A CONSTITUTIONAL DEFENSE OF "YES MEANS YES" – CALIFORNIA'S AFFIRMATIVE CONSENT STANDARD IN SEXUAL ASSAULT CASES ON COLLEGE CAMPUSES

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ABSTRACT

Kurt Cobain said, "Rape is one of the most terrible crimes on earth and it happens every few minutes. The problem with groups who deal with rape is that they try to educate women about how to defend themselves. What really needs to be done is teaching men not to rape. Go to the source and start there."[1] Now, over twenty years later later, sexual assault on college campuses is a predominant issue. Universities are rethinking how to define "consent" on their campuses. This Note seeks to make a constitutional argument in favor of California's "Yes Means Yes" law, which requires affirmative consent by both individuals prior to sexual activity. The Note begins by considering traditional definitions of "rape" and "consent." The next section explores the rise of rape culture on college campuses. The Note then addresses what the requirements are under the "Yes Means Yes" law. The next section looks the case law to determine the proper standard of proof for determining whether consent

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[1] *NME Meets Nirvana in 1991 – Archive Feature*, NME (Sept. 21, 2011), http://www.nme.com/blogs/nme-blogs/nme-meets-nirvana-in-1991-archive-feature.

was present. Finally, the Note suggests that the California law does not impermissibly shift the burden.

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I. INTRODUCTION

In September 2014, California fundamentally altered its college campus policies on sexual assault when Governor Jerry Brown signed into law the nation's first affirmative consent standard.[2] The "Student Safety: Sexual Assault" bill was labeled the "Yes Means Yes" law because the law requires an affirmative "yes" to constitute consent for students engaging in sexual acts (thus replacing the previous "No Means No" mantra, whereby the absence of a "no" was equivalent to the granting of a "yes").[3]

Prior to the passage of "Yes Means Yes" in 2014, California universities were ill-equipped to curb the increasing trend of sexual assaults occurring on campus. As feminist scholar Lois Pineau observed, "In a culture where incidences of sexual assault are verging on epidemic, [a rape law] which regards mere submission as consent fails to offer persons vulnerable to those assaults adequate protection."[4] Approximately one in five college-age women are victims of attempted or completed sexual assault during their college experience.[5] To compound the matter, only an estimated 20 percent of female student rape victims ages eighteen to twenty-four reported the crime to police.[6] As of August 2014, the U.S. Department of Education was investigating seventy-six colleges for mishandling sexual assault allegations.[7]

The affirmative consent standard provided for in the 2014 "Yes Means Yes" law is an adequate standard to apply to sexual assault cases on California college campuses. The statute, which is rooted in the

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[2] Bill Chappell, *California Enacts 'Yes Means Yes' Law, Defining Sexual Consent*, NAT'L PUB. RADIO (Sept. 29, 2014), http://www.npr.org/sections/thetwo-way/2014/09/29/352482932/california-enacts-yes-means-yes-law-defining-sexual-consent.

[3] *See id.*

[4] Lois Pineau, *Date Rape: A Feminist Analysis*, 8 L. & PHIL. 217, 219 (1989).

[5] Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study*, NAT'L CRIM. JUST. REFERENCE SERV. 94 (Dec. 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf. *See also* ROBIN WARSHAW, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE 2, 11 (Harper Perennial 1st ed., 1994) (an earlier study which found that the number of college-age female victims of rape to be one in four).

[6] Sofi Sinozich, Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013*, U.S. DEP'T JUST., BUREAU JUST. STATS. 1 (Dec. 2014), http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.

[7] Callie Buesman, *76 Colleges Now Being Investigated for Mishandling Rape*, JEZEBEL (Aug. 14, 2014, 2:10 PM), http://jezebel.com/76-colleges-now-being-investigated-for-mishandling-rape-1621646792.

concept of affirmative consent, is progressive because it redefines "consent" in the context of sex, moves away from a requirement of resistance by the victim, and allows for university investigations to move forward in the absence of circumstantial evidence.[8] The law reframes views of sexual interactions from the traditional view, where the participant who wishes to move forward with sexual intercourse must stop when detecting a "no," to the present form in which a participant may move forward only after receiving a "yes" from the other party.[9]

"Yes Means Yes" represents a progression in the way the state views sex and gender roles in sexual relations within the context of higher education.[10] The former "No Means No" standard placed the onus on the victim to establish that sexual activity was unwanted; there was no duty on the part of the alleged perpetrator to ask permission.[11] Now, "Yes Means Yes" requires that there be affirmative voluntary agreement by each participating individual.[12]

The purpose of this note is to demonstrate that California's affirmative consent law is constitutionally defensible. Part II provides the context for this Note, briefly describing traditional definitions of rape and California's rape laws. Part III discusses the rise of "rape culture" on college campuses over the last decade and past national and collegiate responses. Part IV discusses the substance of "Yes Means Yes," addressing the scope and application of the law. Part V argues that California's statute meets due process requirements under the Supreme Court's balancing test. Part VI argues that the statute withstands legal scrutiny because it does not impermissibly shift the burden of proof. Finally, Part VII concludes.

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[8] *See* Kelli Gulite, *Why All Colleges Should Adopt Affirmative Consent*, THOUGHTSONLIBERTY (Oct. 6, 2014), http://thoughtsonliberty.com/yes-means-yes.

[9] *See* Jake New, *More College Campuses Swap 'No Means No' for 'Yes Means Yes'*, PBS NEWS HOUR: THE RUNDOWN (Oct. 17, 2014, 1:04 PM), http://www.pbs.org/newshour/rundown/means-enough-college-campuses/.

[10] JACLYN FRIEDMAN & JESSICA VALENTI, YES MEANS YES! VISIONS OF FEMALE SEXUAL POWER AND A WORLD WITHOUT RAPE 3 (2008).

[11] Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 1011 (2008).

[12] Amanda Hess, *"No Means No" Isn't Enough. We Need Affirmative Consent Laws to Curb Sexual Assault.*, SLATE (June 16, 2014, 2:13 PM), http://www.slate.com/blogs/xx_factor/2014/06/16/affirmative_consent_california_weighs_a_bill_that_would_move_the_sexual.html.

II. WHAT IS RAPE AND WHEN IS "CONSENT" PRESENT

A discussion of what constitutes the crime of rape is fundamental to a critical analysis of "Yes Means Yes" and whether such a law is constitutionally defensible. Rape can be a difficult crime to prosecute because there is often little to no physical evidence.[13] In California, the element of "consent" is central to a determination of whether rape occurred because if consent is present, it is recognized as an absolute defense.[14] California's "Yes Means Yes" law garnered widespread attention when it came into effect because the law established that consent could no longer be assumed in the absence of a clear "yes," whether verbal or non-verbal.[15] Additionally, the law fixed the burden of proof at the "preponderance of the evidence" standard, which is lower than the "reasonable doubt" threshold required in criminal prosecutions of rape.[16]

Traditionally, "sexual assault" was synonymous with "rape."[17] This framework, however, has evolved into the understanding that sexual assault is an umbrella term that encompasses more offenses than rape, including "sexual battery."[18] Additionally, while rape can be perpetrated by either sex against the opposite or the same sex, historically a majority of victims are female and perpetrators are male.[19]

Currently, rape is broadly defined by three elements: (1) sexual penetration,[20] (2) without consent, and (3) by force or threat of force.[21]

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[13] John DeSantis, *When 'No' is Not Enough / Lack of Evidence can Make 'Date' Rape Difficult to Prove*, STAR NEWS (June 26, 2005), http://www.ncdsv.org/images/WhenNoisNotEnough tLackEvidence.pdf.

