

## ***Can Criminal Law Drive Social Change? The Promotional Function and the Affirmative Consent Debate***



Jorge Fernández Mejías

(Universidad Católica del Norte, Antofagasta, Chile; jorge.fernandez@ucn.cl)

ORCID: 0009-0005-1604-9065

**Abstract:** The relationship between criminal law and social change has conventionally been conceived as unidirectional: penal statutes reflect, rather than shape, the normative hierarchy of a given society. This article examines the conditions under which the promotional function of criminal law – its deployment, in Bobbio’s sense, as an instrument for installing new social norms rather than merely conserving existing ones – can be considered legitimate. The affirmative consent model in sexual criminal law, as enacted in Spain, serves as the test case against which three analytical perspectives map the boundaries of permissible penal promotion. First, the declaratory perspective holds that, with respect to negative sexual autonomy, the affirmative consent model performs a conservative function, declaring a pre-existing public wrong by reference to shared civic values, while assuming a constitutive function with respect to positive autonomy, thereby exceeding the declaratory warrant of criminal law. Second, the conditioned promotional perspective identifies four cumulative legitimacy criteria and finds the affirmative consent model only partially compliant with them. Third, the normative framing perspective contends that the political rationality structuring affirmative consent reform is oriented toward the legal entrenchment of an interpretative grammar rather than behavioral transformation. The three perspectives converge in finding that the promotional justification of affirmative consent fails to meet the legitimacy requirements applicable to each. The shared conclusion is that whereas criminal law may legitimately perform a conservative function in protecting negative sexual autonomy, it may not legitimately be deployed to entrench a specific communicative model for exercising positive sexual autonomy. The subsidiarity principle is advanced as the criterion that confines criminal law to a consolidating role in cultural transformation, allocating its promotional ambitions to the domain of social and educational policy.

**Keywords:** Affirmative consent; criminalization; sexual autonomy; social change; criminal law; consent.

### **Introduction**

The relationship between punishment and culture is bidirectional. Garland captures this reciprocity with precision:

Punishment is shaped by broad cultural patterns which have their origins elsewhere, but it also generates its own local meanings, values, and sensibilities which contribute – in a small but significant way – to the bricolage of the dominant

culture. Penal institutions are thus 'cause' as well as 'effect' with regard to culture (Garland 1990, 249).

Within criminal law, and particularly in the domain concerned with defining what is "prohibited", the prevailing view has treated it primarily as an "effect" of dominant culture rather than as a potential "cause" of it. Durkheim examined the relationship through the concept of the "collective sentiments." According to the author:

The collective sentiments to which crime corresponds must... singularize themselves from others by some distinctive property; they must have a certain average intensity. Not only are they engraven in all consciences, but they are strongly engraven. They are not hesitant and superficial desires, but emotions and tendencies which are strongly ingrained in us (Durkheim 1893/1964, 77-78).

For Durkheim, the strong bond – deeply inscribed in every collective consciousness – was discernible in the slowness with which criminal law evolved. Underlying this conception of criminal law was the idea of a discipline that confined its intervention to the protection of values of minimal yet significant content within society, a selection grounded in the breadth of social consensus regarding the need to protect them. Criminal law was thus conceived as an instrument of restraint. Over time, however, it underwent a process of expansion driven by shifting social models and growing demands for protection – a process sustained by confidence in "the 'virtues' of criminal law as an instrument for the protection of citizens" (Silva Sánchez 2001, 24). This expansionary trajectory – running counter to the minimalist tradition grounded in liberal principles – gradually transformed criminal law into a mechanism for managing social problems. As Farmer has argued, criminal law has consistently functioned both as an instrument for constructing civil order and as a vehicle for normative change. Across different historical periods, its purpose has been understood "as articulating norms of a social or collective nature for advancing civil order and civilization" (Farmer 2016, 116). During the welfare state period, criminal law "became a key tool for the legislator in responding to social problems"; and the prevailing conception of the state's capacity "to do good" structurally entailed an expansion in the reach of criminal law (Farmer 2016, 94). Subsequently, in the contemporary neo-classical period, the paradox lay in the fact that, while criminal doctrine sought to contain and constrain criminal law through principled limitations, "the development of these ideas has accompanied a large-scale expansion in the use of the criminal law" (Farmer 2016, 115). Drawing on Norberto Bobbio's distinction between traditional<sup>1</sup> and promotional functions of law, this article explores how that tension persists today, with particular focus on sexual criminal law, and specifically on the positive obligation to criminalize sexual conduct on the basis of consent, as established by the European Court of Human Rights

