sexual activity is dangerous to their health.”⁹³ From a public health perspective, this is simply not true.

Unfortunately, AOE is rife with fear-based messages that encourage young people to believe sex occurs only in the context of marriage,⁹⁴ and that disastrous outcomes will result from pre-marital sex.⁹⁵ There is no scientific evidence suggesting that consensual, protected sex between adolescents is harmful.⁹⁶ These scare tactics perpetuate negative perceptions of sexuality, which are then

86. Stanger-Hall & Hall, *supra* note 67.

87. ADVOCATES FOR YOUTH, *supra* note 78, at 1.

88. Community Based Abstinence Education, 70 Fed. Reg. 29,318 (May 20, 2005) (on file with *The University of the Pacific Law Review*).

89. Vanessa Cameron-Lewis & Louisa Allen, *Teaching Pleasure and Danger in Sexuality Education*, 13 SEX EDUC.: SOC'Y & LEARNING 121, 127 (2013).

90. Leslie M. Kantor et al., *Abstinence-Only Policies and Programs: An Overview*, 5 SEXUALITY RES. & SOC. POL'Y 6, 13 (2008).

91. DOUGLAS KIRBY, EMERGING ANSWERS 2007: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY AND SEXUALLY TRANSMITTED DISEASES 4 (2007); CHRISTOPHER TRENHOLM ET AL., IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS 1 (2007); U.S. H.R. COMM. ON GOVT. REFORM, THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS 3 (2004).

92. Michelle Fine & Sara I. McClelland, *Sexuality Education and Desire: Still Missing After All These Years*, 76 HARV. EDUC. REV. 297, 306 (2006); Peter S. Bearman & Hannah Bruckner, *Promising the Future: Virginity Pledges and First Intercourse*, 106 AM. J. OF SOC. 859, 898 (2001); DEBORAH L. TOLMAN, DILEMMAS OF DESIRE 22 (2002).

93. Fine & McClelland, *supra* note 92 at. 309)

94. Bay-Cheng, *supra* note 79, at 64.

95. *Id.*

96. John Santelli et al., *Abstinence and Abstinence-only Education: A Review of U.S. Policies and Programs*, 38 J. OF ADOLESCENT HEALTH 72, 74 (2006).

treated as fact,⁹⁷ thereby foster problematic gender and sexual dynamics among young people.⁹⁸ Reinforcing these misleading gender stereotypes can contribute to rape supportive ideologies and skew perceptions of consent communication.⁹⁹

Exposure to AOE can be problematic in two ways: (1) AOE provides inaccurate and misleading information about sexual assault and consent; and (2) AOE perpetuates stereotypical gender norms that contribute to victim blaming and the endorsement of rape myths.

1. *AOE Provides Inaccurate and Misleading Information*

There is little empirical research available examining the extent to which sexuality education, in general, and AOE programming, specifically, covers topics related to sexual consent and sexual assault.¹⁰⁰ However, when information on sexual consent and sexual assault is provided as part of AOE curricula, it is often inaccurate, misleading, and/or biased.¹⁰¹ According to Kantor's SIECUS report, most AOE curricula "include false and misleading information about sexual assault: rape is not defined adequately; much of the information is confusing and not age-appropriate; date rape is rarely addressed and responsibility for rape prevention is placed solely on women."¹⁰²

Some AOE programs imply or directly state that rape can be avoided.¹⁰³ These programs suggest that if a woman does experience sexual assault, it is likely her fault.¹⁰⁴ For example, in *Sex Respect*, the responsibility for avoiding rape is often placed on girls through their demeanor and attire choices: "You can say NO by the way you act, talk and dress . . . wear clothes that advertise you, not your sexiness."¹⁰⁵ Similarly, *Families, Decision-Making and Human Development* suggests that women should "choose to dress in a way that does not suggest to others that you are looking for sexual activity."¹⁰⁶ Such rhetoric sends the message to adolescent girls and boys that consent can be interpreted via clothing and therefore a woman is to blame for enticing a man if he forces sex on her.

97. Kantor et al., *supra* note 90, at 11.

98. E.g., Fine & McClelland, *supra* note 92, at 321; Kantor et al., *supra* note 90, at 15.

99. FRIEDMAN & VALENTI, *supra* note 19, at 35.

100. Kantor et al., *supra* note 90, at 12.

101. *Id.* at 11.

102. Leslie M. Kantor, *Scared Chaste? Fear-Based Educational Curricula*, 21 SEICUS REP. 1, 8 (1993).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

2. AOE Perpetuates Stereotypical Gender Norms

AOE curricula tends to portray girls as nonsexual and boys as sexually aggressive and manipulative.¹⁰⁷ *RSVP*, another AOE program, perpetuates damaging gender stereotypes in an activity about dating.¹⁰⁸ For this activity, girls and boys are asked a series of questions. For example, girls are asked, “Would you study with your boyfriend in your bedroom?” and “What would you say to your boyfriend if he asked you to prove that you loved him by having sex?”¹⁰⁹ These questions perpetuate the stereotype that boys are only looking for sex, and may try to manipulate girls if given the opportunity.¹¹⁰ Such depictions of adolescent sexuality create poor gender dynamics.

Similarly, AOE programs depict sexual behavior as something that escalates out of the control of young people.¹¹¹ In particular, young men are often depicted as being unable to “stop” past a certain point; once men get their “motor running,” there is no stopping.¹¹² Therefore, it is the responsibility of everyone--but women especially--not to create a situation in which men will be unable to stop.¹¹³ As part of AOE, adolescents are instructed to avoid almost all forms of sexual expression including deep kissing and touching, so as not to push men past the proverbial “point of no return.”¹¹⁴ This is concerning for a number of reasons. First, such conceptualizations paint men as irrational, uncaring individuals who will essentially rape a woman after the first kiss because they have no control over themselves. Women learn that they should be fearful of men’s uncontrollable sexuality and diligent in fending off any and all sexual advances before it gets “too far” and men are unable to stop themselves. Second, by implying that men are sexually uncontrollable and that women are responsible for fending off advances, AOE reinforces the stereotypical role of women as sexual gatekeepers and men as sexual initiators.¹¹⁵ It is not surprising then that college students’ consent communication tends to align with this traditional sexual script.¹¹⁶ Certainly, causal inferences cannot be made. However, as AOE continues to reinforce women as gatekeepers and men as initiators, it will continue to be difficult for young people to conceptualize alternatives to these sexually scripted gender roles.

107. *Id.* at 10.

108. *Id.* at 11.

109. *Id.*

110. *Id.* at 10.

111. *Id.* at 5.

112. *Id.*

113. *Id.*

114. *See id.* (stating there is no discussion for alternatives to sexual intercourse).

