

# TEACHING CONTRACTS and AFFIRMATIVE CONSENT

by Robert Wiener

ad: itsonus.org (heard during radio broadcast of NCAA Women's Basketball semi-finals second game, at 9:50PM, <http://v6.player.abacast.net/1330> (Westwood One Sports) consent vs. rape

## I. INTRODUCTION

Contracts is the central topic we teach in our basic business law/legal studies courses.<sup>1</sup> Sexual assault, dating violence, domestic violence, and stalking are fundamental challenges our society faces,<sup>2</sup> including on our college campuses where approximately ¼ of women report sexual activity without affirmative consent.<sup>3</sup> In this paper I discuss how our students

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<sup>1</sup> Contracts is taught in 10 chapters of the MALLOR ET AL., BUSINESS LAW THE ETHICAL, GLOBAL, AND E-COMMERCE ENVIRONMENT (16<sup>th</sup> ed. 2016) textbook.

<sup>2</sup> See RAINN (Rape, Abuse & Incest National Network) for info. <https://rainn.org/get-information/types-of-sexual-assault/sexual-assault> (last visited March 25, 2016).

<sup>3</sup> Kelly Wallace, CNN, 23% of women report sexual assault in college, study finds. (updated 8:43 AM ET, Wed September 23, 2015) <http://www.cnn.com/2015/09/22/health/campus-sexual-assault-new-large-survey/> "Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct." <http://i2.cdn.turner.com/cnn/2015/images/09/23/report.on.the.aau.campus.climate.survey.on.sexual.assault.and.sexual.misconduct.pdf> Listen to Governor Cuomo's remarks at the bill's signing. <https://soundcloud.com/nygovcuomo/governor-cuomo-signs-enough-is-enough-legislation-to-combat-sexual-assault-on-college-campuses> and see The Hunting Ground (2015) <http://www.thehuntinggroundfilm.com>, reviewed by Manohla Dargis of the New York Times, Review: 'The Hunting Ground' Documentary, a Searing Look at Campus Rape, Feb. 26, 2015. <http://www.nytimes.com/2015/02/27/movies/review-the-hunting-ground-documentary-a-searing-look-at-campus-rape.html>

could understand these issues better if we use state affirmative consent law as a case study for teaching contract law, explaining their similarities and their differences.

California took the lead with its affirmative consent law<sup>4</sup> Governor Andrew Cuomo of New York its “Enough is Enough<sup>5</sup>” legislation on July 7, 2015, and a bill is in committee in Michigan.<sup>6</sup>sexual assault prevention and response policy, including a “definition of affirmative consent.”<sup>7</sup> He is committed “to work to adopt the same standards legislatively for all of New York's colleges and universities.” In this paper I suggest that legal studies professors use the SUNY definition of affirmative consent not only “to combat sexual assault on our college campuses,”<sup>8</sup> but also as a case study to teach the elements of contract law: contract formation, consideration, reality of consent, legality, capacity, and writing, as well as performance, breach, remedies, and third party rights.<sup>9</sup>

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<sup>4</sup>The California law was approved by its governor on September 28, 2014.

<sup>5</sup> Also known as “Yes Means Yes” laws.

<sup>6</sup> Michigan Senate Bill No. 512, introduced on September 24, 2015.

<http://www.legislature.mi.gov/documents/2015-2016/billintroduced/Senate/pdf/2015-SIB-0512.pdf>

The progress of similar initiatives is being tracked at the following website.

<sup>7</sup> Governor Cuomo Signs “Enough Is Enough” Legislation to Combat Sexual Assault on College and University Campuses July 7, 2015 (last visited March 25, 2016).

<https://www.governor.ny.gov/news/governor-cuomo-signs-enough-enough-legislation-combat-sexual-assault-college-and-university>

<sup>8</sup> Amanda Hess, *No Means No” Isn’t Enough. We Need Affirmative Consent Laws to Curb Sexual Assault*, SLATE (June 16, 2014, 2:13 PM) ,

[http://www.slate.com/blogs/xx\\_factor/2014/06/16/affirmative\\_consent\\_california\\_weighs\\_a\\_bill\\_that\\_would\\_move\\_the\\_sexual.html](http://www.slate.com/blogs/xx_factor/2014/06/16/affirmative_consent_california_weighs_a_bill_that_would_move_the_sexual.html) (last visited July 28, 2015).

<sup>9</sup> *Governor Cuomo Announces First-Ever Statewide, Uniform Policy to Combat Sexual Assault on New York College Campuses, From the Office of Governor Andrew Cuomo*, Oct. 2, 2014, <https://www.suny.edu/suny-news/press-releases/october-2014/10-2-14-gov-sex-assault-policy/governor->

New York State and California<sup>10</sup> have recently revisited a debate about sexual assault and rape at least twenty-five years old.<sup>11</sup> It was made famous in 1990 by the Womyn of Antioch College<sup>12</sup> whose verbal affirmative consent policy, later adopted by Antioch College,<sup>13</sup> became the basis of a 1993

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cuomo-announces-first-statewide-uniform-policy-to-combat-sexual-assault.html (last visited July 28, 2015). And in a later talk Governor Cuomo reiterated his support of legislation of an affirmative consent policy at both public and private colleges in New York State. Amanda Marcotte, *Andrew Cuomo Proposes Affirmative Consent for New York Universities* (Jan. 19, 2015 9:11 AM), [http://www.slate.com/blogs/xx\\_factor/2015/01/19/affirmative\\_consent\\_in\\_new\\_york\\_gov\\_andrew\\_cuomo\\_proposes\\_legislation.html](http://www.slate.com/blogs/xx_factor/2015/01/19/affirmative_consent_in_new_york_gov_andrew_cuomo_proposes_legislation.html) (last visited July 30, 2015).