[14] *See, e.g.*, People v. Dominguez, 39 Cal. 4th 1141 (2006) (recognizing mistake of consent as a defense).

[15] Sarah Jacoby, *Will "Yes Means Yes" Consent Laws Work?*, REFINERY29 (Sep. 30, 2014, 4:10 PM), http://www.refinery29.com/2014/09/75371/california-consent-bill.

[16] 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/.

[17] Brian Palmer, *What's the Difference Between "Rape" and "Sexual Assault?"*, SLATE (Feb. 17, 2011, 3:59 PM), http://www.slate.com/articles/news_and_politics/explainer/2011/02/whats_the_difference_between_rape_and_sexual_assault.html.

[18] CAL. PENAL CODE § 243.4(a) (2003) (prohibiting the unwanted touching of another person's intimate parts).

[19] U.S. DEP'T OF JUSTICE, 2003 NATIONAL CRIME VICTIMIZATION SURVEY (2003) (reporting that 90 percent of reported rape victims in the United States in 2003 were female); *see also* U.S. DEP'T OF JUSTICE, BUREAU OF STATISTICS, 1997 SEX OFFENSES AND OFFENDERS STUDY (1997) (reporting that the average rapist is white, male, and approximately thirty-one years old).

[20] *Sex Offenses*, WEST'S ENCYCLOPEDIA AM. L., http://legal-dictionary.thefreedictionary.com/Sex+Offenses (last visited Mar. 22, 2015) (observing that in a majority of states today, sexual penetration can be however slight with objects other than the male genitalia).

Consent is generally defined as "[v]oluntarily yielding the will to the proposition of another; acquiescence or compliance therewith."[22] Under this definition, when the victim of an attack is faced with a choice between "resistance and assent," the victim must resist, otherwise "[p]assive yielding to that sexual advance would constitute permission to be acted upon."[23]

Different standards of consent require varying degrees of action on the part of the victim to rebut that consent, including the use of physical resistance and communicating to the aggressor using verbal or non-verbal cues.[24] In the foregoing standards, consent is presumed until the alleged victim makes an overt action. However, the California rule shifts the responsibility of gaining consent to the alleged perpetrator because the opposing party must explicitly communicate permission.

The California Penal Code defines rape as an act of sexual intercourse that occurs "against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another."[25] In California, there is no resistance requirement on behalf of the victim.[26] Rape also occurs when one of the participants is not capable of consent due to an "intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused."[27]

III. RISE OF RAPE CULTURE ON COLLEGE CAMPUSES

Pressure has mounted on colleges, internally and externally, as recent sexual assault claims suggest that these incidents are part of a more endemic problem. One complaint against colleges pertains to "rape culture," which is defined as a set of values and beliefs that provide an

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[21] *See* Klein, *supra* note 11, at 984 (citing MARGARET GORDON & STEPHANIE RIGER, THE FEMALE FEAR: THE SOCIAL COST OF RAPE 2 (1991)); *see also* Dan Subotnik, *"Hands off": Sex, Feminism, Affirmative Consent, and the Law of Foreplay*, 16 S. CAL. REV. L. & SOC. JUST. 249, 268 (2007) (noting that a few states, such as Washington, Michigan, and New Jersey, have abolished the force requirement).

[22] BLACK'S LAW DICTIONARY 323 (8th ed. 2004).

[23] *Id.*

[24] Meredith J. Duncan, *Sex Crimes and Sexual Miscues: The Need for a Clearer Line Between Forcible Rape and Nonconsensual Sex*, 42 WAKE FOREST L. REV. 1087, 1099 (2007).

[25] CAL. PENAL CODE § 261(a)(2) (2013).

[26] *See id.*

[27] CAL. PENAL CODE § 261(a)(4) (2013).

environment that is conducive to rape.[28] Rape culture creates an atmosphere where student victims, typically females, are left in vulnerable positions and have little recourse to obtain justice.[29] Analysis of rape culture tends to focus on college fraternities and sororities, and the investigative and disciplinary actions taken by school officials regarding rape accusations.[30]

Recognizing that there is a rape culture that exists underneath the surface of many college campuses is critical to understanding the context of how "Yes Means Yes" came into existence. The law was designed to meet the growing complaints against universities regarding rape, sexual assault, and dating violence.[31] One commentator explained:

> The law didn't come out of nowhere. It emerged as a response to a status quo that has proved to be an all-too-powerful tool for sexual predators, because it enables them to claim to see consent in everything except continuous, unequivocal rejection. That status quo puts women in the position of having to constantly police their own behavior to make sure that they are not giving the appearance of passive consent. . . . That burden isn't just annoying for women. It's dangerous.[32]

A. COLLEGES ACROSS THE COUNTRY UNDER THE MICROSCOPE

Approximately one in five college-age women are victims of attempted or completed sexual assault during their college experience.[33] That is an impactful figure given that in Fall of 2014, there were approximately twelve million female students attended colleges across the country.[34] Incidents in which the victims know the attacker, otherwise

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[28] A. Ayres Boswell & Joan Z. Spade, *Fraternities and Collegiate Rape Culture*, 10 GENDER & SOC'Y 133, 133–34 (1996).

[29] Cynthia M. Allen, *Confronting Campus 'Rape Culture'*, STAR-TELEGRAM (Dec. 10, 2014, 5:39 PM), http://www.star-telegram.com/opinion/opn-columns-blogs/cynthia-m-allen/article4412489.html.

[30] *See* Boswell & Spade, *supra* note 28, at 134.

[31] *California Adopts Historic 'Yes Means Yes' Rule on Sexual Consent*, GUARDIAN (Sept. 29, 2014), http://www.theguardian.com/world/2014/sep/29/yes-means-yes-california-sexual-consent.

[32] Amanda Taub, *"Yes Means Yes" is About Much More than Rape*, VOX (Oct. 13, 2014, 3:00 PM), http://www.vox.com/2014/10/10/6952227/rape-culture-is-a-tax-on-women-CA-yes-means-yes-dierks-katz.

[33] Krebs et al., *supra* note 5.

[34] *Back to School Statistics*, NAT'L CENTER FOR EDUC. STAT., http://nces.ed.gov/fastfacts/display.asp?id=372.

known as acquaintance rape,[35] are difficult to prove on college campuses because they may not involve acts of physical violence or force. Further, college-age students may consider themselves responsible for the attack, so the victim may be even less likely to report the incident.[36] Although the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act") requires universities to disclose crime on and around their campuses, one in three surveyed colleges in 2013 did not meet the minimum reporting standards for sexual assault.[37]

Several notable cases have brought national attention to the rape culture that exists at various universities. At Columbia University, a female student carried a mattress around campus to protest the university's handling of her allegation that a classmate raped her.[38] The student's protest helped bring attention to the twenty-seven complaints pending against Columbia for the mishandling of sexual assault cases.[39] In February 2015, two former Vanderbilt football players were convicted of multiple counts of sexual battery and aggravated rape.[40] In October 2014, twenty-eight law professors at Harvard condemned the university's sexual assault policies for being "overwhelmingly stacked against the accused" and "starkly one-sided."[41]

B. PAST REFORM EFFORTS TO REDUCE SEXUAL ASSAULTS ON COLLEGE CAMPUSES

In 2014, the federal government established a Task Force to Protect Students from Sexual Assault and created a website for schools to

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[35] *Acquaintance Rape*, MERRIAM-WEBSTER MED. DICTIONARY (2015), http://www.merriam-webster.com/dictionary/acquaintance%20rape.

[36] Nicholas J. Little, *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, 1334 (May 2005).

[37] Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2008).

[38] Tyler Kingkade, *Columbia University Rape Victim Says She Was Forced Out of School Twice*, HUFFINGTON POST (Sep. 18, 2014), http://www.huffingtonpost.com/2014/09/18/columbia-university-complaint-rape-victims_n_5836944.html.