115. Wiederman, *supra* note 48, at 497.

116. Jozkowski & Peterson, *supra* note 49, at 519.

Perpetuating these gender biases can have negative effects for women in particular. Although AOE emphasizes the expectation that adolescents refuse sex, it also suggests that men are unable to stop themselves.¹¹⁷ It is important and healthy to teach young women (and men) that they have the right to say “no” to unwanted or undesired sexual behavior.¹¹⁸ However, “reinforcing girls’ ability and right to say ‘no’ is not enough if boys are not taught to ‘hear and understand the word no’.” A failure to do so implicitly exempts boys from such discussions.¹¹⁹ Because men are conceptualized as uncontrollable, they are not held responsible for forcing sex on a woman.¹²⁰ After all, men cannot help themselves, especially if women are wearing revealing, sexy clothing (recall messages from *Sex Respect* and *Families, Decision-Making and Human Development* regarding the importance of girls’ attire in communicating their consent or sexual willingness).¹²¹ Such depictions of sexuality send the message that women are at fault for rape and the expectation is that men will rape.

As men are depicted as sexually uncontrollable, women are depicted as sexually uninterested, which is also a false and misleading depiction of female sexuality.¹²² According to *Sex Respect*, “[b]oys tend to use love to get sex. Girls tend to use sex to get love.”¹²³ This sentiment is echoed in *FACTS*, which cautions that “men may . . . use love to get sex, e.g., tell a girl you love her so she will do things sexually,” whereas “women may . . . use sex to get love, e.g., do something sexually to hold on to the boy.”¹²⁴ *Sex Respect* and *FACTS* imply that men are deceptive in their tactics to acquire sex from women, and women are uninterested in sex.¹²⁵ This conceptualization of adolescent sexuality ignores adolescent girls’ potential for sexual desire and continues to perpetuate the image of boys as uncaring, unfeeling, deceitful, and manipulative. If young women cannot see themselves as legitimate sexual subjects, how will they be able to articulate consent or refuse unwanted sex in a sexual situation?¹²⁶ Furthermore, how can adolescents be expected “to know their sexual selves and assert their needs if their sexual agency is denied by sexuality education?”¹²⁷ These are

117. Kantor, *supra* note 102, at 5.

118. *Id.* at 15.

119. Bay-Cheng, *supra* note 79, at 70.

120. *Id.*

121. See Kantor, *supra* note 102, at 8 (discussing messages from *Sex Respect* and *Families, Decision-Making and Human Development* regarding the importance of girls’ attire in communicating their consent or sexual willingness).

122. Michelle Fine, *Sexuality, Schooling, and Adolescent Females: The Missing Discourse of Desire*, 58 HARV. EDUC. REV. 29, 31 (1998).

123. Kantor, *supra* note 102, at 10.

124. *Id.*

125. *Id.*

126. Cameron-Lewis & Allen, *supra* note, at 124 (citing DEBORAH L. TOLMAN, *DILEMMAS OF DESIRE* 21 (2002)).

127. *Id.*

important questions to consider in light of implementing an affirmative consent policy. “Ironically, in our indiscriminate portrayals of teenage girls as sexual victims, we may be failing to teach them about genuine sexual autonomy and consequently ensuring that they *will be* victims.”¹²⁸

Generally, abstinence-based education does not provide an opportunity for adolescents to consider their own feelings about, beliefs towards, and potential criteria for engaging in sex.¹²⁹ In an effort to emphasize abstinence, AOE programs often overlook opportunities to engage students on issues like sexual decision-making and refusal/negotiation skills.¹³⁰ AOE programs rarely address topics such as how to give, ask for, or infer sexual consent.¹³¹ Instead, they suggest, as *Sex Respect* and *Families, Decision-Making and Human Development* do, that consent can be interpreted via the types of clothes women wear, which is cited as a common rape myth.¹³² The message presented to adolescents is simply “don’t,” rather than considering sexual activity as part of a healthy human development. This leaves students poorly prepared for situations they may face in high school and college. Additionally, because AOE programs treat gender stereotypes as factual,¹³³ students may perpetuate these negative perceptions of male and female sexuality as they leave high school and enter college. Due to the emphasis placed on AOE in many states and regions of the country, many students enter college with limited knowledge about sex and sexuality.

B. College Party Culture

In the United States, college is considered a time for experimentation as many young adults live on their own and are away from parents for the first time.¹³⁴ The expectation to party and consume alcohol is embedded in our social scripts about college life.¹³⁵ For example, consider how college life is depicted in mainstream films: *Animal House*, which dates back to the 1970s, portrays students consuming copious amounts of alcohol and engaging in sexual behavior

128. Diane Raymond, *Homophobia, Identity, and the Meanings of Desire: Reflections on the Cultural Construction of Gay and Lesbian Adolescent Sexuality*, in *SEXUAL CULTURES AND THE CONSTRUCTION OF ADOLESCENT IDENTITIES* 115, 132 (1994).

129. Kantor, *supra* note 102, at 4.

130. *Id.* at 5.

131. *Id.* at 26.

132. Martha R. Burt, *Cultural Myths and Support for Rape*, 38 *J. OF PERSONALITY & SOC. PSYCHOL.* 217, 223 (1980); Diana L. Payne et al., *Rape Myth Acceptance: Exploration of Its Structure and Its Measurement Using the Illinois Rape Myth Acceptance Scale*, 33 *J. OF RES. IN PERSONALITY* 27, 50 (1999).

133. Kantor et al., *supra* note 90, at 11.

134. Arielle Kuperberg & Joseph E. Padgett, *Dating and Hooking Up in College: Meeting Contexts, Sex, and Variation by Gender, Partner’s Gender, and Class Standing*, 52 *J. OF SEX RES.* 517, 518 (2015).

135. Kristen N. Jozkowski & Jacquelyn D. Wiersma, *Does Drinking Alcohol Prior to Sexual Activity Influence College Students’ Consent?*, 27 *INT’L J. OF SEXUAL HEALTH* 156, 168 (2015).

while partying.¹³⁶ More contemporary films depict similar images of college students consuming large quantities of alcohol, engaging in sexual activity, and partying.¹³⁷

From a development perspective, experimenting with one's sexuality is not problematic.¹³⁸ However, new students may not be aware of how alcohol affects them and, with the expectation to drink heavily, many students may consume too much alcohol resulting in negative repercussions (e.g., alcohol poisoning; blacking out). Additionally, new students are usually too young to purchase alcohol legally and many universities do not permit partying in campus residence halls.¹³⁹ As a result, students may end up partying in unfamiliar venues, such as fraternity houses or other off-campus residences; sorority houses are generally not permitted to host parties.¹⁴⁰ The links between party culture, including alcohol consumption and sexual assault, have been documented in the literature.¹⁴¹ This section describes how aspects of college party culture can complicate issues of consent and perpetuate a culture on college campuses conducive to rape.