<sup>10</sup> With the adoption of California SB 967. See, Emanuella Grinberg, *Schools preach 'enthusiastic' yes in sex consent education* (Sept. 29, 2014, 5:40 PM), <http://www.cnn.com/2014/09/03/living/affirmative-consent-school-policy/> (last visited July 28, 2015).

<sup>11</sup> Kat Stoeffel, *Why the Campus Rape Debate Feels Like a Bad Rerun* (July 8, 2014 2:16 PM), <http://nymag.com/thecut/2014/07/campus-rape-debate-feels-like-groundhog-day.html> (last visited July 28, 2015).

<sup>12</sup> Nicholas Mills, *How Antioch College Got Rape Right 20 Years Ago*, THE DAILY BEAST (Dec. 10, 2014, 5:45 AM), <http://www.thedailybeast.com/articles/2014/12/10/how-antioch-solved-campus-sexual-offenses-two-decades-ago.html?via=desktop&source=facebook> (last visited July 29, 2015).

<sup>13</sup> “The Sexual Offense Prevention Policy (SOPP) is a campus-wide policy of Antioch College. All sexual interactions at Antioch College must be consensual. Consent means verbally asking and verbally giving or denying consent for all levels of sexual behavior. Non-consensual sexual behavior, verbal and sexual harassment are not tolerated at Antioch College.” “The Sexual Offense prevention Policy (SOPP) is a campus-wide policy of Antioch College. All sexual interactions at Antioch College must be consensual. Consent means verbally asking and verbally giving or denying consent for all levels of sexual behavior. Non-consensual sexual behavior, verbal and sexual harassment are not tolerated at Antioch College.” ANTIOCH COLLEGE STUDENT HANDBOOK 42.

<http://www.antiochcollege.org/sites/default/files/pdf/2014-2015-Student-Handbook.pdf#page=48> (last visited July 29, 2015). What does “verbal” mean in Antioch’s SOPP? Does it mean in words or orally? If it means

Saturday Night Live sketch, “Is It Date Rape?”<sup>14</sup> This paper analyzes the affirmative consent policy at SUNY, but it is relevant at universities across the United States.<sup>15</sup>

Although this paper is titled “Using the SUNY Definition of Affirmative Consent to Teach Contract Law,” understand that the SUNY policy does not satisfy all elements of a valid and enforceable contract and, therefore, does not ultimately result in a contract the non-performance of which would entitle non-breaching party(ies) to a cause of action for breach of contract. The contract common law discussed in this paper is generally black letter law throughout the United States. It is not clear from SUNY’s definition of affirmative consent whether it applies to all members of the community, that is, any combination of students, faculty, and staff, or even non-community members, and where it applies, that is, on campus or off, or even out of New York State.

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orally, does that mean that it is not satisfied by written consent? What of communication using American Sign Language?

<sup>14</sup> SNL: ‘Is It Date Rape?’ (October 23, 1993), NEW YORK, <http://videos.nymag.com/video/SNL-Is-It-Date-Rape> (last visited July 29, 2015).

<sup>15</sup> Teachers might substitute the California legislation or individual university policies for the SUNY policy. Michael Carey, *Consent Culture*, Dec. 23, 2014 (July 28, 2015, 9:05 PM), [http://www.slate.com/blogs/outward/2014/12/23/affirmative\\_consent\\_isn\\_t\\_just\\_for\\_campuses.html](http://www.slate.com/blogs/outward/2014/12/23/affirmative_consent_isn_t_just_for_campuses.html) (last visited July 30, 2015).

## **II. NEW YORK STATE EDUCATION LAW §6441. Affirmative consent to sexual activity.**

1. Every institution shall adopt the following definition of affirmative consent as part of its code of conduct: "Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression."

2. Each institution's code of conduct shall reflect the following principles as guidance for the institution's community:

a. Consent to any sexual act or prior consensual sexual activity between or with any party does not necessarily constitute consent to any other sexual act.

b. Consent is required regardless of whether the person initiating the act is under the influence of drugs and/or alcohol.

c. Consent may be initially given but withdrawn at any time.

d. Consent cannot be given when a person is incapacitated, which occurs when an individual lacks the ability to knowingly choose to participate in sexual activity. Incapacitation may be caused by the lack of consciousness or being asleep, being involuntarily restrained, or if an individual otherwise cannot consent. Depending on the degree of intoxication, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore unable to consent.

e. Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm.

f. When consent is withdrawn or can no longer be

given, sexual activity must stop.<sup>16</sup>

### III. CONTRACT LAW

I decided to use the SUNY affirmative consent policy to teach contract common law when I realized how much of its language is legal. For this paper's contract analysis I will use

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<sup>16</sup> § 6441. Affirmative consent to sexual activity, NY EDUC § 6441

[http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/6441\\_affirmative\\_consent\\_to\\_sexual\\_activity.pdf](http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/6441_affirmative_consent_to_sexual_activity.pdf)This law is similar to the preceding (SUNY) Definition of Affirmative Consent which applied only to the State University of New York.  
<http://system.suny.edu/sexual-violence-prevention-workgroup/policies/affirmative-consent/> (last visited July 29, 2015). In this legislation, "Sexual activity" shall have the same meaning as "sexual act" and "sexual contact" as provided in 18 U.S.C. 2246(2) and 18 U.S.C. 2246(3). Section 6440. Definitions. 10

18 U.S. Code § 2246 - Definitions for chapter

(2) the term "sexual act" means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or  
(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

<https://www.law.cornell.edu/uscode/text/18/2246>

the organization and language of the contract law section of the  
Mallor et al. business law textbook.<sup>17</sup>

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<sup>17</sup> MALLOR ET AL., BUSINESS LAW THE ETHICAL, GLOBAL, AND E-COMMERCE ENVIRONMENT (16<sup>th</sup> ed. 2016).

