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# New York Times Reveals Stupidity of 'Yes Means Yes' Sexual Assault Policies

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Last week the *New York Times* published a balanced news story that inadvertently revealed the stupidity of "Yes Means Yes" policies. Those policies redefine a great deal of consensual sex and touching as "sexual assault," and effectively require college students to engage in "state-mandated dirty talk" during sexual encounters (as one supporter of "Yes Means Yes" policies gloated). That potentially violates the Constitution, and such policies have led to costly lawsuits against colleges that have such policies.

By printing ideologically inconvenient truths, the *Times* allowed the stupidity of "Yes Means Yes" policies to shine through, rather than covering up their stupidity. This was remarkable for the *Times*, which usually can't cover social issues or discuss the failures of big government without injecting its usual doctrinaire left-wing slant. It quotes the developer of the "Yes Means Yes" curriculum admitting that under "Yes Means Yes," "you have to say 'yes' every 10 minutes" during a sexual encounter to avoid sexual assault charges, resulting in constant awkward communication:

> "'What does that mean — you have to say "yes" every 10 minutes?' asked Aidan Ryan, 16, who sat near the front of the room.
>
> "'Pretty much,' Ms. Zaloom answered."

It quotes a female student calling it "really awkward and bizarre":

> "The students did not seem convinced. They sat in groups to brainstorm ways to ask for affirmative consent. They crossed off a list of options: 'Can I touch you there?' Too clinical. 'Do you want to do this?' Too tentative. 'Do you like that?' Not direct enough.
>
> "'They're all really awkward and bizarre,' one girl said."

This illustrates the complete unworkability of "affirmative consent" proposals like the American Law Institute's draft sexual assault definition in its proposed revision of the Model Penal Code. That provision, modeled on "Yes Means Yes" policies, seeks to criminalize non-violent sex and romantic touching in society at large (even if it was welcomed by the participants) unless there was "affirmative" consent in advance. As Megan McArdle noted in *The Atlantic*, under that criminalization proposal, a great deal of harmless touching could well be deemed a crime, including this hypothetical provided by lawyers and law professors: "Person A and Person B are on a date and walking down the street. Person A, feeling romantically and sexually attracted, timidly reaches out to hold B's hand and feels a thrill as their hands touch. Person B does

nothing, but six months later files a criminal complaint. Person A is guilty of 'Criminal Sexual Contact' under proposed Section 213.6(3)(a)."

Unfortunately, there is one shortcoming in the *New York Times* story: it repeats the erroneous idea spread by the *San Francisco Chronicle* that all drunk consensual sex is already legally rape on campus under California's "Yes Means Yes" law regulating campus sex. In reality, as defense lawyer Scott Greenfield, legal commentator Walter Olson, and I have all explained earlier, that law only bans incapacitated sex, not all drunk sex. But the *Times* writes:

> "The 'no means no' mantra of a generation ago is quickly being eclipsed by 'yes mean yes' as more young people all over the country are told that they must have explicit permission from the object of their desire before they engage in any touching, kissing, or other sexual activity. With Gov. Jerry Brown's signature on a bill this month, California became the first state to require that all high school health education classes give lessons on affirmative consent, which includes explaining that someone who is drunk or asleep cannot grant consent."

Although California's "affirmative consent" law does not ban all drunk sex, some campus "affirmative-consent" policies do, invading the privacy of students (there is no logical reason why a married couple should not be able to have a glass of wine before sex). But California's law does heavily intrude into people's private lives, and create a climate of fear, as some of its most outspoken supporters readily acknowledge.

Ezra Klein is the editor-in-chief of the liberal publication *Vox*, and a leading supporter of California's "affirmative consent" law. He says that it will define as guilty of sexual assault people who "slip naturally from cuddling to sex" without a series of agreements in between, and "create a world where men are afraid," which he justifies by saying that "men need to feel a cold spike of fear when they begin a sexual encounter." He writes that California's "Yes Means Yes" law

> "tries to change, through brute legislative force, the most private and intimate of adult acts. It is sweeping in its redefinition of acceptable consent; two college seniors who've been in a loving relationship since they met during the first week of their freshman years, and who, with the ease of the committed, slip naturally from cuddling to sex, could fail its test. The 'Yes Means Yes' law is a necessarily extreme solution to an extreme problem. Its overreach is precisely its value … If the 'Yes Means Yes' law is taken even remotely seriously it will settle like a cold winter on college campuses, throwing everyday sexual practice into doubt and creating a haze of fear and confusion over what counts as consent. This is the case against it, and also the case for it … Men need to feel a cold spike of fear when they begin a sexual encounter … To work, 'Yes Means Yes' needs to create a world where men are afraid."