Embracing Yes Means Yes: A Discussion on the Future of Sexual Discourse with Respect to California’s SB-967

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On September 28, 2014, California passed Senate Bill 967 (SB-967), requiring the governing boards of all institutions of higher education in California to adopt a uniform mutual and affirmative consent standard for those engaging in sexual activities. Commonly known as the “Yes Means Yes” law, SB-967 explicitly disallows implied consent as an acceptable form of permission to engage in sexual activity. This bill marks the first implementation of uniform affirmative consent laws across college campuses on a statewide level.

Here, I will argue that SB-967 is a crucial first step for America to open a needed and meaningful discourse on sexual intercourse. The passage of SB-967 highlights the lack of a meaningful discourse about sexual intercourse in the recent American consciousness. What is meant by a meaningful discourse on sex is one that will hold mutual consent as its main tenant, and will allow for a respectful, open, and shared discussion about sex between members of society. Data on sexual violence compiled by the National Institute of Justice indicate the stark effects of this dialogue’s absence. One in four American college women is a survivor of rape or attempted rape, with even higher rates for students who do not identify as heterosexual.

The gravity of these sexual crimes is reflected by the fact that 80% of victims go on to suffer chronic health consequences. Though more than 800 American colleges and universities have adopted a definition of sexual violence rooted in lack of consent, California is the first and only state to approve a uniform policy that defines mutual consent and uses it as a determination of the occurrence of sexual violence on college campuses. So clandestine is the topic of sex, that even when a widespread problem has been occurring for decades, sex still fails to become an issue of well-known national import, and can instead become a site of oppression. One particular finding from The National Campaign to Prevent Teen and Unplanned Pregnancy’s With One Voice study echoes the sentiment that Americans fail to adequately communicate about sexual issues: 87% of teens ages 12-19 agree that it would be easier to postpone sexual activity if they could “have more open, honest conversation about these topics with their parents.”

Americans have done a poor job of creating a social environment in which sex is respectfully but openly discussed. With One Voice illustrates how the immediate effects of a deficient cultural dialogue about sex manifest in teens and college-aged students. As a result, discussions of sex can become viewed as indecent, leaving no adequate space for open and shared discussions about sexual pleasure.

Required mutual consent is a first step toward creating an open dialogue about sex. SB-967 will require “an affirmative, unambiguous and conscious decision” by all involved actors to participate in a sexual encoun-
ter. To satisfy the requirement of consent as defined by SB-967, those participating in sexual acts must discuss the acts with their partners. Because the ensuing behavior in a sexual situation must be expressed and agreed upon prior to initiation of the behavior, any participant in a sexual encounter governed by SB-967 will identify with his or her own role as an agent of sexuality through discussions of mutual consent. If these discussions are continuously carried out on a micro-level between sexual partners, it follows that mutual consent can be upheld as an agent of sexual discourse on a macro-level.

Mutual consent represents a necessary starting point for positioning pleasure as a key element of sex, but further steps are necessary to fully realize a meaningful discourse on sexual intercourse. In *Madness and Civilization*, philosopher Michel Foucault writes, “People know what they do; frequently they know why they do what they do; but what they don’t know is what what they do does.” In scenarios of mutual consent, actors must know what they are doing in order to express consent. By extension, it is reasonable to assume that these actors are thinking about why they are engaging in the sexual activity, including reasons of lust, love, or procreation. However, in order for sexual satisfaction to result, actors, as Foucault suggests, must think about what they are doing does. In other words, sexual actors must think about what constitutes the ontological end of sexual intercourse. This end—from making a partner climax to creating new life—may be different for each actor, and yet, no ends need be mutually exclusive from the creation of mutual pleasure. At worst, as indicated by austere sexual violence rates, sex without the mutually agreed upon end of pleasure remains a locus of oppression and control. Mutual consent, however, is not enough to realize pleasure as an end of sexual intercourse. In order to fully realize sex as pleasure, actors must talk through sex, as simply conferring on consent prior to engaging in sexual intercourse may not be enough to ensure consistent mutual consent.

Ideally, in a consensual setting, sexual actors engage in a dynamic of reciprocal expression. As a result, sex can result in consensual pleasure. In mandating the expression of mutual consent prior to sexual behavior, sex can be refocused as a locus of pleasure.

SB-967 represents a starting point in opening a discourse on sexual intercourse that is focused on pleasure and mutuality; however, it is not a flawless piece of legislation. Although it is not within the purview of this paper to address all of the weaknesses of SB-967, the following section will discuss how SB-967 dubiously defines the notion of consent and how this definition can be problematic for the accused. The primary challenge in assessing the future impact of SB-967 lies in the bill’s ambiguous definition of mutual consent, defining it only as “affirmative, conscious, and voluntary.” For example, while the bill does clearly state that intoxication precludes the provision of consent, no specifications are given as to the degree of intoxication required to void one’s ability to give consent, which would appropriately vary with one’s physical makeup.