### *A. Agreement*

For a valid and enforceable contract to exist there must be an agreement created by a valid offer and a valid acceptance.<sup>18</sup> Other terms can be used for *agreement*, such as *mutual assent*.<sup>19</sup> The term *contract formation* is commonly used to describe the formation of a contract with an offer and an acceptance of that offer. In this context, the term *contract* is used narrowly, to apply only to the agreement created, understanding that the *contract* may be invalid, that is voidable or void, or unenforceable if it lacks one of the five other required elements.

The SUNY affirmative consent policy concentrates on the agreement element of a valid, enforceable contract. “Affirmative consent is a clear, unambiguous, knowing, informed, and voluntary *agreement* (emphasis added) between all participants to engage in sexual activity.”<sup>20</sup> In negotiation for sexual activity, as with other contracts, the parties may change positions. In fact, due to the nature of this particular contract formation, parties may take turns taking the lead and, therefore, identifying who is initiating and who is consenting may be in constant motion, involving multiple agreements.

#### 1. Offer<sup>21</sup>

A valid offer is necessary for an offeree to have the power of acceptance to make an agreement. The basic (minimal) elements of a valid common law contract offer are (a)

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<sup>18</sup> There is no “magic” to the order of the six elements of a valid and enforceable contracts I will discuss in this paper, and both the order and the precise terminology may differ in different business law textbooks, however our students should be able to apply all six elements in their analysis of contract law cases.

<sup>19</sup> See Mann and Roberts, Smith and Roberson’s Business Law.

<sup>20</sup> (SUNY) Definition of Affirmative Consent, supra note 11.

<sup>21</sup> Mallor et al., Chapter 10.



communication (b) of definite terms (c) with objective intent. One can only accept, that is, consent to, a valid offer. If no valid offer is made, a party who believes she or he is “consenting” as an offeree, may, merely be making an offer as an offeror. That is, if there is no communication of an offer or if the terms are not sufficiently definite or if there is no objective intent there is no valid offer and the other party is the one making an offer that would require consent in order for there to be an agreement.

In the SUNY Definition of Affirmative Consent the offer is largely assumed rather than specified. However, under common law contract analysis, one can only consent to an offer. Without clarification of the elements of an offer for sexual activity, it is unclear as to when consent may occur. Therefore, this is an opportunity to teach both the nature of a contract offer and its relevance to a policy that requires affirmative consent for sexual activity to be permitted sexual activity.

a. *Communication*: For an offer to be valid it must be communicated to the offeree. In the SUNY definition an offer is required, although the terminology is awkward. Offer is referred to as “seeking ... consent” and the offeror is referred to as “the person initiating.” “Seeking and having consent accepted is the responsibility of the *person(s) initiating* each specific sexual act (emphasis added).”<sup>22</sup>

b. *Definite Terms*: The minimal definite terms in contract formation are (i) subject matter, (ii) quantity, and (iii) identification of the offeree. Each of these terms must exist with sufficient specificity for a trier of fact to be able to determine whether the offer has been accepted and, ultimately, whether an agreement’s terms have been performed or breached, as well as the appropriate remedy for a breach.

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<sup>22</sup> (SUNY) Definition of Affirmative Consent, supra note 11.

*i. Subject Matter:* The subject matter of the offer must be sufficiently definite to be understood. This can present a significant concern in sexual relations. There may be different understandings or assumptions as to what is being suggested due to inadequate communication, possibly due to differences in culture and language, including use of euphemisms or even due to shyness in talking about and labeling sexual acts. A “question of fact” might be what is considered to be a “specific sexual act.” Is the leg seen as an entirety or made up of separate parts? Is each side, such as ones left and right breast, separate for the same sort of act? Is any physical contact with a body part part of the same specific sexual act for which consent may be given, or is contact by a toe, finger, or tongue a specific sexual act?

*ii. Quantity:* In contract law the quantity is a definite term that typically must be specified in the offer. Under the SUNY affirmative consent policy the *quantity* of the *subject matter* is not “sexual activity” as a holistic, integrated activity, but discrete specific sexual activities for which specific agreement/affirmative consent is required. Therefore, it may be that in SUNY, persons may not consent in advance to engage in designated sexual activity including several preliminary sexual acts (foreplay) leading to intercourse.<sup>23</sup> The importance of this principle is underscored -- “Consent to any sexual act or prior consensual sexual activity between or with any party does not constitute consent to any other sexual act.”<sup>24</sup> The definition of “prior consensual activity” raises the question of when sexual activity ends.<sup>25</sup> If one makes an unlimited consent to a specific *sexual act*, is repeated consent to that same act required to repeat it as part of the same *sexual activity*? I think

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<sup>23</sup> Note that, regardless of what acts have been offered and accepted/ consented to, either party can terminate sexual activity at any time. *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> I interpret *sexual activity* as different from *sexual act* – that *sexual acts* are separate, but that *sexual activity* may include more than one *sexual act*.

that would be too narrow a reading of the policy. But there may be a question as to what constitutes the same sexual activity. If it has ended—even if one or both participants have fallen asleep in a “compromising position” – the affirmative consent process must begin “from square one.” Also, either participant can end the activity at any time.

*iii. Identification of the Offeree:* Identification of the offeree(s) is an offer requirement. Without knowing who the offeree is, it is not clear who may accept an offer. The SUNY definition makes clear that its principles apply uniformly, regardless of the sexual identity of the offeree. “The definition of consent does not vary based upon a participant’s sex, sexual orientation, gender identity or gender expression.”<sup>26</sup> There may also be a question as to who is an offeree when an is to engage in a ménage à trois or group sex. Only those identified as offerees would have the power of acceptance.

