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## Clear as Mud: Constitutional Concerns with Clear Affirmative Consent

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# CLEAR AS MUD: CONSTITUTIONAL CONCERNS WITH CLEAR AFFIRMATIVE CONSENT

C. ASHLEY SAFERIGHT\*

## ABSTRACT

Rape and sexual assault laws and policies have shifted significantly in recent years, including the introduction of affirmative consent. Unfortunately, both proponents and critics tend to confuse the issues and falsely equate affirmative consent as a substantive social standard versus a procedural standard for adjudication and punishment. Although affirmative consent generally does not represent a significant change in consent law in the United States, statutes and policies requiring a further requirement that affirmative consent be clear and unambiguous (“clear affirmative consent”) are problematic and raise constitutional concerns. When clear affirmative consent policies are used as an adjudicative standard, they increase the dangers of policing sex and may punish even consenting adults. Further, clear affirmative consent policies are unconstitutional because: they are unconstitutionally overbroad; they violate substantive due process rights as unconstitutionally vague; and they violate the constitutional guarantee of free speech and the privacy rights of consenting adults.

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## I. INTRODUCTION

*“Yeah, that’s her. With the gold. I better use some Tic Tacs just in case I start kissing her. You know, I’m automatically attracted to beautiful—I just start kissing them. It’s like a magnet. Just kiss. I don’t even wait. And when you’re a star, they let you do it. You can do anything. . . Grab ‘em by the pussy. You can do anything.”<sup>1</sup>*

This oft-quoted and much maligned statement of now President Donald Trump is a stark illustration of “rape culture.”<sup>2</sup> Sexual assaults are a significant problem across the United States, and in particular on college campuses.<sup>3</sup> According to a 2015 study conducted by the Association of American Universities, more than twenty-seven percent of female college seniors reported having experienced some form of sexual assault while enrolled in college.<sup>4</sup> The Centers for Disease Control and Prevention (“CDC”) reports that 18.3% of adult women have been raped, with 37.4% of female rape victims being first raped between the ages of eighteen and twenty-four.<sup>5</sup> With

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<sup>1</sup> Mark Makela, *Transcript: Donald Trump’s Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html>.

<sup>2</sup> Emanuella Grinberg, *Trump’s ‘Locker Room Talk’ Stirs Real Talk About Sexual Violence*, CNN (Oct. 12, 2016), <http://www.cnn.com/2016/10/11/health/trump-locker-room-talk-reaction/index.html>.

<sup>3</sup> Claude Mellins et al., *Sexual Assault Incidents Among College Undergraduates: Prevalence and Factors Associated with Risk*, NAT’L CTR FOR BIOTECHNOLOGY INFO. (Nov. 8, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5695602/>.

<sup>4</sup> *AAU Climate Survey on Sexual Assault and Sexual Misconduct*, ASS’N OF AM. U. (Sept. 3, 2015), <https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015>.

<sup>5</sup> *Statistics on Sexual Violence in the United States*, TESTIMONY PROJECT, <https://www.thetestimonyprojectdc.com/statistics-on-sexual-violence-in-the-united-states/> (last visited Jan. 30, 2019); Michele C. Black et al., *National Intimate Partner and Sexual*

statistics like these, it is no surprise that rape and sexual assault have garnered increasing scrutiny and media attention, particularly on college campuses.

But the cautionary tale of the young woman, walking alone at night, being pulled into the bushes and raped by a stranger is not the reality for the vast majority of these women. More than half of all female rape victims report that the perpetrator was an intimate partner.<sup>6</sup>

From September 2014 until graduation in May 2015, Columbia University student Emma Sulkowicz carried a fifty-pound dorm mattress around campus to protest Columbia's failure to hold her alleged rapist responsible for sexual misconduct, stemming from what started as a consensual encounter.<sup>7</sup> Arguably, this act of performance-art, titled "Mattress Performance (Carry That Weight)," was the catalyst that spurred sexual assault discussions, protests, and the adoption of stringent new policies designed to improve campus response to sexual assault.<sup>8</sup>

Rape and sexual assault law has evolved significantly over time: from the common law recognition of rape as a property crime against a woman's husband or father;<sup>9</sup> to requiring physical force from the perpetrator and utmost physical resistance from the victim;<sup>10</sup> to eventual passage of shield laws not allowing a victim's sexual history to be used against her in court;<sup>11</sup> and finally, to recognition of marital, date, and acquaintance rape as crimes.<sup>12</sup> These changes have signified an inexorable and inevitable march towards affirmative consent as the desirable and necessary standard to keep women safe.<sup>13</sup>

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*Violence Survey: 2010 Summary Report*, CTDS. FOR DISEASE CONTROL & PREVENTION, (Nov. 2011), [https://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf).

<sup>6</sup> *National Intimate Partner and Sexual Violence Survey*, *supra* note 5.

<sup>7</sup> Kate Taylor, *Mattress Protest at Columbia University Continues into Graduation Event*, N.Y. TIMES (May 19, 2015), <https://www.nytimes.com/2015/05/20/nyregion/mattress-protest-at-columbia-university-continues-into-graduation-event.html>.

<sup>8</sup> Jeannie Suk Gerson, *College Students Go to Court Over Sexual Assault*, NEW YORKER (Aug. 5, 2016), <https://www.newyorker.com/news/news-desk/colleges-go-to-court-over-sexual-assault>.

<sup>9</sup> Ethan Bronner, *A Candidate's Stumble on a Distressing Crime*, N.Y. TIMES (Aug. 23, 2012), <http://www.nytimes.com/2012/08/24/us/definition-of-rape-is-shifting-rapidly.html> (stating that marriage was a "transfer of property from father to husband and if someone deflowered the virgin, that removed the property rights of the father. Rape was about stealing his property.").

<sup>10</sup> *People v. Barnes*, 721 P.2d 110, 117 (Cal. 1986).

<sup>11</sup> The Federal Rules of Evidence were amended October 28, 1978 to include the first version of a rape shield law. *See* FED. R. EVID. 412.

<sup>12</sup> Lily Rothman, *When Spousal Rape First Became a Crime in the U.S.*, TIME (July 28, 2015), <http://time.com/3975175/spousal-rape-case-history/>.

<sup>13</sup> Jake New, *The 'Yes Means Yes' World*, INSIDE HIGHER ED (Oct. 17, 2014), <http://www.insidehighered.com/news/2014/10/17/colleges-across-country-adopting-affirmative-consent-sexual-assault-policies> (discussing how over 800 colleges in the United States have adopted affirmative consent policies).

Affirmative consent has become exceptionally polarized—it is either held up as the gold standard or vilified as a gross overreach of government.<sup>14</sup> There seems to be significant confusion as to the actual definition of affirmative consent.<sup>15</sup> Is it enough to say that “only yes means yes?”<sup>16</sup> Does affirmative consent require a verbal statement of consent?<sup>17</sup> In addition, both proponents and opponents of affirmative consent lack clarity in their support for, or objection to, affirmative consent as a substantive rule versus a procedural standard for adjudication.<sup>18</sup>

This Note will argue that although affirmative consent generally does not represent a significant change in consent law in the United States, statutes and policies requiring a further requirement that affirmative consent be clear and unambiguous (“clear affirmative consent”) are problematic and raise constitutional concerns. This Note will focus exclusively on clear affirmative consent policies and will argue that such policies increase the dangers of policing sex and may punish even consenting adults. Further, clear affirmative consent policies are unconstitutional for several reasons: they are unconstitutionally overbroad; they violate First Amendment free speech rights; they violate substantive due process rights as unconstitutionally vague; and they violate the constitutional right to privacy.

Part II-A of this Note will provide a historical overview of rape and sexual assault law and policy in the United States, will comprehensively discuss the confusion surrounding definitions of affirmative consent, and will explain how clear affirmative consent policies differ from general affirmative consent policies. Part II-A will also clarify the distinctions between affirmative consent as a substantive social rule (how individuals are expected to act) and clear affirmative consent as the procedural standard (adjudication and punishment). This Note will argue that although affirmative consent is an appropriate and desirable social rule, as an adjudicative standard, clear affirmative consent policies do not effectively protect victims of rape and sexual assault, and they also raise constitutional concerns, as they violate rights of consenting adults. Using an adjudicative standard that is fundamentally flawed and intrudes upon the rights of law-abiding citizens significantly harms the position of victim’s rights advocates. Such a flawed standard provides ammunition for critics to dismiss the claims of women more easily and further perpetuates the myth of vast numbers of false rape reports.

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<sup>14</sup> Compare Michael Fein, *Rethink Harvard’s Sexual Harassment Policy*, BOSTON GLOBE (Oct. 15, 2014), <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> (opposing Harvard’s affirmative consent standard), with Wendy Murphy, *Harvard Gets it Right on Sexual Assault*, BOSTON GLOBE (Dec. 2, 2014), <http://www.bostonglobe.com/opinion/2014/12/02/harvard-gets-right-sexual-assault/mmM8hZRndrtP9MAPXwOvtM/story.html> (supporting Harvard’s affirmative consent standard).

<sup>15</sup> Jonathan Witmer-Rich, *Unpacking Affirmative Consent: Not As Great As You Hope, Not As Bad As You Fear*, 49 TEX. TECH L. REV. 57, 58 (2016) (“The phrase ‘yes means yes’ is a slogan (perhaps a good one), not an actual legal standard or an explanation of a legal standard. Affirmative consent does not require ‘express verbal agreement.’”).

<sup>16</sup> *Id.* at 65–66.

<sup>17</sup> *Id.* at 66.

<sup>18</sup> *Id.* at 84.

