SEEKING CONSENT AND THE LAW OF SEXUAL ASSAULT

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This Article focuses on two neglected aspects of rape law. First, its tendency to presume sexual consent across a range of social contexts, overlooking the fact that much social life is predicated on a presumption against sexual contact. Second, its tendency to ignore a critical empirical fact: that an overwhelmingly large number of sexual assaults occur during the first-ever sexual contact between the specific parties involved—what I term "First Encounters." The relationship between these two facets of rape law is crucial. Whereas much of social life operates with an underlying presumption that people have not consented to sex with others unless they have given clear signals to that effect—particularly in relationships that have never before been sexual—rape law does the opposite and presumes consent where it has never existed. This disconnect constitutes our greatest overlooked opportunity for meaningful rape law reform.

Accordingly, rape law has been framed around the wrong questions. The right question, particularly in First Encounters, is whether the accused sought the victim's consent. The wrong questions—those focused on the presence of force, or the victim's reaction to the assault—are based on an underlying presumption that consent was present if force or lack of consent cannot be proven. Any legal presumption of consent to sex contrasts sharply with how people think of their own sexual agency and how they negotiate consensual sexual relationships in real life. I therefore argue for statutory reform that focuses the analytical lens on whether, and how, a sexual assault defendant sought the other party's consent to the encounter. I propose the offense of committing first-time sexual penetration or contact without seeking consent. In the absence of prior sexual contact between parties, the law should presume nonconsent.

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I. INTRODUCTION

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Accordingly, rape law has been framed around the wrong questions. The right question, particularly in First Encounters, is whether the accused *sought* the victim's[1] consent. The wrong questions—those focused on the presence of force, or the victim's reaction to the assault—are based on an underlying presumption that consent was present if force or lack of consent cannot be proven. Any legal presumption of consent to sex contrasts sharply with how people think of their own sexual agency and how they negotiate consensual sexual relationships in real life. I therefore argue for statutory reform that focuses on whether, and how, a sexual assault defendant sought the other party's consent to the encounter. I propose the offense of committing first-time sexual penetration or contact without *seeking* consent. In the absence of prior sexual contact between parties, the law should presume nonconsent.

The Article proceeds in five Parts. Part II sets out the central arguments about the prevalence of a presumption of consent in rape law and the overlooked importance of the First Encounters case. I focus analysis on the law's tendency to presume consent to sex, explaining where this presumption came from, how it continues to operate today, and why it is problematic.

Part III introduces a proposal for statutory reform that is designed to apply specifically to First Encounter cases and which criminalizes the act of engaging in first-time sexual contact or penetration without first seeking the other person's consent. This "Seeking Consent" approach focuses the fact-finder's attention on the accused's conduct rather than the victim's while also respecting the victim's sexual agency.

Part IV analyzes a range of sexual assault cases in order to demonstrate that the Seeking Consent approach is a useful corrective to courts' common practice of overlooking critical First Encounter dynamics and ignoring the sexual agency of victims. Judicial opinions that have trivialized the harm of sexual assault and produced absurd results come out differently under the proposed approach.

Part V shows how my proposal builds upon the affirmative consent debate. It gives an overview of the statewide statutory landscape around affirmative consent, demonstrating that support for the idea is building across constituencies,

1. A note on terminology. Throughout, I use the terms "victim" and "complainant" interchangeably to describe a person reporting or experiencing a sexual assault. Although the term "survivor" is preferred by many victims, I do not use that term here because "victim" and "complainant" better distinguish the victim in relation to the perpetrator. In addition, not all victims of sexual assault survive the experience.

Also throughout the Article, I often use male pronouns to refer to the perpetrator and female pronouns to refer to the victim. Using gender distinct pronouns helps to clarify who I am referring to in each discussion, and I have used the pronouns that reflect the gender of most perpetrators and many victims. However, people of all genders can be victims or perpetrators of sexual assault.

despite critics' objections. It also demonstrates that the seeking consent framework proposed here helps to shift the analysis of consent onto the perpetrator's actions in *seeking* consent and away from the victim's actions in *giving* it. Part VI offers additional justifications for the Seeking Consent approach.

II. PRESUMING CONSENT TO SEX

Courts have presumed consent to sex in rape law, both historically and, in most American jurisdictions, today.[2] This Section demonstrates the linkages between the presumption of consent and the resistance requirement and how this presumption stubbornly persists today.

It then introduces the idea of First Encounter sexual assault and places this dynamic under the microscope, demonstrating how common such cases are, how courts have largely missed their significance, and why it is important to embrace these cases as learning tools capable of informing legislative change. Finally, the Section problematizes the presumption of consent and proposes an alternative: a presumption of *nonconsent* in First Encounter sexual assault.

A. The Presumption of Consent

In 1886 a Nebraska widow, age fifty-eight, lived alone in a shanty.[3] One day, a man shoveled her snow and carried firewood in for her.[4] He then asked for sex.[5] She refused.[6] He responded by throwing her down onto the bed and having sexual intercourse with her, apparently against her will and with force.[7] The victim testified:

> I got away from him once. Then he got me back the second time, he being strong and I being so weak,—wanting something to eat and fright together, I had not much strength. . . . I tried to get away the second time, but could not get away. He kept me till he got satisfaction.[8]

The defendant was convicted, but the Nebraska Supreme Court overturned the conviction, holding that what had happened was not rape because the victim's testimony failed to show such resistance "as would constitute the offense."[9] The court further explained: "[a]ll that she testifie[s] to may be true, and still the act not have been against her will."[10] In other words, the court concluded that the victim did not resist enough, and therefore the sex was likely consensual. In arriving at this holding, the court admitted its concern that women might pursue

2. *See* discussion *infra* Section II.A.
3. Matthews v. State, 27 N.W. 234, 234–35 (Neb. 1886).
4. *Id.* at 234.
5. *Id.*
6. *Id.*
7. *Id.* at 234–35.
8. *Id.* at 235.
9. *Id.* at 236–37.
10. *Id.*

"illicit intercourse" for pleasure and then later claim it was rape when her behavior became known.[11]

But what it ignored was the evidence—the lack of any indication of prior acquaintance between the parties, the coercive circumstances facing the victim, with a man in her home who was larger and stronger than she was, and the fact that her nearest neighbors lived about a quarter of a mile away.[12] The court presumed that she may have, or actually did, consent to sex.[13]

Fast forward to today. Most states have eliminated resistance as an element of rape, but the requirement of resistance, and the corresponding presumption of consent if resistance is absent, persists.[14] Nebraska's current sexual assault statute defines first degree sexual assault as, inter alia, sexual penetration without the consent of the victim.[15] But the statutory definition of "without consent" requires the victim to *express* that lack of consent through words or conduct.[16] Evidence of resistance is no longer required as proof that the victim did everything in her power to oppose the act; rather "[t]he victim need only resist, either verbally or physically, so as to make the victim's refusal to consent genuine and real and so as to reasonably make known to the actor the victim's refusal to consent."[17]

Nebraska's current law is more enlightened than the 1886 version, but it reveals that the resistance requirement persists. In the absence of words or conduct indicating a clear unwillingness to have sex, the court presumes that the victim consented. Professor Tuerkheimer views this type of approach as creating a "new resistance requirement."[18] She points out that requiring "*an expression* of non-consent" is "incompatible with an understanding of women as sexual agents . . . . [T]he new resistance requirement *makes women's sexual availability the default*."[19] To put this another way, statutes such as Nebraska's presume consent; they simply do not recognize nonconsent unless it is clearly expressed.

Nebraska's current approach to sexual consent illustrates an important shortcoming in rape law that has led to calls for the adoption of affirmative consent—the idea that consent is only valid when it is affirmative and freely given.[20] Michelle Anderson helpfully enumerates two models of rape law reform—the "Yes Model," which embraces affirmative consent, and the "No Model," which

11. *Id.*

12. The nearest neighbors resided eighty rods away. *Id.* at 234. A rod is 16.5 feet. *Rod*, BLACK'S LAW DICTIONARY (11th ed. 2019).

13. *See Matthews*, 27 N.W. at 236.

14. *See* discussion *infra* Section II.B.

15. NEB. REV. STAT. § 28-319(1)(a) (2022).

16. *Id.* § 28-318(8)(a) (2022).

17. *Id.* § 28-318(8)(b) (2022).

18. Deborah Tuerkheimer, *Sexual Agency and the Unfinished Work of Rape Law Reform*, *in* RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 166, 173–74 (Cynthia Grant Bowman & Robin West eds., 2018).

19. *Id.* at 174 (second emphasis added).

20. *See, e.g.*, CAL. EDUC. CODE § 67386(a)(1) (West 2021). For an in-depth discussion of affirmative consent and its critics, see Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 442–47 (2016).

does not.[21] Only the Yes Model, or affirmative consent approach, is an antidote to courts' presumption of consent.

Nebraska's approach is an example of Anderson's No Model of rape law reform, in which rape is generally defined as sexual penetration without the victim's consent, although the victim is required to express her lack of consent clearly, such as by saying "no" or offering physical resistance.[22] The No Model is an improvement over the common law approach—which traditionally required the presence of force as well as the victim's physical resistance "to prove her nonconsent"[23]—because it recognizes rape based on lack of consent, even in the absence of force. But as we have seen, the No Model presumes consent in the absence of a clearly expressed objection.

In contrast, the Yes Model requires the sex initiator to obtain affirmative permission from the other person before penetrating him or her.[24] It therefore is the only approach of the three to presume a lack of consent when a complainant does nothing to express consent. Under both the common law and the No Model approaches, the law presumes the complainant's consent if resistance and/or a verbal "no" is absent.[25] As we shall see in Part V, the Yes Model is currently used by a minority of American jurisdictions, although its influence is growing.[26] Most jurisdictions have yet to confront the presumption of consent and the inequities that result.

This presumption of consent, and its corresponding default position that a complaining victim is sexually available, ignores a real-world reality that is both simple and critical: most human beings do not consent to sex with the vast majority of the people with whom they come into contact. Rather, a presumption *against* sexual contact and sexual availability exists in most human relationships. Although sexual contact may be commonplace, most people have sex with a fairly limited universe of partners—one that excludes most of their acquaintances and family members.[27] Why then should the law presume that a person is sexually available to anyone who comes along?

To put it simply, victims of nonconsensual sexual touching should not have to take affirmative steps to assert their right to be left alone.[28] The burden of resistance that courts have placed on victims for dozens of years ignores this core facet of social life and allows the court to reason from a standpoint of presuming the victim's sexual availability.

21. Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1404–05 (2005). Anderson rejects both models in favor of her proposed "Negotiation Model," which has some similarities to the Seeking Consent approach proposed here.

22. *See id.*

23. *See id.* at 1404.

24. *Id.* at 1405.

25. *Id.* at 1404–05.

26. *See infra* notes 308–31 and accompanying text.

27. *See* Joseph J. Fischel & Hilary R. O'Connell, *Disabling Consent, or Restructuring Sexual Autonomy*, 30 COLUM. J. GENDER & L. 428, 493–95 (2016).

28. For an expansion of this point, see Lucinda Vandervort, *Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory*, 23 COLUM. J. GENDER & L. 395, 405 (2012).

There are many contexts in which humans interact with a clear understanding that the interaction is nonsexual and will foreseeably, and often undoubtedly, remain so. A mutual presumption of nonconsent to sex fuels the trust that undergirds a plethora of rewarding and functional nonsexual relationships, such as those between parents and children, doctors and patients, and service workers and their clients. Rape law therefore must be modified to recognize how important the presumption of nonconsent is to society and to respect the role that this presumption should play in adjudicating sexual assault. After all, even if some people are willing to have sex with nearly everyone, that does not mean that everyone shares that view. So why do we allow the law to presume consent?

That rape law has overlooked the societal presumption of nonconsent to sex has not gone unnoticed by scholars. Writing in 1987, Susan Estrich observed that "[i]n spite of the law's supposed celebration of female chastity, a woman's body was effectively presumed to be offered at least to any appropriate man she knows, lives near, accepts a drink from, or works for. The resistance requirement imposed on her the burden to prove otherwise."[29] The Nebraska widow found herself in this position.[30] A man shoveled snow and carried firewood for her, and that was enough for the court to see consent to sex.[31]

Professor MacKinnon similarly noted that "[t]he crime of rape is defined and adjudicated from the male standpoint, *presuming* that forced sex is sex and that consent to a man is freely given by a woman."[32] Professor Tuerkheimer has similarly observed that there is a "[t]elling judicial inclination to posit, needlessly, the presence of consent—and to do so under unlikely circumstances. In dicta, judges manifest deep skepticism of non-consent in the absence of force. *The effect is a legal presumption of perpetual consent*."[33] This approach—presuming consent to sex—ignores the sexual agency of anyone who is on the receiving end of nonconsensual sexual touching.[34]

When courts presume consent to sex, they give the accused a legal advantage that he does not enjoy when negotiating relationships in daily life. Professor Schulhofer has noted the disconnect between how actual consent develops and what the law presumes. He has argued that without an affirmative consent requirement, "[t]he law would, in effect, be assuming that people are always receptive to sexual intercourse (at any time, with any person), until they do something to revoke that permission. That is hardly an accurate description of ordinary life."[35] And yet courts' tendency to presume consent has persisted for decades, except in the minority of jurisdictions that have adopted the Yes Model. It is time for these critical observations about the presumption of consent to shape statutory reform more broadly.

29. SUSAN ESTRICH, REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO 41 (1987).

30. *See* Matthews v. State, 27 N.W. 234, 236 (Neb. 1886).

31. *Id.* at 234–36.

32. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 180 (1989) (emphasis added).

33. Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 16 (2015) (emphasis added).

34. *See* Tuerkheimer, *supra* note 18, at 173–74.

35. Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 L. & INEQ. 335, 345 (2017).

B. The Link Between the Resistance Requirement and the Presumption of Consent

The tendency of the law to presume consent to sex is linked, historically, to the resistance requirement, by which a woman was deemed to have consented to sex if she did not resist.[36] This approach to rape was set in motion prior to the twentieth century. The earliest versions of the resistance requirement mandated that the woman resist "to the utmost."[37] An 1897 Georgia case illustrates this standard: "[i]n order that the offense might constitute rape, she must have resisted with all her power and kept up that resistance as long as she had strength. Opposition to the sexual act by mere words is not sufficient. . . . [t]here must be the utmost reluctance and resistance."[38] If such resistance is not present, the court presumes consent.

Devoy v. State, a 1904 Wisconsin decision, illustrates this principle. The seventeen-year-old victim met one of the defendants at a July 4th dance.[39] He then led her to an isolated area, where they were approached by a friend of the defendant.[40] The men aided one another in having sexual intercourse with the victim; each did so twice before she was able to get away.[41] The victim testified that her hands were not free, that one defendant had his hand over her mouth, and that she kept silent because they threatened harm if she did not.[42] She also testified that she tried to push them off and fought them the whole time.[43]

Most of the opinion is spent analyzing the victim's actions rather than the defendants' and her actions are found wanting.[44] The court faults the victim for not calling for help and finds "a want of the utmost resistance on her part."[45] As a result, there was no rape and she was presumed to have consented to sex with

36. *See* Devoy v. State, 99 N.W. 455, 456 (Wis. 1904).

37. Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 212 (2017). Yung documents the use of this standard in some states through at least 1973. *Id.* But the pace of change varied; Colorado, as one example, had abandoned the rule of utmost resistance by 1925. *See* Magwire v. People, 235 P. 339, 340 (Colo. 1925).

38. Mathews v. State, 29 S.E. 424, 426 (Ga. 1897). In *Mathews*, an adult male forced a sixteen-year-old girl to consent to sex with him. Because she ultimately consented as a result of the application of force, the man was convicted not of rape, but of fornication and adultery. *Id.* Numerous cases demonstrate the use of the utmost resistance standard. *See, e.g.*, Oleson v. State, 9 N.W. 38, 39 (Neb. 1881) ("[I]t must also be made to appear that she did resist to the extent of her ability.") (internal citation omitted); Whittaker v. State, 7 N.W. 431, 433 (Wis. 1880) ("Any consent of the woman, however reluctant, is fatal to a conviction. The passive policy will not do. . . . There must be the utmost reluctance and resistance.") (internal citation omitted); Connors v. State, 2 N.W. 1143, 1147 (Wis. 1879) ("[V]oluntary submission by the woman, while she has the power to resist, no matter however reluctantly yielded, removes from the act of an essential element of rape.").

39. *Devoy*, 99 N.W. at 455. The opinion states that the victim was "within two months of eighteen years of age." *Id.*

40. *Id.*

41. *Id.* at 455–56.

42. *Id.* at 455–57. One defendant displayed a pocket knife; he also allegedly said that if she did not keep silent she "knew what he would do to her." *Id.* at 457.

43. *Id.* at 457.

44. *See id.* at 455–57.

45. *Id.* at 457.

both men.[46] The court apparently saw little point in considering other circumstances that suggested an *unwillingness* to have sex, such as the fact that the victim had just met the first defendant, that the other was entirely unknown to her, and that she was outnumbered.

Susan Estrich has observed that although courts have historically treated women as "passive and powerless" in relation to a range of legal matters, such as voting, professional identity, and property ownership, the law also demanded that women be "strong and aggressive and powerful" in relation to repelling a sexual assault.[47] There was simply no willingness to consider the possibility that a man could force sex on a woman by terrifying or overpowering her into submission. The result was that courts presumed the victim's consent to sex unless she resisted to the utmost.[48] As the New York Court of Appeals put it in 1874, "if a woman, aware that [the sex act] will be done unless she does resist, does not resist to the extent of her ability on the occasion, must it not be that she is not entirely reluctant?"[49] In short, the law insisted that women actively and vigorously resist nonconsensual sex.[50] In doing so, courts enabled a broad range of sexual aggression.

