NOTE

WHAT “YES MEANS YES” MEANS FOR NEW YORK SCHOOLS: THE POSITIVE EFFECTS OF NEW YORK’S EFFORTS TO COMBAT CAMPUS SEXUAL ASSAULT THROUGH AFFIRMATIVE CONSENT

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INTRODUCTION

In October 2014, Governor Andrew Cuomo announced a resolution passed by the State University of New York (SUNY) Board of Trustees establishing a comprehensive uniform sexual assault policy for the SUNY system, to be adopted by SUNY-operated schools by December 2014.¹ Less than a year after instituting the SUNY policy, the Governor signed the “Enough is Enough” legislation² into law, amending the Education Law to expand the policy and require that all public and private colleges and universities in New York “adopt a set of comprehensive procedures and guidelines”³ aimed at combating campus sexual assault.⁴ Governor Cuomo’s actions came about in the midst of what he described as “an epidemic of sexual violence in this country that is truly disturbing and . . . plaguing our

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⁴ See N.Y. S.B. 5965.
college campuses.” Epidemic is certainly an appropriate characterization of the current situation these colleges are facing. It is estimated that nearly 20 percent of college women have experienced some form of sexual assault. The issue has garnered a great deal of media and political attention as it has become apparent that many schools are failing to appropriately and meaningfully address the problem of sexual assault.

These problems have been as prevalent in New York’s public and private institutions as they have across the country. In 2014, the United States Department of Education’s Office of Civil Rights (“OCR”) released a list of fifty-five schools that were under investigation for violations under Title IX of the Education Amendments of 1972 over their handling of sexual assault allegations made by students. The OCR identified four New York institutions that were under investigation: City University of New York Hunter College, SUNY at Binghamton, which are state-funded institutions, and Hobart and William Smith Colleges, as well as Sarah Lawrence College, which are privately funded.

New York’s “Enough is Enough” Law was enacted to address the serious institutional difficulties that schools face in handling sexual assault complaints. Beginning on October 5, 2015, all schools in New York are required to amend sexual assault policies by adopting a “Sexual Assault Victims’ Bill of Rights,” a drug and alcohol amnesty policy, protocols to ensure confidentiality and emphasize a victim’s right to make both criminal and disciplinary complaints and annual campus climate assessments. Also included among the reforms are significant training and public awareness

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5 Uniform Policy to Combat Sexual Assault, supra note 1.
9 See id.
10 See “Enough is Enough”, supra note 3.
14 § 1, 2015 N.Y. Sess. Laws at 596.
requirements.\textsuperscript{15} The law substantially followed the policy adopted by the SUNY system nearly a year before.\textsuperscript{16} One of the most significant and controversial changes required under the law and the SUNY policy is the requirement that New York schools adopt an “affirmative consent” definition. All New York schools must now define “consent” as follows:

“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.”\textsuperscript{17}

New York schools are also required to include several guiding principles in codes of conduct:

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

\textsuperscript{15} § 1, 2015 N.Y. Sess. Laws at 598–99.
\textsuperscript{16} Memorandum from Nancy L. Zimpher, Chancellor of the State Univ. of N.Y. to Members of the Bd. of Trs. 1–2 (Oct. 2, 2014), http://www.suny.edu/media/suny/content-assets/documents/boardoftrustees/memos/Sexual-Assault-Response-Prevention-REVISED.pdf.
\textsuperscript{17} N.Y. EDUC. LAW § 6441(1) (McKinney 2015).
activity must stop.\textsuperscript{18}

This Comment focuses on New York’s state-wide adoption of an affirmative consent standard in its colleges, and its potential effectiveness for combating the epidemic of sexual violence against women.\textsuperscript{19} Its focus is to examine the usefulness of such a standard in the college disciplinary context. Part I explains the context and seriousness of sexual assault on college campuses. Part II discusses Title IX, the Clery Act, and the Campus SaVE Act, the federal laws governing the way colleges handle sexual assault. Part III details the evolution of rape laws over time, and explains the way that consent has traditionally been viewed by the law. Part IV describes the academic and legal theories behind affirmative consent, considering the arguments of both its proponents and its critics. Part V argues that an affirmative consent standard is an appropriate and effective reform within the college disciplinary system, that, when implemented correctly, has the potential to protect students from both sexual assault and its potential ramifications.

I. CURRENT SEXUAL ASSAULT ISSUE WITHIN COLLEGES

With nearly one in five women experiencing some form of sexual assault while in college,\textsuperscript{20} there is no doubt that campus sexual assault is among the most pressing concerns facing academic institutions. Sexual assault is grossly under-reported, with less than 5 percent actually reported to law enforcement officials.\textsuperscript{21} The vast majority of sexual assaults are committed by an acquaintance of the victim, giving rise to new concerns about standards of consent.\textsuperscript{22} With many sexual assault complaints, the case hinges on whether the sex was consensual, not whether it occurred, leaving the parties locked in a he-said-she-said battle. In such cases, the outcome of the case often turns on the question of “consent,” the answer to which may vary radically depending on how that term is defined.

