

## NOTES

### THE CASE AGAINST AFFIRMATIVE CONSENT: WHY THE WELL-INTENTIONED LEGISLATION DANGEROUSLY MISSES THE MARK

Allison L. Marciniak

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# THE CASE AGAINST AFFIRMATIVE CONSENT: WHY THE WELL-INTENTIONED LEGISLATION DANGEROUSLY MISSES THE MARK

Allison L. Marciniak\*

*“It is on all of us to reject the quiet tolerance of sexual assault and to refuse to accept what’s unacceptable.”*

—President Barack Obama<sup>1</sup>

## I. INTRODUCTION

Governor Jerry Brown’s signing of Senate Bill No. 967 on September 28, 2014 marked the official implementation of affirmative consent<sup>2</sup> in California, revising the standard for evaluation of sexual assault claims on college campuses.<sup>3</sup>

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\* Candidate for J.D., 2016, University of Pittsburgh School of Law; B.S., 2013, The Pennsylvania State University.

<sup>1</sup> Tanya Somanader, *President Obama Launches the “It’s On Us” Campaign to End Sexual Assault on Campus*, WHITE HOUSE BLOG (Sept. 19, 2014, 2:40 PM), <http://www.whitehouse.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus>.

<sup>2</sup> Senate Bill No. 967 provides:

“Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the person involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.

S.B. 967 § 67386(a)(1), 2013–2014 Reg. Sess. (Cal. 2014). *See generally* Lani Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103 (1993) (presenting arguments in favor of the implementation of a verbal consent standard).

<sup>3</sup> S.B. 967 § 67386, 2013–2014 Reg. Sess. (Cal. 2014) (implementing an affirmative consent standard).

The law targets colleges and universities as a means for achieving broad sexual harassment and assault reform by requiring each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions to devise certain practices, policies, and procedures regarding disciplinary proceedings in cases of sexual assault on college campuses.<sup>4</sup> New Jersey and New Hampshire have also joined the fight, with their respective legislatures considering legislation very similar to California's Senate Bill No. 967.<sup>5</sup> Many believe California's legislation to be a response to potential Title IX violations arising from numerous college and universities' alleged mishandlings of sexual assault cases—claims that have resulted in dozens of federal investigations.<sup>6</sup>

With some studies evidencing that nearly one out of five women are victims of actual or attempted rape on college campuses,<sup>7</sup> the need for legislators to address the problem of sexual violence has never been more pressing. Some have hailed the official dawn of affirmative consent legislation as a victory—as “an important step in preventing sexual violence on campus.”<sup>8</sup> Yet, the legislation's pitfalls in California—from textual ambiguities to a lowered standard of proof in disciplinary proceedings<sup>9</sup>—will likely inhibit any intended goals of reform. Advocates of

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<sup>4</sup> See *id.*; Cathy Young, “Affirmative Consent”: *The Sex Police on the Defensive*, REAL CLEAR POLITICS (June 30, 2014), [http://www.realclearpolitics.com/articles/2014/06/30/affirmative\\_consent\\_the\\_sex\\_police\\_on\\_the\\_defensive\\_123157.html](http://www.realclearpolitics.com/articles/2014/06/30/affirmative_consent_the_sex_police_on_the_defensive_123157.html).

<sup>5</sup> Elizabeth N. Brown, *Affirmative Consent Is Spreading*, REASON.COM (Nov. 24, 2014, 10:30 AM), <http://reason.com/blog/2014/11/24/affirmative-consent-spreads-to-jersey>. New York Governor Andrew Cuomo has also expressed that he will push for similar affirmative consent legislation. Victoria Cavaliere, *Cuomo Wants Statewide ‘Affirmative Consent’ Campus Sex Assault Bill*, REUTERS (Jan. 17, 2015), <http://www.reuters.com/article/2015/01/17/us-usa-new-york-sexcrimes-idUSKBN0KQ0U820150117>.

<sup>6</sup> A Title IX investigation serves to ensure that institutions receiving federal funding comply with federal law by not discriminating based on sex in handling complaints regarding sexual violence. See Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014) [hereinafter Press Release, U.S. Dep't of Educ.], available at <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>.

<sup>7</sup> See NAT'L CTR. FOR INJURY PREVENTION & CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 39 (2011), available at [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf).

<sup>8</sup> Cathy Young, *Campus Rape: The Problem With ‘Yes Means Yes,’* TIME (Aug. 29, 2014), <http://time.com/3222176/campus-rape-the-problem-with-yes-means-yes>.

<sup>9</sup> S.B. 967 § 67386(a)(2)(B)(3), 2013–2014 Reg. Sess. (Cal. 2014).

affirmative consent programs argue that society needs these programs to address the inadequate response by educational institutions regarding the problems of sexual violence.<sup>10</sup> Others argue that, in practice, such legislation will not facilitate sexual assault prevention and will come with a heavy price tag in the form of constitutional infringements and impositions of pervasive, intrusive standards into students' private lives.<sup>11</sup>

This Note addresses various problems relating to the affirmative consent legislation passed in California. Part II discusses some of the major textual and contextual ambiguities of the bill, resulting in little guidance for use by disciplinary committees addressing sexual assault claims. Part III examines the implications of the legislation from both the victims' and accused's viewpoints, examining due process on campus and the legislation's implications on those protections. Part IV analyzes the underlying policy implications of the affirmative consent standard, proposing alternative solutions to better achieve the ever-pressing need for sexual assault reform. Finally, Part V provides a conclusion, arguing that society must do more to change its current perception on sex and sexual assault.

## II. WHY "YES" IS NOT ENOUGH: THE PROBLEM OF OBTAINING AFFIRMATIVE CONSENT

California's affirmative consent legislation requires university and college students to obtain explicit, ongoing consent when engaging in sexual activity.<sup>12</sup> Many feminists and other activists have long argued that one should obtain sexual consent with an active "yes," rather than a mere absence of a "no" from a partner, discounting as hyperbole sentiments that an explicit consent standard "will turn people into unwitting rapists every time they have sex without obtaining an explicit 'yes.'"<sup>13</sup> However, a closer look into the law's textual faults and its omissions of

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<sup>10</sup> See Emanuella Grinberg, *Schools Preach 'Enthusiastic' Yes in Sex Consent Education*, CNN (Sept. 29, 2014), <http://www.cnn.com/2014/09/03/living/affirmative-consent-school-policy> (stating that Berkeley and Columbia University in New York have been the "subject of negative publicity in the past year" over the handling sexual misconduct).

<sup>11</sup> Amid New York Governor Cuomo's proposal for affirmative consent legislation, opponents cite the standard as an "over-reach of government into private lives" and "intrusive." Cavaliere, *supra* note 5.

<sup>12</sup> See Susan Kruth, *California Governor Signs 'Affirmative Consent' Bill*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Sept. 29, 2014), <http://www.thefire.org/california-governor-signs-affirmative-consent-bill> ("[U]nder this bill students must receive not just explicit consent to sexual activity but *ongoing* consent—although it is impossible to tell how often students must pause to receive explicit consent in order for the sexual activity to qualify as consensual.").

<sup>13</sup> Young, *supra* note 8.

clear guidance leaves room for the law's inconsistent application, thereby faring no better than its "no means no" counterpart.

