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Saying “Yes”: How California’s Affirmative Consent Policy Can Transform Rape Culture

Ruby Aliment*

[I]f there is one area of social behavior where sexism is entrenched in law—one realm where traditional male prerogatives are most protected, male power most jealously preserved, and female power most jealously limited—it is in the area of sex itself, even forced sex.¹

—Susan Estrich, 1991

I. INTRODUCTION

Many criticize the recent spotlight on campus sexual assault rates as another example of the feminist movement emphasizing white feminist issues at the expense of more pervasive and wide-reaching problems.² But this criticism fails to recognize that the focus on college sexual assault

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¹ Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 814–15 (1991).

² Batya Ungar-Sargon, *In 2014, the Campus Rape Debate Drowned Out More Important Feminist Issues*, THE NEW REPUBLIC (Dec. 30, 2014), <http://www.newrepublic.com/article/120660/campus-rape-panic-why-feminists-chose-wrong-issue-2014>; see also Susan Dwyer, *What a difference ‘yes’ makes for sex*, AL JAZEERA AMERICA (Jan. 6, 2015), <http://america.aljazeera.com/opinions/2015/1/campus-sexual-assaultaffirmativeconsent.html>. “In addition, affirmative consent is confined to institutions controlled by the U.S. Education Amendments’ Title IX, which protects people in educational programs that receive federal funding against discrimination on the basis of gender. For this reason, some suggest it may be an elitist standard that does nothing to protect women who are not in college.” *Id.*; see also Jon K. Brent, *Lawmakers tackle sexual violence starting in high school*, KION NEWS (Mar. 9, 2015), <http://www.kionrightnow.com/news/local-news/lawmakers-tackle-sexual-violence-starting-in-high-school/31706626> (“The new legislation would also require high school Health classes to discuss how to develop healthy relationships and include information about affirmative consent.”).

impacts the education of consent throughout the American public education system, and the resulting pressure can lead to the adoption of better policies.³ The reformation of sexual misconduct policies on college campuses could transform our cultural attitudes towards consent, and an emphasis on education rather than incarceration presents an alternative method for increasing the safety of all individuals affected by sexual violence.

Social science research estimates that one-in-four to one-in-five women will experience an attempted or completed sexual assault while in college.⁴ Universities are known for their inaction or sub-par response to allegations of sexual assault and issues of non-consent, due in large part to the sheer number of alleged assaults that occur on them.⁵ In response, the federal government, through the Office of Civil Rights, published policy guidelines on Title IX of the Education Amendments of 1972 expressing its intent that Title IX cover sexual harassment and sexual assault.⁶ Despite these explanations, 76 schools are currently under investigation for violating Title IX in the enforcement of their sexual assault and misconduct policies.⁷

³ See Patsy Takemoto Mink Equal Opportunity in Education Act, 20 U.S.C. §1681(a) (1972) (any education program or activity receiving federal financial assistance).

⁴ CHRISTOPHER P. KREBS ET AL., THE NATIONAL INSTITUTE OF JUSTICE, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY xii (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

⁵ See Caroline Heldman, *The Second Wave of Backlash Against Anti-Rape Activism*, MS. MAGAZINE (Aug. 19, 2014), <http://msmagazine.com/blog/2014/08/19/the-second-wave-of-backlash-against-anti-rape-activism/>.

⁶ Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 102 (2010); see also U.S. Dep't of Educ.'s Office for Civil Rights (OCR), *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. (Apr. 29, 2015), http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

⁷ Tyler Kingkade, *85 Colleges Are Now Under Federal Investigation for Sexual Assault Cases*, THE HUFFINGTON POST (Oct. 15, 2014), http://www.huffingtonpost.com/2014/10/15/colleges-federal-investigation-sexual-assault_n_5990286.html; see also Press Release, U.S. Dep't of Educ.'s Office for Civil Rights (OCR), U.S. Dep't of Educ. Releases List of Higher Educ. Inst. with Open Title IX Sexual Violence Investigations (May 1, 2014), available at

This article argues that Title IX should go further in protecting students' equal access to education and safety by mandating affirmative consent standards in the investigation of allegations. It should also mandate other survivor-centered policies that focus on education and bystander awareness. In this article, California's Senate Bill 967, often referred to as the "Yes Means Yes" Bill, is used as a case study to argue that the federal mandate of an affirmative consent policy, among other survivor-centered programming, is necessary to address the campus rape epidemic. An affirmative consent policy is a vital step in ameliorating the negative implications of contract theory and sexism in our cultural attitudes and legal standards towards sexual consent and female autonomy.⁸

This paper begins with a brief history of consent, contract theory, and American rape law. Second, it describes the federal government's attempts to address the problem. Third, it describes how universities respond, or fail to respond, to allegations of sexual assault in light of federal legislation. Fourth, I argue that California's response is appropriately tailored to address non-consent on college campuses. Fifth, I argue that federal enforcement of a national policy is the best solution for making a difference. Finally, I illustrate how implementing an affirmative consent standard into pre-existing Title IX requirements, specifically the lower standard of proof, will not infringe on the due process rights of the accused and presents the fairest method to adjudicate these allegations.

<http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>.

⁸ This paper advocates for a change to Title IX, but specifically analyzes the change's impact on institutions of higher education. Additionally, some academics have compared changing the policy around consent to laws mandating that people wear seatbelts, which suggests that policy can impact behavior and change our cultural attitudes. See Michael Catalini, *More States Weigh a 'Yes Means Yes' College Policy*, VNEWS.COM (Nov. 25, 2014), <http://www.vnews.com/news/state/region/14513534-95/more-states-weigh-a-yes-means-yes-college-policy>.

A. Use of Language

Although women are the primary victims of sexual violence,⁹ people still criticize the feminist movement for over-victimizing women¹⁰ In discussing the campus rape epidemic, any attempt to de-gender the conversation would be misleading, as college women experience sexual assault at much higher rates than men, and most often at the hands of men¹¹ The heteronormativity implicated by the campus rape epidemic has two points of significance: first, it illustrates the gendered dynamic of consent (where women's consent is suspect under the law, privileging men's sexuality and power), and second, it shows how our gendered assumptions result in a failure to properly address and find solutions for sexual assault by stereotyping male and female sexual behavior in campus adjudicatory hearings (e.g., the common narratives that boys will be boys and she asked for it).

Therefore, throughout this paper, I use female gender pronouns to refer to individuals making sexual assault accusations and male gender pronouns for those accused of sexual assault. I recognize that women often perpetrate sexual assault against men, but, in most cases, college men are raped by other men.¹² Furthermore, since so few men report, there is very little

⁹ KREBS ET AL, *supra* note 4, at viii; *see also Victims and Perpetrators*, NAT'L INST. OF JUST. (Oct. 26, 2010), *available at* <http://www.nij.gov/topics/crime/rape-sexual-violence/Pages/victims-perpetrators.aspx>.

¹⁰ Cathy Young, *Stop Fem-Splaining: What 'Women Against Feminism' Gets Right*, TIME MAGAZINE (July 24, 2014), <http://time.com/3028827/women-against-feminism-gets-it-right/>.

¹¹ *Victims and Perpetrators*, *supra* note 9; RANA SAMPSON, U.S. DEP'T OF JUSTICE: OFFICE OF CMTY. ORIENTED POLICING SERV., ACQUAINTANCE RAPE OF COLLEGE STUDENTS 3 (2002), *available at* <http://www.cops.usdoj.gov/pdf/e03021472.pdf> ("Ninety percent of college women who are victims of rape or attempted rape know their assailant. The attacker is usually a classmate, friend, boyfriend, ex-boyfriend, or other acquaintance (in that order).").

¹² *See id.* "College men who are raped are usually raped by other men. However, since so few men report, information is limited about the extent of the problem." *Id.* National criminal justice statistics reveal that of all adults/juveniles who come to the attention of authorities for sex crimes, females account for less than 10% of the cases. *See also*

reliable information available to describe the problem.¹³ This paper relies on available information, and therefore, de-gendering the accused and accuser would not adequately describe the statistics or responses to those statistics.

Next, the victim versus survivor distinction is unquestionably political.¹⁴ The linguistic shift from victim to survivor, in many ways, better describes the experience of those who have experienced sexual assault by challenging the victimization of women and recognizing the strength required for many to live after a sexual assault. Therefore, those accused of sexual assault will be referred to as the perpetrator, the accused, or the alleged rapist (depending on the determination of the accusation), and the accuser will be referred to as the complainant or survivor, unless specific information indicates how a particular individual describes herself following a sexual assault.

Finally, I use the terms “rape” and “sexual assault” interchangeably to refer to nonconsensual sexual contact and intercourse.¹⁵

CENTER FOR SEX OFFENDER MANAGEMENT, U.S. DEP’T OF JUST., FEMALE SEX OFFENDERS 1 (2007), *available at* http://www.csom.org/pubs/female_sex_offenders_brief.pdf.