[39] *Id.*

[40] Jessica Luther, *A Look at Complex Vanderbilt Rape Case that Left a Community Reeling*, SPORTS ILLUSTRATED (Feb. 10, 2015), http://www.si.com/college-football/2015/02/09/vanderbilt-rape-case-brandon-vandenburg-cory-batey.

[41] Tovia Smith, *Harvard Law Professors Say New Sexual Assault Policy Is One-Sided*, NAT'L PUB. RADIO (Oct. 15, 2014, 6:44 PM), http://www.npr.org/2014/10/15/356424999/harvard-law-professors-say-new-sexual-assault-policy-is-one-sided.

discover methods to handle sexual assault cases.[42] The White House focused predominantly on preventative steps colleges can take before such incidents occur.[43] Meanwhile, colleges have implemented their own varying sexual assault policies. Typically, universities have substantial leeway to discipline students. Depending on the nature of the crime, universities may handle crimes within the campus's own judicial system, refer the crime to local police for investigation and prosecution, or both.[44]

Universities' judicial systems are an important tool to combat sexual assault because they may take action in scenarios where local prosecutors would likely be reluctant to press any charges.[45] In 1991, Antioch College was the first university to introduce a sexual offense policy rooted in affirmative consent in response to two "date rape" incidents, and it was essentially mocked across the country.[46] Antioch's policy recognized that the only form of acceptable consent is verbal consent to each discrete sexual act.[47] Critics of the policy considered it to be an untenable standard devoid of legal justification.[48]

The question is: where do these past efforts and the lessons learned from them leave us now? In the opinion of one academic:

> Our strategy for dealing with rape on college campuses has failed abysmally. Female students are raped in appalling numbers, and their rapists almost invariably go free . . . . [Colleges] are simultaneously failing to punish rapists adequately and branding students sexual assailants when no sexual assault occurred. We have to transform our approach to campus rape to get at the root problems, which the new college processes ignore and arguably even exacerbate.[49]

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[42] Jessica Valenti, *The White House Wants to End Campus Rape. Great. Now What About Colleges?*, GUARDIAN (Apr. 30, 2014), http://www.theguardian.com/commentisfree/2014/apr/30/white-house-campus-rape-colleges-obama-biden.

[43] *Id.*

[44] Justin Pope, *Sexual Assault & Title IX*, EDUC. WRITERS ASS'N (Feb. 2014), http://www.ewa.org/sexual-assault-title-ix.

[45] *See id.*

[46] *See* Little, *supra* note 36, at 1348.

[47] *Id.*

[48] Tara Culp-Ressler, *The First College to Use Affirmative Consent Was a Laughingstock. Now, The Tide Is Turning.*, THINKPROGRESS (Oct. 30, 2014, 2:41 PM), http://thinkprogress.org/health/2014/10/30/3586548/antioch-affirmative-consent/ (noting that even though the college was mocked in the press, the university held firm to its campus community standard).

[49] *See* Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html.

IV. "YES MEANS YES"—A NECESSARY SHIFT IN SEXUAL ASSAULT LAW

A. THE REQUIREMENTS UNDER CALIFORNIA'S "YES MEANS YES" LAW

California's affirmative consent law, effective January 1, 2016, states that in order to receive state funds for student financial assistance, the governing boards of postsecondary education institutions in the state must "adopt policies concerning sexual assault, domestic violence, dating violence, and stalking" that include certain elements, including an "affirmative consent standard in the determination of whether consent was given by a complainant."[50] The bill applies to students who are victimized "on the grounds or facilities of their institutions," and the standard of proof in such cases is set at a "preponderance of the evidence."[51]

Under an affirmative consent model, both parties must have consented in advance of the sexual act for it to be considered consensual.[52] Prior to engaging in sexual activity, each party is required to give "affirmative consent," which is posed by three requirements in the California law: there must be an "(1) affirmative, (2) conscious, and (3) voluntary agreement."[53] Affirmative consent must be "ongoing" and can be "revoked at any time" during sex.[54]

Affirmative consent is essentially "a requirement that the instigator of a sexual interaction ask the other party if he or she wishes to take part."[55] Although the law does not explicitly state that consent can be verbal or non-verbal, the law likely accounts for non-verbal communication. As stated by one commentator, "We do communicate in non-verbal ways, and once individuals have established a relationship it makes sense to include these forms of communication in any standard of affirmative consent."[56]

The law places the responsibility on colleges to provide "comprehensive consent education" so that students can abide by the new consent standard.[57] California's affirmative consent law outlines several

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[50] CAL. EDUC. CODE § 67386 (2015).

[51] *Id.*

[52] *See* Little, *supra* note 36, at 1345.

[53] *See* EDUC. § 67386.

[54] *Id.*

[55] *See* Little, *supra* note 36, at 1348.

[56] *Id.* at 1349 (citing Lois Pineau, *A Response to My Critics*, reprinted in DATE RAPE: FEMINISM, PHILOSOPHY,AND THE LAW 65–67 (Leslie Francis ed. 1996)).

[57] Jessica Valenti, *Beyond 'No Means No': the Future of Campus Rape Prevention is 'Yes*

circumstances where affirmative consent is expressly lacking.[58] "Yes Means Yes" represents one of the largest paradigm shifts to tackling rape on college campuses.[59] The affirmative consent standard moves toward a model of "communicative sexuality" based on the contention that it "is not reasonable for women to consent to what they have little chance of enjoying."[60] The new standard promotes "rational behavior in women by encouraging them to indicate directly their willingness to participate in sexual intercourse."[61] "Yes Means Yes" attempts to address pitfalls in the "No Mean No" model because it accounts for how different individuals may react to sexual assaults, recognizing that some victims may fight, resort to flight, or become paralyzed with fear and be unable to express lack of consent.[62] The affirmative consent law implicitly assigns more value to sexual autonomy and a victim's rights.[63] However, the law still does not require any words or conduct on behalf of the defendant.[64]

B. THE LIMITS OF "YES MEANS YES"

California's affirmative-consent law is limited in scope. "Yes Means Yes" is not a criminal law in California, thus students who are subjected to this standard in university judicial proceedings cannot receive a criminal conviction or a jail sentence.[65] The wrong is assessed against the victim, and the judgment does not reflect the views of society as a whole.[66] An affirmative consent standard does not alter an accused's ability to claim

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Means Yes', GUARDIAN (Sep. 2, 2014), http://www.theguardian.com/commentisfree/2014/sep/02/-sp-campus-rape-prevention-yes-means-yes.

[58] The following are not valid excuses: "(A) The accused's belief in affirmative consent arose from the intoxication or recklessness of the accused. (B) The accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant affirmatively consented." CAL. EDUC. CODE § 67386 (2015).

[59] *See* Valenti, *supra* note 57.

[60] Pineau, *supra* note 4, at 239.

[61] *See* Little, *supra* note 36, at 1350.

[62] Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1405 (2005) (arguing in the broader context that the problem with "No" and "Yes" models is that they rely on man's ability to interpret a woman's body language).

[63] *Id.* at 1409.

[64] *Id.* at 1414.

[65] Mike Cernovich, *Yes Means Yes Is Now the Law in California: Now What?*, DANGER & PLAY (Aug. 29, 2014), http://www.dangerandplay.com/2014/08/29/californias-new-sexual-assault-bill-means-men/ (explaining that "Yes Means Yes" requires colleges and universities to redefine rape under the college's internal disciplinary rules, which represents a change in the civil provision of the Education Code).

