LETTERS OF SUPPORT
REGARDING ADDING A PROHIBITION OF SEXUAL PENETRATION WITHOUT "AFFIRMATIVE CONSENT" TO UTAH'S CRIMINAL CODE

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October 20, 2020

Representative Angela Romero
Utah House of Representatives
350 North State, Suite 350
Salt Lake City, UT 84114
Via Email: Angelaromero@le.utah.gov

Re: Proposed "Affirmative Consent" Legislation

Dear Representative Romero:

We write to you jointly as a law professor and a nationally-recognized expert on sexual assault issues to present proposed "affirmative consent" legislation for your consideration.

For several years, members of the Utah Legislature have been interested in adding to Utah's criminal code a provision that would criminalize sexual penetration without affirmative consent. Such "affirmative consent" legislation would fill a gap in Utah's criminal code and assist prosecutors in cases where they are unable to prove a defendant's specific awareness of the victim's non-consent. We write to pass along some information we have collected on this subject, as well as language that might be considered in draft legislation. We believe that an affirmative consent provision could be a useful addition to Utah's criminal code and propose as a starting point for discussion language described in this letter (which expresses our own personal views, not necessarily that of our Universities).

Title 76, Chapter 5, Part 4 contains Utah's criminal provisions regarding sex offenses. A key provision is Utah Code § 76-5-402, defining the crime of rape, which is generally a first-degree felony. Rape is defined as "sexual intercourse with another person without the victim's consent." Utah Code § 76-5-402(1). In a later provision, the Legislature has helpfully provided further clarification of when an act of intercourse is without the consent of victim, including (most notably for these purposes) when "the victim expresses lack of consent through words or conduct." Utah Code § 76-4-406(2). These statutory provisions combine with other general provisions in Utah's criminal code to require prosecutors to provide that a defendant charged with rape was aware that the victim was expressing lack of consent through words or conduct. *See, e.g., State v. Barela*, 2015 UT 22, ¶ 26, 349 P.3d 676, 682 ("the crime of rape requires proof not only that a defendant 'knowingly, intentionally, or recklessly had sexual intercourse,' but also that he had the requisite mens rea as to the victim's nonconsent").

A number of other states have rape provisions similar to Utah's. However, these provisions have recently been criticized, because they allow defendants to escape criminal liability for engaging in sex where the victim is not consenting through the expedient of avoiding awareness (or avoiding leaving proof of awareness) of the victim's non-consent. And yet, this approach is no longer consistent with general societal understandings. For example, defining sexual consent "to require an affirmative expression of willingness on the part of each participant has become commonplace on college campuses." Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 441 (2016) (included as Attachment 1). As a result, rape law reformers in the American Law Institute (ALI) recently proposed that a new provision be added to the Model Penal Code, reflecting this view. The proposal was to add a new provision, entitled "sexual penetration without consent", which would provide:

> An actor is guilty of Sexual Penetration Without Consent . . . if the actor knowingly or recklessly engages in an act of sexual penetration with a person who at the time of such act has not given consent to such act.

Model Penal Code: Sexual Assault and Related Offenses § 213.2(2) (proposed) (Discussion Draft No. 2) (April 28, 2015) (excerpted as attachment 2) (hereinafter "2015 MPC Discussion Draft"). The drafters of this language justified it in light of general contemporary social understandings:

> Section 213.2(2)'s embrace of an affirmative-consent requirement is grounded in the increasing recognition that sexual assault is an offense against the core value of individual autonomy, the individual's right to control the boundaries of his or her sexual experience, rather than a member exercise of physical dominance. The decision to share sexual intimacy with another person, whether undertaken casually or with great deliberation, is a core feature of our humanity and personhood and thus should always be a matter of actual individual choice. Beyond this, evolving social standards around sexual behavior have increasingly favored more open and honest expressions of sexual needs and stressed the

> importance, in ambiguous circumstances, of discouraging sexual intimacy without first seeking greater clarity.

Id. at 52 (attachment 2).