¹³ *Id.*

¹⁴ *E.g.*, Hannah Groch-Begley, *A Guide To George Will’s Decades Of Attacks On Sexual Assault Victims & “Rape Crisis Feminists,”* MEDIA MATTERS FOR AM. (Oct. 15, 2014), <http://mediamatters.org/research/2014/10/15/a-guide-to-george-wills-decades-of-attacks-on-s/201166> (A prominent American journalist and author criticized “what he called the ‘victimization sweepstakes,’ in which ‘many prizes, including media attention and therapeutic preferences from government, go to those who succeed at being seen as vulnerable and suffering,’ specifically for experiencing rape on college campuses.”).

¹⁵ Side note: I do not address the fear of false rape reports because no reliable data exists to suggest that false rape reports occur at any level higher than the false reports of other crimes, such as burglary and homicide. The Federal Bureau of Investigation (FBI) reports that unfounded rape reports account for eight percent of total reported rapes; however, this number fails to control for the various conditions that encourage individuals to rescind their accusations, such as a person’s intimate relationship with the accused, the lack of physical evidence, victim blaming, and police bias. Additionally, new research has shown that many of these statistics mischaracterized unfounded charges as false reports when they really described those cases for which the police declined to recommend prosecution. *See* SAMPSON, *supra* note 11, at 5; *see also* Nicholas J. Little,

II. CONSENT, CONTRACT THEORY, AND RAPE LAW

Why do you consult their words when it is not their mouths that speak? . . . The lips always say “no,” and rightly so; but the tone is not always the same, and that cannot lie. . . . Must her modesty condemn her to misery?¹⁶

—Jean-Jacque Rousseau, 1911

The above quote from Rousseau describes his personal misogynistic attitudes towards female sexual autonomy, in addition to a commonplace romantic ideal whereby notions of modesty encourage women to play hard to get.¹⁷ John Locke and Thomas Hobbes, two other great political theorists, shared similar positions on female consent and romance, and all three are credited, in large part, with the foundation of much of American (referring to the United States of America) political thought.¹⁸ In summarizing the development of American political thought, Mustafa T. Kasubhai wrote, “If this is the type of consent society has accorded women throughout history, it is not surprising that rape law has developed requiring resistance and force, rather than actual non-consent of the victim.”¹⁹ These trends inform

From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law, 58 VAND. L. REV. 1321, 1330–31 (2005). “Those who suggest that women are prone to false accusations of rape, and who thus oppose any liberalization of the requirements to establish a case of rape, have failed to demonstrate why the numbers do not bear out such a suggestion. They also have not shown why women might be more prone to invent charges of rape than men might be to unjustly accuse people of other crimes (which do not carry the same evidentiary requirements) . . . What is also well documented is the fact that false accusations of rape are no more prevalent than false accusations of other types of major crime.” *Id.*; see also Beverly J. Ross, *Does Diversity in Legal Scholarship Make A Difference?: A Look at the Law of Rape*, 100 DICK. L. REV. 795, 812 (1996).

¹⁶ JEAN-JACQUES ROUSSEAU, *EMILE*, 332 (Barbara Foxley trans., 1911).

¹⁷ See Maureen Dowd, *What’s a Modern Girl to Do?*, N.Y. TIMES MAG. (Oct. 30, 2005), http://www.nytimes.com/2005/10/30/magazine/whats-a-modern-girl-to-do.html?_r=0.

¹⁸ See Mustafa T. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law Is Turned on Its Head*, 11 WIS. WOMEN’S L.J. 37, 49 (1996).

¹⁹ *Id.*

our understanding of women’s ability to consent, which complicates the adjudication of rape accusations.

Throughout American legal history, women’s consent has been suspect and discredited. For example, in *Commonwealth v. Berkowitz*, decided in 1994, the Supreme Court of Pennsylvania denied recourse to a complainant after finding that her story was insufficient to establish the “forcible compulsion” element necessary to support a rape conviction.²⁰ The court reasoned that because the defendant did not physically restrain the complainant, except through his body weight, and the complainant never attempted to leave the room, when “the record clearly demonstrate[d] that the door could be unlocked easily from the inside,” her testimony was devoid of any evidence of force, even though she said “no” throughout the encounter.²¹ Existing case law dictated that when the record does not show evidence of physical force or psychological coercion, the forcible compulsion requirement could not be met.²²

Brown v. State, decided in 1906, used similar reasoning. The Supreme Court of Wisconsin reversed the conviction and sentencing of a man accused of raping a 14-year-old girl.²³ The complainant in the case testified that the defendant approached her in a field on her way to a family member’s home, tripped her to the ground, removed her clothing, and had intercourse with her.²⁴ During the act, the complainant screamed as loud as she could and struggled to get up, but the defendant covered her mouth.²⁵ On these facts, the court found that the complainant’s testimony did not

²⁰ *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1166 (Pa. 1994).

²¹ *Id.* at 1164.

²² *Id.*

²³ *Brown v. State*, 106 N.W. 536, 541 (Wis. 1906).

²⁴ *Id.* at 537.

²⁵ *Id.*

adequately demonstrate that the sexual act was against her will.²⁶ The court held that

not only must there be an entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated.²⁷

Given the facts, it is difficult to imagine what the complainant could have done differently to demonstrate non-consent.

Both cases, though separated by almost 100 years, do not rely on unusual legal standards. In fact, the American Law Institute's revision of the Model Penal Code adopts the attitude that a rape charge should not depend on a woman's lack of consent, but on the attacker's use of force.²⁸

These attitudes towards consent created an uncodified, though frequently followed, "reasonable victim" standard for evaluating the complainant's behavior.²⁹ Many courts require women to display the maximum amount of resistance, regardless of the evidence that "rape victims who attempt physical resistance to sexual attacks are significantly more likely to be injured than those who do not."³⁰ This standard assumes that all women who experience sexual violence communicate their non-consent in the same way—specifically in the way men are expected to communicate it. This male victim model is

best known to the male judges and lawyers who formulated it, but not a model appropriate for a class of victims almost entirely

²⁶ *Id.* at 540–41.

²⁷ *Id.* at 538.

²⁸ Kasubhai, *supra* note 18, at 55–56; *see also* MODEL PENAL CODE § 213.1 (1980). A definition of rape should focus "upon objective manifestations of aggression by the actor. Accordingly, the offense is defined to occur when the actor 'compels' the victim 'to submit by force or by threat.'" *Id.*

²⁹ Ross, *supra* note 15, at 819.

³⁰ *Id.* at 817.

female. . . . This is a standard developed by men from the perspective of men and then imposed on [women] without regard to whether most women actually conform to the standard.³¹

If these assumptions were accurate, our rape laws and attitudes toward consent would have contributed to the decline of sexual assault.

Our cultural acceptance of utmost resistance as the necessary indicator of non-consent obscures our understanding of consent and rape, creating a particularly dangerous environment for women. For example, in a recent study published by *Violence & Gender*, researchers found that, when behaviorally-descriptive questions are posed to heterosexual men (e.g., “Have you ever coerced somebody to intercourse by holding them down?”) versus questions using targeted labels (e.g., “Have you ever raped somebody?”), men will admit to exercising sexually coercive behaviors, including using some force to obtain intercourse, but they will deny ever raping a woman.³²

Cynthia Ann Wicktom reports in her paper, *Focusing on the Offender’s Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, that rape law traditionally focused on the survivor’s non-consent to determine whether rape occurred.³³ Therefore, without evidence of forceful conduct and overt non-consent, silence operates as consent.³⁴ Many people fail to

³¹ *Id.* at 819.

³² Sarah R. Edwards et al., *Denying Rape but Endorsing Forceful Intercourse: Exploring Differences Among Responders*, 1 *VIOLENCE & GENDER* 188, 188–93 (2014), available at <http://online.liebertpub.com/doi/pdf/10.1089/vio.2014.0022>.

³³ Cynthia Ann Wicktom, *Focusing on the Offender’s Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 *GEO. WASH. L. REV.* 399, 402 (1988).

³⁴ *Id.*; see also RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981). Under the Restatement (Second) of Contracts, there are two exceptional instances where silence is interpreted as acceptance: first, those where the offered silently takes the offered benefits, and second, those where one party has given the other party reason to interpret silence or inaction as assent, sometimes based on prior dealings between the parties. Critics of affirmative consent policies say the standard causes sexual interaction to look more like contractual engagements (i.e., *Can I touch you here? Yes. Can I kiss you there? Yes*); however, legal contractual standards parallel American rape law more than California’s

realize that this conceptualization of consent and resistance in rape law is largely informed by a distinctly male point of view—to the exclusion of the female experience.³⁵

Our prevailing conception of consent (i.e., no means no), which requires force and overt non-consent, presumes that both social actors enter into the sexual contract as equals.