In addition to the concern that women might actually be enjoying sex that they later called rape, other courts expressed the concern that men could easily have their reputations ruined by women fabricating rape claims.[51] The Nebraska Supreme Court admitted that it presumed assertive action would be forthcoming from a genuine rape victim: "[t]he law presumes that a woman who has suffered the indignity and brutality of a rape will not submit in silence to the wrong, but will at once take the necessary steps to bring the offender to justice.[52]

During the mid-twentieth century the resistance requirement softened, presumably out of a recognition that utmost resistance might result in the victim's loss of life.[53] The Colorado Supreme Court noted, in 1925, that the old rule of "resistance to the utmost" had been "repudiated by the more modern and enlightened authorities, which require only such resistance as age, mental and physical condition, and surrounding facts and circumstances, demand to make opposition reasonably manifest."[54]

46. *Id.*

47. ESTRICH, *supra* note 29, at 31.

48. *See supra* notes 37–38 and accompanying text.

49. People v. Dohring, 59 N.Y. 374, 384 (1874).

50. *See* Mathews v. State, 29 S.E. 424, 426 (Ga. 1897).

51. Matthews v. State, 27 N.W. 234, 236 (Neb. 1886) ("The reason for this rule is apparent, as probably but comparatively few women would admit that they gave their assent to illicit intercourse. If the mere refusal to give express assent was sufficient to establish the crime of rape, a very large proportion of the cases of illicit intercourse no doubt could be brought under that head."). Also quoted in *Mathews*, 29 S.E. at 426.

52. *Matthews*, 27 N.W. at 237.

53. A number of cases describe circumstances where the victim fears for her life if she does not cooperate. *See, e.g.*, People v. Rincon-Pineda, 538 P.2d 247, 249 (Cal. 1975). This softening of the resistance requirement followed the tightening of the resistance requirement in the early twentieth century and was tied to the introduction of the Model Penal Code's efforts to reform rape law in the early 1960s. *See* STEPHEN SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 19–29 (1998).

54. Magwire v. People, 235 P. 339, 340 (Colo. 1925).

Colorado applied this softened resistance requirement in the 1959 case *People v. Futamata*, although the new standard was not much help to the victim.[55] In *Futamata*, the jury acquitted a defendant who laid in wait for the victim while she walked from her home to her outhouse in the middle of the night, then repeatedly struck her over the head with a large rock, dragged her to a car, and demanded sex.[56] The victim, having sustained several blows to her head, did not have the strength to resist the defendant and felt that if she did so, he would kill her.[57] She therefore complied—she removed her clothes when ordered to do so and "submitted to the defendant's advances."[58] The fact that the parties had had no prior sexual contact and that the defendant abducted the victim from her home in the middle of the night were not enough to persuade the jury that a rape had occurred; apparently her cooperation with the defendant was fatal to the prosecution.[59] As MacKinnon has noted, "'to the extent an accused knows a woman and they have sex, her consent is inferred."[60] In this case, the defendant "knew" the victim in that he had seen her around the YMCA, where they both worked, although there was no evidence that they had ever spoken.[61] The court thus saw consent when he abducted her in the middle of the night, using force, and compelled her to submit to sex.[62]

After the 1970s, states moved to relax the resistance requirement even further, recognizing that a victim might not be able to resist at all if she was sufficiently overcome with fear.[63] California abolished the resistance requirement through a 1980 statutory reform that defined rape to include an act of sexual intercourse accomplished "against a person's will by means of force or fear of immediate and unlawful bodily injury on the person or another."[64] This modification removed most references to resistance and created a path to a rape conviction, without resistance, through proof that the victim experienced a reasonable fear sufficient to overcome her will.[65]

Other states made similar modifications at this time. For instance, Georgia has held, since 1976, that lack of resistance induced by fear is the functional equivalent of force.[66] Similarly, Hawaii retained the resistance requirement, but its supreme court gave a more nuanced explanation of resistance in 1980, stating

55. People v. Futamata, 343 P.2d 1058, 1061 (Colo. 1959).

56. *Id.* at 1059.

57. *Id.*

58. *Id.*

59. The jury in *Futamata* had to wrestle with somewhat confusing jury instructions, which the Colorado Supreme Court held were erroneous because of certain internal contradictions. *Id.* at 1061–62. Despite these contradictions, it is striking that the jury found the defendant's actions to have been taken without the necessary force, and without adequate resistance from the victim, in a context where she was abducted from her home in the middle of the night.

60. MACKINNON, *supra* note 32, at 176.

61. *See Futamata*, 343 P.2d at 1059.

62. *Id.* at 1061.

63. *See, e.g.*, People v. Griffin, 94 P.3d 1089, 1094 (Cal. 2004).

64. *Id.* (internal quotations and citations omitted).

65. *Id.*

66. Curtis v. State, 223 S.E.2d 721, 723 (Ga. 1976).

that "earnest resistance" was a relative term that had to be measured by all of the circumstances surrounding the alleged assault.[67] It elaborated:

> Resistance may appear to be useless, and may eventually prove to be unavailing, *but there must have been a genuine physical effort on the part of the complainant to discourage and to prevent her assailant from accomplishing his intended purpose*. . . . This is not to say, however, that the woman threatened with the violation of her person is required to take unnecessary risks. All the law requires is that her fear must have been reasonable, and that it was this fear which impelled her to submit without resisting to the degree of which she was capable.[68]

Each of these softened resistance requirements retained the presumption that the victim consented to sex if she could not meet the demands of the statute. Whether in California, Georgia, or Hawaii, a victim either had to resist or had to prove that she was too afraid to do so.[69] In addition, her resistance would have to appear reasonable to the fact-finder.[70] If she could not meet the requisite standard, the court would presume that the sex was not against her will, and the defendant would be acquitted.[71] The result was that a conviction continued to rest on the victim's response to sexual assault rather than on the perpetrator's actions, with her consent presumed in the absence of clear evidence to the contrary. Most courts continued to embrace a resistance requirement through the end of the 1990s.[72]

Susan Estrich has noted the illogic of embracing a presumption of consent to sex rather than the opposite presumption: "[a] system of law that truly celebrated female chastity, which is the system that these judges purported to uphold, should have erred on the side of less sex and presumed nonconsent in the absence of affirmative evidence to the contrary. The resistance test accomplished exactly the opposite. Chastity was celebrated but consent was presumed."[73]

Courts typically are not troubled by the continuing presumption that consent to sex exists, but a 1907 Idaho decision is a rare example of a court that *did* identify and problematize this issue.[74] In *State v. Neil*, a traveling salesman met a woman at a dance for the first time; he later offered to walk her home and tried to rape her on the way.[75] She fought him off, and he was convicted of assault

67. The Hawaii statute defined force in relation to what was necessary to overcome the victim's "earnest resistance." State v. Jones, 617 P.2d 1214, 1217 (Haw. 1980).

68. *Id.* (emphasis added).

69. *See* People v. Griffin, 94 P.3d 1089, 1094 (Cal. 2004); *Curtis*, 223 S.E.2d at 723; *Jones*, 617 P.2d at 1217.

70. Courts have often struggled to grasp the terror that rape victims face and have found many victims' fear to be unreasonable. *See* ESTRICH, *supra* note 29, at 30–41; SCHULHOFER, *supra* note 53, at 50–51; Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 95 (1987).

71. *See, e.g.*, *Curtis*, 223 S.E.2d at 723.

72. SCHULHOFER, *supra* note 53, at 31.

73. ESTRICH, *supra* note 29, at 31.

74. State v. Neil, 90 P. 860, 862 (Idaho 1907).

75. *Id.* at 861.

with intent to commit rape.[76] In affirming his conviction, the Idaho Supreme Court focused its analysis squarely on the actions of the perpetrator rather than the victim.[77] When the appellant's lawyer cited case law requiring "utmost resistance," the court gave this critical response:

> To our minds the trouble with a number of these authorities is that they reverse the order of the inquiry. They go about inquiring into the kind, character, and nature of the fight put up by the woman, rather than the nature of the assault and evident and manifest purpose and intent of the assailant. For the purpose of reaching the conclusions announced in some of these cases, it is necessary to assume that, in the first place, a man has a right to approach a woman, lay hold on her person, take indecent liberties with her, and that, unless she "kicks, bites, scratches, and screams" to the "utmost of her power and ability," she will be deemed to have consented, and indeed to have invited the familiarity. Such is neither justice, law, nor sound reason.[78]

This opinion appears progressive for 1907 in its focus on the conduct of the perpetrator rather than the victim, and in its observation that a perpetrator does not have the right to approach a victim, demand sex, and have the law look on with approval unless his victim resists.[79] But this stance appears to be the exception rather than the rule, even today. This historical survey has demonstrated a gradual softening, over time, of the obligations that the law has imposed on victims of sexual assault to express their lack of consent. But it has also shown that most jurisdictions have not evolved to the point of dropping this obligation altogether. In most places, the law continues to presume victims' sexual availability unless they actively express a lack of consent.

C. The Stubborn Persistence of the Presumption of Consent Today

Nearly all American jurisdictions have eliminated the physical resistance requirement, but the presumption of consent tied to this requirement continues in many guises. First, some jurisdictions in fact continue to require physical resistance.[80] Idaho defines rape as occurring, inter alia, "[w]here the victim resists but the resistance is overcome by force or violence,"[81] although it also recognizes that fear or futility can make resistance impossible.[82] Absent physical resistance or an acceptable excuse for its absence, Idaho law sees consent and lawful sexual contact, not rape.[83]

Second, many states continue to follow the approach of providing that acquiescence or submission arising from fear is sufficient to provide the lack of

76. *Id.* at 861–62.

77. *Id.* at 862 ("When the charge is assault with intent to commit the crime of rape, the intent must be judged and determined by the conduct of the party committing the assault.").

78. *Id.* (internal citations omitted).

79. *Id.*

80. *See, e.g.*, IDAHO CODE ANN. § 18-6101(4) (West 2021).

81. *Id.*

82. *Id.* § 18-6101(5)–(6).

83. *See id.* § 18-6101(4)–(6).

consent or the force necessary for a sexual assault conviction.[84] This approach is more favorable to victims and prosecutors than the overt requirement of physical resistance, but it still demands something from victims in order to obtain a conviction—a showing of sufficient fear.[85] In the absence of that fear, this approach does not classify nonconsensual sexual touching as a crime.[86] Instead, it recognizes a sexual violation because of the secondary effect of the victim's fear.[87] In the absence of fear, the law presumes consent.

Third, as we have seen, some jurisdictions use the No Model—they have substituted a verbal resistance requirement for the old physical resistance approach.[88] These jurisdictions continue to presume that the victim consented to sex unless there is at least some manifestation of lack of consent.[89] A mere "no" will usually suffice to express lack of consent, but if a victim says nothing the court will presume that she consented.[90] As Professor Tuerkheimer has noted, where there is a verbal resistance requirement, the victim's sexual availability is the default.[91]

New York is one example. The New York Penal Code defines lack of consent as arising, inter alia, from circumstances, at the time of the penetration or other sexual conduct, where "the victim *clearly expressed* that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."[92] A person who does not or cannot "clearly express" her lack of consent is presumed to have consented.[93] Ambiguity is construed, against the victim, as consent.

Fourth, still other jurisdictions require resistance through judicial interpretation despite the elimination of the resistance requirement from the relevant statute.[94] Alabama's rape statute no longer contains a resistance requirement, but courts have interpreted the statutory "forcible compulsion" language as, inter alia, "[p]hysical force that overcomes earnest resistance."[95] Judges sometimes

84. *See* CAL. PENAL CODE §§ 261, 262, 266(c) (West 2021); CONN. GEN. STAT. ANN. § 53a-70 (West 2015); HAW. REV. STAT. ANN. § 707-733 (West 2016); KAN. STAT. ANN. § 21-5503 (West 2011); MONT. CODE. ANN. § 45-5-511 (West 2009); VT. STAT. ANN. Tit. 13 § 3252 (West 2021).

85. *See, e.g.*, CAL. PENAL CODE § 266(c) (West 2021).

86. *See, e.g., id.*

87. *See, e.g., id.*

88. Tuerkheimer, *supra* note 18, at 173–74.

89. *See, e.g.*, NEB. REV. STAT. ANN. §§ 28-318(8), 319(1) (West 2020); N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2021); UTAH CODE ANN. §§ 76-5-402(2)(a), 46-5-406(1) (West 2022).

90. Tuerkheimer, *supra* note 18, at 174.

91. *Id.*

92. N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2021) (emphasis added). Legislation is currently pending in New York that would modify the definition of consent to add an affirmative consent clause. *Id.*

93. *See id.*

94. *See, e.g.*, Higdon v. State, 197 So. 3d 1019, 1021 (Ala. 2015); People v. Iniguez, 872 P.2d 1183, 1189 (Cal. 1994).

95. *Compare* ALA. CODE § 13A-6-60(1) (West 2022) ("forcible compulsion does not require proof of resistance by the victim"), *with Higdon*, 197 So. 3d at 1021 ("'Forcible compulsion' [means] '[p]hysical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person'").

have difficulty letting go of the obsolete resistance requirement.[96] In *People v. Iniguez*, discussed more fully in Part IV, the California Court of Appeals overturned the defendant's conviction based, in part, on its observation that the victim failed to scream for help despite the fact that her aunt was sleeping nearby and likely would have awoken and come to the victim's aid.[97] The California Supreme Court reinstated the conviction after pointing out the resistance requirement had been abolished, and thus placing a burden on the victim to cry out was contrary to the law.[98] But for the state's appeal, the defendant would have been acquitted by the imposition of a resistance requirement on the victim long after it had been eliminated from the statute.[99]

Fifth, police play a gatekeeping role in selecting which sexual assault complaints to refer to prosecutors. [100] They may require evidence of resistance in order to investigate and take a case forward, even in the absence of a statutory requirement.[101] When Megan Rondini reported a rape to police in Tuscaloosa, Alabama, her interviewing officer expressed skepticism because she had not sufficiently resisted, in his view.[102] During the interview he said to her, "[l]ook at it from my side . . . . You never kicked him, hit him, tried to resist him, physically pushed him away, anything like that."[103]

In sum, courts and law enforcement personnel continue to presume that victims consented to sex unless there is a clear indication to the contrary. They do so by requiring physical or verbal resistance, force sufficient to overcome the victim's will, or fear on the part of the victim.[104] The resistance requirement also persists in judicial opinions that demand such resistance even when the relevant statute does not, and in the actions of police officers who do not take victims seriously without evidence of resistance. Jurisdictions taking any of these approaches still operate with a requirement that a nonconsenting victim must indicate her opposition in some way. If she does not, the court presumes that she consented, and the law fails to hold culpable those perpetrators who violate the societal presumption of nonconsent. By not recognizing this presumption, and the sexual agency that it protects, the law under-criminalizes sexual assault.

96. *See, e.g.*, *Iniguez*, 872 P.2d at 1189.

97. *Id.*

98. *Id.* The court also noted that it was "sheer speculation" for the court of appeals to conclude that the defendant would have "responded to screams by desisting the attack, and not by causing [the victim] further injury or death." *Id.* at 1190.

99. *See id.* at 1186.

100. Yung, *supra* note 37, at 207, 219–21, 227–28.

101. Grace Galliano, Linda M. Noble, Carol Puechl & Linda A. Travis, *Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and Its Correlates*, 8 J. INTERPERSONAL VIOLENCE 107, 107 (1993). Vandervort also notes that law enforcement "often fails to fulfill the promise of law reform initiatives undertaken to reduce the high incidence of sexual assault." Vandervort, *supra* note 28, at 398. Accordingly, changes to the law do not always make their way into practice. *Id.* at 403.

102. *See* John Archibald, *Alabama Turns Rape Victims into Suspects*, AL.COM (June 25, 2017, 10:30 AM), https://www.al.com/opinion/2017/06/alabama_turns_rape_victims_int.html [https://perma.cc/BH9T-EEL8].

103. Interview with Police Regarding Megan Rondini, Tr. 37 (Jul. 2, 2015) (on file with author); *see* Archibald, *supra* note 102.

104. *See* Galliano, Noble, Puechl & Travis, *supra* note 101, at 107.

D. The Ubiquitous First Encounter Sexual Assault and the Presumption of Consent

No statistics exist on how frequently sexual assault occurs during the first sexual contact between victim and accused because crime surveys and researchers typically do not ask this question.[105] Nevertheless, First Encounter sexual contact is likely the most common and yet unexplored feature of the abundant sexual assault case law.[106] When considered alongside the societal presumption of nonconsent, First Encounter sexual assault has very important implications for improving the law's effectiveness by challenging us to consider how the presumption of nonconsent was overcome.[107]

I use the term "First Encounter" to refer to any sexual contact that occurs for the first time between the relevant parties. For example, if nonconsensual sexual penetration is at issue, the conduct in question is a First Encounter if the victim had never before experienced sexual penetration with the accused, even if she engaged in kissing or other intimate contact with him. Thus, the use of this terminology assumes that a form of lesser sexual or intimate contact does not constitute consent to a more serious form.

