**The Constitutional Right to Sexual Autonomy**

**And Affirmative Consent**

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Abstract:

*This paper is a chapter from a book length project on college sexual assault and the constitution. It focuses on Affirmative Consent rules that require unambiguous, overt, contemporaneous consent to each act of sexual touching or progression to a new stage of sexual activity. It examines whether such rules, when imposed by the government, violate the right to sexual autonomy protected by Lawrence v. Texas and related cases.*

This paper argues that when “affirmative consent” rules are imposed by public universities or by state laws they violate the constitutional rights of students. In a string of cases striking down restrictions on birth control and sodomy, the Supreme Court found that the due process clause of the constitution protects a right to what has been called, alternatively, sexual “privacy” or “autonomy”.[[1]](#footnote-1) By regulating how student *express* their consent, rather than merely *requiring* consent, affirmative consent regimes violate this right.

This paper will begin by briefly tracing the development of this constitutional right and its contours. It will argue that affirmative consent requirements violate this right by controlling adult, intimate relationships conducted in private settings. It will then address several possible objections to this argument, including:

--The Supreme Court has never specifically held that sexual autonomy is a “fundamental” right;

--The Court’s decisions are really about reproductive freedom and protecting vulnerable groups such as gays and lesbians;

--Only truly “intimate” relationships are protected, not “hook up” sex.

--The right does not extend to situations where there is an increased risk of coerced sex;

--the Court’s protection of sexual autonomy only extends to criminal prohibitions.

1. **Substantive Due Process and Sexual Autonomy.**

The Supreme Court has held that the due process clause protects various *substantive* rights that cannot be abridged by the state even with proper process. These include most of the rights contained in the Bill of Rights, which is why, for example, the First Amendment applies to state laws as well as federal, even though the First Amendment, by its terms, applies only to “Congress.” This very important idea is called “incorporation” because it incorporates the rights in the Bill of Rights into the 14th Amendment and therefore protects these rights against state, as well as federal interference.[[2]](#footnote-2)

The Court has also held that the due process clause protects numerous "fundamental" rights that are not explicitly mentioned in the constitution. Some­times these are called "unenumerated" rights. These rights have been elevated to be on par with those rights enumerated in the Bill of Rights. Fundamental rights, include the right to abortion and the right to vote. These rights also include such lesser-known rights as the right to travel from state to state and the right of genetically related people to live together in a neigh­borhood zoned for single-family housing, even if the people living in the house do not meet the law's definition of a single family. In addition, the Court has implied, if not firmly held, that fundamental rights might include access to public education (although not to an equal public education).[[3]](#footnote-3)

This is a somewhat frustrating area of constitutional law. The Court has not been as clear as it should be on the relationship between the due process clause and the equal protection clause in deriving and defining these rights.[[4]](#footnote-4) And, as we will see below, the Court is often opaque about whether it is defining certain rights as “fundamental” rather than “liberty interests” or how much that matters, and it can be unclear about what constitutional standard it is applying to laws that interfere with these rights. These questions will be explained and addressed below. The next section will explain the idea that the Court has protected a right to sexual autonomy. The question of whether this right is “fundamental” (and what the implications of that question are) will be reserved for a later section.

1. Contraception, Sodomy, and Sexual Autonomy.

The sexual autonomy line of cases began with *Griswold v. Con­necticut* in 1965.[[5]](#footnote-5) Considering a statute that prohibited the use of "any drug, medicinal article or instrument for the purpose of prevent­ing conception,"[[6]](#footnote-6) the Court struck down the law, emphasizing that it “operate[d] directly on the intimate relation of husband and wife.”[[7]](#footnote-7) Given that the law banned birth control, the can be no doubt that the phrase “intimate relation” in that sentence refers to sexual relations, as opposed to emotional intimacy, which was in no way affected by the law.

Seven years later, in *Eisenstadt v. Baird*, the Supreme Court held that unmarried couples have an equal right to use contraception: “whatever the rights of the individual to access to contraceptives may be, the rights must be the same for unmarried and the married alike.”[[8]](#footnote-8) As a result of these two cases, there is no dispute that there is a fundamental right to access to contraceptives. There are however, two different ways to interpret this. One way, as is argued in this paper, is that *Griswold* and *Eisenstadt* protect the right to sexual intimacy between people. Another way to interpret these cases is that they form of line of cases along with the abortion cases that protects reproductive freedom. Without contraceptives people might become pregnant or father a child against their will, so contraceptives protect reproductive freedom. This was the position the Supreme Court majority took in the now overruled case *Bowers v. Hardwick*: “Griswold v. Connecticut and Eisenstadt v. Baird, with contraception; and Roe v. Wade, with abortion . . . were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child.”[[9]](#footnote-9) Using this logic, the *Bowers* court notoriously held that same-sex sodomy laws did not violate the constitution because they had nothing to do with reproduction.

But that argument never really made sense, even before the Court overruled *Bowers*. After all, the most certain way to avoid pregnancy or fathering a child is to abstain from sexual intercourse. To hold that couples need contraceptives to avoid unwanted pregnancy necessarily *assumes* that there is an underlying right to engage in sexual intercourse in the first place. Imagine if a resident of California, where marijuana is mostly legal, argued that Nevada’s continued criminalization of that drug violated her constitutionally protected right to travel from state to state. This would be seen as a preposterous argument because she does not have an underlying constitutional right to possess or use marijuana in the first place. By the same logic, holding that people have a constitutional right to contraceptives in order to maintain their reproductive control presumes that people have a constitution right to engage in what the *Griswold* Court called “intimate relation[s]”.

In addition, the opinion of the Court in *Griswold* does not even mention the word “reproduction,” nor any variation or synonym of that word. It does, however, use variations of the word “intimate” eight separate times, each time clearly referencing sexual intimacy. The Court was particularly clear that it was discussing a sexual intimacy, as opposed to other forms of intimacy, in the following paragraph:

Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which, always and in every age, it has fostered and protected. It is one thing when the State exerts its power either to forbid extramarital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.[[10]](#footnote-10)

Further, the case cited above, *Bowers v. Hardwick*, has been overruled by the Supreme Court. *Bowers* upheld the anti-sodomy laws of Georgia holding that there is no right to sexual autonomy. *Lawrence v. Texas* overruled *Bowers*, unequivocally stating that “that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”[[11]](#footnote-11) In short, the idea that the Constitution protects only reproductive choices but not sexual intimacy, was temporarily embraced by the Court in *Bowers*, but it never really made sense and has since been overruled.

1. Affirmative Consent Violates Students’ Right to Sexual Autonomy*.*

In the fall of 2014, California Governor Jerry Brown signed the nation’s first mandatory affirmative consent legislation, which applies to all schools, public or private, receiving state funds. The law states:

An affirmative consent standard in 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.[[12]](#footnote-12)

New York State has adopted similar legislation and over 1,400 colleges and universities have also adopted affirmative consent policies defining sexual assault.[[13]](#footnote-13) Several other states are considering legislation that would mandate affirmative consent as the standard for sexual assault on college campuses. Perhaps surprisingly, the federal Office of Civil Rights has not expressed an opinion on affirmative consent. The trend in this direction has been the result of state legislation and decisions made on individual campuses.

Affirmative consent regimes seek to control how adults engage in sexual conduct in private settings. This violates the rights that were established in *Griswold, Eisenstadt* and *Lawrence*. In the words of the *Lawrence* Court: “Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”[[14]](#footnote-14) Under an affirmative consent regime students cannot signal their consent by simply allowing their partner to continue doing what they are doing, which, as I detail elsewhere, is how many, if not most, people behave. They cannot effectively tell their partner that they do not have to ask permission every time they want to kiss them or to progress to the next level of a sexual encounter. This is no small thing. A regime that seeks to impose a government-approved method of sexual intimacy and tells so many people that the way that they make love is against government imposed rules is very serious violation of people’s liberty.