While this proposal was not ultimately accepted by the drafters of the MPC, other states have for many years already taken this approach. Some states currently possess "affirmative consent" requirements in their criminal code, in one form or another. And most important for present purposes, Professor Deborah Tuerkheimer of Northwestern Law School has noted that at least three states (Wisconsin, Vermont, and New Jersey – and perhaps more, depending on how one reads the caselaw) already clearly have full criminal prohibitions of sexual penetration without affirmative consent. *See* Tuerkheimer, *supra*, 13 OHIO ST. J. CRIM. L. at 451. For example, a Wisconsin statute provides that sexual penetration without consent is a felony and defines consent as meaning "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact." Wis. Stat. § 940.225(4) (attachment 3).

Utah should adopt a criminal prohibition of sexual penetration without affirmative consent. To avoid unnecessary litigation, Utah could simply adopt such a provision that already exists in another state. Wisconsin has had such a provision for many years (which, in turn, is similar to the proposed revision to the Model Penal Code discussed above). Accordingly, Utah should add to its criminal code the following provision, modeled on Wisconsin's in section (1) – with additional illustrations provided in section (2) (as is currently done with regard to rape in Utah Code § 76-5-405) and further clarification in section (3) (which is taken verbatim from Utah Code § 76-5-405(3):

> Utah Code § 76-5-406.1 - Sexual Penetration Without Consent (Proposed).
>
> (1) A person commits Sexual Penetration Without Consent when the actor has sexual intercourse with another person or causes the penetration by body part, however slight, of the genital or anal opening of another person for purposes of sexual gratification, without words or overt actions by the person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual penetration.

(2) Criminal responsibility is established if the defendant has acted with intent, with knowledge, or recklessly with respect to the elements specified in subsection (1).
(3) Consent to any sexual act or prior consensual activity between or with any party does not necessarily constitute consent to any other sexual act. Consent may be initially given but may be withdrawn through words or conduct at any prior to or during sexual activity.
(4) A violation of this section is a separate offense and is not a lesser included offense of any other section.

The provision could specify that the penalty would be, for example, that for a Third-Degree Felony (comparable to Wisconsin's penalties). This proposal could also be made a registerable sex offense, adding the provision into the list of registerable offenses contained in Utah Code § 77-41-106.

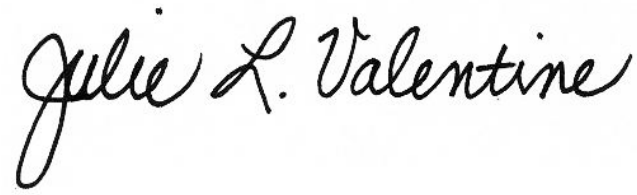
A few points in support of this proposal. First, contrary to some suggestions that have been made by some observers, an affirmative consent statute is clearly constitutional. Several states have long had such a law in their states. See attached description.

Second, this statute would allow words or conduct to transmit willingness to engage in sexual intimacy. Thus, contrary to what some hyperbolic critics sometimes charge, this proposal would not require the parties to express their desires in any particular formal terms, much less in writing. See 2015 MPC Discussion Draft at 54 (commentary) (the law "simply places the onus on the sexually more aggressive party to ensure that each new act is welcome and desired").

Third, the statute fills a clear gap in Utah law. As Professor Tuerkheimer explains in her article on the subject, there are, at least, three commonly recurring situations where rape laws (such as Utah's) do not provide sufficient protection: sleeping victims, intoxicated victims, and fearful victims. See Tuerkheimer, supra, at 468 ("As a rule, in cases involving sleep, intoxication, and fear, where we often (though not invariably) see passivity, a requirement of affirmative consent formalizes an understanding that is, or is becoming, uncontroversial: a victim who is unconscious, sleeping, or immobilized by fright does not consent to intercourse simply by virtue of not resisting"). The proposal addresses these situations.

We believe that there could be a wide consensus in support of such legislation, and thus we wanted to bring this important issue to your attention for discussion.

Sincerely,



Paul G. Cassell, J.D.