Some of the most discussed cases in criminal law are First Encounters, and yet that feature is not usually part of the conversation.[108] In *State v. Rusk*, the victim agreed to give the defendant a ride home (at his request) shortly after meeting him, for the first time, at a bar.[109] Before she did so, she made it clear that she was not at all interested in sex.[110] The defendant then coerced her into coming up to his apartment by taking her car keys, caused her to fear for her life by choking her, and then raped her.[111] In *Commonwealth v. Berkowitz*, the victim, a college student, went to the accused's dorm room while she was looking for his roommate; the defendant then initiated a sexual encounter that resulted in

105. Since 2001, the National Crime Victimization Survey has asked whether sexual assault victims were attacked by someone unknown to them, a casual acquaintance, or someone they knew well, but it does not ask whether the attack was the first instance of sexual contact between those involved. *National Crime Victimization Survey (NCVS)*, BUREAU OF JUST. STAT., https://bjs.ojp.gov/data-collection/ncvs#surveys-0 (last visited Jan. 27, 2023) [https://perma.cc/DW5A-4MME].

106. Every sexual assault case described in this Article is a First Encounter, giving the reader a robust sense of how common these cases are. However, it is also likely that sexual assault in ongoing sexual relationships is even less likely to be reported to police, which could distort our perceptions of how common such sexual assault is. My thanks to Deborah Tuerkheimer for sharing this observation. *See generally* Tuerkheimer, *supra* note 18.

107. This is not to suggest that all sexual assault includes this dynamic. Certainly, many sexual assaults occur in the context of an ongoing relationship, and often such relationships feature multiple sexual assaults as well as other forms of violence. My focus here, however, is on the numerous cases that involve the first instance of sexual contact between victim and accused. *Id.*

108. *Rusk*, *Berkowitz*, and *M.T.S.*, discussed here, are all frequently included in criminal law casebooks. *See, e.g.*, ADAM M. GERSHOWITZ, GERALD G. ASHDOWN, RONALD J. BACIGAL & SHARON G. FINEGAN, CRIMINAL LAW: CASES AND COMMENTS (11th ed. 2022); JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES AND MATERIALS (9th ed. 2022); JOSEPH E. KENNEDY, CRIMINAL LAW: CASES, CONTROVERSIES AND PROBLEMS (2d ed. 2022); CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW: CASES AND MATERIALS (4th ed. 2019); ARNOLD H. LOEWY, CRIMINAL LAW: CASES AND MATERIALS (4th ed. 2020).

109. State v. Rusk, 424 A.2d 720, 721 (Md. 1981).

110. *Id.*

111. *Id.* at 721–22.

a rape complaint.[112] Victim and accused were known to one another and the accused claimed that they had flirted, but they had no prior sexual contact.[113] In New Jersey's pivotal case *State in the Interest of M.T.S.*, victim and accused had lived in the same house for a period of time, but there was no evidence of prior sexual contact.[114] That all of these cases involved First Encounters is not addressed in the respective opinions.

Additionally, each of the cases discussed in this Article *supra* feature First Encounter dynamics. The victim in *Devoy*, the 1904 Wisconsin case, had just met one of the perpetrators at a dance while his co-conspirator was a stranger to her.[115] Futamata's victim was an acquaintance from the YMCA, but they had never spoken.[116] Iniguez's victim had just met him the evening before her wedding.[117] Megan Rondini knew her assailant from around town but had never had sexual contact with him.[118] These cases illustrate that the First Encounter dynamic is easy to spot across decades of case law.[119] In other words, this method of sexual assault remains effective and does not get old, so long as courts ignore it.

That sexual assault very often arises in a context where the alleged assault is the first-ever sexual contact between victim and accused presents an opportunity for investigators to move past the perception that many cases simply boil down to "he said, she said." Investigators often get stuck in this perceptual rut because of a failure to fully investigate.[120] This is where framing the law to recognize the significance of First Encounter dynamics can help. Many First Encounter sexual assaults feature sexually aggressive behavior between people who have recently met or who have no prior sexual contact. In such cases, the presumption of nonconsent to sexual contact has never before been mutually set aside, and yet the perpetrator makes little or no effort to seek the victim's consent

112. Commonwealth v. Berkowitz, 641 A.2d 1161, 1163 (Pa. 1994). Berkowitz's rape conviction was reversed because, although the penetration occurred without the victim's consent, the court found an absence of forcible compulsion. *Id.* at 1165–66. His indecent assault conviction was affirmed because that crime required a lack of consent but no force. *Id.* at 1166. Subsequently, Pennsylvania criminalized sexual penetration without consent and without force. 18 PA. CONS. STAT. § 3124.1 (2022) ("Except as provided in section 3121 (relating to rape) or 3123 (relating to involuntary deviate sexual intercourse), a person commits a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent.").

113. *Berkowitz*, 609 A.2d at 1341.

114. State *ex rel.* M.T.S., 609 A.2d 1266, 1266–68 (N.J. 1992). In *M.T.S.*, the New Jersey supreme court held that the only force required under the rape statute was the force inherent in the sexual act. *Id.* at 1277.

115. Devoy v. State, 99 N.W. 455, 455 (Wis. 1904); *see supra* notes 39–46 and accompanying text.

116. People v. Futamata, 343 P.2d 1058, 1059 (Colo. 1959); *see supra* notes 55–62 and accompanying text.

117. People v. Iniguez, 872 P.2d 1183, 1184 (Cal. 1994); *see infra* notes 217–25 and accompanying text.

118. Katie J.M. Baker, *A College Student Accused a Powerful Man of Rape. Then She Became a Suspect*, BUZZFEED NEWS (June 22, 2017, 6:40 AM), https://www.buzzfeednews.com/article/katiejmbaker/how-accusing-a-powerful-man-of-rape-drove-a-college-student [https://perma.cc/HK7S-6A37].

119. As another example, Deborah Tuerkheimer analyzed nine sexual assault cases in *Rape On and Off Campus.* Six of these were First Encounters involving adult victims. Of the three cases involving juvenile victims, two were not First Encounters because they involved fathers who repeatedly molested their daughters. The third involved a sixteen-year-old victim experiencing second encounter sexual contact with the perpetrator. *See generally* Tuerkheimer, *supra* note 33.

120. *See generally* Tuerkheimer, *supra* note 18.

before initiating sexual contact. The victim is caught off guard as a result, responding with shock or fear that impedes her or his ability to react.

The presumption of nonconsent that precedes many sexual assaults is evident in the case law in other ways as well. There are numerous fact patterns where the parties share a definition of the situation as one that is *explicitly* nonsexual, such as the relationship between a parent and child, a doctor and patient, or a youth pastor and teenage congregant.[121] The assailant violates the victim's trust by touching her sexually without warning and without seeking consent. In such cases, the presumption of nonconsent is overcome unilaterally rather than mutually.

These dynamics fuel a cycle of sexual violence, with perpetrators repeatedly committing First Encounter sexual assault, surprising and traumatizing victim after victim, while courts fail to hold perpetrators accountable. Why? Because existing legal frameworks neither recognize the societal presumption of nonconsent nor the significance of First Encounter sexual assault. The solution is statutory reform that focuses the analytical lens squarely on these critical but overlooked dynamics. Before turning to that proposal, the next Subsection further clarifies the problems of presuming consent.

E. Problematizing the Presumption of Consent

The presumption that people consent to sex unless they resist is highly problematic for several reasons. There are problems pertaining to sexual agency, victims' reactions to sexual assault, and equal protection. This Subsection addresses each of these concepts in turn.

1. The Sexual Agency Problem

When courts presume consent, they presume sexual availability. And in doing so, they rob people of sexual agency—their power and prerogative to make their own choices about when and how to be sexually active, and with whom.[122] The presumption that people, particularly women, are perpetually available for sexual purposes, at any time and with any partner, is at odds with how most people understand their own sexual relationships and sexual access to others.[123]

121. *See infra* notes 233–39, 245–52 and accompanying text.

122. Many scholars use the term "sexual autonomy" to describe an individual's right to decide what kind of sexual activities she wishes to pursue with other willing participants as well as the ability to avoid sexual activities that she prefers to avoid. *See, e.g.*, SCHULHOFER, *supra* note 53, at 99. Others have argued for the term "sexual agency," rather than autonomy, as a corrective to some of the limitations of the latter term, in particular its failure to take into account the social context and power inequalities within which women make decisions about their sexuality. As Tuerkheimer puts it, "agency better contemplates the complicated, power-infused dynamics that surround sexual relations." Tuerkheimer, *supra* note 18, at 169–70. *See generally* Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999).

123. Schulhofer argues that it is simply not the case that people are always receptive to sexual intercourse, at any time, and with any person, "until they do something to revoke that permission." Schulhofer, *supra* note 35, at 345.

As we have seen, the consent presumption stands in direct contradiction to societal norms which presume the opposite. Law-abiding individuals do not assume that everyone around them is sexually available to them; rather, they look for clear signs of consent before proceeding with sexual contact. And they do so because respect for the sexual agency of others requires this course of action. Courts effectively ignore sexual agency and presume that consent is present in the absence of resistance, whether verbal or physical.[124]

This presumption places victims of sexual assault at a disadvantage, requiring them to physically resist or state their objection. Courts' presumption of consent also enables and endorses sexually predatory behavior by giving assailants the benefit of an assumption that society does not extend to them outside the courtroom. Anything a sexually aggressive person does is fine as long as the victim does not voice an objection. The lesson for the predator is to act in such a way as to accomplish his purpose before the victim can say anything—whether due to speed, surprise, or some other factor.[125] As Professor Anderson observes, both the common law and the No Model "[r]eward willful blindness. . . . Unless his partner verbally objects, a man who deliberately avoids guilty knowledge by quietly and quickly penetrating a woman he is passionately kissing is a man who has his partner's consent."[126]

Another aspect of sexual agency is the ability to select one's sexual partner(s).[127] When courts presume consent, they assume that a person is equally available to anyone who comes calling, effectively erasing the person's prerogative to choose. This problem is clearly illustrated in *Futamata*, where the victim was abducted as she walked between her outhouse and her home in the middle of the night.[128] The court assumed that she was sexually available at this particular time, place, and with this partner.[129] The court's erasure of her right to choose is startling.

2. The Frozen in Fear Problem

The expectation that people who do not want sexual contact will clearly express their objection is most problematic in relation to the numerous cases where the victim finds himself unable to articulate his lack of consent and thus appears passive. This includes cases where the victim is affected by the surprise or shock of the assault, where she finds herself frozen in fear and unable to

124. *See, e.g.*, Rusk v. State, 424 A.2d 720, 721 (Md. 1981); Commonwealth. v. Berkowitz, 641 A.2d 1161, 1163 (Pa. 1994); State *ex rel*. M.T.S., 609 A.2d 1266, 1267, 1268 (N.J. 1992).

125. *See* Tuerkheimer, *supra* note 33, at 33–38 for further discussion of the role of the dynamics of trust and surprise in sexual assault cases involving nonconsent but no use of force.

126. Anderson, *supra* note 21, at 1420.

127. SCHULHOFER, *supra* note 53, at 99, 111. Schulhofer makes this argument in relation to sexual autonomy, but it applies equally to sexual agency.

128. People v. Futamata, 343 P.2d 1058, 1059 (Colo. 1959).

129. *Id.*

respond, and where she is afraid of what the perpetrator will do to her if she says "no."[130]

There is a large body of literature on trauma and neurobiology which has found that victims of sexual assault often experience tonic immobility—an inability to move and respond to the assault.[131] Moreover, case law is filled with abundant examples of victims who reported that they froze in response to being sexually assaulted and as a result did not offer any meaningful resistance, whether verbal or physical, to the perpetrator.[132] That victims so frequently respond to sexual assault with a "frozen in fear" reaction is critically important in understanding the need for statutory reform.[133]

It is simply not the case that all people who are the targets of sexually aggressive individuals have the ability, in the moment, to clearly express their lack of consent. They may find themselves immobilized, terrified, or too surprised to react quickly enough. They may be afraid that the perpetrator will harm them if they resist, and they may also be unable to fully articulate this fear to a court. For all of these reasons, courts' tendency to presume consent to sex in the absence of a clear contrary indication results in the under-criminalization of sexual assault and the enabling of sexually predatory conduct.

130. I do not include, in this category, cases where the victim does not express her lack of consent due to intoxication, sleep, or some other form of incapacity, because statutes often have distinct statutory provisions addressing these situations.

131. KIMBERLY A. LONSWAY & JOANNE ARCHAMBAULT, END VIOLENCE AGAINST WOMEN INT'L., VICTIM IMPACT: HOW VICTIMS ARE AFFECTED BY SEXUAL ASSAULT AND HOW LAW ENFORCEMENT CAN RESPOND 12 (2020), https://evawintl.org/wp-content/uploads/Module-2_Victim-Impact.pdf [https://perma.cc/PJP8-7JG6] ("[F]rozen fright and dissociation are very common experiences of sexual assault victims . . . ."); Jim Hopper, *"Reflexes and Habits" Is Much Better Than "Fight or "Flight,"* PSYCH. TODAY (Feb. 12, 2021), https://www.psychologytoday.com/us/blog/sexual-assault-and-the-brain/202102/why-fight-or-flight-doesnt-reflect-the-response-sexual [https://perma.cc/2K4J-V59K] ("[One of the] extreme survival reflexes [is] *tonic immobility*, in which the body is literally paralyzed and muscles are rigid . . . ."); Anna Möller, Hans Peter Söndergaard & Lotti Helström, *Tonic Immobility During Sexual Assault—A Common Reaction Predicting Post-traumatic Stress Disorder and Severe Depression*, 96 ACTA OBSTETRICIA ET GYNECOLOGICA SCANDINAVICA 932, 935 (2017) ("The major finding of the present study was that the experience of TI during sexual assault is common.").

132. *See, e.g.*, Bondi v. Commonwealth, 824 S.E.2d 512, 517–18 (Va. Ct. App. 2019) (victim reported "[c]omplete[] paraly[sis]"); State v. Rowland, 528 S.W.3d 449, 452 (Mo. Ct. App. 2017) (victim "couldn't escape" and "froze in fear"); State v. Janis, 880 N.W.2d 76, 78 (S.D. 2016) (victim was "frozen"); State v. Stevens, 53 P.3d 356, 359 (Mont. 2002) (victim's "mind and body were frozen"); Suarez v. State, 901 S.W.2d 712, 719 (Tex. App. 1995) (victim stated she "just froze"); People v. Smolen, 564 N.Y.S.2d 105, 106 (1990) (victim was "frozen in fear"); State v. Bohannon, 526 S.W.2d 861, 862 (Mo. Ct. App. 1975) (victim "froze" when defendant seized her); Rush v. State, 301 So. 2d 297, 298 (Miss. 1974) (victim was "frozen" and "paralyzed").

133. Some members of the ABA have criticized the notion that being frozen in fear is a common reaction to sexual assault, but the frequency with which this reaction is found across decades of case law discounts that critique. *See* Letter from Various American Bar Association Members re ABA Proposed Resolution 114 to Robert M. Carlson, President of the ABA (Aug. 8, 2019) (on file with author) (showing signatures from numerous members of the ABA).

3. The Equal Protection Problem

The presumption of consent is also problematic because it disproportionately impacts females. Females make up the majority of sexual assault victims, and they generally are sexually assaulted by males.[134] As such, the law's presumption of consent promotes gender bias in that it assumes that females, more often than males, are sexually available to any person who wants them—a presumption that is especially problematic given how widespread First Encounter sexual assault is. The result is the enabling of sexually predatory behavior and the underenforcement of laws against sexual assault.[135]

This Section has argued that a legal presumption of consent is incompatible with the presumption of *nonconsent* which operates in the real world. As Professor Schulhofer notes,

> [t]he premise of a consent requirement is that individuals *do not* want to be sexually penetrated unless and until they indicate that they do. Across the wide range of situations in which acquaintances and strangers encounter one another—on the street, at work, in parks, at parties, on dates—a presumption of disinterest in sexual intimacy is accurate much more often than a presumption that both individuals want to have intercourse with each other. And as a matter of first principles, it is more appropriate to assume that each individual prefers bodily privacy until he or she indicates otherwise.[136]

This contradiction between real-life and legal presumptions may explain why so many victims are shocked, enraged, and even suicidal upon learning that the law does not perceive what was done to them to be rape.[137] The law must

134. PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUST., U.S. DEPT. OF JUST., EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 1, iii (2006), https://www.ojp.gov/pdffiles1/nij/210346.pdf [https://perma.cc/PE5V-XUG3] ("[M]ost rape victims are female (almost 86 percent), and most rapists are male.").

135. Professor Tuerkheimer has argued that gender-based underenforcement of the law is a cognizable harm. *See generally* Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287 (2016). As an example, Tuerkheimer notes that the federal investigation into rape investigation failures in Missoula, Montana was groundbreaking because it was "premised on an understanding of gender-based under-policing as an equal protection violation; one demanding a federal response." *Id.* at 1324. For further discussion of the Missoula example, see *infra* notes 261–73 and accompanying text.

136. Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. L. REV. 665, 670 (2016).

137. It is well established that victims of sexual assault are at higher risk of suicide than the general population. Although I am not aware of any research that parses out what role being disbelieved, accused of false reporting, or otherwise suffering ill treatment at the hands of law enforcement plays in suicide decisions, it would not be surprising if a connection exists. Megan Rondini indicated on a mental health intake form, prior to her suicide, that she had been raped and then "bullied by police." Baker, *supra* note 118. On the link between suicide and sexual assault, see *Victims of Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/victims-sexual-violence (last visited Jan. 27, 2023) [https://perma.cc/8RU9-M9HM] (the incidence of "suicidal or depressive thoughts increases after sexual violence[,] . . . 33% of women who are raped contemplate suicide . . . [and] 13% of women who are raped attempt suicide"). *See also Suicide Prevention: Facts About Suicide*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/suicide/facts/ (Oct. 24, 2022) [https://perma.cc/7PBJ-J28X]; Edward C. Chang et al., *Hope Under Assault: Understanding the Impact of Sexual Assault on the Relation Between Hope and Suicidal Risk in College Students*, 34 J. SOC. & CLINICAL PSYCH. 221, 223 (2015).

change to recognize the same presumption operative in society at large—a presumption of *nonconsent*.