According to Senate Bill No. 967, in order to obtain consent, both partners must receive "affirmative, conscious, and voluntary agreement" from the other.<sup>14</sup> A provision conceding that "relying solely on nonverbal communication can lead to misunderstanding" was cut during revisions,<sup>15</sup> and Bonnie Lowenthal, democratic assemblywoman and a co-author of the legislation, specified that the standard mandates that one "must say 'yes.'"<sup>16</sup> The more familiar "'no means no' standard has been blamed for bringing ambiguity into investigations of sexual assault cases,"<sup>17</sup> prompting many supporters of the affirmative consent legislation<sup>18</sup> to believe that their new standard is necessary "because sexual assault on campuses is a gray area that needs to be better defined."<sup>19</sup> Ironically, black-and-white definitions are largely absent from the California legislation, failing to remedy the ambiguity. Accordingly, Senate Bill No. 967 suffers from the same shortcomings as its "no means no" predecessor.

An examination of the role of alcohol and drugs in sexual encounters highlights remaining, unresolved ambiguity. The legislation prohibits the excuse that the accused believed the complainant affirmatively consented to sexual activity if the accused knew that the complainant "was *incapacitated* due to the influence of drugs, alcohol or medication so that they could not understand the *fact, nature, or extent* of the sexual activity."<sup>20</sup> Further, even though one may have obtained explicit, verbal, and affirmative consent from a partner, such consent is not valid in a disciplinary proceeding if the accused's "belief in [such] affirmative consent

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<sup>14</sup> S.B. 967 § 67386(a)(1), 2013–2014 Reg. Sess. (Cal. 2014).

<sup>15</sup> *Id.* (as introduced Feb. 10, 2014). See also Young, *supra* note 8.

<sup>16</sup> Josh Dulaney, *Students Question 'Affirmative Consent' Bill Designed to Combat Sexual Assaults*, SAN GABRIEL VALLEY TRIB. (June 8, 2014), <http://www.sgvtribune.com/government-and-politics/20140608/students-question-affirmative-consent-bill-designed-to-combat-sexual-assaults>.

<sup>17</sup> Bill Chapel, *California Enacts 'Yes Means Yes' Law, Defining Sexual Consent*, THE TWO-WAY: BREAKING NEWS FROM NPR (Sept. 29, 2014, 12:27 PM), <http://www.npr.org/blogs/thetwo-way/2014/09/29/352482932/california-enacts-yes-means-yes-law-defining-sexual-consent>.

<sup>18</sup> Notable organizations support Senate Bill No. 967, including the California Coalition Against Sexual Assault and the University of California Student Association. See Dulaney, *supra* note 16.

<sup>19</sup> *Id.*

<sup>20</sup> S.B. 967 § 67386(a)(4)(B) (emphasis added).

arose from [his or her] intoxication or recklessness.”<sup>21</sup> The legislation does not specify the level of intoxication required to prohibit consent.<sup>22</sup>

According to a statistical study published in 2007 by the National Center on Addiction and Substance Abuse at Columbia University, “when drunk or high, college students are more likely to be sexually active and . . . have sex with someone they just met.”<sup>23</sup> For example, in 2001, 21.3% of student drinkers engaged in “alcohol-related unplanned sexual activity.”<sup>24</sup> Alcohol and drug use is prevalent and often abused in high quantities at universities,<sup>25</sup> and increased binge drinking and alcohol abuse leads to increased levels of sexual violence.<sup>26</sup> While Senate Bill No. 967’s provisions are well-intended and aim to address this serious issue,<sup>27</sup> the law fails to elaborate what level of incapacitation would lead to a person’s inability to truly understand the “nature or extent” of a partner’s behavior. Moreover, the bill fails to help disciplinary committees evaluate what weight to give to an accused’s accusation that he or she believed his or her partner consented to a sexual act, and at what point they can or must discredit the accused’s belief due to his or her “recklessness.”<sup>28</sup> Instead, the law merely broadens instances in which consensual sexual activity qualifies as sexual assault.

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<sup>21</sup> *Id.* § 67386(a)(2)(A).

<sup>22</sup> *See generally id.* § 67386.

<sup>23</sup> NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., *Wasting the Best and the Brightest: Substance Abuse at America’s Colleges and Universities*, CASA COLUMBIA 5 (2007), available at <http://www.casacolumbia.org/addiction-research/reports/wasting-best-brightest-substance-abuse-americas-colleges-universities>.

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

<sup>25</sup> *See id.* at i (“Each month, half (49.4 percent) of all full-time college students ages 18–22 binge drink, abuse prescription drugs and/or abuse illegal drugs . . . in 2005, almost one in four of these college students (22.9 percent or approximately 1.8 million) met the medical criteria for substance abuse or dependence, almost triple the proportion (8.5 percent) in the general population.”).

<sup>26</sup> *Id.* at 5.

<sup>27</sup> Failure to give consent is not consent under any standard, including when one is *so* incapacitated that he or she is not able to give or refuse consent. Julie Watson, *California Debates ‘Yes Means Yes’ Sex-Assault Law*, WASH. POST (Aug. 10, 2014), [http://www.washingtonpost.com/national/california-debates-yes-means-yes-sex-assault-law/2014/08/10/b7ffa86c-20cd-11e4-958c-268a320a60ce\\_story.html](http://www.washingtonpost.com/national/california-debates-yes-means-yes-sex-assault-law/2014/08/10/b7ffa86c-20cd-11e4-958c-268a320a60ce_story.html). California legislature hoped to clearly address this issue. *Id.*

<sup>28</sup> S.B. 967 § 67386, 2013–2014 Reg. Sess. (Cal. 2014) (emphasis added).

A chief concern stems from the literal reading of these provisions,<sup>29</sup> as they easily give way to the notion that anyone who has been drinking cannot consent. Necessarily, one who is “buzzed,” drunk, or high likely lacks sound judgment, so that person is unable to understand the “nature or extent” of the sexual activity in which he or she is about to participate. As a result, one’s ability to give or obtain consent is subsequently impaired according to the legislation.<sup>30</sup> Actual consent may have been given and received continuously, expressly, and enthusiastically during the sexual event, yet a literal reading of Senate Bill No. 967 allows a finding that such consent may still not establish actual “affirmative consent” under the law. This result could have serious and unpredictable consequences when evaluated by disciplinary committees. By recognizing that as one drinks alcohol, one’s ability to make decisions becomes increasingly impaired,<sup>31</sup> the question remains: at what level of intoxication is consent *actually* prohibited? One beer? Four?

A standard of complete sobriety fails to recognize the realities of sexual activity among those of all ages, especially those of typical college-age.<sup>32</sup> Some critics have agreed that Title IX provides a mechanism for women to raise sexual abuse claims after “alcohol-fueled sexual encounters in which the facts are often murky.”<sup>33</sup> These opinions stem from a consideration of the naiveté of a common argument, that “if both partners were enthusiastic about [a] sexual encounter, there will be no reason for anyone to report a rape later.”<sup>34</sup> This belief fails to account for the instances where one party may regret an act of drunken carelessness and easily

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<sup>29</sup> The dictionary definition of “incapacitated” includes being “to make (someone or something) unable to work, move or function *in the usual way*; to make legally incapable or ineligible; and to deprive of capacity or natural power.” *Incapacitated*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/incapacitate> (last visited Apr. 6, 2015). The same dictionary defines “extent” as “the range, distance, or space that is covered or affected by something or included in something.” *Id.* (defining “extent”).

<sup>30</sup> See S.B. 967 § 67386.

<sup>31</sup> See Laura McMullen, *Your Brain on Booze*, U.S. NEWS & WORLD REPORT: HEALTH (Mar. 11, 2014), <http://health.usnews.com/health-news/health-wellness/articles/2014/03/11/your-brain-on-booze> (discussing that the frontal lobes of your brain, which help you make decisions and control urges, “become increasingly suppressed as you drink.”).