*c. Objective Intent:* Contract common law requires objective intent for a valid offer (and acceptance) to be communicated. That is, the test is not what a person actually thinks (subjective intent), but what a reasonable person would understand from the express or implied communication (objective intent).<sup>27</sup>

The SUNY statement that “Consent to any sexual act or prior consensual sexual activity between or with any party does not constitute consent to any other sexual act“ suggests that it includes a lover, a boyfriend/girlfriend, or even a spouse.<sup>28</sup> According to the SUNY policy, the initiator’s responsibility to communicate a desire for sexual activity is required regardless

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<sup>26</sup> (SUNY) Definition of Affirmative Consent, *supra* note 11.

<sup>27</sup> The “reasonable person” is a legal fiction typically created in the collective mind of a jury to answer a question of fact.

<sup>28</sup> Apparently spousal status does not imply consent to sex in any of the 50 states as all reportedly have marital rape statutes.

of a state of intoxication and is not mitigated by drugs and/or alcohol, whether or not the intoxication of the initiator was voluntary.<sup>29</sup> Is “consent” required only for the initiated/“initiatee”/consenter and not for the initiator? What if a prospective sexual partner who wants to “loosen” another one up “doctors” their drink? And the drink has the desired effect – that is, the involuntarily intoxicated drinker initiates/proposes sexual activity that is it is “consented to” by the “doctor(er)”? Under contract common law, intoxication of either party, whether voluntary or involuntary, makes their consent invalid; under the SUNY rule, I’m not so sure.<sup>30</sup>

## 2. Acceptance<sup>31</sup>

A valid acceptance is necessary for an agreement and requires the same elements as a valid offer, that is, (a) communication (b) of definite terms (c) with objective intent. SUNY uses the term *consent* rather than acceptance and I will treat these terms as synonymous.

*a. Communication:* Under contract common law, the offeror may specify the method of communication of an acceptance. If the method of communication is not specified, it may be express (in words) or implied (in conduct or in action).

*i. Method of Acceptance: Express or Implied:* A key debate on the question of consent to sex has been over whether “verbal” consent (in words) is required. Under the SUNY definition, “Affirmative consent is a clear, unambiguous,

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<sup>29</sup> For example, the result of a spiked drink by consenting party.

<sup>30</sup> Regardless of the answer to the case of one who initiates sexual activity after having been involuntarily intoxicated, what is the answer to the case of one who initiates sexual activity after having been voluntarily intoxicated? That is, they say, “I’m too uptight. I’m going to get drunk (substitute slang here) and get laid.”

<sup>31</sup> Mallor et al., Chapter 11.

knowing, informed, and voluntary agreement between all participants to engage in sexual activity.”<sup>32</sup> A requirement of express/verbal<sup>33</sup> affirmative consent may reflect a sense in society in general and the law in particular that words are more likely to be “clear” and “unambiguous” and less open to misinterpretation than actions.<sup>34</sup> However, if contract common law principles are gap fillers when the SUNY Definition of Affirmative Consent is silent, I believe that affirmative consent can be either express or implied, as long as it meets all of the specified criteria. In addition, the offeror/initiator can determine the method of communication of consent at the outset of sexual activity, possibly limiting it to only express or implied, for example by “calling” “Antioch rules!” If the initiator uses words, must consent be in words? Or might there be hybrid communication, including both words and conduct? Or might the party being propositioned may a counter-offer for method of communication? Regardless, such possible signs of satisfaction as ejaculation<sup>35</sup> or “She was moaning and she was

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<sup>32</sup> (SUNY) Definition of Affirmative Consent, *supra* note 11.

<sup>33</sup> The term verbal is used in this paper in its narrow meaning of “oral” or “spoken” rather in the broader and more etymologically correct definition of “in words.” “verbal USAGE: It is sometimes said that the true sense of the adjective verbal is ‘of or concerned with words,’ whether spoken or written (as in *verbal abuse*), and that it should not be used to mean ‘spoken rather than written’ (as in *a verbal agreement*). For this strictly ‘spoken’ sense, it is said that the adjective oral should be used instead. In practice, however, verbal is well established in this sense and, in certain idiomatic phrases (such as *a verbal agreement*), cannot be simply replaced by oral. Note that it is not incorrect to refer to a spoken agreement, order, etc., as verbal, but it is *more exact* to describe it as oral – a distinction lawyers are expected to observe.” THE NEW OXFORD AMERICAN DICTIONARY 1876 (Elizabeth J. Jewell & Frank Abate eds., Oxford University Press, 2001)

<sup>34</sup> I am skeptical of this proposition. I observe that people use language to obfuscate rather than to clarify, to manipulate rather than to collaborate, to spin rather than to be direct.

<sup>35</sup> Such as, “Oh my God!”

so wet” surely do not satisfy SUNY consent requirements.<sup>36</sup>

*ii. Silence as Acceptance:* Under contract common law, silence or inaction does not generally constitute an acceptance. The SUNY definition states “[c]onsent is active, not passive.”<sup>37</sup> I do not understand that to limit consent to conduct, excluding verbal communication. In fact, other affirmative consent policies require consent to be in words.<sup>38</sup> What is clear is that simple silence (“S/he didn’t say no”) is not consent and in cases of “lack of resistance” or an absence of rejection in words or deeds, consent is not implied by inaction.<sup>39</sup>

*b. Definite terms:* Just as the initiating party must seek and receive consent to begin sexual activity, they must also obtain consent for each specific sexual act in order to proceed. This raises the same questions mentioned in the section on an offer’s definite terms, including who is the initiating party now? Consent must be obtained from all offerees. “Affirmative consent is a[n] ... agreement *between*<sup>40</sup> *all participants* to engage in sexual activity (emphasis added).”<sup>41</sup> As in contract common law, I believe that each participant must obtain consent from all others for additional participants to “jump in.”