Part II will also include a brief discussion of Title IX's role in the campus sexual assault adjudication process (II-B) and introductions to the constitutional guarantees of free speech (II-C) and privacy (II-D). Part III-A will discuss the dangers presented by clear affirmative consent policies as related to policing sex and Part III-B will provide a cautionary tale of a university student who was expelled from school due to an alleged sexual assault, despite both parties stating that the sexual encounter was consensual.

Part IV-A will argue that clear affirmative consent policies are unconstitutionally overbroad. Part IV-B will make a case that clear affirmative consent policies violate free speech and will examine expressive conduct as speech, the compelled speech doctrine, and prohibited government restriction of speech. Part IV-C will examine substantive due process and will argue that clear affirmative consent policies are unconstitutionally vague. Finally, Part IV-C will investigate the dangers of clear affirmative consent as the standard in criminal prosecutions and will contend that these policies violate the constitutional right to privacy as part of the liberty guarantee of the Fifth and Fourteenth Amendment due process clauses.

## II. BACKGROUND

### *A. Affirmative Consent: What is it and how did we get here?*

To fully understand the discourse and controversy surrounding the affirmative consent standard, it is important to identify common misconceptions about what affirmative consent is and to discuss how the history and evolution of rape and sexual assault law in the United States has shaped the conversations about consent that are ongoing today.

#### 1. History and Evolution of Rape and Sexual Assault Law

Upon examining the history of rape and sexual assault law, it becomes immediately clear that it is inextricable from sexism and misogyny<sup>19</sup> and is laden with historical baggage and political half-steps.<sup>20</sup> The state of modern rape law has been described as “the product of a set of imperfect compromises, based upon historical contingencies,” with competing political forces shaping the slow evolution of consent.<sup>21</sup>

Even into the 1970s, the common law definition of rape was largely designed to protect male interests, with little regard for victims' rights.<sup>22</sup> The traditional common law elements of rape were: “(1) sexual intercourse; (2) between a man and a woman who is not his wife; (3) achieved by force or threat of severe bodily harm; and (4) without her consent.”<sup>23</sup> Courts routinely interpreted the non-consent and force requirements to require that a woman's resistance rise to the level of a “valiant struggle

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<sup>19</sup> *People v. Barnes*, 721 P.2d 110, 118 (Cal. 1986) (discussing the history of rape law, and emphasizing that the resistance requirement stemmed from a distrust of women); Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 5, 13 (Feb. 1998).

<sup>20</sup> Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1, 5 (2015).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 15.

<sup>23</sup> *Id.*

to uphold her honor” and must be “to the utmost limit of her power.”<sup>24</sup> Courts held that even when threatened with specific violence, if a victim eventually stopped resisting, such “voluntary” submission to a rapist would amount to consent.<sup>25</sup> In addition, courts were permitted to consider a victim’s past sexual behavior—with the defendant or others—to question her credibility as a witness and prove consent.<sup>26</sup> Most jurisdictions required corroboration because a woman’s testimony was considered to be inherently untrustworthy, and therefore, insufficient to show non-consent by itself.<sup>27</sup>

The feminist movement significantly influenced rape law reform.<sup>28</sup> Michigan became the first state to substantially reform rape law in the mid-1970s.<sup>29</sup> Over the next twenty years, rape law reform took hold, leading to major changes, including: abandoning of gender-specific terms in favor of gender-neutrality; criminalizing all types of penetration, rather than just vaginal intercourse; and criminalizing marital rape.<sup>30</sup> Nevertheless, courts continued to reverse rape convictions where the complainant exhibited little or no resistance, even where consent was objectively absent.<sup>31</sup> Even a verbal “no” was not enough in many circumstances<sup>32</sup> and it was not until much later that the idea of “no means no” even took hold.<sup>33</sup>

Only recently have jurisdictions abandoned the requirement of force.<sup>34</sup> In 1991, the Senate Report for the Violence Against Women Act of 1991 acknowledged the “subtle prejudices” against rape victims in the legal system and that rape prosecutions

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<sup>24</sup> *People v. Hughes*, 343 N.Y.S.2d 240, 241 (N.Y. App. Div. 1973).

<sup>25</sup> Yung, *supra* note 20, at 15.

<sup>26</sup> *People v. Barnes*, 721 P.2d 110, 117 (Cal. 1986); SUSAN ESTRICH, *REAL RAPE* 47–49 (1987).

<sup>27</sup> *Barnes*, 721 P.2d at 117–18 (“The requirement that a woman resist her attacker appears to have been grounded in the basic distrust with which courts and commentators traditionally viewed a woman’s testimony regarding sexual assault. According to the 17th century writings of Lord Matthew Hale, in order to be deemed a credible witness, a woman had to be of good fame, disclose the injury immediately, suffer signs of injury and cry out for help.”) (internal citations omitted).

<sup>28</sup> Jason M. Price, *Sex, Lies, and Rape Shield Statutes: The Constitutionality of Interpreting Rape Shield Statutes to Exclude Evidence Relating to the Victim’s Motive to Fabricate*, 18 W. NEW ENG. L. REV. 541, 550–51 (1996).

<sup>29</sup> Yung, *supra* note 20, at 15; Price, *supra* note 28, at 551.

<sup>30</sup> Yung, *supra* note 20, at 15, 20.

<sup>31</sup> *United States v. Townsend*, 34 M.J. 882, 885 (C.G.C.M.R. 1992) (overturning a military rape conviction when victim did not manifest resistance, but “froze” when her verbal protests went unheeded); *People v. Bales*, 169 P.2d 262, 265 (Cal. App. 1946) (reversing rape conviction where evidence showed no real resistance from complainant).

<sup>32</sup> *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1164 (1994) (finding that woman was not raped despite repeated verbal “no’s” when victim did not approach the locked door to attempt to unlock it, and defendant did not use force or threats).

<sup>33</sup> Joel Emlen, *A Critical Exercise in Effectuating “No Means No” Rape Law*, 29 VT. L. REV. 215, 215, 220 (2004).

<sup>34</sup> Yung, *supra* note 20, at 16; *see State ex rel. M.T.S.*, 609 A.2d 1266, 1278 (N.J. 1992).

“put the victim—not the attacker—on trial.”<sup>35</sup> Until 2012, even the FBI’s Uniform Crime Reporting Program still used a definition of “forcible rape” that originated in the 1920s: “the carnal knowledge of a female, forcibly and against her will,” which only includes forcible penetration of a vagina by a penis, excluding oral or anal penetration, and excluding vaginal penetration with an object other than a penis.<sup>36</sup> The new FBI definition states “penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”<sup>37</sup>

Historically, defendants in rape or sexual assault proceedings were permitted to introduce evidence of the complainant’s prior sexual experiences.<sup>38</sup> Rape shield laws were not widely adopted until the late 1970s, and in 1978, Congress enacted Federal Rule of Evidence 412, making the sexual history of a victim inadmissible under most circumstances.<sup>39</sup> The historical precedent was steeped in mistrust of women and a social desire to police the behaviors of women feared to be promiscuous.<sup>40</sup> This led to decades of rape law that subjugated the sexual autonomy and bodily integrity of women to the desires of sexually aggressive men. It is no surprise that modern reformists continued to seek change that would further transform the paradigm.<sup>41</sup>

## 2. Affirmative Consent: Yes Means Yes? Not Exactly

The historical shift of rape and sexual assault law, coupled with the contemporary climate demanding changes in the prevention and handling of ever-increasing numbers of sexual assaults, have led to the current highly charged debate. Unsurprisingly, affirmative consent emerged as a desirable standard.<sup>42</sup>

Affirmative consent, at its most basic level, simply requires that “some signal of agreement must be sent by each party to a sexual encounter.”<sup>43</sup> In other words, affirmative consent simply requires some expression of willingness to participate in a sexual encounter, rather than depending on the absence of an expression of unwillingness. Commentators have argued that this represents at most a modest clarification of what is already the modern practice in rape and sexual assault cases in most U.S. jurisdictions.<sup>44</sup> Affirmative consent is most notoriously described as “only

<sup>35</sup> S. REP. NO. 102-197, at 50, 57 (1991).

<sup>36</sup> Charlie Savage, *U.S. to Expand Its Definition of Rape in Statistics*, N.Y. TIMES (Jan. 6, 2012), <http://www.nytimes.com/2012/01/07/us/politics/federal-crime-statistics-to-expand-rape-definition.html>.

<sup>37</sup> *Id.*

<sup>38</sup> Price, *supra* note 28, at 550.

<sup>39</sup> *Id.* at 551.

<sup>40</sup> *See id.* at 550 (“One of the reasons [for allowing inquiry into a victim’s sexual history] . . . was that unchaste women were considered dishonest. Further, supporters of the common-law doctrine . . . justified the doctrine by stating that a woman’s unchaste character is probative on the issue of whether the woman consented to sex on a particular occasion.”).

<sup>41</sup> Stephen Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQ. 335, 335–36 (2017).

<sup>42</sup> *See New, supra* note 13.

<sup>43</sup> Witmer-Rich, *supra* note 15, at 88.

<sup>44</sup> *Id.*



yes means yes,”<sup>45</sup> but this slogan severely oversimplifies the concept, and is in fact inaccurate as the definition of the legal standard required of affirmative consent.<sup>46</sup> Generally, affirmative consent does not require express verbal permission,<sup>47</sup> meaning many things besides “yes,” can mean “yes.”

While most U.S. jurisdictions do not use affirmative consent to describe the legal consent element, New Jersey, Illinois, Washington, and Wisconsin all incorporate language requiring “freely given agreement” for sexual contact.<sup>48</sup> The New Jersey Supreme Court stated that defendants must believe that “the alleged victim had freely given affirmative permission” and that “[s]uch permission can be indicated either through words or through actions that, when viewed in the light of all the surrounding circumstances, would demonstrate to a reasonable person affirmative and freely-given authorization for the specific act of sexual penetration.”<sup>49</sup> Although the court used the term “affirmative permission” and clearly articulated permission could be given through words or actions, it did not further define or clarify the standard.