<sup>32</sup> See NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., *supra* note 23.

<sup>33</sup> Robin Wilson, *Presumed Guilty*, CHRON. HIGHER EDUC. (Sept. 1, 2014), <http://chronicle.com/article/Presumed-Guilty/148529> (discussing the problems of males facing alleged false sexual assault accusations).

<sup>34</sup> Young, *supra* note 8 (quoting ThinkProgress.com columnist Tara Culp-Ressler, who makes this argument against those who challenge the use of an affirmative consent standard).

begins to interpret an encounter as non-consensual.<sup>35</sup> These ambiguous questions lead disciplinary committees and university investigations into the very gray area of regulating intoxication. Many institutions may err on the side of caution, finding instances of sexual assault in cases that are actually more ambiguous, especially in light of ongoing federal investigations into prior mishandlings of sexual assault cases.

These are questions that neither the affirmative consent nor the classic “no means no” standard can likely answer and currently do little to help resolve the problems surrounding intoxication, consent, and sexual assault. Yes, these provisions may capture the abhorrent instances where sexual violence occurs while a person is grossly intoxicated and/or *completely* incapacitated from making decisions while drinking. However, legislators can target such instances by creating a more realistic consent standard, such as that of the “reasonable person.”

When asked how an innocent person must prove that he or she, indeed, received consent from another when a partner claims otherwise, Assemblywoman Lowenthal stated, “Your guess is as good as mine. I think it’s a legal issue. Like any legal issue, that goes to court.”<sup>36</sup> Ironically, however, these “legal issues” do not go to court—they go before a disciplinary committee that makes a decision regarding *this exact question*, based largely on provisions in Senate Bill No. 967 that Lowenthal, herself, co-authored.<sup>37</sup> Amidst this circular logic, important questions remain unanswered.

### III. THE VICTIM SHIFT: TOO LITTLE FOR VICTIMS, TOO LITTLE DUE PROCESS

#### A. *Why Senate Bill No. 967 Is Not Enough*

Universities have been criticized for their astonishingly ineffective policies to punish offenders and for their general maladministration of sexual assault cases.<sup>38</sup>

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<sup>35</sup> *See id.*

<sup>36</sup> Ashe Schow, *5 Problems with California’s ‘Affirmative Consent’ Bill*, WASH. EXAMINER (Aug. 28, 2014), <http://www.washingtonexaminer.com/article/2552537>.

<sup>37</sup> Press Release, Cal. State Senate Majority Caucus, College Campus Sexual Assault Legislation Announced (Feb. 10, 2014), *available at* <http://sd24.senate.ca.gov/sb-967>.

<sup>38</sup> *See* Tyler Kingkade, *Brown University Will Allow Rapist Who Choked Victims Back on Campus*, HUFFINGTON POST (Apr. 24, 2014), [http://www.huffingtonpost.com/2014/04/23/brown-university-rapist-strangle\\_n\\_5201644.html](http://www.huffingtonpost.com/2014/04/23/brown-university-rapist-strangle_n_5201644.html) (“[S]everal Ivy League schools [are] under fire for lax policies dealing with sexual violence. Students claim the schools are too lenient on sex offenders[. . . and] Yale University disclosed in a semi-annual report that only one of six people found responsible for sexual



Dozens of mishandlings have prompted federal cases alleging Title IX actions for failure to adhere to gender equality.<sup>39</sup> One notorious example of such mishandling is the case of Emma Sulkowicz—a student raped on Columbia University’s campus—who gained considerable attention for unceasingly carrying her mattress around campus in protest of the university’s failure to discipline her attacker, thereby “carrying the weight” of her rape with her.<sup>40</sup> She vowed to do so until her attacker is expelled or leaves.<sup>41</sup> After Sulkowicz came forward with her accusations, two other women also came forward to acknowledge their botched cases of assault against the same student, mishandled “in part by mistake-riddled record-keeping on the part of university authorities,” which ultimately resulted in the attacker’s exculpation by the university.<sup>42</sup> Their attacker remains on campus.<sup>43</sup> A total of twenty-three students have filed federal complaints against Columbia University for mishandling their cases in violation of Title IX protections of gender equality.<sup>44</sup>

Similarly, at Brown University, a man named Andrew<sup>45</sup> was raped in his dorm bathroom by another male previously accused of two other attacks on two separate individuals<sup>46</sup>—offenses which resulted in a mere suspension.<sup>47</sup> Brown

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assault had been suspended, and the rest were punishable with reprimands, training or probation. A subsequent report showed one student was found guilty of sexual assault and was given a two-term suspension, and the rest of the assault cases hadn’t concluded or did not lead to a formal investigation.”).

<sup>39</sup> Press Release, U.S. Dep’t of Educ., *supra* note 6.

<sup>40</sup> Roberta Smith, *In a Mattress, a Fulcrum of Art and Political Protest*, N.Y. TIMES, Sept. 21, 2014, at C1.

<sup>41</sup> *Id.*

<sup>42</sup> Sarah Barness, *Columbia University Student Will Drag Her Mattress Around Campus Until Her Rapist Is Gone*, HUFFINGTON POST (Sept. 3, 2014), [http://www.huffingtonpost.com/2014/09/03/emma-sulkowicz-mattress-rape-columbia-university\\_n\\_5755612.html](http://www.huffingtonpost.com/2014/09/03/emma-sulkowicz-mattress-rape-columbia-university_n_5755612.html).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Andrew declined to release his last name. Emily Kassie, *Male Victims of Campus Sexual Assault Speak Out*, HUFFINGTON POST (Jan. 27, 2015), [http://www.huffingtonpost.com/2015/01/27/male-victims-sexual-assault\\_n\\_6535730.html](http://www.huffingtonpost.com/2015/01/27/male-victims-sexual-assault_n_6535730.html).

<sup>46</sup> *Id.*

<sup>47</sup> Andrews’s attacker had been accused of similar sexual misconduct with two other male students who had filed complaints about one year prior, but Brown University merely issued a suspension for these two accusations. *Id.* Upon the third report of his conduct (by Andrew), Brown University finally expelled the attacker. *Id.*

University has made headlines for a number of other mishandled cases, most notably the case of Lena Sclove, who was injured while being brutally choked and raped by a fellow student—a student who subsequently received a mere one-year suspension by the disciplinary committee.<sup>48</sup> Sclove’s case prompted a federal Title IX investigation into Brown University’s failures in its disciplinary and investigation processes.<sup>49</sup>

Brown University responded to the decision by defending its position with a simple statement which “acknowledged [that] decisions ‘do not always yield a completely satisfying outcome for someone who has been victimized.’”<sup>50</sup> The University also noted that sexual assault complaint situations are complicated and that it “takes a number of steps, including sexual assault orientation sessions for incoming students, to ensure that every student is aware of applicable policies.”<sup>51</sup> These statements ring hollow in light of the recent mismanagements of sexual assault and bear an uncanny similarity to the requirements imposed via California’s new legislation.<sup>52</sup>

In light of such gross mishandling of important issues surrounding student safety, it seems questionable that California’s affirmative consent legislation lacks the bite to compel disciplinary action.<sup>53</sup> Nothing in Senate Bill No. 967 requires universities to actually discipline the accused.<sup>54</sup> The legislation assumes that details of the crime, the accused, and the victim will inevitably see a disciplinary board process, only establishing a more “stringent”<sup>55</sup> standard regarding the policies to be

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<sup>48</sup> Kingkade, *supra* note 38.

<sup>49</sup> See Kassie, *supra* note 45.