III. A PROPOSAL FOR STATUTORY REFORM: SEEKING CONSENT

This Part first illustrates the value of presuming nonconsent in rape adjudication by applying the new standard to existing case law. It will then reveal a statutory reform proposal framed around a "seeking consent" standard. Part IV will then demonstrate that the proposed standard has the potential to be a powerful tool across a range of First Encounter cases.

A. Recognizing the Presumption of Nonconsent in First Encounter Sex

The violation of sexual agency that occurs in First Encounter sexual assault is particularly distinctive, because the presumption of nonconsent is intact leading up to that moment of first sexual contact between the actors in question. The lawfulness of any ensuing sexual contact should thus turn on *how* the presumption of nonconsent was abandoned. Did the parties make a mutual decision to set aside the presumption, or did the perpetrator make this decision unilaterally, either by failing to consult the victim, or ignoring her wishes?[138] The law should focus on this process, probing all of the circumstances in order to discern whether the presumption of nonconsent was overcome unilaterally or by mutual agreement.

Therefore, the relevant inquiry in a First Encounter sexual assault case is whether the perpetrator *sought* the victim's consent prior to engaging in sexual penetration or contact with her. This question can be evaluated by examining the perpetrator's actions or words in *seeking* consent, rather than the victim's actions in *giving* it. The value in this approach is its recognition that the societal presumption of nonconsent is present between parties who have never before shared sexual contact, and that the operative task is to analyze whether that presumption was lawfully overcome.

A focus on the perpetrator's actions in seeking consent eliminates the obsolete practice of determining whether a sexual assault occurred by assessing the victim's response. Her level of resistance or fear no longer matter because the court is squarely focused on what the *perpetrator* did. This is where the attention should be, because the wrong of sexual assault does not depend on how much the victim resisted or how afraid she was. The wrong of sexual assault lies in the perpetrator's violation of the victim's sexual agency—her right to make her own decisions about her sexuality, including when and with whom to share it.

People v. Warren illustrates.[139] In this Illinois case, the victim had been cycling in a natural area when the perpetrator found her standing alone enjoying

138. For instance, in *Berkowitz*, the accused said, after the encounter, "Wow, I guess we got carried away." The victim replied, "No . . . *you* got carried away." Commonwealth v. Berkowitz, 641 A.2d 1161, 1163 (Pa. 1994). Her comment is evidence of a unilateral abandonment of the presumption of nonconsent.

139. People v. Warren, 446 N.E.2d 591, 593 (Ill. App. Ct. 1983).

a scenic overlook.[140] He approached her and engaged her in conversation, but when she turned to leave, he refused to let her go, saying "[t]his will only take a minute. My girlfriend doesn't meet my needs," and "I don't want to hurt you."[141] He then picked her up, carried her into the woods, and sexually assaulted her.[142] At a bench trial, the defendant was convicted of two counts of deviate sexual assault and was sentenced to six years in prison.[143]

But the Illinois Court of Appeals overturned his conviction, finding a lack of force or threat of force.[144] They reached this conclusion despite the size difference between the parties—he was eighty pounds heavier and thirteen inches taller than she was—and despite his behavior.[145] Indeed, the court stated, "[a]side from picking up complainant and carrying her into and out of the woods, defendant did not employ his superior size and strength."[146] The victim testified that she did not resist or call for help because of her "overwhelming fear," but the court only saw consent in her terror.[147] The opinion faulted her for failing to resist, as resistance was a requirement of Illinois law when the case was decided.[148] "[C]omplainant's failure to resist when it was within her power to do so conveys the impression of consent regardless of her mental state, *amounts to consent* and removes from the act performed an essential element of the crime."[149]

For unexplained reasons, the opinion does find anything wrong with an accused picking up the victim, whom he had just met, and carrying her to the site of the assault.[150] Surely this is force. It is also coercion; adults do not normally carry one another. But the law does not capture the fundamental wrong of the defendant's conduct here—it was not the use of force to accomplish his purpose, but rather the violation of his victim's sexual agency. This violation terrified her.[151] Illinois law no longer requires resistance, but it does require the use of force or threat of force.[152] Accordingly, it does not recognize the violation of sexual agency absent force or threat of force.[153]

If the court was instead tasked with preserving sexual agency by analyzing the perpetrator's actions in seeking consent, the result would be very different. *Warren* was a First Encounter case featuring a victim and defendant who had just met each other and were engaging in casual conversation.[154] As such, there was

140. *Id.* at 592.
141. *Id.*
142. *Id.* at 593.
143. *Id.* at 591.
144. *Id.* at 591–92.
145. *Id.* at 593–94.
146. *Id.* at 593.
147. *Id.*
148. *Id.* at 594.
149. *Id.* (emphasis added).
150. *See id.* at 593.
151. *Id.*
152. 720 ILL. COMP. STAT. ANN. 5/11-1.20(a)(1) (West 2021).
153. *See id.*
154. *See Warren*, 446 N.E.2d at 592.

a presumption of nonconsent to sexual contact present in this situation.[155] The perpetrator had no basis for believing that the victim was open to sexual contact after a few minutes' conversation.[156] The victim's conduct in attempting to leave the interaction is further evidence that the presumption of nonconsent remained in effect, since leaving is the opposite of what one would do if one was consenting to sexual contact.[157] At this point, the defendant made statements that hinted at his desire for sex but did not state that desire explicitly.[158] Then, without waiting for any response from the victim, he used his greater size and strength to pick her up and carry her to a more secluded location.[159]

Under a seeking consent standard, the court would begin by recognizing the presumption against sexual contact and would note that the victim's actions in attempting to leave reinforced that presumption. The court would then note that not only did the perpetrator fail to make his desire for sex unambiguously clear to the victim, he did not give her the opportunity to respond to his request.[160] He impeded her effort to leave and he then picked her up and carried her to a more secluded location.[161] His actions were a violation of her sexual agency. His conviction should have been affirmed.

The advantage of the seeking consent standard over the Yes Model is the focus on the perpetrator's actions of failing to seek consent rather than the victim's actions in freezing or walking away. The law should focus, as it does in most other crimes, on the accused's actions; framing the law in this way sends an important message to perpetrators about how they are expected to conform their conduct to the normative standards.

B. Toward a Better Normative Standard—Seeking Consent

I have argued that a presumption of nonconsent exists in relationships where the parties have not experienced prior consensual sexual contact, and that First Encounter sexual assault complaints therefore merit particular scrutiny of whether that presumption was overcome mutually or unilaterally. The law must recognize the presumption of nonconsent and hold perpetrators accountable for breaching it without seeking and obtaining consent. As Professor Schulhofer points out, "[e]ven without making threats that restrict the exercise of free choice, an individual violates a woman's autonomy when he engages in sexual conduct without ensuring that he has her valid consent."[162] I therefore propose an offense of committing first-time sexual penetration or contact without *seeking* consent.

This "Seeking Consent" approach bears some similarity to the affirmative consent Yes Model. But whereas the typical affirmative consent statute looks to

155. *See id.*
156. *See id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 594.
161. *Id.* at 592.
162. SCHULHOFER, *supra* note 53, at 111.

the actions of the victim in giving consent,[163] as we shall see in Part V, the Seeking Consent approach focuses on analyzing the actions of the perpetrator. The inquiry is concerned with the overall context in which seeking consent occurred and whether it was conducive to a free and voluntary agreement on the part of the victim. In particular, did the defendant's words and actions make clear to the victim his intent to seek sexual contact? And did his words and actions evince a willingness to wait for and to respect the decision of the victim? If people are to conform their conduct to legal expectations, they need to know what those requirements are. Sending the message that the law will analyze a sex initiator's conduct in seeking consent is a clearer message than having the law analyze the victim's actions.

The Seeking Consent approach also bears some similarity to Professor Michelle Anderson's proposed negotiation model, which requires the sex initiator to "negotiate with his or her partner and thereby come to an agreement that sexual penetration should occur."[164] Anderson recognizes the distinctiveness of First Encounter sexual contact and would require the negotiation to be verbal in such cases:[165] "It is important to note that the risk for sexual assault is highest for people engaging in sexual penetration for the first time. . . . Therefore, the imperative of verbal negotiation for penetration is all the more powerful in newer relationships."[166]

Anderson would only apply the model to penetrative acts, but she argues that negotiation should include a discussion of "each other's desires and limitations."[167] In contrast, the Seeking Consent approach is more narrowly focused on whether the sex initiator had consent for the specific acts that the complainant later objects to, which should make it easier to implement. This approach also recognizes that seeking consent can occur through actions as well as words, and should apply to any form of sexual contact, since many people avoid sharing such contact with more than a few others.[168]

The Seeking Consent approach can be codified into law using a three-phase approach. The first is for the statutory framework to define sex crimes in terms of nonconsent alone rather than the presence of force. Just over half of American jurisdictions have already adopted this approach in relation to sexual penetration.[169] It is the preferable approach because restricting criminal sexual assault to situations involving force or fear does not capture the wide range of

163. *See* discussion *infra* Part V.

164. Anderson, *supra* note 21, at 1423.

165. Anderson, *supra* note 21, at 1425. Anderson takes the view that "[r]elying on body language creates too many possibilities for mistake and is therefore ethically inadequate. . . . Particularly when people are engaging in sexual penetration for the first time, verbal discourse is a necessity." *Id.*

166. Anderson, *supra* note 21, at 1426.

167. Anderson, *supra* note 21, at 1422.

168. I do not share Anderson's concern that nonverbal communication is inadequate when it comes to seeking consent, but she makes a compelling argument grounded in studies demonstrating the tendency of men to misinterpret women's body language and to see sexual consent "where there is none." Anderson, *supra* note 21, at 1417.

169. Schulhofer, *supra* note 35, at 343 ("In a majority of states, it is finally true that non-consent alone suffices . . . ."). For a fuller discussion of force and consent in current statutes, see *id.* at 342–44.

nonconsensual sexual contact that society finds offensive. The law should criminalize knowing, nonconsensual sexual contact, whether or not force or fear is present.[170]

An example of this approach is the Montana statute specifying that "[a] person who knowingly has sexual intercourse with another person without consent or with another person who is incapable of consent commits the offense of sexual intercourse without consent."[171] Montana prohibits other forms of nonconsensual sexual contact with similar language.[172] This approach is simple, clear and captures the wide range of offensive sexual contact that occurs.

The second phase is to define consent in affirmative terms—the Yes Model. Montana, like several other states, does so by indicating that "[t]he term 'consent' means words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."[173] This definition of affirmative consent captures the need for affirmative words or actions, but it has the limitation of defining the offense in terms of the victim's behavior rather than the accused's.

This is why a third phase is necessary—the creation of an offense of engaging in first-time sexual penetration or contact without *seeking* consent. This offense would focus scrutiny on the conduct of the perpetrator in seeking the victim's consent to First Encounter sexual contact—an approach that is desirable because the criminal nature of the act should depend on the perpetrator's actions, not on the victim's response. This approach also requires the court to scrutinize First Encounter sexual contact and to recognize the presumption of nonconsent that precedes it.

A person commits the offense of "intentionally, knowingly, or recklessly engaging in first-time sexual penetration/contact without seeking consent" when he engages in sexual penetration or contact without seeking consent from the other person. I would define "seeking consent" to mean (a) indicating, through words or actions, a person's intent to engage in sexual contact/penetration with another person and then (b) waiting until consent has been granted before initiating that contact/penetration. Seeking consent does not occur where the sexual contact/penetration happens before the other person has given consent, or where circumstances of physical or mental coercion prevent freely given consent.

This definition of "seeking consent" requires courts to perform a two-part analysis when analyzing the defendant's culpability with respect to seeking consent. First, the court analyzes how the defendant expressed his desire for sexual contact. What words or actions did he use to indicate an intent to engage in sexual

170. For a full explication of this argument, see Schulhofer, *supra* note 136, at 669–71. Several states already using a consent standard recognize offenses involving sexual *acts* or *contact* in addition to sexual penetration, and they typically define the former terms. *See, e.g.*, ALASKA STAT. ANN. §§ 11.41.410(a)(1), 11.41.420(a)(1), 11.41.470(6) (West 2022); ARIZ. REV. STAT. ANN. §§ 13-1404(A), 13-1406(A), 13-1401(3) (West 2022); NEB. REV. STAT. ANN. §§ 28-318(5), 28-319(1)(a), 28-320(1)(a) (West 2022); VT. STAT. ANN. tit. 13, §§ 3251(1), 3252(a) (West 2021).

171. MONT. CODE ANN. § 45-5-503(1) (West 2019). Montana's statutes also define an offense of "aggravated sexual intercourse without consent," which includes the use of force. *Id.* § 45-5-508.

172. *Id.* § 45-5-502(1).

173. *Id.* § 45-5-502(1)(a).

contact, and would the victim understand these words or actions to indicate a desire for sexual contact?

Second, the "waiting" portion of the definition requires the court to consider two factors in the consent-seeking process—a time factor and a space factor. This is because the case law reveals that sexual assault perpetrators often use time and space to their advantage and to the victim's detriment.[174] For instance, they often introduce sexual contact quickly and unexpectedly, before the victim has a chance to grasp what is happening, let alone choose how to respond. Perpetrators also often make sexual demands while invading the victim's personal space.[175] Case law reveals scenarios where the victim realized the perpetrator's sexual objectives at the moment his hand went down her pants or up her shirt, or she woke up to the sensation of unexpected sexual touching.[176]

The time analysis considers whether the perpetrator respected the time that the victim needed to respond meaningfully to his overture before the sexual contact began. Did the victim have a realistic opportunity to think about the implications of having sexual contact at that moment, consider whether he wanted to do so, and stop the interaction, if he so desired? Or did the defendant proceed so quickly that the victim had no chance to think, let alone respond?

The space analysis is about whether the defendant respected the victim's physical space in such a way that she could make a meaningful choice. Did the victim have the physical space to decline the defendant's advances? If the defendant was on top of her, had his hands around her neck or in her pants, had hold of her arm, or was otherwise using his physical presence to coerce or intimidate her into agreement, then she may not have had the necessary physical space to make an uncoerced decision. The relative size, strength, and ability levels of the parties is relevant to this analysis. If the accused was capable of overpowering the victim, his presence may have been intimidating to her even if he was not touching her.

The offense of "knowingly engaging in first-time sexual penetration/contact without seeking consent" can thus be broken down into the elements of (1) intentionally, knowingly, or recklessly (2) engaging in sexual penetration or contact, (3) with a particular person for the first time, (4) without seeking consent, where "seeking consent" means (a) clearly and unambiguously expressing his intent to engage in sexual contact and (b) waiting until the victim has granted consent prior to proceeding. Courts would analyze both the time and the physical space dynamics of the situation in determining whether the defendant had waited for the victim's response.

It should be apparent that the victim's actual consent is not an element of the crime; this proposed offense focuses on the accused's conduct in seeking consent. The victim's actions are not analyzed because the victim is not on trial and has no obligation to indicate her desire to be left alone. Focusing the analysis

174. *See infra* notes 185–259 and accompanying text.

175. *See, e.g.*, People v. Carlson, 663 N.E.2d 32 (Ill. App. Ct. 1996).

176. *See, e.g., id.* at 33; People v. Iniguez, 872 P.2d 1183, 1189 (Cal. 1994); State v. Janis, 880 N.W.2d 76, 78 (S.D. 2016); State v. Herzog, 610 P.2d 1281, 1282 (Utah 1980).

on the accused is what "force" statutes do—they were designed to assess the conduct of the accused, not the victim.[177] But whereas using force to define sex crimes under-criminalizes sexual assault by failing to capture all offensive, nonconsensual sexual contact, the Seeking Consent approach casts an appropriately wider net by criminalizing all sexual contact that occurs in a First Encounter context where the perpetrator does not first seek consent.

The crime is fulfilled if the accused proceeds with first-time sexual contact without taking appropriate steps to seek consent. Consent is therefore available to the perpetrator as an affirmative defense, allowing the defendant to argue that he did not seek consent because it was already present. He would then have to prove, by a preponderance of the evidence, the presence of consent using an affirmative consent standard. That is, that the victim clearly and unambiguously expressed his or her consent through words or actions.[178] Additionally, jurisdictions should retain an offense of engaging in "sexual intercourse/contact without consent"[179] in order to adjudicate sexual assault beyond the First Encounter context. Existing law would also be relevant to assaults where the defendant *did* seek consent but is accused of sexual assault without consent, such as where the victim withdrew consent.

The chief advantages of the seeking consent offense I have proposed is that it recognizes that consent to sex is not continuously present in human relationships absent some affirmative indication, and it focuses the analysis on the perpetrator's actions. These measures introduce a degree of fairness that has been missing from rape law for decades.

IV. THE SEEKING CONSENT APPROACH IN ACTION

This Part applies the seeking consent standard to a range of sexual assault cases and shows how it produces more just outcomes. Each of the cases discussed involves a First Encounter and a presumption of nonconsent that should have been recognized by the courts—dynamics overlooked when the cases were decided. These cases, taken together, demonstrate that First Encounter dynamics are ubiquitous in sexual assault cases and that the law has overlooked the usefulness of this analytical category and the accompanying presumption of nonconsent.