While affirmative consent as the standard in the criminal context is relatively rare, it has taken a firm hold on college and university campuses. The National Center for Higher Education Risk Management reported that as of 2014, over 800 colleges have adopted an affirmative consent standard.<sup>50</sup> The state legislatures in California and New York even codified the affirmative consent standard, requiring that an affirmative consent definition be adopted for all state university sexual assault policies.<sup>51</sup> California’s definition is:

“Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each

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<sup>45</sup> Janet Napolitano, “*Only Yes Means Yes*”: *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL’Y REV. 387, 389–90 (2015).

<sup>46</sup> Witmer-Rich, *supra* note 15, at 66.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 61 n.13 (citing *State ex rel. M.T.S.*, 609 A.2d 1266, 1278 (N.J. 1992) (“Such permission can be indicated either through words or through actions that, when viewed in the light of all the surrounding circumstances, would demonstrate to a reasonable person affirmative and freely-given authorization for the specific act of sexual penetration.”). *See, e.g.*, 720 ILL. COMP. STAT. 5/11-1.70(a) (2012) (“‘Consent’ means a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent.”); WASH. REV. CODE § 9A.44.010(7) (2007) (“‘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.”).

<sup>49</sup> *State ex rel. M.T.S.*, 609 A.2d 1266, 1278 (N.J. 1992).

<sup>50</sup> Wendy Adele Humphrey, “*Let’s Talk About Sex*”: *Legislating and Educating on the Affirmative Consent Standard*, 50 U.S.F.L. REV. 35, 57 (2016).

<sup>51</sup> CAL. EDUC. CODE § 67386(a)(1) (West 2016); N.Y. EDUC. LAW § 6441 (McKinney 2015) (“Every institution shall adopt the following definition of affirmative consent as part of its code of conduct: ‘Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent.’”).

person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.<sup>52</sup>

Even in states without such legislation, universities around the country are adopting similar definitions for their sexual assault policies.<sup>53</sup>

### 3. Different Standards: Affirmative Consent and Clear Affirmative Consent

Affirmative consent does not mean clear, unambiguous consent.<sup>54</sup> This is perhaps the most common misconception about affirmative consent and is easily observed in commentary from both critics and supporters of the affirmative consent standard.<sup>55</sup> Even a survey of dictionary definitions does not support interpreting affirmative to mean unambiguous.<sup>56</sup> While affirmative consent by itself does not impose the unambiguous standard, there are a small but growing number of policies that also include an unambiguous or clear consent standard as part of their affirmative consent definitions.<sup>57</sup> This distinction has “gone largely unnoticed in the literature” and “represents a major change to existing sexual assault law or university policies. Simply requiring affirmative consent does not.”<sup>58</sup>

For example, in Columbia University’s 2017 Gender-Based Misconduct Handbook, students are advised that “[c]onsensual sexual conduct requires affirmative consent. New York State law defines affirmative consent as a knowing, voluntary and mutual decision among all participants involved.”<sup>59</sup> The policy further explains that consent may be given “by words or actions, as long as those words or actions clearly communicate willingness to engage in the sexual activity. It is important not to make assumptions about consent. If there is confusion or ambiguity, participants need to stop sexual activity and talk about each person’s willingness to continue.”<sup>60</sup>

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<sup>52</sup> CAL. EDUC. CODE § 67386(a)(1) (West 2016).

<sup>53</sup> Witmer-Rich, *supra* note 15, at 63.

<sup>54</sup> *Id.* at 68.

<sup>55</sup> See Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1476 (2014); Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 263–64 (2015).

<sup>56</sup> Witmer-Rich, *supra* note 15, at 68.

<sup>57</sup> *Id.* at 69.

<sup>58</sup> *Id.* at 68.

<sup>59</sup> GENDER-BASED MISCONDUCT POLICY AND PROCEDURES FOR STUDENTS, COLUM. U. 4 (Aug. 24, 2018), <http://www.columbia.edu/cu/studentconduct/documents/GBMPolicyandProceduresforStudents.pdf>.

<sup>60</sup> *Id.* at 9.

The difficulty in interpreting Columbia's policy is that the initial language defining affirmative consent does not contain a requirement that consent be unambiguous. However, in a later, clarifying sentence, the policy adds language requiring that one's words or actions "clearly communicate willingness."<sup>61</sup> This creates confusion when interpreting this statute, as the later sentence seems designed to clarify the first sentence, but in reality, it instead adds an additional standard that is substantially different than affirmative consent.<sup>62</sup> This additional requirement of clear, unambiguous consent creates both social and constitutional concerns.<sup>63</sup>

#### 4. Substantive Rule vs. Procedural Rule

One aspect of affirmative consent policies that creates confusion and disagreement is the standard as it relates to substantive rules (how people should behave) versus how it relates to procedural rules (how violations are adjudicated).<sup>64</sup> Affirmative consent as a substantive rule is designed to prevent assumptions about consent and to encourage increased communication of all parties to a sexual encounter.<sup>65</sup> It seems uncontroversial that these are positive goals, and if affirmative consent can help realize them, it should be adopted as the substantive standard and immediately incorporated into discussions about sex education and sexual assault prevention.

However, affirmative consent also carries with it a procedural and adjudicative aspect. As a procedural rule, the affirmative consent standard includes significant deficiencies, and it simply does not alleviate the current procedural difficulties faced by university administrative hearing boards or courts using non-affirmative definitions of consent. Adjudicative bodies—either courts in criminal proceedings, or university disciplinary committees for campus incidents—play two main roles: (1) fact-finding, and (2) interpretation of the facts to determine if consent was given. The first role, fact-finding, is often considered the "he said, she said" portion of the process.<sup>66</sup> Affirmative consent fails to ease the difficulty of this process when adjudicators must consider evidence from both sides and determine which version of the story is most credible.<sup>67</sup> Affirmative consent comes into play in the second role: interpretation of the facts to determine if consent was given.<sup>68</sup> Interpreting the often imprecise communication between parties to a sexual encounter often represents the most difficult task for adjudicators of sexual assault cases.<sup>69</sup> Unfortunately, requiring some

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<sup>61</sup> *Id.*

<sup>62</sup> Witmer-Rich, *supra* note 15, at 65.

<sup>63</sup> *See* discussion *infra* Parts III–IV.

<sup>64</sup> Witmer-Rich, *supra* note 15, at 59 (“[T]he concept of affirmative consent carries with it a cluster of both substantive rules (related to the definition of consent) and procedural rules (related to how criminal prosecutions or university adjudications should be conducted).”).

<sup>65</sup> *Id.* at 65.

<sup>66</sup> *Id.* at 86.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 86–87.

<sup>69</sup> *Id.* at 87.

affirmative signal of consent will not solve this already difficult problem.<sup>70</sup> Furthermore, because definitions are often unclear as to what behavior is sufficient to constitute affirmative consent, the standard is likely to be applied inconsistently, potentially resulting in both over and under punishment.

The most widely used definitions of affirmative consent do not specifically require express verbal permission (as permission may also be granted through actions), nor do they require that permission be clear or unambiguous.<sup>71</sup> With these kinds of definitions, there is unlikely to be a constitutional violation because there is no significant alteration of currently used consent definitions interpreted in the criminal context almost uniformly throughout the United States. However, policies that use affirmative consent as an adjudicative standard that require clear, unambiguous affirmative consent are unconstitutionally overbroad and vague. Such policies also violate the First Amendment's right to free speech, as well as the constitutional right to privacy.

### *B. The Role of Title IX in the Affirmative Consent Debate*

Title IX requires universities to respond to sexual assault on campus to protect student victim's educational interests and is therefore, a significant driving factor in the adoption of affirmative consent standards.<sup>72</sup> Title IX of the Educational Amendments of 1972 prohibits sex discrimination in education programs or activities that receive federal funding, including public colleges and universities.<sup>73</sup> Section 1681 states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>74</sup> Sexual harassment, including sexual violence, is considered sex discrimination under Title IX. Title IX defines sexual harassment as: "unwelcome conduct of a sexual nature," and can include "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."<sup>75</sup> If the behavior is serious enough to limit a victim's ability to participate in, or benefit from, the school's program, it triggers a university's duty to act.<sup>76</sup> Title IX provides a private right of

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 88.

<sup>72</sup> *Id.* at 61.

<sup>73</sup> 20 U.S.C. § 1681 (2012).

<sup>74</sup> *Id.* at § 1681(a).

<sup>75</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) [hereinafter *2001 Guidance*].

<sup>76</sup> *Id.* at 5.

action<sup>77</sup> and is enforced by the U.S. Department of Education's Office for Civil Rights ("OCR") and the court system.<sup>78</sup>

In 1981, administrative guidance first prohibited employee-student harassment as sex discrimination under Title IX.<sup>79</sup> The Supreme Court expanded the private right of action to allow money damages in teacher-student harassment cases, when (1) an official with authority to address the situation has actual knowledge, and (2) the official is "deliberately indifferent" in the response.<sup>80</sup> By 2000, both OCR and the Supreme Court expanded the definition to include student to student harassment in higher education,<sup>81</sup> stating that:

Sexual harassment of a student can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program. Sexual harassment of students is, therefore, a form of sex discrimination prohibited by Title IX under the circumstances described in this guidance.<sup>82</sup>

Title IX prohibits both quid pro quo harassment (usually teacher-to-student) and hostile environment harassment, which can be either teacher-to-student, or student-to-student.<sup>83</sup> Title IX protects a student's private interest in his or her education, but focuses on accusers of sexual assault, rather than accused students.<sup>84</sup>

To protect a student victim's education interests, Title IX requires that universities respond to allegations of sexual assaults on campus. Under OCR's standards, a school is in violation of Title IX when: (1) a responsible school official knew of or reasonably should have known of harassment; and (2) the school failed to respond promptly and effectively to eliminate the hostile environment and prevent its recurrence; or, (3) the accused student's conduct was unwanted and sufficiently serious to deny or limit the harassed student's ability to participate in an educational program or benefit.<sup>85</sup> OCR specifically stated that its standard for a violation is broader than the courts'

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<sup>77</sup> *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009) ("[Title IX's] only express enforcement mechanism, § 1682, is an administrative procedure resulting in the withdrawal of federal funding from institutions that are not in compliance. In addition, this Court has recognized an implied private right of action . . . [for which] both injunctive relief and damages are available.").