<sup>50</sup> Kingkade, *supra* note 38.

<sup>51</sup> *Id.*

<sup>52</sup> See S.B. 967 § 67386(e), 2013–2014 Reg. Sess. (Cal. 2014) (requiring all colleges and universities in California who receive state funding to have outreach programs addressing sexual harassment and violence as part of every incoming student’s orientation).

<sup>53</sup> Senate Bill No. 967 does not include a provision that requires a disciplinary proceeding to take place. See generally *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *infra* Part III.B (discussing the highly relaxed standard of review in the disciplinary process evaluation of the accused). See also *supra* Part II (discussing the failure to define intoxication and incapacitation to have any real practical effect).

implemented during those proceedings.<sup>56</sup> Although the law explicitly incorporates compliance with the Higher Education Act of 1965,<sup>57</sup> and although all schools must adhere independently to standards under Title IX to receive federal funding,<sup>58</sup> California's bill fails to compel disciplinary proceedings at the state level, instead only implementing policies that affect investigations already commenced.<sup>59</sup> If the legislation intends to keep students safer on campus—a result only possible through suspension and/or expulsion of perpetrators—why not strengthen the bill's bite to “assur[e] that these crimes are taken seriously”?<sup>60</sup>

Although requirements under independent federal legislation exist, many have called into question the assumption that schools will conduct thorough investigations and fair disciplinary proceedings.<sup>61</sup> With the recent, publicly exposed failures at the university level, victims of sexual assault on campuses are victims twice—once to the sexual violence and again to the university disciplinary process. These considerations expose the elephant in the room and beg the question: why are we continuing to allow universities that have notoriously mishandled sexual assault cases handle them at all?<sup>62</sup>

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<sup>56</sup> There is no requirement in California's affirmative consent legislation that requires universities to initiate disciplinary proceedings against an accused attacker. *See* S.B. 967 § 67386.

<sup>57</sup> 20 U.S.C. § 1092(f)(8)(B)(iv)(I) (2012) (requiring schools to institute a statement of policy that includes procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault or stalking, requiring the statement into include the following: “Such [disciplinary] proceedings shall (a) provide a prompt, fair, and impartial investigation and resolution, and (II) that such an investigation shall be conducted by officials who receive annual training on the issues related to these issues . . .”).

<sup>58</sup> Title IX requires disciplinary proceedings in response to sexual assault allegations. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012). *See* Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. Office for Civil Rights (Apr. 4, 2011) [hereinafter Dear Colleague Letter from Russlynn Ali], available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>59</sup> Senate Bill No. 967 requires reporting the incident, contacting and interviewing the victim and accused, seeking identification of any other witnesses, and an investigation of whether drugs or alcohol were present in the incident. S.B. 967 § 67386(b).

<sup>60</sup> *Student Safety: Colleges and Universities: Hearing on S.B. 967 Before the Assembly Committee on Judiciary*, 2013–2014 Reg. Sess. (Cal. 2014) (statements by the California Coalition Against Sexual Assault and the California Police Chiefs Association).

<sup>61</sup> *See* Press Release, U.S. Dep't of Educ., *supra* note 6. *See also supra* Part II (discussing mishandled sexual assault cases).

<sup>62</sup> *See infra* Part IV.

*B. Judicially Implemented Due Process Violations of the Accused*

Arguably, the most disturbing issues embedded in California's affirmative consent bill are the provisions imposed on alleged perpetrators of sexual assault. A fervent reaction to the epidemic of sexual assault on college campuses,<sup>63</sup> California's legislation dismantles constitutional due process rights for the accused with the imposition of a mere preponderance of the evidence standard<sup>64</sup> for purported *felony-level* criminal conduct.<sup>65</sup> Senate Bill No. 967 lowers the standard of proof from that of criminal liability, beyond a reasonable doubt, to that of a civil infraction for otherwise criminal activity. The legislation oversteps its constitutional boundaries and cannibalizes its intended effect of positive reform by implementing a lower standard of proof for use in actual disciplinary proceedings, setting the bar much lower than its criminal counterpart to establish culpability.<sup>66</sup> The potential due process implications resulting from California's new legislation are vast and may extend far beyond the standard of review imposed by the legislation.<sup>67</sup>

The new policies implemented by the legislation merely "substitut[e] one class of victims for another" by instituting a collective "rush to judgment."<sup>68</sup> Males<sup>69</sup> accused of sexual assault on campuses have initiated well over four dozen

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<sup>63</sup> See NAT'L CTR. FOR INJURY PREVENTION & CONTROL, *supra* note 7.

<sup>64</sup> S.B. 967 § 67386(a)(3). See also Ezra Klein, *An Appalling Case for Affirmative-Consent Laws*, ATLANTIC (Oct. 16, 2014), <http://www.theatlantic.com/politics/archive/2014/10/an-apalling-case-for-affirmative-consent-laws/381518> (resolving sexual assault accusations according to a "preponderance of the evidence" standard rather than "reasonable doubt").

<sup>65</sup> Rape is a felony offense. See AM. PROSECUTORS RESEARCH INST., STATE RAPE STATUTES 1–31 (2003), available at [http://www.arte-sana.com/articles/rape\\_statutes.pdf](http://www.arte-sana.com/articles/rape_statutes.pdf).

<sup>66</sup> See S.B. 967 § 67386(a)(3).

<sup>67</sup> Note that other important due process considerations, such as the right to cross-examine witnesses, the right to counsel, and the right to confront one's accuser, are not considered in this Note.

<sup>68</sup> Wilson, *supra* note 33.

<sup>69</sup> Throughout this Note, those accused of sexual assault are often referred to as "male" in recognition of the overwhelming majority of perpetrators of reported sexual assaults. However, women also commit sexual assault. See BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SEX OFFENSES AND OFFENDERS 11 (1997), available at <http://www.bjs.gov/content/pub/pdf/SOO.PDF> (containing a three state study conducted in the late 1990s, indicating that 0.10 percent of rapes had a female perpetrator); BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., WOMEN OFFENDERS 2 (2000), available at <http://www.bjs.gov/content/pub/pdf/wo.pdf> ("[W]omen accounted for 1 in 50 offenders committing a violent sex offense including rape and sexual assault.").

lawsuits against universities alleging wrongful convictions for a multitude of reasons:<sup>70</sup> shoddy investigations, violations of due process rights within disciplinary proceedings, and gender discrimination under Title IX.<sup>71</sup>

### 1. Due Process is Essential to Protect Post-Secondary Education Interests

The right to receive an education has been held to be neither a fundamental right nor a liberty interest for purposes of substantive due process under the U.S. Constitution.<sup>72</sup> In fact, the U.S. Supreme Court has never purposefully granted higher education due process protection.<sup>73</sup> Yet, courts have held that due process is owed to students against “the state itself and all of its creatures—boards of education not excepted.”<sup>74</sup> Even though these institutions have broad authority to prescribe and enforce standards of conduct, such enforcement must be “exercised consistently with constitutional safeguards.”<sup>75</sup> Accordingly, the Supreme Court has assumed, but has never explicitly held, that there is constitutional protection of continued university enrollment rooted in property and liberty rights.<sup>76</sup> Still, the Court has refused to specify whether the Constitution does or does not afford this

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<sup>70</sup> See Johnathan Taylor, *Database: Lawsuits Against Colleges and Universities Alleging Due Process and Other Violations in Adjudicating Sexual Assault*, VOICE FOR MALE STUDENTS (Apr. 3, 2015, 5:12 PM), <http://www.avoicemalestudents.com/list-of-lawsuits-against-colleges-and-universities-alleging-due-process-violations-in-adjudicating-sexual-assault>.