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<sup>1</sup> As will be seen in Section II, Bobbio distinguishes two traditional functions of law: the protective function and the repressive function. Both are subsumed here, for the purposes of this article, under the single term "traditional function," which at the level of criminal law corresponds to what Cadoppi terms the "conservative function."

and the Istanbul Convention. The central question is whether the state's deployment of criminal law as a driver of social change can be considered legitimate and, if so, under what conditions.

The argument proceeds in four sections. Section II reconstructs Bobbio's distinction between the traditional and promotional functions of law, tracing its implications for criminal law and locating the legitimacy problem that arises when the promotional function is pursued through penal sanction. Section III describes the affirmative consent model and maps the two distinct levels on which its justification operates: a protective justification grounded in negative sexual autonomy, understood as the right not to be subjected to non-consensual sexual conduct, and a promotional justification grounded in positive sexual autonomy, understood as the *prima facie* entitlement to engage in sexual conduct (Green 2020, 21), on terms defined by a specific communicative model. The Spanish legislation serves as the primary reference point and the distinction between these two justificatory levels is the conceptual instrument that structures the analysis throughout. Section IV brings three analytical perspectives to bear on the central question: the declaratory perspective, the conditioned promotional perspective, and the normative framing perspective, presenting each perspective's theoretical commitments and applying it to the affirmative consent model. The three perspectives converge in finding that the promotional justification of affirmative consent fails to meet the legitimacy requirements applicable to each. The shared conclusion is that whereas criminal law may legitimately perform a conservative function in protecting negative sexual autonomy, it may not legitimately be deployed to entrench a specific communicative model for exercising positive sexual autonomy. Section V advances the subsidiarity principle as the criterion that confines criminal law to a consolidating role in cultural transformation, allocating its promotional ambitions to the domain of social and educational policy.

## **II. The Promotional Function in Norberto Bobbio**

The concept of law's promotional function is attributed to the legal theorist Norberto Bobbio, who uses it to describe the novel role that legal systems came to perform within the framework of modern welfare states. As Bobbio argues, "after the profound transformation that gave rise everywhere to the welfare state, public bodies began to pursue the new goals proposed for state action through techniques of social control that differed from traditional ones" (Bobbio 1969, 189). Two traditional conceptions of law may be distinguished, each projecting a different image of its function. The first assigns to law an exclusively protective role, aimed at safeguarding lawful conduct and repressing unlawful acts.<sup>2</sup> Instead, the second attributes to law an essentially repressive purpose,

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<sup>2</sup> According to Bobbio, the clearest representative of this protective perspective is Christianus Thomasius, who "characterized [the law] by the fact that it achieves its goal, which is essentially protective, by issuing negative commands or prohibitions" (Bobbio 1969, 190).

achieved through the organization of negative sanctions (Bobbio 1969, 190).<sup>3</sup> Both images are reductive, insofar as neither suffices to account for law in its transition from the liberal state to the social state. In that transition, the threat of negative sanctions – the defining instrument of the general theory of law – gave way to new forms of social control. These new techniques, which Bobbio theorizes as the promotional function, operate through inducement and encouragement rather than restraint, directing the conduct of individuals and groups towards ends the legal order regards as socially desirable. As Bobbio himself puts it, the promotional function “marks the movement from a passive type of control, which is chiefly concerned with putting marks of disapproval on undesirable behavior, to an active type of control, which is chiefly concerned with stimulating socially desirable behavior” (Bobbio 1969, 200).

In principle, the promotional function of law does not appear particularly troubling. Bobbio derives from it a class of measures of “encouragement,” through which a legal order seeks to influence the performance of socially desirable conduct, either by facilitating that conduct or by attaching a reward to its performance. Moreover, this function is broadly consistent with a conception of the state oriented toward “creating and maintaining the conditions for living an autonomous life [by...] protecting and promoting the creation of the environment which makes such a life a possibility” (Raz 1994, 120–121).

