SAN FRANCISCO
Daily Journal
www.dailyjournal.com
WEDNESDAY, OCTOBER 22, 2014

PERSPECTIVE

Demystifying the 'yes means yes' bill

By Gregory J. Rolen

Is it now guilty until proven innocent? Is any sex involving drugs or alcohol now rape? Will adult students have to receive an express "yes" when moving from second to third base?

And the ultimate question: What role should the government play? Should the government be in the bedroom, or dorm room, telling us how to perform our most personal and private acts?

These are but a few of the questions raised by Gov. Jerry Brown's signing of Senate Bill 967, the much publicized "yes means yes" law, which includes an affirmative consent standard in the investigation of sexual misconduct in California's colleges and universities. This landmark law has sparked a titillating sociological discourse pitting liberals against conservatives, feminists against traditionalists, and the most fundamental of opposing viewpoints — women against men. No one should be surprised if Saturday Night Live does a skit involving lawyers, notaries and waivers in a dorm room after a frat party.

However, at its core, SB 967 is only an amendment to the safety policies of public post-secondary institutions. It does not change the law concerning rape, sexual assault or consent. It does not alter the standard of proof in criminal, civil or even disciplinary proceedings. Instead, it mandates that to receive state funds, college and university conduct policies must include "affirmative consent" as one of many factors to be considered when determining whether sex was consensual — not nearly as much fun to talk about, but an important step.

The Legal Landscape Pre-SB 967

There are already many existing laws concerning sexual assault in institutions of higher learning. The federal Clery Act requires public and private colleges that receive federal financial aid to disclose information about sex crimes and provide rights to victims, including notification of the right to file criminal charges, counseling services, the results of disciplinary proceedings, and the option for victims to modify their academic and/or living arrangements. The Campus Sexual Violence Elimination Act ("Campus SaVE Act") amended the Clery Act to offer prevention and awareness programs and defining "consent" regarding sexual offenses.

Associated Press

State Sen. Kevin de Leon, D-Los Angeles, urged lawmakers to approve his measure that would make California the first state to define when "yes means yes" while investigating sexual assaults on college campuses, Aug. 28, in Sacramento.

Before SB 967, California law required colleges and universities to implement written procedures and protocols to ensure that students, faculty and staff who are sexual assault victims receive treatment and information. The California State University and the University of California systems have departments, staff and procedures dedicated to the prevention of sexual assault (see UC Office for the Prevention of Harassment or Discrimination). These institutions have both released updated student conduct policies that they claim mirror the requirements of SB 967. For example, the UC's policy sets forth as grounds for discipline physical abuse, including sexual assault, sex offenses and other for physical assault; threats of violence; or other conduct that threatens the health or safety of any person. The policy also specifically proscribes harassment and stalking. See University of California Policy PACAOS 100, Policy on Student Conduct and Discipline.

The policy establishes procedural due process for the accused, including written notice and a formal hearing when deemed appropriate. The institution issues a written decision based on a preponderance of evidence standard. Chancellors may appoint other parties to make findings, but the student discipline rests with the chancellor. If a student is found in violation of a policy or regulation, the chancellor can impose penalties ranging from a simple warning to dismissal depending on the context and seriousness of the violation.

Although the policy reads as comprehensive and legalistic, upon closer review, it is susceptible to human error. The policy vests considerable discretion in university staff to interpret the severity of the alleged conduct and the discipline imposed.

The Legal Terrain Post-SB 967

SB 967 adds Section 67386 to the Education Code, requiring that "in order to receive state funds for student financial assistance," postsecondary institutions must implement victim-centered procedures to ensure that sexual assault complainants on university facilities receive treatment, information and support "to the extent feasible." This includes, but is not limited to, victim privacy, education, sensitivity and partnerships with counseling and support organizations such as rape crisis centers and victim advocacy groups.

This is a legislative response to nationwide reports that suggest many colleges throughout the country failed to adequately address victims' needs and mishandled sexual assault allegations. However, this is not the language that caused such an uproar. What is novel about the so-called "yes means yes" law is that it not only codified and defined an affirmative consent standard, but also took great pains to identify circumstances where sex is nonconsensual.

"Affirmative consent" means an affirmative, conscious and voluntary agreement to engage in sexual activity. It is each person's responsibility to ensure that he or she has the affirmative consent of the other to engage in sexual activity. The absence of protest or resistance, or plain silence does not constitute consent. Consent must be ongoing throughout the sexual activity and can be revoked. The existence of a dating relationship or prior sexual relations should never, by itself, be assumed as an indicator of consent. SB 967 further holds that consent cannot be provided if a complainant is unconscious, incapacitated, or unable to communicate.

This affirmative consent language is ostensibly offered to eliminate ambiguities in the more established "no means no" standard. Although not a legal standard, "no means no" has allowed perpetrators to claim ignorance, confusion or mistaken consent as a defense in sexual assault matters. However, SB 967 requires no express statement as was often represented in the media, but instead imposes a duty to ensure affirmative consent. What does this mean? Does a nod of the head suffice? Have we replaced one ambiguity with another?

SB 967 specifies situations where consent cannot be provided (e.g., intoxication, incapacity). However, this codification is virtually indistinguishable from long-held black-letter law on consent in sexual assault cases. See California Criminal Jury Instructions 1000, 1002. So is SB 967 a sweeping change in the law and society's sexual mores, or is it something much different?

The True Value of SB 967

"Yes means yes" is an important response to a critical problem, but is a relatively minor change in the law. SB 967 pertains only to conduct on university grounds or facilities and is specific to university disciplinary proceedings. SB 967 neither eliminates procedural due process for the accused nor alters any burden of proof. SB 967 does not create an express private right of action, nor does it change the Penal Code. The only sanction set forth is the possible elimination of "state funds for student financial assistance" for failure to implement policies or outreach programs. Most importantly, SB 967 does not eliminate human discretion.

However, SB 967 establishes the first "affirmative consent" standard and makes positive changes to post-secondary policies causing institutions to acknowledge that sometimes we have failed to understand or address sexual assault victims' rights and needs. So is there a role for government in mandating affirmative consent? Perhaps the answer is "yes." Not necessarily because of the change in the law, but because of an evolution in attitudes. We would not be having this sociological discussion if not for the law. Ironically, discussion may be the greatest value.

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