<sup>71</sup> See Emily Yoffe, *The College Rape Overcorrection*, SLATE MAG. (Dec. 7, 2014, 11:53 PM), [http://www.slate.com/articles/double\\_x/doublex/2014/12/college\\_rape\\_campus\\_sexual\\_assault\\_is\\_a\\_serious\\_problem\\_but\\_the\\_efforts.html](http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html); Taylor, *supra* note 70.

<sup>72</sup> Education is not among the rights afforded explicit or implicit Constitutional protection, so “the discretion to suspend or expel students that is vested in school authorities is very broad, but cannot be exercised arbitrarily.” Fern L. Kletter, *School’s Violation of Student’s Substantive Due Process Rights by Suspending or Expelling Student*, 90 A.L.R. 235, 257–58 (6th ed. 2013).

<sup>73</sup> See *Goss v. Lopez*, 419 U.S. 565, 572–74 (1975) (considering and finding students’ protection interest to be in primary and secondary education arising from the statutory right to free public education and required attendance at school).

<sup>74</sup> *Id.* at 574 (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

<sup>75</sup> *Id.* Note that *Goss* was decided in terms of primary and secondary education only. *See id.*

<sup>76</sup> See *Univ. of Mich. v. Ewing*, 474 U.S. 214, 223–23 (1985) (assuming, without actually deciding, that university students possess a “constitutionally protected property right” in their continued enrollment in a university”); see also Holly Hogan, *The Real Choice in a Perceived “Catch-22”: Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings*, 38 J.L. & EDUC. 277, 279 (2009) (discussing the Supreme Court’s failure to explicitly hold that a student has a constitutional right in continued higher education).

protection,<sup>77</sup> perhaps in consideration of the Court's self-declared belief that "education is perhaps the most important function of state and local governments . . . required in the performance of our most basic public responsibilities . . . [and] is the very foundation of good citizenship."<sup>78</sup>

Lower federal courts have been willing to extend such constitutional protections to college and university level education.<sup>79</sup> For example, in *Gorman v. University of Rhode Island*, the Fifth Circuit held that public university disciplinary proceedings implicate Fourteenth Amendment due process protection, specifying that it is "not questioned" that public, post-secondary students have constitutionally protected interests in pursuing their education.<sup>80</sup> Other lower courts have also not limited this protection and have extended constitutional safeguards to students pursuing post-secondary education.<sup>81</sup>

To the extent that due process applies, what process is due?<sup>82</sup> Continually, courts have been unable to establish a hard and fast rule for such inquiries, but they often center the question around the concept of fairness.<sup>83</sup> The First Circuit emphasized that "[d]ue [p]rocess, which may be said to mean fair procedure, is not a fixed or rigid concept, but, rather, is a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of the deprivation."<sup>84</sup> In *Goss*, the Supreme Court stated that "the Due Process Clause . . . forbids arbitrary deprivations of liberty" and that, "[w]here a person's good name,

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<sup>77</sup> See *Ewing*, 474 U.S. at 222–23 (deciding the case of whether a university's dismissal of a medical degree program student violated due process rights).

<sup>78</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1964).

<sup>79</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due.").

<sup>80</sup> 837 F.2d 7, 9–12 (1st Cir. 1988) (holding that the district court did not err in deciding that a public university's hearing procedures implicated due process protections for an accused student, citing liberty and property interests).

<sup>81</sup> See *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2005).

<sup>82</sup> *Gorman, III v. Univ. of R.I.*, 837 F.2d 7, 12–13 (1st Cir. 1988) (citing *Grannis v. Ordean*, 234 U.S. 385, 395 (1914)) ("The hearing, to be fair in the due process sense, implies that the person adversely affected was afforded the opportunity to respond, explain, and defend. Whether the hearing was fair depends upon the nature of the interest affected and all of the circumstances of the particular case.").

<sup>83</sup> *Id.* at 12 ("The time-honored phrase 'due process of law' expresses the essential requirement of fundamental fairness.").

<sup>84</sup> *Id.* (citing *Matthew v. Eldridge*, 424 U.S. 319, 334 (1976)).

reputation, honor, or integrity is at stake because of what the government is doing to him,<sup>85</sup> the minimal requirements of the [Due Process] Clause must be satisfied.<sup>85</sup>

Various lower courts have discussed the concept of what constitutes a fair hearing in the context of university disciplinary proceedings, and some courts have centered the inquiry around which procedures best guarantee both the student's interests in his private property and liberty interests in pursuing an education, as well as the state's interests in financial and administrative burdens for schools when stringent procedural requirements are implemented.<sup>86</sup> These courts have held that due process imposes minimum requirements in an academic setting, and these requirements very reasonably include that:

(1) the student must be advised of the charges against him; (2) he must be informed of the nature of the evidence against him; (3) he must be given an opportunity to be heard in his own defense; and (4) he must not be punished except on the basis of *substantial evidence*.<sup>87</sup>

## 2. The Erosion of Due Process via Senate Bill No. 967

A determination that one is “more likely than not”<sup>88</sup> to have committed sexual assault against another student seems inherently incongruous with the last prong in *Gomes* requiring substantial evidence.<sup>89</sup> When read literally, the preponderance of

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<sup>85</sup> *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) and *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1971)).

<sup>86</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

<sup>87</sup> Charles Alan Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1059–82 (1969) (summarizing this four part due process requirement by studying the outcomes of several court decisions) (emphasis added). See *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 15–16 (D. Me. 2005) (quoting *Keene v. Rodgers*, 316 F. Supp. 217, 221 (D. Me. 1970) (citation omitted)). The Court in *Keene v. Rodgers* took the requirements for fairness a step further, adding three more factors to the inquiry: (1) the student must be permitted the assistance of a lawyer, at least in major disciplinary proceedings; (2) he must be permitted to confront and to cross-examine the witnesses against him; and (3) he must be afforded the right to an impartial tribunal, which must make written findings. 316 F. Supp. at 221.

<sup>88</sup> “The normal standard of proof in civil cases is preponderance of the evidence. Under that standard, the evidence must establish a probability that an assertion is true, i.e., that it is more probable than not that the assertion is true.” RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmt. e (1995).

<sup>89</sup> See *Gomes*, 365 F. Supp. 2d at 16.

the evidence standard in California's bill is insufficient in comparison to this substantial evidence requirement,<sup>90</sup> which otherwise requires something "strongly made," "considerable in quantity," or "significantly great."<sup>91</sup> In light of this literal reading, due process in school disciplinary proceedings does and should require more than what the preponderance of the evidence standard that California's legislation mandates.<sup>92</sup>

All disciplinary proceedings in schools that receive federal funding must comply with the requirements of Title IX.<sup>93</sup> In the U.S. Department of Education's Office for Civil Rights ("OCR") infamous "Dear Colleague Letter" issued in April of 2011, the agency required schools to adhere to a preponderance of the evidence standard when evaluating sexual harassment and violence complaints.<sup>94</sup> The OCR supported this decision with a circular and conclusory argument that, "in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard" because "grievance procedures using [a] higher standard of proof are inconsistent with the standard of proof established for violations of the civil rights laws, and [so] are not equitable under Title IX."<sup>95</sup>

Title IX violations involve civil law issues which the trier of fact evaluates by a preponderance of the evidence standard.<sup>96</sup> Such violations concerning *civil* issues regarding equality in academic institutions represent a class of cases fundamentally different from situations involving a student charged with sexual violence—conduct that is not only wholly detestable, but potentially *criminal*. Sexual assault cases carry up to a felony-level sentence if tried in criminal court.<sup>97</sup> Title IX does not provide sufficient justification for use of a preponderance of the evidence

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<sup>90</sup> *Id.*

<sup>91</sup> *Substantial*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/substantial> (last visited Apr. 6, 2015).