Although Bobbio originally theorized the promotional function in direct connection with the concept of reward or incentive law [*diritto premiale*], understood as the subset of legal ordering that attaches positive sanctions to socially meritorious conduct, subsequent scholarship has decoupled these two notions. As Trocino has observed, while reward law necessarily presupposes the conferral of a benefit in response to meritorious conduct already performed, the promotional function extends to any domain of law that deploys techniques of encouragement, including facilitation techniques that render certain conduct particularly attractive without implying the award of any prize (Trocino 2025, 614).

The problem of legitimacy arises, however, when this function is pursued through the threat of criminal punishment. Transposing Bobbio’s functional taxonomy to the specific domain of criminal law, Cadoppi distinguishes between a conservative and a promotional function of criminal law, and assigns to the former the protection of legal goods, conceived as interests or values that the legislator finds already established in society (Cadoppi 1988, 399). On this account, criminal law assumes a function proper to social control. The promotional function, by contrast, does not confine itself to control, it operates as an instrument of social change, fostering values that have not yet achieved sufficiently broad consensus within society (Cadoppi 1988, 401).

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3 Bobbio identifies this repressive perspective across the legal positivist tradition from Austin to Ihering and Kelsen, each of whom understood law essentially as a coercive apparatus (Bobbio 1969, 190).

### III. Affirmative Sexual Consent and the Promotional Function

Contemporary criminalization of sexual violence rests on the protection of sexual autonomy, articulated through the concept of consent.<sup>4</sup> This was not always the case. Historically, the Western legal tradition configured the normative structure of sexual offenses by conceiving them as a disturbance of the political and familial order. From a feminist perspective, women were regarded as objects of patrimonial interests: rape injured the authority of the *pater familias*, first that of the father, and subsequently that of the husband (Canan & Levand 2019, 4), while female sexuality remained subordinated to legitimate reproduction within marriage. Concern for the protection of women's individual autonomy was, accordingly, a legally secondary interest (Caletti 2023, 420). Rape was further defined by the relationship between physical force and resistance, the latter being required as an evidentiary condition for the victim's access to criminal protection (Canan & Levand 2019, 4). This regulatory framework remained largely unchanged through much of the twentieth century.

The conceptual reorientation of rape toward personal autonomy proved decisive in expanding the punitive response to sexual violence. The European Court of Human Rights' (ECtHR) contribution was decisive in two aspects. First, it established autonomy and consent as the two core normative standards by which the harm of sexual violence is defined (Pitea 2005, 448). Second, it imposed positive obligations on states directed at the criminalization of sexual offenses, which were to be formulated based on those same two elements (ECtHR 2003, 166). Particularly significant was the Court's recognition that restricting the prosecution of sexual offenses to conduct involving physical violence "risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual's sexual autonomy" (ECtHR 2003, 166).

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention 2011) constitutes a landmark in the configuration of international obligations with respect to sexual and gender-based violence. The Convention imposes on member states the obligation to criminalize non-consensual sexual conduct, stipulating that "[c]onsent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances" (Art. 36.2). States nonetheless retain a margin of appreciation in determining the precise formulation of their domestic legislation and the factors that will preclude the possibility of freely given consent (Council of Europe 2011, 193).

The analysis centers on the affirmative consent model. Following Gruber, "affirmative consent laws direct decision-makers to focus on the external manifestations themselves and decide whether they are sufficient expressions of consent" (Gruber 2022,

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<sup>4</sup> Sexual violence is employed throughout as the broadest category, encompassing both behaviors involving attempted or completed bodily contact – such as sexual assault – and behaviors that may not include bodily contact, such as sexual harassment; rape denotes the most specific term within this spectrum (Canan & Levand 2019, 3).

64). Conceptions within this family differ in stringency. In its most demanding versions, affirmative consent has been assimilated to a contract, to the manifestation of an “enthusiastic yes,” or to a verbal “yes,” and has even been cast as a duty on the parties to secure an external expression of agreement through a “stop-and-ask” ritual (Gruber 2022, 65–68). Less demanding is the formulation that “requires an agreement communicated by words or positive actions – for example nodding or tearing off one’s clothes in response to a sexual proposal” (Schulhofer 2023, 62). The Spanish legislation supplies the reference point for the critique. Article 178.1 of the Criminal Code (Ley Orgánica 10/1995) provides that “[c]onsent shall be deemed to have been given only where it has been freely expressed through acts which, having regard to the circumstances of the case, clearly manifest the person’s will.” Consent thus qualifies as valid only where the person authorizes it through signals that express their will in a clear and unequivocal manner (Faraldo 2021, 271).