The *Lawrence* decision in particular focuses on protection of intimacy. The Court uses the words “intimacy” or “intimate” thirteen times in its decision. Affirmative consent regimes inherently run afoul of the Court’s decision because they negate the power of intimacy. Even the closest of couples must behave as if they are complete strangers to one another. Affirmative consent laws, even the more restrained ones that do not require “enthusiastic” or “equal consent”,[[15]](#footnote-15) require *overt* manifestation of consent and clarify that simply allowing your partner to progress is a violation of university rules or state laws. Under affirmative consent laws, waking a boyfriend or girlfriend up with kisses would be illegal, as it is literally impossible for a sleeping person to consent to such an act before it happens. But, the right to sexual intimacy would allow partners to set guidelines ahead of time that would allow this sort of unsolicited affection. Like most affirmative consent policies, Ohio State University’s, states that “Previous relationships or prior consent cannot imply consent to future sexual acts.” As a point of clarification it adds: “this includes ‘blanket’ consent (i.e. permission in advance for any/all actions at a later time/place.)”[[16]](#footnote-16) This renders impossible entire categories of sexual interactions. One significant example is Bondage, Discipline, Dominance, and Submission (“BDSM”), which is inherently incompatible with affirmative consent. BDSM is based upon the “relinquishing of control,”[[17]](#footnote-17) while the whole point of affirmative consent is to keep people in continuous control of how, when and where they are touched sexually. The idea behind “safe words” is that the dominant partner has presumed permission to continue and progress to further sexual acts absent use of that safe word.[[18]](#footnote-18) This is the exact opposite of affirmative consent, which requires overt consent for each new stage of sexual progression.

Whether the government approves of BDSM or not, it is widely practiced by consenting adults. According to a 2017 study published in the *Journal of Sexual Medicine*:

By use of a cross-sectional survey questionnaire, the level of interest in several BDSM-related activities was investigated in a sample representative of the general Belgian population (N = 1,027). The questionnaire evaluated interest in 54 BDSM activities and 14 fetishes. Self-identification as BDSM practitioner, situational context of BDSM practice, age at awareness of these interests, and transparency to others were queried . . . A high interest in BDSM-related activities in the general population was found because 46.8% of the total sample had ever performed at least one BDSM-related activity and an additional 22% indicated having (had) fantasies about it. Interestingly, 12.5% of the total population indicated performing at least one BDSM-related activity on a regular basis. When asked whether they saw themselves as being interested in BDSM, 26% stated this to be the case and 7.6% self-identified as BDSM practitioners. Interests in dominant and submissive activities were comparable and, remarkably, were highly intercorrelated. BDSM and fetish interests were significantly higher in men than in women. The older group (48-65 years) had significantly lower BDSM scores compared with their younger peers. Of participants with a BDSM interest, 61.4% became aware of it before 25 years of age.[[19]](#footnote-19)

The study concluded: “There is a high level of interest in BDSM in the general population, which strongly argues against stigmatization and pathologic characterization of these interests.”[[20]](#footnote-20)

This is a study of Belgians, not Americans, and the authors concede in their “Strengths and Limitations” section that: “Although our findings tend to argue against it, we cannot completely rule out participation bias introduced by non-interest in the non-completers.” Nonetheless, it seems unlikely that Americans are uniquely uninterested in this practice. According to *National Public Radio*, of the 100 Million copies of the heavily BDSM-themed series *50 Shades of Gray* sold world-wide, 45 Million were sold in the United States.[[21]](#footnote-21)

Thus, whether college couples want to wake each other with kisses, play BDSM sex games, or simply allow themselves to be sexually touched based upon understandings come to over the course of a relationship, rather than overtly consent to every sexual interaction, affirmative consent regulates and proscribes an extraordinary range of adult, private, consensual, intimate behavior. Advocates of affirmative consent may reasonably ask what is so difficult about always asking before touching, but the constitution allows people to answer “that is simply not our desire.”

It is fair to point out that not all college sexual interactions involve gentle kisses, playful fantasy games, or welcome, if not explicitly invited, sexual touching by a long-term partner. There are far darker encounters, and these are what most advocates of affirmative consent are trying to eliminate. Yet affirmative consent policies are both far too over-inclusive and far too under-inclusive to accomplish that goal. They are over-inclusive because they regulate all of the behaviors described above, not just sexual assault. They are under-inclusive because do not apply outside of college, including in situations of extreme power imbalances where sexual predation is a particular risk. It is worth noting that both Donald Trump and Harvey Weinstein, whom dozens of women have accused of abusing their powerful positions to sexually assault women, are from New York. As I explain elsewhere, New York State was one of the first to pass a mandatory affirmative consent law for colleges but also has comparatively lax rape laws that give less protection to the women who have accused men such as Trump and Weinstein of sexual assault.

To be clear, it certainly possible that some affirmative consent laws, if interpreted or applied in a less restrictive way, might not violate students’ right to sexual autonomy. California in particular, attempted to draft its law carefully. The legislature removed language from an early draft that had warned “relying solely on nonverbal communication can lead to misunderstanding.”[[22]](#footnote-22) This leaves open the possibility that the government will not necessarily micro-manage each stage of a couples progression of sexual activity. On the other hand, Democratic Assemblywoman Bonnie Lowenthal who co-authored the bill, has publically stated a verbal yes is required.[[23]](#footnote-23) So it is difficult to know exactly what the law requires. Indeed, it appears that the very people who are supposed to be educating students about what affirmative consent laws mean are confused themselves. The *New York Times* published this account of a training session on “Yes Means Yes” at a San Francisco high school:

“What does that mean — you have to say ‘yes’ every 10 minutes?” asked Aidan Ryan, 16, who sat near the front of the room.

“Pretty much,” Ms. Zaloom [the educator] answered. “It’s not a timing thing, but whoever initiates things to another level has to ask.”

If that is a correct answer, the government is requiring students ask prior permission at every stage of sexual progression. As I show elsewhere, this is very different from the most people conduct themselves sexually and represents a vast new government encroachment into the most personal of human activities. Ana Gruber, a law professor at the University of Colorado, has carefully reviewed the arguments on both sides and concludes that: “Despite its somewhat ambiguous nature, the California law does appear to require some stop-and-ask ritual.”[[24]](#footnote-24) There is similar confusion in New York State where Governor Cuomo has publically asserted that the affirmative consent law requires people “to say yes. It’s yes on both sides.”[[25]](#footnote-25)

Some defenders of affirmative consent argue that concerns over the bills are “idiotic” and that the laws merely require consent in the ordinary use of the word.[[26]](#footnote-26) Yet it is clearly true that affirmative consent laws change the ordinary meaning of consent. As we will see below, in both civil and criminal law consent is a mental state, not a particular way of expressing a mental state. In other words, if someone borrows your cell phone, the law asks if that person actually had your consent, not whether or how that person “ensured” that he or she had your consent.

It is possible that if colleges and courts interpret affirmative consent in a permissive manner, they might not result in the sort of micro-management of private sexual activity that would violate the constitution. There is some “wiggle room” in how some of these laws and policies are interpreted. However, based upon statements by various public officials who drafted and signed these laws, the way the laws are being explained by some educators, the reasonable interpretation of the language of various statutes and college policies, affirmative consent, poses a serious danger of violating constitutionally protected sexual autonomy. The next several sections of this paper look at a different issue: whether there might be reason to believe that there really is not a right to sexual autonomy in the first place.