Julie L. Valentine, Ph.D, RN, CNE, SANE-A

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S W A P

STATEWIDE ASSOCIATION OF
PROSECUTORS & PUBLIC ATTORNEYS

November 25, 2019

Representative Angela Romero,

Re: Affirmative Consent and Sexual Penetration Proposed Legislation

The Statewide Association of Prosecutors (SWAP) strongly supports legislation that would expand Utah's criminal code to include a 3rd degree felony prohibition of sexual intercourse or sexual penetration without affirmative consent from the victim. This proposed legislation would fill a key gap in Utah's criminal justice framework for addressing sexual violence cases. It would provide a clear offense and a significant penalty for sexual abuse violations that Utahns agree are wrong and deeply harmful to victims, yet which may not meet the elements of Rape or other sexual assault offenses.

Rape is currently defined in Utah code as "sexual intercourse with another person without the victim's consent." Utah Code 76-5-402(1). Utah code further provides that intercourse occurs without the victim's consent when "the victim expresses lack of consent through words or conduct." Utah Code 76-5-406(2). In order to convict a defendant of Rape, prosecutors must prove that the offender was aware of (or reckless to) the victim's expression of lack of consent.

This provision makes prosecutions in cases where such awareness is difficult to ascertain nearly impossible. For example, current research on victim behaviors in sexual violence cases shows that one of the most common responses to a sexual assault is to "freeze" and wait until they can safely move again. A victim who freezes while under assault may be incapable of affirmatively expressing her or his lack of consent to the act, yet a responsible, non-criminal actor should know not to proceed further into sexual behavior when a victim is frozen. This proof of awareness issue is also a substantial hurdle in cases where the victim is intoxicated or unconscious.

The Affirmative Consent proposal fills this gap by clarifying that it is also a crime to engage in sexual intercourse with someone who has not expressed their consent affirmatively through words or actions. In cases where a victim "freezes" due to fear of their assailant, the defendant could no longer escape culpability by merely remaining unaware of any lack of consent. Instead, the defendant would be penalized for not obtaining true consent before engaging in sexual behavior. This would bring our criminal code more in line with sexual intercourse with affirmative consent from a victim. Utah's sexual assault victims deserve these same protections.

SWAP strongly supports this proposed legislation. SWAP's members include the Utah Attorney General's Office, all Utah county attorney offices, and most Utah city attorney offices. SWAP hopes that the Utah Legislature will close the gap in existing Utah law by enacting a prohibition of sexual penetration without affirmative consent.

Best Regards,

Ryan Robinson
President

Northwestern
PRITZKER SCHOOL OF LAW

Deborah Tuerkheimer
Class of 1940 Research Professor of Law

Representative Angela Romero
Utah House of Representatives
350 North State, Suite 350
Salt Lake City, UT 84114

Dear Representative Romero:

I write in an effort to briefly summarize the legal context relevant to "affirmative consent" legislation currently under consideration. By way of background, I am a law professor at Northwestern University. (Of course, the views expressed here are my own). For nearly two decades, my scholarly writing has focused on gender violence, including domestic violence and sexual violence. Before entering the legal academy, I served as a prosecutor in the New York County District Attorney's Office.

Much of my recent work has aimed to show how, in many states, criminal statutes lag behind an emerging cultural consensus about what qualifies as sexual assault. One prime example is the definition of sexual consent. In many states, "without consent" means *without an expression of non-consent.* In these states, the victim is required to demonstrate an unwillingness to engage in sexual conduct. Without this indication, a person—even one who has remained inert throughout the encounter—is deemed to have consented. This is at odds with contemporary understandings and it can create undue barriers to justice, particularly in cases involving sleep, intoxication, trust, and fear.[1]

But there is another way to define consent, which a number of states have embraced. In these states, affirmative consent definitions transform the legal meaning of passivity. Absent some indication of consent, verbal or non-verbal, an alleged victim is deemed *not* to have consented. To be clear, in an affirmative consent jurisdiction, the burden of proving guilt beyond a reasonable doubt remains on the state. In order to convict, the prosecution must demonstrate that the defendant engaged in intercourse without the alleged victim's consent, which must be manifested in an affirmative manner.