This was true in what was probably the most widely publicized

\textsuperscript{18} N.Y. EDUC. LAW § 6441(2)(a)–(f) (McKinney 2015).
\textsuperscript{19} Though my central focus is on sexual assaults perpetrated against women, it is worth noting that New York’s affirmative consent definition is gender neutral and protects both unconsenting women and men equally. See EDUC. § 6441(1). However, campus sexual assault impacts women significantly more than men and the most positive attribute of affirmative consent is that it creates a standard that improves the status of women. See CTRS. FOR DISEASE CONTROL & PREVENTION, supra note 6.
\textsuperscript{20} CTRS. FOR DISEASE CONTROL & PREVENTION, supra note 6.
\textsuperscript{22} CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 2-3 (2007).
rape controversy in recent memory: the case of Florida State quarterback, Jameis Winston.\textsuperscript{23} Winston was accused of sexually assaulting a college-aged woman that he had met at a bar late in 2012.\textsuperscript{24} Winston, a red-shirt freshman at the time, was the presumptive starting quarterback for the following season. It was not until nearly one year later that the accusations became public.\textsuperscript{25} University and athletic association officials knew that Winston had been accused of rape in early 2013, approximately eight months before Winston would start in his first college game.\textsuperscript{26} Despite the knowledge of the accusation, neither the university nor the Tallahassee Police Department initiated investigations into the complaint until the accusation became public during the 2013 football season.\textsuperscript{27} Winston would go on to win a Heisman Trophy and lead his team to a national championship for the 2013 season.\textsuperscript{28}

Like in the majority of campus sexual assault cases, Winston did not deny having sex with his accuser.\textsuperscript{29} Rather, throughout the case, he maintained that the sex was consensual and no crime or conduct code violation occurred.\textsuperscript{30} Winston was never criminally charged with rape.\textsuperscript{31} The Heisman Trophy winner was ultimately the subject of disciplinary hearing at Florida State approximately two years after the accusation was made.\textsuperscript{32} He was cleared of any violations of the school’s code of conduct after former Florida Supreme Court Chief Justice Major B. Harding, who presided over the hearing, found that the evidence presented during the hearing did not establish by a

\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id; see also Chip Patterson, \textit{Florida State QB Jameis Winston Near Perfect in First Half Against Pitt}, \textit{CBS Sports} (Sept. 3, 2013), http://www.cbssports.com/collegefootball/eye-on-college-football/23449772/florida-stateqb-jameis-winston-near-perfect-in-first-half-against-pitt (noting that Jameis Winston’s first start was on September 2, 2013).
\textsuperscript{27} Bogdanich, \textit{ supra} note 23.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id. Of course, there were many other issues surrounding the Jameis Winston case, including a poorly executed investigation into the allegations of his accuser and a purported bias towards athletes due to their status. \textit{See id.} However, those issues do not diminish the central issue of a lack of consent.
\textsuperscript{32} Id.
The Jameis Winston case, in terms of the alleged misconduct and the university's handling of that allegation is not one that is unique to Winston, or to college athletes. Colleges, in an effort to protect the reputation of the institution and its high-profile students, such as athletes, often attempt to keep complaints from coming to light. Most students who are sexually assaulted do not report the assault to the school or the police, and those who do often "face a depressing litany of barriers that often assure their silence and leave their alleged assailants largely unpunished." The challenges facing those students who seek to file a complaint with a school often make pursuing disciplinary sanctions seem pointless or difficult, and many choose to leave their school rather than try to seek justice.

This move by Governor Cuomo comes during a widespread push for colleges to reform the handling of sexual assault complaints on their campuses. In 2013, Congress passed the Campus SaVE Act, an amendment to the Clery Act, which was enacted to reduce the prevalence of sexual assault on college campuses. President Obama also announced a White House Task Force to Protect Students from Sexual Assault in early 2014, in hopes of “ensur[ing] safe, secure environments for students of higher education.”

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53 Id.
54 Id. It is worth noting that after Winston was cleared of any wrongdoing by the University, the complainant filed a Title IX action against the university. See Brendan Sonnone, Jameis Winston's Accuser Files Federal Lawsuit Against FSU, ORLANDO SENTINEL (Jan. 3, 2015), http://www.orlandosentinel.com/sports/florida-state-seminoles/jameis-winston/os-fsu-jameis-winston-federal-lawsuit-title-ix-20150107-story.html#page=1. It should also be noted that after writing this article, Florida State University reached a $950,000 settlement with the former student. See Marc Tracy, Florida State Settles Suit Over Jameis Winston Rape Inquiry, N.Y. TIMES (Jan. 25, 2016), http://www.nytimes.com/2016/01/26/sports/football/florida-state-to-pay-jameis-winstons-accuser-950000-in-settlement.html?_r=0.
55 See Bill Buzenberg, A Litany of Barriers . . . A Culture of Secrecy, in SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING SEARCH FOR JUSTICE 7, 8 (Ctr. for Public Integrity 2010).
56 Id. at 7.
57 See Kristin Jones, Barriers Curb Reporting on Campus Sexual Assault, in SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING SEARCH FOR JUSTICE 31, 32, 33 (Ctr. for Pub. Integrity 2010).
58 Id. at 33.
60 Memorandum from the White House Office of the Press Secretary to the Heads of Exec. Dep'ts & Agencies Establishing a White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014), http://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-
is not the only state to address the issue with a statewide reform to university sexual assault policies. In September 2014, California enacted legislation requiring that colleges and universities adopt certain reforms to their policies for sexual assault, including an affirmative consent standard. Since Governor Cuomo announced SUNY’s uniform policy, many states have begun to explore adopting a similar definition of consent.

II. LAWS GOVERNING CAMPUS SEXUAL ASSAULT

A. Title IX – Enforcement and Scope

In considering the role that affirmative consent can play in protecting students from sexual violence, it is helpful to look at the requirements that schools must comply with when handling sexual assaults. Title IX of the Education Amendments of 1972 states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

Consistent with the purpose and meaning of Title IX, it is well established that sexual harassment, which includes sexual violence, is a form of “discrimination” that violates Title IX. Instances of sexual harassment, which includes sexual violence on college campuses create an impermissible hostile environment for female students and “interferes with students’ right to receive an education.
free from discrimination.”45 The Department of Education’s Office of Civil Rights has stated that when the conduct is especially “severe,” a hostile environment can be created by just “a single or isolated incident of sexual harassment.”46 According to OCR, “a single instance of rape is sufficiently severe to create a hostile environment.”47

