UNIVERSITY ADJUDICATION OF SEXUAL ASSAULT: HOW AFFIRMATIVE CONSENT CAN HELP CLOSE THE GAP

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I. INTRODUCTION 351
II. BACKGROUND 357
III. AFFIRMATIVE CONSENT EVALUATED 360
A. *Psychology Supports Affirmative Consent* 361
IV. AFFIRMATIVE CONSENT ON BROADER SCALES 363
A. *England Reforms Consent Standards* 363
B. *Canada's Implementation of Affirmative Consent* ... 364
V. IMPLEMENTATION OF AFFIRMATIVE CONSENT 367
A. *Applying Affirmative Consent at the University Level* 368
VI. PROCEDURAL SAFEGUARDS 370
A. *Lawsuits by the Accused & Due Process Considerations* 370
VII. CONCLUSION 372

I. INTRODUCTION

What appears to be an everlasting game of legislative tug-o-war regarding university adjudication of sexual assault has put an immense strain on the backs of all parties involved. Many wonder, why do universities investigate a criminal matter such as sexual assault? In an effort to deter gender discrimination of students and maintain safe environments on university campuses, several western countries enacted laws that require universities to investigate and punish gender-

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based offenses such as sexual assault.[1] Most recently, in the United States, Canada, and the United Kingdom, cases of campus sexual assault appear to be on the rise, but are often handled with a lack of concern and consistency—varying from insufficient victim protection to lack of procedural safeguards for the accused.[2] These misaligned efforts leave the victim, the accused, and the university at a major loss. Consequently, universities, legislatures, and victims' rights groups are independently trying to conjure up solutions to correct the imbalances—but it appears that no one can get it quite right.[3]

In a world where our laws are shaped by our actions, it is important that current statutory definitions and standards reflect current societal needs. Efforts made by legislatures and universities include redefining what is really at the heart of the crime of sexual assault: consent.[4] In the context of sexual assault, it is common for society to understand 'consent' to mean "no means no."[5] We also traditionally perceive the crime of rape and sexual assault to play out as a masked man who ambushes and violently attacks a helpless woman in the middle of the night. However, neither the typical understanding of consent nor sexual assault reflects what actually occurs more often than not between young adults on college campuses today—neither do our laws.[6]

Applying laws and qualifications that do not reflect current realities of society is arguably one of the biggest issues surrounding the mishandling of university adjudication of sexual assault. Many of the sexual assault cases that take place on university campuses around the world are scenarios between two people who know each other or who became acquainted at a party and may initially agree to be intimate

1. *See* Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681–1688 (2012); Sexual Offences Act, 2003, c. 42 (U.K.).

2. *See* Rachel Browne, *Why Don't Canadian Universities Want to Talk About Sexual Assault*, MACLEAN'S (Oct. 30, 2014), http://www.macleans.ca/education/unirankings/why-dont-canadian-universities-want-to-talk-about-sexual-assault/.

3. *See AAU Climate Survey on Sexual Assault and Sexual Misconduct,* ASS'N OF AM. U., http://www.aau.edu/Climate-Survey.aspx?id=16525 (last visited Feb. 27, 2017).

4. *See* CAL. EDUC. CODE § 67386 (West 2016); Criminal Code, R.S.C. 1985, c. C-46, § 153.1(2)(Can.); *see also CPS and Police Focus on Consent at First Joint National Rape Conference*, THE CROWN PROSECUTION SERV. (Jan. 28, 2015), http://www.cps.gov.uk/news/latest_news/cps_and_police_focus_on_consent_at_first_joint_national_rape_conference/ (U.K.).

5. *See What is Consent,* CONSENTED, http://www.consented.ca/consent/what-is-consent/ (last visited Feb. 19, 2017).

6. *See Campus Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/campus-sexual-violence (last visited Feb. 28, 2017).

until one changes their mind.[7] There exists a gross misunderstanding of acquaintance rape scenarios, as one scholar points out:

> A very old concept of rape prevails. According to this mind-set, there can only be two precursors to rape: (1) A stranger jumps out from the bushes; (2) There is no rape unless the woman puts up a fight, to the death if necessary.[8]

A recent survey of more than 4,000 Canadian college women found that most rapes and attempted rapes occur when the victim is alone with the offender, usually a boyfriend, former partner, classmate, or acquaintance.[9] Most take place in the victim's residence or off-campus living quarters and fewer than five percent are reported to police.[10] But what makes sexual assault so unlike any other crime and so difficult to prove is that,

> [Sexual assault] . . . is the only crime in which the victim is presumed to be lying. If a person was mugged in an alley . . . would we be skeptical of the victim's testimony . . . because there weren't any eyewitnesses?[11]

Because of this typical scenario of sexual assault, it would follow that both parties understand that verbal or nonverbal consent has been given and that the parties then maintain mutual consent throughout the *duration* of the entire sexual encounter. The affirmative consent ideal will allow the accuser and the accused to defend his or her position justly when there are no witnesses, by demonstrating mutual participation. However, many definitions of consent do not reflect this position, and are thus interpreted to mean that sexual activity is consensual between acquaintances unless there is in fact denial or combat present.[12] Because of these gaping discrepancies and, not to mention, the significant psychological intricacies of sexual assault, the idea of affirmative consent is taking both universities and governments by storm in order to reconcile the current climate and misun-

7. *See* Jessica Bennett, *Campus Sex . . .With a Syllabus*, N.Y. TIMES, Jan. 10, 2016, at ST1.

8. JON KRAKAUER, MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN 305 (2015).

9. Rosanna Tamburri & Natalie Samson, *Ending Sexual Violence on Campus*, U. AFF. (Oct. 20, 2014), http://www.universityaffairs.ca/features/feature-article/ending-sexual-violence-campus/.

10. *Id.*

11. KRAKAUER, *supra* note 8, at 292.

12. *See* Lucinda Vandervort, *Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory*, 23 COLUM. J. OF GENDER & L. 395, 409 (2012); *see also* Criminal Code, R.S.C. 1985, c. C-46, § 265(3) (Can.); R. v. Jobdion, [1991] 2 S.C.R. 714, 715-17 (Can.) (the definition of consent in the sexual assault cases has previously been recognized in the Canadian Criminal Code as well as Canadian common law).

derstandings surrounding sexual assault and consent on a broader scale.[13]

While sexual assault is far from a black and white issue, consent is not. Universities can still put their best foot forward in making sure that the definitions they use to find sexual assault match what sexual assault scenarios actually look like. Not only are the traditional, legal definitions of consent at odds with capturing the affirmative nature of consensual sex, but they also profoundly have the opposite effect of proving sexual assault by construing that consent is lacking only if there is a presence of denial, combat, or silence.[14] Therefore, because most statutes state that denial, combat, or silence *do not* equate to consent,[15] laws should be revised to hold that active and enthusiastic participation *are* what equate to consent—instead of allowing varying interpretations to run amok in the minds of applicable triers of fact.