<sup>78</sup> Holly Hogan, *The Real Choice in a Perceived "Catch-22": Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings*, 38 J.L. & EDUC. 277, 280 (2009).

<sup>79</sup> OCR Policy Memorandum from Antonio J. Califa, Dir. of Litig., Enf't, & Policy Serv., to Reg'l Civil Rights Dirs. (Aug. 31, 1981).

<sup>80</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

<sup>81</sup> Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 51 (2013).

<sup>82</sup> *2001 Guidance*, *supra* note 75, at 2.

<sup>83</sup> *Id.* at 5.

<sup>84</sup> Hogan, *supra* note 78, at 280.

<sup>85</sup> *2001 Guidance*, *supra* note 75, at 12–13.

definition.<sup>86</sup> Therefore, colleges and universities must take reports of sexual assault and sexual harassment seriously, and work to protect students from the academic barriers erected by sex discrimination. This focus on protection of victims of sexual assault played a key role in the adoption of affirmative consent standards on campuses across the nation, as affirmative consent is widely seen as more protective.

### C. First Amendment: Free Speech

Perhaps one of the most lauded and fundamental rights afforded by the United States Constitution is the right to free speech. The First Amendment of the U.S. Constitution provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>87</sup> While the text provides no limiting language or modifiers, it is well-settled that the right to free speech is not absolute.<sup>88</sup> In *Roth v. United States*, Justice Brennan stated “[i]n light of history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance.”<sup>89</sup> Litigation involving the constitutional question of free speech asks “whether the First Amendment allows public regulation of the particular communication in the circumstances under which it was made.”<sup>90</sup> The right not to speak is as important as the right to speak freely and the Supreme Court has held that government compelled speech violates the First Amendment.<sup>91</sup> The Supreme Court held a law compelling individuals to be couriers for ideological messages unconstitutional under the First Amendment right against compelled speech.<sup>92</sup>

These free speech protections guaranteed by the First Amendment extend to schools, as students do not “shed constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of [the Supreme] Court.”<sup>93</sup> The Court held that free speech is protected on public college and university campuses,<sup>94</sup> further stating that First Amendment protections on college campuses are necessary for the preservation of democracy:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . Teachers and

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<sup>86</sup> *Id.* at 34 n.74.

<sup>87</sup> U.S. CONST. amend. I.

<sup>88</sup> 16A AM. JUR. 2D *Constitutional Law* § 513 (2017).

<sup>89</sup> *Roth v. United States*, 354 U.S. 476, 483 (1957).

<sup>90</sup> WILLIAM H. ERICKSON, ET AL., UNITED STATES SUPREME COURT CASES AND COMMENTS: CRIMINAL LAW AND PROCEDURE ¶ 5A.03[1][a] (Matthew Bender ed. 2017).

<sup>91</sup> *See generally* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (striking down state school requirement that all children must salute the American flag); *see* *Wooley v. Maynard*, 430 U.S. 705 (1977).

<sup>92</sup> *Maynard*, 430 U.S. at 705–06.

<sup>93</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>94</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>95</sup>

While private colleges and universities are not constitutionally obligated to uphold the First Amendment rights of students, many private schools promise speech rights in school materials.<sup>96</sup> Courts hold that private institutions must uphold these promises based on a theory of contract law.<sup>97</sup> Furthermore, some states have codified free speech protections for students on private college campuses.<sup>98</sup> For example, California's "Leonard Law" prohibits private universities from punishing students for speech that would be protected by the First Amendment if made off-campus.<sup>99</sup>

The connection between clear affirmative consent laws and free speech rights are difficult to decipher, at least in part because of the complicated relationship between free speech and sex in the United States. In 1957, the Supreme Court held that obscenity is a category of speech falling totally outside the protections of the First Amendment.<sup>100</sup> The *Roth* Court specified, however, that "sex and obscenity are not synonymous."<sup>101</sup> While the Court eventually established the black-letter law defining obscenity in *Miller v. California*,<sup>102</sup> several Justices expressed concern that the Court was "unable to . . . separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into suppression of the latter."<sup>103</sup>

#### *D. Fifth and Fourteenth Amendments: Due Process and Privacy Concerns*

The United States Constitution guarantees that no person shall be deprived of "life, liberty, or property without due process of law," by either the federal government

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<sup>95</sup> *Id.*

<sup>96</sup> See Fire, *Private Universities*, <https://www.thefire.org/spotlight/public-and-private-universities/> (last visited Feb. 11, 2019).

<sup>97</sup> See *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 34 (1st Cir. 2007) ("The relevant terms of the contractual relationship between a student and a university typically include language found in the university's student handbook . . . We interpret such contractual terms in accordance with the parties' reasonable expectations, giving those terms the meaning that the university reasonably should expect the student to take from them."); *Corso v. Creighton Univ.*, 731 F.2d 529, 531 (8th Cir. 1984) ("The relationship between a university and a student is contractual in nature.").

<sup>98</sup> See CAL. EDUC. CODE § 94367 (Deering 2017).

<sup>99</sup> *Id.*

<sup>100</sup> *Sweezy*, 354 U.S. at 486–87.

<sup>101</sup> *Id.* at 487.

<sup>102</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>103</sup> *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting) (noting that "the approach initiated 16 years ago in [*Roth*], and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values.").

under the Fifth Amendment,<sup>104</sup> or by state governments under the Fourteenth Amendment.<sup>105</sup> The text appears to guarantee only that a person will not be deprived of life, liberty, or property unless he has first been provided with adequate procedures. Known as procedural due process, the doctrine encompasses the “conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice [of the charges] and the right to a fair hearing before a tribunal with the power to decide the case.”<sup>106</sup>

However, the Court also recognized substantive due process when laws in their substance infringe too deeply into individual liberty.<sup>107</sup> In *Meyer v. Nebraska*, the Court stated that the liberty guarantee of the Fourteenth Amendment included:

[N]ot merely the freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>108</sup>

Scholars criticize the doctrine of substantive due process as the result of activist judges because it is not explicitly stated in the constitutional text.<sup>109</sup>

### 1. Due Process and Title IX

The interplay of due process and the requirements of Title IX can create compliance complications for colleges and universities. To comply with the demands of Title IX, schools must provide the student complainant with a disciplinary hearing for the accused in response to a sexual assault allegation.<sup>110</sup> University disciplinary proceedings have potentially adverse consequences for the accused student, and because students have both a property and liberty interest in their education, those disciplinary proceedings are subject to procedural due process rights for the accused.<sup>111</sup> This includes a notice of the charge, as well as a hearing before an impartial

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<sup>104</sup> U.S. CONST. amend. V.

<sup>105</sup> U.S. CONST. amend. XIV, § 1.

<sup>106</sup> *Due Process*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>107</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (holding that a state law prohibiting the teaching of foreign language violated substantive due process).

<sup>108</sup> *Id.* at 399.

<sup>109</sup> Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 410–11 (2010).

<sup>110</sup> *2001 Guidance*, *supra* note 75, at 14–15. “Schools have an obligation to ensure that the educational environment is free of discrimination and cannot fulfill this obligation without determining if sexual harassment complaints have merit.” *Id.* at 35 n.86.

<sup>111</sup> Hogan, *supra* note 78, at 281–82.



tribunal.<sup>112</sup> The Supreme Court held that even suspensions of ten days or less are sufficiently serious to trigger due process clause protections.<sup>113</sup>

Due process is not a “fixed or rigid” concept, but instead is “a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of the deprivation.”<sup>114</sup> Evaluation of the process that is due in a university disciplinary proceeding requires application of three factors:

(1) the ‘private interest’ impacted by the disciplinary proceeding; (2) ‘the risk of erroneous deprivation of such interest’ through the disciplinary proceeding and the probable value of ‘additional or substitute’ procedural safeguards; and (3) the school’s ‘interest; including the function involved and the fiscal and administrative burden that would result from additional or substitute procedural safeguards.’<sup>115</sup>

## 2. Right of Privacy as a Substantive Due Process Issue

Substantive due process can be justified by the idea that some laws infringe so deeply upon protected liberties that no amount of process would be sufficient to justify the infringement. Although the Supreme Court most often applied substantive due process to protect primarily economic rights (including liberty of contract),<sup>116</sup> in the 1930s, the Court reversed course and took on a much less active role in scrutinizing the rationality of economic legislation.<sup>117</sup> Despite this shift, the doctrine of substantive due process has thrived, particularly as applied to the concept of liberty and certain fundamental individual rights, such as those relating to family and sexual matters, the right to vote, the right to travel, and the right to privacy.<sup>118</sup> The Court has held that activities falling within the constitutional scope of right to privacy include matters relating to marriage, procreation, contraception, and family relationships, and has further established that there are limitations to states’ power to “substantively regulate conduct.”<sup>119</sup>

The Court determined that these fundamental individual rights should be protected by the most rigorous form of judicial review: strict scrutiny.<sup>120</sup> Strict scrutiny requires that the government demonstrate a compelling interest, the regulation must be absolutely essential, and the regulation must be so “narrowly drawn to express only the legitimate state interests at stake.”<sup>121</sup>

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<sup>112</sup> *Id.* at 283.