Under Title IX, schools must be diligent in responding to and investigating sexual assault complaints.48 Additionally, schools must have “grievance procedures” in place in order to facilitate “prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination.”49 Complaints of sexual harassment must be met with a “prompt, thorough, and impartial” investigation.50 Schools must also ensure that students are aware of rules and procedures governing sexual harassment so that they can recognize when harassment occurs, what sort of conduct constitutes harassment, and the types of recourse that victims have available to them.51 The Department of Education has also stated that mediation is an inappropriate mechanism for handling sexual assault claims.52

Beyond creating prompt and equitable grievance procedures, schools must also “take proactive measures to prevent sexual harassment and violence.”53 Schools must use training to ensure that all students are aware of and understand their rights under Title IX, and that all students are informed of the specific school’s policies regarding sexual assault, including how the school defines sexual violence and consent.54 Students must also be fully apprised of the reporting options they have and the grievance procedures in place for adjudicating complaints.55

Title IX both prohibits schools from discriminating on the basis of sex, and creates a private right of action by those students who have been victimized due to a school’s policies that allow the

45 Dear Colleague Letter, supra note 44, at 1.
46 Id. at 3.
47 Id.
48 Id. at 4.
49 REVISED SEXUAL HARASSMENT GUIDANCE, supra note 44, at 14.
50 Id. at 15.
51 Id. at 19–20.
53 Dear Colleague Letter, supra note 44, at 14.
54 Id. at 14–15.
55 Id. at 8, 15.
The two enforcement mechanisms, judicially through the courts and administratively through OCR, have different standards and remedies. The Supreme Court in *Davis v. Monroe County Board of Education*, held for the first time that individuals seeking recovery for a Title IX violation based on student-on-student harassment are entitled to monetary damages “where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities.” The Supreme Court held that in order for a plaintiff to succeed on a Title IX claim, the plaintiff “must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.” The potential exposure to liability to colleges and universities that this judicial enforcement mechanism presents is designed to incentivize compliance with Title IX. However, as the lawsuits tend to place the focus on the school’s conduct with respect to the individual who brought the suit, adjudicating these complaints through the courts does not always encourage systemic reforms to the way that school addresses sexual harassment.

The administrative enforcement mechanism tends to lead to more widespread changes in school policies and further ensures that schools are operating in a manner that best promotes the ideals of Title IX. When a student believes that she or any specific class of people believes there has been discrimination prohibited by Title IX, that person may file a complaint with OCR. In investigating Title IX violations, OCR looks to see if a school knew or should have known about harassing conduct that limited a student’s ability to participate in that school’s programs, and whether it quickly and effectively responded to such harassment. Unlike judicial

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58 *Id.* at 633.
59 *Id.* at 651 (citing Meritor Sav. Bank, FSB v. Vinson, 447 U.S. 57, 67 (1986)).
60 Renfrew, *supra* note 56, at 570.
61 *Id.* at 571.
62 *Id.* at 571–72.
63 REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 45, at 12 (“If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student’s ability to participate in or benefit from the program, and if the school knows or reasonably should know about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.”).
enforcement, a student who files a complaint with OCR is not entitled to recover monetary damages;\(^{64}\) rather, when OCR finds that a school has fallen below the standards set forth by Title IX, OCR responds by first attempting to secure a voluntary resolution agreement from the offending school ensuring that it will comply with Title IX and the guidelines set by OCR.\(^{65}\) If a school fails to successfully negotiate such an agreement within ninety days, OCR will initiate either an administrative process for terminating federal funding to the institution, or will refer the case to the Department of Justice.\(^{66}\)

Depending on the jurisdiction and the nature of the offense, an accused’s sexual misconduct might also have violated local law separate and apart from the college’s failure to fulfill duties under Title IX. When such a scenario results in a criminal investigation, a school’s responsibility to conduct a reasonable inquiry and respond appropriately is not eliminated.\(^{67}\) This is due in part to Title IX’s requirement that schools apply a preponderance of the evidence standard rather than the reasonable doubt standard used in criminal proceedings.\(^{68}\)

**B. The Clery Act and the Campus SaVE Act**

The Clery Act\(^{69}\) and its later expansion through the Campus SaVE Act impose additional federal obligations upon colleges and universities to protect their students from sexual assault. The Clery Act, like Title IX, applies to all colleges and universities receiving federal funding.\(^{70}\) The Clery Act requires institutions to annually publish an Annual Security Report, which gives statistics about the violent crimes that occurred on campus.\(^{71}\) The Annual Security


\(^{66}\) OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., CASE PROCESSING MANUAL (CPM) 21, 28 (2015). It is worth noting that OCR has never initiated this administrative proceeding to withdraw funding. Renfrew, *supra* note 56, at 574.

\(^{67}\) REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 44, at 21.

\(^{68}\) Dear Colleague Letter, *supra* note 44, at 11 ("The ‘clear and convincing’ standard . . . currently used by some schools . . . [is] inconsistent with the standard of proof established for violations of the civil rights laws, and [is] thus not equitable under Title IX.").


\(^{71}\) 20 U.S.C. § 1092(f)(1)(F); Schroeder, *supra* note 52, at 1213. The crimes that schools must

Report must also contain information about the school’s procedures for reporting criminal activity, and the school’s security and campus law enforcement policies.72 The Clery Act details specific reporting requirements for incidences of sexual violence;73 institutions must include in their Annual Security Report the school’s specific policy for sexual violence.74 The policy must discuss the educational programs, the particular grievance procedures, and possible punishments for violating the school’s sexual assault policy.75 Complaints under the Clery Act can only be filed with the Department of Education, and schools not in compliance with the Act can be fined up to $35,000 per violation.76