Opponents of affirmative consent believe that modifying consent standards is yet another ploy in favor of upholding victims' rights—however, there are many benefits to be afforded to the accused through consent reform as well.[16] In 1992, Canada changed its consent laws to reflect affirmative standards, and most recently, the Crown Prosecution Service in England did the same.[17] The realization that consent is one of the major issues surrounding the adjudication of sexual assault underscores the need for education codes to reflect affirmative consent standards as well.

Affirmative consent reform will help clear the murky waters surrounding university adjudication of sexual assault—however, equality, fairness, and procedural safeguards must not escape new legislation and revised university policies. Federal legislation, such as the United States' Title IX, was enacted to correct an imbalance of gender discrimination, namely, discrimination against women in the work place

13. *See* THE CROWN PROSECUTION SERVICE, *supra* note 4; *The Neurobiology of Sexual Assault*, NAT'L INST. OF JUSTICE (Dec. 3, 2012), https://nij.gov/multimedia/presenter/presenter-campbell/pages/presenter-campbell-transcript.aspx; *see generally* S.B. 967, 2013-14 Leg., Reg. Sess. (Cal. 2014).

14. *See* Vandervort, *supra* note 12, at 409-10.

15. *See*, *e.g.*, D.C. CODE § 22-3001(4) (2017); MINN. STAT. ANN. § 609.341(4)(a) (2017); WASH. REV. CODE ANN. § 9A.44.010(7) (2016). *But cf.* ALA. CODE § 13A-6-65 (2015); TENN. CODE. ANN. § 39-13-503 (2016) (providing examples of sexual assault statutes that refer to consent, however, do not define consent).

16. *See* Cathy Young, *Campus Rape: The Problem With 'Yes Means Yes'*, TIME (Aug. 29, 2014), http://time.com/3222176/campus-rape-the-problem-with-yes-means-yes/.

17. *See* Vandervort, *supra* note 12, at 411-12; *see also* The Crown Prosecution Service, *supra* note 4.

and institutions of higher education.[18] Within its gamut, Title IX specifically states that federally funded schools must investigate, punish, and deter gender-based offenses, including sexual assault.[19] In light of those efforts, however, many of the current university policies only contain language that pertains to a complainant in the event that a complaint for sexual assault is filed—but not the rights of the accused or plan of recourse.[20] Regrettably, the strict implementation and adherence to outdated university policies indicate that the accused have been completely left out of the sexual assault adjudication equation—resulting in an abundance of lawsuits.[21] Most university policies do not contain language detailing clear guidelines about how sexual assault adjudications are to proceed, which makes the accused feel as though considerable rights are falling by the wayside.[22]

Punishments rendered by universities are not nearly as severe as punishments rendered in criminal prosecutions,[23] but they still have the profound impact of encumbering the accused's educational career and professional prospects. Notably, however, expulsion remains to be the most austere punishment for the accused in university sexual assault adjudication proceedings, which does not warrant the use nor necessarily afford the accused all constitutional due process rights afforded in trial to criminal defendants—though opponents would assert otherwise.[24] Not only would procedural safeguards for the accused be in the best interest of universities, but it would also help with the process of adjudicating sexual assault, and even reduce the backlash of lawsuits brought forth by the accused.

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18. *See Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. (Apr. 2015), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

19. *See id*.

20. *See* Tovia Smith, *For Students Accused of Campus Rape, Legal Victories Win Back Rights*, NPR (Oct. 15, 2015, 4:45 AM), http://www.npr.org/2015/10/15/446083439/for-students-accused-of-campus-rape-legal-victories-win-back-rights.

21. *See id*.

22. *Id*.

23. Sara Ganim & Nelli Black, *An Imperfect Process: How Campuses Deal with Sexual Assault*, CNN (Dec. 21, 2015, 4:38 PM), http://www.cnn.com/2015/11/22/us/campus-sexual-assault-tribunals/; Editorial, *Why Colleges Should Report Sex Crimes, Pronto, to Police and Prosecutors*, CHI. TRIB. (Aug. 28, 2015), http://www.chicagotribune.com/news/opinion/editorials/ct-sex-assault-campus-crime-reporting-rape-police-edit-0830-jm-20150828-story.html.

24. Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CENTER FOR PUB. INTEGRITY (Feb. 24, 2010, 12:00 PM), https://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault; Tyler Kingkade, *Many Universities Don't Want You to Know How they Punish Sexual Assault*, HUFFINGTON POST (Sept. 29, 2014, 4:18 PM), http://www.huffingtonpost.com/2014/09/29/punish-sexual-assault_n_5894856.html.

Universities in the United Kingdom have yet to feel the repercussions from mishandling sexual assault complaints. This is partly due to their strong belief that a criminal matter, such as sexual assault, should be left entirely for the police to handle.[25] However, statistics and sentiments amongst university students of rising incidences of sexual assault reveal that leaving the matter solely to local authorities is not the best route either—largely because the police and government agencies cannot resolve cases in an efficient or sensitive manner.[26] So, if rising incidences of university sexual assault and their mishandling occur regardless of whether universities or local authorities control the matters exclusively, it follows that the need for changing university policies to reflect affirmative consent will help adjudicate these matters efficiently and ultimately deter them.

Rising numbers of campus sexual assault cannot be traced back to one specific source, but the means by which universities adjudicate them would provide more clarity and structure. Because students' time on campuses is relatively short-lived, it is important that universities investigate and reprimand cases of sexual assault to uphold and foster a safe educational environment.[27] While affirmative consent has been the national norm in Canada since 1992, the realization that universities must also enact similar policy is just now surfacing.[28] Outdated definitions of consent are at the root of this pervasive problem and inadequate procedural safeguards for the accused significantly enable further mishandling of sexual assault cases that currently plague universities. Whether cases of university sexual assault occur in the U.S., U.K., or Canada, the need for comprehensive improvements is finally realized. University adjudication of sexual assault will improve with the adoption of affirmative consent standards coupled with clear procedural safeguards that protect both parties to a sexual assault dispute.

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25. *See* Eliza Gray, *Why Don't Campus Rape Victims Go to the Police?*, TIME (June 23, 2014), http://time.com/2905637/campus-rape-assault-prosecution/; *see also* Tyler Kingkade, *And People Ask Why Rape Victims Don't Report to Police*, HUFFINGTON POST (Aug. 12, 2016, 11:39), http://www.huffingtonpost.com/entry/rape-victims-report-police_us_57ad48c2e4b071840410b8d6; Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES, Nov. 16, 2014, at SR1.