This Part analyzes five categories of cases: (a) brief encounters where the perpetrator failed to seek to consent; (b) brief encounters where the perpetrator unilaterally shifted the dynamic from nonsexual to sexual; (c) cases where a First Encounter sexual assault occurred in the context of a relationship clearly defined as nonsexual; (d) cases involving college-age predators and victims; and

177. ESTRICH, *supra* note 29, at 57–62.

178. Vandervort describes a similar framework in Canada, where the defense of "belief in consent" is available to the accused, but only if he can "point to specific words or actions by the complainant which communicated agreement to the activity in question, with him, at the time in question." Vandervort, *supra* note 28, at 402.

179. *See* MONT. CODE ANN. § 45-5-503(1) (West 2019).

(e) worst case scenarios involving serial predators who exploit First Encounter dynamics.

In many of these cases, the perpetrator's conviction was affirmed. But in each case, the seeking consent standard would have provided a fairer and more straightforward approach to analyzing the wrong of the sexual assault—the interference with the victim's sexual agency. Thus, this approach places respect for the victim's sexual agency at the forefront of the analysis.

A. The Brief Encounter

As we saw in *Devoy*, *Neil*, and *Warren*, First Encounter sexual assault cases often feature sexually aggressive behavior between a perpetrator and a victim whom he has recently met.[180] The term "Brief Encounter" has been coined to describe cases where victim and assailant are recent acquaintances—often having met within the twenty-four hours prior to the assault—and have no prior sexual contact.[181] The term thus describes a subset of First Encounter cases—those where the sexual assault occurs within hours, or even minutes, of the parties' meeting one another for the first time. Sexual assault in the Brief Encounter context is extremely common, and sexual assault advocacy organizations are increasingly drawing attention to the Brief Encounter dynamic in sexual assault.[182] It is often the case that the perpetrator exploits a dynamic of trust and surprises the victim with unexpected sexual advances.[183]

The seeking consent legal framework can be particularly effective here because the presumption of nonconsent is generally intact when people first meet, and signals indicating that it is being mutually abandoned would have to be particularly clear and unambiguous at this early stage of acquaintance.

People v. Carlson further illustrates the Brief Encounter dynamic and demonstrates the effectiveness of the Seeking Consent approach to prosecution.[184] In *Carlson*, defendant and victim became acquainted for the first time at

180. *See supra* notes 39–46 (*Devoy*), 75–78 (*Neil*), 140–49 (*Warren*) and accompanying text.

181. *See, e.g.*, AEQUITAS, MODEL RESPONSE TO SEXUAL VIOLENCE FOR PROSECUTORS (RSVP MODEL) 72 (2020), https://aequitasresource.org/wp-content/uploads/2020/01/RSVP-Appendices-1.9.20.pdf [https://perma.cc/E8KJ-MSGF] (describing brief encounter as "met and assaulted within 24 hours"); ELISABETH OLDS, THE METROPOLITAN POLICE DEPARTMENT'S IMPLEMENTATION OF THE SEXUAL ASSAULT VICTIM'S RIGHTS AMENDMENT ACT OF 2014 (SAVRAA) 16 (2015), https://dccouncil.us/wp-content/uploads/2018/budget_responses/ATTACHMENTGGeneralQuestions26SAVRAA.pdf [https://perma.cc/Z5BK-PVM7] (describing a brief encounter as an assault committed by someone the survivor knows only through meeting them on that occasion); KIMBERLY A. LONSWAY & JOANNE ARCHAMBAULT, END VIOLENCE AGAINST WOMEN INT'L., CLEARANCE METHODS FOR SEXUAL ASSAULT PART 1: BASIC DEFINITIONS 48 (2020), https://evawintl.org/wp-content/uploads/TBClearnaceMethodsforSA1-7Combined.pdf [https://perma.cc/UYU2-PXGS] (describing a brief encounter as a situation in which the victim and suspect knew each other for less than twenty-four hours); OFFICE OF THE GOVERNOR, CRIMINAL JUSTICE DIVISION, SEXUAL ASSAULT FAMILY VIOLENCE INVESTIGATOR COURSE 89 (2020), https://www.wtamu.edu/_files/docs/sexual-assault-training [https://perma.cc/W88J-8HWX] (describing a brief encounter as usually occurring within twenty-four hours after the perpetrator and victim meet).

182. *See supra* note 181 and accompanying text.

183. See Tuerkheimer, *supra* note 33, at 33–38 for further discussion of the role of the dynamics of trust and surprise in sexual assault cases involving nonconsent but no use of force.

184. *See* People v. Carlson, 663 N.E.2d. 32, 33 (Ill. App. Ct. 1996).

a Chicago bar around St. Patrick's Day, the victim having arrived with her sister and a friend.[185] While at the bar, she and the defendant struck up a conversation, and shortly thereafter they exited the bar together to take a walk outside.[186] The victim told her sister she would return shortly.[187] Because it was raining, the perpetrator suggested they go sit in his car, and the victim agreed.[188] Once in the car, the defendant very abruptly reclined the victim's seat and began pulling off her clothes and touching her sexually.[189] The victim was shocked that her seat had suddenly reclined, but before she could react, the defendant penetrated her vagina with his fingers.[190] When asked, during cross-examination, why she did not exit the car, she responded: "[T]hat she . . . 'laid there like a dead fish.' When asked by defense counsel why she did not try to get out of the car, she stated, 'I was frozen. I didn't know what to do. I was frozen. I couldn't move. I was terrified.'"[191] The defendant's conviction was upheld on appeal, but not before he tried to argue that there was insufficient evidence of force. [192] Although this defendant was held accountable for rape, the court relied in part on the corroborating testimony of witnesses who testified about the victim's distress after the encounter.[193]

The use of a seeking consent standard provides a more straightforward approach to prosecution, relying on the perpetrator's failure to seek consent rather than on his use of force or the victim's reaction to his conduct. Because the parties had just met for the first time and had no history of prior sexual contact, presuming nonconsent to sexual contact is the position consistent with the parties' relationship up to that point. Here, the defendant's actions reveal that he did not say or do anything to express his desire for sexual contact. Moreover, the victim's account suggests that she got in the car because she trusted him and had no expectation that he would move so quickly to touch her sexually.[194] She further reported that he suddenly reclined her seat, put his hands down her pants, and pawed her "in places she did not want to be pawed."[195] Thus the defendant neither expressed his intent to seek sexual contact nor waited for the victim's response prior to touching her.[196]

In addition, the time and space factors both favor culpability here. The sexual contact occurred very quickly, within moments of the victim entering the defendant's car.[197] The defendant also violated the victim's personal space; she testified that "he stuck his fingers in my vagina" and positioned his body over

185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 34.
192. *Id.* at 35, 38.
193. *Id.*
194. *Id.* at 33–34.
195. *Id.* at 33.
196. *Id.* at 33–34.
197. *Id.*

her.[198] Thus, even if the defendant asked for permission to touch her sexually, she did not have a meaningful opportunity to decline because his actions interfered with the time and space she needed.

A seeking consent standard first presumes that there was no consent to sex between these recent acquaintances. It then focuses the analytical lens on the perpetrator's actions in seeking consent, finding that he failed to do anything to obtain the victim's consent prior to assaulting her. His culpability would therefore be based on the proof that he made sexual contact with the victim without seeking her consent. None of the victim's words or actions would be relevant, as they would be under the Yes Model.[199] Force and fear would be irrelevant. The defendant would be free to try to prove the presence of consent as an affirmative defense, but the lack of any indication of the victim's clear and unambiguous agreement to sexual contact would be fatal to that effort.

B. How Perpetrators Shift the Definition of the Situation in Brief Encounters

In addition to failing to seek consent in the Brief Encounter context, perpetrators also use a tactic of abruptly, and unilaterally, shifting the definition of the situation.[200] They first build trust with a victim in circumstances where the parties share a common nonsexual definition of the situation. But once the defendant has isolated the victim, he introduces sexually aggressive behavior which his victim would not have anticipated from his prior conduct, thereby violating the trust that originally lured the victim into the interaction.

The Seeking Consent approach is designed to identify this pattern of conduct by recognizing that sexual assaults often occur in situations where there is no common definition of the situation as one that is potentially sexual. Framing the legal inquiry around what the perpetrator did to seek consent captures conduct where the perpetrator unilaterally introduces sexual contact without the other person's authorization. The next three cases illustrate this dynamic in situations where the parties understood themselves to be interacting in a context that had no sexual or romantic connotation.[201] Although reasonable minds could differ widely on when a relationship is intended to remain platonic, my intent here

198. *Id.*

199. Anderson, *supra* note 21, at 1405.

200. "Definition of the situation" is a sociological term describing the agreed upon, collective understanding of what is happening in any given situation and the roles expected of each participant. It can apply to any situation involving human interaction and explains how individuals know how to conduct themselves, for instance, in the grocery store check-out line, when attending a movie, or going through airport security. *See generally* Ashley Crossman, *Assessing a Situation, in Terms of Sociology*, THOUGHTCO., https://www.thoughtco.com/situation-definition-3026244 (May 30, 2019) [https://perma.cc/BTJ2-F9E3].

201. *Carlson* and *Herzog* can be distinguished from *Arnold*, *Clark*, and *Jones* in the sense that the former cases involved interactions that, in the eyes of most people, could potentially have become sexual at some point. In contrast, there was no objectively apparent romantic, sexual or intimate purpose to the interactions in *Arnold*, *Clark*, and *Jones*. *See infra* notes 203–14 and accompanying text.

is simply to point out that people do often have such expectations, and we would do well to include them in discussions around sexual assault.[202]

In *Arnold v. U.S.*, the defendant was found guilty of two Brief Encounter rapes.[203] In both cases, he engaged the victim in platonic conversation to the point that she felt comfortable entering his car.[204] Shortly thereafter, his demeanor became threatening, and he raped each victim after threatening to kill her.[205] In *Clark v. State*, the defendant offered a ride to a woman unknown to him who was waiting for a bus, on her way to take her GED exam.[206] Once she was in the car, he told her he needed to make a brief stop at his apartment; he then lured her inside by claiming that someone in the apartment wanted to meet her.[207] He then raped her.[208] In *State v. Jones*, a navy serviceman engaged in casual conversation with a former roommate of his wife, after which he offered the woman a ride to go see his wife.[209] When the woman later requested a ride home, he took her to his apartment on a pretext and raped her there.[210]

In each of these cases, the victim engaged in conduct with the defendant based on a shared definition of the situation as something other than a sexual encounter. Clark's victim thought she was getting a ride to the GED testing site;[211] Arnold's first victim believed that a neighborhood acquaintance was giving her a ride to work, while his second victim had agreed to speak to him on work-related matters.[212] Jones's victim thought he was taking her to see an apartment for rent.[213]

A seeking consent standard would capture the unlawful conduct in each of these cases without requiring proof of the victim's fear, or of force used against her, as the common law would require, and without analyzing the victim's conduct, as the Yes Model requires. Instead, the analytical lens in focused squarely on the perpetrator's violation of trust and failure to seek consent.[214]

C. First Encounter Sexual Assault in Manifestly Platonic Relationships

First Encounter cases often involve interpersonal dynamics where the defendant and victim are interacting in situations that they mutually understand to exclude sexual activity. Many strong relationships are built on a foundation of

202. For a related discussion on the harms of consensual but unwanted sex, see generally Robin West, *Sex, Law and Consent* 5 (Geo. L. Fac. Working Papers, 2008), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1073&context=fwps_papers [https://perma.cc/R7TC-CN3F].

203. Arnold v. United States, 358 A.2d 335, 336 (D.C. 1976).

204. *Id.* at 336–37.

205. *Id.* at 336–38.

206. Clark v. State, 398 S.E.2d 377, 378 (Ga. Ct. App. 1990).

207. *Id.*

208. *Id.*

209. State v. Jones, 617 P.2d 1214, 1216 (Haw. 1980).

210. *Id.*

211. *Clark*, 398 S.E.2d at 378.

212. Arnold v. United States, 358 A.2d 335, 335–37 (D.C. 1976).

213. *Jones*, 617 P.2d at 1216.

214. These cases also demonstrate that fact-finders should give especially close scrutiny to circumstances where the defendant isolates or seeks to control the victim by getting her into a vehicle.

trust which society recognizes as excluding sexual contact—by design, and with an expectation that they will stay that way. In such relationships, the possibility of consensual sexual contact is so remote that justice requires giving the victim the benefit of the presumption of nonconsent. Unfortunately, courts have often missed this.

When a perpetrator unilaterally introduces a sexual encounter into a manifestly platonic relationship, the seeking consent standard addresses the violation of the victim's sexual agency. In such cases, the victim often does not immediately respond to the violation due to shock or surprise.

These cases occur in a range of circumstances where roles, or status differences between the parties, preclude sexual activity. Health care professionals who violate provider-patient relationships are one example of the latter.[215] The seeking consent standard is critical in such scenarios because it recognizes and respects the decidedly nonsexual nature of the relationship prior to the assault.

People v. Iniguez and *State v. Janis* provide examples.[216] In *Iniguez*, a bride was raped the night before her wedding by her "aunt's" fiancé.[217] The aunt had made the victim's wedding dress, and the victim slept at the aunt's home the night before the wedding.[218] They were joined by the aunt's fiancé, who had agreed to stand in for the victim's father and walk her down the aisle, but was meeting her for the first time that evening.[219] The court noted that there "was no flirtation or any remarks of a sexual nature" between victim and defendant prior to the rape.[220] Indeed, the victim was focused on preparing for her wedding; she was shocked to wake up to find her aunt's fiancé sexually penetrating her.[221]

The defendant conceded that the victim did not consent to sexual contact, but the California Court of Appeals reversed his conviction because evidence of force or fear was insufficient.[222] The California Supreme Court reinstated his conviction, finding that the victim's testimony—that she froze and that she did not say or do anything because she was afraid the perpetrator would become violent—to be sufficient evidence of fear.[223]

This victim found justice, but only after a four year wait.[224] The delay was the result of an awkward fit between the requirements of the law and the nature of the wrong. The law allowed the defendant to challenge the jury verdict on the basis that the victim did not exhibit fear.[225] But the presence or absence of the victim's fear is not what made this sexual penetration a crime; rather, it was the violation of the victim's sexual agency. The defendant stripped her of her agency

215. *See supra* notes 202–13 and accompanying text.
216. People v. Iniguez, 872 P.2d 1183, 1185 (Cal. 1994); State v. Janis, 880 N.W.2d 76, 82 (S.D. 2016).
217. The "aunt" was a close family friend. *Iniguez*, 872 P.2d at 1184–85.
218. *Id.* at 1184.
219. *Id.*
220. *Id.*
221. *See id.* at 1185.
222. *Id.* at 1184.
223. *Id.* at 1188.
224. *See id.* at 1184.
225. *See id.* at 1188.

in circumstances where she wanted no sexual relationship with him and indeed trusted him to maintain a platonic relationship with her. The existing law did not capture the true nature of the wrong, but the seeking consent standard does. Her fear was irrelevant. Her expectation that any interaction with the defendant would remain nonsexual *was* relevant.

State v. Janis also involved a First Encounter sexual assault in close proximity to a wedding; this time, it was the groom who raped the bride's maid of honor.[226] He did so on his wedding night while the victim slept at the couple's home.[227] The evidence demonstrated that the victim was sleeping in a spare room when the bride and groom arrived and was awakened by someone penetrating her anally.[228] She testified to being frozen during the assault, passing out, and then finding the groom in bed with her the next morning.[229] *Janis* is nearly identical to *Iniguez* in relation to the defendant's total inaction in seeking consent.[230] The defendant joined the victim in bed and penetrated her without warning; he simply ignored the need to seek consent.[231] The defendant was convicted of third degree rape on the grounds that the victim was incapable of consent due to intoxication; he claimed that she consented.[232]

Both of these cases would likely reach the same result under the Yes Model because each victim said or did nothing to affirmatively indicate that the perpetrator's conduct was welcome. But the Seeking Consent approach is a more straightforward way to arrive at that result by keeping the analysis focused on the perpetrator's actions rather than the victim's. Each perpetrator penetrated the victim without seeking her consent, and he did so in a context where the social norms and expectations around marriage put him on notice that the victim likely viewed the relationship as nonsexual and expected it to remain so. Each victim likely relied on the presumption of nonconsent when she fell asleep in a house where the perpetrator was present.

Bondi v. Commonwealth provides another example of a First Encounter sexual assault within an established relationship that was expressly nonsexual.[233] The victim, a college freshman, was sexually assaulted after babysitting for her high school youth minister, whom she had known as a mentor for several years.[234] When the defendant returned home on this occasion, he told the victim "I love you like a daughter but I'm also in love with you," while touching her breasts and digitally penetrating her vagina.[235] Here, the parties mutually understood their relationship to be nonsexual, and the victim relied on that

226. State v. Janis, 880 N.W.2d 76, 77–78 (S.D. 2016).
227. *Id.*
228. *Id.* at 78.
229. *Id.*
230. *See* notes 216–29 and accompanying text.
231. *Janis*, 880 N.W.2d at 78.
232. *Id.* at 77.
233. Bondi v. Commonwealth, 824 S.E.2d 512, 512 (Va. Ct. App. 2019).
234. *Id.* at 514–15.
235. *Id.*

understanding when she agreed to babysit for the defendant.[236] The defendant unilaterally disrupted that understanding. He placed a pillow on the victim's lap and then laid down with his head on the pillow—something he had never done before.[237] He then reached under the victim's shirt, touched her breasts, then unzipped her pants and digitally penetrated her vagina.[238] He engaged in all of these actions without expressing his intentions to the victim and without waiting for any response from her before initiating sexual contact.[239]

Although the defendant's conviction was upheld under a force standard, with the court finding sufficient force because the defendant grabbed the victim's arm in order to prevent her from leaving,[240] a seeking consent standard more accurately captures the wrong—the violation of the victim's sexual agency. The defendant touched the victim sexually without seeking her consent and knowing that she understood their relationship to be nonsexual.[241] His use of force was beside the point. The same result could be reached under the Yes Model because the victim froze and gave no indication that the perpetrator's actions were welcome.[242] But the Seeking Consent approach reaches this result solely through analysis of the perpetrator's *proactive* conduct rather than the victim's *reactive* response.