Several longstanding examples illustrate how affirmative consent definitions operate. In Wisconsin, which first enacted its statute in 1975, consent "means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact." In Vermont, which passed its law in 1977, consent "means

[1] I have extensively discussed affirmative consent laws in several publications, including *Affirmative Consent*, 13 OHIO STATE JOURNAL OF CRIMINAL LAW 441 (2016), and *Rape On and Off Campus*, 65 EMORY LAW JOURNAL 1 (2015).

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words or actions by a person indicating a voluntary agreement to engage in a sexual act." And Wisconsin and Vermont are not alone in codifying more contemporary, affirmative, understandings of consent.[2]

To be sure, the statutory landscape in this area is complex, as are the grading and classification schemes that complicate any survey of the national landscape. That said, affirmative consent definitions have clearly existed in the criminal law for many decades. My expectation is that these definitions will become more commonplace as reform efforts—like those in Utah—align the law with social norms that have become increasingly salient in recent years.

Thank you for your attention to this important proposal.

Sincerely,

Deborah Tuerkheimer
Class of 1940 Research Professor
Northwestern University Pritzker School of Law

[2] *See, e.g.,* COLO. REV. STATE. ANN. § 18-3-401(1.5)("Cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act."); D.C. CODE § 22-3001(4) ("words or overt actions indicating a freely given agreement to the sexual act or contact"); MINN. STATE. ANN. § 609.341, subd. 4 ("words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor").

October 23, 2020

Representative Angela Romero
Utah House of Representatives
350 North State, Suit 350
Salt Lake City, Utah 84114

hope | healing | recovery

Dear Representative Romero:

The Rape Recovery Center (RRC) strongly supports legislation that explicitly addresses affirmative consent in the Utah State Criminal Code. The RRC fully supports this effort to close the current gap in the law and believes it will have an impact on decreasing the rates of sexual violence in our state. According to the Utah Department of Health, Rape is the only violent crime in Utah that occurs at a highter rate than the rest of the nation.

In the 46 years we have served the State of Utah, as the only stand-alone sexual assault service provider, we have witnessed survivors of sexual violence denied justice by lack of prosecutions and the barriers they face in the Criminal Justice System. Currently in Utah, survivors must express lack of consent. This is problematic because research shows us that the brain and body of a rape survivor, like anyone experiencing fear or trauma, responds in ways that can not be controlled by the survivor. Often survivors experience what is called a "freeze" response, which essentially makes it impossible to express lack of consent. Additionally, if a victim is unconscious or intoxicated it can be very difficult to prove they were a victim of rape. In many cases these issues make it nearly impossible to hold perpetrators accountable and thereby denying survivors the opportunity for justice to be served.

For some survivors, the perpetrator being held accountable for their crime is a crucial component in their journey toward healing from this traumatic and life altering event. By expanding the Code to prohibit intercourse without affirmative consent of the victim, we are not only supporting survivors, but giving law enforcement the tools they need to prosecute sexual offences successfully in Utah. Additionally, this proposed legislation will strengthen our commitment as Utahns to our values of nonviolence.

We look forward to working with you in eliminating violence and addressing the high rates of sexual violence in our community.

Sincerely,

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October 26, 2020

Representative Angela Romero
Utah House of Representatives
350 North State, Suite 350
Salt Lake City, UT 84114
Via Email: Angelaromero@le.utah.gov

Dear Representative Romero:

The Utah Crime Victims Legal Clinic enthusiastically supports "affirmative consent" legislation and we strongly urge you to adopt such.

Expanding Utah's criminal code to include a 3rd degree felony prohibition of sexual intercourse or sexual penetration without the affirmative consent from the victim serves justice for many victims of sexual assault whose case is not strong enough to satisfy the current criminal definition of rape, which requires the non-consent of the victim. This subtle yet powerful change in the law protects the autonomy of each individual to proactively determine their own sexual experience by not assuming consent but requiring that a sexual aggressor perceive words or overt actions in agreement with each sexual advance.

