THE BURDEN OF CONSENT: DUE PROCESS AND THE EMERGING ADOPTION OF THE AFFIRMATIVE CONSENT STANDARD IN SEXUAL ASSAULT LAWS

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The recent adoption of the "affirmative consent" standard in California and New York for sexual assault on state-run university campuses has placed a renewed focus on rape reform. Moreover, the American Law Institute has proposed revisions to the Model Penal Code's sexual assault provisions for the first time since 1961; these revisions, in part, adopt affirmative consent at the misdemeanor level. This Note explores the due process considerations of an affirmative consent standard in both the university and the constitutionally protected criminal arenas. Specifically, this Note explicates which party must prove consent and the effect of that burden on constitutional guarantees. Such analysis is necessarily statute-driven; however, this Note also uses property and contract doctrines to rebut some commonly held presumptions about consent and the burden of proof. This Note argues that if the burden of proving consent were placed on the defense (as an affirmative defense), such a burden would not violate constitutional due process—provided the prosecution has proved the elements of the crime. Moreover, this Note argues that consent as an affirmative defense would reconcile the disparate consent standards for crimes against a person's sexual autonomy and his or her property.

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INTRODUCTION

In the summer of 2015, as Donald Trump's presidential campaign was becoming an incendiary media focal point, allegations surfaced that decades earlier, Trump had raped his then-wife, Ivana. Coming to the candidate's defense, Trump's lawyer Michael J. Cohen asserted, "[U]nderstand that by the very definition you cannot rape your spouse . . . [a]nd there's very clear case law."[1] Cohen's recollection of rape law is not necessarily erroneous.[2] Rather, it is a

1. *See, e.g.*, Janell Ross, *Trump's Lawyer Defended Him by Saying You Can't Rape a Spouse. That's Not True.*, WASH. POST (July 28, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/07/28/trumps-lawyer-defended-him-by-saying-you-cant-rape-a-spouse-thats-not-true/.

2. The Model Penal Code still retains spousal exceptions. MODEL PENAL CODE § 213.1 (AM. LAW INST. 1962); *see also* Jill Elaine Hasday, *Donald Trump's Lawyer was Right: In Some Places, Raping Your Wife is Still Treated Like a Minor Offense*, WASH. POST (July 29, 2015), https://www.washingtonpost.com/posteverything/wp/2015/07/29/donald-trumps-lawyer-was-right-in-some-places-raping-your-wife-is-still-treated-like-a-minor-offense/ ("Unfortunately, Cohen's broad declaration was less wrong than we'd like to think.

symptom of the general disconnect between rape law and a rape victim's actual path to justice under that law.[3]

Although not as provocative as Trump himself, recent legislation in California[4] and New York[5] adopting an "affirmative consent" standard (dubbed by some as "yes means yes")[6] for state-run universities created a fervor among both legal critics and political commentators.[7] However, this fervor, largely, has not yet reached the American Law Institute's ("ALI") proposed revisions to the sexual assault article of the Model Penal Code ("MPC"), although ALI has recommended adopting the affirmative consent standard in criminalizing sexual penetration without consent at a misdemeanor grade.[8] The act previously carried no criminal sanction.[9] In general, affirmative consent dictates that sexual consent must be affirmative and ongoing throughout sexual activity.[10] But the legal determination

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All states prosecute some forms of marital rape in theory. But in reality, statutes criminalizing marital rape are often inadequate. They also remain dramatically and disproportionately under-enforced."); Danielle Paquette, *Nearly Half of the States Treat Married Women Differently When It Comes to Rape*, WASH. POST (July 29, 2015), http://www.washingtonpost.com/news/wonkblog/wp/2015/07/29/the-ancient-sexist-roots-of-what-donald-trumps-adviser-said-about-rape/ ("Only in 1993 did sexual assaults within marriage become outlawed in every state. And nearly half still don't offer married women the same protections granted to single women. At least 23 states make it harder for a wife to accuse her husband for rape. Some states require clear evidence of violent force. Others give married women a smaller window to report an assault. Many dole out lighter punishments to convicted husbands.").

3. *See* Amanda Marcotte, *What the Trump and Cosby Allegations Reveal About Rape Culture*, ROLLING STONE (July 28, 2015), http://www.rollingstone.com/politics/news/what-the-trump-and-cosby-allegations-reveal-about-rape-culture-20150728 ("There's this myth that lingers in American society that rape is just a matter of men getting a little too excited about sex and forgetting to get consent first. Many people still talk about rape like it's a thing men do by accident, perhaps because they were confused. Or they blame "hook-up culture" for rape, suggesting that the overabundance of lust in the world is the problem, rather than men deliberately choosing to have sex with women who are unwilling or unable to consent.").

4. *See* CAL. EDUC. CODE § 67386 (West 2016); *see also Student Safety: Colleges and Universities: Hearing on SB 967 Before the Assembly Comm. on Judiciary*, 2013–2014 Reg. Sess. (Cal. 2014), http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0951-1000/sb_967_cfa_20140615_135446_asm_comm.html (providing full bill for S.B. 967 as presented to the legislature).

5. *See* N.Y. EDUC. LAW § 6441 (McKinney 2016); *see also* A08244, 201 Leg., Reg. Sess. (N.Y. 2015), http://assembly.state.ny.us/leg/?default_fld=&bn=A08244&term=2015&Summary=Y&Text=Y (providing full bill for A08244 as presented to the legislature).

6. *See, e.g.*, Nicholas J. Little, Note, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1321 (2005).

7. *See infra* Part II.

8. *See* MODEL PENAL CODE: SEXUAL ASSAULT & RELATED OFFENSES (AM. LAW INST., Discussion Draft No. 2 2015) [hereinafter Discussion Draft 2].

9. MODEL PENAL CODE § 213.4 (AM. LAW INST. 2015).

10. *See* Little, *supra* note 6, at 1345.

of what constitutes affirmative consent is unclear, thereby promoting controversy and criticism.

Criticism of the affirmative consent standard falls into three general categories of concerns: (1) that the affirmative consent standard will increase the success and number of false accusations;[11] (2) that it is unworkable;[12] and (3) that it violates due process and the presumption of innocence.[13] This Note primarily addresses the third criticism within the criminal arena and argues three points in doing so. First, that the due process concerns arising out of the recent legislation in California and New York are largely a result of the limited nature of university tribunals and would not arise in criminal proceedings.[14] Second, that the ALI's proposed revisions to the MPC maintain the constitutional safeguards owed to criminal defendants because it places the burden of proving affirmative consent on

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11. *See, e.g.*, George Will, *Colleges Become the Victims of Progressivism*, WASH. POST (June 6, 2014), https://www.washingtonpost.com/opinions/george-will-college-become-the-victims-of-progressivism/2014/06/06/e90e73b4-eb50-11e3-9f5c-9075d5508f0a_story.html ("[Colleges and universities] are learning that when they say campus victimizations are ubiquitous . . . , and that when they make victimhood a coveted status that confers privileges, victims proliferate."); *see also* Robert Carle, *How Affirmative Consent Laws Criminalize Everyone*, THE FEDERALIST (Mar. 30, 2015), http://thefederalist.com/2015/03/30/how-affirmative-consent-laws-criminalize-everyone/ ("Affirmative consent laws trivialize sexual assault by turning nearly everyone who has ever dated into a sexual offender.").

12. *See, e.g.*, Dan Subotnik, *Hands Off: Sex, Feminism, Affirmative Consent, and the Law of Foreplay*, 16 S. CAL. REV. L. & SOC. JUST. 249, 284 (2007) ("The important point for our purposes is that if a no is, psychologically speaking, not always 'no,' a yes and an ambiguous response have even less claim to be treated as 'no.'"); *see also FIRE Statement on "Affirmative Consent" Bill*, FIRE (Feb. 13, 2014), https://www.thefire.org/fire-statement-on-california-affirmative-consent-bill/ ("Further, SB 967 massively compounds the problem of determining whether a sexual assault has occurred by mandating 'affirmative consent,' a confusing and legally unworkable standard for consent to sexual activity."); Megan McArdle, *Affirmative Consent Will Make Rape Laws Worse*, BLOOMBERG: VIEW (July 1 2015, 4:40 PM), http://www.bloombergview.com/articles/2015-07-01/-affirmative-consent-will-make-rape-laws-worse ("I'm struggling to know how a man (or a woman) could ever be fully sure that they were not breaking the law. Even affirmative consent can, after all, presumably be withdrawn at any time—without a clear 'no,' under the prevailing thinking about affirmative consent.").

13. *See, e.g.*, Robert Shibley, *U's 'Yes Means Yes' Policy is Obviously Flawed*, STAR TRIB. (Aug. 13, 2015, 7:08 PM), http://www.startribune.com/u-s-yes-means-yes-policy-is-obviously-flawed/321829881/ ("These may make good sense as guidelines on how to conduct one's sex life. But when they become binding rules that are adjudicated by campus courts, they effectively render students guilty until proven innocent."); *see also* David Bernstein, *You are a Rapist; Yes You!*, WASH. POST: THE VOLOKH CONSPIRACY (June 23, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/23/you-are-a-rapist-yes-you/ ("The DOJ website definition makes almost every adult in the U.S. (men AND women)—and that likely includes you, dear reader—a perpetrator of sexual assault."); Masha Gershman, *The Underside of "Affirmative Consent"*, THE AM. INT. (Oct. 19, 2015), http://www.the-american-interest.com/2014/10/19/the-underside-of-affirmative-consent/ ("The edict also all but eradicates due process.").

14. *See infra* Part II.

the prosecution.[15] Finally, even if the MPC placed the burden of proving affirmative consent on the defendant, doing so would not violate constitutional due process or the presumption of innocence. This Note will use an analogy to property and contract doctrines, where the burden of proving consent rests upon the defendant,[16] to demonstrate that a criminal defendant charged with rape is the proper party to bear the burden of proving the defense of affirmative consent.

In the course of discussion, this Note makes a number of presumptions to focus its analysis on due process and to avoid debating the merit of an affirmative consent standard. For example, this Note presumes that rape is underreported,[17] undercounted by law enforcement,[18] and under-prosecuted.[19] This Note also defines rape as any form of nonconsensual sex.[20] Moreover, following the Supreme Court's holding in *Lawrence v. Texas*,[21] this Note operates under the

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15. *See infra* Part III.

16. *See infra* Part IV.

17. *See* Discussion Draft 2, *supra* note 8, at 19 (citing CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION 1 (2002)) ("Studies consistently show that only a minority of sexual assaults (from a low of 16% in some studies to no more than 42% in others) are ever reported to the police, the lowest reporting rate among all the serious crimes."); *see also Rape and Sexual Assault Higher Among College-Age Nonstudent Females than Female College Students in 1995–2013*, BUREAU OF JUSTICE STATISTICS (Dec. 11, 2014, 10:00 AM EST), http://www.bjs.gov/content/pub/press/rsavcaf9513pr.cfm ("Rape and sexual assault victimizations were more likely to go unreported to police among victims who were college students (80%) than nonstudents (67%).").