[C]ritics . . . have attacked the claim that, if two individuals make a contract, the fact that the contract has been made is sufficient to show that the exchange must be equal. The critics point out that, [sic] if one party is in an inferior position . . . then he or she has no choice but to agree to the disadvantageous terms offered by the superior party.³⁶

Some feminist critics have even gone as far as to say that, within our current construct of female consent within a patriarchal society, women can never truly consent to sex.³⁷ Considered radical by some, this position illustrates the need to seriously consider how women are disadvantaged by the prevailing consent standards.

In her book *Date Rape: Feminism, Philosophy, and The Law*, Lois Pineau writes that “because the prevailing ideology has so much informed our conceptualization of sexual interaction, it is extraordinarily difficult for us to distinguish between assault and seduction, submission and enjoyment,

new policy, as evidenced by the Restatement’s position on silence. A consent standard wherein a participant can infer consent from silence or from the failure to explicitly deny consent is much more like a contractual engagement than a situation where consent is communicated with enthusiasm and willingness. *Id.*

³⁵ Ross, *supra* note 15, at 814.

³⁶ CAROLE PATEMAN, *THE SEXUAL CONTRACT* 57–58 (1988).

³⁷ See CATHARINE A. MACKINNON, *ONLY WORDS* 28 (1993). MacKinnon never explicitly draws this connection, but her work has been interpreted to mean that women cannot give true consent under the existing conditions of gender inequality. *Id.*; see also ANDREA DWORKIN, *INTERCOURSE* xxxiii (Basic Books 1997). “‘I like it’ is the standard for citizenship, and ‘I want it’ pretty much exhausts the First Amendment’s meaning for women.” *Id.*

or so we imagine."³⁸ The ubiquity of male sexual dominance with romance contributes to a sexual environment that is not easily navigable for any sexual participant.

Overall, our culture has relied on consent standards that disserve sexual participants in two ways: first, these standards presume both partners are able to freely express their non-consent, and second, they infer that women's lack of consent does not mean no. The codification of this dynamic should be the one receiving backlash, as it fails to create an equitable sexual atmosphere for any party.

Perhaps in reaction to the law's failure to recognize women's lack of consent in determining whether a rape has occurred, feminist activists have promulgated the standard of "No Means No," which has been popular on college campuses, though it has not been effective.³⁹ Fraternities, in particular, have ridiculed the standard, and sexual assault rates have been largely stagnant despite its use.⁴⁰ Despite the mantra's seeming failure, college campuses host a significant amount of activism against sexual assault.⁴¹

³⁸ LOIS PINEAU, *DATE RAPE: FEMINISM, PHILOSOPHY, AND THE LAW* 6 (Leslie Francis ed. 1996).

³⁹ Erin Anderssen, *Sex on campus: How No Means No became Yes Means Yes*, THE GLOBE AND MAIL (Nov. 14, 2014), <http://www.theglobeandmail.com/life/relationships/sex-on-campus-how-no-means-no-became-yes-means-yes/article21598708/>; see also Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html?ref=opinion&_r=1.

⁴⁰ See Rebecca Rose, *Texas Tech Fraternity Stripped of Charter For 'No Means Yes' Sign*, JEZEBEL (Oct. 7, 2014), <http://jezebel.com/texas-tech-fraternity-stripped-of-charter-for-no-means-1643654682>; see also Lindsay Beyerstein, "No Means Yes, Yes Means Anal" *Frat Banned From Yale*, THE BIG THINK (May 18, 2011), <http://bigthink.com/focal-point/no-means-yes-yes-means-anal-frat-banned-from-yale>.

⁴¹ See generally *End Rape on Campus*, EROC, <http://endrapeoncampus.org/> (last visited Oct. 15, 2015); see generally, *KNOW YOUR IX*, <http://knowyourix.org/> (last visited Oct. 15, 2015).

III. CURRENT FEDERAL RESPONSES

In 1990, Congress “acted to ensure that institutions of higher education [had] strategies to prevent and respond to sexual assault on campus and to provide students and their parents accurate information about campus crime.”⁴² The two major federal laws dealing with sexual violence in education are The Clery Act and Title IX.⁴³ The Clery Act requires schools to disclose information about crime, specifically sexual assault, on campus.⁴⁴ Title IX, as monitored by The Office for Civil Rights (OCR), is a prohibition against sex-based discrimination in education that has been clarified by OCR through “Dear Colleague Letters” and other guidance to implicate sexual violence, though it is best known for mandating equal rights within athletic programs.⁴⁵

Title IX reads 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.”⁴⁶ The statute expressly prohibits exclusion from participation in any educational program or activity and the denial of the benefits of those programs and activities.⁴⁷ It also requires that no student be subject to discrimination under any education program or

⁴² HEATHER M. KARJANE ET AL., NAT’L INST. OF JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 1 (2005), available at <https://www.ncjrs.gov/pdffiles1/nij/205521.pdf>.

⁴³ Jeanne Clery Act, 20 U.S.C. § 1092 (1990); Patsy Takemoto Mink Equal Opportunity in Education Act, 20 U.S.C. § 1682 (1972).

⁴⁴ Jeanne Clery Act, 20 U.S.C. § 1092 (1990); see also KARJANE ET AL., *supra* note 42.

⁴⁵ Patsy Takemoto Mink Equal Opportunity in Education Act, 20 U.S.C. § 1682 (1972); see also Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 333 (2012).

⁴⁶ Patsy Takemoto Mink Equal Opportunity in Education Act, 20 U.S.C. § 1681(a) (1972).

⁴⁷ *Id.*

activity⁴⁸—a piece of the legislation that can be used to ensure equal treatment of all genders in sexual misconduct investigations and hearings.

The OCR monitors Title IX enforcement using the publication of “Dear Colleague Letters,” which act as significant guidance documents to assist administrators in meeting their obligations by informing recipients about how OCR evaluates compliance.⁴⁹ Plus, the documents provide the public with information about their rights and the regulations OCR enforces.⁵⁰

Title IX’s broad language necessitates these letters to clarify that sexual assault and harassment are examples of the sort of disparate treatment experienced based on gender that triggers certain responses under Title IX.⁵¹ To ensure notice to institutions receiving federal funding, OCR sends these documents to the Title IX coordinator of each participating school or institution and makes them available online through its website.⁵²

The letters define sexual violence and schools’ responsibility to respond to violence under Title IX.⁵³ The letters define sexual violence as “physical sexual acts perpetuated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol.”⁵⁴ Some of the listed responsibilities include the prompt, impartial, and thorough investigations following a complaint; the commitment that the institution keeps the complainant’s identity confidential when appropriate; and the suspension of mediation as a remedy in sexual assault proceedings.⁵⁵ The letters make clear that if a school “knows or reasonably

⁴⁸ *Id.*

⁴⁹ RUSSELLYNN ALI, ASSISTANT SEC’Y FOR C.R. (OCR), U. S. DEP’T OF EDUC., DEAR COLLEAGUE: SEXUAL VIOLENCE 1, n. 1 (2011), *available at* http://www.whitehouse.gov/sites/default/files/dear_colleague_sexual_violence.pdf.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.”⁵⁶

Schools must also (1) distribute a notice of nondiscrimination to students, parents, employees, and even applicants; (2) adopt public grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints; and (3) designate one employee the responsibilities of coordinating Title IX complaint procedures and addressing patterns of “systemic problems that arise during the review of complaints.”⁵⁷

The mandate that schools determine responsibility using a preponderance of the evidence standard was the most controversial and criticized clarification of the recent Dear Colleague Letter. OCR adopted this standard because “the Supreme Court has applied [it] in civil litigation involving discrimination under Title VII of the Civil Rights Act,” and it is the standard OCR uses when investigating Title IX complaints against recipients of federal education funds.⁵⁸ Despite these mandates, sexual assault remains an immense threat on college campuses, which suggests schools are not doing enough on their own to protect their students.

IV. THE STATE OF THE COLLEGE RAPE EPIDEMIC

“We have forgotten that before we began calling this date rape and date fraud, we called it exciting.”⁵⁹

— Warren Farrell, men’s rights activist, author of *The Myth of Male Power*

⁵⁶ *Id.*

⁵⁷ *Id.* at 6–7.

⁵⁸ *Id.* at 10.

⁵⁹ WARREN FARRELL, *THE MYTH OF MALE POWER* 314–15 (1993).