Because of situations where a victim is unable to give ***or withhold*** consent, there have been several sexual assault cases declined by prosecuting agencies, citing their inability to prove that "the perpetrator knew that she didn't consent." These situations usually fall into one of three categories: victims who are asleep, victims who are intoxicated, and victims who are frozen with fear. While Professor Cassell outlines the legal barriers to justice with the current "rape" standard, Dr. Valentine describes the physiological and bio neurological reactions to fear or intoxication in their joint letter. We

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will allow the able experts to address those issues to which they are most authorized to speak. While we have a working knowledge of the legal and physical landscape of "consent," our focus is mainly on the clients we help and their experience with the criminal justice system. We believe it is the experience of these Utahns that best illustrates the need for affirmative consent legislation. We will cite some difficult and/or disturbing fact patterns and we want to make it clear that our intention is not to shock you but to educate you as to the very real issues with which our clients struggle.

Jane Doe 1 went to visit a friend with whom she had been corresponding for a while. They knew each other from high school, and she thought it would be fun to visit and see the university campus where he attended school. While there, she was pressured to drink excessively and unfortunately experimented for the first time with drugs, which her "friend" provided her. She soon became barely conscious and only had short memories, but at one point her host was forcing her mouth on his penis and she could not breathe. During another flash of consciousness, the perpetrator's roommate was raping her from behind while the perpetrator continued to force his penis in her mouth. When she woke up the next morning and asked him what in the world happened, he assured her that "it was your idea" and "you were totally into it." There was no way, after heavy drinking and experimenting with new drugs, that she had any capacity to understand what she was doing, much less consent to it. Charges were never even filed because the State assumed that 1. The jury would judge Jane Doe 1 for using alcohol and drugs and 2. The perpetrator insisted that she consented, and there was no way to prosecute him absent a clear mens rea amounting to rape. If an affirmative consent law had been in place, it would have made it clear that Jane Doe 1 did not have the requisite ability to consent, and there would have been at least some justice for this perpetrator.

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Jane Doe 2 was attacked by a classmate in her own home when she was 17 years old and the classmate had come over to discuss a school club event. Jane Doe is physically disabled and only walks with tremendous effort as well as with an assistance dog. The minute her mom left to take the therapy dog to the kennel, this classmate pushed Jane Doe 2 onto the couch and shoved her face into a pillow and proceeded to rape her. Because she did not react or fight back, the prosecuting agency told her that her attacker just "moved too fast" and so there was no way he could have known that she did not consent. Her fear, compounded by her absolute inability to leave the situation even if she wanted to, caused her to freeze. This perpetrator felt vindicated when no charges were filed, and Jane Doe 2 was labeled a liar even though it was him who perpetrated a serious crime. Had it been a requirement for him to obtain consent, there would have been some accountability for his actions. However, because of the current law, the victim is labeled rather than the perpetrator.

In another two cases, our clients are pursuing Title IX actions because most publicly funded universities, which are subject to Title IX, understand and have integrated the importance of affirmative consent in their investigation of sexual misconduct on their campuses. These clients realize that they have a chance of securing some justice for themselves because these educational institutions recognize the vital importance of affirmative consent. Jane Doe 3 was in a relationship with her perpetrator for approximately 18 months when one evening she was drinking alcohol and fell asleep. She woke up to him having sex with her. Because she cannot show that she fought him off or said no, she has been encouraged not to pursue a criminal case. Jane Doe 4 attended a party where everyone was drinking. She became drunk and ended up in a bedroom with her perpetrator. She does not remember what happened but would have been too drunk to consent. The perpetrator began raping her from behind. At

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some point the perpetrator's friend came into the room and forced her to perform oral sex. The two men took turns vaginally and anally raping her and forcing her to perform oral sex. The prosecuting agency declined to file charges. Jane Does 3 and 4 have the vehicle of Title IX to find some sense of justice for themselves and accountability for their perpetrators. It is time that the laws for all Utahns reflect the importance of agency and accountability when it comes to sexual relationships.