1. Alcohol Use and Sexual Assault

Young adults have the highest rates of alcohol use, alcohol use disorders, and alcohol-related problems compared to any other age cohort,¹⁴² and young adult women are one and a half times more likely to experience a sexual assault than women in the general population.¹⁴³ Research has consistently linked sexual assault with alcohol use by perpetrators, victims, or both.¹⁴⁴ Additionally, sexual assault commonly occurs in settings where other individuals are present and also consuming alcohol.¹⁴⁵

Although the links between sexual assault and alcohol consumption are well documented, documented, research examining how people consent to sex while under the influence of alcohol is limited. This is not entirely surprising given the ethical challenges associated with studying sexual consent and alcohol

136. ANIMAL HOUSE (Universal Pictures 1978)

137. E.g., OLD SCHOOL (Dreamworks 2003); 21 AND OVER (Relativity Media 2013); THE INTERNSHIP (Twentieth Century Fox Film Corporation 2013).

138. TOLMAN, *supra* note 92, at 20.

139. Elizabeth A. Armstrong et al., *Sexual Assault on Campus: A Multilevel, Integrative Approach to Party Rape*, 53 SOC. PROBS. 483, 489 (2006).

140. ELIZABETH A. ARMSTRONG & LAURA T. HAMILTON, PAYING FOR THE PARTY: HOW COLLEGE MAINTAINS INEQUALITY 52-53 (2013).

141. Armstrong et al., *supra* note 139, at 483.

142. NAT'L INST. OF HEALTH, U.S. DEP'T. OF HEALTH & HUMAN SERV., ALCOHOL ALERT (2006).

143. FISHER ET AL., *supra* note 1, at 1.

144. Antonia Abbey, *Alcohol-Related Sexual Assault: A Common Problem among College Students*, 14 J. OF STUD. ON ALCOHOL 118, 119 (2002).

145. Armstrong et al., *supra* note 139, at 490.

consumption.¹⁴⁶ Indeed, alcohol consumption obscures one's ability to even give consent to sexual activity,¹⁴⁷ and engaging in sexual activity with someone who is *too intoxicated* to consent to sex *is* sexual assault.¹⁴⁸ However, legally, distinguishing between "consensual sex under the influence of alcohol" and someone who is "too intoxicated to give and interpret consent" is challenging but particularly germane to discussions of sexual assault among college students. Nonetheless, college students do engage in sexual activity in conjunction with alcohol use, therefore, discussions of partying, alcohol consumption, and sexual consent are necessary.¹⁴⁹

2. *Alcohol Use and Consent*

Alcohol use can influence people's perceptions of consent in several ways. First, when people have consumed alcohol, it is generally more difficult for them to interpret the sexual intent of others, regardless of whether the other person is intoxicated.¹⁵⁰ Second, individuals consuming alcohol are generally perceived as being more sexually interested and available than those who have not consuming alcohol.¹⁵¹ Related research suggests that some men believe a woman's alcohol consumption suggests her sexual intent.¹⁵² According to interviews conducted with college students, Jozkowski and Hunt found that college men in their sample interpreted women consuming alcohol as indicating consent to engage in sex, as articulated in the following quote from Joe, 19:

'If she is drinking a bunch, or even just partying a little, ya know, having a few drinks or shots or whatever, you know she is looking to have sex. Like, that's why she is partying and drinking . . . it's like a way of saying—hey I am interested . . . I'm willing to do it.'¹⁵³

146. Jozkowski & Wiersma, *supra* note 135, at 156.

147. *Id.*

148. *Id.*

149. *Id.* at 156–57.

150. Farris et al., *supra* note 35, at 48–66. *See also*, Lindgren et al., *supra* note 40, at 423–39.

151. Farris et al., *supra* note 35, at 58 (for reviews, see Farris, Treat, Viken, & McFall, 2008; Lindgren, Parkhill, George, & Hendershot, 2008).

152. Abbey et al., *supra* note 40, at 675.

153. Kristen N. Jozkowski & M. Hunt, 'Who Wants a Quitter? . . . So You Just Keep Trying': *How College Students' Perceptions of Sexual Consent Privilege Men*, SOC. FOR SCI. STUDY OF SEXUALITY ANN. MEETING (2014). This is derived from thirty interviews with college students from a large southern university. Students' ages ranged from eighteen to twenty-five. Participants were assigned pseudonyms to reflect gender; names were redacted to in the text by their pseudonym and accurate age.

Mike, 20, shared a similar sentiment: “‘It’s like if I see her drinking, I know that it’s game on . . . I know she is drinking so I know she wants me to know—‘I’m interested, I’m willing.’”¹⁵⁴

Men in this sample even linked women’s discussions about alcohol use and partying to consent.¹⁵⁵ That is, men in the sample, like Jacob, 21, indicated that if a woman discusses partying or drinking, this can be interpreted as indicators of wanting and/or agreeing to sex:

‘Sometimes when I hear a group of females, ladies, talking about how ya know they wanna get wasted or want to get drunk, or blasted or something, I know they mean they wanna have sex too. Especially for the females because . . . they’re like not allowed to be as upfront about it [sex].’¹⁵⁶

Alternatively, women in Jozkowski and Hunt’s sample linked alcohol consumption more generally with partying and hookup culture.¹⁵⁷ They did not see alcohol consumption as an absolute indicator of consent as articulated by Sarah, 19: “‘When I go out and drink, I am usually just looking to have fun. If something happens, if I hook up or something, okay, fine. But usually, I am just drinking to have a good time with friends.’”¹⁵⁸

Women recognized, however, that men perceived an association between alcohol consumption and agreement to sexual activity.¹⁵⁹ For example, in the following quote Jessica, 22, describes how a man might perceive a woman’s acceptance of a drink he purchases for her:

‘Accepting it [an alcohol drink purchased by a man] might be an indicator that you might be interested [in having sex] or you might not. Sometimes you get nice guys that are just, ‘oh, you ladies have a good night’ and they’ll leave you alone. But there are some guys that kind of want to stay around you because they bought you a drink, because they have that expectationSo the main thing that makes you feel bad in saying no [refusing sex] would be hurting his feelings and feeling like in some way I perhaps owe this person something.’¹⁶⁰

An individual’s perception of another person’s consent or willingness to engage in sexual activity while under the influence of alcohol is also related to that person’s alcohol expectancies. Alcohol expectancies are defined as the