Many reject the commonly-cited statistic that one-in-four or one-in-five women will experience an attempted or completed sexual assault while in college, in part because so many women choose not to view what happened to them as rape and the population at large refuses to believe men are committing so much rape.⁶⁰ However, statistics show that, in a given academic year, three percent of college women experience an attempted or completed sexual assault.⁶¹ When projected over a typical college career, researchers estimate that one-in-five women experience sexual assault during college.⁶² These statistics do not mean to suggest that one-fifth of women believe they have been raped; rather, they are based on studies of unreported rape, which indicate that six to 15 percent of men report acts that meet the legal definitions of rape or attempted rape.⁶³

Dr. David Lisak, in his study, “Repeat Rape and Multiple Offending Among Undetected Rapists,” reports that almost two-thirds of the men whose reported acts met the legal definition of rape raped more than once.⁶⁴ These repeat rapists each committed an average of six rapes and/or attempted rapes while in college.⁶⁵ In fact, Lisak estimates that three percent of college men are responsible for more than 90 percent of the rapes.⁶⁶

⁶⁰ See Jake New, *One in Five?* INSIDE HIGHER EDUC. (Dec. 15, 2014), <https://www.insidehighered.com/news/2014/12/15/critics-advocates-doubt-oft-cited-campus-sexual-assault-statistic>.

⁶¹ KARJANE ET AL., *supra* note 42, at 2.

⁶² *Id.*

⁶³ David Lisak et al., *Repeat Rape and Multiple Offending Among Undetected Rapists*, 14 VIOLENCE AND VICTIMS 73, 73 (2002).

⁶⁴ *Id.* at 80.

⁶⁵ *Id.*; but see SAMPSON, *supra* note 11, at 11; letter from Scott Berkowitz & Rebecca O’Connor, Rape, Abuse & Incest National Network (RAINN), to the White House Task Force to Protect Students from Sexual Assault (Feb. 28, 2014), *available at* <https://rainn.org/images/03-2014/WH-Task-Force-RAINN-Recommendations.pdf>.

⁶⁶ *Id.*

Additionally, other research shows that, within the context of college rape, the vast majority of survivors and perpetrators knew one another.⁶⁷

Despite this problem, a national survey of 440 institutions of higher education found that 40 percent of US colleges and universities have not conducted a sexual assault investigation in five years, 21 percent of campuses do not provide training on sexual violence to all faculty and staff, and 31 percent do not provide any training to students on sexual assault prevention or the available resources.⁶⁸ Our cultural willingness to doubt complainants, especially when a man's reputation is on the line, promotes this failure.

A. University Responses or Lack Thereof

Emma Sulkowicz, a Columbia University student, became a symbol of the movement against college adjudicatory procedures in 2014 after she began carrying her mattress around campus in a brave public protest following the sexual misconduct hearing of her alleged rapist—a man she knew and had a previous sexual relationship with.⁶⁹ Sulkowicz, along with 23 Columbia and Barnard students, filed a Title IX complaint alleging the schools mishandled her sexual assault case.⁷⁰ Sulkowicz did not decide to come forward with her allegation until she met two other women her alleged rapist assaulted under similar circumstances.⁷¹

⁶⁷ Dana Berliner, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2687 (1991); *Victims and Perpetrators*, *supra* note 9.

⁶⁸ U.S. SENATE SUBCOMMITTEE ON FINANCIAL AND CONTRACTING OVERSIGHT—MAJORITY STAFF, *SEXUAL VIOLENCE ON CAMPUS: HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS 1* (2014), *available at* <http://www.mccaskill.senate.gov/imo/media/doc/SurveyReportwithAppendix.pdf>.

⁶⁹ Vanessa Grigoriadis, *Meet the College Women Who Are Starting a Revolution Against Campus Sexual Assault*, N. Y. MAG. (Sept. 21, 2014), <http://nymag.com/thecut/2014/09/emma-sulkowicz-campus-sexual-assault-activism.html>.

⁷⁰ Emma Sulkowicz, *My Rapist Is Still on Campus*, TIME MAG. (May 15, 2014), <http://time.com/99780/campus-sexual-assault-emma-sulkowicz/>.

⁷¹ *Id.*

During Sulkowicz’s hearing, rather than focus on when consent was given and received, the committee hearing members were fixated on how it was possible to be anally raped without lubricant.⁷² In all three women’s hearings, the same alleged rapist was found not responsible by a preponderance of the evidence.⁷³ Outcomes like Sulkowicz’s contribute to an environment that excuses sexual assault and discourages survivors from coming forward.

Universities have ample research on the factors that inhibit their students from reporting sexual assault. These factors include their own campus policies on drug and alcohol; required participation in campus adjudicatory hearings; and unintentional victim blaming through the over emphasis of the complainant’s responsibility to avoid sexual assault, stigma, trauma, and psychological distress.⁷⁴ Partnered with all these factors is the hesitancy to recognize these acts of violence as reportable acts of violence.⁷⁵

At most universities, administrators deal with reports of sexual assault through no-contact orders or other binding administrative actions.⁷⁶ Other outcomes include expulsion, suspension, probation, censure, restitution, and the loss of privileges—such as the ability to participate in campus activities.⁷⁷ But the guidelines for imposing such outcomes vary widely. Only a quarter of universities engage in information-gathering or investigative processes, and due process for the accused is guaranteed by fewer than 40 percent of schools with disciplinary procedures.⁷⁸

⁷² *Id.*

⁷³ *Id.*

⁷⁴ KARJANE ET AL., *supra* note 42, at 8–9.

⁷⁵ *Was I Raped?*, RAPE, ABUSE & INCEST NATIONAL NETWORK (RAINN), <https://rainn.org/get-information/types-of-sexual-assault/was-it-rape> (last visited Feb. 9, 2015).

⁷⁶ KARJANE ET AL., *supra* note 42, at 10–11.

⁷⁷ *Id.*

⁷⁸ *Id.*

Critics of campus adjudicatory hearings, including the Supreme Court of the United States, argue that campuses' ability to expel students—depriving them of property and liberty interests guaranteed by the Fourteenth Amendment—creates pressing due process concerns.⁷⁹ However, studies show that colleges rarely expel the men found “responsible” for sexual assault;⁸⁰ meanwhile, survivors often drop out of school following inadequate responses to their allegations and have no case law or guaranteed due process rights to fall back on.⁸¹

V. CALIFORNIA’S SENATE BILL 967 AND BACKLASH AGAINST TITLE IX ENFORCEMENT

Senate Bill 967 was added to California’s Education Code in 2014, and it states that “in order to receive state funds for student financial assistance, [schools] shall adopt” an affirmative consent standard “*in the determination of whether consent was given by both parties to sexual activity*” (emphasis added).⁸²

A. California’s Response

The bill defines affirmative consent as affirmative, conscious, and voluntary.⁸³ The legislation designates the responsibility of ensuring the receipt of affirmative consent to all participants of sexual activities.⁸⁴ This

⁷⁹ Elizabeth Bartholet et al., *Rethinking Harvard’s sexual harassment policy*, THE BOS. GLOBE (Oct. 15, 2014), <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>.

⁸⁰ Kristen Lombarth, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUBLIC INTEGRITY (Feb. 24, 2010), <http://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault-0>.

⁸¹ See SAMPSON, *supra* note 11, at 8.

⁸² CAL. EDUC. CODE § 67386 (2015).

⁸³ *Id.*

⁸⁴ *Id.*

consent cannot be inferred through the existence of a sexual relationship, silence, lack of protest or resistance, and it can be revoked at any time.⁸⁵

During disciplinary evaluations, the accused will not be excused for mistakenly believing the complainant consented because of intoxication, recklessness, or under circumstances where the accused knew or should have known the complainant was unable to consent.⁸⁶ All complaints will be evaluated using a preponderance of the evidence standard.⁸⁷

These standards and policies—including the rights and responsibilities for students under the policy—will be made available for students and addressed during incoming student orientation.⁸⁸ The outreach and educational components of the bill seek to ensure that students will not be surprised to learn during investigations that the question will not be “When did you say ‘no’?” but rather “When did you say ‘yes’?” and “When did you hear ‘yes’ from your partner?” The bill places more restrictions and responsibilities onto schools, ensuring greater compliance with Title IX.⁸⁹

B. Criticisms

In an article titled “Campus Rape: The Problem with ‘Yes Means Yes,’” Cathy Young wrote that the bill’s effect “will be to codify vague and capricious rules governing student conduct, to shift the burden to (usually male) students accused of sexual offenses, and to create a disturbing precedent for government regulation of consensual sex.”⁹⁰ Young’s concerns seem to be based largely on what she sees as enforcing an unfair policy against men engaged in sex.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Cathy Young, *Campus Rape: The Problem With ‘Yes Means Yes,’* TIME MAG. (Aug. 29, 2014), <http://time.com/3222176/campus-rape-the-problem-with-yes-means-yes/>.