The Campus SaVE Act was enacted as an effort to curb the frequency of sexual assault on college campuses. The SaVE Act expands the Clery Act’s reporting requirements to include stalking, and domestic and dating violence.77 Schools must also comply with additional educational requirements that promote prevention of sexual assault, knowledge of sexual assault and the rights of victims of sexual assault.78 As a result of the Act, students have access to a wider range of information about options that victims of sexual assault have regarding pursuing criminal charges, with or without the assistance of school officials.79 Students also must have greater access to information about institutions’ internal mechanisms for handling sexual assault.80 Those who adjudicate disciplinary hearings are required to receive training on how best to handle sexual assault hearings and investigations to ensure that victims are treated with the utmost respect.81

III. WHAT IS CONSENT?

While the purpose of this paper is not to assess consent in the context of the criminal system, it is important to understand the role

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74 Schroeder, supra note 52, at 1213.
76 See Schroeder, supra note 52, at 1214.
77 Id. at 1224–25.
78 Id. at 1225–26.
79 Id. at 1227.
80 Id. at 1227–28.
81 Id. at 1228.
that consent has typically played in rape laws. Under traditional common law, rape is the “carnal knowledge or sexual intercourse, by means of force, without the consent or against the will of the survivor,” with many jurisdictions requiring the additional element of “resistance on the part of the [victim].” 82 It is still the case in many jurisdictions today that a mere lack of consent is insufficient to establish rape. 83 It is not surprising that prosecuting a defendant for rape, particularly when the defendant and victims know each other, was typically, and still is, a difficult and unsuccessful endeavor. 84

As a result of a number of rape law reform efforts from the latter half of the twentieth century, certain definitional changes to rape and consent have been made in some jurisdictions to make it easier to obtain a conviction for rape. 85 Even with significant reforms, the way rape is handled in both the criminal justice setting and college setting is far from perfect. To date, only twenty-eight states have some form of a non-consent statute, allowing a conviction for a sexual offense based solely on a lack of consent. 86 In jurisdictions that prohibit non-consensual sexual contact, the primary inquiry is whether the victim expressed a lack of consent, taking the focus off of the accused and placing it on the victim. 87 Under this standard, rape occurs only when the victim makes known his or her unwillingness to engage in sexual activity. 88 This differs from those jurisdictions requiring proof of resistance, which also shifts the focus onto the victim and looks to the extent to which she fought her attacker. 89 In these jurisdictions, there is no rape if there is no evidence that the victim made any effort to resist the attack. 90 Though states vary as to the type of resistance required, in these jurisdictions, lack of consent alone is not enough

84 Id. at 54.
86 John F. Decker & Peter G. Baroni, Criminal Law: “No” Still Means “Yes”: The Failure of the “Non-Consent” Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1086 (2011). It is worth noting that twelve of these twenty-eight states do not deem non-consent enough for a conviction for a sexual offense involving penetration. Id.
88 See, e.g., N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2015).
89 Decker & Baroni, supra note 86, at 1102.
90 See id. at 1103–04.
for a rape conviction.  

This burden on the victim to expressly state her unwillingness to engage in sexual activity sharply contrasts with what is expected of a victim in most other crimes. Contrasting theft crimes with sexual assault offenses demonstrates a striking difference in how the law treats a person’s right to their property and a person’s (typically a woman’s) right to her body. Under the common law, larceny is defined as “the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive the possessor of the property.” In prosecuting a defendant for larceny, the prosecutor establishes the “trespassory” element by demonstrating that the defendant never obtained permission to take property from the owner. Unlike rape laws, a person’s property need not be forcibly taken, and such attempts to take property need not be met with resistance. Furthermore, a person is guilty of larceny when he takes the property of another, without first obtaining permission to do so. The law does not require a victim of theft to object to the conduct in order for it to become unlawful. Unless a person first obtained lawful permission to remove the property of another, he may not do so without facing consequences for his actions.

The importance of protecting property interests has always been valued by law, whereas a woman’s sexual autonomy has traditionally been “underprotected.”

New York is among the states that criminalize non-consensual sex. Under the New York Penal Law, a person commits rape in the third degree when “[h]e or she engages in sexual intercourse with another person without such person’s consent where such lack of consent is by reason of some factor other than incapacity to consent.” For the purposes of this statute, the penal law defines a lack of consent as sexual conduct where “the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the

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91 See id.
92 JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 32.02, at 554 (5th ed. 2009). In the context of crimes against property, such as larceny, “trespassory taking [refers to] the nonconsensual taking of possession of the property in question.” Id.
93 50 AM. JUR. 2D Larceny § 27 (2015).
94 50 AM. JUR. 2D Larceny § 26 (2015) (“Larceny is not committed where the property is taken with the full knowledge and consent of the owner . . . .”).
95 See Stephen J. Schulhofer, Rape in the Twilight Zone: When Sex is Unwanted But Not Illegal, 38 SUFFOLK U. L. REV. 415, 422–23 (2005) (“[T]he law protects us from non-violent threats, it protects us from takings by stealth, and it usually protects us from breech [sic] of trust and deception. The puzzle is that sexual autonomy is treated so differently and given so much less protection.”).
96 N.Y. PENAL LAW § 130.25(3) (McKinney 2015).
actor’s situation would have understood such person’s words and acts as an expression of lack of consent to such act under all the circumstances.”97

This contrasts with the compulsory definition in New York institutions requiring that parties first obtain “knowing, voluntary, and mutual” assent, “given by words or actions.” The two disparate standards create situations where students can violate school rules, while potentially avoiding criminal liability.

Indeed, this may often be the case given how difficult it is to win a criminal conviction in acquaintance rape cases under traditional definitions of consent.99 Notably, the vast majority of rapes are committed by someone known to the victim, especially in colleges.100 Though the relationship of the accused to the victim makes no difference in terms of the law, when there exists a preexisting relationship between the parties, police, judges and juries often view the case differently.101 Unlike stranger rape cases, where the primary defense is misidentification, when the accused is someone known to the victim, the accused typically argues that there was consent for the sexual act, causing the primary issue in the case to become whether any rape ever actually occurred.102 In cases of acquaintance rape, the focus is typically placed on the conduct and background of the victim, with the defendant calling the victim’s morality in question in an effort to controvert her allegations.103

While rape shield laws limited the accused’s ability to question his

97 N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2015). It is worth noting that New York uses a “reasonable person” standard to determine whether a person expressed a lack of consent. If an objection to sex falls outside of what a normal person would expect, the accused might not be liable for sex, even though the victim was expressing a lack of consent. Under the law in New York “‘no’ does not necessarily mean no.” Schulhofer, supra note 95, at 421.