[66] Duncan, *supra* note 24, at 1110.

that the other party gave permission, and there is not an implicit requirement to "carry permission slips."[67] To raise an affirmative defense under prior law, an accused could simply state that there was no indication, either verbal or non-verbal, to show the other individual did not want sex. Because silence can no longer be interpreted as a "yes," it now appears that the accused must provide some positive proof that there was willingness on the part of the victim.[68]

"Yes Means Yes" does not imply that "those who are dating should bring a condom and a consent form with them,"[69] nor does it suggest that the equivalent of Miranda warnings be given prior to sexual intercourse.[70] The key is that the law no longer insists on requiring "proof of the woman's opposition" and no longer requires the purported victim to "take actions clear enough to overcome the law's presumption that she is always interested in sex—at any time, in any place, with any person."[71]

From a practical standpoint, "Yes Means Yes" will not immediately put an end to all rapes occurring on college campuses, nor does it imply that all rape accusations will result in convictions.[72] The law does not take the place of California's Penal Code for criminal conduct, nor does it take the place of education programs that occur on campuses. However, the law clearly asserts the state's interest in protecting the safety of its young students. While the law can redefine definitions of rape, it cannot change societal values overnight.[73] However, in the past, similar legal proclamations have drastically changed the social landscape.[74]

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[67] *See* Little, *supra* note 36, at 1347.

[68] *Id.* (not examining the CA law, but examining how affirmative consent standards such as that being used in CA would function in practice).

[69] *See, e.g.*, Peggy O'Crowley, *Date Rape Redefined: A New Jersey Supreme Court Ruling Will Change the Way Juries and Couples Look at Sexual Consent*, RECORD, Aug. 9, 1992, at A17.

[70] *Id.*

[71] Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, ATLANTIC, October 1998, at 272.

[72] *See* Little, *supra* note 36, at 1345.

[73] *See* Craig T. Byrnes, *Putting the Focus Where It Belongs: Mens Rea, Consent, Force and the Crime of Rape*, 10 YALE J.L. & FEMINISM 2777, 2778 (1998) (explaining that rape law reform efforts can only do so much and that it is a mental exercise where one hopes action follows).

[74] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that racial discrimination in public education was unconstitutional).

V. THE PREPONDERANCE OF THE EVIDENCE STANDARD REQUIRED UNDER "YES MEANS YES" IS A TENABLE LEGAL STANDARD IN COLLEGE SEXUAL ASSAULT PROCEEDINGS

The preponderance of the evidence standard required under California's "Yes Means Yes" law is a sufficient standard of proof to protect an accused student's due process rights under the Constitution. Section A of this section will explain what constitutes a due process violation and how students in a school environment are entitled to procedural due process rights. Section B will identify and apply the Supreme Court's three-factor balancing test to demonstrate that the preponderance of the evidence standard is an adequate safeguard to protect a student's procedural due process claims. Central to this argument will be an evaluation and critique of the standards of review available to courts when considering whether there has been a violation of due process.

A. DUE PROCESS RIGHTS AT STAKE IN SEXUAL ASSAULT PROCEEDINGS

The Due Process Clause, as applicable to the states under the Fourteenth Amendment, acts as a safeguard from arbitrary denial of key ideals on which this country was founded.[75] Due process rights are triggered when the government denies an individual's right to "life, liberty, or property."[76] When addressing due process violations, the Supreme Court has opined, "[D]ue process . . . is not a technical conception with a fixed content unrelated to time, place, and circumstances . . . ."[77] To determine whether a student's due process rights are violated requires a determination of whether due process applies in the first place, and, if due process does apply, how much procedural protection is due.[78]

When considering whether due process applies to a college student seeking a fair disciplinary proceeding, two types of claims must be distinguished: substantive due process claims[79] and procedural due process

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[75] *See, e.g.*, Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572 (1972).

[76] U.S. CONST. amend. XIV, § 2.

[77] Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

[78] Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (recognizing that not all situations that require procedural due process require the same kind of procedures).

[79] Substantive due process involves those liberty interests that are not explicitly mentioned in the Constitution, but that are such fundamental concepts that they can be derived from the text, such as the right to privacy or the right to travel. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 558 (4th ed. 2011).

claims.[80] The Supreme Court has not extended substantive due process rights to include the right to education.[81] However, procedural due process does apply to the realm of education.[82] Procedural due process as a fundamental right is somewhat narrow; it simply requires that the judicial process affecting an individual's recognized rights occur in a "meaningful time and in a meaningful manner."[83] At the outset, procedural due process ensures that before a person's "life, liberty, or property" is deliberately denied, he or she must be given notice[84] and the opportunity to be heard.[85]

The Supreme Court has recognized that students have procedural due process rights. In *Goss v. Lopez*, the Court held that a student had a valid procedural due process claim because education could be characterized as a property and liberty interest.[86] If the state confers a recognized property interest, then the state must protect that right.[87] In *Goss*, the property interest was created because the student was required to attend school, and when the student was suspended without proper adjudication, the student's property and liberty rights were violated.[88] The Court found a liberty interest on the grounds that the student's reputation could be damaged and that his future educational opportunities could also be limited.[89]

Federal courts have extended the Court's reasoning in *Goss* to include due process rights in the context of university disciplinary hearings.[90] As the Court held in *Goss*, cases involving expulsions may require more formal proceedings.[91] Potential procedural due process claims for a student facing a disciplinary hearing under "Yes Means Yes" are likely rooted in concern over a meaningful hearing and access to an

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[80] *Id.* at 557.

[81] *But see* Goss v. Lopez, 419 U.S. 565 (1975) (recognizing that a student is legally entitled to a public education as a property interest).

[82] CHEMERINSKY, *supra* note 79, at 558.

[83] Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

[84] *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318–20 (1950).

[85] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (requiring that a hearing be held before welfare benefits could be terminated).

[86] *Goss*, 419 U.S. at 576.

[87] Arnett v. Kennedy, 416 U.S. 134, 167 (1974) ("[The state] may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards").

[88] *Goss*, 419 U.S. at 574–75.

[89] *Id.*

[90] *See* Gorman v. Univ. of R.I., 837 F.2d 7, 9 (1st Cir. 1988) (holding that students facing expulsion from a public school are entitled to due process protection).

[91] *Goss*, 419 U.S. at 584.

impartial decision maker.[92] This concern arises if an accused student claims that the standard of proof inadequately protects his right to a fair process in connection with a school hearing.[93] The key questions that must be answered when considering the constitutionality of a preponderance of the evidence standard are: "What *is* the required standard of proof and who has that standard of proof?"[94]

B. THE BALANCING TEST REQUIRED UNDER *MATHEWS V. ELDRIDGE*

The balancing test adopted by the Supreme Court in *Mathews v. Eldridge* can address due process concerns raised by the preponderance of the evidence standard used by "Yes Means Yes."[95] In *Mathews*, the Court adopted a three-part balancing test: (1) the importance of the individual interest at stake; (2) "the risk of an erroneous deprivation of the [student's] interest [because of] the procedures used, and the probable value . . . of additional procedural safeguards; and . . . (3) the government's interest."[96] When applying this multi-factor test to sexual assault hearings on college campuses, only the interests of the individual accused are weighed against the interests of the college.[97]

The Court's rationale in adopting the three-part balancing test is that "due process is flexible and calls for such procedural protection as the particular situation demands."[98] The Court implicitly recognized that the competing interests must be weighed against each other in the unique context in which they occur.[99] A three-factor balancing test allows for a great deal of judicial discretion, and as the Court remarked of the *Mathews* test, "[t]he balance is simply an ad hoc weighing which depends to a great extent upon how the Court subjectively views that underlying interests at stake."[100] Courts have been willing to apply the *Mathews* test in the context of college disciplinary hearings as a workable standard that proves

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[92] *Id.*

[93] CHEMERINSKY, *supra* note 79, at 592.