Batya Ungar-Sargon attacks the legislation for defining silence as non-consent in her piece titled, “‘Affirmative Consent’ Is Bad for Women: California’s new campus rape law only codifies a troubling double standard.”⁹¹ Ungar-Sargon worries that the legislation immediately redefined millions of consensual sex acts as rape.⁹²

Since California adopted SB 967, other states and universities implemented similar language requiring affirmative consent, intended to keep them in adherence with Title IX’s responsibilities.⁹³ These developments amplified the opposition, as more and more young men are believed to be in danger of false accusations and wrongful findings of responsibility. Harvard University law professors have been some of the loudest opponents to the change. They argue that these changes give greater power and governance to institutions that are not suited to adjudicate crimes, like sexual assault, in the first place.⁹⁴

Other concerns look to the impact that culture can have on the ways individuals express consent. Janet Halley, writing for *Harvard Law Review*, worries that adjudicators’ own experiences and biases will determine how they view proper expressions of consent, leading to potentially classist outcomes.⁹⁵ To illustrate her point, Halley describes the facts of *State v.*

⁹¹ Ungar-Sargon, *supra* note 2.

⁹² *Id.*

⁹³ Mileka Lincoln, *UH considering ‘Yes Means yes’ consent policy to strengthen Title IX requirements*, HAW. NEWS NOW (Jan. 23, 2015), <http://www.hawaiiinewsnow.com/story/27929490/uh-considering-yes-means-yes-consent-policy-to-strengthen-title-ix-requirements>; *see also* Mike Vilensky, *Gov. Cuomo Plans ‘Yes Means Yes’ Policy for Sexual Interactions at College Campuses*, THE WALL ST. J. (Jan. 17, 2015), <http://www.wsj.com/articles/governor-andrew-cuomo-plans-yes-means-yes-policy-at-college-campuses-statewide-1421529943>.

⁹⁴ Bartholet, *supra* note 79.

⁹⁵ Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement: Backing off the hype of Title IX enforcement*, 128 HARV. L. REV. 103 (2015), available at <http://harvardlawreview.org/2015/02/trading-the-megaphone-for-the-gavel-in-title-ix-enforcement/>.

Rusk, where the white, middle-class female complainant brought charges against a low-income white male defendant with an inner-city background.⁹⁶ The complainant testified that the accused coerced her into sex by taking her keys and choking her.⁹⁷ Halley questions these expressions of coercion and asks, “is entirely subjective evidence of threat of force sufficient to establish guilt?” These sorts of ambiguities support the argument that Title IX enforcement procedures are inherently indifferent to “race, class, and other key differences” that may impact fair determinations.⁹⁸

Halley’s other concern is that, in “hook-up culture,” all genders are consuming copious amounts of drugs and alcohol, but policies addressing consent and intoxication inherently privilege the female participant at the expense of the male.⁹⁹ She describes a sexual encounter where both the woman and the man are voluntarily drunk during the encounter and then afterwards feel “intense remorse and moral horror” leading them both to turn to the Title IX office with complaints.¹⁰⁰ She asks, “which of them gets the benefit of the per se imputation of unwelcomeness, and which of them carries the heavy handicap of no mitigation?”¹⁰¹ Her worry, of course, is that institutions implement these policies to the detriment of men.

Halley’s concerns are valid; however, they imply colleges are not fit to adjudicate sex crimes since it is the responsibility of the criminal justice system. Those at The Foundation for Individual Rights in Education (FIRE) agree and argue, “Improving police response to sexual crimes is the only

⁹⁶ *Id.*; see also *State v. Rusk*, 424 A.2d 720, 721 (Md. 1981).

⁹⁷ *Rusk*, 424 A.2d at 721.

⁹⁸ Halley, *supra* note 95.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

way to help victims universally.”¹⁰² Similarly, an open letter from the Rape, Incest, and Abuse National Network (RAINN) to The White House reads, “It would never occur to anyone to leave the adjudication of a murder in the hands of a school’s internal judicial process. Why, then, is it not only common, but expected, for them to do so when it comes to sexual assault?”¹⁰³ These criticisms presume that our criminal justice system provides the proper solution.

Reliance on the criminal justice system requires that we ask ourselves whether incarceration works and what it would take to remove the biases identified by Halley, regarding race and class, from criminal adjudications. An exploration of that question is out of the scope of this paper, but considering the wide-based failure of the criminal justice system and its major disproportionate impact on people of color and low-income individuals, it hardly seems like a well-thought-out solution. Additionally, increasing police intervention ignores the fact that most assaults on college campuses occur without witnesses and physical evidence, making it extremely unlikely that any prosecutor would pursue the claims.

VI. WHY FEDERAL ENFORCEMENT IS THE BEST OPTION

A. The Benefits of a Universal Federal Policy

Mandating affirmative consent standards through Title IX “Dear Colleague Letters” is the best way to ensure a universal response to campus sexual assault because it sets a clear standard for all recipients of federal education money. Through these clarifying letters, the federal government has “an unprecedented platform to deliver a national message of zero

¹⁰² Robert Shibley, *Time to Call the Cops: Title IX Has Failed Campus Sexual Assault*, TIME MAG. (Dec. 1, 2014), <http://www.thefire.org/time-call-cops-title-ix-failed-campus-sexual-assault/>.

¹⁰³ Letter from Scott Berkowitz & Rebecca O’Connor, *supra* note 65.

tolerance for sexual violence on college campuses.”¹⁰⁴ Data on campus sexual assault and the sheer number of Title IX investigations shows that states are not taking action on their own to address issues of non-consent and are only passively trying to adhere to Title IX’s obligations. Federal enforcement is the only way to ensure universal equal rights on all college campuses.

Next, much of the backlash against affirmative consent standards suggests a certain amount of anxiety resulting from what critics see as an ambiguous standard subject to misinterpretation and accidental rape. This anxiety is the best argument for the institution of a national standard because universalizing investigative procedures will reduce ambiguity in sexual communication. OCR could mandate affirmative consent policies in the same way that it enforced a universal adoption of the preponderance of the evidence standard.

Currently, the policy guidelines around consent “leave schools with wide latitude in developing and implementing grievance procedures. Having promulgated a flexible compliance standard, OCR naturally investigates the worst actors and rarely examines ineffective, but non-egregious, sexual harassment policies.”¹⁰⁵ A stricter standard on consent would give the federal government greater enforcement power, which is beneficial—despite federalist concerns—because the existing framework puts the burden on individual litigants to ensure schools resolve complaints properly,¹⁰⁶ and this dynamic contributes to a legal system that is only available to those with the means to afford it.

Additionally, a national standard is most likely to result in a paradigm shift regarding consent in general, outside of adjudicative and criminal proceedings. California SB 967 is a great example of how the federal

¹⁰⁴ *Id.*

¹⁰⁵ Walker, *supra* note 6, at 99–100.

¹⁰⁶ *Id.*

government can clarify Title IX requirements to better respond to the campus rape epidemic.

Finally, many have criticized California since the promulgation of SB 967 for seeking to legislate sexuality by mandating that sexual partners adopt a specific style of consent.¹⁰⁷ However, consent is both a legal and a sexual policy, given the fact that the lack of consent is what distinguishes sexual conduct from sexual assault. For these reasons, the law can help address sexual assault because it applies uniformly, has standards of review, and proscribes normative behavior to ensure that individuals know when they are breaking the law. Furthermore, sexual assault is a criminal act and should be addressed by the law to illustrate the seriousness of a sexual assault violation.

B. A Better Alternative to the Criminal Justice System

Although sexual assault is a criminal act, SB 967 does not advocate for a greater intervention from the criminal justice system. In fact, the statute prescribes standards for university misconduct proceedings that distinguish it from the court of law in an intentional and beneficial way. Though many people argue that a university is not the place to determine quasi-criminal liability, deferring to the criminal justice system only serves to promote a different kind of violence and injustice. Currently, the United States has the largest incarcerated population in the world, with over 2.2 million people in the nation's prisons, plus countless more who are still under community custody or reeling from the effects of a guilty verdict.¹⁰⁸ The United States' criminal justice system produced a 500 percent increase in its incarcerated population in the last 30 years, despite evidence that incarceration is not the

¹⁰⁷ Ungar-Sargon, *supra* note 2.

¹⁰⁸ *Incarceration*, THE SENTENCING PROJECT (Nov. 7, 2014), <http://www.sentencingproject.org/template/page.cfm?id=107>.

best means to achieve public safety.¹⁰⁹ California’s policy emphasizes communication and education to reduce contact with the criminal justice system while adequately responding to sexual assault violations with the seriousness those violations deserve.

