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Romance or Sexual Assault? Ambiguity of Sexual Consent in the Media and How Yes Means Yes Legislation Can Help

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a white man.

The idea of consent is confusing because it is confusing legally, psychologically, and socially. The “Yes Means Yes” legislation is a hard concept to grasp because Americans rarely see it on the movie screen. This paper highlights all the messaging depicted in film and television and how those messages conflict with “Yes Means Yes” legislation. First, I will discuss the interconnection of media and the law. Then, I will evaluate the messages being portrayed in movies and how “Yes Means Yes” legislation is important in helping people constructively define consent. Even though consensual sex is critical in every type of relationship, this paper focuses on the conflicting messages in heterosexual relationships. Lastly, this paper discusses a resolution of either consumers not supporting these movies and their depiction of consent, or creating educational programs that help people better understand consent.

First, to understand “Yes Means Yes” legislation, a clear definition of what it is important. “Yes Means Yes” is a term used by the media to discuss affirmative consent. Affirmative consent in California is defined by statute as:

An affirmative consent standard in the determination of whether consent was given by both parties to sexual activity. “Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.³

Initially, California legislators aimed this definition at colleges and universities, trying to dispel the ambiguity surrounding campus sexual assaults.⁴ As seen in the language of the statute, it is gender neutral and highlights that prior sexual relationship is not an indicator of consent. Other states such as Illinois, New York, and Connecticut have also adopted affirmative consent legislation.⁵ Other states have it under consideration.⁶

3. CAL. EDUC. CODE SEC. §67386(a)(1) (West 2016).

4. Bill Chappell, *California Enacts ‘Yes Means Yes’ Law, Defining Sexual Consent*, NATIONAL PUBLIC RADIO (Sept. 29, 2014), <https://www.npr.org/sections/thetwo-way/2014/09/29/352482932/california-enacts-yes-means-yes-law-defining-sexual-consent>.

5. Affirmative Consent Laws (Yes Means Yes) State by State, AFFIRMATIVE CONSENT / STOPPING CAMPUS SEXUAL ASSAULT., <http://affirmativeconsent.com/affirmative-consent-laws-state-by-state/> (last visited Mar. 12, 2018).

6. *See supra* note 5.

A. THE CYCLE: POPULAR CULTURE INFORMS LAWS AND LAWS
INFORM POPULAR CULTURE

“Yes Means Yes” legislation can help the ambiguity regarding consent, changing the question from whether the victim affirmatively said no to whether the victim consented by saying “yes.”⁷ While connecting this problem to romantic comedies, one sees that movies and television shows are making consent more confusing than ever, substantially affecting the way society thinks about romantic encounters. Although skeptics may argue that people view movies for entertainment, not educational films, “movies, as a creation of popular culture, reflect the values and biases of the society of the time.”⁸ Take for example the Nazi regime. Top German leadership understood the power and manipulation movies have on society.⁹ They promoted their “propaganda” through film to show “racial antisemitism, the superiority of German military power, and the intrinsic evil of the enemies as defined by Nazi ideology.”¹⁰

Law and popular culture are intertwined in a multiple ways.¹¹ During litigation, lawyers want to relate to jurors and judges.¹² Successful trial lawyers do this by being relatable, for instance:

Savvy trial lawyers often tap, in order to direct strategically, the familiar meaning-making tools and materials trial participants carry in their heads into court. Familiar images, popular story forms, and recurring symbols, together with a host of unconscious prejudices, impulses, and passions (including disguised or displaced feelings of rage and desire), are all grist for the lawyer’s storytelling mill.¹³

Movies and plot devices are effective tools for storytelling and certain stories will most likely resemble a popular movie that resonates with people.¹⁴ Author Richard Sherwin acknowledges the strong presence that popular culture plays on law, and how popular culture and the law interconnect in a variety of ways.¹⁵ As outlined by Sherwin, culture helps shape the law and in turn law continues to define and exhibit the values and beliefs of society.¹⁶ For instance, people’s beliefs inform whom they vote

7. Gruber, *supra* note 1, at 423.

8. CATHERINE GOURLEY, *ROSIE AND MRS. AMERICA: PERCEPTIONS OF WOMEN IN THE 1930S AND 1940S* 46 (Twenty-First Century Books, 2008).

9. See DANIEL JAMES BROWN, *BOYS IN THE BOAT: NINE AMERICANS AND THEIR QUEST FOR GOLD AT THE 1936 OLYMPICS* (Penguin Books, 2014).