[94] *Id.* at 593.

[95] Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (holding that no post-termination hearing was required before the government terminated an individual's Social Security disability benefits).

[96] *Id.* at 335.

[97] *See* Gomes v. Univ. Me. Sys., 365 F. Supp. 2d 6, 15–16 (D. Me. 2005) (establishing that the proper balance must be struck between the due process rights of the students and the interests of the university).

[98] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[99] CHEMERINSKY, *supra* note 79, at 619.

[100] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 562 (1985) (Rehnquist, J., dissenting).

accommodating for the interests of the students and the interests of the university.[101] Ultimately, the underlying question that must be addressed in applying the *Mathews* test to "Yes Means Yes" is whether the standard of proof represents necessary deference to school authorities or whether such a standard lacks adequate protections and unnecessarily infringes upon a student's rights.[102]

1. First Prong of the *Mathews* Test

The first factor of the *Mathews* test focuses on the accused student's private interest that is affected by the California law.[103] This factor considers the "seriousness of the charge and the potential consequences" for the student.[104] The more important the interest is to the student, the higher procedural protections will be required of the state.[105] The liberty interests at stake include the student's desire to protect his or her reputation, preserve good standing with the university, and ensure that future educational and business opportunities are available.[106] However, the Court has observed that damage to one's reputation by itself is not enough to merit a liberty deprivation claim, thus there must be more at stake for the accused student to put forth a valid procedural due process claim.[107]

A student also has a recognized property claim in the right to continue his education.[108] California has provided that right by making colleges available to the public, and the student will have likely invested heavily in the education as well.[109] An important distinction, however, is that there is no mandatory attendance requirement for higher education under state law. An accused student has more at stake than his standing

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[101] *See* Osteen v. Henly, 13 F.3d 221 (7th Cir. 1993) (applying the *Mathews* test to determine that a college student's due process rights were not violated after the student was expelled due to a college disciplinary hearing).

[102] CHEMERINSKY, *supra* note 79, at 605.

[103] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[104] Gomes v. Univ. Me. Sys., 365 F. Supp. 2d 6, 16 (D. Me. 2005).

[105] CHEMERINSKY, *supra* note 79, at 594.

[106] *Gomes*, 365 F. Supp. 2d at 16.

[107] Paul v. Davis, 424 U.S. 693, 708–09 (1976) (observing that defamation alone could not constitute a liberty deprivation).

[108] Goss v. Lopez, 419 U.S. 565, 574–75 (1975) (finding that because Ohio created the public school system and required children to attend, thus the state created the property interest for students).

[109] *See* U. CAL., http://universityofcalifornia.edu/ (last visited Mar. 11, 2016).

within the academic community; a sexual assault conviction risks the possibility of attending graduate school and securing a job in the future.[110] As the Court observed in past cases where a student faces sexual assault charges, "[t]he potential consequences reach beyond their immediate standing at the University."[111] The first factor suggests that a higher burden of proof than the preponderance of the evidence is needed when considering the significant long-term liberty and property interests at stake in continuing one's higher education.

2. Second Prong of the *Mathews* Test

The second factor of the *Mathews* Test considers two components: (1) "the risk of an erroneous deprivation of such interest through the procedures used, and (2) the probable value, if any, of additional or substitute procedural safeguards."[112] Alternatively stated: Does the preponderance of the evidence standard impermissibly risk a student's rights, and are there other procedural safeguards the school could enact that mitigate the risk of false convictions? The second factor considers whether a higher standard of proof than a preponderance of the evidence could lead to fewer erroneous findings.[113] This is where the crux of the debate occurs. If both the student and the university have significant competing interests, then the inquiry must focus on the "fairness and reliability" of a school's procedures.[114] As applied to "Yes Means Yes," "procedures" includes the standard of proof required when proceeding with sexual assault cases.

The Supreme Court defined a "standard of proof" as "the degree of certainty by which the factfinder was required to be persuaded . . . to find in favor of the party bearing the burden of persuasion."[115] Theoretically, standards of proof reflect society's value judgments placed on certain rights,[116] while from a practical perspective, standards of proof allow the

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[110] Lavinia M. Weizel, *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, 1646 (2012).

[111] *Gomes*, 365 F. Supp. 2d at 16.

[112] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[113] *See* Weizel, *supra* note 110, at 1648 (observing that a student's due process rights should not be erroneously deprived).

[114] *Mathews,* 424 U.S. at 343.

[115] Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 100 n.4 (2011).

[116] Addington v. Texas, 441 U.S. 418, 423–24 (1997) (illustrating that there are heightened burdens of proof in criminal trials compared with civil trials because of the degree of concern

fact-finder to make decisions of fact based on varying degrees of certainty.[117] Thus, the focal point of the following analysis will center on the different standards of proof and why the "preponderance of the evidence" standard is most fitting for sexual assault hearings on college campuses.

The analysis within the second prong will proceed in five parts. First, the analysis will discuss how "Yes Means Yes" has not relegated sexual assault crimes to strict liability crimes. Second, the note will confront those critics of "Yes Means Yes" that call for an untenable "beyond a reasonable doubt" standard. Third, the discussion will address why the "clear and convincing" standard is inappropriate to safeguard procedural due process rights. Finally, the "preponderance of the evidence" standard will be applied to show that it is the most appropriate standard of proof because it strikes the proper balance between truth-seeking and fairness.

i. "Yes Means Yes" Does Not Render a Sexual Assault Crime the Functional Equivalent of a Strict Liability Crime

An affirmative consent standard does not morph a sexual assault crime on a college campus into a strict liability crime.[118] Strict liability crimes do not require the prosecution to prove that the defendant had *any* specific criminal mental state; the defendant is automatically guilty by performing the act.[119] The underlying rationale of strict liability offenses is that social order or public welfare interests of the law outweighs the punishment of the wrongdoer.[120] There is a misplaced concern that under the "Yes Means Yes" standard, an individual accused of rape will be found guilty by the very act. However the law does not remove the state of mind requirement.[121] The fear is that it will be too easy for a school disciplinary committee to convict a student without proving the necessary culpable state of mind.[122] But such a viewpoint presumes that a reasonable

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society places on the outcome).

[117] *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (considering the social costs of erroneous outcomes based on vague standards of proof, though imprecise, the standards convey to the fact-finder the degree of confidence he is expected to have in his decision).

[118] *See* Little, *supra* note 36, at 1349.

[119] *See* MODEL PENAL CODE § 2.05 (2015).

[120] *See* RESTATEMENT (SECOND) OF TORTS § 509 cmt. d (1977).

[121] CAL. EDUC. CODE § 67386 (2015).

[122] *See* Byrnes, *supra* note 73, at 291 (observing that if the focus is put solely on the woman's words, then consent is relegated to a strict liability crime because the proper focus is not being place on the mens rea element; the proof must be more persuasive than an absence of a "no" so

student is only capable of understanding a "no" means to stop; not also that a "yes" grants permission.[123]

California's sexual assault law requires a conscious, volitional decision to proceed with the sexual act; however, consent cannot be inferred when there is silence.[124] "Yes Means Yes" represents a shift in the definition of consent, not the removal of the *mens rea* requirement. The key is that the fact-finder is now required to make different inferences based on the absence of direct or circumstantial evidence. If the accused can show that the other individual freely gave consent prior to sexual activity, then the defense will have successfully prevented the investigating arm of the school from carrying its burden of proof.[125] Additionally, even if the accused does not explicitly seek permission, that does not lead to an automatic finding that there was lack of consent because the prosecution must still "show that consent was not expressed in other ways—all that alters is that silence is no longer presumed to be consent."[126] An accused student's guilty mind remains a required element that is distinguished by the presence or lack of a verbal or non-verbal "yes."[127]

ii. The "Beyond a Reasonable Doubt" Standard Does Not Strike the Proper Balance

Commentators who argue that the preponderance of the evidence standard is insufficient to protect a student's rights contend that a campus sexual assault hearing is more analogous to a criminal court proceeding than a civil proceeding.[128] Criminal trials require the highest standard of proof in that every element must be proved beyond a reasonable doubt.[129] For the defendant to prevail he must negate an element of the offense—he must raise a reasonable doubt as to whether it in fact occurred or not.[130] The standard is appropriate and necessary because the defendant risks

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that no reasonable person can misconstrue the lack of consent).