Furthermore, college adjudicatory proceedings differ from criminal trials in another significant way. In a criminal trial, the state brings charges against the accused and defends its own interests; it does not advocate on behalf of the survivor. This procedure means that the needs of the survivor are secondary or ignored altogether. Schools are equipped to focus on the needs of the survivor, including academic accommodations, dorm and class transfers, and mental health support.¹¹⁰ Tantamount to all these benefits is the fact that schools are in a position to respond more quickly than our overburdened criminal justice system.¹¹¹ Attorney Nancy Chi Cantalupo, an expert on Title IX, spoke to this benefit:

For student survivors of sexual assault, Title IX creates rights that do not exist in criminal law. The statute recognizes that students struggling to heal from sexual trauma often have greater difficulty succeeding in school. Sexual trauma commonly causes serious health consequences that lead to drops in grades, withdrawal from classes, transfers to less desirable schools and even dropping out. These consequences deny victims equal educational opportunity. In contrast, criminal laws cannot protect students from gender inequality and provide crime victims with few rights. Prosecutors do not represent victims, so victims have no right to confidentiality

¹⁰⁹ *Id.*

¹¹⁰ *Why schools handle sexual violence reports*, KNOW YOUR IX, <http://knowyourix.org/why-schools-handle-sexual-violence-reports/> (last visited Jan. 26, 2015).

¹¹¹ *Id.*

or privacy. Prosecutors' wide discretion empowers them to shortchange victims' interests for their own priorities.¹¹²

The small percentage of men who rape, relative to the number of sexual assaults occurring on college campuses, lends further support to an affirmative consent standard. Critics of the affirmative consent standard worry that it will cause men to accidentally rape more women, but the standard will likely give more women the framework to understand their experiences as reportable,¹¹³ and theoretically allow those who are completing the majority of sexual assaults to be identified.

C. How "No Means No" Fails Sexual Participants and "Yes Means Yes" Does Not

Despite concerns regarding men's inability to get affirmative consent, current standards relying on the subjective readings of ambiguous indicators of consent are far more dangerous for all people engaging in partnered sex. These criteria contribute to difficult standards of consent for women and also do no favors for men, who are the presumed initiators of sex. Under these standards, men learn that the absence of "no" operates as "yes."

Critics of SB 967 worry that the shift from "No Means No" to "Yes Means Yes" will cause the young men of America to accidentally rape women and ruin their lives over a miscommunication during what was, to them, consensual sex. Laura Dunn, executive director of SurvJustice, describes how "No Means No" was a failed standard, causing more ambiguity than the affirmative consent standard:

We only talked about what consent was not, which is not a very helpful paradigm. From the victim's side, it says we have to resist. But even looking at this from the perspective of [the accused], the

¹¹² Nancy Chi Cantalupo, *Rape victims need Title IX: Opposing View*, USA TODAY (May 6, 2014), <http://www.usatoday.com/story/opinion/2014/05/06/sexual-assault-colleges-universities-title-ix-editorials-debates/8786319/>.

¹¹³ KARJANE ET AL., *supra* note 42, at 2.

traditional definition is telling them that it’s O.K. to do this until the victim says ‘no.’ That’s not really a helpful definition for them either because it can really be too late at that point. With affirmative consent, it’s simple. Consent is consent.¹¹⁴

Conversely, under the traditional “No Means No” policies, the investigator would ask the complainant when she said no to sex, and if she failed to say no, then the investigator could assume the accused had no ability to know that the complainant was not interested in continuing with sexual activity. Under the new policy, rapists do not receive the license to presume consent when they have no reason to believe they received it.

The bill makes clear that affirmative consent is not a requirement to engage in sexual activity, but a required lens through which allegations are evaluated.¹¹⁵ Nothing in the statute prevents two or more people from agreeing to practice a different style of consent, but rapists ought to be wary that their failure to practice any consent will be scrutinized by the university’s misconduct board, as opposed to past procedures that scrutinized the complainant’s failure to say no.

D. The Inherent Equity in Affirmative Policies

This move promotes equity by changing the standards of consent to recognize the power imbalances that have been practiced throughout the history of rape law in the United States. We know that past practices—where complainants are expected to voice non-consent through force and resistance—do not accurately reflect how most women respond to sexual assault.¹¹⁶ In the past, allegations of sexual assault could be set aside after

¹¹⁴ Jake New, *More college campuses swap ‘No means no’ for ‘Yes means yes,’* INSIDE HIGHER EDUC. (Oct. 17, 2014), <http://www.pbs.org/newshour/rundown/means-enough-college-campuses/>.

¹¹⁵ CAL. EDUC. CODE § 67386 (2015) (Institutions shall adopt “an affirmative consent standard in the determination of whether consent was given by both parties to sexual activity.”).

¹¹⁶ Ross, *supra* note 15, at 817.

the accused showed that the complainant did not say “no.”¹¹⁷ Those legal standards inevitably promote rape by giving complainants the responsibility to prevent their own assaults, as opposed to placing the responsibility of positive and enthusiastic consent on all parties.

Conversely, an affirmative consent standard asks all participants when they received consent, instead of asking the survivor how she resisted. Furthermore, the adoption of affirmative consent standards may encourage survivors to come forward because of the requirement that the accused show he sought and received consent. This change “straightforwardly eliminates a primary reason that sexual assault goes unreported: that the [survivor’s] credibility is questioned in the absence of visible cuts or bruises.”¹¹⁸ Overall, the new standard promotes equity by abandoning offensive assumptions about how people express and receive consent.

In Nicholas J. Little’s law review article promoting the affirmative consent standard’s adoption in criminal trials, he explains that the standard would only prevent silence from operating as consent. He writes,

Simply moving to an affirmative consent standard does not prevent the accused from claiming that he asked permission and the woman gave it to him. It is not, as some have suggested, a requirement that men carry permission slips that must be signed by the woman before sex. Instead, it holds that a man cannot take a woman’s silence as indicative of a willingness to engage in sexual orientation.¹¹⁹

In the case of university adjudicatory hearings, the university will still have to find that the complainant did not give consent, which includes verbal and non-verbal expressions of consent.

¹¹⁷ *Id.*

¹¹⁸ Dwyer, *supra* note 2.

¹¹⁹ Little, *supra* note 15 at 1347.

Arguments opposing affirmative consent standards fail because they rest on the criticism that privileging affirmative consent codifies an ambiguous standard that makes it difficult for men to know when they are raping someone and when they are having consensual and enthusiastic sex. This reasoning has two major flaws. First, it presumes that men are stupid and cannot tell the difference between rape and sex until their sex partner begins fighting for her life. This presumption is entirely offensive to all men. Second, the opposition to affirmative consent implies that a standard focusing on resistance and non-consent is less ambiguous. Because we know women respond to rape differently,¹²⁰ a standard that seeks out a positive or affirmative expression of sexual enthusiasm is inherently less ambiguous.

This clarity assists people engaging in sex understand what does and does not qualify as consent (e.g., “yes” means “yes,” while the absence of “yes” or another enthusiastic and positive expression of consent means “no”). Similarly, clearer lines will improve determinations of responsibility by preventing bias and gender stereotypes from predominating administrators’ decisions. The federal government’s promulgation of less ambiguous framework will help university administrators know when their investigations—or lack thereof—place them in violation of Title IX. A potential violation of Title IX, and the dependent suspension of federal funding, will likely prevent universities from engaging in silencing and inadequate investigatory behaviors and lead to more consistent and fair outcomes.

Lastly, the growing precision of Title IX’s application to athletic programs suggests it will be equally successful in remedying problems related to sexual violence. To enforce the athletic nature of Title IX, Congress passed the Javits Amendment, which required the Department of

¹²⁰ Ross, *supra* note 15.

Health, Education, and Welfare to prepare “proposed regulations implementing the provisions of [Title IX] relating to the prohibition of sex discrimination in federally assisted education programs which shall include . . . reasonable provisions considering the nature of particular sports.”¹²¹ Several guidance letters and the Civil Rights Restoration Act made it clear that “Title IX compliance is institution-wide, which means it is not focused on only a specific program or activity that receives federal financial assistance.”¹²² The success of Title IX in making intercollegiate athletics more equitable among sexes shows how clarification and scope of federal enforcement can create national and lasting changes to an institution.

VII. ADDRESSING DUE PROCESS AND STANDARDS OF PROOF CONCERNS

Reading the criticisms of affirmative consent policies can be frustrating because many of the writers misunderstand the policy to be one that legislates sexual behavior; however, many critics have been smart to recognize the potential due process concerns alive in this debate. This section will walk through the due process concerns and focus specifically on standards of proof the accused must meet.

A. A General Overview of Due Process in Education

Under the Due Process Clause of the Fourteenth Amendment, primary and secondary public school students have both a property and liberty interest in their education.¹²³ The Supreme Court held in *Goss v. Lopez* that

¹²¹ *An Act To Extend and Amend the Elementary and Secondary Education Act of 1965, and for Other Purposes*, PL 93-380 (HR 69), PL 93-380, 88 Stat. 484 (1974).

¹²² Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 344 (2012).