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

emotional, social, or behavioral outcome expectations individuals have when consuming alcohol.¹⁶¹ Alcohol expectancies are particularly salient regarding the discussion about consent, because heavier drinkers tend to have stronger positive alcohol expectancies.¹⁶² In other words, individuals with higher alcohol expectancies more often believe that alcohol has a disinhibiting effect and “aphrodisiac powers.”¹⁶³ As such, it is not surprising that men with stronger alcohol expectancies perceive women who have consumed alcohol as being more sexually aroused and having a higher degree of intent to engage in sexual behavior compared to women who have not consumed alcohol, as well as compared to men with lower alcohol expectancies.¹⁶⁴ This is important because, according to a lab-based study, men’s perception of women’s sexual arousal was positively associated with the men’s belief that it is acceptable to pressure women to have sex after physical and verbal refusal.¹⁶⁵

When considering these findings together, some men may believe that when a woman consumes alcohol she is more sexually aroused. And when a woman is sexually aroused, some men perceive that it is acceptable to pursue sexual advances even after she has refused. The notion that a man is justified in pressuring or coercing an intoxicated woman to have sex in general, and especially post-refusal, mirrors common rape myths (e.g., “If a woman is raped while she is drunk, she is at least somewhat responsible for letting things get out of control”).¹⁶⁶ Rationalizing that a woman’s alcohol consumption insinuates her consent or agreement to sex serves only to perpetuate such rape myths by ascribing to unrealistic interpretations of consent.

Graham and colleagues noted similar findings in their observational study of sexually aggressive behaviors at bars and nightclubs in Canada.¹⁶⁷ Approximately ninety percent of the sexually aggressive actions observed by the researchers included situations in which men initiated an aggressive act aimed at women targets.¹⁶⁸ Interestingly, the level of the act’s invasiveness was related to the women’s intoxication level, not the men’s intoxication level.¹⁶⁹ In other words, these findings suggest that sexually aggressive men seem to be targeting

161. Barry T. Jones et al., *A Review of Expectancy Theory and Alcohol Consumption*, 96 *ADDICTION* 57, 59–61 (2001).

162. Mark S. Goldman et al., *Alcohol Expectancy Theory: The Application of Cognitive Neuroscience*, in *PSYCHOLOGICAL THEORIES OF DRINKING AND ALCOHOLISM* 203, 205–07 (Kenneth E. Leonard & Howard T. Blane eds., 1999).

163. George et al., *supra* note 40, at 166.

164. Abbey et al., *supra* note 40, at 675–76.

165. *Id.*

166. Payne et al., *supra* note 132, at 49.

167. Kathryn Graham et al., “*Blurred Lines?*” *Sexual Aggression and Barroom Culture*, 38 *ALCOHOL CLIN. EXP. RES.* 1416, 1416 (2014).

168. *Id.* at 1421.

169. *Id.* at 1422.

intoxicated women.¹⁷⁰ It may be the case that men believe a woman who has consumed alcohol is indicating her willingness to engage in sexual activity--as some of the interview data presented by Jozkowski and Hunt suggests.¹⁷¹ Alternatively, perhaps men are specifically and intentionally targeting women who have consumed alcohol because they will be less able to resist aggressive acts and/or less inclined to confront aggressive acts after the fact due to their intoxication level.¹⁷² Additionally, some men may be strategic in purchasing alcohol drinks for women with the intention of increasing a woman's interest in sex, as described by Russ, 23: "If she is drinking, she's more likely to ya know, let it happen. So I'll sometimes buy a girl that I like a drink to help things along."¹⁷³

It is unclear exactly what Russ means when he says "help things along."¹⁷⁴ He may believe alcohol might act as a social lubricant, resulting in a more comfortable flow of conversation and, potentially, engagement in sexual behavior. However, this excerpt may also suggest that Russ is being predatory by supplying a woman with alcohol to increase the likelihood that sex will be attainable with or without consent.

It is possible that men are targeting intoxicated women and then claiming that they interpreted her alcohol consumption as an indicator of consent in order to rationalize their wrongdoing. It is important to note that women do feel pressure to engage in sexual activity with men, particularly if the man in question has purchased alcoholic drinks for a woman, or if women are partying at the man's residence like at fraternity parties.¹⁷⁵ That pressure may come directly from men, but also from women. For example, according to Jozkowski and Hunt's interviews with college students, Stacey, 21, describes the social expectation for women to have sex with a man they have accepted alcoholic drinks from: "Well, so here is the thing—if you take drinks all night from a guy, you are sort of telling him you will have sex . . . Some girls will drink all night, letting him pay for it without having sex, but she probably should do it [have sex]."¹⁷⁶

Finally, intoxicated men also perceive more sexual intent from women compared to sober men. These findings were observed in both lab-based and computer-based studies in which men viewed women confederates.¹⁷⁷ In these

170. *Id.*

171. Jozkowski & Hunt, *supra* note 153.

172. Graham, *supra* note 167, at 1422..

173. Jozkowski & Hunt, *supra* note 153.

174. *Id.*

175. Armstrong et al., *supra* note 139, at 491.

176. Jozkowski & Hunt, *supra* note 153.

177. Antonia Abbey et al., *The Effects of Past Sexual Assault Perpetration and Alcohol Consumption on Men's Reactions to Women's Mixed Signals*, 24 J. SOC. CLIN. PSYCHOL. 1, 14 (2005) (lab-based); Coreen Farris et al., *Alcohol Alters Men's Perceptual and Decisional Processing of Women's Sexual Interest*, 119 J. OF ABNORMAL PSYCHOL. 427, 428 (2010) (computer-based).

studies, intoxicated men were more attentive to women's sexual interest cues compared to sober men, even when cues of uncertainty or disinterest were present.¹⁷⁸ It is not surprising that college students face challenges in consent negotiation under the influence of alcohol, as nonverbal, subtle cues to communicate consent are most frequently reported.¹⁷⁹ Although research suggests that college men are able to understand women's subtle and implicit refusals, under the influence of alcohol, these subtle, nonverbal cues may be misinterpreted more often.¹⁸⁰ College men may see such cues as indicating sexual intent and potentially consent even when that was not the intent of the other person.¹⁸¹

3. *Male-Controlled Party Scene*

As previously stated, from a developmental perspective, there is nothing inherently wrong with experimentation that includes partying and engagement in sexual behavior. However, problems can arise when one gender is in control of the party scene. Many universities in the United States have specific rules and regulations, as well as unwritten, cultural norms and practices that privilege men in regard to control over the party scene.¹⁸² American fraternities and sororities represent a system that operates under formalized rules and regulations, as well as informal cultural norms and practices.¹⁸³ The formal rules and regulations and informal cultural normal and practices create a party environment that is dominated and controlled by men.¹⁸⁴

According to Elizabeth A. Armstrong et al.:

Fraternities control every aspect of parties at their houses: themes, music, transportation, admission, access to alcohol, and movement of guests. Party themes usually require women to wear scant, sexy clothing and place women in subordinate positions to men such as 'Pimps and Hos,' 'Victoria's Secret,' and 'Playboy Mansion.'¹⁸⁵

Furthermore, women who attend fraternity parties "cede control of turf, transportation, and liquor" and are "expected to be grateful for men's

178. *Id.* at 430.