1. **The Arguments against the Existence of a Right to Sexual Autonomy.**

Not everyone agrees that there is a constitutional right to sexual autonomy. Indeed a number of counter arguments have been made by various judges and scholars. These will be addressed below.

1. The Lawrence Court never explicitly stated that sexual autonomy is a fundamental right.

There is a major split among the federal circuit courts (those courts just below the Supreme Court whose various jurisdictions are divided over twelve different geographic areas of the country) about whether there is a fundamental right to sexual autonomy. The First, Fifth and Ninth Circuit Courts have held that there is. The Seventh and Eleventh Circuits have held otherwise. There is a similar split among state courts.[[27]](#footnote-27)

As noted earlier, a fundamental right is a substantive right, not explicitly mentioned in the constitution, which is protected by “strict scrutiny”—courts will strike down laws that violate fundamental rights unless such laws are “narrowly tailored to further a compelling government interest.”[[28]](#footnote-28) The Seventh and Eleventh Circuit Courts based their rejection of the claim that *Lawrence* in particular, recognized a fundamental right to sexual autonomy on three related arguments: (1) the *Lawrence* Court never used the term “fundamental right”; (2) the *Lawrence* Court never explicitly stated that it was applying strict scrutiny; and (3) the *Lawrence* did not inquire whether there is a “history and tradition” of sexual autonomy in this county.

In *Muth v. Frank*, the Seventh Circuit quotes Justice Antonin Scalia’s dissent in *Lawrence:* "[N]owhere does the Court's opinion declare that homosexual sodomy is a `fundamental right' under the Due Process Clause..."[[29]](#footnote-29) The *Muth* Court added: “The Supreme Court in *Lawrence* also did not apply strict scrutiny in reviewing the sodomy statute at issue.”[[30]](#footnote-30)

In addition, the Eleventh Circuit reasoned that:

[T]he *Lawrence* opinion contains virtually no inquiry into the question of whether the petitioners' asserted right is one of "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." [T]he opinion [also] notably never provides the "`careful description' of the asserted fundamental liberty interest" that is to accompany fundamental-rights analysis.[[31]](#footnote-31)

In this view, *Lawrence* merely subjected Texas’ sodomy laws to “rational basis” review—the Court’s lowest form of scrutiny. The sodomy laws were struck down because: “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”[[32]](#footnote-32)

This chapter argues that none of this reasoning can withstand any sort of serious analysis. Each of these arguments contains serious flaws. While it is true that the *Lawrence* Court did not use the term “fundamental rights”, it relied on cases that are fundamental rights cases, which indicates that it was applying fundamental rights doctrine. As the Ninth Circuit wrote in the 2008 case *Witt v. Department of The Air Force*: “in Lawrence, the Supreme Court relied on Griswold, Roe v. Wade, and Carey v. Population Services International, all of which are fundamental rights cases.”[[33]](#footnote-33)

Not only did *Lawrence* rely on these cases, but it repeatedly pointed out they were fundamental rights cases. In the following passage the *Lawrence* court uses the term ‘fundamental’ five separate times in describing the cases:

After Griswold it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In Eisenstadt v. Baird, [405 U.S. 438](https://supreme.justia.com/cases/federal/us/405/438/case.html) (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause, id., at 454; but with respect to unmarried persons, the Court went on to state the *fundamental* proposition that the law impaired the exercise of their personal rights, ibid. It quoted from the statement of the Court of Appeals finding the law to be in conflict with *fundamental* human rights, and it followed with this statement of its own:

"It is true that in Griswold the right of privacy in question inhered in the marital relationship. . . . If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so *fundamentally* affecting a person as the decision whether to bear or beget a child." Id., at 453.

The opinions in Griswold and Eisenstadt were part of the background for the decision in Roe v. Wade, [410 U.S. 113](https://supreme.justia.com/cases/federal/us/410/113/case.html) (1973). As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman's rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. Roe recognized the right of a woman to make certain *fundamental* decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of *fundamental* significance in defining the rights of the person.[[34]](#footnote-34)

Not only did the *Lawrence* Court rely upon a string of fundamental rights cases, but it also *eschewed* reliance on *Evans v. Romer*, which is the only Supreme Court case to strike down a law targeting gays and lesbians on rational basis grounds:

The second post-Bowers case of principal relevance is Romer v. Evans, [517 U.S. 620](https://supreme.justia.com/cases/federal/us/517/620/case.html) (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. Romer invalidated an amendment to Colorado's constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," id., at 624 (internal quotation marks omitted), and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose. Id., at 634.

As an alternative argument in this case, counsel for the petitioners and some amici contend that Romer provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether Bowers itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

In short, the *Lawrence* Court repeatedly made clear it was applying fundamental rights cases, emphasizing that those cases protected fundamental rights, while specifically eschewing reliance on the only rational basis case in history in which the Supreme Court struck down an anti-same sex equality law. To call *Lawrence* a rational basis case rather than a fundamental rights case is truly the tail wagging the dog.

The *Lawrence* Court did make a reference to the anti-sodomy law lacking a “legitimate” state interest, which is language associated with the rational basis test. However, the Court required not only a legitimate interest, but one that must be strong to justify the anti-sodomy law’s intrusion on liberty: “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”[[35]](#footnote-35) The rational basis test is not a balancing test that weighs the state interest against intrusions on liberty. Once a legitimate interest is identified, the law will be upheld as long as there is some conceivable connection between the law and that interest. As the Ninth Circuit pointed out: “Were the [Lawrence] Court applying rational basis review, it would not identify a legitimate state interest to ‘justify’ the particular intrusion of liberty at issue in Lawrence; regardless of the liberty involved, any hypothetical rationale for the law would do.”[[36]](#footnote-36)

Furthermore, the *Lawrence* Court used other language that demonstrates that it was applying heightened scrutiny to the Texas law. As the *Witt* Court noted:

the language of Lawrence emphasizes the importance of the right at issue and refers to “substantial protections” afforded “adult persons in deciding how to conduct their private lives in matters pertaining to sex.”  “Substantial protections” are not afforded under rational basis review . . .[[37]](#footnote-37)

“Rational basis” scrutiny is the minimum level of judicial scrutiny. As the *Witt* Court notes, the *Lawrence* Court would not be talking about “substantial protections” for sexual conduct under rational basis analysis.

The *Witt* Court also pointed out that in *Lawrence*, the Supreme Court stated that the decision in *Bowers v. Hardwick* “failed to appreciate the extent of the liberty involved.”[[38]](#footnote-38) The *Witt* Court continued:

The criticism that the Court in Bowers had misapprehended “the extent of the liberty at stake” does not sound in rational basis review.   Under rational basis review, the Court determines whether governmental action is so arbitrary that a rational basis for the action cannot even be conceived post hoc.[[39]](#footnote-39)

Even apart from the various word choices of the *Lawrence* Court, it is clear from the substance of its holding that the Court was applying a high level of scrutiny to the sodomy law. Outside of sexual liberty, moral disapproval of practice is well within the scope of rational basis review for barring or regulating the practice. Under rational basis review, the government is free to ban gambling, “nude” dancing and obscene movies, even if children are not exposed.[[40]](#footnote-40) Therefore if the anti-sodomy laws were struck down because moral disapproval is not a sufficient basis for the law, this demonstrates that sexual autonomy is more protected than other activities.

Although the arguments above indicate that the Supreme Court has treated sexual autonomy as a fundamental right, the Eleventh Circuit’s ruling disagrees, claiming that the Court did not find that such autonomy is among “"those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."”[[41]](#footnote-41) This language comes from the Supreme Court case *Washington v. Glucksberg[[42]](#footnote-42)*, which held that there is no constitutional right to physician-assisted suicide.