<sup>113</sup> *Goss v. Lopez*, 419 U.S. 565, 574–75 (1975).

<sup>114</sup> *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)).

<sup>115</sup> Hogan, *supra* note 78, at 283 (citing *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976)).

<sup>116</sup> *Lochner v. New York*, 198 U.S. 45, 67 (1905).

<sup>117</sup> *See W. Coast Hotel v. Parrish*, 300 U.S. 379, 389–90 (1937).

<sup>118</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>119</sup> *Paul v. Davis*, 424 U.S. 693, 713 (1976).

<sup>120</sup> *Roe v. Wade*, 410 U.S. 113, 170 (1973).

<sup>121</sup> *Id.* at 155.

Although the Court recognized a right to privacy related to procreation and contraception, sexual privacy has not always been clearly protected by the constitutional right to privacy. In 1986, the Supreme Court found no constitutional protection for sexual privacy when they upheld a challenged sodomy statute.<sup>122</sup> However, the Court overruled that holding in *Lawrence v. Texas* in 2003, which invalidated sodomy laws in every state, thereby making it unconstitutional for states to criminalize same-sex consensual sexual activity.<sup>123</sup>

### III. CLEAR AFFIRMATIVE CONSENT: DANGER OF POLICING SEX AND PUNISHING CONSENTING ADULTS

The United States has a history of policing sex, particularly minimizing the sexual autonomy of women and sexual activity among members of the same sex.<sup>124</sup> The U.S. criminalized homosexual conduct for much of the nation's history, and only received recognized constitutional protection in 2003.<sup>125</sup> In *Lawrence*, the Supreme Court struck down a Texas law prohibiting sodomy between same sex partners.<sup>126</sup> Prior to *Lawrence*, the Supreme Court upheld a Georgia statute criminalizing sodomy, and held that the Fourteenth Amendment's due process clause did not confer a right to engage in consensual sodomy, even in the private home, stating that "[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."<sup>127</sup>

The *Lawrence* Court faced its prior precedent in *Bowers* head-on, stating that the *Bowers* Court "fail[ed] to appreciate the extent of the liberty at stake."<sup>128</sup> *Lawrence* invalidated the statute because it involved the "intimacies . . . of physical relationship," and such personal choices should be free from governmental interference.<sup>129</sup> *Lawrence* prohibits regulation or interference from the government of consensual sex.<sup>130</sup>

#### A. Clear Affirmative Consent: Hypotheticals with Consenting Adults

Strict interpretations of clear affirmative consent policies could criminalize even consensual encounters where both parties willingly participated but did not communicate that willingness at the level required by the clear affirmative consent standard. This violates the Court's holding in *Lawrence*, as clear affirmative consent policies could easily be enforced against consenting adults. For example, a college student playfully grabbing her boyfriend's rear end as he walks by would be

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<sup>122</sup> *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>123</sup> *Lawrence*, 539 U.S. at 578.

<sup>124</sup> REGULATING SEX: THE POLITICS OF INTIMACY AND IDENTITY 14–15 (Elizabeth Bernstein & Laurie Schaffner eds., 2005).

<sup>125</sup> *Lawrence*, 539 U.S. at 562.

<sup>126</sup> *Id.* at 560.

<sup>127</sup> *Bowers*, 478 U.S. at 190.

<sup>128</sup> *Lawrence*, 539 U.S. at 558.

<sup>129</sup> *Id.* at 578.

<sup>130</sup> *Id.* at 560.

considered non-consensual sexual contact, even if she has done it every day for a year, and even if he subjectively desired the contact, unless she asked first (or if he invited her to do it). Under the strictest interpretation of clear affirmative consent standards this would be a non-consensual sexual encounter. Even something as ubiquitous as running up and kissing a significant other on the lips without express permission would fail to meet the clear affirmative consent standard. Even if the assumption is made that the parties to these events had previously agreed that low-level public affection (even with a sexual intent) is agreeable, under strict clear affirmative consent, that would be insufficient to comply, because these policies typically require ongoing consent, and prior consent does not indicate future consent.<sup>131</sup>

This is problematic, as it opens the door for governmental policing of sexual conduct. Suppose the two hypothetical incidents discussed above happened on a college campus and were observed by a member of the campus disciplinary committee. The initiating student could be subject to disciplinary action and punishment, even absent a complaint by the supposed “victim.”

#### *B. Real World Punishment of Consenting Adults*

It may seem ridiculous that a university would move forward with disciplinary proceedings in the face of a victim denying wrongdoing, however, for Colorado State University-Pueblo (“CSUP”) student Grant Neal, that is precisely what occurred.<sup>132</sup> A female student in the athletic training program (only referred to anonymously as “complainant”) alleged that Mr. Neal raped Jane Doe (“Ms. Doe”) after noticing a hickey on Jane Doe’s neck.<sup>133</sup> The complainant made the allegation to university officials without informing Ms. Doe or Mr. Neal.<sup>134</sup> Both Mr. Neal and Ms. Doe repeatedly insisted that the sex was consensual, and in fact, Ms. Doe never reported to anyone, including complainant, that the sex was non-consensual.<sup>135</sup> Ms. Doe stated, “he’s a good guy. He’s not a rapist, he’s not a criminal, it’s not even worth any of this hoopla!”<sup>136</sup> However, the university continued with disciplinary proceedings, found Mr. Neal responsible for sexual misconduct, and ultimately suspended him for the duration of Ms. Doe’s education at CSUP.<sup>137</sup>

The subsequent suit brought by Mr. Neal alleged the university’s violations of procedural due process under the Fourteenth Amendment and sex discrimination under Title IX.<sup>138</sup> He also subsequently filed suit against the federal government, alleging that it coerced the state to conduct the hearings in a manner that violated due

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<sup>131</sup> Evan Gerstmann, *The Constitutional Right to Sexual Autonomy and Affirmative Consent*, Address at 2018 Western Political Science Association Annual Conference 7 (Loyola Marymount Univ., 2018).

<sup>132</sup> Neal v. Colo. State Univ.-Pueblo, No. 16-cv-873-RM-CBS, 2017 WL 633045, at \*1 (D. Colo. Feb. 16, 2017).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at \*2.

<sup>137</sup> *Id.* at \*4.

<sup>138</sup> *Id.* at \*5.

process and Title IX, and thus had further put pressure on CSUP to find males responsible for sexual misconduct, regardless of the available evidence.<sup>139</sup> In July 2017, Mr. Grant and CSUP reached an undisclosed settlement agreement.<sup>140</sup>

Although this case did not challenge an affirmative consent standard, it illustrates the dangers inherent in enforcing a clear affirmative consent policy. This is particularly true in the context of college campuses where disciplinary hearings only use a clear and convincing or preponderance of the evidence standard; there are no safeguards in place against abusing these policies, resulting in abuses of power and policing sex. To partially reign in possible abuses of power related to enforcement of clear affirmative consent policies, universities could institute policies requiring corroboration from the alleged victim in cases where a third-party reports an allegation. While adoption of this policy would likely decrease the ability of university officials to police sexual conduct (at least as related to enforcing clear affirmative consent standards), this policy would prove problematic in cases where an alleged victim has been threatened, which could result in dangerous sexual predators escaping punishment.

#### IV. CONSTITUTIONAL ISSUES WITH CLEAR AFFIRMATIVE CONSENT POLICIES

As discussed above, affirmative consent does not represent a significant departure from rape and sexual assault law as defined in most American jurisdictions. However, the further requirement that affirmative consent also be clear and unambiguous does represent a substantial change from current law and raises constitutional concerns. This analysis and discussion focuses on clear, unambiguous affirmative consent policies (“clear affirmative consent”).

##### A. First Amendment: Analytical Challenges with Clear Affirmative Consent

The task of analyzing clear affirmative consent policies in the context of free speech is inexact, because this type of policy does not fit neatly into any of the previously litigated classifications of speech regulations. Sexual communication and sexual encounters can be inherently awkward and imprecise. Clear affirmative consent policies do not prohibit speech or compel speech in the traditional First Amendment sense.<sup>141</sup> Instead, the government has waded into this sphere requiring individuals to meet an ill-defined, but exacting level of precision, within sexual communication, or risk facing severe punishment.

There is no precedent regarding this type of government regulation because requiring a particular level of precision in speech is not typical. Although an unusual way to regulate speech, clear affirmative consent standards limit free expression in

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<sup>139</sup> *Id.* at \*6.

<sup>140</sup> Kayla Schiebecker, *Athlete Accused of Rape by Colorado State – Not His Sex Partner – Is Getting Paid to Drop Lawsuit*, COLLEGE FIX (July 19, 2017), <https://www.thecollegefix.com/athlete-accused-rape-colorado-state-not-sex-partner-getting-paid-drop-lawsuit/>. On July 14, 2017, a joint status report was filed with the court, indicating that Mr. Grant and CSU-Pueblo were nearing a settlement agreement including both monetary and non-monetary terms. The Federal defendants in the case were not part of settlement discussions with the Plaintiff.