179. Hickman & Muehlenhard, *supra* note 33, at 259.

180. *Id.* at 269.

181. *Id.* at 270.

182. Armstrong et al., *supra* note 139, at 484.

183. *Id.* at 488 (provided by the Intra-Fraternity Council and Panhellenic, implicitly endorsed by universities as they allow these groups to self-regulate).

184. *Id.* at 489.

185. *Id.*

hospitality.”¹⁸⁶ Men often disproportionately target freshmen women as part of their tactics to control the party scene.¹⁸⁷ Women are expected to be “nice” to the men who host the parties.¹⁸⁸ Being “nice” can sometimes equate to accepting and tolerating unwanted sexual contact.¹⁸⁹ Some women even believe they are expected to have sex with a man in exchange for his hospitality, as articulated by Jessica, 22: “‘But then a lot times I do feel like girls do feel that pressure especially if they’re at the fraternity house if they go to sleep there, they’re expected to basically reciprocate for staying there. [Kristen: ‘Have you ever felt that way?’] . . . ‘Yes.’”¹⁹⁰

The gender imbalances in the fraternity and sorority system are only problematic if men choose to exploit women’s vulnerabilities.¹⁹¹ Some men do exploit these vulnerabilities as they compete to obtain sex from as many women as possible in order to improve their reputation among their male-peer groups.¹⁹² DeSantis labeled the social expectation for men to engage in sex with as many women as possible as “heterosexual promiscuity.”¹⁹³ When men feel social pressure to engage in sex with numerous women, some men may attempt to obtain sex from intoxicated women. However, women who are intoxicated to the point of incapacitation cannot legally give consent.¹⁹⁴ Even the women who are not intoxicated to the point of incapacitation experience pressure or low-level coercion.¹⁹⁵ Aspects of contemporary party culture—including party environments controlled by men and the social expectation for women to be sexy and “nice”—create an environment in which women feel pressured to have sex.¹⁹⁶ Compounded with the fact that men are supposed to seek sex, it is easy to see how the party culture can facilitate sexual assault.¹⁹⁷

Although other social settings exist for college students to party, “Greeks are considerably more visible and powerful on campus than their numbers suggest.”¹⁹⁸ It is important to note that fraternity houses control and have access to “valuable” campus resources: “space to congregate socially, a large supply of

186. *Id.* at 490.

187. Stephen Cranney, *The Relationship Between Sexual Victimization and Year in School in U.S. Colleges: Investigating the Parameters of the “Red Zone,”* J. OF INTERPERSONAL VIOLENCE 1, 11 (2014).

188. Armstrong et al., *supra* note 139, at 490.

189. *Id.* at 484.

190. Jozkowski & Hunt, *supra* note 153.

191. Armstrong et al., *supra* note 139, at 484.

192. *E.g., id.* at 488; KATHLEEN A. BOGLE, *HOOKING UP: SEX, DATING, AND RELATIONSHIPS ON CAMPUS* 74 (2008); ALAN D. DE SANTIS, *INSIDE GREEK-U: FRATERNITIES, SORORITIES, AND THE PURSUIT OF PLEASURE, POWER, AND PRESTIGE* 36–37 (2007).

193. DE SANTIS, *supra* note 192, at 36.

194. Armstrong et al., *supra* note 139, at 484.

195. *See id.* at 492.

196. *Id.* at 495.

197. *Id.* at 488.

198. ARMSTRONG & HAMILTON, *supra* note 140, at 51.

alcohol, and the promise of legal impunity.”¹⁹⁹ Thus, their impact on campuses should not be understated. Bars, apartments, and houses also serve as venues for partying, but mainly for upperclassmen who are old enough to go to the bar or are permitted to live off campus.²⁰⁰ As such, there is an unequal distribution of power on campus which can result in fraternity men having greater control.

C. *Sexual Ambivalence and Gender Norms*

Often we assume that consensual sex is wanted and nonconsensual sex is unwanted. Although this is most often the case, conflating “wantedness” and consent can be problematic.²⁰¹ Indeed, sometimes sex is not entirely wanted or unwanted, irrespective of consent. At times, people feel ambivalent towards sex, meaning they have both favorable and unfavorable thoughts and feelings about engaging in sex. According to Peterson and Muehlenhard, people may feel ambivalent about sex in general, ambivalent about sex with a specific partner, or ambivalent about sex under specific contextual factors, circumstances, or situations.²⁰² People may have concurrent negative and positive feelings about the sex itself—someone may be extremely sexually aroused, but very nervous about sexual performance (i.e., performance anxiety). Someone may possess strong negative and positive feelings associated with the potential outcome of engaging in sex. For example, individuals may worry about experiencing unintended pregnancy, but believe that having sex without a condom could increase emotional closeness in the relationship and build intimacy.

Individuals who feel ambivalent about sex may also “avoid thinking about sexual activity, or might feel reluctance to acknowledge that they may engage in such activity.”²⁰³ In a prospective study, Tara K. MacDonald and Michaela Hynie asked college students their intentions to engage in intercourse, as well as to use condoms.²⁰⁴ After one week, the authors asked students about their actual sexual and condom use behaviors.²⁰⁵ They found that more ambivalent students predicted whether they would have sex less accurately and used condoms less frequently compared to students who felt less ambivalence.²⁰⁶

199. *Id.* at 53

200. *Id.* at 54.

201. Zoe D. Peterson & Charlene L. Muehlenhard, *Conceptualizing the “Wantedness” of Women’s Consensual and Nonconsensual Sexual Experiences: Implications for How Women Label Their Experiences with Rape*, 44 *J. OF SEX RES.* 73–74 (2007).

202. *Id.*; Charlene L. Muehlenhard & Zoe D. Peterson, *Wanting and Not Wanting Sex: The Missing Discourse of Ambivalence*, 15 *FEMINISM & PSYCHOL.* 18 (2005).

203. Tara K. MacDonald & Michaela Hynie, *Ambivalence and Unprotected Sex: Failure to Predict Sexual Activity Decreased Condom Use*, 38 *J. OF APPLIED SOC. PSYCHOL.* 1094 (2008).

204. *Id.* at 1096.

205. *Id.*

206. *Id.* at 1101.