18. *See* Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1248 (2014) ("Instead, a conservative estimate of an additional 796,213 to 1,145,309 forcible rapes of women have been reported to authorities, but police have hidden them from the public record, thereby feeding the myth of the 'great decline' in rape.").

19. *See* PATRICIA TJADEN & NANCY THOENNES, U.S. DEPT. OF JUSTICE, EXTENT, NATURE AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 33 (2006), https://www.ncjrs.gov/pdffiles1/nij/210346.pdf ("According to victim accounts, [37%] of the rapes against women that were reported to the police resulted in the rapist being criminally prosecuted."); *see also* Lewis Field, *The Fear of the Vindictive Shrew: Using Alternative Forms of Punishment to Change Societal Sentiment About Rape Laws*, 17 J. GENDER RACE & JUST. 515, 515 (2014) ("only three percent of rapists ever spend a day in jail.").

20. *See, e.g.*, Online Video: *Model Penal Code: Sexual Assault and Related Offenses*, at 1:23, AM. LAW INST., https://www.ali.org/projects/show/sexual-assault-and-related-offenses/ (last visited Aug. 7, 2016) ("It has become clear over this period [since 1962], the essence of rape is the absence of consent.").

21. In *Lawrence v. Texas*, the Court held, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." 539 U.S. 558, 562 (2003). Moreover, individual autonomy is a foundational principle within the MPC. *See* Discussion Draft 2, *supra* note 8, at 52 ("[The MPC's] embrace of an affirmative consent requirement is grounded in the increasing recognition that sexual assault is an offense against the core value of individual autonomy, the individual's right to control the boundaries of his or her sexual experience, rather than mere exercise of physical dominance."); *see also* Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE

assumption that the law of sexual assault should not be understood to pursue the punishment of physical dominance so much as to protect the fundamental right to individual autonomy.

With these definitions, presumptions, and assumptions in mind, this Note develops over five parts. In Part I, this Note examines the purpose and origin of affirmative consent. In Part II, this Note then addresses affirmative consent policies of state universities and the due process concerns that flow from them. In Part III, this Note discusses the ALI's proposed amendments to the MPC as they relate to affirmative consent and due process concerns. In Part IV, this Note compares the consent standards found in contract and property to those found in criminal law. Finally, in Part V, this Note provides guidance for drafting a workable and constitutional affirmative consent standard.

I. THE ORIGINS AND PURPOSE OF AFFIRMATIVE CONSENT

In order to properly assess whether recent and proposed rape reform can withstand due-process scrutiny, it is necessary to address the origins of the affirmative consent standard and to evaluate the rationale behind such rape law reform. Early proponents of rape law reform focused on consent as a response to the limitations of the common-law force standard.[22] The common law required a showing of both lack of consent and force.[23] Force could be proved by actual evidence of physical harm, or constructively through either the proof of a threat of force that would reasonably induce fear,[24] or the victim's resistance or fear that would overcome a victim's reasonable attempts to resist.[25] The force standard placed the burden of proof on the victim, rather than the alleged perpetrator, which the court would use an objective standard to evaluate.[26] Thus, if a court found a

335, 337–38 (2013) (stating that modern rape law protects "sexual agency" as distinct from autonomy, emphasizing "self-definition and self-direction").

22. *See* Lucy R. Harris, Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 613 (1976); *see also* Robin D. Wiener, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143, 143–44 (1983) ("Traditionally, criminal statutes defined rape as sexual intercourse with a woman without her consent, and 'without her consent' was generally considered synonymous with 'by force.'").

23. State v. Atkins, 666 S.E.2d 809, 812 (N.C. Ct. App. 2008) ("At common law rape occurred when there was sexual intercourse by force and without the victim's consent.").

24. State v. Alston, 312 S.E.2d 470, 476 (N.C. 1984) ("Threats of serious bodily harm which reasonably induce fear thereof are sufficient [to satisfy the force requirement of rape].").

25. Rusk v. State, 406 A.2d 624, 625 (Md. Ct. App. 1979) (citing Hazel v. State, 157 A.2d 922, 925 (Md. Ct. App. 1979), *rev'd*, 424 A.2d 720 (Md. 1981) ("[T]he evidence must warrant a conclusion either that the victim resisted and her resistance was overcome by force or that she was prevented from resisting by threats to her safety").

26. *Id.* at 486 (Wilmer, J., dissenting) ("Thus it is that the focus is almost entirely on the extent of resistance The victim's acts, rather than those of her assailant. Attention is directed not to the wrongful stimulus, but to the victim's reactions to it. Right or wrong, that seems to be the current state of the Maryland law.").

victim's level of fear as unreasonable, or amount of resistance insufficient, the alleged rapist would go free.[27]

Aside from the evidentiary and procedural problems of rape law, the affirmative consent standard can also be understood as a response to the far reaches of an entrenched patriarchy.[28] Regardless of whether the force standard was purposed against (or retained in spite of) women, the affirmative consent standard was to provide a remedy (or at least justice) to victims of rape, whose circumstances lacked evidence sufficient to support force.[29] Indeed, it was this requirement of force that contributed to the underreporting, undercounting, and under-prosecution of rape.[30] In this sense, what the law sought to criminalize created common circumstances for perpetrators of rape to escape criminal scrutiny,[31] and what the law demanded procedurally further insulated those it sought to punish.[32]

Even as jurisdictions attempted to move towards some form of a consent standard, they did so in the "no-means-no" form.[33] Rather than require a potential

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27. *See, e.g.*, *Alston*, 312 S.E.2d at 470. *But see Rusk*, 424 A.2d 720 (reversing the trial court on the grounds that there was sufficient evidence to support the victim's reasonable fear of bodily harm).

28. *See* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 644 (1983) ("The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender, through its legitimizing norms, relation to society, and substantive policies."); *see also* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 588 (2009) ("Sexist gender norms were woven into the very fabric of rape law in the form of iniquitous obstacles to prosecution such as resistance and corroboration requirements."); Lani Anne Remick, *Read Her Lips: An Argument for A Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1105 (1993) ("[R]ape law currently operates in the context of a sexually coercive society.").

29. *See* Wiener, *supra* note 22, at 146 ("A court must confront the question of what constitutes reasonable behavior only if it recognizes that force need not be physical, or if it applies a sexual assault statute that criminalizes sexual relations without consent, defining lack of consent either as 'clearly expressed by the victim's words or conduct' or as a lack of 'words or overt actions' expressing consent.").

30. *See* Harris, *supra* note 22, at 615 ("Because of the personal burdens and potential embarrassment involved in both investigation and trial, and perhaps because of the low probability of obtaining a conviction, a large proportion of rape victims do not report the crime at all. When an alleged rape is reported, police often 'unfind' the complaint on the ground that the evidence available would not hold up in court.").

31. *See* Remick, *supra* note 28, at 1104 ("[T]he law of rape is founded on a paradigm of violent stranger rape which fails to clearly proscribe less violent rapes or rapes in which some elements of a consensual sexual encounter are present.").

32. *See* Harris, *supra* note 22, at 616 ("Much of this failure can be attributed to the legal rules that determine how a charge of rape is tried and punished.").

33. *See* Wiener, *supra* note 22, at 144–45 ("Although the typical American rape statute still requires that the act be compelled by force or threat of force and be against the woman's will, courts currently apply an objective—'reasonable person'—standard to determine whether the force used was sufficient to amount to compulsion, whether the act was against the woman's will, and whether to believe a perpetrator's claims that he thought the woman consented."); *see also* Little, *supra* note 6, at 1322 ("Central to the consideration of consent has been the much-affirmed concept that 'no means no.'").

rape victim to physically resist, no-means-no allowed for criminalization only when a victim had expressed refusal.[34] Although the no-means-no standard turned on consent, any ambiguity in communicating such a refusal weighed against the victim.[35] Affirmative consent, by contrast, is a way to alleviate the problem of miscommunication[36] and supplies a clear directive: anything less than "yes" does not qualify as consent.[37]

A. Antioch University's Sexual Offense Policy

Although affirmative consent was part of legal scholarship throughout the 1980s, it was not until 1991 that a private educational institution, Antioch University, attempted to codify affirmative consent.[38] Antioch University's "Sexual Offense Policy" provided:

> 1. For the purpose of this policy, "consent" shall be defined as follows: the act of willingly and verbally agreeing to engage in specific sexual contact or conduct.

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34. *See* Little, *supra* note 6, at 1322 ("In short, the standard means that, if an individual verbally rejects sexual advances, that person must be seen as withdrawing consent to sexual contact.").

35. *See, e.g.*, United States v. Saunders, 943 F.2d 388, 392 (4th Cir. 1991) ("A defendant's reasonable, albeit mistaken, belief that the victim consented may constitute a defense to rape."); People v. Williams, 841 P.2d 961, 965 (Cal. 1992) ("[A] defendant must adduce evidence of the victim's *equivocal* conduct on the basis of which he erroneously believed there was consent") (emphasis added); *see also* Weiner, *supra* note 22, at 146 ("[A] woman may believe she has communicated her unwillingness to have sex—and other women would agree, thus making it a 'reasonable' female expression. Her male partner might still believe she is willing—and other men would agree with his interpretation, thus making it a 'reasonable' male interpretation.").

36. *See* Harris, *supra* note 22, at 1147 ("[H]is discrepancy would be corrected by a law recognizing that a reasonable man, knowing the high likelihood of miscommunication that characterizes nonverbal cues and appreciating the grave harm of subjecting a woman to nonconsensual sex, would avail himself of a less ambiguous expression of consent, that is, verbal consent.").

37. *See* Little, *supra* note 6, at 1345 ("An affirmative consent standard requires that, for sex to be considered consensual, it must have been consented to by the woman in advance. In short, if the instigator of a sexual interaction wishes to do anything, he or she must inquire whether his or her partner wishes that to be done, and that partner must receive freely given consent to continue. In the absence of such consent, the activity cannot be seen as voluntary for both parties."); *see also* Harris, *supra* note 22, at 1147 ("It also sends a *clear message* to every man that when he has sex with a woman who willingly states her consent, he is not raping her; when he has sex with a woman who has verbally expressed her unwillingness, he is violating her rights, raping her, and breaking the law. If she has expressed neither consent nor nonconsent, he has an obligation to inquire into the situation further before proceeding." (emphasis added)).

38. *See, e.g.*, Michael Kimmel & Gloria Steinem, *'Yes' Is Better Than 'No'*, N.Y. TIMES, Sept. 5, 2014, at A27; *see also 'Ask First' at Antioch*, N.Y. TIMES: OPINION (Oct. 11, 1993), http://www.nytimes.com/1993/10/11/opinion/ask-first-at-antioch.html; Ada Calhoun, *The Antioch Rules' Sexual Offence Prevention Policy,* 90SWOMAN.COM (June 3, 2010, 11:10 AM), https://90swoman.wordpress.com/2010/06/03/the-antioch-rules-sexual-offence-prevention-policy/.