10. Nazi Propaganda, HOLOCAUST ENCYCLOPEDIA, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005202>.

11. See RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* (Reed Bus. Info., Inc., 2000).

12. *Id.* at 4.

13. *Id.* at 6.

14. *Id.*

15. *Id.*

16. See SHERWIN, *supra* note 11, at 6.

for which impacts overall policy.¹⁷

[O]rdinary expectations, shared values, and popular beliefs—what might be called the collective “folk knowledge” of the community—enter into the law directly by way of the jury in civil and criminal cases, and indirectly by way of the ballot, the process by which citizens put judges and legislators into (or out of) power.¹⁸

Popular culture has a way of permeating certain thoughts and perceptions into the law and contributing to societal bias that is also enforced in American movies.¹⁹

Popular culture influences other mediums as well. Legal feminist scholar, Catherine MacKinnon, has explored the impact of mass media and pornography on how society looks at sexual assault. In her essay *Mediating Reality*, MacKinnon explores the effect of mass media on people's thoughts of sexual abuse.²⁰ MacKinnon states:

When so much of public consciousness is formed by the media, not seeing sexual abuse represented in public as *it actually happens* makes it seem to each sexually abused person as if they are the only one to whom it ever has happened. (emphasis added).²¹

In another essay, *Civil Rights Against Pornography*, MacKinnon directly links pornography to “women's inequality.”²² MacKinnon further elaborates, “recent correlational results, supports the conclusion that exposure to pornography increases attitudes and behaviors of aggression and discrimination by men against women.”²³ MacKinnon has struggled to get people to fully understand the damning effects that pornographic films have on women since pornographic films are a piece of the overall puzzle of how society views women.²⁴

But movies have a profound impact on people not only in America but worldwide. Rachel Spronk outlines this in her paper, highlighting the effects of the movie *Save the Last Dance* on young professionals in Nairobi:

Why is *Save the Last Dance* such a popular movie? Apparently, the movie represents issues that are of importance to young adults

17. *Id.* at 18.

18. *Id.*

19. *Id.* at 20.

20. CATHERINE MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 291 (The Belknap Press, 2005).

21. *Id.* at 291.

22. *Id.* at 301.

23. *Id.* at 303.

24. Wendy Kaminer, *Feminists Against the First Amendment*, ATLANTIC MONTHLY (Nov. 1992), <https://www.theatlantic.com/magazine/archive/1992/11/feminists-against-the-first-amendment/305051/>.

in contemporary Nairobi. It is the combination of addressing problems like race, ambiguity of cultural identities, relational tribulations and the generational gap with parents, visualised by love as its solution that makes the movie attractive.²⁵

The article goes on to describe the effect of American movies on the lives of people in Nairobi by displaying Western ideals of people being in love.²⁶ Spronk elaborates the impact of *Save the Last Dance* on a Sereti, a young Nairobi woman:

This representation of a love story makes her dream away and fantasise about her own love life. In a society where affection is, generally, expressed in more covert ways, looking at people showing affection physically and verbally makes a powerful impression.²⁷

The same young woman even compares her boyfriend to the main male protagonist in *Save the Last Dance* (mostly how her boyfriend does not live up to the main male character)²⁸ and desires to be in love the way *Save the Last Dance* depicts it rather than a relationship like her parents (her parents “have come to love each other through time”).²⁹ Spronk’s article focuses on one movie’s popularity in Nairobi but illuminates the reality that Hollywood movies have a huge impact on the way young people view modern romantic interactions.³⁰

As children, most Americans grow up watching television and movies. Therefore it is important to know what children are watching. Take for examples teenagers. For teenagers, there is a proven link between them learning about sexual socialization and the reality television shows that they watch.³¹ A three-year study was conducted tracing the effects of reality television on 498 teenagers.³² The impact of these romantic themed reality television shows was that it reinforced patriarchal relationships such as:

the sexual stereotype that men are driven by sex and the sexual double standard, all of which suggests that men are independent

25. Rachel Spronk, *Looking at Love: Hollywood Romance and Shifting Notions of Gender and Relating in Nairobi*, 15 Etnofoor No. ½ 229 (Stitching Etnofoor, 2002).

26. *Id.*

27. *Id.* at 230.

28. *Id.* at 237.

