Affirmative Consent Laws: 'State-Mandated Dirty Talk'?

Writing in the *California Law Review*, Harvard Law School professors Jeannie Suk and Jacob Gersen note that "Today we have an elaborate and growing federal bureaucratic structure that in effect regulates sex." This is largely the result of pressure from the Education Department's Office for Civil Rights, where I used to work.

OCR also has told colleges like the University of Montana and University of New Mexico to classify all "unwelcome" sexual conduct or speech as "sexual harassment." It did so even though this violates free speech, and even though courts have never defined sexual harassment that broadly.

The Obama administration expects colleges to massively meddle in students' romantic lives, even off campus. It has told colleges to investigate students for sexual harassment or assault even when their allegedly victimized partner does not want any investigation. It instructed the University of Virginia to investigate further even when the accused has already admitted guilt (even though that could needlessly force a victim to relive her trauma) and even in "cases in which students chose not to file a formal complaint" or even to pursue an "informal resolution process." It perversely faulted Michigan State for not investigating a false complaint fast enough, even though the complainant didn't want a college investigation at all, and it suggested the University might have to offer the false accuser academic "remedies."

By pressuring colleges to vastly increase their regulation of students' sex lives, and demanding investigations students don't want, the Obama Education Department has fueled vast expansions of college bureaucracies. There are now thousands of staffers responsible for enforcing Title IX sexual conduct

mandates. As Suk & Gersen note, "the bureaucracy dedicated to that regulation of sex is growing," and a recently-formed association of Title IX officials boasts 1,400 members.

Reason magazine's Elizabeth Nolan Brown says that "The root of the confusion lies in federal government guidance. For instance, here's a definition the White House offered universities in a model survey on campus sexual violence:

> *Sexual violence refers to a range of behaviors that are unwanted by the recipient and include remarks about physical appearance; persistent sexual advances that are undesired by the recipient; [or] unwanted touching….These behaviors could be initiated by someone known or unknown to the recipient, including someone they are in a relationship with.*

If you expect colleges to police "remarks about physical appearance" made during a relationship with an ex-partner, and treat it as "violence," you will end up with vastly more investigations (and need a vastly larger and more costly administrative apparatus).

Legislation may further fuel the growth of the sex bureaucracy. Congresswoman Nancy Pelosi (D-CA), the former (and possibly future) House Speaker, has advocated passing laws requiring college students across the country to show "affirmative consent" before engaging in sex or intimate touching, and requiring colleges to discipline those who don't. This term "affirmative consent" is usually not well-defined (in terms of exactly what intimate activities it applies to, and what is needed to show the required "agreement"). So when the co-sponsor of California's 2014 "affirmative consent" law was asked how an innocent person could prove "affirmative" consent, she said, "Your guess is as good as mine." Yet California state legislators expect colleges to enforce such rules for them (a number of colleges are now being sued by expelled students).

As Gersen and Suk note, very little actual consent qualifies as "affirmative consent" under the extremely narrow definition of "consent" contained in many campus "affirmative consent" policies. For example, many such policies require that the consent be "enthusiastic": "Very rapidly," point out Suk and Gersen, "the consent line shifted again in many places to make enthusiasm a requirement of consent itself—anything less than enthusiasm is sexual assault." The claim is that consent is not meaningful unless it is "verbal," "enthusiastic," "sober," "informed," "honest," etc.

Even if you liked being kissed, a college may deem it sexual assault if there was no explicit discussion beforehand between you and your partner to establish the existence of "affirmative consent," as Ramesh Ponnuru has noted at Bloomberg News.

As supporters of "affirmative consent" legislation acknowledge, such laws require regulated entities to enforce "sweeping" changes on the government's behalf. Ezra Klein, a leading *supporter* of California's "affirmative consent" law, says it will define as guilty of sexual assault people who "slip naturally from cuddling to sex" without a series of agreements in between, since

> *It 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.*

There is also talk of enacting "affirmative consent" as a national requirement for not just students but all citizens. Historically, the federal government could not pass a nationwide law mandating "affirmative consent," even assuming states could require it in their own borders. That's because the Supreme Court's 5-to-4 ruling in *United States v. Morrison*, 529 U.S. 598 (2000) had ruled that it is the function of states – not the federal government – to define and punish intrastate crimes like sexual assault. The Supreme Court's *Morrison* ruling struck down Subtitle II-C of the Violence Against Women Act, which authorized federal lawsuits over sexual assault. The Court ruled that Congress lacked the power to do that under the Constitution's commerce clause and section 5 of the Fourteenth Amendment.

But the crucial fifth vote in that case was provided by conservative Justice Antonin Scalia, who died in 2016. He will likely be replaced by a progressive Justice who supports broad federal power over intrastate activities. That may encourage a more liberal Congress to pass national "affirmative consent" legislation covering everyone.

Students have often raised practical concerns about the workability of affirmative-consent policies. The *New York Times* quotes the developer of California's "affirmative consent" curriculum, Ms. Zaloom, saying that to comply, you have to say "'yes' every 10 minutes" during a sexual encounter, resulting in constant awkward communication:

> *"'What does that mean – you have to say "yes" every 10*

> *minutes?' asked Aidan Ryan. . .*
>
> *"'Pretty much,' Ms. Zaloom answered."*

The *Times* quoted 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."*

One supporter of "affirmative consent" legislation says it requires "state-mandated dirty talk" before intimate touching. Professors Suk and Gersen (and others) have argued that requiring students to do this sort of thing raises serious constitutional privacy issues under Supreme Court decisions like *Lawrence v. Texas* (2003), which struck down Texas's sodomy law as a violation of privacy rights.

"Affirmative consent" laws have been opposed by civil liberties groups like the Foundation for Individual Rights in Education, and former ACLU Board member Wendy Kaminer. They also have been criticized by columnists like Bloomberg News' Megan McArdle, Newsday's Cathy Young, The New Republic's Batya Ungar-Sargon, New York Magazine's Jonathan Chait, and Amy Alkon.

McArdle notes that such legislation "seems to criminalize most sexual encounters that most people have ever had, which (I hear) don't usually involve multistep verbal contracts." Affirmative-consent legislation has also been opposed by the editorial boards of newspapers such as the Los Angeles Times, Orange County Register, and New York Daily News.

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