> 2. If sexual contact and/or conduct is not mutually and simultaneously initiated, then the person who initiates sexual contact/conduct is responsible for getting the verbal consent of the other individual(s) involved.
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> 3. Obtaining consent is an on-going process in any sexual interaction. Verbal consent should be obtained with each new level of physical and/or sexual contact/conduct in any given interaction, regardless of who initiates it. Asking "Do you want to have sex with me?" is not enough. The request for consent must be specific to each act.
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> 4. The person with whom sexual contact/conduct is initiated is responsible to express verbally and/or physically her/his willingness or lack of willingness when reasonably possible.
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> 5. If someone has initially consented but then stops consenting during a sexual interaction, she/he should communicate withdrawal verbally and/or through physical resistance. The other individual(s) must stop immediately.
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> 6. To knowingly take advantage of someone who is under the influence of alcohol, drugs and/or prescribed medication is not acceptable behavior in the Antioch community.
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> 7. If someone verbally agrees to engage in specific contact or conduct, but it is not of her/his own free will due to any of the circumstances stated in (a) through (d) below, then the person initiating shall be considered in violation of this policy if:
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> > a) the person submitting is under the influence of alcohol or other substances supplied to her/him by the person initiating;
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> > b) the person submitting is incapacitated by alcohol, drugs, and/or prescribed medication;
> >
> > c) the person submitting is asleep or unconscious;
> >
> > d) the person initiating has forced, threatened, coerced, or intimidated the other individual(s) into engaging in sexual contact and/or sexual conduct.[39]

The complexity of the Antioch policy gives insight into the difficulty of determining what constitutes affirmative consent.[40] It may place too high a burden on those seeking consent, where asking, "Do you want to have sex with me?" is

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39. *See* David S. Hall, *Consent for Sexual Behavior in College Student Population: Appendix A*, ELECTRONIC J. OF HUM. SEXUALITY VOL. 1 (Aug. 10, 1998), http://www.ejhs.org/volume1/conseapa.htm; *see also* Alan G. Soble, *Antioch's 'Sexual Offense Policy': A Philosophical Exploration*, 28 J. SOC. PHIL. 22, 25–26 (1995) (quoting Antioch's Policy on Sexual Assault).

40. Arun Rath & Kristine Herman, *The History Behind Sexual Consent Policies*, NPR (Oct. 5, 2014, 5:05 PM), http://www.npr.org/2014/10/05/353922015/the-history-behind-sexual-consent-policies ("At Antioch we really focused on defining consent in a very different way and asking a very different question, which is did somebody say yes?").

not enough. This is complicated by the requirements that communication of consent must be ongoing. Moreover, the Antioch policy requires that the initiation must be simultaneous, yet the party initiating the sexual contact has a different burden of communication than the other party. Moreover, if both parties engage in a sexual act simultaneously, determining who initiated the act is indeed problematic. On the other hand, the policy is wrought with protections for potential victims of rape, where an alleged rapist has a high burden in meeting the conditions for acquiring consent.

Not unlike the backlash to the recent legislation in California and New York,[41] the Antioch policy was met with both scholarly[42] and public outcry. For example, *Saturday Night Live* produced a skit entitled "Is it Date Rape?"[43] The skit portrayed a mock game show featuring a veritable cascade of date rape clichés with the following categories: "Halter Top"; "She Was Drunk"; "I Was Drunk"; "Kegger"; "Off-Campus Kegger"; "She Led Me On"; "I Paid For Dinner"; and "Ragin' Kegger."[44] This skit served to emphasize to the American public that such a standard would, in effect, kill the mood.[45] The skit implicitly criticizes the apparent rigidity of Antioch's reliance on a verbal consent standard;[46] however, some scholars asserted that there was room for implied consent.[47]

The distinction between verbal consent and implied consent impacts how a fact-finder determines whether an individual consented to sexual contact. Under a verbal consent standard, consent may only be communicated by words—a strict standard that would make a fact-finder's task of determining consent less

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41. *See infra* Part II.

42. *See, e.g.*, Soble, *supra* note 39, at 39; *see also* Eva Feder Kittay, *AH! My Foolish Heart: A Reply to Alan Soble's "Antioch's 'Sexual Offense Policy': A Philosophical Exploration*, 28 J. SOC. PHIL. 153, 153 (2008) (responding to Soble's critiques of Antioch's Sexual Assault Policy).

43. *Saturday Night Live*, S. 19, EP. 2 (NBC television broadcast Oct. 2, 1993); *Is It Date Rape*, SATURDAY NIGHT LIVE TRANSCRIPTS, http://snltranscripts.jt.org/93/93bdaterape.phtml (last visited Sept. 14, 2016) [hereinafter *Is It Date Rape*] (transcripts of the same skit).

44. *Is It Date Rape*, *supra* note 43.

45. *See* Nicolaus Mills, *How Antioch College Got Rape Right 20 Years Ago*, DAILY BEAST (Dec. 10, 2014, 3:45 AM), http://www.thedailybeast.com/articles/2014/12/10/how-antioch-solved-campus-sexual-offenses-two-decades-ago.html ("The premise of the sketch was that sex was too spontaneous to be regulated, and the quiz show played that idea to the hilt.").

46. *See* Soble, *supra* note 39, at 26 ("Similarly, the verbal request for, and the verbal consent to, sexual contact must be not only explicit, but also specific for any sexual act that might occur"); *see also* Amanda O. Davis, *Clarifying the Issue of Consent: The Evolution of Post-Penetration Rape Law*, 34 STETSON L. REV. 729, 754 (2005) ("The victim's initial consent may be given expressly but also implied by actions, because it is impractical to suggest a set of rules, such as the Antioch Code, in which sexual partners must gain affirmative consent in order to advance in stages of intimacy.").

47. *See* Kittay, *supra* note 42, at 154 ("Therefore, contrary to Soble's reading, we are not always obliged to obtain verbal consent, not forced to 'mix the pleasures of language with the pleasures of the body' if the sex is mutually initiated.").

nuanced.[48] In contrast, the implied consent standard allows a fact-finder to consider the actions and circumstances surrounding the communication of consent—a nebulous standard that would require a fact-finder to assess the totality of the circumstances, the subjective understandings of the people involved, and the objective reasonableness of those understandings.[49]

Even for proponents of affirmative consent, the formalism of the Antioch policy is unworkable.[50] However, a standard that allows for implied consent might recreate the same problems of subjectivity and miscommunication that undermined the no-means-no standard.[51] Indeed, rape reform struggles to balance the need for manageable standards against the need to protect those exposed to harm.

B. New Jersey's Interpretation of Sexual Assault

A year after Antioch instituted its policy, the New Jersey Supreme Court resisted finding implied consent in *State* ex rel. *M.T.S.*[52] Although the controlling New Jersey statute did not codify affirmative consent,[53] the court reasoned that the suggestion that consent need not be freely given "would directly undermine the goals sought to be achieved by [the sexual assault law's] reform."[54] The New Jersey Supreme Court utilized the following test:

> The fact[-]finder must decide whether the defendant's act of penetration was undertaken in circumstances that led the defendant reasonably to believe that the alleged victim had freely given affirmative permission to the specific act of sexual penetration. Such

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48. *See* Remick *supra* note 31, at 1117 ("Since proof of sexual activity combined with a woman's verbal nonconsent, or even her lack of verbal consent, are intended to be *dispositive* under the redefinition of the consent standard." (emphasis added)).

49. *See* Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 67–68 (1995) ("Of course, drawing inferences from physical action is always somewhat ambiguous. Physical actions are even more prone to be misinterpreted in the heat of passion, or when people are motivated more by fantasy than reality."). *Compare* Remick *supra* note 31, at 1125 ("[T]here may be slight or no correlation between actual consent and behavior from which a jury deduces consent."), *with* Alan Wertheimer, *What Is Consent? And is it Important?*, 3 BUFF. CRIM. L. REV. 557, 574 (2000) ("I believe that [the problem with implied consent] is much ado about very little. Nothing problematic will follow from construing any behavior or act of omission as a token of consent so long as its meaning is clear.").

50. Christina Rudolph, *California Senate Bill 967 Does Not Make Everyone a Rapist: Proposed Guidelines for Analyzing its Ambiguities*, 36 U. LA. VERNE L. REV. 299, 307–08 (2015) ("This formalistic way of determining the existence of consent eliminates the necessity of making a finding based on the surrounding circumstances of a sexual encounter.").

51. *See supra* text accompanying note 32.

52. State *ex rel.* M.T.S., 609 A.2d 1266, 1279 (N.J. 1992) (holding that force required for second-degree sexual assault need not be extrinsic to the penetration, and permission to engage in sexual penetration must be affirmative and must be freely given).

53. N.J. STAT. ANN. § 2C:14-2(c)(1) (West 2016) ("An actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances: . . . The actor uses physical force or coercion, but the victim does not sustain severe personal injury.").

54. *M.T.S.*, 609 A.2d at 1278.

> 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.[55]

In *M.T.S.*, a seventeen-year-old defendant and a fifteen-year-old victim had engaged in consensual kissing and "heavy petting," after which the defendant physically penetrated the victim without her consent.[56] There was nothing to suggest that the defendant applied any other physical force beyond the penetration itself.[57]

In applying this test, the *M.T.S.* court reasoned that "neither the alleged victim's subjective state of mind nor the reasonableness of the alleged victim's actions can be deemed relevant to the offense."[58] The court avoided the subjectivity problem by employing a reasonable-person test from the vantage point of the defendant.[59] Although it set an objective, reasonable-person test, the court failed to clearly identify the circumstances, actions, or words that would constitute implied consent.[60]

Just as Antioch's policy did not lead to more universities adopting the affirmative consent standard, the *M.T.S.* test was not readily adopted by New Jersey courts. Instead, they avoided utilizing the *M.T.S.* test by interpreting subjectivity back into the statute[61] or distinguishing the defendant's actions from those that constitute rape.[62] Additionally, the Supreme Court of Idaho, in *State v. Jones*, refused to adopt the "no extrinsic force" necessary beyond penetration standard set out in *M.T.S.*, despite similarly worded statutes in that state.[63] The *Jones* court found that the *M.T.S.* test rendered the statutory force requirement moot, and stated that it would not write such a requirement out of the statute.[64]

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55. *Id.*
56. *Id.* at 1267.
57. *Id.*
58. *Id.* at 1279.
59. *Id.*
60. *See* Rudolph, *supra* note 50, at 310 ("Although the court explained that consent could be inferred from the surrounding circumstances, what types of non-verbal actions can be inferred as consenting to sexual activity?").
61. State v. Garron, 827 A.2d 243, 259 (N.J. 2003) ("Defendant's state of mind was directly at issue. How defendant's prior relationship with J.S. affected his state of mind was critical to the ultimate determination of the jury.").
62. State v. Thomas, 731 A.2d 532, 534 (N.J. Super. Ct. App. Div. 1999) (distinguishing on the basis that defendant "only admitted to touching the victim in her 'vaginal area,' but he did not admit to any penetration and there was no factual finding of a penetration."; State v. Lee, 9 A.3d 190, 193 (N.J. Super. Ct. App. Div. 2010) (distinguishing on the basis that there was no issue of "bodily integrity of the victim").
63. State v. Jones, 299 P.3d 219, 228 (Idaho 2013).
64. *Id.* at 229 ("Were we to construe 'force' as encompassing the act of penetration itself, it would effectively render the force element moot.").