29. Spronk, *supra* note, at 230.

30. *Id.*

31. Laura Vandenbosch and Steven Eggermont, *Temptation Island, The Bachelor, Joe Millionaire: A Prospective Cohort Study on the Role of Romantically Themed Reality Television in Adolescents’ Sexual Development*, 564 J. OF BROAD. & ELEC. MEDIA (Dec. 2011) (“The emergence and popularity of a sexually oriented television genre is relevant in light of research that revealed media as having substantial influences on adolescents’ sexual socialization.”).

32. *Id.*

sexually and unable to say no to sex, and women are judged on their sexual attractiveness as well as their ability to have a successful relationship. Furthermore, exposure to romantically themed programs was linked to an idealized view of romantic relationships.³³

Thus it is very important for children to learn about consensual sex either from parents, schools or possibly television. This is especially true for teenagers since they are a group at risk for sexually transmitted diseases (STDs). As outlined by Dexter Voisin, teenagers have a higher occurrence of STD's in proportion to their population since they constitute "10 percent of the total population, [yet] account for more than 60 percent of all reported STDs."³⁴

More than ever, Americans spend an incredible amount of time on digital screens.³⁵ This includes watching television shows, playing on social media, or watching a movie; the possibilities are not endless.³⁶ In 2016, *The New York Times* reported:

The amount of time you spend consuming media—watching TV, surfing the web on a computer, using an app on your phone, listening to the radio and so forth—continues to go up. Nielsen said that in 2015, Americans spent about nine and a half hours each day consuming content this way. This year? The average is 10 hours and 39 minutes.³⁷

People are being bombarded with images of couples and sexuality that are not grounded in reality. If the average amount of time consuming media is 10 hours and 39 minutes each day, consequently this means the time of person-to-person interaction must be at an all-time low. This supports the need to start educational programs at an early age, promoting healthy and safe sexual activity to counteract the mixed messages depicted from films and television regarding consent. About 40 percent of parents in the United States want "comprehensive sexuality education in general."³⁸ California is the only state to have a state law mandating affirmative consent orientated sexual education highlighting consent from grades 9 to 12.³⁹ However, critics have suggested this may be too late for

33. See *supra* note 31, at 566.

34. Dexter R. Voisin, et al., *Ecological Factors Associated with STD Risk Behaviors Among Detained Female Adolescents*, 51 *SOCIAL WORK* 71 (2006).

35. John Koblin, *How Much Do We Love TV? Let Us Count the Ways*, N.Y. TIMES (June 30, 2016), <https://www.nytimes.com/2016/07/01/business/media/nielsen-survey-media-viewing.html>.

36. *Id.*

37. *Id.*

38. Stephanie Auteri, *When Should Kids Start Learning About Sex and Consent?* ATLANTIC MONTHLY (Apr. 28, 2016), <https://www.theatlantic.com/education/archive/2016/04/when-should-kids-start-learning-about-sex-and-consent/480264/>.

39. CAL. EDUC. CODE SEC. § 33544 (a)(2) (West 2017).

some teenagers.⁴⁰

B. THE UNIMPORTANT WOMAN OR SEXUALIZED WOMAN: MESSAGES IN MOVIES

In many public forums and in classroom discussions, “Yes Means Yes” legislation seems to be an uncomfortable topic. Not many states have adopted “Yes Means Yes” legislation because states may be uncomfortable in adopting an affirmative consent standard.⁴¹ This may be because Hollywood movies depict a range of activities that are could either be viewed as romantic or potentially illegal depending on the reception of the target.⁴²

Another issue is what are the appropriate gender roles that these movies are perpetuating. For instance, if a person thinks of their favorite romantic comedy, the gender roles are typically patriarchal.⁴³ In 2016, a study was conducted showing that movies made the audience aware of men’s employment status more than women’s while on the other hand made the audience more aware of a women’s marital status more than men’s.⁴⁴ Also, the study showed that woman tended to be younger than their male counterparts and seldom in leadership roles.⁴⁵

Another important aspect of the equation is how movies impact the way young people feel about interacting romantically. Studies have been conducted about the social impact of romantic comedies. One study shows that in many romantic comedies, a certain “regressive fantasy” is enforced by “traditional values”:

The man’s role in romantic comedies is described as “taking the lead,” the man is usually the one that “rescues” the female, that ultimately “fights” for her and suggests that they get married. Even if this is not what was what the character wanted in the beginning he almost always realizes it by the end which is demonstrated in the culminating point where the two main characters either get

40. Auteri, *supra* note 38.

41. Jaclyn Friedman, *Adults Hate ‘Yes Means Yes Laws.’ The College Students I meet Love Them.* WASH. POST (Oct. 14, 2015), https://www.washingtonpost.com/posteverything/wp/2015/10/14/adults-hate-affirmative-consent-laws-the-college-students-i-meet-love-them/?utm_term=.835e2d4b8437 (While she does not specifically refer to states, the author of this article states, “every time one of these bills is introduced, a certain subset of adults freaks out.”).