This argument can be applied to college students' ambivalence and consent communication. For example, someone's positive feelings about sex might lead to willingness to have sex, but their negative feelings might make them reluctant to explicitly communicate sexual consent. In such situations, students may not want to admit thinking about or planning sex prior to it happening. Instead, students may prefer to consider the encounter something that occurred spontaneously or sex that "just happened" rather than as something deliberate. Therefore, it is not surprising, that college students commonly report that sex "just happened" when asked to recount how they communicated consent.²⁰⁷ Feelings of ambivalence can influence consent, particularly in light of certain gender norms and expectations.

Some reasons for sexual ambivalence are related to gender norms regarding sex and gendered sexual expectations. Gender norms largely dictate what is considered acceptable sexual behavior for men and women; substantial gender differences exist, especially in regard to permissive sexuality—or hooking up—among college students.²⁰⁸ Women are expected to minimize the number of sexual partners they have and limit sex to only romantic or potential romantic partners.²⁰⁹ For women, sex in the context of a romantic relationship is deemed socially acceptable, whereas hookups with casual partners are considered socially unacceptable.²¹⁰ In order to minimize the number of men women have sex with, women opt for steady hookup partners—like friends with benefits—or try to initiate romantic relationships with men.²¹¹ Appropriately ascribing to these gender norms is particularly important for college students because college students are hyper-aware of what their peers do. According to qualitative and mixed-method studies, college students observe and monitor each other's actions, specifically in regard to sexual behaviors.²¹² Deviating from the ascribed sexual norms can result in social repercussions.

In the context of college hookup culture, these gender norms can perpetuate sexual ambivalence. For example, a college woman may enjoy sex and find sex highly arousing, and thus desire sex during a hookup, but at the same time be concerned about acquiring a negative label.²¹³ Indeed, researchers found that women will stay in unhappy relationships in order to align with the gender norm

207. Hickman & Muehlenhard, *supra* note 33, at 270; Jozkowski, *Consenting*, *supra* note 50, at 444.

208. BOGLE, *supra* note 192, at 74–75.

209. BOGLE, *supra* note 192, at 77; Laura Hamilton & Elizabeth A. Armstrong, *Gendered Sexuality in Young Adulthood: Double Binds and Flawed Options*, 23 GENDER & SOC'Y 589, 593–94 (2009).

210. BOGLE, *supra* note 192, at 77, 80.

211. *Id.* at 80.

212. See, e.g., Armstrong et al., *supra* note 139, at 487 (explaining how men engineer parties to pursue sex); BOGLE, *supra* note 192, at 73 (illustrating college students' preoccupation with their peers' sexual behaviors); DESANTIS, *supra* note 192, at 36, 38 (recounting "the timeless practice of men and women categorizing and ranking each other").

213. Charlene L. Muehlenhard et al., *Double Standard*, in INT'L ENCYC. OF HUM. SEXUALITY 310–11 (2015).

to have sex only with romantic partners, minimize their number of sexual partners while still engaging in sexual activity because it is with a romantic partner and therefore acceptable, and thus avoid the social repercussions of being labeled a “slut” or “whore.”²¹⁴

Jozkowski and Hunt’s interviews with college students articulated the potential for social repercussions for women who engage in casual sex. For example, Damien, 22, stated: “‘Afterwards [referring to after college] you want a wife and not a woman who’s done all these people. You know? It’s like when you get a new car. You don’t want a lot of mileage on it.’”²¹⁵ Similarly, Joe, 19, stated, “‘A girl that hasn’t had sex, they’re typically in a lot higher—they’re a lot nicer, they know what they want in life.’”²¹⁶

Women are also aware of the social repercussions of having or desiring sex outside of a romantic partnership. As noted by Sandra, 21, some women may want to have sex, but feel pressured to say no in order to avoid developing a negative reputation:

I have this one friend who gets drunk so she can have sex, an excuse to have sex. That’s another thing she says too, ‘oh I had sex with such and such’ and it’s like, ‘oh I was drunk.’ She uses that as an excuse. Sometimes she’s not always drunk but she . . . and a whole lot of people use that as an excuse to why they hooked up with someone. It’s like, ‘oh I was drunk or that happened because I was drunk.’

Kristen: So a lot of your friends have used alcohol consumption as an excuse to have sex.

Sandra: Yes! Well, the girls. [Kristen: Just the women?] You know—they do it because then they have the reason to have sex. Or else, they are just being kind of, well you know, trampy.²¹⁷

According to Sandra, women may consume alcohol or claim they consumed alcohol to “excuse” sex they may have wanted.²¹⁸ This dynamic creates a tricky double bind for women: if they admit to having sex for the sake of wanting sex, they are slutty or trampy. But, if they consume alcohol with the intention of engaging in sex in order to have an “excuse” and later change their minds, they may be in situations that increase risk for sexual assault and experience victim blaming after the fact.

214. Hamilton & Armstrong, *supra* note 209, at 593–94; Melissa Burkett & Karine Hamilton, *Postfeminist Sexual Agency: Young Women’s Negotiations of Sexual Consent*, 15 *SEXUALITIES* 815, 825 (2012).

215. Jozkowski & Hunt, *supra* note 153.

216. *Id.*

217. *Id.*

218. *Id.*

Additionally, during a sexual interaction women may think they need to refuse a man's initiation of sex, at least initially, to avoid negative social labels. This sentiment was expressed by both women and men in Jozkowski and Hunt's interviews. According to Laura, 19:

Girls are supposed to be like 'wait.' And then see what the guy does—like he's supposed to lead the way and we're supposed to kind of let him direct whatever is going to happen . . . [Interview asks how women should respond to men's advances]. Girls are supposed to just kind of pull away and you kind of just act like the feminine girl. If you don't, that's not good . . . if you're too forward in that way [i.e., initiate sexual activity], you're kind of just slutty.²¹⁹

Similarly, men reported that women are supposed to refuse and men are supposed to pursue sex post-refusal, as articulated by Eric, 22: "Yeah, the guy is going to try. He's going to try. If she don't [sic] move your hand when it's on her, you know, she wants it, but she has to act like she has standards so she has to move away, but you have to try."²²⁰

Indeed, college men may believe pursuing sex post-refusal is part of their masculine gender role.²²¹ According to Wiederman:

Masculinity calls for being proactive and able to outdo one's opponent, and unfortunately this is the stance many young men take in relation to early sexual relationships. In many cases, male-female differences in sexual roles set up a dynamic of polar extremes; the more he pushes for sex, the more defensive she has to be, and vice-versa.²²²

As previously described, men are expected to have sex with many different partners; this was described earlier as "heterosexual promiscuity."²²³ Rushard, 20, bluntly articulated that sexual promiscuity is acceptable for men, but not women:

I guess it's deemed socially acceptable in a sense, that a guy can have as many partners as possible or whatever, because he's seen as that guy or he's a pimp or he's a player or whatever. But for a woman, she has negative labels. She's a ho, she's a slut or whatever.²²⁴