These differing conclusions spring from the Supreme Court’s inconsistent derivation of it’s definition of fundamental rights. The Court has vacillated among at least four separate tests. Justices have asked whether the right is "deeply rooted in this Nation's history and tradi­tion," but they have also asked whether the right is "explicitly or implicitly protected by the Constitution" and whether the right is "implicit in the concept of ordered liberty."[[43]](#footnote-43) Finally, the Court has said the delineation of fundamental rights is a matter of "reasoned judgment."[[44]](#footnote-44) There is no consistently applied reasoning for recognizing fundamental rights.

If this was not entirely clear when the Eleventh Circuit was writing in 2004, it was made crystal clear by the Supreme Court in 2015 when it decided *Obergefell v. Hodges*:

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." Poe v. Ullman, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See ibid. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See Lawrence, supra, at 572. That method respects our history and learns from it without allowing the past alone to rule the present.[[45]](#footnote-45)

Indeed, the *Obergefell* majority decision went even further, and explicitly listed intimacy as a fundamental right:

Glucksberg did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing *other fundamental rights, including marriage and intimacy.*[[46]](#footnote-46)

The entire argument that the string of cases protecting contraception and sodomy do not protect sexual autonomy is based upon an unrealistically mechanical view of the Court’s jurisprudence. Abortion is a fundamental right, but the Court does not use that term in its abortion cases. Further, not only does it ignore the term strict scrutiny in abortion cases; it applies a heightened level of scrutiny called the “undue burden” test.[[47]](#footnote-47) The *Obergefell* Courtrecognized that marriage is a fundamental right but did not explicitly apply strict scrutiny. In *Troxel v. Granville*, the Supreme Court held that there is a fundamental right to control to control who has custody of one’s children, but it also failed to apply strict scrutiny. As Justice Clarence Thomas wrote in his concurring opinion:

Consequently, I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case . . . The opinions of the plurality recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights.[[48]](#footnote-48)

In sum, the Court frequently protects fundamental rights without mechanical invocation of the term “strict scrutiny”.

Finally, even if we put aside all of this technical legal argument, a simple, commonsense thought experiment demonstrates that *Lawrence* could not have merely been applying the rational basis test when it held that moral disapproval is not a sufficient basis for anti-sodomy laws. According to the Center for Disease Control, “Anal sex is the riskiest sexual behavior for getting and transmitting HIV for men and women”. Also: “Anal sex may also expose individuals to other sexually transmitted diseases or other infections.”[[49]](#footnote-49) While use of condoms lowers the risk of transmission, it is nonetheless true that “[t]he vast majority of men who get HIV get it through anal sex.”[[50]](#footnote-50) Obviously, reducing the risk of spreading infectious disease is a legitimate government interest. So, if *Lawrence* is just a rational basis decision, then if any state wants to reinstate its anti-sodomy laws, all it has to do is to say that its government purpose is preventing the spread of disease. Since women can also get HIV through anal sex, but at a lower rate than men[[51]](#footnote-51), states would have a rational for banning either all sodomy or just same-sex sodomy. Rather than being a major constitutional precedent widely taught in law schools, a rational basis interpretation of *Lawrence* renders it nothing more than a minor technical case that required the State of Texas to adjust its pleadings. That surely is not right.

In sum, it is clear that the Court has held, in both the contraception and sodomy cases, that the Constitution gives real protection to sexual autonomy. The Court has sometimes called this right “privacy” and other times “autonomy”. It has called people’s interest in this right “substantial” and has said the state must have an interest important enough to justify its infringement. It has discussed this right in the context of other strongly supported rights such as the right to an abortion. It does not matter that, as with other such rights, the Court has not explicitly used the term “fundamental” or strict scrutiny.

Why the skittishness of some courts to acknowledge this? It may be similar to the courts’ reluctance to acknowledge a broad right to marry prior to the Supreme Court’s landmark decision in *Obergefell v. Hodges[[52]](#footnote-52).* As I have discussed extensively elsewhere, many courts were fearful that recognizing a fundamental right to marry, which is broad enough to cover same-sex marriage, would lead down a slippery slope to all manner of undesirable marriages such as incestuous and polygamous marriages. This led them to accept very weak arguments to guard against this result, all of which were eventually swept aside by the Supreme Court in *Obergefell*.[[53]](#footnote-53)

Perhaps the same phenomenon is at work with the right to sexual autonomy; courts might fear that recognizing such a fundamental right would protect a parade of horribles ranging from bestiality to necrophilia to sex with minors. Such analogies were often applied to gays and lesbians as well.[[54]](#footnote-54) This should not happen if the courts apply *Lawrence* correctly. The *Lawrence* Court’s invocation of intimacy provides sufficient traction against a slippery slope. Sex with animals, corpses and children hardly involve the type of adult, human intimacy that *Lawrence* protects. As will be discussed below, *Lawrence*’s protection does not require a demonstration that each individual sexual encounter is an intimate one, but there is nothing in *Lawrence* that requires courts to extend its protections to sex with animals, corpses, or children.

As this paper was being written, the Ninth Circuit demonstrated the dangers of misunderstanding *Lawrence* when it allowed, after a hearing, a challenge to California’s anti-prostitution lawsuit to go forward. The District Court judge had ruled against the law’s challengers, saying the high court ruling protected only intimate personal relationships, not commercial sex.[[55]](#footnote-55) This certainly seems like the correct result given that the *Lawrence* specifically pointed out that the case did not involve prostitution.[[56]](#footnote-56) The Ninth Circuit, at the hearing, sidestepped the question of intimacy, asking “Why should it be illegal to sell something that it’s legal to give away?”[[57]](#footnote-57) This seems like an odd question. The district court judge, Jeffrey White, had ruled that “the state had adequately justified the current law as a deterrent to violence against women, sexually transmitted diseases and human trafficking.”

This paper argues that the district court judge had it exactly right when he ruled that commercial sex lacks the intimacy requirement of *Lawrence*, and was also right that the state’s interest in avoiding evils such as sex trafficking is more than adequate to distinguish prostitution from non-commercial sex. There is no need to deny, as the Seventh and Eleventh circuits have done, that there is not a fundamental right to sexual intimacy at all. Nonetheless, this sort of decision may well be why some courts fear the slippery slope and have stayed with an overly cramped interpretation of *Lawrence.*

1. The (Misconception that the) Right to Sexual Autonomy is Limited to Historically Unpopular or Vulnerable Minorities.

In *Doe v. The Rectors and Visitors of George Mason University,­* a student challenged his expulsion for engaging in BDSM sexual acts. Although he won his procedural due process case, the federal judge declined to hold that his substantive constitutional rights were violated. The judge held that *Lawrence*’s protection of sexual autonomy did not protect him because he was not part of a vulnerable minority group. The judge reasoned that the Supreme Court has created two different methods of deriving fundamental rights. The first way is by balancing “private interests against social needs.” The second way is the method used in *Glucksberg,* the assisted suicide case discussed in the previous section. Under that precedent, fundamental rights are defined as narrowly and specifically as possible and they are only considered fundamental if they are part of America’s history and tradition:

The Supreme Court's cases recognizing judicially-enforceable fundamental liberty interests disclose two equal but distinct lines of precedent with respect to the appropriate methodology to be used when considering whether a liberty is fundamental and therefore protected as judicially enforceable under the Fourteenth Amendment. One approach is a common law methodology articulated by Justice Harlan in dissent in *Poe v. Ullman* , [367 U.S. 497, 543,](https://www.casemine.com/judgement/us/5914c93eadd7b049347f0d2f#p543) [81 S.Ct. 1752,](https://www.casemine.com/judgement/us/5914c93eadd7b049347f0d2f) [6 L.Ed.2d 989](https://www.casemine.com/judgement/us/5914c93eadd7b049347f0d2f) (1961), and later embraced in cases such as *Planned Parenthood of Se. Pa. v. Casey* , [505 U.S. 833, 848](https://www.casemine.com/judgement/us/5914bf04add7b049347abb6a#p848)–49, [112 S.Ct. 2791,](https://www.casemine.com/judgement/us/5914bf04add7b049347abb6a) [120 L.Ed.2d 674](https://www.casemine.com/judgement/us/5914bf04add7b049347abb6a) (1992), and *Obergefell* , [135 S.Ct. at 2598](https://www.casemine.com/judgement/us/59145e0fadd7b049342027dd#p2598)–99. This methodology balances private interests against social needs by reference to, but not bound by, historical practice. In contrast, a more restrictive and historical-focused approach was articulated in *Washington v. Glucksberg* , [521 U.S. 702, 721,](https://www.casemine.com/judgement/us/591481c4add7b0493448a02a#p721) [117 S.Ct. 2258,](https://www.casemine.com/judgement/us/591481c4add7b0493448a02a) [138 L.Ed.2d 772](https://www.casemine.com/judgement/us/591481c4add7b0493448a02a) (1997), in which the Supreme Court held that a judicially enforceable implied fundamental liberty interest must be (i) deeply rooted in the nation's history and traditions and (ii) implicit in the concept of ordered liberty.[[58]](#footnote-58)

Under this analysis, the question of whether Doe’s rights had been violated should be decided according to the more restrictive, tradition-based rules of *Glucksberg*:

Under the *Glucksberg* mode of analysis, plaintiff's asserted fundamental liberty interest in engaging in BDSM sexual activity is clearly not protected as judicially enforceable under the Fourteenth Amendment. Defined with specificity and cast as a negative liberty, as *Glucksberg* counsels, plaintiff's asserted liberty is a freedom from state regulation of consensual BDSM sexual activity. There is no basis to conclude that tying up a willing submissive sex partner and subjecting him or her to whipping, choking, or other forms of domination is deeply rooted in the nation's history and traditions or implicit in the concept of ordered liberty.[[59]](#footnote-59)

Why were Doe’s sexual practices less protected than those who engage in sodomy? Because, according to the judge in that case, T.S. Ellis III, *Lawrence* is based on equality issues as much as it is on liberty issues. If equality issues are not at play, Ellis argues the courts should apply *Glucksberg*’s approach of defining rights narrowly and only protecting those rights that are traditionally protected. Therefore, the court would not ask a question about broad rights such as sexual autonomy; the question should be whether BDSM in particular is a historically protected practice. Judge Ellis based his conclusion largely on his reading of *Obergefell v. Hodges*, the Supreme Court case holding there is a right to same-sex marriage. Ellis wrote:

Importantly, *Obergefell* explicitly establishes that the Due Process and Equal Protection Clauses are "interlocking" and each "leads to a stronger understanding of the other." *See* 135 S.Ct. at 2603-04. In other words, *Obergefell* highlights that the decision to recognize an implied fundamental liberty interest as judicially enforceable turns, in part, on whether the liberty interest at issue has historically been denied on the basis of impermissible animus or, alternatively, on a legitimate basis aimed at protecting a vulnerable group. *See, e.g., id.* at 2596.[33](https://www.leagle.com/decision/infdco20160311674#fid33) *Lawrence* is not to the contrary. There, the Supreme Court reasoned that a statute criminalizing homosexual sodomy violated a judicially enforceable implied fundamental liberty interest in sexual intimacy because of the history of animus towards homosexuals. *See Lawrence,* 539 U.S. at 571, 123 S.Ct. 2472 (noting that "powerful voices...condemn homosexual conduct as immoral" but that this does not permit "the majority [to] use the power of the State to enforce these views on the whole society through the operation of the criminal law").[[60]](#footnote-60)

So Ellis is arguing that same-sex marriage was protected because gays and lesbians are a historically disliked, vulnerable group. But this has it exactly backwards. What *Obergefell* actually held is that same-sex couples *cannot be denied the same rights as everyone else* just because they are historically unpopular and vulnerable. The Court was very clear that it was deciding whether gays and lesbians could be excluded from *an already existing* right:

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to Washington v. Glucksberg, 521 U. S. 702, 721 (1997), which called for a “‘careful description' " of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." Brief for Respondent in No. 14 556, p. 8. Glucksberg did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. Loving did not ask about a "right to interracial marriage"; Turner did not ask about a "right of inmates to marry"; and Zablocki did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.[[61]](#footnote-61)

The same is true for the right to sexual autonomy in *Lawrence*. Gays and lesbians are not being treated as a special class. The Court merely held that they are entitled to the same rights as heterosexuals:

In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” Ibid. *Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.[[62]](#footnote-62)*

It is true that the *Lawrence* does discuss the issue of animus towards gays and lesbians. However the Court never implies that gays and lesbians are receiving any special rights that others do not have. Rather the Court simply holds that such animosity is not a rational basis for depriving them of the same protections that everyone else enjoys:

The second post-Bowers case of principal relevance is Romer v. Evans, 517 U. S. 620 (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. Romer invalidated an amendment to Colorado’s constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by orientation, conduct, practices or relationships, id., at 624 (internal quotation marks omitted), and deprived them of protection under state antidiscrimination laws. We concluded that the provision was born of animosity toward the class of persons affected and further that it had no rational relation to a legitimate governmental purpose.[[63]](#footnote-63)

Furthermore, Judge Ellis’ cramped interpretation of *Lawrence* ignores all of the cases that *Lawrence* relies upon. As noted in the previous section, *Lawrence* derives the right of sexual autonomy from a serious of cases protecting the right of contraception and abortion. The *Lawrence* Court wrote:

Both Eisenstadt and Carey, as well as the holding and rationale in Roe, confirmed that the reasoning of Griswold could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered Bowers v. Hardwick.[[64]](#footnote-64)

Recall that the dissenters in *Bowers* (the now-overruled case upholding anti-sodomy laws) believed that the contraception cases did not protect sexual autonomy; they were purely reproductive freedom cases. Judge Ellis held that *Lawrence* did not protect sexual autonomy but only protected unpopular minorities from discrimination in sexual regulation. To accept all of this, you would have to believe that *Lawrence* has nothing to do with these other cases--*Lawrence* and *Obergefell* protect minorities and all the other cases protect reproductive rights. The problem is, that as we have now seen, *Lawrence* and *Obergefell* repeatedly cite the contraception and abortion cases as the precedent for their autonomy holdings. Further, if Judge Ellis is right, we would have to conclude that *Eisenstadt* was wrongly decided because it protected contraceptive use by unmarried couples, and there is no tradition of protecting fornication (unmarried sex) in this nation.

Ellis’ opinion ignores the overall structure of the *Lawrence* opinion, which is surely concerned about prejudice and equality, but is first and foremost a defense of liberty and freedom. As Nan Hunter points out, the first word of the opinion is “liberty” and the last word is “freedom”:

"Liberty" is the Court's major chord. Lawrence begins with "liberty" and ends with "freedom," and those word choices are not a fluke. The opening paragraph defines Lawrence as a case about realms where government should not go. The first four sentences of the opinion declare: Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds.”[[65]](#footnote-65)

Finally, the *Lawrence* repeats in full the reasons that the American Legal Institute recommends against criminalizing sodomy. It is striking how much the reasoning applies with equal force to affirmative consent regimes:

It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail.[[66]](#footnote-66)

In sum, the Supreme Court’s decisions taken as a whole protect a right to sexual autonomy that is not confined to contraception or to unpopular minorities or to sexual practices that have been historically approved of. The government could not require every person to have sex only using the missionary position or ban oral sex. This right is broad enough to cover sexual practices ranging from morning kisses to BDSM sex play, to consensual love-making based on a couple’s unspoken intimate understandings with one another rather than the same sort of overt, step by step consent that might be appropriate for complete strangers.