The most harrowing of our experiences is when a client musters up the strength to await and endure the process of going to trial, the many continuances and various motions, the agony and embarrassment of cross examination, only to have the jury return a "not guilty" verdict. Jane Doe 5 was attacked at her birthday party in her home. Her perpetrator was not invited to her small gathering but showed up with a friend who had been. Jane Doe 5 had been drinking with her friends throughout the night. While Jane Doe was severely intoxicated, her perpetrator physically carried her to her bedroom and raped her. While being interviewed by the police her perpetrator first denied vaginal penetration. However, his DNA was present on vaginal and cervical swabs retrieved from Jane Doe 5 during a Code-R examination. Her perpetrator later testified in court that they did in fact have intercourse and, while she never said yes, she has kissed him before passing out. The perpetrator's defense theory was that, despite Utah Rape statute as it relates to intoxication, there is no way the prosecution could prove that she didn't consent; she merely ***forgot*** that she consented because she had passed out. Devastatingly, her perpetrator was acquitted.

Finally, it is the experience of our team that survivors feel very defeated when they are asked during their initial interview and during the forensic exam if they did anything to fight back or if they said "No." A good detective or SANE will explain the question isn't based in judgment but to help them look

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for any wounds on the perpetrator and to help the SANE know where to look for evidence (under fingernails, etc), but so many victims blame themselves for not saying "No" or fighting back. This legislation is a vital catalyst to change the way society looks at consent and will help alleviate some of the disappointment survivors feel in themselves, helping them to heal and overcome their assault trauma.

We strongly encourage all of our representatives in both houses of the Utah Legislature to adopt affirmative consent laws not only because it's legally and scientifically sound, but because it is the way to ensure justice for Utahns who are victims of some of the worst types of crime.

Best Regards,

The Team at Utah Crime Victims Legal Clinic

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Executive Director & Attorney

Alexandra Merritt
Victim Advocate & Office Administrator

Lorie Hobbs
Attorney

Bethany Warr
Attorney

Jade Fisher
Attorney

Laurel Hanks
Attorney

Crystal Powell
Attorney

Representative Angela Romero
Utah House of Representatives
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Salt Lake City, UT 84114

October 25, 2020

Re: Wisconsin's Affirmative Consent Statute

Dear Representative Romero:

It is my understanding that Utah is considering legislation that proposes a crime for situations where there is sexual penetration without affirmative consent. I am writing at the request of proponents of this proposal to provide some perspective on how a sexual assault case is impacted by the inclusion of affirmative consent in an effort to aid you in deciding about proposed legislation in your state. In Wisconsin, where we have operated for many years using a definition of consent that always requires that it be affirmative, such a definition has assisted law enforcement in determining how to fully investigate the context of the event, prosecutors in assessing the provability of the elements of the crime, and has provided jurors an evidence-based guide when examining facts to determine whether they support a finding of consent or whether they reveal a lack thereof. The law also bridges a potential justice gap that might exist for those situations where a victim freezes or is otherwise unable to express lack of consent or physically resist.

Before I explain more fully how the Wisconsin definition of consent operates, please allow me to introduce myself. I am currently (since August 2014) an Assistant Attorney General for the Wisconsin Department of Justice, and our state's Violence Against Women Resource Prosecutor for Law Enforcement responsible for training in the areas of domestic violence and sexual assault. From 1987-2014 I was an Assistant District Attorney in the Milwaukee County District Attorney's Office, working for the latter 23 of those years in the Sensitive Crimes Unit prosecuting all forms of adult and child sexual assaults, among other sensitive matters. In that capacity I took many hundreds of sexual assault cases to trial and reviewed and charged thousands of them. This letter represents my perspective on how Wisconsin's consent law operates, and is not an opinion of the Wisconsin Department of Justice on the merits of the proposed legislation in Utah.

Under Wisconsin law, consent means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Thus, for consent to be present, the individuals must affirmatively indicate agreement by either words of consent, or overt actions, or both. If there are no words of consent or overt actions indicating it, then consent cannot be considered given. Further, certain persons are presumed to be incapable of giving consent, including the unconscious and those with mental diseases or defects that impair the individual's capacity to appraise personal conduct.