219. *Id.*

220. *Id.*

221. Wiederman, *supra* note 48, at 498.

222. *Id.*

223. DESANTIS, *supra* note 192, at 36–37.

224. Jozkowski & Hunt, *supra* note 153.

In order to obtain sex from multiple women, men avoid romantic relationships and instead seek hookups with novel partners.²²⁵ In fact, college students, both men and women, endorse the notion that men always want sex and are willing to engage in sex whenever the opportunity presents itself.²²⁶ Not being able to obtain sex from women may result in social repercussions for men such as teasing, being labeled as weak, or having one's heterosexuality questioned.²²⁷ For the typical college man, these social repercussions are steep, especially in all-male peer groups such as fraternities.²²⁸

The idea that a man's masculinity is tied to his sexual performance, including his number of sexual partners, can sometimes result in men consenting to sex they do not want. If a man were to refuse sex when the opportunity presented itself, his masculinity may be called into question and he would risk losing a favorable reputation with his peers.²²⁹ If it is assumed that men are always seeking sex because they always want to have sex or improve their reputation, the entire notion of men needing to consent to sex seems somewhat irrelevant. Jozkowski, Peterson, et al. use this rationale as a potential explanation for why men most frequently report using nonverbal cues to communicate consent.²³⁰ If it is assumed that men will always want and thus consent to sex, what is the point in verbally or explicitly articulating consent? It is important to note that men do not *always* want sex. However, if this is the expectation men and women endorse, men's affirmative consent seems unnecessary.

Additionally, the social expectation for men to have sex with as many women as possible can result in men, intentionally or unintentionally, pressuring or coercing women into sex. Some of the college men interviewed by Jozkowski and Hunt allude to attempts at trying to "convince" women to have sex post-refusal, which may equate to coercion.²³¹ Eric, 22, for example, described a situation in which he questioned whether a woman's refusals were genuine, or whether the woman was playing "hard to get": "I had some experiences to where I've convinced the woman, you know, to change her mind because the whole time you're wondering if she wants to do it but is saying no to put up the little friction to make me work for it, I guess."²³²

Damien, 22, also described pursuing sex post-refusal: "if she doesn't really seem sure when she says 'no', she can be convinced in the mind."²³³ Rushard, 20,

225. BOGLE, *supra* note 192, at 76; DESANTIS, *supra* note 192, at 36–37.

226. *E.g.*, Jozkowski & Peterson, *supra* note 48, at 519.

227. *Id.* at 521.

228. DESANTIS, *supra* note 192, at 36.

229. Brian N. Sweeney, *Masculine Status, Sexual Performance, and the Sexual Stigmatization of Women*, 37 *SYMBOLIC INTERACTION* 369, 377–378 (2014); Wiederman, *supra* note 48, at 498; DESANTIS, *supra* note 192, at 36.

230. Jozkowski, *Gender Differences*, *supra* note 45, at 913–14.

231. Jozkowski & Hunt, *supra* note 153.

232. *Id.*

233. *Id.*

specifically stated that if a woman is not assertive enough in her refusals, he continues to pursue sex from her: “If it’s real soft [her refusal], it’s like that’s not really clear to me, you know, so I’m going to try again. And if it’s still soft, it’s like okay, I’ve got some options here. I could probably convince her, you know.”²³⁴

Men’s articulations of “convincing” women post-refusal are concerning in light of how college students tend to communicate about sex--primarily nonverbally--and the male-controlled party scene.²³⁵ It is important to highlight that the men being interviewed who described attempts to ‘convince’ women post-refusal did not conceptualize women’s refusals as genuine, which is problematic.²³⁶ In fact, the men rationalized that it was acceptable to continue to initiate sex post physical and verbal refusal because women’s refusals were not assertive enough and thus not meaningful.²³⁷ This certainly begs the question, is trying to *convince* women to have sex post-refusal any different from coercion? And, this rationalize also begs the question whether some men truly interpret “no” as “meaning no.”

VIII. CONCLUSION

A. *Where Does This Leave Affirmative Consent?*

The perspective underlying affirmative consent is: college students’ ineffective consent communication and interpretation leads to sexual assault.²³⁸ Therefore, more explicit consent communication will reduce sexual assault. In addition to outlining what consent needs or should be to be explicit, affirmative consent policies also aim to promote a sex-positive perspective on sexuality and consent.²³⁹ Affirmative consent tries to promote consent as something positive, good, and sexy.²⁴⁰ If consent is sexy, then non-consent, by default, is not sexy. In theory then, affirmative consent will not only eliminate sexual assaults stemming from miscommunication, but also work to eroticize the consent negotiation process. If consent is an erotic component of the sexual encounter, people may be more inclined to communicate consent clearly during every sexual encounter. Jozkowski actually linked consent to an overall higher quality of sexual intercourse, so there is some, albeit quite limited, empirical evidence to support

234. *Id.*

235. Hickman & Muehlenhard, *supra* note 33, at 270; Jozkowski, *Gender Differences*, *supra* note 45, at 905; Jozkowski, *Consenting*, *supra* note 50, at 444; Armstrong et al., *supra* note 139, at 491.

236. McCaw, *supra* note 31, at 610, 617.

237. *Id.* at 617.

238. Jozkowski, *Consenting*, *supra* note 50, at 439.

239. Kristen N. Jozkowski, *The Influence of Consent on College Students’ Perceptions of the Quality of Sexual Intercourse at Last Event*, 25 INT’L J. OF SEXUAL HEALTH 260, 268–69 (2013).

240. *Id.*

eroticizing consent.²⁴¹ In order for consent to be truly affirmative and erotic, an affirming, sex-positive environment needs to exist.

Unfortunately, contemporary America does not exude sex-positivity. The cultural climate in the United States perpetuated by abstinence-based education, campus party practices, and gender dynamics that can lead people--and in particular women--to feel ambivalent about sex contributes to a rape-supportive climate instead of a sex-positive climate.²⁴² This article discussed the formalized policies and the cultural norms and practices that demonstrate men, and, especially women are not taught to have an affirmative, sex-positive approach to sexuality or believe they deserve sexual agency.²⁴³ As such, it is no surprise “sexism, patriarchy, and hegemonic masculinity pervade college campuses, just as they do society as a whole” and these factors “contribute to and facilitate sexual violence.”²⁴⁴

When considering the arguments presented in this article, it seems as though cultural norms and practices get in the way of people being allowed to truly practice and appreciate affirmative consent; but, this can change. The depiction of consent as being affirmative cannot exist in an environment in which: (1) adolescents are denied adequate information about sexuality and sexual health in public schools; (2) adolescents are exposed to damaging male and female stereotypes; (3) a male-controlled party scene exists; and (4) college cultural norms dictate that men should always desire sex and try to acquire sex while women should avoid “too much” sex. In such a culture, it is no surprise women feel ambivalent about sex, and men, in order to increase their reputation, continue to pursue sex post-refusal.