¹²³ *Goss v. Lopez*, 419 U.S. 565, 577 (1975). At a minimum, students facing disciplinary action, such as a suspension, must be given “some kind of notice and afforded some kind of hearing.” *Id.*

public school students from kindergarten through high school face the deprivation of a liberty interest during school disciplinary proceedings and hearings because those findings could damage their reputations among peers, teachers, and future employers.¹²⁴ However, it is not clear whether this holding translates to public universities and colleges, where students’ attendance is not mandatory, nor are they entitled to admission.

Some lower courts have extended *Goss*’ protections to students of public colleges and universities.¹²⁵ In *Gaspar v. Burton*, for example, a nursing student brought an action for wrongful dismissal following a determination of poor academic performance at a public vocational-technical college.¹²⁶ The Tenth Circuit of the United States Court of Appeals found that the plaintiff had a property interest in her education after paying a “specific, separate fee for enrollment and attendance.”¹²⁷ The court deferred to the university’s judgment because academic proceedings exercise a quasi-judicial function and, therefore, “their decisions are conclusive, providing that their action has been in good faith and not arbitrary.”¹²⁸ The court held further that schools only need to make the student aware prior to termination of that student’s “failure or impending failure to meet [the school’s academic] standards” to satisfy due process.¹²⁹ The holding in *Gaspar* suggests that universities have broad discretion to remove students

¹²⁴ *Id.* at 574–75.

¹²⁵ See *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) (“not questioned that a student’s interest in pursuing an education is included within the fourteenth amendment’s protection of liberty and property.”); *Hart v. Ferris State Coll.*, 577 F. Supp. 1379, 1380, 1382 (W.D. Mich. 1983) (“undisputed”); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 150 (5th Cir. 1961) (“We are confident that precedent as well as a most fundamental constitutional principle support our holding that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct.”).

¹²⁶ *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1975).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 851.

for subjective cause; however, the criminal nature of sexual assault allegations complicates this dynamic because of the stigma associated with a finding of responsibility.

B. Stigma and Fair Standards of Proof

Given the inherent stigma of criminal behavior, some courts mandate a higher standard of review for campus violations that are also criminal violations. For example, in *Smyth v. Lubbers*, students were suspended from their state university after a college official found marijuana in their dorm room.¹³⁰ The students argued that the search was unlawful, that it violated their Fourth Amendment rights of privacy, and that the disciplinary proceeding's "substantial evidence" standard of proof violated their due process rights.¹³¹ The district court held that, where a student is charged under college regulations with an act that is also criminal, "substantial evidence" is an inadequate standard of proof and that "any standard lower than a 'preponderance of the evidence' would have the effect of requiring the accused to prove his innocence . . . it would be fundamentally unfair to shift the burden of proof to the accused."¹³² The court encouraged universities to at least adopt a preponderance standard in future determinations because of the serious consequences of allegations that are also criminal.¹³³ This holding, in some measure, supports the contention that the preponderance of the evidence standard would not shift the burden of proof to students who are accused of sexual assault, as many critics prophesize.

The OCR mandated the preponderance standard through a "Dear Colleague Letter," so even schools that have not instituted an affirmative

¹³⁰ *Smyth v. Lubber*, 389 F. Supp. 777, 781 (W. D. Mich. 1975).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

consent policy are still required to make determinations under the standard.¹³⁴ In response to the letter’s policy, Lavinia M. Weizel applied the Supreme Court’s procedural due process balancing test from *Mathews v. Eldridge* to determine whether the preponderance standard jeopardizes the rights of accused students.¹³⁵ *Mathews* held that due process is a flexible standard to be construed based on the demands of a particular situation.¹³⁶

In *Mathews*, the majority opinion held that due process generally requires the consideration of three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹³⁷

As to the first factor, the property interest in one’s education and the liberty interest in one’s reputation are the private interests affected by university misconduct proceedings, specifically as they relate to future educational and employment opportunities.¹³⁸ For the second, no data on false findings of responsibility under a preponderance standard exists, but plenty of solutions exist to safeguard against this risk. These solutions include the right to counsel; the right to cross-examine the witnesses against the accused; the right to a public hearing; a list of the witnesses the university intends to call; and recusal of hearing committee members with

¹³⁴ ALI, *supra* note 49, at 10–11.

¹³⁵ Lavinia M. Weizel, *Note: The Process That Is Due: Preponderance of The Evidence as The Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L REV. 1613, 1625 (2012); *see also* *Mathews v. Eldridge*, 424 U.S. 319 (1967) (dealing with the wrongful deprivation of social security benefits).

¹³⁶ *Mathews*, 424 U.S. at 344.

¹³⁷ *Id.* at 355.

¹³⁸ *See Gaspar*, 513 F.2d at 850.

familiarity with the accused, the complainant, or the conduct involved.¹³⁹ Neither the preponderance of the evidence standard nor an affirmative consent standard deny the student any of the above protections, as they are still available for any university to adopt under Title IX's guidelines.

The third factor is the government's interest or the school's interest. Universities have a massive interest in creating disciplinary proceedings that are fair to both parties because of the high rate of sexual assault and the difficulty complainants and survivors have in gaining a resolution that ensures the equal educational atmosphere Title IX guarantees.¹⁴⁰ American rape law's influence on the public's willingness to disbelieve the complainant is the primary complication of the preponderance of the evidence standard, and is something that the affirmative consent standard will need to confront.

Will Creely, writing for FIRE, worries that the preponderance standard will afford the accused "the scant protection of our judiciary's least certain standard . . . [where] the burden of proof can be satisfied by little more than a hunch."¹⁴¹ Creely's premises his position on the idea that allegations of rape within college campuses are stigmatized, treated, and viewed with equal footing to those in criminal settings, but anecdotes from rape survivors suggest that this assumption is bore more out of hysteria than reality.¹⁴² Even before OCR mandated the preponderance standard, more than 80 percent of schools had already adopted it voluntarily.¹⁴³ The use of

¹³⁹ Weizel, *supra* note 135, at 1624.

¹⁴⁰ *See id.* at 1644.

¹⁴¹ Will Creely, *FIRE Letter to Office for Civil Rights Assistant Secretary for Civil Rights*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (FIRE) (May 4, 2011), <http://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011/>.

¹⁴² *See* Grigoriadis, *supra* note 69.

¹⁴³ Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 1000, n.331 (2005).

a preponderance standard, without more survivor-centered policies like an affirmative consent standard and bystander trainings, do little to protect survivors of sexual assault.

Joe Cohn, the legislative policy director of FIRE, argues that the adoption of affirmative consent standards will “undermine trust and the integrity and reliability of campus judiciaries.”¹⁴⁴ But stories like Emma Sulkowicz’s show that, before affirmative consent was even a national hot topic, students were unable to trust in their campus disciplinary hearings.¹⁴⁵

C. Should Survivors Have Due Process Rights?

The narrative that promotes disbelieving complainants in favor of protecting the accused’s future invalidates the survivors’ experiences, which often consists of a negative impact to their reputation and educational and future employment opportunities.¹⁴⁶ Despite consistent findings that the lack of institutional support following a sexual assault causes students to miss or fail classes, complainants have no due process rights in these proceedings.

A student challenged her university’s violation of her due process rights in *Therault v. University of Southern Maine*, where the faulty disciplinary proceeding against her alleged assailant caused harm to her education and emotional well-being.¹⁴⁷ The court found that her

property interest in a public education was not at issue in the Committee hearing and any alleged loss of educational opportunity was due to her subjective response to the outcome of the hearing,

¹⁴⁴ Natalie Kitroeff, *More States Tell College Students to Say Yes Before Sex*, BLOOMBERG BUS. WEEK (Nov. 24, 2014), <http://www.businessweek.com/articles/2014-11-24/new-jersey-colleges-may-make-students-explicitly-consent-to-sex>.

¹⁴⁵ Grigoriadis, *supra* note 69.

¹⁴⁶ *Id.*

¹⁴⁷ *Therault v. Univ. of S. Me.*, 353 F. Supp. 2d 1, 3 (D. Me. 2004).

the ‘attendant emotional anguish’ . . . was not imposed by any of the defendants, nor could it have been.¹⁴⁸

This case is used to support the conclusion that college misconduct hearings do not affect complainants’ liberty and property interests.

Theriault states that a charge concerning a complainant’s reputation following a disciplinary hearing would need to implicate an underlying interest protected by the Fourteenth Amendment, like the vested property interest discussed in *Gaspar*.¹⁴⁹ For students who experience sexual assault, the damage to their reputation does not give rise to a claim without a university action infringing on their interest in education, since the university does not pursue their expulsion or suspension following an allegation.

This nuance concerning action and inaction is primarily semantic. Although the adjudicatory board does not decide to push the complainant out of school, suspend her from classes, or subject her to public humiliation following its determination, those consequences follow directly from a culture that fails to hold men accountable for sexual assault on college campuses. A campus culture that sustains and perpetuates a victim-blaming mentality delivers an inadvertent response to the complainant following an adjudicatory hearing that forces many of the proposed sanctions and punishments available to the accused onto the complainant. This dynamic is concerning because the inadvertency of these sanctions allows campus administrators to view the treatment as self-imposed.