<sup>141</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); see also William M. Howard, *Constitutional Challenges to Compelled Speech – Particular Situations or Circumstances*, 73 A.L.R. 6th 281, 281 (2012).

violation of the First Amendment. The requirement of consent in sexual encounters is a substantive requirement of law and is clearly constitutionally permissible, however, the further requirement of clear, unambiguous consent (particularly when that is not clearly defined) raises First Amendment concerns.<sup>142</sup>

### 1. Overbreadth as a Constitutional Concern

From a First Amendment perspective, this Note does not argue that the First Amendment rights of a would-be rapist would be infringed. In cases where one party alleges that the encounter was non-consensual, no First Amendment concern is raised because violence is not protected speech.<sup>143</sup> Therefore, any consent law as applied to the free speech rights of an attacker would likely be upheld. However, under strict interpretations of clear affirmative consent policies, the rights of law-abiding citizens are violated. These policies are unconstitutionally overbroad because they reach protected speech—sexual encounters that both parties subjectively agree were consensual.<sup>144</sup>

Regulations of any speech, whether protected or unprotected, must not be overly broad or so vague that the average citizen cannot understand what is allowed or prohibited.<sup>145</sup> Overly broad speech regulates substantially more speech than is permissible under the First Amendment.<sup>146</sup> For example, a law banning all photographs containing nudity is overly broad.<sup>147</sup> The Court held that pornography may be regulated if it is obscene,<sup>148</sup> but other expression must be allowed to contain nudity, like art.<sup>149</sup> Here, strict clear affirmative consent laws are unnecessarily broad in that they purport to regulate all sexual activity, including that which is mutually desired, but still violates the clear affirmative consent policy.<sup>150</sup>

Statutes may be challenged as “facially” invalid, “because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court

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<sup>142</sup> *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

<sup>143</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (“The First Amendment does not protect violence.”).

<sup>144</sup> See discussion *supra* Part III-A.

<sup>145</sup> *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

<sup>146</sup> See *Ctr. for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 648, 652 (E.D. Pa. 2004) (holding that overbreadth doctrine did not apply, because child-pornography law was not facially challenged, but was unconstitutional under the First Amendment because implementation of the statute resulted in blocking significant amounts of constitutionally protected speech). Here, clear affirmative consent policies are facially overbroad, as they purport to regulate all sexual conduct, even between two willing, consenting adults.

<sup>147</sup> *Miller v. California*, 413 U.S. 15, 28 (1973).

<sup>148</sup> *Id.* at 23–24 (“This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment . . . As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct . . . A state offense must also be limited to works which . . . portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”) (internal citations omitted).

<sup>149</sup> *Id.* at 26.

<sup>150</sup> See *Ctr. for Democracy & Tech.*, 337 F. Supp. 2d at 649.

to refrain from constitutionally protected speech or expression.”<sup>151</sup> An overbroad law is often too vague for a reasonable person to understand what behavior is prohibited and what behavior is not. To avoid breaking an overbroad law, many people will voluntarily choose not to engage in behavior protected by the First Amendment or another basic right just to be sure they are not accidentally breaking the overbroad law. Since these laws either infringe on basic rights or encourage people to avoid exercising basic rights, most courts recognize that anyone who is affected by an overbroad law has standing to challenge the law’s overbreadth on behalf of all persons affected by that law.<sup>152</sup>

### *B. Violation of the First Amendment’s Right to Free Speech*

A clear affirmative consent standard violates the First Amendment rights of free speech of consenting adults. While the First Amendment’s language at first appears to be unambiguous and absolute, the Supreme Court has not regarded the text as absolute and has categorically denied free speech protections for certain kinds of speech: obscenity, true threats, fighting words, perjury, blackmail, incitement to imminent lawless action, solicitation to commit crimes, defamation, and plagiarism of copyrighted material.<sup>153</sup> Justice Holmes understood that free speech is not absolute when he wrote, “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic,”<sup>154</sup> and the government may take action to prevent or punish such speech.<sup>155</sup>

It was not until 1925 that the Supreme Court held that freedom of speech guaranteed by the First Amendment was protected from impairment not only from the national government, but from state governments, as protected under the due process clause of the Fourteenth Amendment.<sup>156</sup> The Fourteenth Amendment states, in relevant part “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”<sup>157</sup>

#### 1. Sexual Communication as Protected Speech

To challenge a law regulating speech, one must first determine what constitutes protected speech.<sup>158</sup> Sexual communication between two consenting adults is pure speech.<sup>159</sup> An ignoble theme of First Amendment law is that, when faced with difficult speech questions, the Supreme Court often avoids the issue by determining that the

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<sup>151</sup> *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

<sup>152</sup> *Id.*

<sup>153</sup> 16B C.J.S. *Constitutional Law* § 953 (2017).

<sup>154</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>155</sup> *Id.*

<sup>156</sup> *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>157</sup> U.S. CONST. amend. XIV.

<sup>158</sup> *Act Now to Stop War and End Racism Coal. v. District of Columbia*, 905 F. Supp. 2d 317, 328 (2012).

<sup>159</sup> *Cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969).

law at issue regulates conduct rather than speech.<sup>160</sup> Because clear affirmative consent standards purport to regulate the procurement of consent, it is possible that courts would attempt to avoid the First Amendment question altogether by stating that this is conduct rather than speech. However, conduct that is considered expressive is accorded First Amendment protections as symbolic speech.<sup>161</sup> The communication of participants in a sexual encounter may be comprised exclusively of conduct. If courts are hesitant to define sexual communication as pure speech in and of itself, courts must determine if that conduct is expressive.

Whether conduct has an expressive element is determined by a two-part test.<sup>162</sup> Conduct is deemed expressive if (1) the actor intended to express a particularized message and (2) that message is understood by the audience.<sup>163</sup> Here, the act of seduction or request for consent indicates a particularized message or idea and is able to be understood by the audience: “I am interested in sexual contact with you.” Further, the act of the consenting party is also expressive conduct that is understood by the audience: “sex is welcome.” The two-part test to determine expressive conduct sets a low bar and recognizes that a wide-range of conduct can be considered expressive.<sup>164</sup> Treating sexual conduct as expressive satisfies the two-part test and is consistent with the First Amendment’s purpose. At its most basic level, sexual communication is protected speech, whether verbal or non-verbal. The government should not compel enthusiastic response to a request for a sexual encounter in order that the encounter not be criminalized.

In *Bowers*, the Supreme Court upheld a statute criminalizing sodomy against a due process claim, finding that the statute was rationally related to the state’s interest in protecting morality.<sup>165</sup> Although not decided on free speech grounds, the Court’s rationale for allowing the state to regulate sodomy (upholding notions of morality) indicates that sexual activity is inherently communicative: “upholding community morals—is inextricably related to what sodomy expresses to the community . . . . Because homosexual conduct between consenting adults can have no effect on society other than by virtue of what it communicates, its regulation should trigger searching examination by a reviewing court.”<sup>166</sup> Although the argument was raised that sodomy within the privacy of the home should be protected based on *Stanley v. Georgia*—holding that the First Amendment prohibited conviction for possession of obscene material within the privacy of the home—the *Bowers* Court rejected this argument.<sup>167</sup>

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<sup>160</sup> See, e.g., *United States v. O’Brien*, 391 U.S. 367, 382 (1968).

<sup>161</sup> 16B C.J.S. *Constitutional Law* § 922 (2017).

<sup>162</sup> *Spence v. Washington*, 418 U.S. 405, 415 (1974) (holding that the display of a flag with a peace symbol affixed to it was constitutionally protected speech, and statute was unconstitutional as applied to defendant).

<sup>163</sup> *Id.* at 414–15.

<sup>164</sup> David D. Cole, *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 323–24 (1994).

<sup>165</sup> *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, (2003).

<sup>166</sup> Cole, *supra* note 164, at 323.

<sup>167</sup> *Bowers*, *supra* note 165, at 195.

The Court stated that the holding of *Stanley* was based firmly on First Amendment rights, rather than Fourteenth Amendment due process.<sup>168</sup>

In *Lawrence*, the Supreme Court overruled *Bowers*.<sup>169</sup> While not decided on First Amendment grounds, the Court expressed that states should not:

[D]efine the meaning of the [personal] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.<sup>170</sup>

Nude dancing has also been considered “expressive conduct” by eight Supreme Court Justices.<sup>171</sup> In a concurring opinion, Justice Scalia defined “inherently expressive conduct” as conduct “that is normally engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else.”<sup>172</sup> Sex clearly meets this definition of inherently expressive conduct. Sex between two persons is inherently communicative at its core, and may express any number of emotions: love, desire, or even anger.<sup>173</sup> No matter the degree—kissing, holding hands, or intercourse—sex is inherently communicative and expressive, and should be considered protected speech for the purposes of First Amendment protection.

## 2. Compelled Speech

Free speech violations can be broadly grouped into two categories: (1) compelled speech and (2) restricted speech. One of the most fundamental tenants in free speech jurisprudence is that the right not to speak is protected as fiercely as the right to speak.<sup>174</sup> One of the problems with the government essentially requiring a script for sex is that it appears, at first glance, like government compelled speech. However, clear affirmative consent standards would likely not fall within the compelled speech doctrine as historically defined because it does not require communication of an ideological message.

In *West Virginia State Board of Education v. Barnette*, the Supreme Court struck down a state law requiring school children to salute the flag and recite the Pledge of

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<sup>168</sup> *Id.*

<sup>169</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>170</sup> *Id.* at 566–67.

<sup>171</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991).

<sup>172</sup> *Id.* at 578 n.4 (Scalia, J., concurring).

<sup>173</sup> *Cole*, *supra* note 164, at 326 (“Indeed, the communicative power of sex is often unmatched by other forms of communication. To say, ‘I love you’ is one thing; to hold a lover’s hand in public to express one’s love can express something quite different; and ‘to make love’ is often a still more profound expression of what one feels and thinks.”).

<sup>174</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).