II. AFFIRMATIVE CONSENT ON CAMPUS

The recent legislation in California[65] and New York[66] marked the first instances of state or federal legislatures codifying affirmative consent, even if only for the limited purpose of university tribunals.

A. California's Law on Sexual Assault at State Universities

Similar to the reaction to Antioch's policy, the California legislation received adamant criticism,[67] though the criticism focused on due process.[68] Despite the critiques directed at Antioch's policy, the California law adopted similar statutory language, which invited similar critiques.[69] Section 67386 of the California Education Code provides:

> An affirmative consent standard is the determination of whether consent was given by both parties to sexual activity. "Affirmative consent" means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. 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.[70]

Although the statute does not evoke the verbal consent language, the statute creates a difficult burden in proving implied consent. The requirement that "each person ensure that he or she has the affirmative consent of the other" gives very little room for implied consent. If consent was obtained by *implication*, it suggests that the initiator did not ensure *affirmative* consent. At minimum, this

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65. *See* CAL. EDUC. CODE § 67386 (West 2016).

66. *See* N.Y. EDUC. LAW § 6441 (McKinney 2016).

67. *See, e.g.*, Ashe Schow, *Five Problems with California's 'Affirmative Consent' Bill*, WASH. EXAMINER (Aug 28 2014, 8:00 AM), http://www.washingtonexaminer.com/5-problems-with-californias-affirmative-consent-bill/article/2552537; *Sex and the College Student: A Bill in Sacramento to Require 'Affirmative Consent' by Both Partners is Problematic.* L.A. TIMES, 29 May 2014 at A.12.

68. *Compare* Tamara Rice Lave, *Affirmative Consent and Switching the Burden of Proof*, PRAWFSBLAWG (Sept 3, 2015), http://prawfsblawg.blogs.com/prawfsblawg/2015/09/affirmative-consent-and-switching-the-burden-of-proof.html (criticizing putting the burden of proving consent on the defense), *with* Corey Yung, *Affirmative Consent and Burden Shifting*, CONCURRING OPINIONS (Sept. 3, 2015), http://concurringopinions.com/archives/2015/09/affirmative-consent-and-burden-switching.html#more-101373 (claiming that the burden of proving consent would not necessarily be on the defense in an affirmative consent standard).

69. *See, e.g.*, Jake New, *The Yes Means Yes World*, INSIDE HIGHER ED (Oct. 17, 2014), https://www.insidehighered.com/news/2014/10/17/colleges-across-country-adopting-affirmative-consent-sexual-assault-policies (criticizing "every step of the way" language).

70. *See* CAL. EDUC. CODE § 67386(1).

standard would preclude a reasonable belief defense, where a defendant could claim that he or she reasonably, but mistakenly, believed that he or she had obtained affirmative consent. However, the statute does suggest that evidence of a past dating or sexual relationship between the persons involved could be considered—though not exclusively—in determining consent. This suggests that a fact-finder could determine affirmative consent from the totality of the circumstances. Any objective test, however, would not evaluate whether a reasonable person would believe he or she had consent, but whether a person had reasonably ensured affirmative consent was given. Thus, Section 67386 refocuses the analysis away from the alleged victim's behavior to what the defendant did or did not do—the proper target of criminal scrutiny.

B. New York's Law on Sexual Assault at State Universities

In contrast to California's statutory language, Section 6441(1) of New York's Education Law provides:

> 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. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.[71]

The New York statute, in asserting that "consent can be given by words or actions," is more permissive in finding implied consent than California's statute.[72] Additionally, the New York statute does not apply the same burden of ensuring consent—though the statute's use of "a *knowing*, voluntary and mutual decision" and "*clear* permission" create a similar, though perhaps watered-down, burden in satisfying the statute's version of affirmative consent.[73] However, applying the reasonableness standard here would seem to turn once again on the victim's actions—where a fact-finder would determine whether reasonable knowledge of consent had been clearly given from the point of view of the accused. Put differently, if the victim claims that he or she did not consent, a New York court could still find that, from the totality of the circumstances, an accused person reasonably knew otherwise. In this sense, a reasonable-belief defense might still be available.

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71. N.Y. EDUC. LAW § 6441(1).

72. *Compare* CAL. EDUC. CODE § 67386(1) ("Lack of protest or resistance does not mean consent, nor does silence mean consent."), *with* N.Y. EDUC. LAW § 6441(1) ("Consent can be given by words or actions.").

73. N.Y. EDUC. LAW § 6441(1) (emphases added).

C. Criticisms of Affirmative Consent standard at Universities and the Implications of Affirmative Consent standard on Due Process

Although the California and New York statutes differ facially, and likely operatively, initial critiques of the more recent New York statute are similar in spirit to those of the California statute.[74] Thus, this Section spotlights the criticism of the California consent statute.

Critics of California's affirmative consent legislation suggest that the statute's requirements are yet another example of the government regulating what should be private behavior.[75] Indeed, many critics take issue with California's "every step of the way" provision.[76] As one commentator avers, "It is not ridiculous to wonder how one could go about offering repeated affirmations while maintaining the momentum of the encounter."[77] Further, another commentator suggests that affirmative consent laws, like those of New York and California, would reduce the initiation of sex to the contractual exchange between a prostitute and her client.[78] Although these policy arguments might hold some sway in the public forum (a matter for the legislature to consider), the basis of the argument—

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74. *Compare* Joseph Cohn, *NY Legislators and Governor Strike a Not-So-Grand Deal on Campus Sexual Assault Bill*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (June 24, 2015), https://www.thefire.org/ny-legislators-and-governor-strike-a-not-so-grand-deal-on-campus-sexual-assault-bill-2/ ("But an affirmative consent standard will result in judicial procedures that focus less on whether the individuals involved actually consented to the sexual activity and more on whether they can prove it."), *with FIRE Statement on California "Affirmative Consent" Bill*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Feb. 13, 2014), https://www.thefire.org/fire-statement-on-california-affirmative-consent-bill/ ("Under this mandate, a student could be found guilty of sexual assault and deemed a rapist simply by being unable to prove she or he obtained explicit verbal consent to every sexual activity throughout a sexual encounter.").

75. *Sex and the College Student; a Bill in Sacramento to Require 'Affirmative Consent' by both Partners is Problematic*. L.A. TIMES (May 29, 2014), A12 ("But is there a role for the government in mandating affirmative consent? It seems extremely difficult and extraordinarily intrusive to micromanage sex so closely as to tell young people what steps they must take in the privacy of their own dorm rooms").

76. *See, e.g.*, New, *supra* note 69 ("John Banzhaf, a law professor at George Washington University, said, the idea that students would ask for permission at every point of a sexual encounter is 'unreasonable.'").

77. Elizabeth Stoker Bruening, *Sex is Serious: Affirmative Consent Laws Miss the Point*, BOS. REV., Jan.–Feb. 2015, at 64.

78. *See* Bernstein, *supra* note 13 ("There is one type of sexual relationship that, as I understand it, involves primarily explicit consent–the relationship between a prostitute and her (or his) clients, with exact sexual services to be provided determined by explicit agreement in advance"); *see also* Hands Bader, *Senator McCaskill and Obama Administration Bureaucrats: Most Americans are Rapists*, LIBERTY UNYIELDING (June 26, 2014), http://libertyunyielding.com/2014/06/26/senator-mccaskill-obama-administration-bureaucrats-americans-rapists-sexual-assaulters/ ("By contrast, grudgingly consensual sex acts, like those between a prostitute and her clients, are generally preceded by explicit discussion and verbal agreement, because one party wants sex, while the other merely puts up with it to obtain money or other benefits. A verbal request followed by an explicit "yes" often reflects an imbalance in sexual desire between partners, not the ideal in which both partners deeply want it.").

that the law seeks to change the behavior of those who would not change it themselves—is not a legal defense. Criminal laws do not seek to simply punish morally culpable behavior, they seek to deter that behavior at the outset.[79]

However, many other critics take issue with the legal repercussions of California's affirmative consent law.[80] At issue is whether the affirmative consent standard creates a presumption of guilt or otherwise comprises the constitutional due process protections of the accused.[81] Critics ask how an innocent person would prove that he or she had obtained affirmative consent.[82] Adding fuel to the incendiary fervor, one of the California bill's co-sponsors, Assemblywoman Bonnie Lowenthal, responded to such a question with, "Your guess is as good as mine."[83] Furthermore, K.C. Johnson, history professor and co-author of *Until Proven Innocent: Political Correctness and the Shameful Injustice of the Duke Lacrosse Case*, maintains that the only way for the accused to truly prove consent is by "recording the entire sexual encounter."[84]

Although such criticism overstates the proof problem, it does illuminate the California statute's ambiguity regarding who has the burden to prove affirmative consent or lack thereof. Because the statute is silent about who must prove affirmative consent, scholars and commentators do not agree on the issue of with whom the burden rests.[85] The assumption on the part of many critics is that such a burden would fall to the defendant[86] and would result in a de facto presumption of guilt.[87] On the one hand, placing the burden of proving affirmative consent on the accused would seem to criminalize sexual intercourse itself, leaving the prosecution's burden of persuasion entirely satisfied by proof that sexual penetration had occurred (hence the alleged presumption of guilt).[88] On the other

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79. *See* Discussion Draft 2, *supra* note 8, at 14 (discussing the "high value of deterring" rapists).

80. *See infra* text accompanying notes 80–89.

81. *See, e.g.*, Robert Carle, *How Affirmative Consent Threatens Liberty*, REASON.COM (Feb. 3, 2015), http://reason.com/archives/2015/02/03/how-affirmative-consent-rules-threaten ("[Affirmative consent laws] establish a presumption of guilt and strip the accused of due process protections.").

82. *See id.*; *see also* Spencer Case, *Should Guilt and Innocence Matter on Campus*, NAT'L REV. (JUNE 16, 2014, 2:26 PM), http://www.nationalreview.com/article/380486/should-guilt-and-innocence-matter-campus-spencer-case ("Institutions of higher education should not be able to punish a student as a sexual pariah on the basis of a mere 55 percent confidence in that student's guilt.").