<sup>92</sup> The preponderance of the evidence standard was likely implemented as a result of the standard outlined in OCR's Dear Colleague Letter. *See* Dear Colleague Letter from Russlynn Ali, *supra* note 58, at 11–12.

<sup>93</sup> *See* 20 U.S.C. § 1681(a) (2012).

<sup>94</sup> *See* Dear Colleague Letter from Russlynn Ali, *supra* note 58, at 10–11.

<sup>95</sup> *Id.* at 11 (specifying this heightened standard as "clear and convincing evidence").

<sup>96</sup> *See supra* note 92.

<sup>97</sup> *See supra* note 65.



standard to evaluate the academic violations, themselves. Instead, it provides guidance in ensuring equality when making determinations concerning violations.<sup>98</sup> Numerous critics remain skeptical of the agency's imposed lower standard of proof.<sup>99</sup>

Undoubtedly, lowering the standard of proof will capture more perpetrators of sexual assault, just as lowering the standard of proof required in a criminal trial would statistically capture more thieves or murderers. Yet, courts maintain the high standard in criminal trials no matter how small the offense. Heightened standards of proof in criminal trials are “an expression of fundamental procedural fairness, requir[ing] a more stringent standard . . . than for ordinary civil litigation”<sup>100</sup> and reflect the liberty interests at stake for an accused. In disciplinary hearings, certain student liberty interests are similarly in jeopardy and accordingly deserve due protection against “arbitrary deprivations of [that] liberty.”<sup>101</sup>

Nevertheless, schools need not utilize “all the procedural requirements of a common law trial” and, instead, must only ensure that “the hearing [is] fair and accord[s] the individual the essential elements of due process.”<sup>102</sup> As such, disciplinary proceedings need not rise to the level of a criminal trial or embody a “full-dress judicial hearing.”<sup>103</sup> Since colleges and universities yield limited resources to deal with these matters,<sup>104</sup> and since any punishment would not result in complete deprivation of one's liberty, employing the criminal common-law standard of beyond a reasonable doubt would likely also be fundamentally unfair.

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<sup>98</sup> See Dear Colleague Letter from Russlynn Ali, *supra* note 58, at 10–11.

<sup>99</sup> Among critics included two representatives from the American Association of University Professors (“AAUP”), one written by the associate secretary and director, and the other by Ann E. Green, chair on AAUP's Committee on Women in the Academic Profession. See Letter from Ann E. Green, Chair, Comm. on Women in the Academic Profession, Am. Ass'n of Univ. Professors and Cary Nelson, President, Am. Ass'n of Univ. Professors, to Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dept. of Educ. Office for Civil Rights (June 27, 2011), available at [www.aaup.org/NR/rdonlyres/FCF5808A-999D-4A6F-BAF3-027886AF72CF/0/officeofcivilrightsletter.pdf](http://www.aaup.org/NR/rdonlyres/FCF5808A-999D-4A6F-BAF3-027886AF72CF/0/officeofcivilrightsletter.pdf).

<sup>100</sup> *In re Winship*, 397 U.S. 358, 372 (1970).

<sup>101</sup> *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

<sup>102</sup> *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988).

<sup>103</sup> *Id.* at 14.

<sup>104</sup> See *id.* at 14–15 (discussing that fairness serves both students and schools, but schools must expend limited resources with which to do so, often imposing administrative burdens).

However, with the aforementioned considerations, a preponderance of the evidence is equally insufficient.

Students who face suspension and expulsion for sexual harassment, violence, or rape, have much at stake: their academic freedom, their financial and personal interests in pursuing their education, and their compelling private interests due to the nature of the crime involved,<sup>105</sup> including the potential for further consequences, their general reputation, their good standing in the community, and their good standing with themselves. Students facing background checks for future employment or seeking eventual admittance to their state bar could face serious consequences if employers and administrators discover a disciplinary record entailing a suspension or expulsion for sexual violence. A student facing disciplinary action for alleged sexual assault, like all students facing disciplinary action from a school, maintains the interest “to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences.”<sup>106</sup> Although due process “will not shield [the accused] from suspensions properly imposed, . . . it disserves both his interest and *the interest of the State* if his suspension is in fact unwarranted.”<sup>107</sup> As the court explained in *Gorman*, “[t]he interests of students in completing their education, as well as avoiding unfair or mistaken exclusion from the educational environment, and the accompanying stigma are, of course, paramount.”<sup>108</sup>

Due to the particularly heinous conduct involved in complaints involving sexual assault, the bar for proof should be set high enough to warrant substantial evidence as a cause for sanction.<sup>109</sup> This Note does not advocate that all disciplinary committee boards use a heightened standard in evaluating all types of student conduct,<sup>110</sup> but when the accusation is as severe as that of sexual violence, the aforementioned considerations support some level of heightened review.

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<sup>105</sup> *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2005).

<sup>106</sup> *Goss*, 419 U.S. at 579.

<sup>107</sup> *Id.* (emphasis added).

<sup>108</sup> *Gorman*, 837 F.2d at 14.

<sup>109</sup> See Wright, *supra* note 87, at 1059–82.

<sup>110</sup> Other offenses such as plagiarism, academic dishonesty, or other less-severe criminal violations may not warrant such heightened consideration. A standard of review for these offenses is not discussed in the content of this Note.

### 3. Why Due Process Extends Beyond the Accused

In addition to the multitude of due process implications for the accused arising from implementation of a preponderance of the evidence standard, a lower standard of proof operates *against victims* and against general sexual assault reform, both publicly and culturally. The standard of proof judicial systems utilize reflects our societal values regarding the action alleged and ensures due process procedural safeguards for those accused. In turn, evaluating crimes as grave as sexual harassment and violence with a mere preponderance of the evidence standard belittles sexual harassment and violence by suggesting that these crimes do not require significant proof or complete investigation and evaluation. While such a result may capture more rapists on campus,<sup>111</sup> it will likely dismantle increased awareness of sexual assault and consent education as well as cultural reform—issues finally at the forefront of political debate. Rape is not a civil matter; it is a violent crime that society must evaluate as such, whether in a criminal court or in a school disciplinary committee board room.

In reality, a victim may more easily manipulate a preponderance of the evidence standard. Alleging a lack of consent when such consent was freely given may be all that a victim needs to establish culpability.<sup>112</sup> When a disciplinary committee bases its decision on whether the accused *more likely than not* committed an act of sexual assault, many will quickly doubt the validity of the surrounding disciplinary consequences, and the student population and public at large will not give those decisions much weight or authority. Universities and colleges, already in the hot seat for poor investigations, will likely err on the side of caution by penalizing the accused. Disciplinary consequences, if too quickly handed out, will become a joke to both students and the public. With more students receiving sanctions in this fashion, the seriousness of both the crime and its

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<sup>111</sup> Justice Harlan explains in *In re Winship*:

If . . . the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, *but a far greater risk* of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

397 U.S. 358, 371 (1970) (Harlan, J., concurring) (emphasis added).

<sup>112</sup> See Schow, *supra* note 36.

consequences become less severe, and the penalties received by those found culpable for such conduct become less significant. Such a loss will inevitably erode the intended impact of these consequences, quelling the necessary exposure of sexual assault issues and the importance of a fair consent standard. Ultimately, this fails to promulgate much-needed change.