26. Owen Boycott, *Student Sues Oxford over Handling of Rape Complaints*, GUARDIAN (May 7, 2015, 8:07 AM), https://www.theguardian.com/law/2015/may/07/student-sues-oxford-rape-complaints-policy.

27. *See* Tamburri & Samson, *supra* note 9.

28. *See id.*; *see also* Laura Kane, *Sexual Assault Policies Lacking at Most Canadian Universities, Say Students*, CBC NEWS (Mar. 7, 2016, 11:43 AM), http://www.cbc.ca/news/canada/british-columbia/canadian-universities-sex-assault-policies-1.3479314; *The Law of Consent in Sexual Assault*, WOMEN'S LEGAL EDUC. & ACTION FUND, http://www.leaf.ca/the-law-of-consent-in-sexual-assault/ (last visited Feb. 25, 2017).

II. Background

Sexual assault is a serious crime and also serves as a form of sex discrimination on university campuses. Given the pressing needs for students to enjoy a hostility-free learning environment, the United States passed Title IX of the 1972 Education Amendments, which prohibits sex discrimination in any federally funded educational institution.[29] Universities across the U.S., however, are no longer simply institutions of higher learning—but also environments that foster heavy drinking and partying that often create the ripe conditions for sexual assault, which now prompt stricter regulations.[30] In 2006, the National Institute of Justice conducted a study of campus sexual assault and found that only 19% of college women reported attempted or completed sexual assault.[31] After exposure of this pervasive problem, the Office of Civil Rights (OCR) has since enacted rigorous policies and guidelines that universities must follow when handling sexual assault complaints.[32] In 2011, OCR sent out the famous "Dear Colleague Letter," which most notably required universities to use the preponderance of the evidence standard of proof, a lesser standard, instead of clear and convincing evidence when adjudicating sexual assault.[33]

Similarly, the U.K. passed the Equality Act of 2010, which also prohibits sex discrimination at institutions of higher education.[34] The laws evolved to include sexual assault as a form of harassment and advocate that universities respond and investigate student allegations.[35] However, unlike that of the U.S., nearly all discretion is left to universities without real oversight or repercussions—which result in either a total lack of policy and procedure or confusing procedural

29. 20 U.S.C. §§ 1681-1688 (2012).

30. *See* Pádraig MacNeela et al., Rape Crisis Network Ireland, Young People, Alcohol and Sex: What's Consent Got to Do With it? 65-66 (Jan. 28, 2014), http://www.rcni.ie/wp-content/uploads/Whats-Consent-Full-A41.pdf.

31. Christopher P. Krebs et al., Nat'l Inst. of Justice, The Campus Sexual Assault (CSA) Study, at 5-3 (Dec. 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf.

32. U.S. Dep't of Educ., Dear Colleague Letter Providing Guidance about Title IX Requirements for Schools (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter Dear Colleague Letter].

33. *Id.*

34. *See* Equality Act, 2010, c. 15, §§ 64-76 (U.K.); *see also* Polly Williams, Equality Act 2010 Implications for colleges and HEIs, Equality Challenge Unit (Aug. 2012), http://www.ecu.ac.uk/wp-content/uploads/external/equality-act-2010-briefing-revised-08-12.pdf.

35. *See* Williams, *supra* note 34.

guidelines that fail to properly resolve sexual assault disputes.[36] Not far behind the U.S., the U.K is in the process of implementing more stringent requirements for campus sexual assault—with affirmative consent on its agenda.[37]

Despite the implementation of affirmative consent in Canada's national criminal code, many Canadian universities are even further behind those in the U.S. and U.K, lacking *any* policies or regulations concerning incidences of university sexual assault.[38] Most recently in 2015, Ontario published an action plan to stop campus sexual assault that addressed the necessity that universities adopt policies and procedures to combat campus sexual assault and assist complainants.[39] The action plan resulted in the 2016 passage of Bill 132, Sexual Violence and Harassment Action Plan Act, holding universities accountable for implementing sexual assault policies and procedures.[40]

At varying stages of enactment and implementation, universities' perfunctory efforts are deficient in the fine details of the key issue: consent. If universities are going to tackle sexual assault efficiently and correctly, proper consent definitions must be outlined. Further, the lack of transparency and access to policies coupled with uninformed administrators has had the profound effect of either dismissing valid complaints of sexual assault, and on the other end of the spectrum, expelling the accused from their university without any real recourse.[41] Countries with universities on both ends of the spectrum are facing backlashes from disgruntled students in the form of lawsuits.[42]

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36. Karen McVeigh & Elena Cresci, *Student Sexual Violence: 'Leaving Each University to Deal with it Isn't Working*, GUARDIAN (July 26, 2015, 2:27 PM), https://www.theguardian.com/education/2015/jul/26/student-rape-sexual-violence-universities-guidelines-nus.

37. *See NUS Announces the Next Phase of its Fight Against Lad Culture*, NAT'L UNION OF STUDENTS (July 27, 2015), https://www.nus.org.uk/en/news/press-releases/nus-announces-the-next-phase-of-its-fight-against-lad-culture/; *see also* NAT'L UNION OF STUDENTS, LAD CULTURE AUDIT REPORT (2015), http://www.nusconnect.org.uk/resources/lad-culture-audit-report/download_attachment.

38. *See, e.g.,* Kane, *supra* note 28.

39. *See* OFFICE OF THE PREMIER OF ONTARIO, IT'S NEVER OKAY: AN ACTION PLAN TO STOP SEXUAL VIOLENCE AND HARASSMENT 27 (Mar. 2015), http://docs.files.ontario.ca/documents/4136/mi-2003-svhap-report-en-for-tagging-final-2-up-s.pdf.

40. Sexual Violence and Harassment Action Plan Act, S.O. 2016, c.2 (Can.).

41. *See* Ashe Schow, *Due Process for Campus Sexual Assault is Not a Left/Right Issue*, WASH. EXAMINER (July 9, 2015, 12:01 AM), http://www.washingtonexaminer.com/due-process-for-campus-sexual-assault-is-not-a-leftright-issue/article/2567881.

42. *See* Anita Wadhawani, *Growing List of Colleges Facing Sexual Assault Lawsuits*, USA TODAY (Feb. 20, 2016), http://www.usatoday.com/story/news/nation-now/2016/02/20/growing-list-colleges-facing-sexual-assault-lawsuits/80689514/; *see also* Elizabeth Ramey, *Why I'm Suing Oxford University Over Rape*, TELEGRAPH (May 7, 2015), http://www.telegraph.co.uk/women/womens-life/11588353/Rape-case-Why-Im-suing-Oxford-University.html. *See generally* Sahm v.