*c. Objective intent:* Objective intent is still a requirement, imagine, for consent to sexual activity. What sort of communication would a reasonable person understand as consent, especially if it is implied by conduct or action? Might

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<sup>36</sup> I expect that ambiguity as to method of consent will be clarified if New York State legislates affirmative consent for all of its universities.

<sup>37</sup> (SUNY) Definition of Affirmative Consent, *supra* note 11.

<sup>38</sup> Such as that at Antioch College and legislation in California.

<sup>39</sup> It is not a valid defense to claim, “I didn’t know that you didn’t want to. You should have said/done something.”

<sup>40</sup> This SUNY definition probably contains a grammatical error. I believe that it should read “among all participants.”

<sup>41</sup> Blank footnotes are generally either to the SUNY definition or to pages in Mallor et al.

there be a verbal “blank check” for sexual activity? For example, if a person says, “My foot hurts” and another offers foot massage. The offer is accepted. Then ankle massage is offered and consented to.<sup>42</sup> The person receiving the massage says, “Don’t stop.” Is that consent for the sexual activity to be “elevated,” understanding that a check for sexual activity is never truly blank. That is, one may say “Stop” at any time.<sup>43</sup>

This question is addressed in the SUNY policy, but it still requires interpretation. This opportunity to “play act” such scenarios would be instructive in school orientation sessions, ideally before students move into dorms. Under the SUNY definition, whatever method of communication is used, it must convey objective intent. The specific SUNY language is, “Affirmative consent is a *clear, unambiguous*... agreement between all participants to engage in sexual activity.”<sup>44</sup> The “devil is in the details,” and here, as elsewhere in application of the definition, questions of fact are key. What is *clear*? What is *unambiguous*? Much communication is not clear and unambiguous. This is no less true in negotiating sexual activity than in negotiating a business contract. In fact, perhaps particularly when romance is involved, communication may include poetry and nuance and be more suggestive than blunt.

### 3. Revocation

Revocation is not possible once there is a valid and enforceable contract. One may revoke an offer before it is accepted, but one cannot “revoke” acceptance of an offer because a contract was

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<sup>42</sup> If one begins ankle massage with consent for foot massage is that sexual assault?

<sup>43</sup> And “stop” means “stop.” “When consent is withdrawn ... sexual activity must stop.” SUNY. If one is engaged in sexual activity that might be physically risky (such as including oxygen deprivation/“strangulation”), responsible participants might have a safety sign/word. (citation?)

<sup>44</sup> (SUNY) Definition of Affirmative Consent, *supra* note 11.

formed by the acceptance.<sup>45</sup> Post-acceptance attempted revocations are legally ineffective and may constitute a breach of contract. However, the SUNY definition states, “When consent is withdrawn or cannot be given, sexual activity must stop.”<sup>46</sup> This establishes that under the SUNY definition, affirmative consent to sexual activity is not contractual. If it were contractual, it could not be withdrawn<sup>47</sup> at any time.

### *B. Consideration*<sup>48</sup>

For a contract to be enforceable it must be “supported by consideration” – that is, reflect a bargained-for-exchange. A promise to give a gift is generally unenforceable.<sup>49</sup>

The element of consideration is missing in the SUNY definition and it may be missing in most such negotiations, a reason why agreements to engage in sexual activity are generally unenforceable. Reciprocity (“I’ll scratch your back if you scratch mine”)<sup>50</sup> might not be explicit or understood by both parties. There’s the rub. To scratch a back may be seen by one as a specific sexual act and by the other as a prelude to reciprocal back scratching or as foreplay for something more. Does performing oral sex on another imply some consideration? The initiator may not even enjoy performing oral sex and may be doing it only to get “payment in kind.” Subjectively, they believe that they have bargained for a non-verbal *quid pro quo* agreement. Under the SUNY rules, passive

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<sup>45</sup> Generally this is immediately upon the sending/dispatch of the acceptance under the *mailbox deposit rule*. This analysis assumes that the agreement constitutes a valid and enforceable contract.

<sup>46</sup> (SUNY) Definition of Affirmative Consent, *supra* note 11. This raises the question of whether consent must be withdrawn in words, or whether, for example, when a male’s penis is withdrawn, so is consent.

<sup>47</sup> Unfortunate choice of words?

<sup>48</sup> Mallor et al., Chapter 12.

<sup>49</sup> Promissory estoppel is a limited exception to this principle.

<sup>50</sup> Either by choice or due to physical impossibility.



acceptance of such attention would not even constitute “clear, unambiguous” consent for giving such attention if it is a specific sexual act.

This piece may not be “common sense” to college students<sup>51</sup> (“everyone knows that...”). Discussing it directly may minimize the possibility of deviating expectations leading to non-consensual sexual acts constituting sexual assault/date rape. In fact, one may take another out on a “date” and pay a substantial sum for food and entertainment, etc., expecting sexual activity after.<sup>52</sup> The initiator may believe that there was “clear” and “unambiguous” consent to this offer when they the other consented to “the date” and may feel entitled to “performance” of “the agreement.” Perhaps the only reasonable alternative to avoid such misunderstandings is explicit “clear, unambiguous...” verbal communication in advance. But then, where’s the romance? It’s a matter for consideration.

### *C. Reality of Consent*<sup>53</sup>

Contract common law recognizes that even when there appears to be an agreement, reality of consent may be lacking. Examples include fraud and misrepresentation, duress, undue influence, and (mutual) mistake. Further investigation of the facts of consent, including consent to sexual relations, may reveal “conduct invalidating assent.”<sup>54</sup> Therefore, a contract may be deemed invalid (that is, voidable or even void) due to lack of reality of consent

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<sup>51</sup> Or even older adults.

<sup>52</sup> “Surf ‘n turf. That’s 40 bucks!” Saturday Night Live skit, “Is it Date Rape?,” *supra* at note 7.