A presumption that a relationship is nonsexual is also critical to a wide range of professional relationships, such as those between health care providers and their patients. There are numerous First Encounter sexual assaults where the shared definition of the situation is that the victim is a patient who has come to see the defendant for medical treatment or professional services.[243] The perpetrator unexpectedly introduces a sexual element into the encounter, and the victim is too shocked to object.[244]

In *State v. Sedia*, the defendant, a physical therapist, used his penis to vaginally penetrate a patient as she laid on an exam table.[245] The parties mutually understood that the victim was seeking physical therapy; she was not in the office for sexual purposes.[246] Similarly, *Mohajer v. Commonwealth* involved a massage therapist who "shoved" his penis into the mouth of an eighteen-year-old first-time client.[247] His conviction was affirmed, although he tried to claim that the victim consented to his actions, despite coming as they did unexpectedly, and

236. *Id.* at 517 ("[Victim] testified that [appellant] was her mentor and father figure . . . [and] '[o]ne of the people [she] trusted the most and valued the most.'").

237. *Id.* at 514.

238. *Id.*

239. *See id.* at 514–15.

240. *Id.* at 517.

241. *See id.* at 514–15.

242. *See id.* at 514.

243. *See infra* notes 245–51 and accompanying text.

244. *See infra* notes 245–51 and accompanying text.

245. State v. Sedia, 614 So. 2d 533, 534 (Fla. Dist. Ct. App. 1993).

246. *See id.*

247. Mohajer v. Commonwealth, 579 S.E.2d 359, 362 (Va. Ct. App. 2003).

in the middle of a massage that the victim had booked to celebrate her high school graduation.[248]

Larry Nassar is perhaps the best known physician who has abused his position in order to sexually assault his patients.[249] Not a single one of Nassar's victims went to his office seeking a sexual encounter with him.[250] The same can be said of other physicians, such as Richard Strauss, who assaulted at least 177 male students at The Ohio State University, and gynecologist George Tyndall, who committed years of sexual assaults on patients at the University of Southern California.[251]

None of the health care providers discussed here expressed their intent to seek sexual contact prior to initiating it, nor did they give their victims any opportunity to consent or decline prior to sexual contact. These cases illustrate a broader range of scenarios where perpetrators abuse a position of authority—whether that is physician, teacher, psychologist, pastor, police officer or jail warden—to seek sexual contact from those who do not have a meaningful opportunity to consent in light of the nature of the relationship between the parties.[252]

Although some states have passed statutes declaring consent invalid within certain relationships, the seeking consent standard renders some of this parsing unnecessary, instead capturing all first-time encounters where there is a violation

248. *See id.* at 361.

249. Benjamin Hoffman, *Gymnastics Doctor Larry Nassar Pleads Guilty to Molestation Charges*, N.Y. TIMES (Nov. 22, 2017), https://www.nytimes.com/2017/11/22/sports/larry-nassar-gymnastics-molestation.html [https://perma.cc/VP47-8HVN] (Ingham County, Michigan case); Christine Hauser, *Larry Nassar Is Sentenced to Another 40 to 125 Years in Prison*, N.Y. TIMES (Feb. 5, 2018), https://www.nytimes.com/2018/02/05/sports/larry-nassar-sentencing-hearing.html [https://perma.cc/J3FD-HVFX] (Eaton County, Michigan case); Maggie Astor, *Gymnastics Doctor Who Abused Patients Gets 60 Years for Child Pornography*, N.Y. TIMES (Dec. 7, 2017), https://www.nytimes.com/2017/12/07/sports/larry-nassar-sentence-gymnastics.html [https://perma.cc/LBS3-NJQF] (federal case).

250. *See supra* note 249 and accompanying text.

251. CARYN TROMBINO & MARKUS FUNK, PERKINS COIE LLP, REPORT OF THE INDEPENDENT INVESTIGATION: SEXUAL ABUSE COMMITTED BY DR. RICHARD STRAUSS AT THE OHIO STATE UNIVERSITY 1 (2019), https://presspage-production-content.s3.amazonaws.com/uploads/2170/finalredactedstraussinvestigationreport-471531.pdf?10000 [https://perma.cc/6MMY-B7MP]; Alan Blinder, *Officials Ignored 'Clear Evidence' of Abuse by Ohio State Doctor*, N.Y. TIMES (Aug. 30, 2019), https://www.nytimes.com/2019/08/30/sports/ohio-state-doctor-abuse.html?searchResultPosition=2 [https://perma.cc/4VFQ-LGPQ]; Victor Mather, *Ohio State Finds Team Doctor Sexually Abused 177 Students*, N.Y. TIMES (May 17, 2019), https://www.nytimes.com/2019/05/17/sports/ohio-state-sexual-abuse.html?searchResultPosition=4 [https://perma.cc/7X4L-4KJB]; Harriet Ryan, Matt Hamilton & Paul Pringle, *Must Reads: A USC Doctor Was Accused of Bad Behavior with Young Women for Years. The University Let Him Continue Treating Students*, L.A. TIMES (May 16, 2018, 6:25 AM), https://www.latimes.com/local/california/la-me-usc-doctor-misconduct-complaints-20180515-story.html [https://perma.cc/JQU4-W6WX].

252. New York declared people detained by police officers to be incapable of consent to sex with the detaining officer(s) after the Anna Chambers case. N.Y. PENAL LAW § 130.05(j) (McKinney 2021). Chambers was raped by two police officers while handcuffed and in their custody; they claimed that she consented to sex. Natasha Lennard, *In Secretive Court Hearing, NYPD Cops Who Raped Brooklyn Teen in Custody Get No Jail Time*, INTERCEPT (Aug. 30, 2019, 11:40 AM), https://theintercept.com/2019/08/30/nypd-anna-chambers-rape-probation/ [https://perma.cc/M77Y-XR9J]. At the time, no New York statute declared people in custody to be incapable of consent under such circumstances. *Id.*

of sexual agency due to a failure to seek consent.[253] It is impractical for legislators to identify every situation where status differences between parties render the consent of one party void. The seeking consent standard performs the needed function more effectively given how common it is for perpetrators such as Nassar, Strauss, and others in positions of power to commit First Encounter sexual assaults against multiple victims.

D. College-age Sexual Predators, First Encounters, & Failing to Seek Consent

Failing to seek consent during First Encounters is characteristic of many sexual assaults involving college students. This is not surprising, because institutions of higher education bring together large numbers of young people who are becoming acquainted for the first time. These cases, like many of the others we have examined, often begin when a perpetrator initiates sexual touching without making his intentions clear and without waiting for the victim's consent before actually touching him or her.[254]

Berkowitz, discussed *supra*, is an example of a First Encounter case in the university context.[255] There, when the victim entered the defendant's dorm room looking for someone, the defendant persuaded her to stay and then initiated sexual contact by kissing the victim, touching her breasts, and attempting to put his penis in her mouth.[256] He did these things without warning, and when she said "no" repeatedly, he ignored her.[257]

Brock Turner was a Stanford University freshman when he raped Chanel Miller behind a dumpster, shortly after meeting her for the first time at a campus party.[258] Miller was too intoxicated to have given consent, and she had no memory of being alone with any males and no memory of being raped by Turner.[259] Prior to assaulting Miller, Turner approached at least two other

253. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1412(A) (2022) (providing for strict liability for sexual contact between a peace officer and a person in his custody); CONN. GEN. STAT. ANN. § 53a-71(a)(6)(B) (West 2021) (providing for strict liability when a psychotherapist has sexual intercourse with a current or former patient who is emotionally dependent on the psychotherapist); TEX. PENAL CODE ANN. §§ 22.011(b)(10), 22.011(b)(13) (West 2021) (rendering consent void where the actor is a clergyman, coach, or tutor who exploits a person's dependency on the actor). Additionally, numerous scholars have debated the question of when status differentials render consent to sex void and when they do not. For a fuller discussion, see ANDREA DWORKIN, INTERCOURSE 124–26 (1987); MACKINNON, *supra* note 32, at 174–75; Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS: J. WOMEN IN CULTURE & SOC'Y 631, 642 (1980); SCHULHOFER, *supra* note 53, at 47–59.

254. *See, e.g.*, Commonwealth v. Berkowitz, 609 A.2d 1338, 1340 (Pa. Super. 1992).

255. *Id.* at 1339.

256. *Id.* at 1340.

257. *Id.*

258. Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 6, 2016), https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html [https://perma.cc/X2YW-J23N]; *see also* CHANEL MILLER, KNOW MY NAME (2019).

259. People's Sentencing Memorandum, People v. Turner, No. B1577162, 2016 WL 3440260, at *4–7 (Cal. Super. Ct. June 2, 2016).

women and touched them sexually shortly after meeting them, without warning and without seeking their consent.[260]

John Krakauer provides several additional examples in his book *Missoula: Rape and the Justice System in a College Town*.[261] Krakauer gives an in-depth discussion of the justice system's disastrous handling of six separate sexual assaults on young women in Missoula between 2008 and 2012.[262] Each was a First Encounter, and most of them occurred within hours of the first meeting between victim and defendant.[263] Nowhere in Krakauer's book or in the U.S. Justice Department's report on their investigation into Missoula is there any indication that law enforcement agents were aware of and attached significance to the fact that rape is so often reported in circumstances where victim and accused have never shared prior sexual contact and often have just met.[264]

To the contrary, one police detective quoted in *Missoula* stated that "it's not easy to just throw people in jail when it's a 'he said, she said' scenario."[265] That comment ignores a very clear pattern—the prevalence of First Encounter offending where the parties are barely acquainted, and the perpetrator uses sexual aggression, often against intoxicated or unconscious victims. Most of the *Missoula* cases involve victims who were either asleep or heavily intoxicated at the time of the assault.[266] Several woke up to find the accused penetrating them as they slept; in one case the victim woke to violent digital penetration of her vagina and anus, and the accused would not stop even when she clearly told him to.[267]

These cases also demonstrate the value of adjudicating acquaintance rape cases under a seeking consent standard. All of the cases described in *Missoula*

260. Hannah Knowles, *Brock Turner Trial Continues in Second Week of Testimony*, STANFORD DAILY (Mar. 21, 2016, 11:34 PM), https://www.stanforddaily.com/2016/03/21/brock-turner-trial-continues-in-second-week-of-testimony/ [https://perma.cc/4FT3-SXGU] (stating that Turner tried to kiss the victim's sister despite the fact that he and the sister never spoke that evening); People's Sentencing Memorandum, *Turner*, 2016 WL 3440260, at *7–8, *14–15 (stating that Turner twice attempted to kiss one woman and put his hands on her waist without her consent; became "touchy" with another woman at a party and touched her waist, stomach, and upper thighs without her consent; and describing Turner as a "predator who is searching for prey").

261. *See* Jon KRAKAUER, MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN (2015).

262. Krakauer details the cases of rape victims Keely Williams, Allison Huguet, Kelsey Belnap, Kerry Barrett, Kaitlynn Kelly, and Cecilia Washburn. *Id.* at 3, 19, 34, 51, 71, 132. Krakauer describes three additional rapes with unnamed victims and perpetrators which also appear to be First Encounters. *Id.* at 127–30.

263. *Id.* at 19, 35–36, 51–53, 63–65.

264. Letter from Michael W. Cotter, U.S. Att'y, Dist. of Mont. & Thomas E. Perez, Assistant Att'y Gen., C.R. Div., to Royce C. Engstrom, President, Univ. of Mont. (May 9, 2013), http://www.justice.gov/crt/about/spl/documents/missoulafind_5-9-13.pdf [https://perma.cc/HQD7-B56M]; Letter from Michael W. Cotter, U.S. Att'y, Dist. of Mont. & Thomas E. Perez, Assistant Att'y Gen., C.R. Div., to John Engen, Mayor (May 15, 2013), http://www.justice.gov/crt/about/spl/documents/missoulapdfind_5-15-13.pdf [https://perma.cc/G562-B9PS]; Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., C.R. Div. & Michael W. Cotter, U.S. Att'y, Dist. of Mont., to Fred Van Valkenburg, Cnty. Att'y (Feb. 14, 2014), http://www.justice.gov/crt/about/spl/documents/missoula_ltr_2-14-14.pdf [https://perma.cc/AD2W-QATG] [hereinafter Van Valkenburg Letter].

265. KRAKAUER, *supra* note 261, at 72.

266. KRAKAUER, *supra* note 261, at 12, 19–20, 34–40, 51–53, 69.

267. KRAKAUER, *supra* note 261, at 64. That assault left blood on the victim's pillow, on two walls near her bed, and "all over" her sheets. *Id.* at 65. That assailant was expelled from the university but not criminally prosecuted. *Id.* at 100–01.

were First Encounters.[268] Approaching them by presuming nonconsent and then evaluating the defendants' actions in seeking consent is revealing. In four of the cases featuring sleeping victims, each was awoken not by a polite request by the defendant for sexual activity, but by the sensation of being penetrated as she slept.[269] These perpetrators simply initiated sexual activity without communicating with the victim at all.[270] At least two of these five victims were heavily intoxicated as well as unconscious, with the accused having played an active role in encouraging the victims' drinking prior to the sexual assault.[271]

Just one of the *Missoula* cases involved a victim who was awake and not intoxicated; she reported that a football player used his greater size and strength to physically pin her down and assault her.[272] When he sought physical intimacy with her, she repeatedly said no and asked him to go back to their agreed-upon activity of watching a movie, but he ignored her protests.[273]

Krakauer's book and the Justice Department's investigation into sexual assault in Missoula revealed substantial deficiencies in law enforcement's approach to investigating non-stranger sexual assault, including gender bias and other issues.[274] The seeking consent standard brings helpful clarity to the task of building strong cases for prosecution, because it focuses the analysis on the perpetrator's conduct rather than the victim's. An offender-centered investigation that frames the inquiry around seeking consent can help police to more clearly see the nonconsensual nature of the types of cases described in *Missoula*, which frequently feature perpetrators penetrating unconscious or intoxicated First Encounter victims without even attempting to seek consent.

E. Worst Case Scenarios: First Encounters and Serial Offenders

It is well known that most sexual assaults occur among acquaintances, and I have further argued that these assaults are very often committed in the First Encounter context by perpetrators who fail to seek consent. It is also the case that many sexual predators are serial offenders.[275] Accordingly, when sexual predators are left to offend for long periods of time—because of poor police investigations and/or because police are skeptical of the victims—they often commit a

268. *See supra* notes 261–63 and accompanying text.

269. KRAKAUER, *supra* note 261, at 12, 19, 53, 69. A fifth victim felt a penis thrust into her mouth and then blacked out. *Id.* at 36.

270. *Id.* at 12, 19, 36, 53, 69.

271. *Id.* at 19, 35–36.

272. *Id.* at 137–38.

273. *Id.* at 136.

274. For instance, Krakauer documents a police officer asking a victim whether she had a boyfriend and then explaining that "sometimes girls cheat on their boyfriends, and regret it, and then claim they were raped." *Id.* at 54. *See generally* Van Valkenburg Letter, *supra* note 264, at 2 (discussing evidence of gender bias, animus towards victims, and other problems preventing the prosecution of non-stranger sexual assault).

275. David Lisak, *Understanding the Predatory Nature of Sexual Violence* 1, 4–5 (2008), https://www.middlebury.edu/media/view/240951/original [https://perma.cc/24QN-D2LW].

large number of assaults.[276] Many of these are First Encounters that involve no effort to seek consent.

From the predator's standpoint, the goal is to maneuver the victim into a situation where sexual contact is possible, carry out the assault, and then move onto the next victim. We have seen several cases where predators accomplish this goal by building a basic level of trust with the victim and then unilaterally changing the definition of the situation without giving the victim the opportunity to respond before the sexual violation begins.[277] Because predators are interested in extracting sex rather than forming on ongoing relationship with their victims, they do not need to know their victims well, just well enough to make the rape look like consensual sex to the fact-finder. As long as we ignore the significance of First Encounter sexual assault, this is not difficult.

David Lisak uses the term "undetected rapists" to describe sexual predators who evade detection for long periods of time.[278] Lisak argues that such predators use strategies that allow them to avoid detection such as grooming their victims, testing victims' boundaries, and isolating them as precursors to sexual assault.[279] Lisak's work helps to explain why some sexual predators manage to commit hundreds of assaults without being detected.[280]

Reynhard Sinaga is one example of a sexual predator who operated repeatedly in the First Encounter context, using the behaviors identified by Lisak.[281] Sinaga is thought by police to have raped 195 men between 2005 and 2017 in Manchester, England.[282] In 2020, he was convicted of forty-eight rapes and sentenced to at least forty years in prison.[283] Each of Sinaga's rapes were Brief Encounters.[284] Sinaga's modus operandi was to find young men who were leaving the bars near his home at closing time and who were in some sort of distress—heavily intoxicated, without money, or needing to charge dead phone

276. *Id.*

277. *Id.* at 2.