Recently, in the U.S., a San Diego district court ruled against the University of California San Diego and ordered the dismissal of a ruling that found a student guilty of sexual assault.[43] The judge ruled that the university did not afford the accused adequate rights during the adjudication, resulting in a dismissal of the judgment.[44] On appeal, the court reversed and remanded the case in favor of the university.[45] Conversely, at Oxford University in the United Kingdom, a student was unsuccessful in maintaining that the university *did not* do enough to investigate her claim of sexual assault against a fellow student during the course of her studies at their graduate school.[46]

Overall, the crime of sexual assault is largely underreported.[47] This is due to the very sensitive nature of the crime and the stereotypes perpetuated by society.[48] Most university students who complain of sexual assault do not go to local authorities because criminal prosecutions are too lengthy and intrusive.[49] Additionally, prosecutors are reluctant to file sexual assault cases because of significant evidentiary hurdles; when they do, however, they are not very successful in obtaining convictions.[50] For these reasons, universities that implement policies with affirmative consent models will be more equipped to offer autonomy, sensitivity, fairness, and efficient results without long, public proceedings.[51]

The inconsistencies and lack of proper definitions and guidelines morphed the adjudication of sexual assault into a revolving door with no easy solution. Universities are trying to play catch up with rising complaints of campus sexual assault—with efforts ranging from issuances of no-contact orders between students to flat out expulsions

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Miami Univ., 110 F. Supp. 3d 774 (S.D. Ohio 2015); Doe v. Regents of the Univ. of California, 210 Cal. Rptr. 3d 479, 484 (Cal. App. 4th Dist. 2016); R. (on the application of Ramey) v. Oxford Univ., [2014] EWHC 4847 (Admin).

43. *See Regents of the Univ. of California*, 210 Cal. Rptr. at 484.

44. *Id.*

45. *Id.*

46. *See Oxford Univ.*, EWHC at 4847 (Admin.).

47. *See* AZ v. Shinseki, 731 F.3d 1303, 1313-14 (Fed. Cir. 2013); State v. Navarro, 354 P.3d 22, 24 (Wash. Ct. App. Div. 1. 2015).

48. *See* State v. Daniel W. E., 142 A.3d 265, 280, 284-286 (Conn. 2016).

49. *See* Kingkade, *supra* note 25; *see also* McVeigh & Cresci, *supra* note 36.

50. *See* Gray, *supra* note 25; *see also* Meredith Donovan, *Why Convictions in Sex Crime Cases are so Hard to get,* N.Y. Daily News (Mar. 31, 2012, 10:19 a.m.), http://www.nydailynews.com/opinion/convictions-sex-crimes-cases-hard-article-1.1053819.

51. *See* Katherine Tam, *UC Implements New Student Model in Ongoing Progress Toward Addressing Sexual Violence and Sexual Harassment*, UCnet (Jan. 6, 2016), http://ucnet.universityofcalifornia.edu/news/2016/01/uc-implements-new-student-model-in-ongoing-progress-toward-addressing-sexual-violence-and-sexual-harassment-.html.

which leave students with lingering feelings of inadequacy, on both sides of the fence.[52] Although issues that pertain to sexual assault amount to a problem on a much larger scale, they will not be solved easily or independently according to Professor Wayne MacKay of Saint Mary's University.[53] He states that if universities do not make a better effort to respond, "how can [universities] have really effective learning in an unsafe, discriminatory, sexist kind of environment?"[54] The short answer is, "[They] can't. [They] have to find the means and the ways to do it."[55]

III. Affirmative Consent Evaluated

Redefining sexual assault consent standards to reflect the affirmative nature of consent not only makes logical sense, but is also reaffirmed by various studies and court cases.[56] While most laws do not require mental behavioral adjustments on our part, society has so profoundly maimed traditional sex roles to fit into an imperfect ideal that perpetuates sexual assault that any new legislation regarding an affirmative consent model may feel unnatural to those who comply with skewed ideals.[57] Sexual assault is a unique crime as it involves an act that is natural to humans—so requiring us to re-learn a key component of a natural act is accompanied by its very own hardships.[58] This is not to say that affirmative consent will be ineffective, because it has proved to be the opposite, and it seems as though the small scale environments like those of universities will allow a more focused approach to educating and adjudicating sexual assault based on the affirmative consent model.[59]

Many who oppose the adoption of affirmative consent by universities believe that these standards now require two individuals to enter

52. *See* Tamburri & Samson, *supra* note 9; *see also* Butters v. James Madison Univ., No. 5:15-CV-00015, 2016 WL 5317695 at 13 (W.D. Va. 2016); Marshall v. Indiana Univ., 170 F.Supp.3d 1201, 1204-05 (S.D. Ind. 2016).

53. *See* Tamburri & Samson, *supra* note 9.

54. *Id.*

55. *Id.*

56. *See* Vandervort, *supra* note 12, at 440-45, 449-57, 459-65 (2012); *see also* R. v. J.A., [2011] S.C.R. 440 (Can.).

57. Jacklyn Friedman & Jessica Valenti, Yes means Yes! Visions of Female Sexual Power & A World Without Rape 20-21 (2008); *see also* State *ex rel.* M.T.S., 609 A.2d 1266, 1277 (N.J. 1992).

58. Friedman & Valenti, *supra* note 57, at 26.

59. Tyler Kingkade, *Colleges Are Rewriting What Consent Means To Address Sexual Assault*, Huffington Post (Sept. 11, 2014), http://www.huffingtonpost.com/2014/09/08/college-consent-sexual-assault_n_5748218.html.

into a written contract prior to any sexual act.[60] However, that could not be further from the truth.[61] Affirmative consent is defined as:

> 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.[62]

Affirmative consent highlights the importance of *voluntary* words or actions that are actively *communicated*. Surprisingly, however, critics are still confused by the semantics of affirmative consent and do not truly understand that the wording in fact matches natural sexual encounters.[63] Therefore, to fully understand the subjective nature of communicated voluntarism, it is necessary to evaluate the way in which humans engage in sexual activities.

A. Psychology Supports Affirmative Consent

A psychological study titled "Young People, Alcohol, and Sex: What's Consent Got To Do With It?" was conducted in 2014 by the National University of Ireland.[64] The study ultimately revealed that young adults' descriptions of sexual encounters naturally mimicked affirmative consent.[65] In the study, one female focus group noted that "Even if [consent] is not verbalized, it should be obvious that both people want to be doing it . . . unless you get a clear yes, don't just assume the other person wants to do it"—meaning that actions can and do speak louder than words in sexual scenarios.[66] "The [typical] 'no means no' standard places the onus on the targeted individual to protest and offers no protection for bodily integrity until an assault is threatened or already in progress."[67] Consent standards that reflect

60. Amanda Hess, *"No Means No" Isn't Enough. We Need Affirmative Consent Laws to Curb Sexual Assault*, SLATE (June 16, 2014), http://www.slate.com/blogs/xx_factor/2014/06/16/affirmative_consent_california_weighs_a_bill_that_would_move_the_sexual.html.