42. Megan Garber, *How Rom Com’s Undermine Women*, ATLANTIC MONTHLY (Nov. 1, 2016), <https://www.theatlantic.com/entertainment/archive/2016/11/its-rom-coms-fault-too/505928/>.

43. Cassidy Green, *The Effects of Romantic Comedies on Women and Female Adolescents*, Proceedings of The Nat’l Conf. On Undergraduate Res. (NCUR) 402 (2013).

44. Dr. Martha M. Lauzen, *It’s a Man’s (Celluloid) World: Portrayals of Female Characters in the Top 100 Films of 2016*, Center for the Study of Women in Television & Film (2017), <https://womenintvfilm.sdsu.edu/wp-content/uploads/2017/02/2016-Its-a-Mans-Celluloid-World-Report.pdf>.

45. *Id.*

married or decide they want to be together forever.⁴⁶

The article lists certain popular movies, such as *Pretty Woman*, *When Harry Met Sally*, and *The Holiday*, as portraying these themes.⁴⁷ However, it does not take long to make a list of more movies that reflect this theme, or the multitude of movies that depict a man forcibly kissing a woman in what is suppose to be the epitome of romance. The critical aspect of this analysis is how much does this permeate people's minds when they apply it to situations of sexual assault.

Interestingly, one study analyzed how media interplayed with individuals' loss of virginity. The study showed, that the focus group of adults, all had movies they referred to when discussing learning about sex and sexual terms in their formative years prior to being sexually active.⁴⁸ The study also showed that men learned from movies that virginity was a stigma for men. For instance, one of the participants recounted:

Dan Levy (29, white, heterosexual) recalled: There was the movie *Porky's* that probably came out when I was 13 and that definitely talked about, you know, virginity. One of the ... nerdy characters on there, they kept calling a virgin. So that might have been a very concrete way for me to get what virginity was ... That it was a bad thing.⁴⁹

This study also highlights the sexual prowess and expectations that men have in society to be sexual active, as virginity is portrayed in movies for men as "stigmatizing."⁵⁰ This study demonstrates the lasting impact a simple movie can have on young people.⁵¹

The danger of romantic comedies is that they often do not take into consideration women's wants or needs. These movies also do not believe that women are telling the truth about their romantic desires. For instance, a consistent trope that Megan Garber highlights in her article *How Rom-Com's Undermine Women*: "[s]he says she's not interested; he assumes she's lying. She says "no"; he replies, "I will make you say yes."⁵² If men think women are lying when they say no, or that they do not really mean it, this creates consent confusion since often times, gender roles in movies are that men should be aggressive while women should be resisting.⁵³ It is not only movies this idea is perpetuated, but also in articles targeted at modern men on how to woo women.⁵⁴

One argument is that affirmative consent may be the wrong method of

46. Green, *supra* note 43, at 402.

47. *Id.* at 400–01.

48. Carpenter, *supra* note 2, at 814–15.

49. *Id.* at 814.

50. *Id.* at 818.

51. *Id.* at 815.

52. Garber, *supra* note 42.

53. *Id.*

54. Garber, *supra* note 42.

preventing sexual aggression since female sexualization is so pervasive in American media culture. One commentator in *The Washington Post* opinion piece noted that society should focus on the “rape culture” that is shown constantly in media. The amount of sexual images men are bombarded with is astounding. Further illuminating her argument:

From the moment boys hit puberty (or even earlier), popular culture delivers the message that women are accessories, their bodies are for men’s pleasure, a real man can “have a woman.” Objectification is a near-constant theme in advertisements—from old-school GoDaddy.com commercials to Carl’s Jr’s infamous series of bikini-clad women with splayed legs. In the bestselling video game series *Grand Theft Auto*, players gain health points for having sex with prostitutes and can kill them to get their money back. Magazine covers, music videos, and pornography portray women as always sexually available to men. Is it any wonder that by the time these young men get to college, they have no idea what consensual sex looks like?⁵⁵

Women portrayed as vessels waiting for a man to “get them” creates horrible messages for both men and women not only about sexual relations but human sexuality.