The next section looks at another possible issue with this argument. Is it possible that college “hook up” sex is not constitutionally protected because it lacks the intimacy for such protection?

1. The Question of Intimacy.

Obviously not all sexual activity takes place among people in intimate relationships. Popular culture is awash with stories about the prevalence of “hook up sex” on college campuses.[[67]](#footnote-67) While the difference between the sexual behavior of today’s college students and that of their parents’ generation is greatly exaggerated, it is nonetheless true that a significant amount of college sexual activity takes place outside of long term relationships.[[68]](#footnote-68)

Is it possible that the right to sexual autonomy does not apply to these sexual encounters? There is an argument to be made that *Lawrence* only protects sexual activity within intimate relationships:

The most recent Supreme Court case ostensibly protecting sexual activity, Lawrence v. Texas, also can be narrowly construed to protect sexual conduct only when such activity promotes emotional intimacy. In holding that same sex couples possess a liberty right to engage in sodomy, the Court emphasized that sexual acts, including anal sex between two men, "can be but one element in a personal bond that is more enduring." The Court therefore did not declare that consenting adults enjoy the freedom to engage in all forms of sex. Instead, the Court suggested that sex deserves constitutional protection only when potentially in the service of emotional intimacy.[[69]](#footnote-69)

One scholar goes even further, arguing the *Lawrence* is limited to protecting sex that is *transcendental* in nature: “[Lawrence] leaves little or no justification for protecting less-than-transcendental sex that is not part of an ongoing relationship."[[70]](#footnote-70) This section argues that, while the *Lawrence* Court certainly discussed intimacy, it would be a mistake to assume that it was directing courts to make case by case findings on the degree of intimacy of each individual sexual relationship. This would be a job for which they are spectacularly unsuited. As Judge Richard Posner has pointed out: “[J]udges know next to nothing about [sex] beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much . . . screened out of the judiciary."[[71]](#footnote-71)

The *Lawrence* Court tacitly recognized how unsuited the courts are for this by declining to examine the level of intimacy of the couple whose sexual encounter was at the center of that case. In fact, the pair in *Lawrence* were not an established couple at all and were not intimate in any sense beyond the way that any pair of individuals engaging in sexual activity would be considered intimate. Indeed, one of them was cheating on the long term boyfriend he actually had, who called the police, which is how the police ended up in the bedroom in the first place:

The defendants in Lawrence-two men discovered engaging in anal sex in a private home-did not hold themselves out as a couple nor is there any evidence that they intended to pursue an ongoing relationship comparable to dating or marriage. In fact, one of the men was "romantically involved" with another man at the time of the arrest, and it was that romantic partner who called the police.[[72]](#footnote-72)

In short, the two men in *Lawrence* were engaged in exactly the sort of hook up sex that so many college students are assumed to be engaging in. If the Court protects the *Lawrence* couples’ right to sexual autonomy, there is no reason to assume it does not protect sexual activity that falls well short of the romantic ideal of an intimate relationship.

What then was the point of discussing intimacy at all in *Lawrence*? The most reasonable interpretation is that the majority opinion was distinguishing the type of sex at issue in that case from the sorts of sexual encounters that, *as a class*, are unlikely to be intimate. In his dissent, Justice Antonin Scalia argued the *Lawrence* decision opened the door to sexual anarchy:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision . . .[[73]](#footnote-73)

Many of the practices listed by Scalia, such masturbation and bestiality, are distinguishable from the sexual acts protected in *Lawrence*, because they inherently do not involve intimacy with another human being. Indeed, numerous courts have limited *Lawrence*’s reach on this basis, holding that it does not protect sex with minors, sex toys sold for masturbatory purposes, sex in public, or non-consensual sex.[[74]](#footnote-74) The specification of intimacy also excludes prostitution from protection since it is a commercial rather than personal activity.[[75]](#footnote-75)

So the invocation of intimacy is better understood as distinguishing between categories of sexual activity—commercial vs. non-commercial; adult humans vs. minors and animals, public vs. private—than as inviting case by case determinations of adult couple’s level of intimacy. As the eminent constitutional scholar Lawrence Tribe writes:

[T]he Court evidently recognized an obligation to extend constitutional protection to some brief interactions that might not ripen into meaningful connections over time - even to some that might be chosen precisely for their fleeting and superficial character and their lack of emotional involvement. Had the Court done otherwise, it would have ceded to the state the power to determine what count as meaningful relationships and to decide when and how individuals might enter into such relationships. Doing so would have drained those relationships of their unique significance as expressions of self-government.[[76]](#footnote-76)

1. The Question of Consent and Coercion.

There is no question that the constitutional protections of *Lawrence* do not apply to coerced sexual activity. The Court clearly stated: “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.”[[77]](#footnote-77) And of course the whole point of affirmative consent regimes is to avoid non-consensual sexual contact.

So can one argue that affirmative consent is constitutional because it does not punish truly consensual activity? Probably not. As the *Lawrence* Court itself points out, sodomy laws were rarely prosecuted and were usually enforced only in cases of assault or where vulnerable or powerless parties were involved:

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. Thus the model sodomy indictments presented in a 19th-century treatise addressed the predatory acts of an adult man against a minor girl or minor boy. Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.[[78]](#footnote-78)

So limiting sodomy prosecutions to cases of assault or situations involving vulnerable individuals did not make those laws constitutional. Further, as discussed above, affirmative consent regimes go well beyond requiring consent. The require a particular way of engaging in sexual relations, one that is at odds with how many, if not most, people actually engage in sex.

Further, the state cannot evade constitutional rights by simply narrowing the definition of consent. For example, it could not bring back sodomy prohibitions by arguing that since sodomy is medically dangerous and without reproductive value, no person could truly voluntarily consent to it.

Nor can the state define away the ways that so many people actually consent to sexual activity. The law is quite clear on what actual consent means—it is a mental state, and does not require any specified expression of that mental state. This is true today and it was true at the time that *Lawrence* was decided.According to the most recent draft of the *Restatement (Third) of Torts*, consent is defined as follows:

§ 112. Actual Consent A person actually consents to an actor’s otherwise tortious conduct if the person is subjectively willing for that conduct to occur. *Actual consent need not be communicated to the actor to be effective.* It can be express or can be inferred from the facts.[[79]](#footnote-79)

The authors of the Model Penal Code considered adopting a definition of consent that requires overt expression, but ultimately decided against do so.[[80]](#footnote-80) So consent as measure of a mental state rather than as a specific expression of that mental state is the accepted understanding in both civil and criminal law and this was certainly the case when the Court decided *Lawrence.* Therefore, when the Court stated that its holding involved consensual sex, the obvious understanding of what they meant by consent would be the widely accepted definitions of that word at the time *Lawrence* was written.

Furthermore, it is important to remember that we are discussing a right to sexual *autonomy.* Restricting how a person may consent to sexual activity lessens rather than enhances their autonomy. As Kimberly Kessler Ferzan writes:

If we think that what we are protecting is autonomy, then that autonomy is best respected by recognizing that the consenter has it within his or her power to allow the boundary crossing simply by so choosing. No expression is needed. So, if I see my neighbor walking across my lawn to get to the street, and I think “that is okay with me,” then the neighbor does not wrong me even if I never communicate that to him. Similarly, assume that a man is awakened by the woman he had intercourse with the night before performing oral sex on him. When he wakes up he thinks, “this is the best alarm clock ever.” He proceeds to do nothing to indicate his acceptance of this act. At the point at which he decides to allow the act, she does not wrong him because he has assented. His autonomy is fully protected. In contrast, if a man woke up and thought “What is going on? I don’t want this!” but was too panicked to say or do anything, then he is wronged. It is the consenter’s act of will, his or her choice that makes the consentee’s actions permissible.