The standards used to decide these issues cannot be found in administrative and misconduct polices—they are the result of a culture that is willing to excuse rapists because of miscommunication, a culture of binge drinking, or the distractions of pretty girls. Though largely a cultural issue,

¹⁴⁸ *Id.* at 9.

¹⁴⁹ *Id.* at 9; *see also Gaspar*, 513 F.2d at 850.

these assumptions and stereotypes have been codified and perpetuated through American rape law for years and now inform college adjudicatory proceedings. Stories like Emma Sulkowicz’s support the need for national affirmative consent policy because university sexual misconduct policies do not just need a few revisions, they need a complete overhaul to adequately respond to the problem. Affirmative consent policies make this shift possible.

D. When to Share the Risk of Error

Given the harms to both the accused and the accuser’s reputation, educational opportunities, and success following sexual assault, the preponderance of the evidence standard is the most equitable standard of proof. The lower standard is further supported by the fact that complainants are not guaranteed any due process should they experience injury to either liberty or property interests related to their educations.

The Supreme Court of the United States, in *Addington v. Texas*, discussed the differences between the preponderance of the evidence and clear and convincing standards in a way that is helpful for settling this debate.¹⁵⁰ *Addington* decided the standard of proof necessary for the involuntary commitment of individuals with mental illness.¹⁵¹ The Court found that the individual’s liberty interest in the outcome of a civil commitment hearing was much greater than the state’s interest in providing care to its citizens who are unable to care for themselves and in protecting the community from those individuals with violent tendencies.¹⁵² The Court said that the “standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate

¹⁵⁰ *Addington v. Texas*, 441 U.S. 418, 423–27 (1979).

¹⁵¹ *Id.* at 423.

¹⁵² *Id.* at 426.

decision.”¹⁵³ The use of a preponderance of the evidence standard allows litigants to “share the risk of error in roughly equal fashion,” which is an inappropriate standard when deciding whether to commit an individual with mental illness against his will.¹⁵⁴

Universities further their interests in student safety and gender equality in educational access by using a preponderance of the evidence standard. Though, by its very nature, it could increase the risk of erroneous determinations, using the standard sends the message to the student body that the university is serious about supporting those who are sexually assaulted and holding accountable those who perpetuate those assaults. A policy using a “clear and convincing evidence” sets too high a standard based on the minimal risk to the accused’s freedom.

The clear and convincing evidence standard is used in involuntary civil commitment cases, permanent termination of parental rights proceedings, and denaturalization determinations.¹⁵⁵ In all of these determinations, individuals are at risk of losing their freedom, their ability to parent their children, or the right to remain in the United States, respectively. Surely those losses are not comparable to a punishment that requires an individual to take Biology 101 next semester so as to avoid the woman he raped. Because universities so rarely impose suspensions after misconduct hearings, it is more helpful to compare determinations that currently use the “clear and convincing evidence” standard with more commonly used punishments, such as no-contact orders and sexual assault bystander trainings.¹⁵⁶ Taking actually imposed punishments into account further

¹⁵³ *Id.* at 423.

¹⁵⁴ *Id.*

¹⁵⁵ See *Santosky v. Kramer*, 455 U.S. at 747–48; *Addington*, 441 U.S. at 431; *Schneiderman v. United States*, 320 U.S. 118, 125 (1943).

¹⁵⁶ Nick Anderson, *Colleges often reluctant to expel for sexual violence — with U-Va. a prime example*, WASH. POST (Dec. 15, 2014), <https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for->

illustrates how absurd the use of the clear and convincing evidence standard would be in college adjudicatory hearings.

While the preponderance of the evidence standard does not shift the burden of proof to the accused, many argue that coupling it with the affirmative consent standard will unfairly shift the burden of proof. However, in sexual assault proceedings, it is the accused who raises consent as a defense.¹⁵⁷ In criminal proceedings, the defense that the sex was consensual is the most difficult defense for prosecutors to defeat.¹⁵⁸ When a complaint is brought, the accused will raise consent as a defense and argue that he, in fact, had consensual sex with the complainant.

The affirmative consent standard merely asks the accused to describe when he received consent at each point of the sexual encounter. This way, the complainant's non-consent does not become the focus of the determination.¹⁵⁹ This definition of consent dissuades decision-making bodies from using the resistance and implied consent standards that have privileged rapists in the past. Additionally, it requires individuals to ensure an express agreement through words or actions before engaging in sexual contact, which raises the standard of sexual responsibility for all participants.¹⁶⁰

VIII. CONCLUSION

The topic of sexual assault, especially when the needs of perpetrators become tantamount to those of the survivors on college campuses, is a

sexual-violence--with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e_story.html; KARJANE ET AL., *supra* note 42, at 10–11.

¹⁵⁷ John H. Biebel, *I Thought She Said Yes: Sexual Assault in England and America*, 19 SUFFOLK TRANSNAT'L L. REV. 153, 175 (1995).

¹⁵⁸ M. Wood, *City Attorney Shares Reality of Prosecuting Sexual Assault Cases*, UNIV. OF VA. SCH. OF L., http://www.law.virginia.edu/html/news/2001_02/zug.htm (last visited Nov. 26, 2014).

¹⁵⁹ See Wicktom, *supra* note 33, at 425.

¹⁶⁰ *Id.*

depressing and tiresome topic. On the bright side, affirmative consent policies have really taken off since California passed SB 967. California already extended its “Yes Means Yes” policy to high school, and New York adopted an affirmative consent policy like California’s SB 967 in July.¹⁶¹

While defending the proposed bill in New Jersey, Democratic Senator Jim Beach said, “It will create a more supportive environment and get rid of the notion that victims must have verbally protested or physically resisted in order to have suffered from a sexual assault.”¹⁶² Beach’s statement highlights the standard’s potential cultural impact as the strongest reason for the language’s adoption, as opposed to making it easier to vilify rapists.

Despite the fact that legislators adopt affirmative consent policies in an effort to create safer spaces for women on college campuses, the conversation always turns to men, as if they have been forgotten. What people really forget is how central men’s autonomy has been to previous strategies to prevent rape. Consider rape whistles. They are not made for men to blow right before they consider raping someone; they are for women to use to notify people in the area that she is in danger. They are an example of how we have made it women’s responsibility to avoid rape. This approach does not work.

In looking at college campuses, many blame the excessive number of sexual assaults on binge drinking. Jaclyn Friedman, the creator of the “Yes Means Yes” mantra, points out that the “unregulated party scene” is only a risk for half the population; being a woman is a risk factor for rape.¹⁶³ The

¹⁶¹ THE ASSOCIATED PRESS, *California to require high schools to learn ‘yes means yes’ sex policy*, FOX NEWS (Oct. 2, 2015), <http://www.foxnews.com/us/2015/10/02/california-to-require-high-schools-to-learn-yes-means-yes-sex-policy/>.

¹⁶² Natalie Kitroeff, *More States Tell College Students to Say Yes Before Sex*, BLOOMBERG BUS. (Nov. 24, 2014), <http://www.bloomberg.com/bw/articles/2014-11-24/new-jersey-colleges-may-make-students-explicitly-consent-to-sex>.

¹⁶³ Jaclyn Friedman, *In Defense of Going Wild or: How I Stopped Worrying and Learned to Love Pleasure (and How You Can, Too)*, in YES MEANS YES: VISIONS OF SEXUAL

problem is not drinking too much, short skirts, or fraternities—the problem is sexual misconduct policies that make the complainant’s consent suspect.

Institutions of higher education, however, do not have stare decisis keeping them from responding quickly, appropriately, and intelligently to the sexual assault of women across the United States, and the federal government can accelerate the adoption of these policies through Title IX.

The argument that affirmative consent standards will turn good men into rapists should offend all people, but particularly those who identify as men. In defending men from offensive rape narratives, Jill Filipovic writes, “Men are rational human beings fully capable of listening to their partners and understanding that sex isn’t about pushing someone to do something they don’t want to do. Plenty of men are able to grasp the idea that sex should be entered into joyfully and enthusiastically by both partners.”¹⁶⁴ Affirmative consent is not scary. It is a necessary step our communities should welcome as we respond to years of allowing the absence of “no” to function as “yes.”

POWER AND A WORLD WITHOUT RAPE, 314 (Jaclyn Friedman & Jessica Valenti eds. 2008).

¹⁶⁴ Jill Filipovic, *Offensive Feminism: The Conservative Gender Norms that Perpetuate Rape Culture, and How Feminists Can Fight Back*, in YES MEANS YES: VISIONS OF SEXUAL POWER AND A WORLD WITHOUT RAPE, 20–21 (Jaclyn Friedman & Jessica Valenti eds. 2008).