98 N.Y. EDUC. LAW § 6441(1) (McKinney 2015).

99 See Meredith J. Duncan, Sex Crimes and Sexual Mischief: The Need for a Clearer Line Between Forcible Rape and Nonconsensual Sex, 42 WAKE FOREST L. REV. 1087, 1113–14 (2007); Lani Anne Remick, Comment, Read Her Lips: An Argument for a Verbal Consent Standard in Rape, 141 U. PA. L. REV. 1103, 1104 (1993) (“The law of rape . . . fails to clearly proscribe less violent rapes or rapes in which some elements of the consensual sexual encounter are present. . . . The inability of victims of these ‘nontraditional’ rapes to vindicate their rights through use of the criminal system is thus one of the biggest impediments to the comprehensive protection of female sexual autonomy under the law of rape.”).


101 Id. at 1201–02.

102 Id. at 1204.

103 Id.
accuser or present evidence of the victim’s sexual history, such laws are less effective in situations where the primary factual dispute regards whether or not the victim consented.104

IV. AFFIRMATIVE CONSENT

A. The Switch to Affirmative Consent

“No means no,” the longstanding articulation of the standard for consent in this country, has been the slogan for countless anti-rape movements. As was discussed supra,105 this standard establishes a presumption that in the absence of “no,” or physical resistance, a woman has consented to sex. This places the onus on the victim to specifically note her unwillingness to engage in sexual activity.106 Affirmative consent definitions seek to switch the burden away from the woman and place it on the initiator to receive actual consent before engaging in sexual activities, rather than just waiting for the woman to object.107 In doing so, proponents are seeking to equalize men and women in terms of sex, allowing them both the opportunity to decide when they want to have sex.108

Feminist scholars have been advocating for a shift in sexual assault definitions for decades, recognizing that the traditional rape laws are based upon, and further perpetuate, inequality between men and women regarding sexual autonomy.109 Many scholars expressed a belief that pre-reform rape laws “promote the sexual agency of men at the expense of that of women.”110 Reformers were successful in

104 Michelle J. Anderson, From Chastity Requirements to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 GEO. WASH. L. REV. 51, 54, 55 (2002) (explaining that rape shield statutes typically include exceptions for cases in which consent is the primary issue, allowing for the introduction of evidence about the prior sexual relations between the accused and the victim); see also Fed. R. Evid. 401(b)(1)(B) (“The court may admit the following evidence in a criminal case: . . . evidence of specific instances of a victim’s sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent.”); N.Y. CRIM. PROC. LAW § 60.42(1) (“Evidence of a victim’s sexual conduct shall not be admissible in a prosecution for a[] [sex] offense or an attempt to commit a[] [sex] offense . . . unless such evidence: proves or tends to prove specific instances of the victim’s prior sexual conduct with the accused.”).

105 See supra Part III.

106 Remick, supra note 99, at 1110.


108 See Remick, supra note 99, at 1147.

109 See, e.g., Kasubhai, supra note 83, at 50, 51; Remick, supra note 99, at 1104 (explaining that rape laws reflect a belief that women do not have full authority to determine when, how and with whom they wish to have sex).

110 Anne M. Coughlin, Sex and Guilt, 84 VA. L. REV. 1, 2 (1998).
gaining widespread changes in rape laws, including the introduction of rape shields laws, the elimination of the corroboration requirement,\(^{111}\) and the resistance requirement. Society has moved past the days of viewing women as the property of their husbands and viewing rape as a crime against the household, rather than the victim.\(^{112}\) While there have been significant changes in the way that rape is criminalized, there is still room for improvement.

Affirmative consent provides a cure for the disparity between a woman’s personal autonomy and her sexual autonomy.\(^{113}\) Standards of non-consent perpetuate the notion that women are merely “objects of male sexual aggression who feign resistance to male advances despite internally welcoming them.”\(^{114}\) Non-consent essentially allows men to cast aside any doubts about a woman’s willingness to have sex so long as her behavior concerning that willingness is sufficiently ambiguous.\(^{115}\) Furthermore, under traditional approaches to consent, the effective default is that women are consenting to sex, and that can only be changed by clear and unambiguous protestation or resistance.\(^{116}\) By contrast, the requirement that men first confirm that his female partner is a voluntary participant in sex eliminates the presumption that women are always consenting and gives her a voice in the bedroom.

Colleges have been adopting affirmative consent standards since the early 1990s.\(^{117}\) Antioch College received widespread media attention for adopting its Sexual Offense Prevention Policy

\(^{111}\) Under traditional rape laws, a conviction for rape could not be sustained based only on the victim’s account; in order to obtain a conviction for rape, a prosecutor was required to evidence substantiating the victim’s testimony. Cassia C. Spohn, \textit{The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms}, \textbf{39} \textit{JURIMETRICS} J. 119, 124–25 (1989). As a result of feminist reform efforts, corroboration requirements have been largely eliminated from American jurisdictions. See Michelle J. Anderson, \textit{The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault}, 84 B.U. L. REV. 945, 968 (2004).

\(^{112}\) Cairney, supra note 100, at 291–92.


\(^{114}\) Remick, \textit{supra} note 99, at 1146.

\(^{115}\) See \textit{SCHULHOFER, supra} note 113, at 270 (“To justify an acquittal, courts and juries need only say that the woman’s conduct left her actual desires unclear—that the prosecution failed to prove penetration against her will.”).