61. *Id.*

62. *What is Affirmative Consent?*, AFFIRMATIVECONSENT, http://affirmativeconsent.com/whatisaffirmativeconsent/ (last visited Feb. 26, 2017).

63. Suzannah Weiss, *5 Common Arguments Against Affirmative Consent & Why They're Actually BS*, BUSTLE (Oct. 23, 2015), https://www.bustle.com/articles/119012-5-common-arguments-against-affirmative-consent-why-theyre-actually-bs.

64. MACNEELA ET AL., *supra* note 30.

65. *Id.* at 14, 69.

66. *Id.* at 18.

67. Vandervort, *supra* note 12, at 404; *see also* FRIEDMAN & VALENTI, *supra* note 57, at 20-25 (defining the culture of rape and understanding and respecting a female's sexual pleasure).

this notion do not understand or delineate that actions *do* show the subjective intent of parties to go forward with a sexual act, and therefore consent should be modified to reflect that reality. "No means no" standards not only fail to reflect natural attitudes toward consent, but tend to be one-sided and lead toward absolute innocence on behalf of the accused.[68] This model is faulty because the he-said she-said nature of sexual assault and lack of witnesses so often allow the accused to simply claim that the complainant did not scream or protest, thus forging a false sense of consent.

Moreover, affirmative consent reform is not aimed solely at appeasing complainants of sexual assault—it encompasses the ideals of initiators of the sexual acts as well—who are typically men. The Irish study involved several male focus groups that relayed the same sentiments as women.[69] The study found that it is unacceptable for the accused to act on silence during a sexual encounter and that "A yes is more important than saying no."[70] These findings suggest the importance for regular checking that the other person agrees to progress with further sexual activity.[71] But verbal assertions aside, these findings suggest that men and women alike understand consent to mean that all parties involved are *active* participants. Meaning, enthusiastic body language is conveyed by both parties throughout the encounter.

These findings additionally reveal that while some people may choose to verbalize consent, affirmative consent standards largely encompass nonverbal, enthusiastic bodily communication.[72] In the Irish study, the male focus groups further revealed, "She should be an active participant, not just like lying there nearly passed out."[73] Bluntly stated, enthusiastic body language and active participation encompass sexual reciprocity: both parties asserting new sexual positions, both moving in accordance with one another, and both parties responding positively to the acts.[74] Most perplexing, however, is the fact that opponents of affirmative consent are fighting against a model that mimics natural sex. Affirmative consent, contrary to popular, albeit incorrect belief, does not require two people to sign a contract before

68. *See* Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1322, 1322-23 (2005).

69. *See* MACNEELA ET AL., *supra* note 30, at 7, 21.

70. *Id.* at 21.

71. *Id.*

72. *See id.* at 21, 24.

73. *Id.* at 24.

74. *See* MACNEELA ET AL., *supra* note 30, at 14; *see also* FRIEDMAN & VALENTI, *supra* note 57, at 47-49 (describing how you can read consent through body language).

sex—it simply holds that both participants are active, engaged, and willing to proceed with any sexual act.[75]

IV. Affirmative Consent on Broader Scales

Affirmative consent is not only on the agenda of universities. Both Canada and England have revised their *national* criminal codes to reflect affirmative consent.[76] In 1992, Canada revised their criminal codes to reflect affirmative consent and several cases following this legislation have demonstrated the importance of redefining consent standards.[77] Just recently, in January 2015, England changed its criminal code to an affirmative consent standard as well.[78] Despite the fact that many universities in both Canada and England are plagued with similar sexual assault burdens like that of the U.S., their efforts on a broader scale implicate something more—a need for change.[79] The willingness of countries to completely revise their national, criminal standards of consent indicate how difficult the adjudication of sexual assault is and that universities, faced with more cases than ever, must revise their standards as well.

A. England Reforms Consent Standards

The Crown Prosecution Service in England completely revised their criminal prosecution standards of consent to reflect affirmative consent.[80] Alison Saunders, Director of Public Prosecutions in England, set forth new guidelines with respect to consent—holding that "Prosecutors are now being instructed to ask how the suspect knew that the complainant had consented—with full capacity and freedom to do so."[81] While the United States has been the frontrunner in trying to tackle university mishandling of sexual assault, it seems as though

75. *See* Katherine Timpf, *Students Told to Take Photos with a 'Consent Contract' Before They Have Sex*, Nat'l Rev. (July 7, 2015), http://www.nationalreview.com/article/420870/college-affirmative-consent-contract.

76. *See* Sexual Offences Act 2003, c. 42 § 74 (U.K.); Can. Crim. Code, R.S.C., c. C-46 § 153.1 (1985).

77. *See* Tamburri & Samson, *supra* note 9.

78. *See* Sexual Offences Act 2003, c. 42 (U.K.); *see also* The Crown Prosecution Service, *supra* note 4.

79. *See* Timothy Sawa & Lori Ward, *Sex Assault Reporting on Canadian Campuses Worryingly Low, Say Experts*, CBC News (Feb. 6, 2015), http://www.cbc.ca/news/canada/sex-assault-reporting-on-canadian-campuses-worryingly-low-say-experts-1.2948321; Ministry of Justice, An Overview of Sexual Offending in England and Wales (Jan. 10, 2013), http://webarchive.nationalarchives.gov.uk/20160105160709/https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214970/sexual-offending-overview-jan-2013.pdf (U.K.).

80. *See* The Crown Prosecution Service, *supra* note 4.

81. *Id.*

England has surpassed the U.S. by updating their criminal justice system to reflect new ideals.[82]

While England may be revising standards on a national level, their university policies considerably lag behind the U.S.[83] In 2014, Elizabeth Ramey, a student at Oxford University, unsuccessfully filed a lawsuit against Oxford and its policy on investigating campus rape.[84] She was told by the university to go to the police, but even after she did, her case was never prosecuted.[85] Finally, the Office of the Independent Adjudicator of Higher Education, who found Oxford's policies to be inadequate, reviewed Ms. Ramey's case.[86] Because of governmental agencies' inability to prosecute sexual assault cases like Ms. Ramey's, the growing need that universities be able to maintain clear policies aimed at protecting all students is ever more paramount.