<sup>53</sup> Mallor et al., Chapter 13.

<sup>54</sup> “Conduct invalidating asset” is a term used in RICHARD A. MANN & BARRY S. ROBERTS, SMITH AND ROBERSON’S BUSINESS LAW, Ch. 11 (16<sup>th</sup> ed., 2014).

The reality of consent requirement appears at the beginning of the SUNY definition – “Affirmative consent is a clear, unambiguous, *knowing, informed, and voluntary* agreement between all participants to engage in sexual activity (emphasis added).”<sup>55</sup> When is such consent “*knowing, informed, and voluntary*”? Here are situations where it may not be.

### 1. Misrepresentation and Fraud

A contract is voidable if there is reasonable detrimental reliance on a false representation of material facts (innocent/negligent misrepresentation) with scienter<sup>56</sup> (fraud).<sup>57</sup> What does *representation* mean? Does it include *representation* by silence or inaction?

If, under the SUNY guidelines, “Affirmative consent is a[n] ... *informed* ... agreement ... to engage in sexual activity,”<sup>58</sup> is there is a duty of disclosure, and, if so, disclosure of what facts? Consider the following case. Two college women meet and engage in sexual activity. Afterwards, one of them claims sexual assault due to lack of affirmative consent because she wasn’t informed that the other was married, either because she was not wearing a wedding ring<sup>59</sup> (misrepresentation) or because, when questioned of her marital status, she said that she was single (fraud). Or, a male is putting on a condom in preparation for sexual activity with a female to (significantly) reduce (1) the risk of pregnancy and (2) transfer of sexually transmitted infections (STIs).<sup>60</sup> The female says, “Please don’t

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<sup>55</sup> (SUNY) Definition of Affirmative Consent, *supra* note 11.

<sup>56</sup> Scienter means actual or constructive knowledge, that is, in misrepresentation and fraud cases, that one does or should know the truth.

<sup>57</sup> In this case it would be fraud in the inducement.

<sup>58</sup> (SUNY) DEFINITION OF AFFIRMATIVE CONSENT, *supra* note 11.

<sup>59</sup> And acted single – flirted and didn’t mention a spouse.

<sup>60</sup> If we eliminate “the risk of pregnancy” this case may also apply (in part) to male:male sexual activity.

use that. You have nothing to worry about.” The male, relying on this statement, engages in sexual activity with the female. He does so understanding her to have informed him that she is either “on the pill” or that she is using a diaphragm or similarly effective contraceptive device with anti-spermicidal jelly and that she has tested negative for STIs. Neither is true. (1) She is relying exclusively on the rhythm method for “birth control” and either has not been tested or has tested positive for STIs. Is this valid consent or not because it is not *informed*? What if the female gets pregnant or the male gets an STI from her?<sup>61</sup>

## 2. Duress

“Duress” in the common law means improper physical, emotional, or even economic threats causing a loss of freedom of will. An agreement resulting from physical duress is void. Agreements in others cases of duress are voidable.

This sentence in the SUNY definition describes cases of duress: “Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm.”<sup>62</sup> Unfortunately, the list of such cases, both hypothetical and actual, would be quite lengthy. Sexual duress may take a variety of forms, including social coercion, especially for adolescents and particularly in groups, such as sororities and fraternities.<sup>63</sup> Sexual relationships between senior and junior faculty<sup>64</sup> and between faculty and students<sup>65</sup> may be inherently coercive due to the power differential between the participants.

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<sup>61</sup> Legally, the female may argue that the male’s reliance is not justifiable.

<sup>62</sup> (SUNY) Definition of Affirmative Consent, *supra* note 11.

<sup>63</sup> Carol W. Metzler, John Noell, Anthony Biglan, Dennis Ary, and Keith Smolkowski, *The Social Context for Risky Sexual Behavior Among Adolescents* (Journal of Behavioral Medicine, Vol. 17, No. 4, p. 419, 1994) <http://link.springer.com/article/10.1007/BF01858012>

<sup>64</sup> Particularly when tenure, promotion, and salary issues are involved.

<sup>65</sup> The equivalent policy at Pace University explicitly includes the whole “community” – “students, faculty, and staff.”

### 3. Undue Influence

Unfair persuasion constituting undue influence resulting in a voidable contract is limited to fiduciary/confidential relationships. Most sexual relationships in college would not qualify and, therefore, undue influence is unlikely to occur in the college setting. However, relationship with a college therapist may be an exception.

### 4. Mistake

Either party can avoid a contract based upon mutual mistake of material facts. If both parties believe that assuming a certain position eliminates the possibility of pregnancy, an agreement to engage in such sexual activity might be a case of mistake.<sup>66</sup>

#### *D. Capacity to Contract*<sup>67</sup>

Those who are minors, intoxicated, or mentally incompetent do not have capacity to contract. Under common law in these situations an individual cannot make a valid affirmative consent, including to sexual activity.

SUNY apparently adopts this approach. “Consent cannot be given when a person is incapacitated.”<sup>68</sup>

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<sup>66</sup> I will observe later that such agreements are not enforceable by the remedy of specific performance regardless, and scenarios where such agreements precede performance of the agreement by a significant period of time – long enough to Google the issue and determine the mistake – are likely to be a small exception to the ordinary case. However, legal studies professors regularly change facts with hypotheticals to better understand legal principles, so why not here?

<sup>67</sup> Mallor et al., Chapter 14.

<sup>68</sup> (SUNY) Definition of Affirmative Consent, *supra* note 11.