83. *See* Schow, *supra* note 67.

84. *Id.*

85. *Compare* Rice Lave, *supra* note 68 ("I don't see how making a person prove that her partner consented doesn't switch the burden of proof to the accused."), *with* Yung, *supra* note 68 ("I'm not persuaded by the argument that affirmative consent standards switch the burden of proof to the defendant.").

86. *See, e.g.*, Rice Lave, *supra* note 68.

87. *See, e.g.*, Carle, *supra* note 81; Schow, *supra* note 67.

88. Although there would not be a presumption of innocence, critics perhaps go too far in suggesting that there is presumption of guilt, because the State would still have to overcome its burden. *See* BRETT A. SOKOLOW & DANIEL C. SWINTON, COREY MOCK V. THE UNIVERSITY OF TENNESSEE, CHATTANOOGA 2–4 (2015),

hand, placing the burden on the State to prove a lack of affirmative consent may cut against refocusing the analysis away from the alleged victim to the accused. California's mandate that a person must ensure that they have obtained affirmative consent may alleviate this problem; the State would need to prove that the accused did not take reasonable steps to ensure affirmative consent, and as a defense, the accused could prove that he obtained affirmative consent in spite of not taking such necessary steps.

Regardless of who has the burden of proving consent,[89] a defendant's right to the presumption of innocence is not implicated in tribunal hearings. Because the allegations of rape would be adjudicated in a university tribunal, the constitutional protections for criminal defendants would not apply.[90] However, it is because of the limitations of university tribunals that due process concerns arise, not because of the affirmative consent standard itself. In fact, much of the criticism of affirmative consent is buttressed by the due process implications unique to university tribunals.[91] Some commentators take issue with the preponderance standard employed at university tribunals (as opposed to the "beyond a reasonable doubt" standard),[92] while other commentators take issue with the lack of discovery available to the accused and the inability to confront witnesses in university adjudications, such as proscribed by Harvard's sexual harassment policy.[93]

In general, procedural due process implications in state-run, noncriminal proceedings are governed by *Matthews v. Eldridge*,[94] where the State's interest is weighed against the claimant's property interests and the probability of a more accurate outcome given the amount of procedure requested.[95] Courts have recognized that the right to continued higher education is such a property interest,

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https://www.ncherm.org/wordpress/wp-content/uploads/2012/02/2015-UTC-Due-Process.pdf. If the State presented no case, the accused would not be presumed guilty. *Id.*

89. For a discussion of who should bear the burden to prove affirmative consent in criminal proceedings, see *infra* Parts III and IV.

90. *See, e.g.*, *infra* note 97 and accompanying text.

91. *See infra* note 97 and accompanying text (discussing the limited and flexible approach to due process that prevails in administrative hearings).

92. *See, e.g.*, Case, *supra* note 82 ("The preponderance standard essentially means that California universities will be forbidden to give accused students the benefit of the doubt that is accorded in criminal court proceedings.").

93. Debra Cassens Weiss, *28 Harvard Law Profs Blast New Sexual-Assault Policy as 'Stacked Against the Accused*", ABA J. ONLINE (Oct. 16, 2014, 8:24 AM CDT), http://www.abajournal.com/news/article/28_harvard_law_profs_blast_new_sexual_assault_policy_as_stacked_against_the ("According to [Harvard] professors, the [Harvard sexual assault] policy does not give the accused an adequate opportunity to discover the facts charged, to confront witnesses and to present a defense at an adversary hearing."). Although Harvard is a private university, which alters due-process considerations, *see* SOKOLOW & SWINTON, *supra* note 88, at 4 (explaining the differences between tribunals and criminal law due process), the arguments here apply to tribunals in state-run universities. *Id.* (explaining that tribunals make findings by a totality of the circumstances and place no burden of proof on either party).

94. 424 U.S. 319 (1976).

95. *Id.* at 335.

and that it deserves procedural due process protection.[96] However, because *Eldridge* holds that procedural due process is flexible to the demands of the particular situation,[97] exactly what process is required by university hearings changes from jurisdiction to jurisdiction.[98]

D. University Adjudication of Affirmative Consent and Due Process: A Case Study

Recently, in *Mock v. University of Tennessee at Chattanooga*, a Tennessee court held that a university student's procedural due process rights were violated when the university improperly shifted the burden of proving affirmative consent to the accused.[99] In *Mock*, after a long night of drinking, the accused and the alleged victim engaged in sexual intercourse.[100] The alleged victim recalled little of the events,[101] and asserted that she did not consent to sexual intercourse.[102] The University of Tennessee at Chattanooga ("UTC") Chancellor, who expelled the accused, found that "there [was] no suggestion that [the alleged victim] gave any indication, verbal or non-verbal, that [the alleged victim] consented to [the accused] performing vaginal intercourse."[103]

Mock is procedurally complex; an Administrative Law Judge ("ALJ") conducted a hearing and found, at first, that the State had not carried its burden of proving sexual assault by preponderance.[104] However, upon a petition for reconsideration, the ALJ reversed her ruling, despite the lack of any new factual findings, and held that the accused had violated the university's Standard of

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96. *See, e.g.*, Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988) ("[S]tudent facing expulsion or suspension from a public educational institution is entitled to the protections of due process.").

97. *Eldridge*, 424 U.S. at 335.

98. *Compare* Gomes v. Univ. of Me. Sys., 304 F. Supp. 2d 117, 128 (D. Me. 2004) ("In order to satisfy procedural due process requirements, in connection with the discipline of a state university student, (1) the student must be advised of the charges against him, (2) he must be informed of the nature of the evidence against him, (3) he must be given an opportunity to be heard in his own defense, (4) he must not be punished except on the basis of substantial evidence, (5) he must be permitted the assistance of a lawyer, at least in major disciplinary proceedings, (6) he must be permitted to confront and to cross-examine the witnesses against him, and (7) he must be afforded the right to an impartial tribunal, which shall make written findings."), *with* Martin v. Sizemore, 78 S.W.3d 249, 264 (Tenn. Ct. App. 2001) (holding that due process has no specific requirements other than "a fair trial before a neutral or unbiased decision-maker").

99. Mock v. Univ. of Tenn. at Chattanooga, No. 14-1687-II, slip op. at 23 (Tenn. Ch. Ct. Aug. 10, 2015), https://kcjohnson.files.wordpress.com/2013/08/memorandum-mock.pdf.

100. *Id.* at 5.

101. *Id.* at 4.

102. *Id.* at 5.

103. *Id.*

104. *Id.* at 2.

Conduct.[105] After reviewing the ALJ's findings, the UTC Chancellor expelled the accused, leading to the accused's petition for judicial review.[106]

The relevant provision in *Mock*, UTC Standard of Conduct 7 ("SOC 7"), contains language that is similar to California's definition for affirmative consent on campus:

> "Sexual assault" is defined as any sexual act or attempt to engage in any sexual act with another person without the consent of the other person, or in circumstances in which the person is unable to give consent due to age, disability, or an alcohol/chemical or other impairment. . . . It is the responsibility of the person initiating sexual activity to ensure the other person is capable of consenting to the activity. Consent is given by an affirmative response or acts that are unmistakable in their meaning. Consent to one form of sexual activity does not mean consent is given to another type of activity.[107]

The dispute in *Mock* centered on whether the UTC Chancellor's reading of the policy that the initiator's responsibility to "ensure" consent also meant that the accused had to carry the burden of proving that consent.[108] The court found that the policy language did not shift the burden to the accused.[109] Further, the court held that the erroneous shift was a violation of procedural due process.[110] In doing so, the court reasoned that the burden on the accused was insurmountable,[111] evoking similar language to that of critics of the affirmative consent standard:[112] "Absent the tape recording of verbal consent or other independent means to demonstrate that consent was given, the ability of an accused to prove the complaining party's consent strains credulity and is illusory."[113]

However, commentators from the National Center for Higher Risk Management ("NCHERM") and the Association of Title IX Administrators question whether the burden was shifted at all, and whether ambiguity may have

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105. *Id.*

106. *Id.* at 3.

107. TENN. COMP. R. & REGS. 1720-02-05-.04(7) (2016).

108. *Mock*, slip op. at 11 ("Parties agreed that the burden of proof was on the Dean to produce evidence to persuade the finder of fact by preponderance of the evidence that Mr. Mock violated SOC 7. Nonetheless, the UTC Chancellor referenced a number of periodical and newspaper articles in his Order to interpret SOC 7 as to impose upon Mr. Mock a duty to prove an affirmative consent.").

109. *Id.* ("However, this does not shift the burden of proof to Mr. Mock to disprove the charges against him.").

110. *Id.* ("The UTC Chancellor's interpretation of SOC 7 and his implantation of that rule erroneously shifted the burden of proof onto Mr. Mock, when the ultimate burden of proving a sexual assault remained on the charge party . . . . This procedure is flawed and untenable if due process is to be afforded the accused.").

111. *Id.* at 12 (The accused "must come forward with proof of an affirmative verbal response that is credible in an environment in which there are seldom, if any, witnesses.").

112. *See* Schow, *supra* note 67.

113. *Mock*, slip op. at 12.

resulted from poor documentation given the complex procedure of the case.[114] Additionally, NCHERM notes that criminal understandings[115] of the burden of proof do not necessarily apply to university tribunals:

> A more modern way to look at this issue is to acknowledge that a burden of proof, as a legalistic concept, doesn't apply to the campus conduct process at all. In fact, when assessing a discrimination claim, universities are obligated to weigh the totality of the evidence, from whatever source. That's our burden of proof, by another name. The use of a burden of proof as a legalism is thus misplaced, existing only as an analog of the legal proceedings some campus conduct processes resemble.[116]

Whether the ALJ erroneously shifted the burden at the initial hearing is not dispositive, however, because the UTC Chancellor's basis for expulsion was founded on the assumption that the burden was indeed on the accused.[117] Therefore, NCHERM cautions that *Mock*'s precedential value is small because its holding is unique to the Tennessee law and Tennessee university adjudication.[118]

Due process implications notwithstanding, the *Mock* court's rationale is demonstrative of the necessity to guard against flexible consent standards. In spite of the ALJ's factual finding that "there [was] no suggestion that [the alleged victim] gave [the accused] any indication, verbal or non-verbal, that she consented,"[119] and the UTC Chancellor's assertion "[t]hat there was no evidence that Mr. Mock did anything to 'ensure' that [the alleged victim] was able to consent,"[120] the *Mock* court asserted, "As noted by the UTC Chancellor her silence does not constitute 'yes.' By the same reasoning, it does not constitute 'no.'"[121] The *Mock* court seems to eschew the basis of the affirmative consent doctrine that consent is not given unless it is affirmative and unmistakable.[122]

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114. *See* SOKOLOW & SWINTON, *supra* note 88, at 2 ("There remains a fair question in our view about whether UTC in fact shifted the burden or whether its poor documentation of the decision led the court to so infer, when in fact it did not do so.").