Another issue is the absence of women in non-sexual roles. The American Psychological Association appointed a task force specializing in researching the effects of the constant sexualization of girls and young women. The task force focused on about 100 family friendly movies over a 14-year period and found that women were generally missing from them.⁵⁶ Thus, most movies are either sexualizing women or not featuring them at all. The study further found:

Of the over 4,000 characters in these films, 75% overall were male, 83% of characters in crowds were male, 83% of narrators were male, and 72% of speaking characters were male. In addition, there was little change from 1990 to 2004. This gross underrepresentation of women or girls in films with family-friendly content reflects a missed opportunity to present a broad spectrum of girls and women in roles that are nonsexualized.⁵⁷

Based on this study, for movies made for young audiences especially, the conclusion is that many movies focus on a wide spectrum of male roles

55. Kara Eschbach, *Affirmative Consent Won’t End Rape Culture. Here’s What Might.* WASH. POST: Opinion (Oct. 12, 2015), https://www.washingtonpost.com/news/in-theory/wp/2015/10/12/affirmative-consent-wont-solve-our-rapeculture/?tid=a_inl&utm_term=.4e257b11794a.

56. Eileen L. Zurbriggen, et al., REPORT ON THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS 7 (Am. Psychological Ass’n 2007), <https://www.apa.org/pi/women/programs/girls/report-full.pdf>.

57. See *supra* note 56.

but women are not given the same opportunity to appear as complex humans.⁵⁸ The amount of material sexualizing women is overwhelming and it would help to have more movies counteracting that message.^{59, 60}

Romantic encounters and consent ambiguity is further exasperated because generally, Americans are very uncomfortable talking about sex. In the highly publicized Stanford rape case, Brock Turner defended his actions because he thought the victim gave her consent.⁶¹ The example he gave was that she allegedly rubbed his back.⁶² Considering that the victim was passed out behind a garbage dumped, it is horrifying Turner alleged consent. Furthermore, the only reason Turner stopped sexually assaulting her was because two men bicycled by, saw the attack, stopped Turner, and Turner ran away.⁶³ This however, did not stop Turner from alleging consent and discussing the victim's motivations that night, alluding they might have been sexual in nature.⁶⁴

These cases bring with them shocking declarations of what people assert as consensual sexual activity. Aya Gruber deals with the complexity of consent and knowing when people want to have sex. Gruber highlights how American culture is uncomfortable with sex "considering the long Anglo-American history of not communicating forthrightly about sexual desire, it would follow that internal mental states are unlikely to have some obvious and clear relationship to external manifestations."⁶⁵ Gruber also highlights the difficulty of defining what consent looks like, and how each individual person views consent differently.⁶⁶

WHY "YES MEANS YES" IS IMPORTANT

In recent years, legislation pushing "Yes Means Yes" has sparked popular debate. This is interesting because the legislation directly conflicts with everything popular films and movies have taught people about romance. Until recently, Disney's *Frozen* seems to be a rare Hollywood exception since the movie depicts affirmative consent for kissing.⁶⁷ Otherwise, many films and television shows show nonconsensual sexual interactions. Also, movies rarely, maybe even never, depict someone asking if the other person wants to have sex. From romantic comedies to

58. *Id.*

59. *See generally*, MISS REPRESENTATION (Girls Club Entertainment 2011).

60. Zurbriggen, *supra* note 57.

61. Katie J. M. Baker, *Here Is The Powerful Letter The Stanford Victim Read Aloud To Her Attacker*, BUZZFEED NEWS (June 3, 2016, 1:17 PM), https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-herra?utm_term=.ve4vDoWAX#.mq7nDA0k.

62. *Id.*

63. *Id.*

64. Baker, *supra* note 61.

65. Gruber, *supra* note 1, at 427.

66. *Id.*

67. FROZEN (Disney 2013).

television shows, there never seems to be a discussion about consent or a conversation about what each partner wants sexually.