The review that follows is built around the requirement of an external manifestation of agreement, communicated by words or positive actions sufficient to express consent. On that basis, the analysis sets aside formulations which, though labeled affirmative consent, relocate the inquiry to the circumstances or context surrounding the encounter. The contextual communicative conception illustrates the point, since it allows consent to “be inferred from the totality of a person’s behavior in the context of all the circumstances” (Schulhofer 2023, 62). Here, the requirement of an external manifestation dissolves, and the standard ceases to be affirmative in the operative sense. The same occurs, as a matter of positive law, with the Swedish model. Its provision sanctions sexual activity “with a person who is not participating voluntarily” and requires no expression of agreement. The clause adding that “particular consideration is given to whether voluntariness was expressed by word or deed or in some other way” governs proof rather than the substantive definition of the wrong. Classified by the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) as affirmative consent (GREVIO 2025, 78), the model in fact turns on the voluntariness of participation assessed through the surrounding circumstances, which is why Hörnle reads it as a “circumstances model” (Hörnle 2024, 57).

In the discussions surrounding these reforms, two distinct strands of justification may be observed, structured here through Green’s distinction between negative and positive sexual autonomy (Green 2020, 21), which, within the domain of sexual offences, loosely parallels Berlin’s account of negative and positive liberty (Berlin 2002, 166–217). The first is a protective strand grounded in negative sexual autonomy; the second is a promotional strand grounded in positive sexual autonomy. The protective strand operates in the sense given by Bobbio, in that the reform’s standard aims to capture more accurately the unlawfulness of non-consensual sexual conduct, by placing the weight of criminal law on the safeguarding of negative sexual autonomy, understood as “the right not to engage in, or be subject to, one or another form of sexual conduct” (Green 2020, 21). On the assumption that the notion of autonomy has achieved sufficiently broad social

recognition to constitute a shared normative standard,<sup>5</sup> the punitive expansion entailed by the affirmative consent model is justified on the basis of a conservative function against impunity, operating on two fronts: it reaches conduct that a coercion-based model failed to capture, and it establishes – in contrast to other consent models – that “passivity, silence, lack of protest or lack of resistance cannot be deemed to mean consent” (GREVIO 2025, 73).

In turn, the promotional strand bears on positive sexual autonomy, understood as “the *prima facie* right to engage in” sexual conduct (Green 2020, 21). On the assumption that consent manifests itself in a wide variety of forms within social interaction, an affirmative model shifts the analytical core toward the absence of a specific form of communicative verification, thereby offering a reductive conception of sexual consent and replacing the object of protection – sexual autonomy – with the procedure designed to verify it (Díaz y García & Trapero 2021, 566). Through this proceduralization, the model loses contact with the social norms that govern sexual interaction in everyday life. As Halley observes, it demands “something more than the relationship and its understandings” (Halley 2016, 270), imposing a formal verification requirement where lived practice operates through context and implicit communication.

This promotional justification for affirmative consent, grounded in the perceived need for social change, is reflected in the discourse of its proponents. Notably, GREVIO maintains in its reports that affirmative consent “is also a powerful way of changing the mindset of law-enforcement and judicial officers and of providing better protection to victims, by putting them at the centre of any intervention” (GREVIO 2025, 77). In the Spanish academic literature, Faraldo assigns to the model a function of social pedagogy, invoking the need to awaken social consciousness and maintaining that the law should function as a manifesto (Faraldo 2021, 277). In the U.S. context, Leary proposes a cultural shift through an “affirmative consent climate” encompassing three dimensions: education, social stigma, and legislative reform (Leary 2016, 34–37). From a critical standpoint, Gruber addresses the aspirational argument underlying affirmative consent, noting that the model, in its pursuit of cultural transformation, exposes a significant portion of society to the risk of criminalization (Gruber 2022, 73–75). This promotional ambition, moreover, is not confined to affirmative consent strictly understood. The Swedish reform is instructive: although the provision finally adopted does not qualify as an affirmative consent model, for the reasons set out above, it was first drafted as one. The 2016 commission proposed that only the outward, communicated signs of voluntariness should count as consent (Lernestedt & Kagrell 2023, 174); the 2018 proposition moderated that design on the operational plane while leaving its ideological premise intact. Wegerstad observes that the resulting law “is woven into a sexual education imperative” (Wegerstad