\(^{116}\) It would seem obvious that, even under non-consent standards, “no” does, in fact, mean “no.” However, the societal belief that women who do want to have sex first coyly deny sexual advances allows men to proceed, even lawfully, despite a woman’s continuous and clear expression of “no.” \textit{See generally} Remick, \textit{supra} note 99, at 1144–47 (describing the societal norms that gave rise to and justified the non-consent standard).

(“SOPP”).118 SOPP defines consent as “verbally asking and verbally giving or denying consent for all levels of sexual behavior.”119 The policy requires students to obtain verbal consent for each and every sexual act, regardless of an existing or previous sexual relationship between the students or any “current activity.”120 When it was first introduced in early 1993, the policy was celebrated by some as a positive step towards curbing the prevalence of sexual assaults on campus;121 the policy was also met with strong criticism, including a notable sketch from Saturday Night Live, which portrayed a fictional game show called “Is It Date Rape?”122 The sketch featured the fictional “Antioch Date Rape Players” demonstrating purposefully awkward portrayals of sexual interactions as governed by Antioch’s policy.123 The sketch mocked the policy in the following unrealistic and exaggerated depiction:

MALE. May I compliment you on your halter top?
FEMALE. Yes. You may.
MALE. It’s very nice. May I kiss you on the mouth. [sic]
FEMALE. Yes. I would like you to kiss me on the mouth.
MALE. May I elevate the level of sexual intimacy by feeling your buttocks?
FEMALE. Yes. You have my permission.
MALE. May I raise the level yet again, and take my clothes off so that we could have intercourse?
FEMALE. Yes. I am granting your request to have intercourse.124

New York’s position that parties must ensure that their partners express a clear and unambiguous willingness to have sex is not based on a novel and untested theory. Affirmative consent policies in colleges have become even more prevalent recently as approximately 1,400 colleges and universities across the country have adopted some form of affirmative consent.125 Every Ivy League school—except for

118 See Alan D. Miller, Ohio Colleges Attempting to Reduce Sexual Assaults, COLUMBUS DISPATCH (Ohio), Oct. 4, 1993, at 01B.
119 Antioch College, supra note 117, at 42.
120 Id. at 42–43. The policy gives the following example of a “current activity”: “grinding on the dancefloor [sic] is not consent for further sexual activity.” Id. at 43.
121 Miller, supra note 118.
123 Id.
124 Id.
Harvard University—has adopted some form of affirmative consent.\textsuperscript{126} Even large state-run universities, such as the University of Texas and the University of North Carolina, have adopted such policies.\textsuperscript{127} The Obama Administration is promoting affirmative consent standards for colleges. As part of the White House’s Task Force to Protect Students from Sexual Assault, the Administration has recommended that schools adopt sexual assault policies that include affirmative consent language defining consent as “informed, voluntary, and mutual” and that “[s]ilence or absence of resistance does not imply consent.”\textsuperscript{128} In fact, affirmative consent is not entirely new to New York schools, as many already had some sort of affirmative consent standard in place when Governor Cuomo announced the new policy.\textsuperscript{129} Some states have even adopted affirmative consent standards in their criminal systems. Washington State’s Criminal Code defines consent as “actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.”\textsuperscript{130} In Illinois, consent is “a freely given agreement to the act of sexual penetration or sexual conduct in question.”\textsuperscript{131} Wisconsin similarly defines consent as “a freely given agreement to have sexual intercourse or sexual contact” by one who is “competent


\textsuperscript{128} Task Force to Protect Students from Sexual Assault, Sample Language and Definitions of Prohibited Conduct for a School’s Sexual Misconduct Policy, NOT ALONE, https://www.notalone.gov/assets/definitions-of-prohibited-conduct.pdf (last visited Mar. 20, 2016).


\textsuperscript{130} WASH. REV. CODE ANN. § 9A.44.010(7) (West 2015).

\textsuperscript{131} 720 ILL. COMP. STAT. ANN. 5/11–1.70 (West 2015).
to give informed consent.” In In re Interest of M.T.S., the Supreme Court of New Jersey adopted an affirmative standard for consent. In that case, the defendant, a juvenile referred to as M.T.S., was accused of sexually assaulting a fifteen-year-old girl, C.G., who resided in the same house as M.T.S. The two teenagers gave different accounts of the events at issue: C.G. said that she had woken up to “M.T.S. on top of her, her underpants and shorts removed” and “his penis [in] [her] vagina.” The defendant gave a different story, testifying that he and C.G. consensually engaged in kissing and consensual touching. According to the defendant, he and C.G. then began to engage in sexual intercourse, before C.G. pushed him off, and said “stop, get off.”

The defendant was ultimately convicted of second-degree assault. The Appellate Division reversed his conviction, concluding that in the absence of force on the part of the defendant, no finding of second-degree sexual assault could be upheld. The Supreme Court of New Jersey, greatly expanded the definition of force in reinstating the defendant’s conviction, and articulated a new standard for consent:

In a case such as this one, in which the State does not allege violence or force extrinsic to the act of penetration, the factfinder must decide whether the defendant’s act of penetration was undertaken in circumstances that led the defendant reasonably to believe that the alleged victim had freely given affirmative permission to the specific act of sexual penetration.

The court, in creating a new standard for consent, noted that because the revised New Jersey statute did away with any requirement for resistance or relating to the will of the victim, “the standard defining the role of force in sexual penetration must prevent the possibility that the establishment of the crime will turn on the alleged victim’s state of mind or responsive behavior.”

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134 Id. at 1278.
135 Id. at 1267.
136 Id. at 1267–68 (second alteration in original) (internal quotation marks omitted).
137 Id. at 1268.
138 Id. (internal quotation marks omitted).
139 Id. at 1269.
140 Id.
141 Id. at 1278 (emphasis added).
142 Id. at 1277.
The definition given here is consistent with that commonly seen in college policies. Similar to the definitions in both New York’s and California’s mandated policy, the rule established by the court does not require affirmative permission to be verbal, but rather can come in the form of “actions that, when viewed in the light of all the surrounding circumstances, would demonstrate to a reasonable person affirmative and freely-given authorization for the specific act of sexual penetration.”