This sense of confusion about what consent should look like is evident in court cases as well. Take for example, college campus rapes. College campus rapes typically present scenarios where the victim knew the perpetrator, furthering the debate on what exactly constitutes consent. These cases create uncomfortable situations of alleged sexual assault since the couple knew one another, resulting in people viewing these cases as simple miscommunications or a botched romantic encounter. On college campuses 90 percent of sexual assaults are committed by a perpetrator known to a victim compared to the overall average of 60 percent of sexual assaults victims that knew the perpetrator.⁶⁸ This can lead to troubling situations where the victim is heavily questioned about their actions to see if the victim in any way gave their consent either verbally or nonverbally, as the perpetrator will most likely tell the story of consensual sex inferred from the fact that the encounter was romantic in nature.

An important aspect of “Yes Means Yes” legislation is that it would remove the analysis of how the victim acted and prevent it from being used to either support or negate the sexual assault.⁶⁹ An example of how victim’s actions are sometimes irrelevant to rape cases, is the case decided in 2016 at Columbia University. At Columbia University, the male perpetrator appealed the exclusion of witnesses at his University hearing as part of his sex discrimination claim.⁷⁰ The university investigator of the sexual assault claim did not interview certain people before turning over her investigation to the University.⁷¹ These witnesses included people in the lobby, the victim’s roommate, and the perpetrator and victim’s mutual friend.⁷² Witnesses are evidence of a crime, but what the case failed to mention is that none of these witnesses actually *witnessed a crime*.⁷³ The people in the lobby saw two friends walking together.⁷⁴ They did not witness the sexual activity that was contested to in the case.⁷⁵ Also, the judge critiqued the University’s report for not including an interview with the victim’s roommate to elaborate on the victim’s thoughts of the perpetrator weeks leading up to the rape.⁷⁶ This is another instance where this should be irrelevant. Using the judge’s logic, spouses could never rape their significant others since at one point they cared about the perpetrator.

68. *Victims and Perpetrators*, NAT’L INST. OF JUSTICE (Oct. 26, 2010), <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/victims-perpetrators.aspx>.

69. Gruber, *supra* note 1 (This article goes into how the yes means yes legislation removes the analysis of someone’s “external manifestations.”).

70. *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016).

71. *Id.* at 6.

72. *Id.* at 6, 8.

73. *Id.*

74. *Id.* at 6.

75. *Id.*

76. *Doe*, 831 F.3d at 8.

The judge also discusses how the report lacked information from the victim's friend and the victim's motivations on the night of the attack.⁷⁷ This also refutes what is generally known about consensual sexual activity—that someone can change their mind about wanting to have sex with a particular person. The judge's misconceptions resulted in the perpetrator being guilty in the University's hearing, but not guilty criminally.⁷⁸ While it is unclear what impacted the judge the most, all of these factors seemed to have been considered in the judge's ruling.

Unfortunately, it is easy to think that sexual assault between friends is a misunderstanding of romantic feelings, or that the woman did not fully communicate what she wanted sexually, because movies constantly tell those narratives, strengthening the implicit bias against women. However, "Yes Means Yes" legislation can fix this. "Yes Means Yes" legislation is a law that helps both men and women have a healthy conversation about sex as it mandates that people discuss sex before it happens. Educating students through an affirmative consent lens is very important because it gives young adults a chance to discuss sex with educators and counteracts aggressive messages that by and large sexualize women in films.

In 2014, California was the first state to impose strict affirmative consent laws in the United States.⁷⁹ The following year, California went a step further and mandated that this new consent standard be implemented in the education system for grades 9-12 (typically a high school setting).⁸⁰ However, prior to California passing consent laws, two universities in California already adopted a consent project. This project is described on the website as:

... the Consent Project is designed to create a safe space for victims and non-victims of sexual or domestic violence to learn more about the issue and to build an open dialogue about the notion of consent and what it means. The program also aims to help educate the campus about sexual and domestic violence. It also helps create safe spaces for survivors to talk about their experiences in confidentiality.⁸¹

Additionally, there are a plethora of other "consent projects" throughout the world, though titled differently. From Project Consent⁸² to the Consensual Project⁸³ to Consent Projects in England schools. In

77. *Id.*

78. *Id.*

79. Chappel, *supra* at note 4.

80. Cal. Educ. Code § 33544 (a)(2) (West 2017).

81. *The Consent Project*, CSU BAKERSFIELD, <http://www.csub.edu/compliance/title%20ix/The%20Consent%20Project/index.html> (last visited Mar. 18, 2018).