115. *See id.* at 4 ("Criminal law analogies don't even hold up, because the university is not prosecuting or actively seeking to find someone responsible.").

116. *Id.* at 2.

117. *See Mock*, slip op. at 11 ("The UTC Chancellor's interpretation of SOC 7 and his implantation of that rule erroneously shifted the burden of proof onto Mr. Mock.").

118. SOKOLOW & SWINTON, *supra* note 88, at 1 ("This is a low-level state chancery court decision applying Tennessee laws and procedures to the University of Tennessee, Chattanooga (UTC). The precedential value of the case as a chancery decision is minimal; the decision only applies to public universities in Tennessee, and it is still subject to appeal by the university.").

119. *Mock*, slip op. at 5.

120. *Id.* at 13.

121. *Id.* at 15.

122. TENN. COMP. R. & REGS. 1720-02-05-.04(7) (2016) ("Consent is given by an affirmative response or acts that are unmistakable in their meaning.").

The *Mock* court also criticizes the UTC Chancellor for ignoring the ALJ's concerns about the alleged victim's credibility on the issue of intoxication.[123] However, if the alleged victim was not as intoxicated as she indicated, it increases the credibility of her assertion that she did not give consent. Although the alleged victim's memory was admittedly foggy,[124] she did remember "Mr. Mock on top of her, a strong pain, an effort to say 'ow' and Mr. Mock's hand attempting to quiet her. She stated that she did not consent to sexual relations."[125] Even if the claimant had consented prior to that point, the statute's implication is that consent can be withdrawn at any time.[126]

The *Mock* court, despite its assertion that the accused would need to have recorded the event to meet his burden, found a basis for affirmative consent outside the ALJ's factual findings: "[The accused] testified as to two acts by [the alleged victim] that were unmistakable in their meaning: taking off her bra and helping to position him to penetrate her. The record contains evidence that [the accused] had secured [the alleged victim's] consent through her specific actions."[127] Without examining the evidentiary record, it is impossible to determine whether the acts (the removal of the bra, and assisting to position the accused for penetration) were in dispute. Given, however, that the alleged victim's memory was foggy, it is unlikely she factually corroborated these acts. Furthermore, the first act—the removal of the bra or the exposing of breasts—that the *Mock* court deems as an unmistakable act of affirmative consent falls precisely within the kinds of acts the affirmative consent standard seeks to draw the court's attention away from in determining consent.[128] The university policy explicitly states that, "Consent to one form of sexual activity does not mean consent is given to another type of activity."[129] Therefore, the removal of a bra (an act independent of sexual intercourse) should not be construed as an act constituting consent.

Indeed, the Standard of Conduct's use of "unmistakable" is meant to safeguard against the abuse of totality-of-circumstance and reasonable-person discretion. However, NCHERM notes that language such as "unmistakable" is unwise, as it indicates absolute certainty,[130] and that terms like "clear, knowing, and voluntary" are better suited for the purposes of sexual assault.[131] NCHERM suggests that such language might serve to undercut its designed purpose in that

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123. *Mock*, slip op. at 13 ("[UTC Chancellor] failed to address the credibility determination of the ALJ"); *Id.* at 15 ("[T]he ALJ concluded there was no clear evidence that [the alleged victim] was intoxicated or drugged during the incident in question.").

124. *Id.* at 13 ("[The claimant] described her memory as being 'like a fog.'").

125. *Id.* at 18.

126. TENN. COMP. R. & REGS. 1720-02-05-.04(7) ("Consent to one form of sexual activity does not mean consent is given to another type of sexual activity.").

127. *Mock*, slip op. at 16.

128. *See supra* text accompanying notes 30–35 and 68–70.

129. TENN. COMP. R. & REGS. 1720-02-05-.04(7).

130. SOKOLOW & SWINTON, *supra* note 88, at 5 ("The use of an absolute term like "unmistakable" is unwise in a policy context. Unmistakable connotes absolute certainty—and good luck with that in a sexual context.").

131. *Id.* ("More appropriate terms are 'clear, knowing and voluntary.' Even affirmative consent laws use the term "unambiguous" rather than "unmistakable.").

judges might be motivated to read against the statute, as the *Mock* court seems to have done.[132]

The *Mock* decision is a unique example in that it attempts to grapple with the due process implications of the affirmative consent standard. But *Mock* also demonstrates the resistance to that standard and reinforces the pattern of construing evidence against a finding of no consent. NCHERM explained the results of *Mock* this way: "The court may have assumed that a 'Yes Means Yes' policy on consent automatically shifts the legal burden, which is an erroneous assumption, but one that many foes of 'affirmative consent' policies want you to believe is inherent in such policies."[133]

III. THE ALI'S REVISION TO THE MPC'S PROVISION ON SEXUAL ASSAULT

A. The Need for Reform

As some state legislatures mandate the affirmative consent standard for state university adjudication, the ALI is working to reform the MPC's provision on sexual assault to include, at least in part, an affirmative consent standard.[134] The MPC's current provision, astonishingly, has not been updated since it was originally drafted in 1962,[135] and even the revisions to the commentary are considered outdated.[136]

The ALI's proposed revisions are quite expansive, including separate provisions for varying degrees of force and consent.[137] In justifying the expansive

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132. *Id.* ("The formulation [with the term 'unmistakable' that] UTC uses is popular on some campuses, but definitely (and understandably) rankled the judge here.").

133. *Id.* at 2.

134. *See* Discussion Draft 2, *supra* note 8.

135. CAROL E. TRACY ET AL., RAPE AND SEXUAL ASSAULT IN THE LEGAL SYSTEM 5 (2013), http://www.womenslawproject.org/resources/Rape%20and%20Sexual%20Assault%20in%20the%20Legal%20System%20FINAL.pdf ("Written in 1962, the MPC defines rape as 'sexual intercourse with a female not his wife' by force or threat of severe harm."); *see also* Model Penal Code § 213.1 (AM. LAW INST. 1962) (discussing the need for revision of the 1962 sexual assault code).

136. Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 207 (2003) ("[T]he Code's sexual offense provisions and even its 1980 revised Commentaries 2 were already considered outdated.").

137. The proposed sections and subsections of the MPC are as follows: Section 213.1(1) *Aggravated Forcible Rape*; Section 213.1(2) *Forcible Rape*; Section 213.2(1) *Sexual Penetration Against the Will*; Section 213.2(2) *Sexual Penetration Without Consent*; Section 213.3(1) *Rape of a Vulnerable Person*; Section 213.3(2) *Sexual Penetration of a Vulnerable Person*; Section 213.4(1) *Sexual Penetration by Coercion*; Section 213.4(2) *Sexual Penetration by Exploitation*; Section 213.5 *Sexual-Penetration Offenses Against Children*; Section 213.6(1) *Aggravated Criminal Sexual Contact*; Section 213.6(2) *Forcible Criminal Sexual Contact*; Section 213.6(3) *Criminal Sexual Contact Without Consent*; and Section 213.7 *Criminal Sexual Contact with a Child*. *See* Discussion Draft 2, *supra* note 8, at 1–6.

reform project, Lance Liebman, director of the ALI, wrote that the sexual assault provisions "must be reconsidered in light of experience and changed values."[138] However, the drafters realized the innate balancing that the revisions of the MPC's sexual assault provisions demanded:

> No doubt the same concern [that law-reform efforts addressed to the sexual offenses go beyond social standards currently accepted by a good many law-abiding citizens] will be interposed in response to every other revision effort of this sort. And the concern is not always misplaced. Where deeply felt injuries are unappreciated or not uniformly appreciated by the general public, the criminal law may at times properly carry the burden of insuring that appropriate norms of interpersonal behavior are more widely understood and respected. Due weight must be given to the breadth and depth of existing social expectation but also to the gravity of the harms to which individuals are exposed and, as always, the difficult art of the possible. The present revision seeks to strike that complex but unavoidable balance.[139]

The drafters are keenly aware of the criticisms of those resistant to rape reform, and do not necessarily discredit that criticism. Rather, the drafters seek to balance cultural norms with protecting those harms left unaddressed by the current MPC. In this sense, the MPC is anticipatory rather than reactionary.[140]

B. The Model Penal Code and Affirmative Consent

As part of their self-stated goal of addressing "the gravity of the harms to which individuals are exposed," the ALI's revisions to the MPC's provisions on sexual assault have adopted the affirmative consent standard in criminalizing "sexual penetration without consent."[141] ALI explains, "Section 213.2(2)'s embrace of an affirmative consent requirement is grounded in the increasing recognition that sexual assault is an offense against the core value of individual autonomy, the individual's right to control the boundaries of his or her sexual experience, rather than mere exercise of physical dominance."[142] This rationale

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138. Lance Liebman, *Foreword* to MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES, at ix (AM. LAW INST., Tentative Draft No. 1 2014), http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/03_Proposed Revision_MPC213_Excerpt_201405.pdf.

139. Discussion Draft 2, *supra* note 8, at 11.

140. Gerard E. Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OHIO ST. J. CRIM. L. 219, 221 (2003) ("The reactionary political response to the crime wave of the 1970s and 1980s was largely focused on the courts and on constitutional criminal procedure, and not on the substantive criminal law reforms of the MPC as such. Nevertheless, the political need to do something about crime led to a vast increase in precisely the sort of ad hoc criminal legislation that had, over two centuries, created the need for codification in the first place.").

141. *See* Discussion Draft 2, *supra* note 8, at 51 ("Section 213.2(2), together with Section 213.0(3) posits, to the contrary that in the absence of affirmative indications of a person's willingness to engage in sexual activity, such activity presumably is not desired.").

142. Discussion Draft 2, *supra* note 8, at 52.

reflects the Supreme Court's current trend in recognizing that a person's sexual autonomy is a constitutionally protected fundamental right.[143]

In order to follow the Court's lead, the ALI seeks to reverse the traditional premise in law "that individuals are presumed to be sexually available and willing to have intercourse—with anyone, at any time, at any place—in the absence of clear indications to the contrary."[144] The ALI seeks to establish the presumption that in the absence of affirmative consent sexual activity is not desired.[145] The drafted provision incorporating affirmative consent reads:

> **Section 213.2** Sexual Penetration Against the Will or Without Consent
>
> (1) *Sexual Penetration Against the Will.* An actor is guilty of Sexual Penetration Against the Will, a felony of the third degree, if he or she knowingly or recklessly engages in an act of sexual penetration with a person who at the time of such act:
>
> > (a) has expressed by words or conduct his or her refusal to consent to the act of sexual penetration; a verbally expressed refusal establishes such a refusal in the absence of subsequent words or actions indicating positive agreement.
> >
> > (b) is wholly or partly undressed, or is in the process of undressing, for the purpose of receiving nonsexual professional services from the actor, and has not given consent to the act of sexual penetration.
>
> (2) *Sexual Penetration Without Consent.* An actor is guilty of Sexual Penetration Without Consent, a misdemeanor, if the actor knowingly or recklessly engages in an act of sexual penetration with a person who at the time of such act has not given consent to such act.[146]

Unlike the codified university policies on sexual assault,[147] the ALI makes a criminal distinction between *Sexual Penetration Against the Will*, and *Sexual Penetration Without Consent*, with only the latter adopting the affirmative consent standard. ALI "does not endorse the view, reflected for example in the *MTS* decision, that absence of affirmative consent is sufficient to place the

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143. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 558 (2003) ("Liberty presumes an autonomy of self . . . that includes certain intimate conduct.").