B. Rebutting Criticisms of Affirmative Consent

While adoption of New York’s new policy and the passing of the analogous California bill was celebrated by many, affirmative consent has also been met with much criticism by those who believe it to be an unrealistic and often unfair approach to regulating sex. Chairman of the New York Conservative Party Mike Long expressed disapproval of the policy, claiming that such a measure would do little to prevent rape. Many of the denunciations have resulted from misunderstandings and myths regarding affirmative consent.

One of the more popular myths promulgated by opponents is that under this standard, individuals must first obtain verbal consent to engage in sexual conduct, thus virtually eliminating all of the romanticism involved in sex. However, the policy specifically allows for consent to be given through actions, where those actions “create clear permission regarding willingness to engage in the sexual activity.” Sexual encounters need not be an uncomfortable and unromantic litany of questions seeking similar to that interaction depicted in Saturday Night Live’s “Is It Date Rape?” Many times, consent is very clear based on conduct. Affirmative consent addresses those scenarios where it is difficult to ascertain a party’s willingness to have sex. In a situation where consent is ambiguous,

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143 N.Y. EDUC. LAW § 6441(1) (McKinney 2015).
144 CAL. EDUC. CODE § 67386(a)(1) (West 2015).
145 M.T.S., 609 A.2d at 1278.
148 N.Y. EDUC. LAW § 6441(1) (McKinney 2015).
149 See supra note 124 and accompanying text.
affirmative consent, as defined by New York institutions, requires that consent be obtained before moving forward. Protestors claim that affirmative consent signals the end of spontaneous, romantic sex. Even for obtaining verbal consent, affirmative consent does not require a stiff, formulaic inquiry, nor does it require the parties to enter into a “love contract” before sex. All that affirmative consent requires is that the initiator of the sex pause long enough to ask if his partner wants to have sex. In fact, affirmative consent encourages open communication about sex, which experts agree leads to an overall more enjoyable sexual experience.

Many have argued that such a measure shifts the burden of proof, stripping the defendant of his presumption of innocence. This too is a misunderstanding of affirmative consent. In order to find a student responsible for sexual assault in a disciplinary hearing, the presiding officer would still need to find that the accused never obtained either explicit or implicit permission before engaging in sexual conduct. In these proceedings, finders of fact would still be required to assess the weight of all of the evidence presented and make a determination regarding credibility of all testifying witnesses. Under an affirmative consent regime, the only shifting burden remains in the bedroom; rather than women having a burden to object to unwanted sexual acts, the man has the burden to ensure that a potential sexual partner is willing to have sex. Requiring consent before sex places no barrier to an accused’s ability to defend himself. What affirmative consent does is create more equal and comfortable sexual encounters for women.

Critics have also expressed concern over an increased potential for false allegations resulting in criminal liability for an innocent man. One commentator claimed that the increased attention to campus rape, and the various reforms attempting to address the problem “put[] boys in danger of trumped-up assault charges heard before kangaroo courts.” However, various studies have found that

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150 EDUC. § 6441(1).
151 Remick, supra note 99, at 1148.
152 Id. at 1149–50.
153 See, e.g., Will Saying Yes to Affirmative Consent Curb College Sexual Assault?, PBS NEWSHOUR (Nov. 6, 2014), http://www.pbs.org/newshour/mm/yes-means-yes-affirmative-consent/.
154 See Little, supra note 107, at 1349.
155 SCHULHOFFER, supra note 113, at 271.
157 Heather Mac Donald, Neo-Victorianism on Campus, WKLY. STANDARD (Oct. 20, 2014),
between 2 and 8 percent of sexual assault claims are false.\(^{158}\)

Furthermore, studies consistently demonstrate that rape is grossly under-reported,\(^{159}\) a fact which has been attributed to the hostility that those who file charges face, an unwillingness to be subject to intense scrutiny during investigation and trial, and a lack of knowledge about what constitutes rape.\(^{160}\) Additionally, requiring that men ensure that their partners are truly willing to engage in sexual conduct does not change one’s ability to report a crime either to a college or the police. There is no substantial difference between a woman reporting that she objected to sexual conduct and a woman reporting that she never consented to sexual conduct.

V. BENEFITS OF “ENOUGH IS ENOUGH”

There is no doubt that sexual assault has become one of the most serious issues plaguing college-aged Americans. The issue is a complex one, stemming from a history of patriarchy driven rape laws, traditional difficulty in addressing and prosecuting rape, and social mores that often prove to be hypocritical and sexist.\(^{161}\) Affirmative consent alone cannot fix the sexual assault epidemic in colleges. It is, however, a step in the right direction. Affirmative consent in colleges and universities has the potential to protect both male and female students from both sexual assault and the potential ramifications of sexual assault.

The Department of Education’s treatment of sexual violence as an impermissible barrier to education requires schools to take steps to prevent instances of sexual violence and to properly address those that do occur.\(^{162}\) By instituting affirmative consent standards, the legislature has ensured that all colleges and universities in New York


\(^{159}\) LYNN LANGSTON ET AL., U.S. DEP’T OF JUSTICE, VICTIMIZATION NOT REPORTED TO THE POLICE, 2006–2010 4 (2012), http://www.bjs.gov/content/pub/pdf/vnrp0610.pdf. According to this report, the Justice Department estimates that sixty-five percent of rapes or sexual assaults went unreported to the police. Id. A separate study by the Justice Department found that eighty percent of women who were sexually assaulted did not report their attacker to the police. STROZICH & LANGTON, supra note 100, at 9.

\(^{160}\) Little, supra note 107, at 1358.