278. *Id.* at 6–7; *see also infra* notes 281–307 and accompanying text.

279. Lisak, *supra* note 275, at 7 (arguing that undetected rapists (1) are "extremely adept at identifying 'likely' victims," and testing prospective victims' boundaries"; (2) "plan and premeditate their attacks"; (3) typically use only the amount of violence necessary to "coerce their victims into submission"; (4) use "psychological weapons" rather than physical force, and (5) "use alcohol deliberately to render victims more vulnerable to attack").

280. *See* Lisak, *supra* note 275, at 4–5. There is some controversy around Lisak's work. For a brief treatment of some of these critiques, see Tyler Kingkade, *Researchers Push Back on Criticisms of Well-known Serial Rapist Study*, HUFFPOST, https://www.huffpost.com/entry/researchers-serial-rapists-study_n_5630e8c9e4b00aa54a4c0c2d (Oct. 29, 2015) [https://perma.cc/RQ78-CRF8].

281. *See* Lisak, *supra* note 275, at 7.

282. Helen Pidd & Josh Halliday, *'I Thought, OK, He Goes for Drunk Guys': Friends and Flatmates on the Reynhard Sinaga They Knew*, GUARDIAN (Jan. 25, 2020, 3:00 AM), https://www.theguardian.com/society/2020/jan/25/friends-flatmates-reynhard-sinaga [https://perma.cc/4ETG-NJSH].

283. Alexandra Topping & Helen Pidd, *UK Court Increases Minimum Jail Terms of Two Serial Rapists to 40 Years*, GUARDIAN (Dec. 11, 2020, 6:24 AM), https://www.theguardian.com/uk-news/2020/dec/11/uk-court-increases-minimum-jail-terms-of-two-serial-rapists-to-40-years-joseph-mccann-reynard-sinaga [https://perma.cc/FC3T-QHV2].

284. Helen Pidd, *How Serial Rapist Posed as a Good Samaritan to Lure Victims*, GUARDIAN (Jan. 6, 2020, 7:20 AM), https://www.theguardian.com/uk-news/2020/jan/06/reynhard-sinaga-serial-rapist-posed-good-samaritan-lure-men [https://perma.cc/VQ6V-67B2].

batteries.[285] Sinaga invited each victim to his apartment to charge their phones, have another drink, and sleep for a few hours.[286] The fact that he was slightly built made him appear nonthreatening to his victims.[287] Sinaga raped his victims as they slept.[288]

According to the prosecution, Sinaga selected an apartment near several bars for the express purpose of luring victims to his home at closing time.[289] He was discovered only when his last victim awoke during the assault and called police.[290] But Sinaga's conduct at that time was still poorly understood. The victim, who was a physically larger man than Sinaga, was treated as a suspect for assaulting Sinaga and was held in custody for several hours; police did not believe his statement that he had been sexually assaulted.[291] Police only grasped the true nature of the situation when they discovered video footage on Sinaga's phone of his numerous sexual assaults on sleeping men.[292]

There are numerous other examples of sexual predators who pursue multiple victims by engaging in a Brief Encounter with each one after establishing some level of trust. Harvey Weinstein assaulted numerous women who sought his help in advancing their careers in the film industry.[293] He would summon the women to a meeting in a hotel room and would proceed to sexually assault each one, usually in a First Encounter context.[294]

Jeffrey Epstein sought underage girls whom he had never met for sexual encounters, and he used co-conspirators to lure them to his home, promising to pay them hundreds of dollars for "massages."[295] But once he was alone with them, he would reveal the true purpose of the interaction by ordering them to

285. Helen Pidd & Josh Halliday, *Reynhard Sinaga Jailed for Life for Raping Dozens of Men in Manchester*, GUARDIAN (Jan. 6, 2020, 9:23 AM), https://www.theguardian.com/uk-news/2020/jan/06/reynhard-sinaga-jailed-life-drugging-raping-men-manchester [https://perma.cc/GY6W-WSPX]; Pidd, *supra* note 284.

286. Pidd & Halliday, *supra* note 285; Pidd, *supra* note 284.

287. Pidd & Halliday, *supra* note 285; Pidd, *supra* note 284.

288. Pidd & Halliday, *supra* note 285; Pidd, *supra* note 284.

289. Katerina Vittozzi, *Reynhard Sinaga: UK's Worst Serial Rapist Handed Multiple Life Sentences for Campaign Against Men*, SKY NEWS (Jan. 7, 2020, 6:53 AM), https://news.sky.com/story/reynhard-sinaga-serial-rapist-handed-multiple-life-sentences-for-violent-campaign-11902070 [https://perma.cc/BMB5-JQB9]; *Britain's Most Prolific Rapist Jailed for Life Following Historic CPS Prosecution*, CPS (Jan. 6, 2020), https://www.cps.gov.uk/north-west/news/britains-most-prolific-rapist-jailed-life-following-historic-prosecution [https://perma.cc/QB79-7BRK]; Pidd, *supra* note 284.

290. Pidd, *supra* note 284; Nazia Parveen, *Reynhard Sinaga Victim: 'I Thought I Might Have Killed Him,'* GUARDIAN (Jan. 26, 2020, 9:15 AM), https://www.theguardian.com/uk-news/2020/jan/26/reynhard-sinaga-victim-i-thought-i-might-have-killed-him [https://perma.cc/YQ8F-EBYS].

291. Parveen, *supra* note 290.

292. *Id.*; Pidd, *supra* note 284.

293. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html [https://perma.cc/V3NV-GKVS].

294. *Id.*

295. *In re* Wild, 955 F.3d 1196, 1198 (11th Cir. 2020); JULIE K. BROWN, PERVERSION OF JUSTICE: THE JEFFREY EPSTEIN STORY xi–xii, 105–06, 108 (2021) (stating that Epstein "didn't want experienced women; his preferred prey were waiflike prepubescent girls from troubled backgrounds who needed money and had little or no sexual experience").

undress and engaging in sexual contact with them during the massage.[296] The victims often did not expect to engage in any sexual activity with Epstein, and some learned that they could get paid for bringing new girls to him if they did not want to repeat the sexual experience.[297] Epstein and Weinstein both committed sexual assault repeatedly in a First Encounter context.

The case of Jonas Dick, Alexander Smith, and Jason Berlin highlights how predators can become expert at their craft when they engage in a pattern of First Encounter coercion and sexual assault without being detected by police.[298] Dick and Smith ran an entity called "Efficient Pickup" through which they accepted fee-paying clients who wanted to learn how to "seduce" women.[299] Berlin was their student.[300] Much like Sinaga, Smith taught his students to "go to bars at closing time to find a woman and to have an apartment nearby to take her to afterward."[301] Dick and Smith approached one heavily intoxicated victim outside of a San Diego bar at closing time and invited her to an apartment.[302] Once there, they gave her something to drink, and Smith and Berlin then took turns raping her as she drifted in and out of consciousness.[303] The defendants were prosecuted as a result of the victim's own efforts at investigating her case and finding online evidence of the men bragging about sexually assaulting her as well as other women.[304] The trial judge declared that the victim deserved an award for her investigatory work because: "But for you, he wouldn't be here . . . . Nobody would be held accountable . . . . In fact, worse than that, things would have gone on and there would be other victims, and it is quite possible we would have never learned about this."[305]

These cases featuring seasoned predators demonstrate the worst-case scenarios that develop when predators are left unchecked and ignored by law enforcement for long periods of time. The fact that most of the sexual assaults committed by these individuals occurred in a First Encounter context reveals a common denominator that we have been missing and the importance of a path forward that takes this dynamic into account and applies a seeking consent standard.[306] These predators differed somewhat in terms of whether they used alcohol, drugs, or force to accomplish rape, but what they all had in common was repeatedly engaging in First Encounter sexual penetration or contact without seeking

296. BROWN, *supra* note 295, at 107–08; JAMES PATTERSON, FILTHY RICH 68–71 (1st ed. 2016).

297. *In re Wild*, 955 F.3d at 1198; BROWN, *supra* note 295, at xi, 106, 108; PATTERSON, *supra* note 296, at 71.

298. *See generally* People v. Smith, No. D071479, 2017 WL 6521853, at *1 (Cal. Ct. App. Dec. 21, 2017).

299. *Id.*; Dana Littlefield, *Rape Victim Did Her Own Detective Work to Find Her Assailants*, L.A. TIMES (Jan. 30, 2017, 5:00 AM), https://www.latimes.com/local/lanow/la-me-rape-victim-20170129-story.html [https://perma.cc/8JDD-SKDA].

300. *Smith*, 2017 WL 6521853, at *1.

301. *Id.* at *1, *4.

302. *Id.* at *1.

303. *Id.*

304. *Id.* at *2; Littlefield, *supra* note 299 ("[T]he real break in this case came from the victim's own investigation.").

305. Littlefield, *supra* note 299 (internal quotation marks omitted).

306. *See supra* notes 281–305 and accompanying text.

consent.[307] Applying a legal standard that takes the First Encounter context into account and applies a seeking consent standard would focus police and prosecutors squarely on the predatory nature of this conduct.

Part IV has demonstrated that a large number of sexual assaults take place between acquaintances in First Encounter scenarios where the defendant initiates sexual contact or penetration without seeking the victim's consent. Despite the fact that this pattern of offending repeats itself again and again, rape law has ignored First Encounter dynamics and the ubiquity of this type of offending. Sexual predators are able to amass a large number of victims when police ignore them, leaving them to exploit First Encounter dynamics repeatedly without getting caught. In this way, offenders improve their predatory skills, gain experience in successfully evading detection, and become emboldened to commit more assaults. To remedy this inequity, rape law must recognize the presumption of nonconsent that precedes First Encounter sexual assault through the development of a crime of sexual contact without seeking consent.

V. BUILDING UPON AFFIRMATIVE CONSENT APPROACHES

This Article's Seeking Consent proposal harmonizes with, but also goes beyond, current understandings of affirmative consent. Affirmative consent is sexual consent defined as an active expression of willingness to engage in sexual activity rather than mere passive acquiescence.[308] As California puts it, "[a]ffirmative consent means affirmative, conscious, and voluntary agreement to engage in sexual activity."[309] Support for affirmative consent—the Yes Model—is spreading across constituencies, despite its critics.

Colleges and universities began to focus substantial attention on the problem of sexual assault on college campuses about ten years ago and have since enthusiastically embraced affirmative consent when adjudicating sexual assault cases.[310] As of 2015, over 1,400 colleges and universities in the United States used an affirmative consent standard for sexual assault claims.[311] Certain states, including California, Connecticut, Illinois, and New York, have passed legislation requiring higher education institutions to adopt an affirmative consent standard when adjudicating sexual assault cases.[312]

307. *See supra* notes 281–305 and accompanying text.

308. For an excellent explanation of the Yes Model and No Model approaches to consent in sexual assault law, see Anderson, *supra* note 21, at 1408–14.

309. CAL. EDUC. CODE § 67386(a)(1) (West 2020).

310. *See generally* Janet Napolitano, *"Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL'Y REV. 387, 389 (2015). *See also* Sandy Keenan, *Affirmative Consent: Are Students Really Asking?*, N.Y. TIMES (Jul. 28, 2015), https://www.nytimes.com/2015/08/02/education/edlife/affirmative-consent-are-students-really-asking.html [https://perma.cc/PM2F-R5RN].

311. Keenan, *supra* note 310.

312. CAL. EDUC. CODE §§ 67386(a)(1), (2) (West 2020); CONN. GEN. STAT. ANN. §§ 10a-55m(a)(1), (b)(1) (West 2021); 110 ILL. COMP. STAT. ANN. 155/10 (West 2019); N.Y. EDUC. LAW § 6441(1) (McKinney 2021); Jillian Gilchrest, *Consent and Connecticut Law: Ensuring Criminal Justice Keeps Pace with Today's Culture*, CT MIRROR (Oct. 20, 2020), https://ctmirror.org/category/ct-viewpoints/consent-and-connecticut-law-ensuring-criminal-justice-keeps-pace-with-todays-culture/ [https://perma.cc/9CHM-LGUF].

Opponents of affirmative consent argue that the standard places the burden of proof upon the accused to demonstrate that he obtained consent to each sexual act, and that such a burden interferes with the accused's right to avoid self-incrimination, effectively forcing him to speak at trial.[313] In fact, the burden of proof remains with the state when an affirmative consent standard is used; the prosecutor must prove that the sexual contact took place in the absence of the victim's freely given agreement.[314] Canada's use of affirmative consent in its criminal justice system for nearly thirty years demonstrates that it is workable in the criminal context.[315]

The American Law Institute ("ALI") declined to endorse an affirmative consent standard as part of the Model Penal Code Revision process in 2016, and the American Bar Association refused to do so in 2019.[316] In so doing, these organizations have turned away from the embrace of affirmative consent in higher education, in Canada, and, increasingly, in American state legislatures. Prior to ALI's 2016 vote, some form of affirmative consent was already used in the criminal law of several states, although these state statutes vary in complexity and function.[317] Since ALI's vote, even more states have embraced affirmative consent as a criminal law requirement.[318]

States that incorporate an affirmative definition of consent into statutory or case law use a range of approaches, and the result is rather complex terrain.[319] However, there are at least nine jurisdictions that include consent as an element

313. Alan Dershowitz, *Opinion: Innocent Until Proven Guilty? Not Under 'Yes Means Yes.,'* WASH. POST (Oct. 14, 2015, 9:00 AM), https://www.washingtonpost.com/news/in-theory/wp/2015/10/14/how-affirmative-consent-rules-put-principles-of-fairness-at-risk/ [https://perma.cc/6MS4-CCLR].

314. *See infra* notes 315–31 and accompanying text.

315. *See generally* Vandervort, *supra* note 28.

316. Bradford Richardson, *American Law Institute Rejects Affirmative Consent Standard in Defining Sexual Assault*, WASH. TIMES (May 17, 2016), https://www.washingtontimes.com/news/2016/may/17/american-law-institute-rejects-affirmative-consent/ [https://perma.cc/52LK-ZSZS]; Amanda Robert, *Contentious Resolution Seeking to Redefine Consent in Sexual Assault Cases Is Postponed*, ABA J. (Aug. 12, 2019, 10:20 PM), https://www.abajournal.com/news/article/resolution-114 [https://perma.cc/8KPS-DL36]. Revision to the MPC's sexual offense provisions is long overdue. *See, e.g.*, Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 207 (2003). 2016 was a crucial year for examining affirmative consent. Not only did ALI vote to reject affirmative consent in the MPC sexual offenses revision process that year, but numerous scholars wrote about the state of affairs surrounding affirmative consent around the same time. *See, e.g.*, Kimberly Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 397 (2016); Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 416–17 (2016); Mary Graw Leary, *Affirmatively Replacing Rape Culture with Consent Culture*, 49 TEX. TECH. L. REV. 1, 2 (2016); Melissa Murray & Karen Tani, *Something Old, Something New: Reflections on the Sex Bureaucracy*, 7 CALIF. L. REV. CIRCUIT 122, 123 (2016); Tuerkheimer, *supra* note 20, at 442; Schulhofer, *supra* note 136, at 667; Schulhofer, *supra* note 35, at 335.

317. *See infra* notes 322–25 and accompanying text; *see also* Tuerkheimer, *supra* note 20, at 449–51.

318. *See infra* notes 324–30 and accompanying text.

319. *See* Tuerkheimer, *supra* note 20, at 449–51. State affirmative consent requirements can loosely be divided into what Tuerkheimer terms "pure" and "diluted" approaches. Broadly speaking, "pure" affirmative consent jurisdictions use an affirmative consent standard to adjudicate consent as an element of the charged crime with no separate force requirement. In "diluted" jurisdictions, the affirmative consent requirement is somehow attenuated. *See* Tuerkheimer, *supra* note 20, at 450–51.

of the crime of sexual assault and that define that consent in affirmative terms.[320] In each of these jurisdictions, a defendant can be held criminally liable for engaging in sexual contact in the absence of a freely given indication of consent from the victim.[321]

New Jersey, Vermont, and Wisconsin included affirmative consent as an element of rape or sexual assault prior to 2016, the year that ALI rejected it.[322] New Hampshire also did so prior to 2016, in part through supreme court jurisprudence, and two additional jurisdictions—Minnesota and the District of Columbia—already treated sexual contact without affirmative consent as a misdemeanor at that time.[323]

Moreover, several jurisdictions strengthened their embrace of affirmative consent since the actions by ALI and the ABA. Vermont has defined "consent" affirmatively since 2005, but effective July 2021, it clarified that the presence of ambiguity means a *lack* of consent.[324] New Jersey, in 2021, codified its 1992 supreme court holding, statutorily defining sexual assault to include sexual penetration or sexual contact without affirmative consent.[325]

Since 2016, three additional states have incorporated affirmative consent into their criminal law, with Oklahoma embracing it right around the time of ALI's rejection.[326] Montana has long defined rape as sexual intercourse without consent, but in 2017 the state incorporated an affirmative definition of consent as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."[327] In 2019, Washington State also took action.[328] The state had previously defined consent in affirmative terms, but with a requirement that lack of consent had to be "*clearly expressed* by the victim's words or

320. The nine jurisdictions are the District of Columbia, Minnesota, Montana, New Hampshire, New Jersey, Oklahoma, Vermont, Washington, and Wisconsin. *See infra* notes 322–31 and accompanying text.

321. *See infra* notes 322–31 and accompanying text.

322. For instance, Vermont's sexual assault statute reads, in part, "[n]o person shall engage in a sexual act with another person without the consent of the other person." VT. STAT. ANN. tit. 13 § 3252(a)(1) (West 2021).