## 1. Minor

The most common common law age of majority for contractual capacity in the United States is 18, but many states have a different age of consent for sexual activity ranging from 16 to 18.<sup>69</sup> In New York State the legislative age of majority to engage in sexual activity is 17;<sup>70</sup> the SUNY affirmative consent policy uses 17 as its age of capacity. A wunderkind may be a minor and unable to give legal consent for sexual activity. “Consent cannot be given when a person is incapacitated. Incapacitation occurs... if any of the parties are *under the age of 17*.”<sup>71</sup>

## 2. Intoxicated

Intoxication can be a common law basis for avoiding a contract based on its voidability by the party who was intoxicated at the time of contract formation.

The SUNY definition recognizes that this can be an issue in colleges. “Incapacitation includes *impairment due to drugs or alcohol (whether such use is voluntary or involuntary)*....<sup>72</sup> One therefore lacks the capacity to consent to sexual activity when impaired due to (prescription or street) drugs or alcohol, whether one is underage or not, and whether these substances were taken voluntarily or not. Open questions include, does this apply to the initiator and how much impairment constitutes *incapacitation*? Is it a zero tolerance test? For alcohol, is it the

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<sup>69</sup> <http://www.ageofconsent.us>

<sup>70</sup> 3. A person is deemed incapable of consent when he or she is: (a) less than seventeen years old... N.Y. PEN. LAW § 130.05 : NY Code - Section 130.05: Sex offenses; lack of consent .  
<http://codes.lp.findlaw.com/nycode/PEN/THREE/H/130/130.05> (last visited July 30, 2015).

<sup>71</sup> (SUNY) Definition of Affirmative Consent, *supra* note 11.

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

local driving while intoxicated limit for alcohol and, if so, how is it measured? Is it different if one or both participants are underage?<sup>73</sup> What if drug/alcohol use is ongoing and the capacity to consent is increasingly diminished?

### 3. Mentally Impaired

Contracts formed by those who are mentally impaired are, at best, voidable. This situation is not specifically mentioned in the SUNY definition, but would be captured by other examples and the ending catchall phrase, “Incapacitation includes ... if an individual otherwise cannot consent.”<sup>74</sup> What if one party is not actually or constructively aware that the other “individual otherwise cannot consent.” What if neither party is mentally competent? Does this include sex addiction?<sup>75</sup>

#### *E. Illegality*<sup>76</sup>

Under contract common law, contracts that violate a statute are either void or unenforceable. Sexual assault is a crime, including “statutory rape” for sexual activities with another person who is underage.<sup>77</sup> The age of consent for criminal purposes differs in different states in the United States, ranging from 16 to 18 years of age.<sup>78</sup>

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<sup>73</sup> In New York state the “drinking age” is twenty-one. “(a) No person under the age of twenty-one years shall present or offer to any licensee... any written evidence of age which is false, fraudulent or not actually his own, for the purpose of purchasing or attempting to purchase any alcoholic beverage.” N.Y. ABC. LAW § 65-b : NY Code - Section 65-B: Offense for one under age of twenty-one years to purchase or attempt to purchase an alcoholic beverage through fraudulent means (last visited July 30, 2015).

<sup>74</sup> *Id.*

<sup>75</sup> <http://www.webmd.com/sexual-conditions/features/is-sex-addiction-real>

<sup>76</sup> Mallor et al., Chapter 15.

<sup>77</sup> *Supra* note 60.

<sup>78</sup> For example, the age of consent in California is 18.

In New York State the age of consent is 17 years old.<sup>79</sup> This is probably why the age of consent in the SUNY policy is 17.<sup>80</sup> Even if both parties are of the age of consent, sexual activity may be illegal, such as with prostitution.<sup>81</sup> This raises the question as to whether an agreement for something other than reciprocal sex, “merely” sex for sex” -- perhaps sex for an expensive date (dinner and dancing and...) or math tutoring or letting someone copy your homework or a teacher promising a student an “A” – is valid/enforceable as a matter of legality.

#### *F. Writing*<sup>82</sup>

Only a few types of contracts are “within the statute of frauds” and thus typically require a memorandum/legal writing<sup>83</sup> to be enforceable. They include sales of real property, sales of goods for \$500 or more, and contracts impossible for both parties to perform within one year of contract formation. An agreement for sexual activity does not fall under any of these categories. Therefore, under contract common law, an agreement to engage in sexual activity need not be signed, sealed, and delivered by both parties.<sup>84</sup> In other words, an oral agreement or even an implied agreement created exclusively by conduct or action would be legally enforceable.

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<sup>79</sup> “3. A person is deemed incapable of consent when he or she is: (a) less than seventeen years old.” N.Y. PEN. LAW § 130.05 : NY Code - Section 130.05: Sex offenses; lack of consent See more at: <http://codes.lp.findlaw.com/nycode/PEN/THREE/H/130/130.05#sthash.dg5Tyy84.dpuf>

<sup>80</sup> (SUNY) Definition of Affirmative Consent, supra note 11.

<sup>81</sup> Sex for money?

<sup>82</sup> Mallor et al., Chapter 16.

<sup>83</sup> Memorandum.

<sup>84</sup> See “Signed, Sealed, Delivered, I’m Yours,” Stevie Wonder.

<https://www.youtube.com/watch?v=cBDqgSOWxkc> (last visited July 31, 2015).

The SUNY definition does not discuss whether affirmative consent is required to be memorialized in writing. As in other contract formation situations, the fact that an “informal”/unwritten agreement is not legally necessary does not mean that it is not advisable under some circumstances. One may have fulfilled all of the requirements for affirmative consent, yet be found guilty of sexual assault. A signed, notarized writing, or possibly an e-mail or text, might effectively support one’s credibility in court. However, insisting that one’s partner sign on the dotted line to confirm affirmative consent might spoil the moment. Other evidence of consent, such as taping the proceedings might be probative, but may be tortious (invasion of privacy) or even criminal.<sup>85</sup>

*G. Performance and Breach*<sup>86</sup>

Failure to perform a valid and enforceable common law contract is a breach of that contract.