Similar concerns were discussed in the legislative debate surrounding Senate Bill No. 967.<sup>113</sup> Stop Abusive and Violence Environments (“SAVE”) spokesperson, Sheryle Mutter, expressed corresponding apprehensions, stating that “[t]he California bill would flood the system with students falsely accused of sexual assault . . . mak[ing] investigators more skeptical of persons claiming to be raped and leav[ing] real victims less likely to report the crime. Who in their right mind would want that?”<sup>114</sup> Senate Bill No. 967 shifts public attention to those who are falsely accused, rather than to victims, heightening suspicion of sexual violence reports and patronizing the disparaging impact of such crimes. Victims of sexual assault deserve not only justice, but to be heard and respected. Legislators should strive towards creating a system that allows one to advocate for a better understanding of consent and sexuality while also maintaining fairness in proceedings. Instead, the preponderance of the evidence standard only serves to depreciate the legitimacy of accusations of sexual assault.<sup>115</sup>

Furthermore, without stringent due process protections for the accused, racial and class prejudices will likely result in consequences for some students based on their minority or class status. The lowered preponderance standard establishing quasi-criminal culpability at the university level may result in victimization of the innocent-accused through a negative, class-based ripple effect, “unleash[ing] a lower standard onto police and prosecutors . . . incapable of avoiding racial or class prejudice,” ultimately falling “on people of color and working class students in our

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<sup>113</sup> “The bill’s broad definitions would serve to dissipate scarce resources and make it harder for victims to be believed.” COMM. ON JUDICIARY, CAL. STATE ASSEMBLY, BILL ANALYSIS S.B. 967, 2013–2014 Reg. Sess., at 7 (Cal. 2014) (quoting SAVE).

<sup>114</sup> *Id.* (quoting SAVE spokesperson Sheryle Mutter).

<sup>115</sup> See Naomi Shatz, *Feminists, We Are Not Winning the War on Campus Sexual Assault*, HUFFINGTON POST (Oct. 29, 2014), [http://www.huffingtonpost.com/naomi-shatz/feminists-we-are-not-winn\\_b\\_6071500.html](http://www.huffingtonpost.com/naomi-shatz/feminists-we-are-not-winn_b_6071500.html) (“We as feminists are failing if we make our victories dependent on eschewing the fundamental rights and principles of our legal system was founded on—fairness, due process, a presumption of innocence—in order to obtain findings of guilt in sexual assault cases without regard to facts of individual cases.”).

universities.”<sup>116</sup> By implementing a preponderance of the evidence standard, California’s affirmative consent law further fails to ensure protections for students against racial and class-based prejudices.

#### IV. WHY AFFIRMATIVE CONSENT TOLLS AN AFFIRMATIVE “NO”

##### A. “Yes Means Yes” Has the Same Administrative Problems as “No Means No”

In the “no means no” versus “yes means yes” debate, the discussion often focuses on one of two solutions: proving or disproving a “yes” or a “no.” The “yes means yes” movement potentially<sup>117</sup> embodies necessary cultural awareness of the concept of affirmative consent in order to make strides “towards healthy sexuality”<sup>118</sup> by promoting increased communication between partners. However, “healthy sexuality” does not need, and should not mandate, explicit verbal consent at every stage of an encounter, from “‘May I kiss you?’ to ‘May I undo your blouse?’”<sup>119</sup>

Rather, a healthier, positive view of human sexuality includes acknowledgement that one gives and revokes consent in a variety of ways. David Bernstein, a professor at George Mason University School of Law, points out that California’s legislation polices and deems illegal “a lot of normal sexual conduct” through regulation of sexual behaviors that legislators likely did not intend when enacting Senate Bill No. 967.<sup>120</sup> Additionally, Harvard law professors have

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<sup>116</sup> Fredrick deBoer, *The Burden of Expanding the Police State’s Power to Prosecute Sex Crimes Will Fall on the Poor and the Black*, FREDRIKDEBOER.COM (Oct. 14, 2014), <http://fredrikdeboer.com/2014/10/13/the-burden-of-expanding-the-police-states-power-to-prosecute-sex-crimes-will-fall-on-the-poor-and-the-black>.

<sup>117</sup> See Kathleen F. Cairney, Note, *Addressing Acquaintance Rape: The New Direction of The Rape Law Reform Movement*, 69 ST. JOHN’S L. REV. 291, 312 (“[T]here remains dispute, even among women and feminists over the degree of protection women truly need or desire.”).

<sup>118</sup> Mary Tyler March, *Affirmative Consent as State Law in California*, DAILY TAR HEEL (Oct. 6, 2014, 1:52 AM), <http://www.dailytarheel.com/article/2014/10/affirmative-consent-as-state-law-in-california> (providing reasons that affirmative consent should be implemented in order to better facilitate healthier sexual behavior).

<sup>119</sup> Jake New, *The ‘Yes Means Yes’ World*, INSIDE HIGHER ED. (Oct. 17, 2014), <https://www.insidehighered.com/news/2014/10/17/colleges-across-country-adopting-affirmative-consent-sexual-assault-policies> (quoting Harvard University’s Title IX Officer Mia Karvonides).

<sup>120</sup> Steven Nelson, *California ‘Yes Means Yes’ Law Worries Skeptics*, U.S. NEWS & WORLD REPORT (Sept. 29, 2014, 5:54 PM), <http://www.usnews.com/news/articles/2014/09/29/california-yes-means-yes->

expressed their concerns, explaining problems with dismantling the role of the reasonable person standard in sexual assault allegations and shifting, instead, to a policy that is grossly “one-sided.”<sup>121</sup>

Branding “no means no” as the perpetrator of all things ambiguous when it comes to consent, proponents of an affirmative consent standard believe that the “no means no” approach “leaves [consent] open for ambiguity, and [that] . . . there [should] be more clarity in the [school] polic[ies], specifically saying that ‘yes means yes.’”<sup>122</sup> However, California’s affirmative consent legislation does very little to help determine when one actually gives consent and ignores the reality that perpetrators will not care about whether their partner gives or revokes consent or that such perpetrators may not tell the truth during the disciplinary process.<sup>123</sup> In fact, the “yes means yes” standard faces the same administrative hearsay problem as its outdated “no means no” counterpart. With the failure to “hear no,” now the failure to “receive yes,” a school disciplinary hearing will likely volley the he-said-she-said debate when assessing a complaint with little to no guidance from the legislation on how to evaluate conflicting evidence of whether consent was given or received.

Senate Bill No. 967 shifts the burden of proof from the victim to the accused.<sup>124</sup> However, without more, California’s legislation does not solve the problems posed where one party claims to have been given consent, but the other party denies this assertion. Aside from initiating an important cultural change

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law-worries-skeptics (quoting George Mason School of Law professor David Bernstein, arguing against proponents of the bill who dismiss worries that the law will be enforced too literally, by acknowledging that “the way to judge a policy or rule is by what it says, not by [one’s] expectations of common sense.”).

<sup>121</sup> Tovia Smith, *Harvard Law Professors Say New Sexual Assault Policy Is One-Sided*, NPR (Oct. 15, 2014, 6:44 PM), <http://www.npr.org/templates/transcript/transcript.php?storyId=356424999> (noting that a group of twenty-eight law professors at Harvard University have expressed dissatisfaction with Harvard’s new sexual assault policy and support the refusal of the university to implement affirmative consent). See Peter Schworm, *Harvard’s View on Consent at Issue in Sexual Assault Policy*, BOSTON GLOBE (Nov. 17, 2014), <http://www.bostonglobe.com/metro/2014/11/17/harvard-sexual-assaults-policy-fuels-debate-about-consent/IRpfu05MkjbH0hN8ETerbK/story.html> (discussing Harvard’s exclusion of affirmative consent).