In sum, it is certainly true that *Lawrence* only applies to consensual sexual activity. Nonetheless, the State cannot lessen constitutional protections by defining consent more narrowly than the Court did. Sexual autonomy includes the autonomy to express one’s consent to intimate conduct in whatever manner one wishes.

1. Is Lawrence Limited to Criminal Laws?

The *Lawrence* Court acknowledges that many people have negative views of homosexuality and then writes: “The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.” Since being suspended or expelled from college is not a criminal punishment, can it be argued that such sanctions are not covered by the *Lawrence* decision?

This proposition is doubtful. First of all, it has been rejected in other contexts. Most famously, in *New York Times v. Sullivan*, a case granting broad first amendment protection to those sued for libeling public officials, the Supreme Court stated: “What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.”[[81]](#footnote-81) Similarly, the Seventh Circuit Court of Appeals applied the same constitutional standards to a civil anti-pornography law that would apply to criminal obscenity laws.[[82]](#footnote-82)

Once again, a simple thought experiment demonstrates why this argument fails. Could state legislatures require colleges to suspend or expel students for having an abortion? For possessing contraception? For homosexuality? In fact the argument is even more compelling than usual in this case because, as discussed in chapter 2, there are often parallel criminal proceedings in college sexual assault cases, in which the two investigations share information.

1. **Conclusion.**

There is a clear and powerful line of cases that protects sexual autonomy, including the sexual autonomy of college students. Affirmative consent regimes violate this right by regulating how students engage in private sexual activity and by limiting how they may express their consent.

1. For the sake of brevity, this paper will refer to the right as “sexual autonomy.” [↑](#footnote-ref-1)
2. *Duncan v. Louisiana*, 391 U.S. 145 (1968). [↑](#footnote-ref-2)
3. See, respectively, *Roe v. Wade,* 410 U.S. 113 (1973), *Griswold v. Connecticut,* 381 U.S. 479 *(1965), Shapiro v. Thompson,* 394 U.S. 618 (*1969),Harper v. Virginia Bd. of Election,* 383 U.S. 663 (1966), *Moore v. East Cleveland,* 431 U.S. 494 (1977), *Plyler v. Doe,* 457 U.S. 202 (1982), and *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). [↑](#footnote-ref-3)
4. Evan Gerstmann, Same-Sex Marriage and the Constitution (3rd ed., 2017) Cambridge University Press at Chapter 4. [↑](#footnote-ref-4)
5. 381 U.S. 479 (1965). One could argue that the line of cases actually begins earlier with *Skinner v. Oklahoma* in 1942, but the Court did not begin considering the issue in earnest until the 1960’s. [↑](#footnote-ref-5)
6. Connecticut General Statutes Sec. 53-32 (1958 Rev.). [↑](#footnote-ref-6)
7. 381 U.S. at 482. [↑](#footnote-ref-7)
8. 405 U.S. 438, 453 (1972). [↑](#footnote-ref-8)
9. ### 478 U.S. 186, 190 (1986) (citations omitted.)

   [↑](#footnote-ref-9)
10. 381 U.S. at 499. While this quotation references marriage, as noted above, the Court later held that unmarried people enjoy the same rights. [↑](#footnote-ref-10)
11. # 539 U.S. 558, 572 (2003).

    [↑](#footnote-ref-11)
12. http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\_id=201320140SB967. [↑](#footnote-ref-12)
13. Deborah Tuekheimer, “Affirmative Consent,” *Ohio State Journal of Criminal Law,* vol. 13, no. 2 (2016), 441-468 at 442. [↑](#footnote-ref-13)
14. 539 U.S. at 578. [↑](#footnote-ref-14)
15. See Chapter 6 at 2. [↑](#footnote-ref-15)
16. https://hr.osu.edu/public/documents/policy/policy115.pdf at 3. [↑](#footnote-ref-16)
17. The Merriam-Webster On-Line Dictionary defines BDSM as “sexual activity involving such practices as the use of physical restraints, the granting and relinquishing of control, and the infliction of pain.” https://www.merriam-webster.com/dictionary/BDSM. [↑](#footnote-ref-17)
18. *Doe v. Rector and Visitors of George Mason University*, 179 F.Supp.3d 583 (2016). [↑](#footnote-ref-18)
19. # Holvoet L, Huys W, Coppens V, Seeuws J, Goethals K, Morrens M., “Fifty Shades of Belgian Gray: The Prevalence of BDSM-Related Fantasies and Activities in the General Population,” J Sex Med. 2017 Sep;14(9):1152-1159.

    [↑](#footnote-ref-19)
20. Id. at 3. [↑](#footnote-ref-20)
21. Annalisa Quinn, “”Book News, ‘Fifty Shades of Grey Sales’”, *National Public Radio, Inc.* (February 24, 2017) http://www.npr.org/sections/thetwo-way/2014/02/27/283342810/book-news-fifty-shades-of-grey-sales-top-100-million. [↑](#footnote-ref-21)
22. # Cathy Young, “Campus Rape: The Problem With 'Yes Means Yes'” http://time.com/3222176/campus-rape the-problem-with-yes-means-yes/

    [↑](#footnote-ref-22)
23. Id. [↑](#footnote-ref-23)
24. Ana Gruber, “Consent Confusion”, 38 Cardozo L. Rev. 415 at 434. [↑](#footnote-ref-24)
25. Gruber at p. 433 n.74. [↑](#footnote-ref-25)
26. Callie Beusman, ‘Yes Means Yes’ Laws Will Not Ruin Sex Forever, Despite Idiotic Fears”, *Jezebel* (September 4, 2014) http://jezebel.com/yes-means-yes-laws-will-not-ruinsex-forever-despite-i-1630704944. [↑](#footnote-ref-26)
27. # See, Hannah Hicks, “To the Right to Intimacy and Beyond: A Constitutional Argument for the Right to Sex in Mental Health Facilities” *NYU Review of Law and Social Change*, 40: 621-673 (2016) and cases cited at pp. 632-642.