[123] *Id.* at 292–93.

[124] EDUC. § 67386.

[125] *See* Little, *supra* note 36, at 1349.

[126] *Id.*

[127] Duncan, *supra* note 24, at 1112.

[128] Eugene Volokh, *"Revisiting the 'Preponderance' Debate"*, VOLOKH CONSPIRACY (June 11, 2013, 11:55 PM), http://volokh.com/2013/06/11/revisiting-the-preponderance-debate/ [hereinafter Volokh, *The Preponderance Debate*].

[129] *In re* Winship, 397 U.S. 358, 364 (1970).

[130] *Id.*

losing fundamental liberties while being publicly condemned.[131]

Federal courts have repeatedly emphasized that discipline hearings at schools do not need to replicate criminal proceedings.[132] The Supreme Court has hesitated to apply a reasonable doubt standard "too broadly or casually in noncriminal cases."[133] Because there is no potential for jail time or a criminal record resulting from a school disciplinary hearing under "Yes Means Yes," a reasonable doubt standard is inappropriate.

While few people would argue that it is permissible to send someone to jail under a preponderance of the evidence standard, the better analogy for a college student punished for a sexual assault violation under "Yes Means Yes" is to liken the situation to one where someone is fired from a job in the private sector. A job has been earned, invested in, income and reputation are tied to one's job performance, and the loss of a job carries with it significant impacts. While the preponderance of the evidence standard may not be enough to send an individual to jail, meeting the standard provides the necessary justification for firing someone from their job and for preventing sexual assaults in the workplace.[134] If such a standard were applied to "Yes Means Yes," then a 66 percent chance that the defendant was a rapist would not be enough to imprison him. However, it is enough to decide that the campus is better off without him or her.[135] Thus, while the standard is insufficient to attach criminal liability, it is more akin to limitations established in the workplace, and the standard takes into account the paramount safety need for all students on the campus.

iii. The "Clear and Convincing" Standard is Not Suitable for Sexual Assault Proceedings

The clear and convincing standard should not be applied in "Yes

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[131] Eugene Volokh, *Quantum of Proof in University Sexual Assault Investigations*, VOLOKH CONSPIRACY (May 29, 2013, 9:49 AM), http://volokh.com/2013/05/29/quantum-of-proof-in-university-sexual-assault-investigations/.

[132] *See* Dixon v. Ala. State Bd. Of Educ., 294 F.2d 150, 159 (5th Cir. 1961) ("[A] hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out.").

[133] Addington v. Texas, 441 U.S. 418, 428 (1997).

[134] Volokh, *The Preponderance Debate*, *supra* note 128.

[135] *Id.*

Means Yes" cases. The clear and convincing standard of proof is higher than a preponderance of the evidence standard but lower than beyond a reasonable doubt standard; it requires that a party must prove the evidence is substantially more likely than not that it is true.[136] The clear and convincing standard has been reserved for those cases where the rights are not fundamental but are immensely important.[137] The Court has found that the rights at stake under this standard represent a "unique kind of deprivation."[138] Such rights include parental rights where parents could potentially lose visitation rights with their children[139] or instances where individuals could potentially lose their physical liberty due to involuntary civil commitment.[140]

The clear and convincing standard is not suitable for sexual assault proceedings in college settings because the nature of a student's right is not the equivalent of those rights previously recognized by the Court. Critics of the preponderance of the evidence standard argue that there are significant individual interests at stake in sexual assault hearings on college campuses, claiming that a higher evidentiary standard is needed in order to protect those rights and ensure that students are not falsely convicted.[141] Critics of "Yes Means Yes" maintain that the clear and convincing standard is required because "[t]he interests at stake . . . are deemed to be more substantial than mere loss of money . . . ."[142] However, unlike issues involving parental custody or someone being physically confined against their will, the "weight and gravity"[143] of a student's liberty interest of reputation, future economic loss, and standing within one's academic community are not viewed as indispensable, closely-guarded rights.[144] Effectively, sexual assault findings that result in

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[136] *Clear and Convincing Evidence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/clear_and_convincing_evidence (last visited Jan. 26, 2015).

[137] Cal. *ex rel.* Cooper v. Mitchell Bros. Santa Ana Theater, 454 U.S. 90, 93 (1981); *see also* Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (finding that termination of a parent's rights in the child requires more than a preponderance of the evidence standard).

[138] *Santosky*, 455 U.S. at 759 (quoting Lassiter v. Dep't of Doc. Servs. of Durham Cnty., N.C., 452 U.S. 18, 27 (1981)).

[139] *Id.* at 769.

[140] Addington v. Texas, 441 U.S. 418, 418 (1997).

[141] Gordon E. Finley, *The Denial of Due Process May Bankrupt Universities*, NCFM: NAT'L COALITION FOR MEN (Aug. 24, 2014), http://ncfm.org/2014/08/action/ncfm-adviser-gordon-finley-urges-governor-brown-not-to-sign-sb-967-which-denies-due-process-to-college-students-accused-of-sexual-assault/.

[142] *Addington*, 441 U.S. at 424.

[143] *Id.* at 427.

[144] *See* Finley, *supra* note 141.

expulsion from college result in future lost opportunity where one's options are diminished, which is not comparable to being confined against a person's will or a parent losing the right to raise his or her child. The nature of the right to continue one's education weighed against the university's foremost obligation to keep its students safe does not tip as heavily as in the aforementioned cases.

The clear and convincing standard of proof is intended to be reserved for those cases where the risk of loss is very high.[145] Based on the Court's past application, the concept of "loss" can be associated with something the state cannot easily replace once it is taken from an individual.[146] A student convicted of rape in a college judicial proceeding is allowed to keep the credits he or she has earned, and can likely transfer those credits to another institution, allowing him or her to seek higher education at another university. A "guilty" finding by a school disciplinary board does not translate to a criminal record. By that reasoning, a student's liberty and property interests in his or her college education do not amount to due process rights that can only be protected by the clear and convincing standard.

California's affirmative consent law has been attacked on the grounds that courts, universities, and student defendants all seem to agree that the appropriate standard of proof in student disciplinary cases is one of "clear and convincing" evidence.[147] However, a majority of federal courts have found that, within the setting of school disciplinary proceedings, the "substantial evidence" standard has been sufficient to meet due process requirements so long as the findings were based on enough relevant evidence that a reasonable person would support the fact-finder's conclusion and the evidence was based on the whole record that is available.[148] Under this deferential standard, the burden of proof is *lower* than a preponderance of the evidence standard. Federal courts have consistently held that school discipline proceedings need not be as formalistic as judicial proceedings, thus a clear and convincing standard

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[145] *Addington*, 441 U.S. at 424.

[146] *Id.*

[147] James M. Picozzi, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132, 2159 n.117 (1987); *see also* Nicholas Trott Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J. C. & U. L. 71, 80–81 (1985) ("The 'clear and convincing' standard weighs the balance in the student's favor while not placing an undue burden of proof on the institution").

