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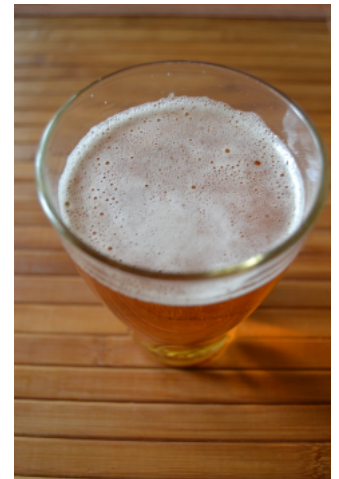
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"Yes Means Yes" Bill Fails to Adequately Address Link Between Alcohol and Sexual Assault

April 21, 2015 · by [daniellecearley](#) · in [GGU Law Review](#) ·
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Much talk has surrounded California's "Yes Means Yes" bill. [SB 967](#) (https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967) has been hailed a major shift in the way colleges will approach sexual assault by instituting an affirmative consent standard. Authored by Senator Kevin de Leon, SB 967 was signed (<http://www.msnbc.com/msnbc/california-governor-signs-yes-means-yes-campus-sexual-assault-bill>) by Governor Jerry Brown on September 28, 2014. While the "Yes Means Yes" bill did not go unchallenged by Republicans, it was unanimously (http://www.huffingtonpost.com/2014/08/28/california-yes-means-yes_n_5733420.html) put forward. Despite the unanimity, many have criticized the bill. Critiques have questioned a number of aspects of the bill, first and foremost it has been labeled as ambiguous, and many critics have alluded to possible negative consequences of the bill.

The first question is what changes will the bill actually put forth compared to how the law works now? Much attention has been given to the affirmative consent standard that the bill outlines. Specifically the bill defines consent as, "affirmative, conscious, and voluntary agreement to engage in sexual activity." Furthermore, "[a]ffirmative consent must be ongoing throughout a sexual activity and can be revoked at any time." Lack of protest or resistance is not sufficient to assume consent, nor is evidence of a dating relationship or past sexual history between the persons engaged in sexual activity.



Ideally, under this proposed paradigm shift, the person initiating sexual contact would have to obtain consent, as opposed to the old standard, which put the burden on the person being pursued to object or forcibly resist. Consequently, this shift in responsibility is expected to diminish victim blaming or questioning for failing to say no or actively resist. Some universities in California and throughout the nation have already adopted this standard of consent. While the motivation for the "Yes Means Yes" bill is admirable, it does not resolve the 'he said she said' scenario presented under 'no means no' ideology.

What is really missing from the bill is an effective procedure that addresses the use of alcohol and drugs. There should be a larger emphasis on the role of drugs and alcohol with respect to a student's ability to provide consent to sexual contact or intercourse of any sort. The Bill states in [relevant part](#) (http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0951-1000/ab_967_bill_20150226_introduced.pdf):

- (2) A policy that, in the evaluation of complaints in any disciplinary process, it shall not be a valid excuse to alleged lack of affirmative consent that the accused believed that the complainant consented to the sexual activity under either of the following circumstances:
- (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.
 - (3) A policy that the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence.
 - (4) A policy that, in the evaluation of complaints in the disciplinary process, it shall not be a valid excuse that the accused believed that the complainant affirmatively consented to the sexual activity if the accused knew or reasonably should have known that the complainant was unable to consent to the sexual activity under any of the following circumstances:
 - (A) The complainant was asleep or unconscious.
 - (B) The complainant was incapacitated due to the influence of drugs, alcohol, or medication, so that the complainant could not understand the fact, nature, or extent of the sexual activity.
 - (C) The complainant was unable to communicate due to a mental or physical condition.

In essence the bill attempts to preclude the accused from using their intoxicated status as a defense, or to claim that the victim failed to protest or resist. Again, this represents a shift in responsibility from the victim to the accused in obtaining consent and ensuring that its validity. The validity of consent where drugs and alcohol are involved remains ambiguous.