B. Canada's Implementation of Affirmative Consent

Canada's affirmative consent laws and following cases prove that affirmative consent is a step in the right direction and can be for universities as well.[87] The Criminal Code enacted by Parliament in 1992 states that "Consent means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused."[88] Additionally, and most importantly, in implementing this new standard, when the accused claims the complainant gave consent, the accused must "believe that the complainant effectively said, 'yes' through her word and/or her action."[89] In response to the new affirmative consent laws, Chief Justice McClachlin of the Supreme Court of Canada stated:

> This concept of consent produces just results in the vast majority of cases. It has proved of great value in combating the stereotypes that historically have surrounded consent to sexual relations and undermined the law's ability to address the crime of sexual assault.[90]

Three decisions rendered by the Supreme Court of Canada between 1992 and 1997, *R v. M, R v. Park,* and *R v. Esau*, made significant contributions to the development of common law jurisprudence

82. See *id*.

83. *See* Vicky Spratt, *What's Your University Doing About Consent?*, DEBRIEF (Oct. 6, 2016), http://www.thedebrief.co.uk/news/real-life/consent-at-university-2016-20161065185.

84. *Oxford Univ.*, [2014] EWHC 4847 (Admin).

85. *Id*.; *see also* Boycott, *supra* note 26.

86. Boycott, *supra* note 26.

87. Vandervort, *supra* note 12, at 398.

88. R. v. Ewanchuk, [1999] 1 S. C. R. 330, 355 (Can.).

89. Vandervort, *supra* note 12, at 433.

90. R v. J.A., [2011] 2 S.C.R. 440, 464 (Can.).

on affirmative consent in Canada.[91] In *R v. M*, the 16 year-old complainant did not resist sexual touching advanced by her stepfather.[92] The evidence presented at trial was that her lack of resistance was due to fear of her stepfather.[93] The Court of Appeals quashed the trial verdict because the complainant did not resist the touching, and in the absence of coercion, there was no evidence that consent was *not* obtained.[94] The Supreme Court later reinstated the trial court's initial conviction, holding that a lack of resistance is not equated with consent.[95] Further, the Court rephrased their holding to "focus on the legal effect of non-communication by the complainant" and that "silence means 'no'."[96]

The preconceived notions involving sexual assault make it difficult for the general public to conceptualize affirmative consent. Because most think that a complainant can kick and scream in the event of unwanted sexual advances, they also believe that consent standards reflecting protest are sufficient. However, in most instances, victims of sexual assault are in so much shock and distress that their bodies tense and freeze over, thus inhibiting any such physical or even verbal protests.[97] This realization is what necessitates that consent standards be revised to reflect affirmative consent. Most university sexual assault incidences are not violent or scary. *R v. M* confirms that submission is not what in fact takes place during unwanted sexual advances—it is an intense fear for lack of control of your body.[98] For this reason, successful adjudication of sexual assault must encompass not only that lack of protest and silence is not consent, but that both individuals must be engaging in positive, active verbal or nonverbal communicative manners. If both parties are active and engaged, then there is no reason to believe either does not want to be performing these acts—for free will and basic human nature tells us just that.

Non-affirmative definitions of consent offer inadequate protection for women against sexual violence. In the case of *M.C. v Bulgaria*, the European Court of Human Rights "considered rape legislation that focuses exclusively or unduly on proving the use of force, rather

91. Vandervort, *supra* note 12, at 415.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 416.

97. Kris Hannah, *Freezing During Rape is Normal*, HEALING HEART (Apr. 20, 2012), https://krishannah.wordpress.com/2012/04/20/freezing-during-rape-is-normal/.

98. Vandervort, *supra* note 12, at 415.

than the lack of consent of the victim, to be in violation of the European Convention on Human Rights."[99] The Istanbul Convention incorporated this judgment by requiring States Parties to adapt their criminal legislation on sexual violence and rape to focus on consent as a constituent element of the crime.[100] Countries around the world are focusing their efforts on redefining consent because it truly is at the root of sexual assault. While requiring the use of force to be an element of sexual assault is an outdated model in most developed countries, it is finally realized that we have been operating under outdated consent models as well.

A deeper analysis and understanding of the social context of consent helps further explain affirmative consent. In Justice L'Heureux-Dube's opinion in *R v. M*, she acutely detailed that:

> consent must be regarded from the standpoint of communication, rather than from the standpoint of a mental state: the social act of consent consists of communication to another person, by means of verbal and non-verbal behavior, of permission to perform one or more acts which that person would otherwise have a legal or non-legal obligation to perform.[101]

Because the ways in which consent are communicated, laws must reflect and incorporate these notions.

The implications from affirmative consent standards for equality is significant and help in separating two stories of he-said she-said. In *R v. Ewanchuk*, the trial court found that the complainant had not consented to the unwanted sexual acts of the accused but ultimately acquitted the accused on the grounds that the he may have believed she consented on the grounds of "implied consent."[102] The Supreme Court eventually held that "under Canadian law there is no defense of implied consent."[103] While implied consent is no longer a valid defense, in most jurisdictions, a defendant may still assert a defense that the complainant consented to a sexual act. Because of this, affirmative consent models would aid in clarifying whether or not consent was in fact given by evidencing that both parties were actively engaged.

The significance of these two cases connotes the importance of active, enthusiastic participation in response to a sexual advance.

99. M.C. v. Bulgaria, 2003-XII Eur. Ct. H.R. 1, 35.

100. Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence art. 36, *opened for signature* May 11, 2011, C.E.T.S. No. 210 (entered into force Aug. 1, 2014).

101. R v. Park, [1995] 2 S.C.R. 836, 866 (Can.).

102. Vandervort, *supra* note 12, at 428.

103. *Id.*

There are too many instances that allow sexual assault to go undetected under traditional consent models. For those reasons, affirmative consent standards should also require that complainants and the accused discuss who obtained consent and *how* it was demonstrated throughout a sexual encounter. Affirmative standards are not any more designed for complainants than they are for the accused: the importance is that affirmative consent standards reflect *reality*. Consequently, the cases of sexual assault adjudicated by universities are real instances of lack of consent and must be held to reflecting standards.

V. Implementation of Affirmative Consent

Much of the criticism surrounding affirmative consent policies and laws deal with implementation. While universities are not legal tribunals, adjudications are comprised of administrative panels that render a final determination of culpability—with the most severe punishment being expulsion from the university.[104] These panels are not much different than panels that hear incidences of student perjury or other similar misconduct, but may require more elaborate guidelines given the difficult intricacies of the offense.[105] Further, the evidentiary burden exercised by universities requires "beyond a preponderance of the evidence," similar to the civil evidentiary standards held by many countries.[106]

Canadian court cases that utilized affirmative consent reflect its effectiveness in proving and disproving sexual assault cases, however, implementation of affirmative consent remains to be an obstacle on a larger scale. Because no appellate court or independent review tribunal review the actions of police, prosecutors or judges, government officials continue to investigate and prosecute sexual assault based on common law principles of consent.[107] The most significant causes of haphazard disposal of sexual assault cases are due to a lack of awareness of what the law actually requires, and failure to enforce the law.[108] Moreover, because police and prosecutors are unwilling to

104. Robert Carle, *The Trouble with Campus Rape Tribunals*, Pub. Discourse (July 14, 2014), http://www.thepublicdiscourse.com/2014/07/13369/.