144. Discussion Draft 2, *supra* note 8, at 51 ("[I]ndeed this still appears to be the current view in roughly half of American jurisdictions.").

145. *Id.* at 51 ("[T]hat in the absence of affirmative indications of person's willingness to engage in sexual activity such activity presumably is *not* desired.").

146. *Id.* at 2. The definition of consent in the revised version of the MPC, which is codified within 213.0(3), is: "'Consent' means a person's positive agreement, communicated by either words or actions, to engage in a specific act of sexual penetration or sexual contact." *Id.* at 1. The revised MPC further defines consent "as an action, not a state of mind." *Id.* at 30.

147. *See supra* Part II.

misconduct at or near the highest available level for grading purposes."[148] In explaining their rationale for grading Sexual Penetration Without Consent as a misdemeanor, a lower level than other sexual assault crimes, the drafters state, "However unjustifiable, intercourse without affirmative consent is distinctly less reprehensible than intercourse imposed over an express statement of unwillingness."[149] Although the ALI's rationale that an overt disregard of a person's expressed refusal should be punished more severely than a failure to obtain consent makes sense, left unaddressed is why such failure to obtain consent is punished only at the misdemeanor level. Champions of affirmative consent and victims of Sexual Penetration Without Consent likely will find little solace in the fact that a person found guilty of the crime will evade a felony conviction.

Perhaps the decision to grade Sexual Penetration Without Consent below a felony is informed by the ALI's consideration of the part of our society that remains resistant to sexual assault reform. Nonetheless, the ALI does rebut some of the critiques of the affirmative consent standard: "[T]he harm of unwanted sexual imposition greatly exceeds any harm entailed in having to make arguably awkward efforts to clarify the situation or (temporarily) missing an opportunity for a mutually desired encounter, the appropriate default position clearly is to err in the direction of protecting individuals against unwanted sexual imposition."[150] Here, the ALI dismisses critiques—such as those proffered as comedy in the SNL skit[151]—based on the notion that sexual relations would be inextricably altered by the affirmative consent standard. The ALI suggests this argument is, in part, based on the belief that expressions of non-consent can be easily given.[152] Indeed, this is not the case as ALI points to the well-documented phenomenon of "frozen fright," where a person is paralyzed by fear, panic, or anxiety.[153]

C. The Burden and Problems of Proving Consent Under the Model Penal Code's Revisions

Though critics suggest that the affirmative consent standard necessarily places the burden of proving consent upon the defendant,[154] the ALI dispels this notion by dispositively stating: "A prosecutor's burden is to prove beyond a reasonable doubt that no affirmative words or conduct by the complainant

148. Discussion Draft 2, *supra* note 8, at 54–55.

149. *Id.* at 55.

150. Discussion Draft 2, *supra* note 8, at 53.

151. *See Saturday Night Live*, *supra* note 43.

152. Discussion Draft 2, *supra* note 8, at 53 ("[Prevalent are the] circumstances that make expression of unwillingness much more difficult than intuition might suggest.").

153. *Id.* ("[A] person confronted by an unexpectedly aggressive partner or stranger succumbs to panic, becomes paralyzed by anxiety, or fears that resistance will engender even greater danger."); *see also* People v. Barnes, 721 P.2d 110, 117–20 (Cal. 1986) (noting studies that "have demonstrated that while some women respond to sexual assault with active resistance, others 'freeze.' . . . The 'frozen fright' response resembles cooperative behavior.").

154. *See, e.g.*, Judith Shulevitz, *Regulating Sex*, N.Y. TIMES, June 28, 2015, at SR1 ("An affirmative consent standard also shifts the burden of proof from the accuser to the accused, which represents a real departure from the traditions of criminal law in the United States.").

constituted, in light of the totality of the circumstances, positive agreement to engage in the specific conduct at issue."[155] Although placing the burden of proving consent on the prosecution does place the focus on the victim's actions (and thus exposes them to re-traumatization[156]), as opposed to the alleged assailant's actions, the ALI conclusively avoids any due process violations by not placing any burden on the defendant and preserving his or her right to the presumption of innocence.[157] The ALI acknowledges that factual disputes about what words and actions constitute affirmative consent will arise,[158] but also notes that affirmative consent "does not impose on the parties any obligation—as hyperbolic critics sometimes charge—to express their desires in any particular formal terms, much less in writing."[159]

Additionally, any dispute about how to understand an alleged victim's words and conduct are for the jury to resolve.[160] It should be noted, though, that the problems arising from implied consent[161] also emerge from the ALI's codification of affirmative consent, where a fact-finder must use a totality of the circumstances test to determine consent.[162] Namely, a fact-finder could find consent in spite of claimant's honest belief that he or she had not consented. That such a finding is possible is leveraged by the ALI's insistence that consent is "defined as an action, not a state of mind." [163] This is an unfortunate fiction—common sense implores that if a person believes he or she has not consented, indeed, he or she has not consented.

Sexual Penetration Without Consent is a specific-intent crime, thus making available not only the reasonable mistake defense, but also the unreasonable, but honest mistake defense.[164] Furthermore, a claimant's honest

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155. Discussion Draft 2, *supra* note 8, at 54.

156. Beatrice Diehl, *Affirmative Consent in Sexual Assault: Prosecutors' Duty*, 28 GEO. J. LEGAL ETHICS 503, 510 (2015) (citing Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence*, 14 VIOLENCE & VICTIMS 261 (1999)) ("Many criminal trials and criminal-like adjudications in school settings can leave many victims feeling re-traumatized.").

157. Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

158. Discussion Draft 2, *supra* note 8, at 54 ("[A]ny standard invites both factual disputes about what words or conduct occurred and interpretative disputes about how to understand such words and conduct.").

159. *Id.*

160. *Id.* ("[H]ow to understand such words and conduct . . . are the proper province for the jury to resolve.").

161. *See supra* notes 47–51 and accompanying text.

162. Discussion Draft 2, *supra* note 8, at 54 ("A factfinder may judge the existence of such assent on the basis of the totality of the circumstances.").

163. *Id.* at 30.

164. Section 2.04 of the MPC provides:

> (1) Ignorance or mistake as to a matter of fact or law is a defense if: (a) the ignorance or mistake

belief that he or she had not consented also may not trigger a finding of guilt under the ALI's codification because of the possible mistake defenses available to the accused. Since Section 213.2(2) calls for a mens rea of "knowingly" or "recklessly,"[165] if the accused does not know he or she does not have consent (reasonably or not), or the accused does not act with disregard to the known risk that he or she may not have consent, the accused cannot be found guilty of the crime.[166]

Moreover, a person's criminal negligence[167] with regard to consent, where that person makes gross deviation from what a reasonable person would

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> negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.
>
> (2) Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

MODEL PENAL CODE § 2.04 (AM. LAW INST. 1962).

165. Discussion Draft 2, *supra* note 8, at 2.

166. Section 2.02(2) of the Model Penal Code provides:

> (b) Knowingly. A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
>
> (c) Recklessly. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2).

167. Section 2.02(2)(d) of the Model Penal Code provides:

have done, will not trigger Section 213.2(2). This is somewhat contradictory to what the ALI avers. Section 213.2(2) "simply places the onus on the sexually more aggressive party to ensure that each new act is welcome and desired."[168] As is, the provision's language does not seem to place a burden on either party to "ensure" consent. Moreover, the burden to ensure consent is inconsistent with the requisite level of mens rea: a person, by failing to ensure consent, would not *know* that he or she did not have consent. Criminal liability would only be triggered if the person acted with disregard to *his or her knowledge* (i.e. certainty) that by not ensuring consent he or she risked engaging in sex without consent. Essentially, by requiring specific intent, the ALI undercuts one of the chief values of an affirmative standard—protecting "the core value of individual autonomy"[169]—by focusing on the defendant's subjective understanding, and leaving room for the unreasonable mistake defense. Indeed, one's autonomy is worth very little when another person can ignore it by gross negligence or unreasonable belief.

IV. CONSENT AS AN AFFIRMATIVE DEFENSE TO SEXUAL ASSAULT: AN ANALOGY TO OTHER LEGAL DOCTRINES

Although the ALI's proposed revisions to the MPC's sexual assault provisions make a compelling argument for the affirmative consent standard, its efforts leave many exposed to harm unprotected and allow many who are culpable to escape criminal liability. But what should be done? One possible solution is that consent should be proven by the defendant as an affirmative defense. In the following section, this Note will explore the legal basis for consent as an affirmative defense by way of comparison to legal doctrines in property and contracts and to other crimes such as theft.

A. Rape as a Property Crime

To demonstrate the significance of legal property doctrines in rape jurisprudence, recall the assertion by Donald Trump's lawyer that a man cannot rape his wife.[170] Although the marital exception to rape has been found

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> (d) Negligently. A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, *involves a gross deviation from the standard of care* that a reasonable person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(d) (emphasis added).

168. Discussion Draft 2, *supra* note 8, at 52.

169. *Id.*

170. *See supra* notes 1–3 and accompanying text.

unconstitutional by some courts,[171] the MPC still retains the common-law exception: "A male who has sexual intercourse with a female *not his wife* is guilty of rape if . . . ."[172]

The marital exception was justified by two different rationales: first, that the wife had consented through marriage, and second, that the wife was the property of the husband.[173] The implied-consent rationale is traceable to seventeenth-century English jurist Lord Hale's statement, "[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[174] Notwithstanding the prevalent reliance on Lord Hale's statement,[175] Lord Hale cited to no common-law authority for the implied-consent rationale.[176]

However, the other justification for the marital exception to rape—that a woman is the property of her husband—has roots in common law.[177] Indeed, "[i]n English common law, rape was initially seen as a property crime."[178] Historically, rape law protected the husband's or father's property interest in a woman's chastity.[179] Likewise, laws against adultery were premised on the notion that the husband had been wronged.[180] Whether a woman had consented to the adultery—whether or not she had been raped—was immaterial, "[b]ecause the [seventeenth-century common-law] action belonged to the husband for *his loss*."[181]

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171. *See, e.g.*, People v. Liberta, 474 N.E.2d 567, 571 (N.Y. 1984) ("[T]he marital . . . exemption[] must be read out of the statutes prohibiting forcible rape and sodomy.").