[148] Slaughter v. Brigham Young Univ., 514 F.2d 622, 625 (10th Cir. 1975) (examining the procedures utilized by the university through the lens of procedural due process as applied to public universities).

has never been the required standard within the context of school discipline proceedings.[149]

iv. The "Preponderance of the Evidence" Standard Strikes the Appropriate Balance

The preponderance of the evidence standard strikes the most appropriate balance between the interests of the accused and the interests of the university while accounting for the evidentiary problems that are associated with sexual assault cases.[150] As applied to "Yes Means Yes," the preponderance of the evidence standard means that if a university finds that there is a 51 percent chance that the accused student did not receive affirmative consent from the other party, then the accused student may be disciplined according to school policy.[151] The "more likely than not" standard is typically reserved for civil cases where the accused stands to lose property, and a liability finding does not carry with it any criminal condemnation from society.[152] As the Supreme Court observed,

> The preponderance-of-the-evidence standard, which allocates the risk of error more or less evenly, is employed when the social disutility of error *in either direction* is roughly equal—that is, when an incorrect finding of fault would produce consequences as undesirable as the consequences that would be produced by an incorrect finding of *no* fault. Only when the disutility of error in one direction discernibly outweighs the disutility of error in the other direction do we choose, by means of the standard of proof, to reduce the likelihood of the more onerous outcome.[153]

Such a standard is in line with the second factor of the *Mathews* test because it properly balances the potential for wrongful convictions against the potential harm stemming from wrongfully pardoning a guilty individual. If an innocent student is found at fault for a sexual assault, the consequences are significant for the individual. Likewise, if a truly guilty

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[149] *See* Lisa L. Swem, *Due Process Rights in Student Disciplinary Matters*, 14 J. C. & U. L. 359, 379–80 (1987).

[150] *See* 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 (2004) (explaining that 80 percent of colleges choose the preponderance of the evidence standard for disciplinary hearings).

[151] Hans Bader, *Proof and Campus Rape: Standards for Campus Disciplinary Proceedings*, FIRE: FOUNDATION FOR INDIVIDUAL RTS. EDUC. (July 8, 2014), http://www.thefire.org/proof-and-campus-rape-standards-for-campus-disciplinary-proceedings/.

[152] Addington v. Texas, 441 U.S. 418, 418 (1997).

[153] Santosky v. Kramer, 455 U.S. 745, 788 n.13 (1982) (Rehnquist, J., dissenting).

student is found innocent of a sexual assault crime, then the risk posed to the student body remains and the continued risk is equally as great.

The preponderance of the evidence standard embraces the position that a "mistaken judgment for the plaintiff is no worse than a mistaken judgment for the defendant."[154] Raising the standard of proof beyond "more likely than not" does not lead to more *fair* and *accurate* fact-finding in sexual assault cases because the crime is statistically proven to be underreported,[155] rarely involves witness, and there is often little physical evidence.[156] If the standard of proof is placed too high, then there is serious concern whether the victim could ever prove the requisite elements of the crime because such facts may be very difficult to ascertain; there must be a balance between what is possible to be proved and the rights of the accused student.[157] The preponderance of the evidence standard balances the equation in a model that is already skewed as it excludes victim testimony and physical evidence.[158]

In weighing due process on the whole in conjunction with courts' recognition that, at a minimum, students are entitled to procedural due process protections, it seems that students do have sufficient protections in place under the preponderance of the evidence standard. "Yes Means Yes" does not prevent universities from enacting other procedural protections including the right to counsel, right to cross-examine, right to confront witnesses, and a potential to appeal the finding.[159] Thus, campus proceedings will not become the functional equivalent of civil proceedings with fewer procedural safeguards.[160]

3. Third Prong of the *Mathews* Test

The third prong of the *Mathews* test focuses on the government's

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[154] 2 MCCORMICK ON EVIDENCE § 341, at 570 (Kenneth S. Broun ed., 6th ed. 2006).

[155] *See The Sexual Victimization of College Women*, NAT'L INST. JUST. (Dec. 2000), https://www.ncjrs.gov/pdffiles1/nij/182369.pdf (reporting that less than 5 percent of attempted and completed rapes of college women are reported).

[156] DeSantis, *supra* note 13, at 1.

[157] *See* Brett A. Sokolow, *Standard of Proof in Campus Conduct Hearings*, NAT'L CENTER FOR HIGHER EDUC. RISK MGMT., https://www.ncherm.org/pdfs/STANDARDS_PROOF.pdf (observing that only in rare cases are accused students held responsible when the campus employs a standard higher than a "preponderance of the evidence," thus higher standards are "outcome determinative" and leave victims without meaningful redress).

[158] *See* Long, *supra* note 147, at 80–81.

[159] *See*, CAL. EDUC. CODE § 67386 (2015); *see, e.g.*, Swem, *supra* note 149, at 365.

[160] *See* Volokh, *The Preponderance Debate*, *supra* note 128.

interests affected by requiring a preponderance of the evidence standard.[161] The public interests are rooted in the administrative, financial, and social costs at stake to implement a higher standard of proof when adjudicating sexual assault cases.[162] From a social standpoint, it is in a university's best interest to promote a fundamentally fair system for adjudicating sexual assault claims because such a policy is in line with the fundamental values that schools teach across the country.[163] Additionally, a fair system encourages colleges to ensure a safe learning environment for all students. A university has a substantial interest in providing a learning atmosphere that is free from fear and sexual violence.[164] Adhering to the preponderance of the evidence standard creates a tremendous financial incentive because if colleges do not comply with the law, they risk losing state funding.[165] Further, a higher burden of proof translates into more formalized disciplinary proceedings, which equates to higher consumption of resources and the delay of justice.[166]

One of the primary purposes of an administrative hearing is to ensure that "escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool . . . ."[167] A university's resources should be properly allocated to conduct a thorough investigation without getting bogged down in technical proceedings. A school undoubtedly has an interest in protecting its student body from both known and potential dangers. Further, the school has a substantive duty to meet its students' needs through swift and transparent disciplinary procedures.[168] A university is obligated to warn and protect reasonably foreseeable victims from known dangers, and a university "frequently . . . [has] a legal duty to protect the members of [the] community."[169] A university cannot dismiss a student's presumption of innocence, but a university also has an obligation to investigate and weigh available evidence against the existing social

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[161] Mathews v. Eldridge, 424 U.S. 319, 335 (1976)

[162] *Id.*

[163] *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970).

[164] *See* C. Rob Shorette II, *Sexual Violence Prevention and College Campuses: Insight from Student Affairs Administrators*, NASPA: STUDENT AFF. ADMINS. HIGHER EDUC. (Feb. 24, 2014), http://www.naspa.org/rpi/posts/sexual-violence-prevention-and-college-campuses-insight-from-student-affair.

[165] CAL. EDUC. CODE § 67386 (2015).

[166] *See* Goss v. Lopez, 419 U.S. 565, 583–84 (1975).

[167] *Id.* at 583.

[168] *See* Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 507 (1969).