105. Ganim & Black, *supra* note 23; Tovia Smith, *When College Sexual Assault Panels Fall Short, and When They Help*, NPR (May 1, 2014, 8:31 PM), http://www.npr.org/2014/05/01/308607420/when-college-sexual-assault-panels-fall-short-and-when-they-help; *see also* Emily Bazelon, *Washing Takes on College Rape*, Slate (Apr. 29, 2014, 5:58 PM), http://www.slate.com/articles/double_x/doublex/2014/04/campus_sexual_assault_new_white_house_guidelines_won_t_solve_the_ongoing.html.

106. Dear Colleague Letter, *supra* note 32.

107. Vandervort, *supra* note 12, at 439.

108. *Id.* at 439-40.

conform to newer ideals of sexual assault, it is imperative that universities be able to adjudicate such matters. Universities are not busy government offices or police stations back-logged with paperwork and rape kits—they are institutions devoted to upholding a fair and safe educational environment for their students, which requires deterring and punishing sexual assault amongst students.

A. Applying Affirmative Consent at the University Level

Educators and legislators have relayed their confusion as to how consent will be proven under affirmative consent standards.[109] However, affirmative consent will clear up many gray areas in instances of campus sexual assault—mainly due to the fact that alcohol plays a significant role in most cases.[110] In instances where a complainant is drunk, his or her lack of active participation through either verbal or nonverbal communication will clearly indicate that he or she did not consent in that moment—regardless if prior conduct indicated otherwise.[111] Additionally, new definitions of consent can greatly protect the accused from false accusations and simply very gray encounters where some lines were crossed.[112] For instance, a slightly intoxicated complainant who positively engages in the activity will have a very hard time convincing the university that he or she has not demonstrated consent to the sexual activities—despite the complainant's subjectivity.[113]

In applying affirmative consent at universities, critics argue that it would require a "burden shifting" upon the accused, thus making it an unworkable model. The U.S. Office of Civil Rights, for example, requires schools to promptly investigate reasonably known incidents of sexual assault even if the complainant chooses not to file a formal complaint.[114] The policy is not that the complainant bears the burden of proof, but instead, that the university must evaluate all relevant facts and evidence presented by both sides under the applicable defi-

109. Ashe Schow, *5 Problems with California's 'Affirmative Consent' Bill*, WASH. EXAMINER (Aug. 28, 2014, 8:00AM), http://www.washingtonexaminer.com/5-problems-with-californias-affirmative-consent-bill/article/2552537.

110. Tamburri & Samson, *supra* note 9.

111. *See* Amanda Marcotte, *Can Affirmative Consent Standards Fix the Problem of Alcohol and Rape?*, SLATE (Feb. 18, 2014, 12:27 PM), http://www.slate.com/blogs/xx_factor/2014/02/18/alcohol_and_rape_it_s_time_to_embrace_affirmative_consent_standards.html.

112. *Id.*

113. *Id.*

114. U.S. Dep't of Educ., Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School (2011); *see also* 20 U.S.C. § 1681.

nitions by a preponderance of the evidence.[115] The "burden shifting" argument is not entirely applicable as universities are not courts of law, and complainants have no burden—universities simply assess the dispute equally and weigh the relevant evidence under a standard of preponderance.[116]

Traditional and often skewed views of consent uphold the narrative that sex is something "that belongs to one person and is taken by another."[117] Affirmative consent can finally allow a comprehensive discussion and investigation as to how *both* parties acted throughout the encounter. Affirmative consent is the definition to be used by *both* the accuser and the accused. Meaning, the accuser demonstrates that he or she was not voluntarily and actively participating because the language of the proposed affirmative consent definitions hold that "a knowing, voluntary, and mutual decision among all participants to engage in sexual activity" be present.[118] Updating definitions to state that sexual assault has occurred "if accomplished without that person's affirmative consent" would ensure that, on a national level, no such "burden shifting" occurs.[119]

Among concerns of implementation, some argue that allowing universities to adjudicate sexual assault diminishes the seriousness of a real crime.[120] It has been purported that students are often reluctant to report rape and other sexual assaults to authorities because they feel they will be re-traumatized by the police investigation process.[121] It may initially feel safer to report a rape to someone on campus, but is this a good enough reason to allow schools to police themselves?[122] Critics argue that universities should not be adjudicating sexual as-

115. *Id.*

116. *See Standards of Proof*, Campus Clarity (Oct. 15, 2013), https://home.campusclarity.com/standards-of-proof/; *see also* Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 16, 45 (D. Me. 2005).

117. Joelle Stangler, *We Need Affirmative Consent Now*, Change.org, https://www.change.org/p/students-need-affirmative-consent-now (last visited Feb. 22, 2016); *see* Aegis, Comment to *Yes Some Guys are Assholes, but It's Still Your Fault if You Get Raped*, Alas! (June 24, 2005, 12:08 AM), http://amptoons.com/blog/?p=1628&cpage=5#comments; *see also* Thomas MacAulay Millar, *Toward a Performance Model of Sex*, *in* Friedman & Valenti, *supra* note 57, at 35.

118. N.Y. Educ. Law §6441 (McKinney 2015).

119. Tamara Rice Lave, *Affirmative Consent and Burden Shifting, Take 2*, Prawfs Blawg (Sept. 8, 2015, 2:33 PM), http://prawfsblawg.blogs.com/prawfsblawg/2015/09/affirmative-consent-and-burden-shifting-take-2.html.

120. Kari O'Discoll, *Why On Earth Do We Let Colleges and Universities "Handle" Their Own Rape Cases?*, The Feminist Wire (May 19, 2014), http://www.thefeministwire.com/2014/05/op-ed-earth-let-colleges-universities-handle-rape-cases/.

121. *Id.*

122. *Id.*

sault—however, the ineffectiveness and time consuming prosecutions that would take place otherwise simply do not afford victims of sexual assault the autonomy or efficiency that a university can.[123]

VI. Procedural Safeguards

If universities are going to undertake the efforts to adjudicate sexual assault, the policies and guidelines reflecting such efforts must afford both parties adequate procedural safeguards. The overcorrection of one problem has led universities to completely absolve the accused of his or her rights in the event of sexual assault adjudication.[124] This is not to say that universities will now become the judge and jury, so to speak, but that students must have the opportunities to ask questions, have lawyers present if requested, and review evidence. Moreover, punishments enacted by universities are at odds with universities' current efforts. Many are diligently trying to protect the victim but turn around with a slap on the wrist for the perpetrator.[125] Without clearer punishments in place, victims are forced, during an emotionally difficult time, to live amongst their assaulter.[126] These vast inconsistencies within universities' policies call for a strict adherence to clear guidelines that afford both parties the necessary safeguards when adjudicating sexual assault.