Allegiance.<sup>175</sup> Jehovah's Witnesses, who refused to salute the flag, challenged the law citing religious grounds. Their children were "expelled from school and . . . threatened with exclusion for no other cause."<sup>176</sup> Justice Jackson wrote what is perhaps the most often cited passage in First Amendment case law, stating that if "there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."<sup>177</sup>

Not all government compelled speech is problematic. For example, the government compels all citizens to report income each year for income taxes and the government restricts commercial speech in various ways.<sup>178</sup> Courts have typically only prohibited government compelled speech when the speech communicates an officially mandated ideology.<sup>179</sup> In 1977, the Supreme Court again struck down a law compelling government speech when a New Hampshire couple was prosecuted three times for covering up the motto "Live Free or Die" on their license plate.<sup>180</sup> The couple, also Jehovah's Witnesses, objected to the motto on religious grounds.<sup>181</sup> Chief Justice Burger stated that the law prohibiting obscuring or defacing license plates could not be enforced against the couple because the law compelled individuals to be "couriers for ideological messages" and "mobile billboards."<sup>182</sup> The Court found a "freedom of mind" that protects individuals from government coercion to communicate an officially mandated ideology.<sup>183</sup>

To argue that clear affirmative consent standards offend the compelled speech doctrine as historically interpreted would require a considerable expansion of the doctrine, as there is no ideology communicated in clear affirmative consent. As such, even the strictest interpretations of clear affirmative consent standards are unlikely to meet the current criteria to be considered compelled speech. However, as previously discussed, the regulation at issue charges individuals with inspiring or compelling speech from another, with the further requirement that the inspired speech be clear and unambiguous to avoid punishment. This atypical regulatory scheme may warrant a closer look at, and potential expansion of, the compelled speech doctrine.

### 3. Restricting Speech

The Supreme Court has had a complicated relationship with restrictions on sexually explicit speech. While obscenity is not protected speech under the First

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<sup>175</sup> *Id.* at 629.

<sup>176</sup> *Id.* at 630.

<sup>177</sup> *Id.* at 642.

<sup>178</sup> *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 620 (1995); *United States v. Edge Broad. Co.*, 509 U.S. 418, 436 (1993); *Kiser v. Reitz*, 765 F.3d 601, 620 (6th Cir. 2014).

<sup>179</sup> *Wooley v. Maynard*, 430 U.S. 705, 713 (1977).

<sup>180</sup> *Id.* at 708.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 715.

<sup>183</sup> *Id.* at 714–15.

Amendment, the Supreme Court has held that not all sexual speech is obscene.<sup>184</sup> In *Roth*, the Court stated:

Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest . . . Sex, a great mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.<sup>185</sup>

The Supreme Court has generally struck down prohibitions on non-obscene nudity and erotic expressive conduct, but in 1991, the Court upheld a ban on nude dancing, reasoning that it was part of a general prohibition of public nudity.<sup>186</sup> Although nude dancing has been considered expressive conduct, Chief Justice Rehnquist argued that the statute did not run afoul of the Constitution because the law was not aimed at the erotic message, but rather at the perceived evil of public nudity, generally.<sup>187</sup>

It is well-settled that “a law imposing criminal penalties on protected speech is a stark example of speech suppression.”<sup>188</sup> In *Ashcroft v. Free Speech Coalition*, the Court invalidated a federal law banning virtual child pornography (pornography which appears to, but does not actually, depict children) as overbroad, and thus violating the First Amendment because the speech ban was not narrowly drawn.<sup>189</sup> The Court reasoned that the statute went “well beyond” an interest in prohibiting only illegal conduct by “restricting speech available to law-abiding adults.”<sup>190</sup>

#### 4. Level of Scrutiny

Typically, in First Amendment cases, strict scrutiny is applied to laws that regulate speech if the regulation is content-based. Strict scrutiny requires that the government must have a compelling interest and the regulation must be absolutely essential and narrowly tailored to achieve that end.<sup>191</sup> Although the government has a compelling interest in the prevention of rape and sexual assault, “[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations

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<sup>184</sup> *Roth v. United States*, 354 U.S. 476, 487 (1957) (citations omitted).

<sup>185</sup> *Id.* The Court went on to define “prurient interest” as “material having a tendency to excite lustful thoughts.” *Id.* at 487 n.20.

<sup>186</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571 (1991).

<sup>187</sup> *Id.*

<sup>188</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002).

<sup>189</sup> *Id.* at 252–53.

<sup>190</sup> *Id.* The Court stated that because actual children were not harmed or exploited in creating the virtual child pornography, the central rationale behind making child pornography a category of wholly unprotected speech (creation of the speech is itself the crime of child abuse) did not apply to the virtual depictions. *Id.* at 254–55.

<sup>191</sup> *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

of the law, not abridgment of the rights of free speech.”<sup>192</sup> Merely the prospect of crime “by itself does not justify laws suppressing protected speech.”<sup>193</sup>

Strict clear affirmative consent standards go well beyond a government interest in preventing crime and intrude into constitutionally prohibited territory by compelling a particularly demanding level of precision in sexual communication. This, in turn, constrains the speech of even consenting adults. If the Court applied strict scrutiny to a First Amendment challenge of clear affirmative consent laws, the government is very unlikely to succeed.

However, clear affirmative consent policies are not so easy to classify as content-based or content-neutral. Content-based restrictions are enacted for the purpose of restraining speech on the basis of its content, and presumptively violate the First Amendment.<sup>194</sup> Conversely, content-neutral restrictions (time, place, and manner restrictions) are subject to intermediate scrutiny and do not violate the First Amendment “so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.”<sup>195</sup> In *Renton*, the Court considered a zoning law regulating the location of adult theatres and stated that the ordinance did not, at first glance:

[A]ppear to fit neatly into either the ‘content-based’ or the ‘content-neutral’ category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless . . . the Renton ordinance is aimed not at the content of the films shown at ‘adult motion picture theatres,’ but rather at the *secondary effects* of such theaters on the surrounding community.<sup>196</sup>

If challenged on free speech grounds, the government is likely to argue that clear affirmative consent is not meant to regulate the content of the speech, except to ensure that the consent law’s substantive requirement of consent is met. In other words, clear affirmative consent is concerned with regulating a secondary effect (sexual assault) rather than regulating the content of individuals’ sexual communications. The Court in *Renton* eventually held that zoning ordinances designed to combat objectionable secondary effects should be considered content-neutral, “at least with respect to businesses that purvey sexually explicit materials,” and therefore, subject to intermediate scrutiny rather than strict scrutiny.<sup>197</sup>

While intermediate scrutiny is a less exacting standard than strict scrutiny, it provides a more in-depth inquiry than the rational basis test. The government would easily meet the first prong of the test, as preventing sexual assault is a substantial government interest.<sup>198</sup> However, the second prong is more difficult to meet. Clear

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<sup>192</sup> *Kingsley Int’l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689 (1959) (citation omitted).

<sup>193</sup> *Ashcroft*, 535 U.S. at 245.

<sup>194</sup> *Renton v. Playtime Theatres*, 475 U.S. 41, 46–47 (1986).

<sup>195</sup> *Id.* at 47.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 49.

<sup>198</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 583 (1991).

affirmative consent policies cannot be said to leave open reasonable alternatives for communication. Because these policies require such an exacting level of precision, even intermediate scrutiny will be a difficult hurdle to clear. It is important to note that affirmative consent policies without the further requirement of clear and unambiguous consent are more likely to survive intermediate scrutiny, as those policies allow for significant freedom in sexual communication, while still protecting the consent requirement.

### *C. Substantive Due Process and the Constitutional Right to Privacy*

In addition to First Amendment free speech and overbreadth concerns, clear affirmative consent policies also raise substantive due process concerns. Under the Fifth and Fourteenth Amendments, statutes that punish an individual for something not clearly defined runs afoul of substantive due process and can be struck down as unconstitutionally vague.<sup>199</sup>

#### 1. Vagueness as a Constitutional Concern

Laws are considered void for vagueness if it would be impossible for a reasonable person to determine what speech or conduct is sufficient and/or necessary to be in compliance with the law.<sup>200</sup> The Court has held that a statute forbidding or requiring an act must not be so vague that “men of common intelligence must necessarily guess at its meaning and differ as to its application.”<sup>201</sup> Unconstitutional vagueness extends the vagueness doctrine to the due process clauses of the Fifth and Fourteenth Amendments, with courts holding that vague criminal laws deprive citizens of rights without fair process, and such laws are thus, unconstitutional.<sup>202</sup> In 1971, the Florida Supreme Court struck down the state’s sodomy law as “unconstitutional for vagueness and uncertainty in its language,” holding that a reasonable person could not know for certain whether the statute prohibited oral sex (or if it was restricted to only anal penetration) as an “abominable and detestable crime against nature.”<sup>203</sup>

Unfortunately, clear affirmative consent statutes, though aiming to clarify consent rules, have instead muddied the waters and made it less clear what speech or conduct is required to avoid violation of the policy. Although courts have typically applied the unconstitutional vagueness test to criminal statutes for violation of due process, it would likely be applicable even in non-criminal statutes governing university policies because the Supreme Court has recognized, though never explicitly held, that university students have property and liberty rights in their education that are protected

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<sup>199</sup> *Welch v. United States*, 136 S. Ct. 1257, 1261–62 (2016) (noting that the void-for-vagueness doctrine is “a doctrine that is mandated by the Due Process Clauses of the Fifth Amendment (with respect to the federal government) and the Fourteenth Amendment (with respect to the States).”) (citing *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015)).

<sup>200</sup> *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 393 (1926) (holding that a statute imposing severe punishments on State contractors paying employees less than the “current rate of per diem wages in the locality where the work is performed,” was void for vagueness and uncertainty, presenting a “double uncertainty, fatal to its validity as a criminal statute”).

<sup>201</sup> *Id.* at 391.

<sup>202</sup> *Franklin v. State*, 257 So. 2d 21, 24 (Fla. 1971).