172. MODEL PENAL CODE § 213.1(1) (emphasis added).

173. *See Liberta*, 474 N.E.2d at 572–73.

174. *Id.* at 572.

175. *Id.* at 573 ("Lord Hale's notion of an irrevocable implied consent by a married woman to sexual intercourse has been cited most frequently in support of the marital exemption.").

176. *Id.* at 572.

177. *Id.* at 573 ("The other traditional justifications for the marital exemption were the common law doctrines that a woman was the property of her husband.").

178. Little, *supra* note 6, at 1328; *see also* Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1256 (1986) (citing S. BROWNMILLER, AGAINST OUR WILL 8 (1975)) ("Because women were property, the common law treated rape not as a violation of women, but 'as a property crime of man against man.").

179. *Liberta*, 474 N.E.2d at 573 ("Rape statutes historically applied only to conduct by males against females, largely because the purpose behind the proscriptions was to protect the chastity of women and thus their property value to their fathers or husbands.").

180. *Ex parte* Rocha, 30 F.2d 823, 824 (S.D. Tex. 1929) ("Adultery was not, however, regarded as an indictable offense, but as a private wrong, and for the injury sustained the husband had his right of action for damages.").

181. Jeremy D. Weinstein, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 219 (1986).

B. Consent in Contract

If the law is rooted in an understanding that a woman's sexual autonomy (if not herself and her body) is the property interest of some other man (be it her husband or father), it is contract law that dictates the exchange of such property. Within contract law, consent to the transfer of property must pass a rather high bar: mere words are not enough.[182] The English common-law rule was elegantly rephrased by the New York Court of Appeals: "[I]ntention or mere words cannot supply the place of an actual surrender of control and authority over the thing intended to be given."[183] Nearly a century later, the New York Court of Appeals laid out precisely what is necessary for a person to consent to an inter vivos[184] gift:

> First, to make a valid inter vivos gift there must exist the intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee. Second, the proponent of a gift has the burden of proving each of these elements by clear and convincing evidence.[185]

Not only are mere words not enough, but the party who claims to have received consent carries the burden of proof.[186]

C. Consent as an Affirmative Defense to Crimes of Property

Not dissimilar to the burden placed on those seeking to prove the consent of a transfer of property, in many jurisdictions consent is an affirmative defense to some property crimes. For instance, in Florida, "consent is an affirmative defense to the crime of theft,"[187] which courts have extended to the felony of grand theft of a motor vehicle.[188] Moreover, Florida courts assert that "lack of consent is presumed."[189] Similarly, Tennessee codified consent as an affirmative defense to theft, where a defendant must prove by a preponderance of evidence that he or she "[a]cted in the honest belief that [he or she] had the right to obtain or exercise control over the property."[190] Additionally, Florida courts regard consent to enter as an affirmative defense to burglary,[191] and in Michigan, consent is an affirmative

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182. Irons v. Smallpiece, 106 Eng. Rep. 467 (1819) (holding mere verbal agreement was not enough to transfer property).

183. Vincent v. Putnam, 161 N.E. 425, 427 (N.Y. 1928).

184. The transfer of property during one's lifetime. *Inter Vivos*, BLACK'S LAW DICTIONARY (10th ed. 2014).

185. Mirvish v. Mott, 965 N.E.2d 906, 911–12 (N.Y. 2012) (quoting Gruen v. Gruen, 496 N.E.2d 869, 869 (N.Y. 1986)).

186. *Id.*

187. Jones v. State, 666 So. 2d 960, 964 (Fla. Dist. Ct. App. 1996).

188. *Id.*

189. *Id.*

190. TENN. CODE ANN. § 39-14-107(2) (2016); *see also* State v. Davis, No. 01C01-9803-CC-00138, 1999 WL 5436, at *2 (Tenn. Crim. App. Jan. 7, 1999).

191. D.R. v. State, 734 So. 2d 455, 459 (Fla. Dist. Ct. App. 1999) ("Consent to enter is an affirmative defense to burglary. . . . [Defendant] had the burden initially to offer evidence to establish the consent defense.").

defense to the charge of identity theft.[192] Furthermore, the U.S. Supreme Court has held that placing the burden on defendants to prove affirmative defenses by a preponderance of the evidence does not violate the due process protections of criminal defendants.[193]

What should be dismaying is that if a woman's sexual autonomy were still a man's property, the law would afford her sexual autonomy (or his property) greater legal protection than current rape laws do by requiring the defendant to prove consent as an affirmative defense. Instead, current law places the burden on the State to prove a lack of consent.[194] Today, the law does not even go as far as to protect a woman's sexual autonomy as if it were her own property. Indeed, the dollar in her pocket is better protected by criminal law.[195] The irony of the disparate criminal protections under theft and rape has not escaped the notice of rape reform advocates.[196] In fact, NCHERM used theft to demonstrate that obligating the defense to prove consent does not violate constitutional due process:

> A simple illustration of this concept in everyday application is the crime of theft. Theft is an affirmative consent offense, just like sexual misconduct. Taking someone's property without their permission is a theft. Taking someone's sexual property without their permission is sexual misconduct. To avoid being convicted of

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192. MICH. COMP. LAWS § 445.65 (2016); *see also* People v. Sumpter, No. 289835, 2010 WL 4774251, at *13 (Mich. Ct. App. Nov. 23, 2010) ("Consent is an affirmative defense to a charge of identity theft, but a defendant must prove by a preponderance of the evidence that he 'acted with the consent of the person whose personal identifying information was used, unless the person giving consent knows that the information will be used to commit an unlawful act.'"). However, these property crimes are distinct from larceny, which is a specific intent crime, often including "without consent" as an element that the prosecution must prove beyond a reasonable doubt. *See, e.g.*, People v. Ricchiuti, 93 A.D.2d 842, 844 (N.Y 1983) ("A component of this burden is that the People must show that the defendant was aware that his act of taking the owner's property was without the latter's authority or consent. In other words, an appropriation 'under a claim of right made in good faith' should be considered a defense and not an affirmative defense; the burden is on the People to disprove such an allegation.").

193. Patterson v. New York, 432 U.S. 197, 206–07 (1977).

194. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1406(a) (2010) ("A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person.")

195. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1802 (Supp. 2015) (providing that lack of consent is not an element of theft).

196. *See* SUSAN ESTRICH, REAL RAPE 59 (1987) ("[I]f a thief stripped his victim, flattened that victim on the floor, lay down on top, and took the victim's wallet or jewelry, few would pause before concluding forcible robbery."); *see also* Alexandra Wald, *What's Rightfully Ours: Toward A Property Theory of Rape*, 30 COLUM. J.L. & SOC. PROBS. 459, 502 n.3 (1997) (citing Catharine MacKinnon, *Feminist Approaches to Sexual Assault in Canada and the United States: A Brief Retrospective*, *in* CHALLENGING TIMES: THE WOMEN'S MOVEMENT IN CANADA AND THE UNITED STATES 189 (Constance Backhouse & David H. Flaherty eds., 1992)) ("Say you are walking down the street and somebody jumps you and takes your money. The law does not assume you were a walking philanthropist, nor do the police inquire how many times this has happened to you, or whether you gave to United Charities last week.").

> thievery, the taker must get consent before they take someone else's property. Courts have always processed thefts as such, without any difficulty with still imposing the burden on the state to prove the offense. The obligation to obtain consent does not inherently shift the burden of proof in sexual misconduct cases any more than it does in theft, but colleges and universities need to carefully guard their processes to ensure that.[197]

That advice—that colleges and universities need to carefully guard their processes—can be extended to our criminal system, where the challenge of rape reform is not only one of process but also of the statutory language itself.

V. STRATEGIES FOR DRAFTING AN AFFIRMATIVE CONSENT STATUTE THAT PLACES THE BURDEN OF PROVING CONSENT ON THE DEFENDANT

If one of the goals of the affirmative consent standard is to redirect criminal scrutiny from the alleged victim to what the defendant did or did not do,[198] the statutory language needs to reflect that value. As stated above, the ALI's proposed revisions to the MPC do not codify this value, as the drafted statute requires the prosecution to prove the lack of consent beyond a reasonable doubt.[199] However, California's affirmative consent standard for state universities does focus on the accused's actions by utilizing the following language: "It is the responsibility of each person involved in the sexual activity *to ensure* that he or she has the affirmative consent of the other or others to engage in the sexual activity."[200] Rather than focus on consent itself, the statute asks decision-makers to examine what the accused did or did not do to ensure he or she had affirmative consent.

If the "ensure affirmative consent" standard were adopted in a criminal proceeding, the prosecution would need to prove beyond a reasonable doubt that the sexual act took place and the defendant took no steps to ensure affirmative consent. The defendant, in spite of taking no steps to ensure consent, could nonetheless prove that he or she had obtained consent by a preponderance of the evidence, thus reserving consent as an affirmative defense. Such a statute would, at least at the outset, focus less on what each actor subjectively believed in regards to consent, more on what each actor actually did to ensure or communicate consent. Furthermore, such a statute would guard against some mistake defenses in requiring each party to take steps so that there would be no mistake about consent. However, as seen in *Mock*, the ensure affirmative consent standard is subject to abuse by some decision-makers as American jurisprudence resists rape reform[201]—a sentiment that will likely wane over time and as courts become familiar with adjudicating under an affirmative consent standard.

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197. SOKOLOW & SWINTON, *supra* note 88, at 2–3.
198. *See supra* text accompanying notes 30–35 and 68–70.
199. *See supra* text accompanying notes 151–65.
200. CAL. EDUC. CODE § 67386(1) (West 2016) (emphasis added).
201. *See supra* text accompanying notes 117–26.

CONCLUSION

It has been nearly 50 years since there was a national effort to reform rape laws.[202] The resistance to that reform, and especially to the affirmative consent standard, is partially due to the nature out of which rape law has historically emerged—namely, as a property right protecting the husband's interest. However, fears that affirmative consent standards necessarily shift the burden of proof to the defense are unfounded. Thoughtful construction of statutes that focus on a defendant's behavior can help safeguard against due process concerns. Whether through an ensure-affirmative-consent standard or another similar standard, sexual assault laws predicated on the actions of the accused and not on the actions or words of the alleged-victim will provide greater clarity and better protect victims of sexual assault.

The recent adoption of affirmative consent standards for state universities in California and New York, along with the ALI's proposed changes to the MPC, signal that our culture is ready to reform our rape jurisprudence. However, even if the ALI officially incorporates the affirmative consent standard into the MPC, each state's legislature would still need to adopt such revisions, making real reform a thing of the distant future.

Nonetheless, today, a person's sexual autonomy is afforded less criminal protection than a person's property. We do not ask a victim of theft to prove that he or she did not consent to the violation, yet we still ask the alleged victim of rape to do just that—to prove that he or she was not asking for it. Adoption of affirmative consent standards that make consent available as an affirmative defense would reconcile such inconsistency and disparity.

202. *See* Tracy, *supra* note 132.