<sup>122</sup> Smith, *supra* note 121.

<sup>123</sup> Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN’S L.J. 62 (2000).

<sup>124</sup> See Young, *supra* note 8.

regarding how one views sex and consent,<sup>125</sup> California's judicially mandated "yes means yes" standard entails nearly all of the same administrative problems of the "no means no" approach.

*B. University Students Are (Only?) Deserving of Protection*

Even assuming affirmative consent as implemented by Senate Bill No. 967 is the preferable standard, why does the bill extend such "important" protections *only* to women currently attending college? Many have criticized the legislation for providing increased protection "only appropriate for students at a university, not for anyone else at the university[, and] not for anyone else in any other context."<sup>126</sup> In the legislative debate on Senate Bill No. 967, supporters of the bill—a bill that actually *limits* its reach solely to college campuses—incongruously purported in support of the bill, that "sexual violence, domestic violence, dating violence and stalking [need to] be taken just as seriously on a college or university campus as when that conduct takes place in the rest of our communities."<sup>127</sup>

While numerous studies support the unfortunate reality that sexual assaults are all too frequent on college campuses, rapes occurring within the age group of eighteen to twenty-four years old are not limited to campus grounds.<sup>128</sup> In fact, according to a 2014 report from the U.S. Department of Justice, the rate of rape and sexual assault among those of college-age men and women was 1.2 times higher for *nonstudents* than for students.<sup>129</sup> Currently, only seventeen states have statutes prohibiting sexual intercourse where there the accused uses no force or where the victim has not consented to sexual activity.<sup>130</sup> Why not broaden to bill to serve more victims of sexual assault? Why afford increased protection only to those privileged enough to attend college, or fortunate enough to continue attending?

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<sup>125</sup> See March, *supra* note 118.

<sup>126</sup> Nelson, *supra* note 120.

<sup>127</sup> COMM. ON JUDICIARY, CAL. STATE ASSEMBLY, *supra* note 113, at 6 (quoting California Police Chiefs Association).

<sup>128</sup> See BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUST., RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES 1995–2013, at 1 (2014), available at <http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

<sup>129</sup> *Id.*

<sup>130</sup> CAROL E. TRACY ET AL., RAPE AND SEXUAL ASSAULT IN THE LEGAL SYSTEM 31 (2012), available at <http://www.womenslawproject.org/resources/Rape%20and%20Sexual%20Assault%20in%20the%20Legal%20System%20FINAL.pdf>. These jurisdictions do not include California. *Id.*

Sexual assaults occurring on university campuses are very much the business of colleges and universities and, at least to some extent, their responsibility to combat. Universities may be the fastest vehicles for providing immediate protection to student victims; they can quickly initiate necessary measures, such as separating a victim from the accused until proceedings have concluded.<sup>131</sup> However, using university protocol as the only catalyst for sexual assault reform ignores the reality that sexual assault does not solely happen on college campuses and that colleges and universities are notorious for mishandling cases by failing to investigate and punish students.

### C. *A Step Away from the University System*

Senate Bill No. 967, supposedly a “victory for women,”<sup>132</sup> can do better to serve victims of sexual assault. Legislation should attempt to increase the effectiveness of investigations and focus on specific, key issues that pose problems in disciplinary hearings. It should not attempt to control the sexual encounter, itself. Rape cannot be prevented. However, implementing effective policies in universities which provide a greater understanding of healthy sexual behavior, while increasing resources for student victims, would have a stronger impact on improving the issues which have given rise to so many Title IX investigations.<sup>133</sup>

Finally, legislation could better incentivize schools to use the actual police and court systems for sexual assault proceedings in order to more fairly and uniformly punish offenders and protect victims. Although Senate Bill No. 967 requires schools to implement a policy that provides written notification to the victim about coordination with law enforcement, these requirements could extend to “nudge universities toward the court system—with measures such as civil protective orders—and away from using campus judicial systems,”<sup>134</sup> thereby encouraging and empowering victims to report their sexual assaults, as so many go unreported.<sup>135</sup> The legislation encourages universities to handle these cases in-

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<sup>131</sup> Eliana Dockterman, *The Vanderbilt Rape Case Will Change the Way Victims Feel About the Courts*, TIME (Jan. 29, 2015), <http://time.com/3686617/the-vanderbilt-rape-case-will-change-the-way-victims-feel-about-the-courts> (discussing reasons why students may choose a campus judiciary process over reporting sexual assault to police).

<sup>132</sup> Sara Libby, *What Victory for Women’s Rights Looks Like*, SLATE (Sept. 8, 2014, 9:51 AM), [http://www.slate.com/blogs/xx\\_factor/2014/09/08/california\\_s\\_legislature\\_led\\_by\\_women\\_passing\\_laws\\_to\\_help\\_women.html](http://www.slate.com/blogs/xx_factor/2014/09/08/california_s_legislature_led_by_women_passing_laws_to_help_women.html).

<sup>133</sup> See Press Release, U.S. Dep’t of Educ., *supra* note 6.

<sup>134</sup> Nelson, *supra* note 120.

<sup>135</sup> TRACY ET AL., *supra* note 130, at 9.



house with a limited system that bypasses essential due process protections for the accused. This fails to incentivize schools to provide a victim full entitlement to justice through the criminal court system, as colleges and universities can only expel student perpetrators.

## V. CONCLUSION

Senate Bill No. 967 not only fails to realistically address the issue of sexual assault on campus, but it also targets the fundamentally wrong issues. This Note does not dispute that a standard of affirmative consent may serve as a strong catalyst for much-needed cultural change regarding how society views both sex and sexual violence. Broad reorientation about how society approaches sex may serve as a strong force in better defining consent and ensuring better communication between partners.<sup>136</sup> In fact, much of California's law is positive by requiring all colleges and universities to enter into agreements and collaborative partnerships with existing on-campus and community-based organizations to offer resources to students, including counseling, health services, mental health services, and legal assistance, and by implementing comprehensive prevention and outreach programs.<sup>137</sup>

Many of the goals behind affirmative consent legislation are not merely appropriate, but also vital, to shift society's cultural perspective of sex and sexual violence. This Note does not doubt the need for such change in mentality. Perpetuating the affirmative consent standard in sex education in middle schools, high schools, and throughout post-secondary institutions could very well achieve long-lasting improvements aimed at healthy and consensual sexual behavior that will positively develop how the upcoming generation views such issues.

Yet, while this new approach to sexual assault may seem like "justice for the years of turning a blind eye to sexual assaults of university students,"<sup>138</sup> the legislation's dismantling of essential constitutional due process protections in order to achieve this goal will not provide true, long-standing sexual assault reform. Instead, it will only further skepticism and doubt, broaden any gray areas

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<sup>136</sup> Tara Culp-Ressler, *What 'Affirmative Consent' Actually Means*, THINKPROGRESS.ORG (June 25, 2014, 2:20 PM), <http://thinkprogress.org/health/2014/06/25/3453041/affirmative-consent-really-means>. See Remick, *supra* note 2.

<sup>137</sup> S.B. 967 § 67386(d), 2013–2014 Reg. Sess. (Cal. 2014).

<sup>138</sup> Shatz, *supra* note 115.

surrounding sexual violence, belittle its devastating effects, and undermine society's reaction to these issues.

There is more to be done.