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<sup>5</sup> The recent legislative record corroborates this assumption. As Uhnöo et al. have documented, consent-based rape laws spread from seven to twenty European jurisdictions after 2017 (Uhnöo, Erixon, & Bladini 2024, 1), a cross-jurisdictional convergence that would be difficult to explain absent a prior, shared recognition that sexual autonomy constitutes a socially cognizable standard.

2021, 736), while it “sends a clear message about what sex should be – namely, something voluntary – but does not accurately describe the crime and the conduct that deserves criminal censure” (Wegerstad 2021, 737). The discussion of the promotional function attributed to affirmative consent thus converges on a single essential question: can the use of criminal law to achieve such transformation be considered legitimate?

#### **IV. Can Criminal Law Be Legitimately Employed to Transform Social Norms?**

As the preceding section has shown, two strands of justification can be found in the debate surrounding affirmative consent reforms: one grounded in negative sexual autonomy, which falls within the conservative function of criminal law, and one grounded in positive sexual autonomy, which conceives criminal law – and affirmative consent specifically – as an instrument of social transformation. It is in this second strand, the promotional rationale attached to certain affirmative consent conceptions, that questions of legitimacy arise. Building on this distinction, this section examines whether criminal law may legitimately function as an instrument of social change, from three analytical perspectives: the declaratory perspective, the conditioned promotional perspective, and the normative framing perspective. The first two assess whether and under what conditions the promotional function may be legitimately pursued through penal sanction. The third is concerned with the political rationality behind the demand for this specific form of regulation, rather than with the normative conditions of its legitimacy.

The declaratory perspective addresses the legitimacy of criminal law’s promotional function by asking what criminal law is entitled to declare. It conceives criminal law as a “communicative enterprise” whose substantive dimension “declares certain kinds of conduct to constitute public wrongs that merit a formal public response” (Duff 2018, 109). The notion of declaration is determinative in Duff’s definition of criminal law: it is a discipline that neither creates nor constitutes public wrongs but rather identifies and pronounces – in the collective voice of citizens – those forms of conduct already recognized as wrongs by reference to the shared values of the political community. For Duff, criminal law:

is (or aspires to be) a common law in the sense that it is a law that citizens make for themselves and make (or should make) their own. On this view, the voice of the criminal law is the (collective) voice of the citizens – a voice in which they talk, as it were, to themselves in terms of the shared values that define them as a polity (Duff 2018, 118).

The penal prohibition thus emerges for citizens not as a mandate imposed by an external sovereign, but as a declaration operating on two distinct strata. The first concerns wrongfulness: the wrong is constituted independently of its inclusion in the penal code, deriving instead from the values shared within society. The second concerns

the consequence that this collective valuation produces in relation to the wrong itself, conferring upon it its character as a public wrong (Duff 2018, 120). Duff acknowledges, however, that criminal law may function authoritatively even when some citizens dissent, and he draws a distinction between “reasonable” and “unreasonable” dissent. The former constitutes a disagreement about the content of an evolving civic morality, while the latter involves a refusal to recognize a wrong that is identifiable by reference to shared values (Duff 2018, 132). When strong communicative formulations of affirmative consent prescribe a particular model of sexual verification as legally required, the dissent of those who engage in genuinely consensual relations under different models is plausibly reasonable. The authoritative declaration therefore loses its communicative legitimacy and becomes coercive imposition.