    [↑](#footnote-ref-27)
28. Gerstmann, The Constitutional Underclass: Gays Lesbians and the Failure of Class-Based Equal Protection (University of Chicago Press 1999) at 22. [↑](#footnote-ref-28)
29. Muth v. Frank, 412 F. 3d 808, 818 (7th Cir. 2005) (Quoting *Lawrence,* 539 U.S. at 586, 123 S. Ct. 2472 (Scalia, J., dissenting). [↑](#footnote-ref-29)
30. Id. at 818. [↑](#footnote-ref-30)
31. *Lofton v. Sec'y of the Dep't of Children & Family Servs.,* 358 F.3d 804, 816 (11th Cir.2004). [↑](#footnote-ref-31)
32. *Lawrence* at 577-78 (quoting Bowers, 478 U.S. at 216 (Stevens, J., dissenting)). [↑](#footnote-ref-32)
33. *Witt v. Department of the Air Force,* 527 F.3d 806, 823 (9th Cir. 2008) *Roe v. Wade,* 410 U.S. 113 (1973) held that there is a fundamental right to an abortion. *Carey v. Population Services International* [431](https://en.wikipedia.org/wiki/List_of_United_States_Supreme_Court_cases,_volume_431) [U.S.](https://en.wikipedia.org/wiki/United_States_Reports) 678 (1977), was a [United States Supreme Court](https://en.wikipedia.org/wiki/Supreme_Court_of_the_United_States) case in which the Court held that it was [unconstitutional](https://en.wikipedia.org/wiki/Unconstitutional) , to prohibit anyone other than a licensed pharmacist to distribute nonprescription contraceptives to persons 16 years of age or over, to prohibit the distribution of nonprescription contraceptives by any adult to minors under 16 years of age, and to prohibit anyone, including licensed pharmacists, to advertise or display contraceptives. [↑](#footnote-ref-33)
34. *Lawrence* at 565. (italics added.) [↑](#footnote-ref-34)
35. *Lawrence* at 578. [↑](#footnote-ref-35)
36. *Witt v. Department of the Air Force,* 527 F.3d 806, 823 (9th Cir. 2008) at 817. [↑](#footnote-ref-36)
37. Id. at 814. [↑](#footnote-ref-37)
38. 539 U.S. at 567. [↑](#footnote-ref-38)
39. *Witt v. Department of the Air Force,* 527 F.3d 806, 823 (9th Cir. 2008) at 813. [↑](#footnote-ref-39)
40. Respectively, *Champion v. Ames*, 188 U.S. 321 (1903); *Barnes v. Glen Theatre*, 501 U.S. 560 (1991); and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). [↑](#footnote-ref-40)
41. *Lofton v. Sec'y of the Dep't of Children & Family Servs.,*358 F.3d 804, 816 (11th Cir.2004). (Quoting *Washington v. Glucksberg,* 521 U.S. 702, 720-721 (1997). [↑](#footnote-ref-41)
42. 521 U.S. 702, (1997). [↑](#footnote-ref-42)
43. See, respectively, *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 17 (1973); *Palko v. Connecticut,* 302 U.S. 319, 325 (1937). See Clark. [↑](#footnote-ref-43)
44. *Planned Parenthood v. Casey,* 505 U.S. 833, 849 (1992). [↑](#footnote-ref-44)
45. 576 U.S. at 10. [↑](#footnote-ref-45)
46. Id. at 18. (Emphasis added.) [↑](#footnote-ref-46)
47. *Whole Woman’s Health v. Hellerstadt*, 136 S.Ct. 2292. 2309 (2016). [↑](#footnote-ref-47)
48. 530 U.S. 57, 80 (2000) (Thomas, J. concurring.) [↑](#footnote-ref-48)
49. https://www.cdc.gov/hiv/risk/analsex.html [↑](#footnote-ref-49)
50. Id. [↑](#footnote-ref-50)
51. Id. [↑](#footnote-ref-51)
52. 135 S. Ct. 2584 (2015). [↑](#footnote-ref-52)
53. Gerstman (2017) 108-125. [↑](#footnote-ref-53)
54. Id. at 139. [↑](#footnote-ref-54)
55. # Bob Egelko, “Appeals Court in SF May Allow Challenge to State Law Banning Prostitution” *SFGate* (October 25, 2017) http://www.sfgate.com/news/article/Appeals-court-in-SF-allows-challenge-to-state-law-12292093.php

    [↑](#footnote-ref-55)
56. 539 U. S. at 578. [↑](#footnote-ref-56)
57. Egelko at 1. [↑](#footnote-ref-57)
58. 149 F.Supp.3d 602, 632 (2016). [↑](#footnote-ref-58)
59. Id. at 632. [↑](#footnote-ref-59)
60. Id. at 633. [↑](#footnote-ref-60)
61. 576 U.S. at 208. [↑](#footnote-ref-61)
62. 539 U.S. at 574. (emphasis added.) [↑](#footnote-ref-62)
63. Id. at 574. [↑](#footnote-ref-63)
64. Id. at 566. [↑](#footnote-ref-64)
65. Nan Hunter, “Living with Lawrence,” 88 Minn. L. Rev., 1103-1139, 1104 (2004). [↑](#footnote-ref-65)
66. 539 U.S. at 572. [↑](#footnote-ref-66)
67. See, Lisa Wade, “American Hook Up: The New Culture of Sex on Campus” *W.W. Norton & Co. 2017* [↑](#footnote-ref-67)
68. Martin A. Monto and Anna G. Carey, “[A New Standard of Sexual Behavior? Are Claims Associated With the “Hookup Culture” Supported by General Social Survey Data?](http://www.tandfonline.com/doi/full/10.1080/00224499.2014.906031)” [*The Journal of Sex Research*](http://www.tandfonline.com/toc/hjsr20/51/6)*Vol. 51 , Iss.* 6, at 605-615 (2014). [↑](#footnote-ref-68)
69. Laura A. Rosenbury and Jennifer E. Rothman, “Sex in and out of Intimacy”, 59 Emory L.J. 809, 810 (2010) [↑](#footnote-ref-69)
70. Teemu Ruskola, Gay Rights Versus Queer Theory: What Is Left of Sodomy After Lawrence v. Texas?, 23 Soc. Text at 235, 239, 238-45 (2005). [↑](#footnote-ref-70)
71. Richard A. Posner, *Sex and Reason* 1 (1992) (quoted in Rosenbury at 835, n. 153.) [↑](#footnote-ref-71)
72. Rosenbury and Rothman, Sex In and Out of Intimacy, 59 Emory L.J. 809 at 824-825. [↑](#footnote-ref-72)
73. 539 U.S. at 590. [↑](#footnote-ref-73)
74. *Singson v. Commonwealth*, 621 S.E.2d 682, 685-86 (Va. Ct. App. 2005) (holding that offer of oral sex in a men's restroom was not protected by Lawrence because of the public location); *In re R.L.C*., 635 S.E.2d 1, 3-4 (N.C. Ct. App. 2006), aff’d, 643 S.E.2d 920 (N.C. 2007); ; State v. Acosta, No. 08-04- 00312-CR, 2005 WL 2095290, at 3 (Tex. App. Aug. 31, 2005). [↑](#footnote-ref-74)
75. As noted above, at the time of this writing the Ninth Circuit had allowed a challenge to California’s prostitution laws to go forward, but all other courts that have ruled on this have gone the other way. E.g., State v. Freitag, 130 P.3d 544, 546 (Ariz. Ct. App. 2006); State v. Romano, 155 P.3d 1102, 1109- 15 (Haw. 2007); People v. Williams, 811 N.E.2d 1197, 1199 (Il1. App. Ct. 2004); State v. Pope, 608 S.E.2d 114, 115-16 (N.C. Ct. App. 2005). (All cited in Rosenbury and Rothman at 830, n.122. [↑](#footnote-ref-75)
76. Lawrence Tribe, “Lawrence V. Texas: The "Fundamental Right" That Dare Not Speak Its Name,” Harvard Law Review, Vol. 117, No. 6 (Apr., 2004), at 1893-1955, 1905. [↑](#footnote-ref-76)
77. 539 U.S. at 578. [↑](#footnote-ref-77)
78. 539 U.S. at 569. [↑](#footnote-ref-78)
79. Restatement (Third) of Torts: Intentional Torts to Persons § 112 (Am. Law Inst., Tentative Draft No.1, 2015). (Emphasis added.) (Cited in Kimberly Kessler Ferzan, “Consent, Culpability, and the Law of Rape,” *Ohio State Journal of Criminal Law* 13:2, 397-439, 407 (2016). [↑](#footnote-ref-79)
80. https://www.the-american-interest.com/2016/05/18/yes-means-yes-falters/. [↑](#footnote-ref-80)
81. *New York Times v. Sullivan*, 376 U.S. 254, 257 (1964) [↑](#footnote-ref-81)
82. *American Bookseller Association v. Hudnut*, 771 F.2d 323 (1985). [↑](#footnote-ref-82)