Under the SUNY definition, affirmative consent to sexual activity at SUNY does not establish a valid and enforceable common law contract, primarily because “Consent may be initially given but withdrawn at any time.”<sup>87</sup> Therefore, non-performance of such an agreement does not give the promised party a cause of action for breach of contract. In other words, if one agrees to sexual relations but then refuses to keep her or his promise once they’ve gotten their benefit of the bargain, they would not be subject to civil legal action for that failure.

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<sup>85</sup> Secret taping by one participant of sexual activity by college couple punished as illegal surveillance. *People v. Michael J. Piznarski*, No. 2011–0073 (County Court, Madison County, 2014), *available* at <http://caselaw.findlaw.com/ny-county-court/1686692.html> .

<sup>86</sup> Mallor et al., Chapter 18.

<sup>87</sup> (SUNY) Definition of Affirmative Consent, *supra* note 11.



## *H. Remedies*<sup>88</sup>

If there is a breach of contract, the non-breaching party may be entitled to a remedy. Typically that would be monetary damages, but in unique situations specific performance may be available. However, if a party does not want to provide the services they promised, they would not need to.

In other words, even if there were a valid and enforceable contract for sexual activity at SUNY, the remedy for refusal to perform as promised would not be enforceable by specific performance, if only because of the “involuntary servitude” clause of Thirteenth Amendment of the U.S. Constitution.<sup>89</sup>

## *I. Third Party Rights: Assignment*<sup>90</sup>

Third parties generally may transfer contractual rights to a transferee through an assignment of rights. An exception to this rule is personal services.

We can teach that in the context of the SUNY definition of affirmative consent and even if there were a valid, enforceable contract for sexual activity it could not be assigned as a matter of contract common law. Under the SUNY definition, affirmative consent must be obtained from each participant of sexual activity,<sup>91</sup> so it is clear that one’s consent is personal and cannot be assigned to another.

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<sup>88</sup> Mallor et al., Chapter 18.

<sup>89</sup> U.S. Constitution, Amendment XIII, Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

<https://www.law.cornell.edu/constitution/amendmentxiii>

<sup>90</sup> Mallor et al., Chapter 17.

<sup>91</sup> (SUNY) Definition of Affirmative Consent, *supra* note 11.

#### IV. CONCLUSION

Sexual assault is a continuing problem in our society as shown in news reports, and in documentaries on the military, *THE INVISIBLE WAR*<sup>92</sup> and on colleges, *THE HUNTING GROUND*,<sup>93</sup> as well as in a television episode of *INSIDE AMY SCHUMER*.<sup>94</sup> Are affirmative consent laws such as at SUNY a good idea? If they are broad enough to include unambiguous and clear nonverbal cues, I think so. If consent is often communicated with body language, lack of consent need not always manifest itself in a shouted “stop” or a kick in the “shins.” Here is one way we can teach the importance of affirmative consent and contract law at the same time. Please share your experiences with me if you do.

The debate will continue on campuses as to how higher education should both comply with federal guidelines and state legislation, and prevent and respond to sexual assault, possibly including the participation of students in the process.<sup>95</sup>

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<sup>92</sup> Released January 20, 2012, <http://www.imdb.com/title/tt2120152/> (last visited July 30, 2015).

<sup>93</sup> Released 2015. <http://www.nytimes.com/2015/01/26/movies/the-hunting-ground-a-film-about-rape-culture-at-colleges.html> (last visited July 30, 2015).

<sup>94</sup> This video on rape and football culture has received nearly two million visits. *Inside Amy Schumer: Football Town Nights* (Apr 22, 2015) <https://www.youtube.com/watch?v=TM2RUVnTlvs> (last visited July 29, 2015).

<sup>95</sup> Adam Liptak, *Should Students Sit on Sexual Assault Panels?*, *THE NEW YORK TIMES* (April 10, 2015), <http://www.nytimes.com/2015/04/12/education/edlife/12edl-12forum.html> (last visited July 30, 2015).

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Michigan

Senate Bill No. 512

<https://www.legislature.mi.gov/documents/2015-2016/billintroduced/Senate/pdf/2015-SIB-0512.pdf>

§ 6441. Affirmative consent to sexual activity

1. Every institution shall adopt the following definition of affirmative consent as part of its code of conduct: “Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant’s sex, sexual orientation, gender identity, or gender expression.”
2. Each institution’s code of conduct shall reflect the following principles as guidance for the institution’s community:
  - a. Consent to any sexual act or prior consensual sexual activity between or with any party does not necessarily constitute consent to any other sexual act.
  - b. Consent is required regardless of whether the person initiating the act is under the influence of drugs and/or alcohol.
  - c. Consent may be initially given but withdrawn at any time.
  - d. Consent cannot be given when a person is incapacitated, which occurs when an individual lacks the ability to knowingly choose to participate in sexual activity. Incapacitation may be caused by the lack of consciousness or being asleep, being involuntarily restrained, or if an individual otherwise cannot consent. Depending on the degree of intoxication, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore unable to consent.
  - e. Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm.
  - f. When consent is withdrawn or can no longer be given, sexual activity must stop.<sup>96</sup>

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<sup>96</sup> Affirmative consent to sexual activity, NY EDUC § 6441 (McKinney’s. Effective: October 5, 2015)  
<http://web.law.columbia.edu/sites/default/files/microsites/gender->

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sexuality/6441\_affirmative\_consent\_to\_sexual\_activity.pdf

Amy Schumer: Inside Amy Schumer

SNL

The Hunting Ground

§ 6441. Affirmative consent to sexual activity, NY EDUC §  
6441

[http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/6441\\_affirmative\\_consent\\_to\\_sexual\\_activity.pdf](http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/6441_affirmative_consent_to_sexual_activity.pdf)