The declaratory perspective offers a clear illustration of the distinction between declaring and constituting a public wrong. With respect to negative sexual autonomy, the declaratory constraint is satisfied: the assessment that a non-consensual sexual act harms the person’s sexual autonomy is recognizable by reference to values shared and pre-existing within society. Broadly speaking, the consent model has been normatively consolidated from the international to the domestic level through the jurisprudence of the ECtHR and the subsequent ratification by states of the Istanbul Convention. The affirmative consent model, however, stands on the other side of that distinction. The reduction of consent to the verification of a formality may not declare a wrong that the community recognizes as such, it establishes the sole legally valid mode of expressing consent. Those who engage in genuinely consensual – that is, voluntary – relations through a different expressive framework constitute reasonable dissenters in Duff’s sense (Duff 2018, 132). What confronts them is not the collective voice of citizens articulating a shared wrong, but the entrenchment of one conception of how sexual interactions ought to be conducted.

The conditioned promotional perspective rests on the premise that criminal law is not a passive receptacle of pre-existing social consensus, but an active agent in its configuration (Corda 2020, 606; Robinson 2017, 1591). Without rejecting the promotional function of criminal law, this perspective makes its legitimacy conditional upon four cumulative requirements: (a) that its transformational use be outcome-oriented rather than purely symbolic; (b) that it not amount to an unwarranted form of social dirigisme, or undue interventionism in the conduct of social life; (c) that it not treat the defendant merely as a means to an end; and (d) that it not impose partisan moral views that run counter to the fundamental rights and perspectives of a pluralistic democratic society.

The first condition requires that penal intervention be directed at tangible effects on social conduct or attitudes, and that it operates as an integral instrument of a broader policy effort that extends beyond penal measures (Corda 2020, 609–612). Where it fails to produce such effects, it amounts, as Robinson observes, to political proclamation clothed in legal dress (Robinson 2017, 1578–1579). The Spanish affirmative consent reform was embedded within a broader array of measures: enacted as a law of “comprehensive

protection” of sexual autonomy, it incorporated provisions for prevention, awareness, detection, and education alongside the redefinition of the offences (Cancio Meliá 2023, 221). This accumulation of non-penal measures lends partial support to the condition. This assessment must nonetheless be qualified. Applied to the Spanish case, the condition serves less as an objection than as a demonstration of where the reform’s transformative ambition actually lies. As Castellví argues, article 178.1 of the Criminal Code effects no genuine paradigm shift: the prior model never held that silence amounted to consent, and the reformed provision does not hold that silence amounts to its refusal (Castellví 2024, 483). With respect to sexual autonomy, the Spanish reform changes little, since protection against non-consensual conduct was already secured under the conservative strand. What it adds operates instead on positive sexual autonomy: a requirement that consent be manifested through acts clearly expressing the person’s will (Castellví 2024, 514). Its aim is behavioral: to shape how sexual interaction is conducted. This duty is the promotional component the first condition tests, and the question is whether it produces the conduct it seeks or exhausts itself in expressive value.

The second condition concerns penal initiative that runs ahead of settled social attitudes. As Corda suggests, elected bodies may act as trailblazers, so that legislation can build consensus rather than merely reflect it and may even depart from prevailing norms (Corda 2020, 618–619). That authority is conditional: its legitimate exercise requires “some prior social/political/non-penal action aimed at setting a certain cultural shift into motion” (Corda 2020, 619). In Robinson’s formulation, the law’s normative initiative must remain legible to citizens as the articulation of an emerging consensus rather than as an arbitrary imposition of political will (Robinson 2017, 1592–1593). Failing this requirement, penal innovation collapses into what Corda conceives as a form of dirigisme: the attempt to inculcate the legislator’s views in “a more or less silent majority,” detached from the popular will and free of any significant constraint (Corda 2020, 617). The object of assessment is the affirmative consent model that requires a prior communicative act as a condition of permissible sexual conduct together with the promotional discourse that advances it. So delimited, the model’s social anchorage is, at least, doubtful. Even granting that a consent-based understanding of sexual conduct has gained considerable social currency, it does not follow that the affirmative consent model enjoys comparable settlement. A recent briefing for the European Parliament points in the same direction at the level of the evidence base: explicit affirmative standards, however attractive in theory, sit uneasily with the practice of negotiating consent, where parties rely predominantly on non-verbal and behavioral cues (Bavré & Michielsen 2025, 5). A standard that contrasts with the forms in which consent is ordinarily manifested in practice cannot be read as the articulation of an emerging consensus. That being so, what the affirmative consent model does is impose a particular mode of understanding sexual interaction, displacing the plurality of forms through which consent is ordinarily expressed. Imposed in the absence of settled attitudes that would sustain it, that requirement amounts, on Corda’s

own terms, to *dirigisme* rather than legitimate trailblazing.