[169] Sokolow, *supra* note 157, at 3 (observing that the rights of the accused must be balanced against the rights of the members of the campus' community).

backdrop and available resources.[170] Thus, it would not be an "error" to apply the preponderance of the evidence standard when both sides have considerable investments and motivation to discover the truth.[171]

Under the *Mathews* test, the proper balance would be struck between the accused student and the university, the two key actors. The standard would be higher than the currently employed substantial evidence standard, and it would allow schools the necessary flexibility to account for evidentiary shortages and to protect the safety interests of the community. In the school setting, "the Due Process Clause requires, not an 'elaborate hearing' before a neutral party, but simply 'an informal give-and-take between student and disciplinarian' which gives the student 'an opportunity to explain his version of the facts.'"[172] The preponderance of the evidence standard does not jeopardize procedural due process rights because individuals receive notice and are given the "meaningful opportunity to present their case."[173] An individual maintains liberty and property interests in the right to education, yet a dynamic school environments dictates adherence to flexible and adaptable discipline polices. With clear standards as to what constitutes "consent," and a balance of interests on both sides of the equation, utilizing the preponderance of the evidence standard minimizes the risk of error.[174]

The Supreme Court has expressed deference to schools in other areas outside of the discipline context in determining the appropriate mechanisms for student punishment, including potential free speech violations[175] and potential Fourth Amendment violations.[176] In reference to the relationship between state legislatures and public education, the Court has opined, "By and large, public education in our Nation is committed to the control of state and local authorities."[177] In applying the *Mathews* test to the preponderance of the evidence standard required in college sexual

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[170] Bader, *supra* note 151.

[171] *Id.*

[172] Ingraham v. Wright, 430 U.S. 651, 693 (1977).

[173] Mathews v. Eldridge, 424 U.S. 319, 349 (1976).

[174] Santosky v. Kramer, 455 U.S. 745, 788 n.13 (1982) (Rehnquist, J., dissenting).

[175] *See, e.g.*, Morse v. Frederick, 551 U.S. 393 (2007) (holding that the school principal did not violate the student's free speech rights by confiscating a banner that she believed promoted drug use).

[176] *See, e.g.*, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottowatomie Cnty. v. Earls, 536 U.S. 822 (2002) (holding that a school did not violate students Fourth Amendment by requiring all students who participated in extracurricular activities to submit to drug testing because it was a reasonable measure to prevent and deter drug use).

[177] Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

assault proceedings, the context of the claims must also be given due weight. The school environment presents a unique set of circumstances because of safety and the paternal obligations of the school. The reality is that unlike a case of an individual's liberty versus the state, "Yes Means Yes" has to account for the interests of the school and fellow students in addition to the liberty and property rights of an accused student.[178] It is entirely possible that California schools can comply with the "Yes Means Yes" law while still providing the constitutionally required procedural due process rights to their students.

While due process centers on the rights of the accused, over the past several decades the expansion of victims' rights show that there is a vital interest in protecting the rights of all students. There can be "minimal standards of proof and we can protect the rights of students who are accused through our processes."[179] Thus, truly successful campus conduct boards are those that are equitable and well balanced to represent students on both sides of the aisle, which is what the preponderance of the evidence standard represents.[180]

VI. "YES MEANS YES" DOES NOT IMPERMISSIBLY SHIFT THE BURDEN OF PROOF; THE LAW LEGALLY CHANGES THE LEGAL DEFINITION OF CONSENT

"Yes Means Yes" does not represent an impermissible shift in the burden of proof required. California's law simply changes the legal definition of consent, while reserving for the accused the ultimate burden of proving a lack of consent. "Burden of proof" encompasses two kinds of burden: the burden of production and the burden of persuasion.[181] The burden of production refers to which party has the burden of producing evidence.[182] The burden of persuasion refers to the party that must persuade the fact-finder in regard to that issue.[183]

In a criminal trial, the state must prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [the defendant] is

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[178] *See Mathews*, 424 U.S. 319.

[179] Sokolow, *supra* note 157, at 2.

[180] *Id.* at 3 (advocating that, of the available standards of proof, he prefers the "more likely than not" standard for campus conduct proceedings based on his experience training 250–300 campus conduct boards a year).

[181] Schaffer v. Weast, 546 U.S. 49, 56 (2005) (quoting 2 J. STRONG, MCCORMICK ON EVIDENCE § 342, 412 (5th ed. 1999) (alteration omitted)).

[182] *Id.*

[183] *Id.*

charged."[184] In some instances, there is an "affirmative defense" which places on the accused an evidentiary burden that is akin to an excuse for otherwise illegal activity, and this is permissible so long as the affirmative defense does not require the accused to actively disprove any element of a charge against them.[185]

Here, "Yes Means Yes" envisions an affirmative defense when it lists scenarios that do not pose a "valid *excuse* to alleged lack of affirmative consent."[186] A mistaken belief in the attainment of affirmative consent does not negate any element of consent since the two can co-exist; that is, there can be a belief in the attainment of affirmative consent even when such consent was not given.[187] As such, it is entirely permissible in terms of due process to expect the accused to make some showing as to their mistaken belief regarding consent.[188] Next, nothing in the language of "Yes Means Yes" suggests that the legislature has taken the drastic step of outright burden-shifting; that is, increasing the threshold necessary for "consent" to be achieved does not in itself mean that the accuser no longer has to prove each element of the sexual assault.[189]

Changing the definition of consent falls within the "traditional legislative power to select elements defining a crime."[190] The Court in *McMillan* explicitly rejected "the view that anything in the Due Process Clause bars states from making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions."[191] If a state has the ability to redefine elements under criminal law and the state remains the ultimate arbiter in defining education policy, then surely California's "Yes Means Yes" represents an appropriate use of legislative authority.[192] With respect to the Constitution, "a change in law favorable to defendants is not necessarily good, nor is an innovation favorable to the prosecution necessarily bad."[193]

"Yes Means Yes" has not changed the procedural standard to be

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[184] *In re* Winship*,* 397 U.S. 358, 364 (1970).

[185] Martin v. Ohio*,* 480 U.S. 228, 237 (1987) (Powell, J., dissenting).

[186] CAL. EDUC. CODE § 67386 (2015) (emphasis added).

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] Apprendi. v. New Jersey, 530 U.S. 466, 563 (2000) (Breyer, J., dissenting).

[191] McMillan v. Pennsylvania, 477 U.S. 79, 49 n.5 (1986).

[192] *See Apprendi*, 530 U.S. 466.

[193] John C. Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1361 (1979).

followed by California universities; rather it has changed the substantive content of the law.[194] At root, the definitional shift signifies how the university adjudication process must interpret an alleged victim's silence. A consent interpretation that does not require resistance acknowledges the precarious situation of victims: either they must physically resist and risk further physical injury or they submit to the aggressor and then run the risk of not being able to prove their case in court.[195] Under this modern view of sexual autonomy, sex is treated as an act that is "freely chosen only when an individual unambiguously desires it under conditions free of coercive pressures, intoxication and power imbalances."[196] "Yes Means Yes" heightens the threshold that must be met to determine the presence of consent.

VII. CONCLUSION

In its simplest form, "Yes Means Yes" changes the way individuals in college approach sexual relations. The presumption of consent until withdrawn is substituted in favor of the presumption of non-consent until permission is given. The preponderance of the evidence standard is constitutionally defensible because it strikes the proper balance among the interests of the accused and victimized students, interest of the school, and the safety of the student population at large. The California legislature has not impermissibly shifted the burden of proof to the defendant; it has removed "force" from the definition and has further clarified what can be interpreted as "consent."

Motivated by public concern for the safety of its sizeable college student body, the California legislature recognized that the state law needed to be reformed to reflect the current reality. New legislation is encouraging for rape and sexual assault victims, although it may seem daunting to university staff whose task it is to implement the new measures. However, the law's impact will not be fully realized until California state courts are forced to confront cases involving the newly enacted policies. Therefore, the difficulty moving forward will be in how the courts can give the state law effect in order to protect victims, afford justice to accused, and balance those interests to create a fair, safe, and progressive environment around sexual assault issues.

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[194] *See id.* at 1333.

[195] *See id.*

[196] Rubenfeld, *supra* note 49.