It is my experience that the affirmative consent regarding sexual activity is well grounded in the realities of how people express consent or lack of it and is supported by research in this area. Requiring an affirmative "yes" certainly promotes healthy and respectful relationships. More importantly, in the area of sexual assault, it operates as a means of discerning whether there is, in fact, agreement to engage in the particular sexual activity. Sociological research reveals that saying "no" is not always the manner in which people communicate a lack of consent, although that word may be part of the context. More likely, however, individuals soften the "no", saying things like "I don't think this is a good idea". As likely is that the non-consenting individual will engage in actions that communicate "no" just as clearly as the word itself: pushing the other away, turning away, or pulling clothes back into place all being examples of such actions. Often, communication of "no" is both verbal and through actions. All of the above-described situations lack affirmative consent and are easily understood as non-consensual.

There are also situations where there is no word or overt action offered at all by the non-consenting individual. Research supports that the initiation and carrying forward of sexually assaultive behavior is often experienced as traumatic, and the non-consenting person's survival responses may become engaged. Freezing, or being unable to move or talk at all, is one of the survival responses that can occur, and has been reported in a number of sexual assault cases. Since saying or doing nothing cannot reasonably be construed as constituting words or overt actions that indicate consent, such circumstances can and are charged as sexual assaults in Wisconsin.

I have found that the requirement of affirmative consent has resulted in a more robust examination by law enforcement, prosecution and juries of the complete context of the sexual assault allegation. Depending on the specific characteristics and vulnerabilities of the victim, little to no forceful conduct may be necessary for a perpetrator to accomplish a sexual assault. One example I prosecuted involved a recently-blinded woman in her 20's who began dating a sighted man. She had told him while he was kissing her on their previous date that she did not want to engage in sexual intercourse because she did not want to risk becoming pregnant in her new, disorienting situation. He wanted to have sex with her, however, and on the second date proceeded to move from kissing her to removing her clothes, laying his weight on top of her and ultimately engaging in unprotected vaginal sexual penetration. The woman described that she went into a "state of shock" when he moved from kissing her to removing her clothes and was so scared she couldn't move or talk. She said "I laid there like a board." The man acknowledged that the victim had previously explained to him why she did not want to engage in intercourse with him, and went on to say that he thought he'd try any way, but she "didn't seem into it" because she didn't say or do anything during his advances, although she "didn't say no or push him off". This case was successfully prosecuted to a jury under the Wisconsin statute that is similar to the one you are considering now. The jury did not accept the defense that "she didn't say "no" " was equivalent to saying yes, and, of course, it is not equivalent. I should also note that it would not have been possible to prosecute if use of force or violence was an element, since he did not use any. The offender's comments revealed that he did not obtain her consent before he moved forward with the assault, and his tone reflected that he did not care whether she consented. The woman described at

sentencing how terrifying it was for her not to be able to read his face or figure a way to stop his advances without being harmed, and also how degraded and disregarded she felt when it became clear that he was going to do whatever he wanted without considering whether she also wanted to continue. The impact for her was magnified by her new disability, and she believed that she might never be able to date or trust men again. Other examples of cases that have been able to be prosecuted for intercourse without consent where the victim froze or did not struggle, resist or say no include a police officer who made arrest threats resulting in victim submission, a manager at a fast food restaurant who cornered a young worker in the freezer and assaulted her, and a priest who lured an adult man he had been counseling into a motel room under the guise of giving the man privacy to cry, where he then assaulted the man "out of the blue." There are many other examples I could offer to illustrate freezing or submitting by victims, and if you require additional information on this issue, my address and phone are below. I would be happy to answer your questions.

As is true for other kinds of crimes, offenders who commit sexual assaults may count on a victim not being able to say no or resist, or that the victim will comply out of fear. Requiring affirmative consent allows for offender accountability in cases where the victim is so shocked or surprised by the assault that words and actions fail them, rather than rewarding predatory behavior and punishing victims who are unable to protect themselves.

I hope that this letter is helpful to you in understanding how affirmative consent operates in real world sexual assault cases. If gaps exist in your code that allow offenders to avoid culpability because they can capitalize on normal victim trauma responses, this proposal represents a path to closing that gap.

Sincerely,
(electronically signed)

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