The third condition prohibits instrumentalizing the defendant merely as a means to an end. Desert must operate as a constraining factor: punishment imposed in pursuit of ends detached from the offender's blameworthiness clashes with the principles that legitimize the imposition of penal sanctions. Social change cannot in itself justify punishing those who did not act with the degree of culpability that punishment presupposes (Corda 2020, 627–629). This constraint yields a regulative ideal for any prohibition grounded in sexual autonomy: to “adequately criminalize all cases in which an offender subjects a victim to nonconsensual sex but do so without criminalizing any cases involving sex that is consensual” (Green 2020, 76). On the further view that consent is a communicative act, its performance must also be intentional and accompanied by a consenting mental state (Schnüriger 2018, 24). When a criminal provision constructs the wrong of sexual violence solely as a communicative deficit, a constitutive tension follows: the more demanding the prescribed form of manifestation, the wider the gap between the communicative act and the mental state beneath it, shifting the inquiry from what actually occurred to what ought to have been done. The requirement of a clear or unequivocal manifestation of consent thus “risks treating as criminal conduct cases in which genuine consent was present but did not conform to the legal formula” (Díaz y García & Trapero 2021, 567). This is a displacement of the punishable conduct from the *malum in se*, the actual violation of another person's will, toward the *malum prohibitum*, the failure to satisfy a communicative formality (Green 2020, 92). As Green himself concedes, under the affirmative consent standard “it is inevitable that we will capture at least some tokens that do not involve nonconsent” (Green 2020, 90). The doctrinal consequences confirm this diagnosis. According to Castellví, the requirement of manifestation alters liability directly: certain attempts become consummated offences, and certain instances of negligence become intentional ones (Castellví 2024, 495–509). The defect thus operates in two directions. On the one hand, it is overinclusive, criminalizing conduct in which genuine consent was present. On the other hand, it distorts the proportionality of the criminal response. Both are forms of dissociation of censure from desert that the third condition forbids.

The fourth condition bars the imposition of partisan moral values, in the sense that criminal law must not be used to impose the views of specific groups upon the political community as a whole, in contradiction with the foundational principle of pluralism that informs democratic societies (Corda 2020, 631–633). The Spanish debate, however, reveals significant tensions. Cancio observes that the reform was driven primarily by the parliamentary initiative of a single political sector (Unidas Podemos), and that the debate was marked by a “cultural struggle” in which substantive arguments were displaced by identity-based positions on both sides of the spectrum (Cancio Meliá 2023, 226). This is particularly significant if the discussion unfolded in terms of a “collective perspective on sexual identity, moralizing use of criminal law, and an identity-based approach to the subject matter” (Díez Ripollés 2020, 1551–1557).

While the first two perspectives interrogate the legitimacy conditions of criminal law's promotional function, a third shifts attention from those conditions to the political rationality that structures symbolic criminalization claims. According to Wilenmann, symbolic criminalization conflicts concern the framing of meaning rather than the regulation of conduct: what value-oriented groups seek through criminalization is not the reduction of harmful conduct but the legal recognition of their interpretative framework as socially valid (Wilenmann 2019, 10). On this account, criminal law is valuable less for its coercive capacity than for its symbolic power to confer or deny legal validity to conduct whose meaning is contested between social groups. As Wilenmann explains, "value-oriented groups struggle for a definition of the desired content that mimics the meaning which the group attributes to the actions that are to be criminalized or decriminalized, thus seeking to confirm the validity of the framework they use when attributing meaning to those actions" (Wilenmann 2019, 13).

The affirmative consent model furnishes direct evidence of this rationality, since its proponents have made their framing ambitions explicit. On this view, enactment functions for the group as the entrenchment of the affirmative consent grammar as the grammar of law, satisfying its objective whether or not behavioral transformation ultimately occurs. The resort to criminal law for expressive purposes has become an increasingly common feature of criminalizing discourse, which appeals to the need to signal public condemnation and treats punishment as "an instrument of popular pedagogy, in order to 'sensitize' the people. No attention is paid to the crucial question of whether it is appropriate or fair to use punishment for this purpose – the message is all that counts" (Jareborg 2005, 528). In the case of affirmative consent, the message in question is the legal validation of a particular conception of positive sexual autonomy.