Without clearly describing what criteria must be met in order to satisfy mutual consent, the bill necessitates the interpretation of mutual consent by sexual actors. Considered in isolation, this ambiguity actually serves to perpetuate the opening of the dialogue on sexual intercourse. Rather than having a circumscribed set of qualifications that must be met to satisfy the threshold of mutual consent— which would refocus sex as a site of authority and oppression—actors must consciously define for themselves what standards constitute mutual consent and consider the conditions under which it might not be appropriate to engage in sexual intercourse. Considered within the context of the bill, however, the lack of clarity about what qualifies as mutual consent can pose a problem in considering how to proceed once an episode of sexual violence has been reported.

Because mutual consent is not clearly defined in the language of SB-967, and there are no prescribed parameters for its documentation, it then follows that there is due cause for an accusation of sexual violence if just one actor feels that the threshold for mutual consent was not met. Stated another way, individual dissent will disprove mutual consent. Given such a situation, there would appear to be no need to investigate an incident of sexual violence; so long as the reporter of the incident believes that consent was neither mutual nor affirmative, sexual violence must have occurred
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because the reporter said it did. If there is no official and required documentation of mutual consent, then each time a claim of sexual violence is made, the accused can theoretically be found guilty without further inquiry. The burden of proof to show that mutual affirmative consent was met then falls on the accused, and the process of substantiating claims of assault or violence are left wholly for each college or university to deal with independently. As such, it is important to help validate the claim of the accuser while not forsaking due process for the accused.

The aims of an open discourse on sex include preventing sexual violence and helping to empower victims of sexual violence, but neither of these aims can be met if the rights of the accused are forsaken. As such, it is incumbent upon schools to adopt a policy that suggests how documentation of mutual consent may be collected so as to protect the rights of the accused and preserve the dignity of the accuser in situations of alleged sexual violence. The creation, deployment, and reformation of such policies on college campuses will serve as a preliminary step in opening discourse about sexual intercourse.

The implementation of SB-967 represents only the first step in a series of changes that must follow in order to make sure that mutual consent becomes central to discussions of safe and pleasurable sex. In order to incorporate the policy into a campus’s culture, each college and university must create their own mutual consent policy that satisfies the parameters of the law. The White House Task Force to Prevent Students from Sexual Assault recommends that schools conduct campus climate surveys to determine students’ attitudes about sexual violence, and such surveys would help to create policies personalized for each individual school.

Although California is the first state to adopt a statewide policy on mutual affirmative consent on college campuses, Antioch College in Ohio was one of the first colleges to support a policy of affirmative mutual consent, called the Sexual Offense Prevention Policy (SOPP) in 1991. In discussing Antioch College’s policy of mutual affirmative consent, concerned citizen Julia A. Reidhead writes in a letter to the editor of The New Yorker that a policy of mutual affirmative consent is “an opportunity for undergraduates to discover that wordplay and foreplay can be happily intertwined. The possibilities are wonderful-pedagogic, even as is the idea that language is choice.”

A policy of mutual affirmative consent during sexual relations holds each sexual actor responsible for generating his or her own conception of consent and then communicating that consent during each step of sexual intercourse. By creating provisions to make sure that all sexual actors actively and continuously consent to engage in sex, the law empowers sexual actors by encouraging them to define and obtain mutual consent during each sex act, and provides the framework for sexual actors to begin to view the ontological end of sex as pleasure. Other states, including New Jersey and New Hampshire, have also introduced legislation aimed at creating statewide guidelines for affirmative consent on college campuses.

High rates of sexual violence across college campuses indicate that a more open dialogue about sex is desperately needed nationwide. By targeting college campuses as sites of education and change, SB-967 has the potential to create widespread effects, including placing increased emphasis on mutual consent to sexual intercourse. As a law still in its infancy, it would be impractical to quantify the effects of SB-967, on reporting of sexual violence events on college campuses or on overall rates of sexual violence. Further, such quantifications would greatly oversimplify the potential impact of the law. The essence of SB-967 lies in its ability to open a discourse on sexual intercourse between sexual actors that will bleed into a larger public discourse. When actors realize the ontological end of sex as pleasure and feel uninhibited to discuss sex, a reduction in sexual violence should logically follow.

The policy of mutual consent, as called for in SB-967, will require that sexual actors think through their behavior to understand consent as a vehicle for mutually desired and mutually pleasurable sex. As such, the bill represents a first step in working toward a meaningful American discourse on sexual intercourse. Ultimately, the bill’s legacy will not be quantified by how many incidents of sexual violence it prevents, but instead, by how it reframes the way that people converse about and create shared experiences around...
sex. Continued discussions about sex and pleasure will contribute to the creation of a meaningful discourse on sexual intercourse and will transition sex from a site of oppression to a source of pleasure.

References:
1. De León K. California Senate Bill No. 967, Chapter 748. 2014.