<sup>203</sup> *Id.*

by the Constitution.<sup>204</sup> In 1975, the Court considered due process rights of students at the elementary and secondary levels, holding that a suspension without a hearing violated due process guaranteed by the Fourteenth Amendment.<sup>205</sup> Lower courts have expanded *Goss*, holding that university students have a liberty and property interest in their education, and attempts to deprive students of those interests—through suspension or expulsion—must comport with due process.<sup>206</sup>

Because students' education rights are protected under due process, the unconstitutional vagueness doctrine would apply to both criminal clear affirmative consent statutes and statutes governing university sexual assault policies.<sup>207</sup> Particularly with sexual communication, it is difficult, if not impossible, to determine what clear or unambiguous consent looks like at the margins, particularly when many statutes require continuous consent.

Clearly, asking for verbal consent, "may I kiss you?" and receiving a verbal "yes" would constitute clear affirmative consent for kissing. But, as the sexual encounter escalates, clear consent must be continually obtained. While some activity can be clearly distinguished from another activity (for instance, consent obtained for kissing is not sufficient to be considered consent for intercourse), lines cannot be drawn so clearly for many of the varying degrees of sexual activity. For example, if consent has been obtained for kissing, must separate consent also be obtained to wrap arms around a partner? If consent has been granted to remove clothing, must consent also be obtained to now touch the exposed skin? Once a particular sexual activity has commenced, how often must consent be renewed to remain in compliance with continuous consent requirements? Answers to these questions are elusive and amount to speculation at best. Therefore, many of these policies would be unconstitutionally vague and unenforceable.

## 2. Dangers of Clear Affirmative Consent as the Criminal Standard

Even in the criminal arena, there has been significant pushback from the legal community in response to proposed changes to the Model Penal Code's ("MPC") definition of affirmative consent.<sup>208</sup> In May 2016, the American Law Institute ("ALI") rejected a definition of consent for the MPC that would move it closer to affirmative

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<sup>204</sup> *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

<sup>205</sup> *Id.* at 574 ("Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.")

<sup>206</sup> *See, e.g., Albert v. Carovano*, 824 F.2d 1333, 1339 n.6 (2d Cir. 1987) ("A preliminary question here would be whether the appellants have been deprived of any constitutionally protected rights by their suspension. Although the students' complaint does not specify which rights they claim to have been deprived of, we note that, at a minimum, the students' protected liberty interest is at stake because of the 'stigma' attached to suspension from college for disciplinary reasons.") (citing *Goss*, 419 U.S. at 574–76).

<sup>207</sup> *Yoder v. Univ. of Louisville*, 526 F. App'x 537, 547 n.4 (6th Cir. 2013).

<sup>208</sup> Jennifer Morinigo, *The Evolution of the Model Penal Code "Consent" Definition*, ALI ADVISER (Sept. 6, 2016), <http://www.thealiadviser.org/sexual-assault/evolution-of-model-penal-code-consent-definition/>.

consent.<sup>209</sup> In 2014 and 2015, the ALI Annual Meeting drafts for proposed changes were the same, and included the following definition of “consent” in section 213.0(3): “‘Consent’ means a person’s positive agreement, communicated by either words or actions, to engage in sexual intercourse or sexual contact.”<sup>210</sup> This definition was hotly debated at the 2015 Annual Meeting, with critics arguing that, as written, the definition adopted an affirmative consent standard and “strayed too far from existing cultural norms.”<sup>211</sup> As a result, the committee returned to the 2016 Annual Meeting with a new, more convoluted definition:

(a) “Consent” means a person’s behavior, including words and conduct—both action and inaction—that communicates the person’s willingness to engage in a specific act of sexual penetration or sexual contact . . .

(c) Consent may be express, or it may be inferred from a person’s behavior. Neither verbal nor physical resistance is required to establish the absence of consent; the person’s behavior must be assessed in the context of all the circumstances to determine whether the person has consented.

(d) Consent may be revoked any time before or during the act of sexual penetration or sexual contact, by behavior communicating that the person is no longer willing. A clear verbal refusal—such as “No,” “Stop,” or “Don’t”—suffices to establish the lack of consent. A clear verbal refusal also suffices to withdraw previously communicated willingness in the absence of subsequent behavior that communicates willingness before the sexual act occurs.<sup>212</sup>

One hundred and twenty members signed a letter to ALI, urging members to vote no, voicing concerns about due process and burden-shifting caused by the proposed definition, as well as the dangers of criminalization of consensual sexual activity. The ALI members wrote:

The prosecutor need only say, ‘Ladies and Gentlemen of the Jury, under the State’s definition, it does not matter whether the complainant actually was willing. It is undisputed that the sex act occurred and there is no evidence in the record that the complainant communicated willingness. There is no consent if the complainant has not communicated willingness.

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<sup>209</sup> 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/>.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

You must convict if you find that the defendant recklessly disregarded that absence of consent.<sup>213</sup>

### 3. Constitutional Right to Privacy

Currently, the constitutional right to privacy is held to reside in due process. However, the Supreme Court previously recognized a “penumbra” of right to privacy in the guarantees of the Bill of Rights, including in the First Amendment.<sup>214</sup> The Court struck down a Connecticut law prohibiting the sale, possession, and distribution of contraception to married couples holding that it was unnecessarily broad, and thus unconstitutionally intruded upon the right of marital privacy.<sup>215</sup> The Court offered multiple justifications for this decision, ranging from Justice Douglas’s penumbra theory, stating that without “peripheral rights,” other constitutional rights would be “less secure,”<sup>216</sup> to Justice Goldberg’s interpretation that the Ninth Amendment provides justification for protecting privacy,<sup>217</sup> to Justice Harlan’s argument that the Fourteenth Amendment’s liberty clause proscribed this kind of far-reaching state action.<sup>218</sup>

In 1972, the Court extended the right to privacy to even unmarried individuals by invalidating a law prohibiting distribution of contraceptives to unmarried persons.<sup>219</sup> The Court found the law to be in conflict with fundamental human rights and stated, “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>220</sup>

The Supreme Court even concluded, in a unanimous decision, that the right to privacy protects an individual’s right to possess and view otherwise unprotected obscenity in his own home.<sup>221</sup> Justice Marshall relied on both the First and Fourth Amendments to conclude that no matter the justifications for obscenity laws, those justifications do not reach into the sanctity of the home.<sup>222</sup> “If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole

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<sup>213</sup> *Over 110 ALI Members Express Concerns About Sexual Assault Project*, CRIMPROFBLOG (Apr. 18, 2016), [http://lawprofessors.typepad.com/crimprof\\_blog/2016/04/over-110-ali-members-express-concerns-about-sexual-assault-project.html](http://lawprofessors.typepad.com/crimprof_blog/2016/04/over-110-ali-members-express-concerns-about-sexual-assault-project.html).

<sup>214</sup> *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

<sup>215</sup> *Id.* at 485–86.

<sup>216</sup> *Id.* at 482–83.

<sup>217</sup> *Id.* at 487 (Goldberg, J., concurring).

<sup>218</sup> *Id.* at 500–01 (Harlan, J., concurring).

<sup>219</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>220</sup> *Id.* at 453.

<sup>221</sup> *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

<sup>222</sup> *Id.*

constitutional heritage rebels at the thought of giving government the power to control men's minds."<sup>223</sup>

Over time, the Court has moved away from the “penumbra” theory of right to privacy, shifting in favor of a constitutional right to privacy residing in the liberty guarantees of the Fifth and Fourteenth Amendments under substantive due process.<sup>224</sup> In *Roe v. Wade*, the Court held that the “right of privacy . . . founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action” is a fundamental right and any state regulation must therefore be subjected to strict scrutiny.<sup>225</sup> In *Lawrence*, Justice Kennedy stated:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. ‘It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.’<sup>226</sup>

The clear affirmative consent standard regulates not just speech between persons prior to sexual encounters, but throughout one of the most intimate experiences in human existence. Clear affirmative consent standards intrude into the most private portion of the home, the bedroom—and indeed—the bed itself. These policies clearly violate the constitutional right to privacy between two consenting adults.

#### V. CONCLUSION

Affirmative consent has garnered both support and opposition. Both proponents and critics, though, tend to confuse the issues and misunderstand what an affirmative consent policy does—or does not do—as well as falsely equate affirmative consent as a substantive standard versus an adjudicative standard. Affirmative consent, generally, does not represent a substantial modification of currently existing rape and sexual assault law in most jurisdictions. However, policies that further require that affirmative consent be clear or unambiguous do represent a considerable change.

As substantive policies, affirmative consent policies are positive and encourage people to not only communicate prior to engaging in sexual encounters, but to check for understanding. They also decrease the possibility of error or confusion, thus ensuring a more positive sexual experience for all involved. Teaching young people that affirmative consent is the only appropriate benchmark for initiating sexual activity is important and may well be transformative.

However, as an adjudicative standard, clear affirmative consent policies do not resolve—or even simplify—the difficulties currently faced in university sexual assault disciplinary hearings: determining what happened and then deciding if what happened amounts to proper consent. Further, clear affirmative consent standards, as currently

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<sup>223</sup> *Id.*

<sup>224</sup> See, e.g., *Kline ex rel. Arndt v. Mansfield*, 454 F. Supp. 2d 258, 263 (E.D. Pa. 2006).

<sup>225</sup> 410 U.S. 113, 153 (1973) (“This right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

<sup>226</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)).



written and implemented, increase the dangers of policing sex, are overbroad, violate the constitutional guarantee of free speech and the privacy rights of consenting adults, and are unconstitutionally vague. These policies violate essential rights and freedoms and do not solve the problems inherent with current interpretations of consent law. Rape and sexual assault continue to be significant, growing problems on college campuses and efforts to prevent and punish these kinds of incidents should be applauded. Those efforts should not, however, trample liberty in the process.