## **V. Conclusion: Sexual Criminal Law as an Instrument of Social Change?**

The analysis developed in the preceding sections has examined the legitimacy of employing criminal law as an instrument of social change, taking the affirmative consent model as its test case. The declaratory perspective offers perhaps the most compelling objection: criminal law does not create public wrongs but declares them by reference to the shared values of the political community. The affirmative consent model, by reducing positive sexual autonomy to a process of communicative verification, constitutes rather than declares such wrong. The conditioned promotional perspective does not categorically reject assigning a promotional function to criminal law, but subjects its legitimacy to structural requirements that the affirmative consent model satisfies only partially. The normative framing perspective operates at a different analytical level, shifting attention from the normative conditions of legitimacy to the political rationality that structures symbolic criminalization claims. On this view, what value-oriented groups pursued is the recognition of their reading of sexual interaction as the authoritative one,

the establishment of affirmative consent as the normative framework whose validity the law itself confirms.

Subjecting criminal law's transformative claims to critical scrutiny is not equivalent to endorsing legal passivity in the face of practices incompatible with genuine respect for sexual autonomy. Such practices constitute a serious social problem, and the legal and political system has well-founded reasons to address it. The question is not whether criminal law has a role in protecting sexual autonomy against conduct that violates it, but whether it may also legitimately assume the function of actively promoting a specific communicative model for exercising that autonomy. The answer turns on a limit that derives not merely from prudential concerns but from the institutional character of criminal law itself. Educational initiatives, cultural interventions, and social policy may legitimately advocate demanding relational ideals while still proposing rather than compelling: they leave the proposed norm open to argument and refusal, so that it takes hold, if it does, through acceptance over time. The recourse to criminal law, by contrast, carries a cost that these instruments do not. As Van Kempen observes, the criminal justice system:

'encompasses the most severe instrument at the state's disposal in times of peace. It is principally coercive in nature (...) The intrinsic violation by the application of criminal law and criminal procedure of an individual's freedom and social sphere is a universal characteristic'. Moreover, involvement in the criminal justice process may have other adverse consequences, including the delinquent's social exclusion and stigmatization... (Van Kempen 2019, 5).

The coercion does not begin with the sentence. It inheres in the investigative and procedural powers that criminalization sets in motion, and it reaches beyond the accused, to third parties such as their family (Van Kempen 2019, 5). The desirability of a social norm does not, therefore, by itself establish the legitimacy of pursuing its consolidation through penal means. In a context of penal expansion and functional distortion, recovering the principle of subsidiarity may still serve a precise purpose. On the one hand, it cautions against "the inadequacy of a policy based exclusively, or almost exclusively, on the criminal justice system" (Londoño Martínez 2025, 12). There is a further risk in this regard: the persistent use of criminal law as a promotional instrument may, over time, generate a displacement effect, eroding the capacity of extra-penal mechanisms to perform that function, not because those mechanisms are ineffective, but because no formal instrument transmits public condemnation with equivalent force (Husak 2005, 538). On the other hand, entrusting structural social change to the domain of social and cultural policy, where strategies for promoting integration and removing the conditions that generate discrimination and violence can be articulated with greater legitimacy and efficacy, reflects a more principled allocation of regulatory functions.

Formulas such as affirmative consent, enthusiastic consent, and negotiated exchange are not without value. Their proper domain, however, is education. As Hörnle observes, "it makes sense to set standards high – they will be diluted in real life. Good

advice for adolescents could be: treat the other as if this were a relationship with duties of care and consideration (it might develop this way)” (Hörnle 2018, 239). That register – aspirational, relational, formative – is precisely what criminal law cannot replicate without distortion. Its grammar is prohibition and sanction. To insist that criminal law is the vehicle through which such transformation should be pursued is to ignore the force of Zipf’s caution that criminal law is:

the most inadequate instrument conceivable for the transformation of society. Whoever seeks to reshape society through criminal justice resembles one who attempts to devise a pedagogical program on the basis of [school] punishment (Zipf 1975/1979, 43).

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