Proponents of affirmative consent say that policy mandates can shift culture.²⁴⁵ “If college students are forced, by means of a ‘yes means yes’ policy, to obtain affirmative consent, over time explicitness in consent communication might be adopted as a cultural standard.”²⁴⁶ But, in order for this policy to be effective, a multi-tiered approach addressing the larger social context in which rape-supportive ideology is perpetuated is necessary. In other words, in order for affirmative consent to be culturally adopted we first need to adopt an affirmative approach to sexuality.

B. Affirmative Sexuality Leads to Affirmative Consent

Before an affirmative consent policy can be effective, an affirmative approach to sexuality is necessary. Consent communication remains largely

241. *Id.* at 269.

242. *See supra* Part V.

243. *See id.*

244. Jozkowski, *Yes Means Yes*, *supra* note 20, at 17.

245. Armstrong et al., *supra* note 139, at 496; Jozkowski, *Yes Means Yes*, *supra* note 20, at 21.

246. *Id.*

embedded in gender roles that lead to imbalances and inequalities in consent communication.²⁴⁷ Affirmative consent policies may start to shift cultural norms particularly around gender, reduce inequalities, and make sex a less taboo topic. But the policy will not be effective if it is implemented in isolation. Therefore, as universities begin to consider different approaches to intervention, I recommend instituting an ecological perspective.²⁴⁸ Ecological approaches to health-related intervention include instituting change at the individual level (e.g., knowledge, attitudes, skills); interpersonal level (e.g., friends, peers, social networks); organizational level (e.g., campus administration, fraternities, sororities, student clubs); community level (e.g., university/campus community, relationship between fraternities, sororities and administration); and policy level (e.g., affirmative consent policies, zero tolerance policies).²⁴⁹ For example, at the individual level, interventions can target students' sexual assault and sexual consent-related knowledge and develop skills-training related to consent communication.²⁵⁰ At the interpersonal level, universities can implement bystander-intervention programs that encourage students to look out for their peers.²⁵¹ Organizational specific interventions, such as the Men's Program, can be implemented to target groups of high-risk individuals such as fraternity men and male college athletes.²⁵² Additionally, at the organizational level, tailored trainings can be provided for campus administrators, faculty, and staff who sit on Title IX student conduct boards or who are involved with sexual assault on campus in other facets, so that they will be better equipped to deal with sexual assault prevention and provide sexual assault services.²⁵³ Implementing a multi-tiered intervention approach will not only help to address the multi-faceted aspects of sexual violence and rape culture, but also serve to support implementation of an affirmative consent policy.

Additional socio-cultural shifts are necessary to fully combat rape culture in conjunction with affirmative consent policies as well. Socio-cultural shifts in gendered expectations regarding sex need to come from both student and administrative initiatives. Grassroot student initiatives are necessary to promote and empower female sexual agency, as well as provide men permission to refuse sex without social repercussion. Student-led initiatives can aim to dismantle rigid sexually scripted roles (i.e., men as initiators; women as gatekeepers).

247. Jozkowski & Peterson, *supra* note 48, at 522.

248. RALPH J. DICLEMENTE ET AL., *HEALTH BEHAVIOR THEORY FOR PUBLIC HEALTH: PRINCIPLES, FOUNDATIONS AND APPLICATIONS* 4 (2013).

249. Victoria L. Banyard et al., *Reducing Sexual Violence on Campus: The Role of Student Leaders as Empowered Bystanders*, 50 J. OF C. DEV. 446, 447 (2009).

250. *Id.* at 452–55.

251. *Id.*

252. JOHN FOUBERT, *THE MEN'S PROGRAM: HOW TO SUCCESSFULLY LOWER MEN'S LIKELIHOOD OF RAPING 1* (2000).

253. Banyard, *supra* note 249, at 455–56.

This task cannot be left solely to students. Campus administrators should adopt a zero-tolerance approach to victim-blaming and demonstrations or displays of rape-supportive ideologies. “In order to address sexual violence on college campuses, we need to identify the features of rape culture—such as patriarchal ideology and institutions of male dominance and entitlement—that are linked to sexual assault and aggression, and then [we need] to change that culture.”²⁵⁴ For affirmative consent policies to be effective, they need to be championed by campus leaders including campus administration, as well as faculty and staff working with note-worthy entities on campus such as athletics and Greeks.²⁵⁵

However, the support provided by administration, athletics, faculty, and staff needs to be more than lip-service. If an athlete commits a sexual assault, the administration cannot turn a blind eye because of his notoriety or skill on the playing field. Likewise, when egregious examples of rape culture surface from certain students or student groups-- the chants and signage of “No Means Yes, Yes Means Anal” that occurred at Yale University, Louisiana State University, and Texas Tech University²⁵⁶-- those responsible including their institution--the entire fraternity--need to be held accountable.

Finally, campuses can take the lead in promoting a pleasure ideal with regard to sexuality that includes affirmative consent.²⁵⁷ Public school sex education has a long way to go before it can be considered sex-positive. If students are not coming to college prepared, universities can attempt to mitigate this by providing some kind of affirmative sex education to students, and certainly by promoting diversity and acceptance in regard to people’s sexual expression. If we can shift our gendered approaches to sexuality from the current sex-negativity to appreciating and accepting broad expressions of sexuality, affirmative consent policies will have a much better impact on not only reducing sexual violence, but also promoting sexual communication and potentially improving the quality of people’s sexual experiences.

254. Jozkowski, *Yes Means Yes*, *supra* note 20, at 21.

255. *Id.*

256. Marina Watson Peláez, *Yale Suspends Delta Kappa Epsilon Fraternity After Sexist Chants*, TIME, May 18, 2011, <http://newsfeed.time.com/2011/05/18/yalesuspendsdeltakappaepsilonfraternityaftersexistchants/> (on file with *The University of the Pacific Law Review*); Quincy Hodges, *LSU's Kappa Sigma Fraternity Writes 'No Means Yes' on Wall, University Looking into Incident*, THE TIMES-PICAYUNE, Nov. 6, 2014, http://www.nola.com/news/batonrouge/index.ssf/2014/11/lsus_kappa_sigma_fraternity_wr.html (on file with *The University of the Pacific Law Review*); Tyler Kingkade, *Texas Tech Frat Loses Charter Following 'No Means Yes, Yes Means Anal' Display*, HUFFINGTON POST, Oct. 8, 2014, http://www.huffingtonpost.com/2014/10/08/texastechfratnomeansyes_n_5953302.html (on file with *The University of the Pacific Law Review*).

257. Jozkowski, *Influence*, *supra* note 239 at 270.