A. Lawsuits by the Accused & Due Process Considerations

Lack of procedural safeguards for students who are accused of sexual assault have resulted in lawsuits against their respective universities. In California, one student sued the University of California San Diego. Superior Court Judge Joel M. Pressman held that the accused student, identified as John Doe, was impermissibly prevented from fully confronting and cross-examining his accuser.[127] However, the Confrontation Clause of the U.S. Constitution is only applicable in

123. *See Why Schools Handle Sexual Violence Reports*, Know Your IX, http://knowyourix.org/why-schools-handle-sexual-violence-reports/ (last visited Feb. 23, 2015).

124. *See generally* Emily Yoffe, *The College Rape Overcorrection*, Slate (Dec. 7, 2014, 11:53 PM), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html.

125. *See* Nick Anderson, *Colleges Reluctant to Expel for Sexual Assault*, Wash. Post (Dec. 15, 2014), https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence—with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e_story.html; *see also* Lombardi, *supra* note 24.

126. *See* Lombardi, *supra* note 24.

127. Doe v. Regents of Univ. of Cal., 210 Cal. Rptr. 3d 479 (Cal. App. 4th Dist. 2016).

criminal prosecutions—thus establishing the basis for the court's ruling in favor of the University of San Diego on appeal.[128]

Due process concerns are at the forefront of the argument against implementing affirmative consent. Yet, school policies maintain whether it is the most blatant violation of perjury or violation of sexual misconduct, the most severe punishment is still expulsion. So why are opponents fighting tooth and nail against affirmative consent and pushing for constitutional criminal rights when these proceedings are not of that nature? "Campus disciplinary proceedings must be handled in a . . . consistent manner—not in an arbitrary manner chosen for this or that particular case—[but] must include procedural safeguards *that match* the seriousness of the potential punishment."[129] In the U.S., students are notified of violations and are afforded the ability to explain or rebut accusations against them, in addition to presenting evidence and witnesses.[130] While the OCR discourages cross-examining witnesses, the accused may still ask any questions necessary to assert their position.[131] However, courts have found that the Fourteenth Amendment does not guarantee complete due process in university proceedings, thus rendering certain university policies sufficiently equitable.[132]

Opponents of university adjudication of sexual assault hold that however flawed narratives of sexual assault can be, it is "by questioning the witness, holding hearings, by sharing the evidence that has been gathered, by giving everyone access to lawyers, by assuring a neutral fact-finder."[133] Fairness must not escape university policies and "While we know from the Innocence Project that even these 'tests' can produce wrongful convictions, they are at least more likely to produce reliable results than the opposite—a one-sided, administrative proceeding, with a single investigator, judge, jury, and appeals court."[134] One possible route to ensure an accused's criminal rights

128. U.S. CONST. amend. VI.

129. FOUND. FOR INDIV. RIGHTS IN EDUC., FIRE'S GUIDE TO DUE PROCESS AND CAMPUS JUSTICE (2017), https://www.thefire.org/fire-guides/fires-guide-to-due-process-and-campus-justice/fires-guide-to-due-process-and-fair-procedure-on-campus-full-text/#__RefHeading__2480_2127946742 [hereinafter FIRE'S GUIDE].

130. *See* DEAR COLLEAGUE LETTER, *supra* note 32.

131. *See id.* at 11-12.

132. Fernand N. Dutile, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 FLA. COASTAL L.J. 243, 265 (2001); *see also* Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78, 85 (1978); Regents of University of Michigan v. Ewing, 474 U.S. 214, 225 (1985).

133. Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT (Jan. 12, 2015), http://prospect.org/article/sex-lies-and-justice.

134. *Id.*

are not violated in the event criminal action is taken, would be for countries to statutorily enact legislation holding that any evidence and determination of culpability exposed in a university proceeding cannot be used against them in a criminal prosecution.[135]

Complainants and the accused are not the only "losers" in many cases of university adjudication of sexual assault that have gone awry. Universities, plagued with lawsuits from both sides, are forced to pay large sums of money due to their procedural inadequacies.[136] The U.S. Department of Education has launched more investigations, imposed more fines, and issued more guidelines on campus sexual assault than ever before, pressuring schools to improve what many acknowledged were serious flaws in their handling of complaints—however, these efforts remain to be seen.[137] As these efforts often go unseen, another concern is that "[w]hen you have unfair procedures it delegitimizes the process, it makes the whole process seem like a joke. And people don't actually believe in the accuracy of the result when the process itself is unfair."[138]

Many universities in the U.S. have Title IX compliance offices with administrators available to assist students with discrimination on campus.[139] As a solution, it would be relatively simple to have an independent coordinator, trained in sexual assault policies and guidelines, to oversee investigations and adjudications. In addition to allowing students to have attorneys present, access to evidence, and allowance to question their complainant, hiring an independent coordinator to oversee sexual assault cases will help to resolve matters efficiently, but most importantly, correctly.[140]

VII. Conclusion

The current adjudication of sexual assault by universities is improving, but largely at the expense of both the victim and the accused. Complainants of sexual assault are not receiving the proper attention

135. *See* FIRE's Guide, *supra* note 129.

136. *See generally* Jamie Altman, *Former UC Berkeley Students Sue University for Mishandling Sexual Assault,* USA Today C. (July 1, 2015), http://college.usatoday.com/2015/07/01/former-uc-berkeley-students-sue-university-for-mishandling-sexual-assaults/; Boycott, *supra* note 26; Sarah Kaplan, *Columbia University Sued by Male Student in 'Carry That Weight' Rape Case*, Wash. Post (Apr. 24, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/04/24/columbia-university-sued-by-male-student-in-carry-that-weight-rape-case/?utm_term=.dd3788aa1daa.

137. *See* Gamin & Black, *supra* note 23.

138. *Id.*

139. Dear Colleague Letter, *supra* note 32.

140. *Id.*

and commitment to potential cases, the accused are not given the necessary procedural safeguards, and both parties are suing universities. Implementing affirmative consent standards will allow both sides to a sexual assault case to prove whether consent actually took place. Affirmative consent not only reflects the attitudes and realities of sexual encounters, but most importantly also holds *each* party accountable for their actions. Consent is at the heart of sexual assault, which is why overwhelming efforts by countries across the world are being made to fix it. Due to the current climate of inconsistencies, successful adjudication of sexual assault at universities also requires clearer procedural policies so that both parties' rights are ensured. Clearer policies will create a comprehensive approach that can both protect victims while affording the accused proper defense mechanisms while eliminating the chances for error and future lawsuits brought by either side against the university for their mishandling. University adoption and implementation of affirmative consent would allow new guidelines to reflect real sexual scenarios, uphold the bodily and moral integrity of students on campuses, and thus ultimately lead to fairer adjudications of sexual assault altogether.