College students are inundated with drugs, alcohol, and a new sense of freedom without any parental supervision. College is often the highlight of a person's youth, the glory days; but for nearly one in every four women (<https://a.next.westlaw.com/Document/19941e121001c11df9b8c850332338889/View/FullText.html?navigationPath=%2FFoldering%2Fv1%2Fdcearley%2Fcontainers%2Fuser%2Fa8c1eb8cef714f98b169df0e383ece6b%2Fcontents%2FdocumentNavigation%2Fd7e2-4a5a-95af-c0ef64001cef%2FI9941e121001c11df9b8c850332338889%3FcontainerType%3Dfolder&listSource=Foldering&list=folderContents&rank=3&sessionScopeId=5e3>) college is a period of time in which they were sexually assaulted. In many of these cases, one or both parties were under the influence of drugs or alcohol. In fact, according to statistics, ninety percent of sexual (<https://a.next.westlaw.com/Document/19941e121001c11df9b8c850332338889/View/FullText.html?navigationPath=%2FFoldering%2Fv1%2Fdcearley%2Fcontainers%2Fuser%2Fa8c1eb8cef714f98b169df0e383ece6b%2Fcontents%2FdocumentNavigation%2Fd7e2-4a5a-95af-c0ef64001cef%2FI9941e121001c11df9b8c850332338889%3FcontainerType%3Dfolder&listSource=Foldering&list=folderContents&rank=3&sessionScopeId=5e3>) assaults on college campuses involve alcohol.

The all too common sexual assault between college students is reflected in an incident that occurred between two freshman students at Occidental University (<http://www.businessinsider.com/occidental-sexual-assault-2014-9>). Referred to only as John and Jane Does, the initial contact between the students appears to have been consensual. What is in question however, is the nature of Jane Doe's consent: whether the woman—who was intoxicated to the point of blacking out—had the ability to legitimately agree to have sex at all. Also in question is whether John Doe, also extremely drunk, violated the school's policy by failing to recognize the woman's consent was essentially meaningless as it was given while she was incapacitated.

Many male and female students engage in sexual activity after using drugs and alcohol. Males typically use alcohol (<http://www.foxnews.com/story/2014/04/23/any-student-would-attest-to-this-fact-outside-of-maybe-students-from-brigham>) as a way to gain confidence to initiate a "hook-up." On the other hand, some female students rely (<http://www.foxnews.com/story/2014/04/23/any-student-would-attest-to-this-fact-outside-of-maybe-students-from-brigham>) on alcohol as an excuse to engage in sexual intercourse and avoid being labeled negatively. But too much alcohol can sometimes be a recipe for unintended consequences.

It is a reality that sex and alcohol go together. Unfortunately, so too does alcohol and sexual assault and rape, particularly on college campuses where the environment fuels a culture of sex, drugs, and alcohol. It is without question that alcohol impairs a person's judgment. Alcohol affects (<http://www.niaaa.nih.gov/alcohol-health/alt-habits/effects-body>) a person's conscious state of mind, lowering inhibitions, making it hard to concentrate, and making a person more impulsive. These side effects of alcohol cannot always be observed, especially if the observer is also similarly impaired. Symptoms of alcohol use such as slurred speech, loss of coordination, vomiting, and loss of consciousness are more obvious, but these only manifest after extreme alcohol consumption (<http://www.bestdrugrehabilitation.com/blog/addiction/what-are-the-different-phases-of-getting-drunk-on-alcohol/>). The involvement of drugs and alcohol in sexual assaults on college campuses is all too common. Consequently, the proposed law fails to adequately address a student's ability to give consent if under the influence of drugs or alcohol.

The bill merely states that, where the, "complainant was incapacitated due to the influence of drugs, alcohol...." (https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967) The term incapacitated is ambiguous. Is it physically or mentally incapacitated or both? What does it mean to be incapacitated? The bill does not say. On its face the term incapacitated goes too far. An individual is not able to operate a motor vehicle if they are determined to be under the influence of alcohol. This seems a much lower standard than incapacitated.

While the 'Yes Means Yes' bill does address some major issues and will hopefully check victim blaming and put the responsibility on individuals to obtain consent throughout a sexual encounter, the requirement of obtaining affirmative consent does not necessarily change anything in an accusation of rape or sexual assault. By far the biggest problem with the bill is that it fails to address the biggest issue of sexual assault and rape on college campuses, the involvement of alcohol.

Tags: [Alcohol](#), [California](#), [campus rape](#), [drugs](#), [Jerry Brown](#), [SB 967](#), [sexual assault](#), [Yes means yes](#)

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