\(^{161}\) See generally, Kasubhai, supra note 83, at 51–53 (explaining that the history of rape laws demonstrates that they have a foundation in patriarchy and the view that women are mere property of their fathers and husbands).

\(^{162}\) See supra Part II.A.
are complying with Title IX, and allowing all students in the state to have equal access to education, regardless of their sex. The inherent sexual inequality stemming from traditional non-consent approaches threatens a woman’s ability to enjoy complete access to higher education. Non-consent restricts a woman’s control over her body, and allows the male initiator to engage in sexual relations with a woman with little to no regard for her desires.\textsuperscript{163} It protects those men who, in the face of ambiguous behavior, opt to follow their urges rather than take the time to clear up potential misunderstandings. Where a man’s belief that a woman never objected to sex is reasonable, that woman’s subjective unwillingness to have sex is entirely irrelevant.\textsuperscript{164} In this respect, traditional approaches to consent favor the aggressor over the victim and create significant barriers to providing victims with justice and a safe environment.\textsuperscript{165}

New York’s Law resolves this inherent inequality by creating a system that protects women by fostering an environment that encourages open communication during sex, thus increasing the likelihood of proper and fair adjudication of sexual assaults. In New York schools, women are no longer precluded from seeking justice because they were too frightened or shocked to object. With proper education and enforcement, affirmative consent can create a fairer and more comfortable atmosphere where women can freely socialize and date, unburdened by the lingering sense that they do not have complete control over their bodies.

Affirmative consent has the ability to allow women to take more control of their own bodies. Under this standard, schools can protect women who find themselves in unwanted sexual encounters, but who are too fearful or shocked to object.\textsuperscript{166} Through affirmative consent, New York institutions are recognizing the importance of a woman’s right to decide what she does with her own body. The definition increases the likelihood that women will ultimately obtain closure and that justice will be properly served in the event of a sexual assault. Women can no longer be told that they were not raped because they never physically resisted or verbally rejected their aggressor’s attempts to engage in sexual contact. When schools define consent as affirmative acquiesce and ensure a well-functioning disciplinary procedure, with proper mechanisms for a victim to seek

\textsuperscript{163} See Remick, \textit{supra} note 99, at 1111–12.
\textsuperscript{164} See \textsc{Schulhofer}, \textit{supra} note 113, at 270.
\textsuperscript{165} See Lois Pineau, \textit{Date Rape: A Feminist Analysis, in DATE RAPE} 1, 8 (Leslie Francis ed., 1996).
\textsuperscript{166} \textsc{Schulhofer}, \textit{supra} note 113, at 268–69.
and obtain justice, the school is more likely to have a safer and more comfortable environment for all students, especially victims of sexual assault.

The policy provides a clear and definite meaning for “consent” that applies equally to all students attending New York schools. The uniform definition eliminates a great deal of ambiguity regarding sexual assault. Students attending SUNY Albany are held to the same standard as students attending Columbia University. The wide dissemination of a standardized definition not only promotes consistency in adjudicating sexual assault complaints across the state, but also encourages a change in social attitudes and mores regarding sexual relationships. Affirmative consent recognizes that gender equality extends to sexual relationships. By requiring that men seeking to have sex with women first obtain consent, New York has allowed college women to take total control over some of the most intimate and personal decisions that are made: whether or not to have sex.

New York’s affirmative consent policy also appropriately addresses the fact that many sexual assaults happen because either one or both parties genuinely lack an ample understanding of unacceptable sexual conduct. In addition to supplying a clear definition for consent that students can look to in order to help guide conduct, the policy requires that students undergo certain training on sexual assault. The policy mandates that each school adopt a uniform training program to be given to students during freshman orientation. Such a move helps in educating all parties about sexual assault. It ensures that men will have the opportunity to learn to differentiate between permissible and impermissible conduct and the potential consequences. By educating students about sexual assault, students are encouraged to ensure that their partners are comfortable with sexual conduct and consent to it.

167 See N.Y. EDUC. LAW § 6441(1) (McKinney 2015).
168 Remick, supra note 99, at 1144.
169 N.Y. EDUC. LAW § 6447(1) (McKinney 2015).
170 EDUC. LAW § 6447 (2).
171 See BRETT A. SOKOLOW, NAT’L CTR FOR HIGHER EDUC. RISK MGMT., CREATING A PROACTIVE CAMPUS SEXUAL MISCONDUCT POLICY 14 (2001) (“The myth of college sexual misconduct policies is that they are only of a reactive nature, to be applied in judicial hearings to determine alleged violations. In fact, a well-constructed campus sexual misconduct policy is the best tool colleges have for creating proactive behavioral guidelines to which students may conform their behaviors.”).
CONCLUSION

Given the seriousness and the prevalence of sexual assault on college campuses, it is no surprise that there have been significant efforts to reform the system. Governor Cuomo and the New York Legislature have recognized the importance of addressing these problems and have created a response that establishes New York as a national leader for reforming a broken, discriminatory, and ineffective system. New York’s policy requiring affirmative consent makes New York schools safer and fairer environments and increases the likelihood that women will be able to take full advantage of the educational opportunities offered to them.

Affirmative consent breaks down some of the traditional barriers to successfully adjudicating sexual assault claims. Women are no longer precluded from seeking justice because they did not repeatedly and unquestionably object to unwanted sex. Those stunned or frightened college women who remain silent during the assault who file complaints are now afforded the same treatment as the women who physically resist their attackers. Affirmative consent also requires these schools to recognize that these college women are autonomous individuals, capable of making their own decisions about their bodies. Women attending New York’s colleges and universities are able to enjoy their college experience without having to constantly confront the idea that their subjective desires might be entirely irrelevant in sexual situations. Through New York’s affirmative consent standard, both the societal and disciplinary rules governing sexual relationships are finally evolving to reflect the significant gains that women have made to date, eliminating women’s second-class status in the bedroom.