323. MINN. STAT. §§ 609.341(4), 609.3451, 609.342–609.345 (2022); D.C. CODE ANN. §§ 22-3001(4), 22-3006 (West 2009).

324. VT. STAT. ANN. tit. 13 § 3251(3) (West 2021); 2021 Vt. Legis. Serv. No. 68 (West). The prior version read: "Consent" means words or actions by a person indicating a voluntary agreement to engage in a sexual act. *Id.*

325. State *ex rel.* M.T.S., 609 A.2d 1266, 1277 (N.J. 1992); N.J. STAT. ANN. §§ 2C:14-2(a)(5), 2C:14-2(a)(6), 2C:14-2(c)(1) (West 2020) (indicating that lawful sexual contact requires "affirmative and freely-given permission," as well as a lack of coercion).

326. Effective June 2016, consent in Oklahoma has been defined as "the affirmative, unambiguous and voluntary agreement to engage in a specific sexual activity during a sexual encounter which can be revoked at any time." OKLA. STAT. ANN. tit. 21 § 113 (West 2016).

327. MONT. CODE ANN. § 45-5-503(5)(c) (2019). Montana made this legislative change in response to a federal investigation, in 2012, into rape prosecution failures in Missoula, and after publication of Jon Krakauer's 2015 book on the same topic. Gabriel Furshong, *Montana Legislature Grapples with Sexual Violence*, HIGH COUNTRY NEWS (Mar. 7, 2017), https://www.hcn.org/articles/montana-confronts-its-antiquated-laws-on-sexual-violence [https://perma.cc/6MP3-EH87]; *see also supra* notes 261–74 and accompanying text.

328. WASH. REV. CODE ANN. § 9A.44.060(1)(a) (West 2019). Class C felonies carry a five-year maximum prison term. WASH. REV. CODE ANN. § 9A.20.021(c) (West 2015).

conduct."[329] The legislature removed that requirement in 2019, effectively construing ambiguity as a lack of consent.[330]

This brief survey demonstrates that at least nine American jurisdictions have adopted an affirmative consent requirement in relation to one or more forms of sexual contact.[331] The fact that New Jersey and Vermont have recently strengthened this requirement while Montana, Oklahoma, and Washington have added one indicates that momentum for affirmative consent is building rather than subsiding, apparently unaffected by the recent rejection of the concept by ALI and the ABA.

Nor are such developments restricted to the United States. New South Wales, Australia introduced affirmative consent reforms into their criminal law effective June 1, 2022, using an approach that is even more comprehensive than those seen in the above-referenced American states.[332] Under the New South Wales approach, a person who wants to engage in sexual activity with someone must "say or do something to seek consent," or the other person must "do or say something to show consent."[333] A belief in consent is not reasonable when a person has said or done nothing to seek it.[334] Further, it is impermissible to assume that someone is consenting because they do not say no; "silence is not consent."[335] The law also clarifies that consent can only be given "freely and voluntarily;" a person cannot consent when asleep, unconscious, intoxicated, or subjected to force or coercion.[336]

The new law has been introduced with the help of an education campaign, "Make No Doubt," designed to ensure that everyone understands the new law as well as to change social behavior "with clearer rules of engagement to drive down the rate of sexual assaults."[337]

The proposal offered here both builds on this momentum and goes beyond it. The Seeking Consent approach harmonizes with the Yes Model but focuses the analysis on the perpetrator's *actions* in seeking consent rather than on the

329. WASH. REV. CODE ANN. § 9A.44.060(1)(a) (West 2018).

330. "'Consent' means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." WASH. REV. CODE ANN. § 9A.44.010(2) (West 2022).

331. These are the District of Columbia, Minnesota, Montana, New Hampshire, New Jersey, Oklahoma, Vermont, Washington, & Wisconsin. *See supra* notes 322–30 and accompanying text.

332. *Consent Reforms Become Law in NSW*, LIBERAL NEW S. WALES (June 1, 2022), https://nswliberal.org.au/template/news/consent-reforms-become-law-in-nsw [https://perma.cc/5CWQ-6CNQ].

333. *Id.*; Tamsin Rose, *NSW Affirmative Consent Laws: What Do They Mean and How Will They Work?*, GUARDIAN (June 1, 2022, 4:50 AM), https://www.theguardian.com/australia-news/2022/jun/01/nsw-affirmative-consent-laws-what-do-they-mean-and-how-will-they-work [https://perma.cc/GQT9-8BD6].

334. Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021, Sched. 1, Sub. 1A, 61HK(2) ("[A] belief that the other person consents to sexual activity is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.").

335. *Consent Reforms Become Law in NSW*, *supra* note 332.

336. *Consent Reforms Become Law in NSW*, *supra* note 332.

337. *Consent Reforms Become Law in NSW*, *supra* note 332; *see Check Consent, Every Time*, NSW GOV'T, https://www.makenodoubt.dcj.nsw.gov.au/#checkconsent (last visited Jan. 27, 2023) [https://perma.cc/7XBL-W7P2].

victim's actions in *giving* it—an important corrective when analyzing sexual aggression. My proposal also incorporates into the analysis, for the first time, the key practice of analyzing whether the alleged assault was a First Encounter and the great potential this type of analysis holds for greater fairness in rape law. I have also demonstrated how the proposal could be applied across a wide range of cases, and how it complements the Yes Model, which can still be used in cases where it is necessary to analyze whether the victim gave consent.

The Seeking Consent approach offers the advantage of a clear bright line that is easy to understand—for victims, those accused, and law enforcement authorities alike. It tells the sex initiator that before touching another person sexually for the first time, it is necessary to seek permission, and to be certain that the other person has unambiguously indicated, through words or actions, a willingness for the initiator to proceed. If he is not sure, he must refrain from sexual contact. The law further instructs him to expect that the law will presume that a person who has never before consented to sexual contact with him has maintained that stance, absent a clear and unambiguous indication to the contrary.

This clear bright line rule makes the law clear to everyone concerned and has the potential to greatly reduce sexual assault in the First Encounter context. It is an easy rule to learn—one must *seek consent* of the other party prior to touching them sexually. An educational campaign similar to the New South Wales "Make No Doubt" campaign can reinforce the message.

This approach will be opposed, perhaps vehemently, by those who have benefitted from society's tolerance of sexual aggression, but if we are concerned with protecting victims of all ages, genders, and races from sexual assault, this bright line is the most fair and effective way to construe sexual assault laws. We must fully abandon, at long last, the sexist notion, embraced by decades of sexual assault law, that women can be seen as voluntarily submitting to men's sexual initiative unless they actively object by resisting or saying "no."[338]

Moreover, given the serious invasion of privacy that is involved in touching someone sexually without his or her consent, as well as the long-lasting psychological trauma that can result, it is fair and just to place the burden on the person initiating the sexual contact to be sure that he has clear and unambiguous consent before acting.

To paraphrase an Idaho court writing in 1907: a person who takes the liberty of touching another person sexually without her or his consent does so "at his own risk."[339] It is the person initiating the sexual contact who has the power to avoid unlawful contact by being cautious about seeking consent in advance of

338. Michelle Anderson demonstrates the heterosexist assumptions underlying rape law's archaic notions of consent. *See* Anderson, *supra* note 21, at 1408–09. As late as 1994, Donald Dripps demonstrated that the view that it was fine for a man to touch a woman without her consent was still alive and well: "Women are expected to object when male advances exceed female preference. Unless a man either exploits an unconscious or incompetent victim, or induces a woman's acquiescence by violence or some other wrongful pressure, this doesn't seem like so much to ask." Anderson, *supra* note 21, at 1411 (quoting Donald Dripps, Panel Discussion, *Men, Women and Rape*, 63 FORDHAM L. REV. 125, 146 (1994)).

339. State v. Neil, 90 P. 860, 862 (Idaho 1907). I have paraphrased in order to avoid some of the archaic language in the original opinion.

touching. That person can "incur the risk and hazard" of misjudging the situation and facing the legal consequences.[340] If he is not sure, he can simply refrain from touching. That Idaho court went on to note:

> A little of this kind of law would go a long way with some of the brutes who unfortunately bear the names of men. There would be far less illicit intercourse if there were no assaults by the seducer in the first place, and the oftener he is brought to justice the less annoyance the community will suffer from the graver offenses towards which his conduct leads.[341]

Although the "illicit intercourse" framing may no longer resonate today, this opinion effectively captures the sexual violation that we see repeatedly in First Encounter cases. These cases are not the result of miscommunication between the well-intentioned; rather, they are the result of deliberate predatory conduct and sexual aggression. The more diligent we are at identifying and prosecuting this conduct, the safer our communities will be.

VI. OBJECTIONS TO THE SEEKING CONSENT APPROACH

As with most proposals to reform rape law, there will be objections or concerns about the proposal's scope. I will address three of those here—two that have to do with criminalizing sex, and one pertaining to equity in how First Encounter and repeat encounter cases are treated. The objections addressed here raise important concerns, but none are compelling enough to negate the value of the Seeking Consent approach.

A. Is the Proposal Overbroad?

First is the concern that the proposal could be overbroad and accordingly result in a flood of prosecutions, particularly in relation to sexually inexperienced but well-intentioned young people. The framework I propose criminalizes the act of engaging in sexual contact or penetration with another person for the first time without seeking consent. In this way it puts nonconsensual sexual contact on the same level as battery statutes, which typically criminalize offensive touching without any analysis of whether the victim consented to the offensive touching.[342] Rather, the law presumes a lack of consent to offensive touching as a result of the offensive nature of the touch.

My proposal simply asserts what should be obvious—that when sexual contact occurs between an initiator and complainant for the first time without the initiator making any effort to find out whether the other person consents, we

340. *Id.*

341. *Id.*

342. CAL. PENAL CODE § 242 (West 2021) ("A battery is any willful and unlawful use of force or violence upon the person of another."); 720 ILL. COMP. STAT. ANN. 5/12.3(a) (West 2021) ("A person commits battery if he or she knowingly without legal justification by any means . . . makes physical contact of an insulting or provoking nature with an individual."); TEX. PENAL CODE ANN. § 22.01(a)(3) (West 2021) (person commits an offense if he or she "intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative").

should presume that the touching is offensive, much like a battery would be. If the touching is not offensive to the complainant, the initiator is free to rely on an affirmative defense that consent existed and that he believed consent existed. It is then his burden to demonstrate what words or actions the complainant used express that consent. The availability of this affirmative defense of consent, as in relation to battery, helps to protect the accused.

That New South Wales has recently incorporated a requirement that sex initiators seek consent before sexual contact, and that they have implemented an education campaign on this issue, demonstrates that the real issue here is changing social norms around sex, gender-role expectations, and consent. Rather than the proposal being overbroad, it, like the Yes Model of affirmative consent, requires us to fully abandon the outdated notion that sexual aggression is acceptable unless the complainant actively presents physical or verbal resistance. People should not have to do anything in order to be left alone sexually. The New South Wales "Make No Doubt" campaign places responsibility on the sex initiator to ensure that the recipient of sexual contact has consented to the contact.[343]

Additionally, and as a practical matter, Professor Tuerkheimer's analysis of case law in existing affirmative consent jurisdictions shows that prosecutors typically do not focus on cases where miscommunication is at issue.[344] Similarly, my analysis demonstrates that First Encounter cases featuring sexually aggressive conduct, rather than miscommunication, dominate case law.[345] There is little reason for prosecutors to focus on more ambiguous "miscommunication" cases when First Encounter sexual aggression cases are abundant.

B. Will the Proposal Exacerbate Existing Disparities in Prosecution Rates?

Second is the concern that any effort to increase the number of sexual assault prosecutions will lead to a disproportionate emphasis on prosecuting "the usual suspects"—those disadvantaged by forms of bias, whether implicit or explicit, such as race and socioeconomic status. The crux of the problem here is that prosecutorial discretion allows such bias to operate with impunity.[346] The Seeking Consent approach and its clear bright line rule have the potential to alleviate such bias, because this approach makes it easier to build strong cases for prosecution, in turn increasing the odds that prosecutors will bring cases against more sex offenders from wealthy and/or racially advantaged backgrounds.

343. *Consent Reforms Become Law in NSW*, *supra* note 332.

344. Tuerkheimer, *supra* note 20, at 444, 468 (concluding that "even in the affirmative consent jurisdictions, cases involving a plausible claim of a reasonable mistake are far eclipsed by the cases where miscommunication is not an issue" and stating that "[m]iscommunication appears to be far less of a concern than opponents [of affirmative consent] have suggested").

345. *See supra* notes 119–21 and accompanying text.

346. William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 27–30 (1997) (identifying prosecutors' practice of targeting impoverished defendants in order to avoid the significant legal challenges that can be brought by defendants able to hire private attorneys); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 163–67 (2011) (examining how a lack of financial resources impedes defendants' access to expert witnesses and other resources).

Sex crimes are vastly under-reported, under-investigated, and under-prosecuted. Failing to improve this state of affairs means failing large numbers of victims, many of whom are marginalized and vulnerable based on *their* race, age or socioeconomic status. To shy away from the important work of improving sexual assault conviction rates out of a concern for biased law enforcement is untenable. We must work to eliminate bias while also improving conviction rates, protecting potential sexual assault victims, and making all communities safer for victims and less protective of perpetrators. The Seeking Consent approach is just, equitable, and easy to understand. For all of those reasons, it has the potential to chill a great deal of sexual assault.

If we are to rectify the under-prosecution of sexual assault, the enormous public health costs that result, and the mental, emotional, and physical health consequences for victims,[347] we must expect prosecutions to increase dramatically under a more effective legal framework. When prosecution numbers rise, some will inevitably argue that too much sexual assault is being prosecuted. But we must judge each case on the evidence and recognize that a large increase is to be expected when sex crimes have been under-prosecuted for so long.

C. Does the Proposal Unfairly Prioritize First Encounter Sexual Assault?

A third concern is whether the proposal prioritizes prosecutions of First Encounter sexual assault over those occurring in established relationships. Although First Encounter sexual assault dominates case law, sexual assault certainly occurs within established sexual relationships as well and in fact may be even more under-reported than First Encounter sexual assault. I join with Professors Schulhofer and Tuerkheimer in supporting the Yes Model as the best approach to prosecuting all cases of sexual assault where the presence or absence of consent is the critical question.[348]

The First Encounter/Seeking Consent approach proposed in this Article sets a new legal standard *earlier* in the adjudication process in First Encounter cases. My proposal adds a more efficient way to prosecute such cases posing a question that *precedes* the consent analysis. If the accused has engaged in sexual penetration or contact without seeking consent, he can be held liable for sexual assault. But if he can demonstrate that he did not seek consent because he reasonably believed consent was already present, then the court would proceed to conduct

347. For a discussion of the public health costs and consequences of sexual assault and how to address them, see generally Alena Allen, *Rape Messaging*, 87 FORDHAM L. REV. 1033 (2018).

348. Professor Anderson rejects the Yes Model in favor of her negotiation model because she believes that the Yes Model ultimately reverts to the No Model when there are nuanced questions about how the victim expressed consent. Anderson, *supra* note 21, at 1412–14. I do not share this concern because existing case law in both the United States and Canada demonstrates that courts are capable of analyzing whether the victim gave affirmative and freely given consent. For examples of states that already use the Yes Model in criminal prosecutions, see Tuerkheimer, *supra* note 20, at 451–67. For Canadian examples, see generally Vandervort, *supra* note 28. *See also* State v. Lisasuain, 117 A.3d 1154, 1159 (N.H. 2015) (finding a lack of consent where the victim did nothing).

an analysis of consent under the Yes Model, as it would in any non-First Encounter case.

It makes sense to treat First Encounters with a bit more scrutiny around consent-seeking conduct since sexual consent has never before existed in such cases. This approach is akin to statutory rape laws that treat individuals below a certain age as incapable of consent. That statutory presumption in no way diminishes the seriousness of sexual assault occurring between adults. Similarly, a statutory presumption—in the absence of clear evidence to the contrary—that sexual consent does not exist between individuals who have never before consented to sexual intimacy with one another, fits the First Encounter context and does nothing to diminish the seriousness of sexual assault occurring within established relationships.

Some might argue that the seeking consent approach should be applied to all sexual assault cases and not just to First Encounters. This may well be the case, but in introducing the idea, I have chosen to focus only on First Encounters here because the application of a Seeking Consent standard to such cases should be particularly clear. Consent seeking within established relationships is likely to be more nuanced and complex, and I leave that issue to future scholarship.

VII. CONCLUSION

This Article has described a pattern of sexually predatory behavior that has been repeated for decades, with courts largely missing the opportunity to hold perpetrators accountable because the law has not defined the wrong of sexual assault in terms of whether the accused sought the victim's consent prior to initiating sexual contact. In part, this oversight is because conventional rape law has taught us to focus a skeptical eye on victims rather than analyzing the conduct of those accused. We must change our focus.

First Encounter cases help to illustrate how necessary it is to make this change. Rape law should presume that people generally do not consent to sexual contact with everyone they meet. The law must recognize that there is a presumption of nonconsent that must be overcome before sexual contact is lawful, mutual, and consensual. We therefore need an analytical focus that appreciates the significance of First Encounter cases and considers whether and how the perpetrator sought the victim's consent before initiating sexual contact. This approach respects the sexual agency of all persons, makes sexual assault law clearer for everyone, and can correct the under-prosecution and under-criminalization of sexual assault. We owe it to all victims of sexual assault to adopt a seeking consent standard and thereby treat sexual assault as the serious crime that it is.