82. PROJECT CONSENT, <http://www.projectconsent.com/overview> (last visited Mar. 18, 2018).

83. THE CONSENSUAL PROJECT, <http://www.theconsensualproject.com> (last visited Mar.

England, as part of the Schools Consent Project, lawyers and law students go to schools to discuss the legality of consent to students ages 11-18, while also “getting students to talk about consent.”⁸⁴ England’s project also includes LGBT curriculum and focuses on creating a comfortable atmosphere by having “young & approachable staff.”⁸⁵ The outreach due to the project has reached a substantial number of children, resulting in “86% of students feel[ing] more empowered to take informed decisions about consent”⁸⁶ upon completion of the program. It can be argued though that simply talking about these issues and informing young people is positive regardless of the statistics.⁸⁷

The Schools Consent Project targets children younger than in California, but it has been suggested that children should begin sex education in kindergarten.⁸⁸ Though it would not be titled sex education, but more of an explanation of appropriate touching and body contact.⁸⁹ To further elaborate the process:

Kindergartners, for example, would learn about their bodies, about boundaries, and about the different types of families that exist, while first graders would then move on to lessons about friendship and gender roles. By fifth grade, students would be ready to learn about puberty, sexual and reproductive anatomy, and sexual orientation. By following this timeline, high-school seniors would have a firm infrastructure in place in order to be ready for more complex lessons on reproductive and sexual rights, STD testing, and the human sexual response cycle. This entire body of knowledge would provide the necessary support for a greater understanding of issues such as consent.⁹⁰

In some aspects, introducing sex education at 5th grade or middle school may be late. Introducing these discussions at Kindergarten not only prepares children for a more healthy sexual experience, but it also can be used to prevent childhood abuse.⁹¹ As statistics show, “among female rape victims surveyed, more than half (54 percent) were younger than age 18; 32.4 percent were ages 12–17; and 21.6 percent were younger than age 12 at time of victimization.”⁹² This approach, however, directly contradicts an abstinence only message that many religious and conservative groups as

18, 2018).

84. SCHOOLS CONSENT PROJECT, <https://www.schoolsconsentproject.com> (last visited Mar. 18, 2018).

85. *Id.*

86. *Id.*

87. Friedman, *supra* note 41.

88. Auteri, *supra* note 38.

89. *Id.*

90. *Id.*

91. Auteri, *supra* note 38.

92. *Victims and Perpetrators*, NAT’L INST. OF JUSTICE (Oct. 26, 2010), <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/victims-perpetrators.aspx>.

well as the new Secretary of Education, Betsy DeVos, supports.⁹³

EITHER TOO MUCH OR NOTE ENOUGH: ARGUMENTS AGAINST YES MEANS YES

There are also critics of the “Yes Means Yes” legislation. Adults worry that the legislation would put up barriers around the natural occurrence of sex, and may seem to eliminate the lack of control needed to not make sex boring or bad.⁹⁴ While older generations may be uncomfortable asking to have sex, young college students found that affirmative consent was empowering and resulted in the “best sex of their lives.”⁹⁵ Another critique is that everyone will allege sexual assault, as one critic stated:

Under this consent standard, if one partner touches his or her partner in a sexual way, and the person says ‘I am not interested tonight,’ that person has already committed sexual assault because he or she didn’t get permission upfront⁹⁶

This is a simplistic view of what “Yes Means Yes” legislation actually means, but it is a fear that opponents nonetheless have that people will be viewed as assaulters when in reality they merely had romantic intentions.⁹⁷ However, Yes Means Yes is critical because instead of focusing on the victim saying “no,” the alleged assaulter will have to point to when the victim indicated “yes” to sexual activity and most importantly “hold perpetrators accountable who assaulted individuals who were either asleep or incapacitated by alcohol or drugs.”⁹⁸ It seems highly unlikely that the people in the above scenario would enter into the arduous process of a sexual assault lawsuit and if they did, there may be some underlying issues in the relationship that need to be addressed.

Antiquated ideas of what constitutes romance or how Americans discuss sex may be drastically different with younger generations as they seem to support the affirmative consent standard.⁹⁹ According to Jaclyn Friedman, author of *What You Really Want: The Smart Girl’s Shame-Free Guide to Sex & Safety*, who speaks to college students about sex and consent:

93. Aimee Ortiz, *Hassan Questions Betsy DeVos’s Knowledge of Civil Rights Disabilities Law for Students*, POLITICS: THE BOSTON GLOBE (Jan. 18, 2017), <https://www.bostonglobe.com/news/politics/2017/01/18/devos-unfamiliarity-with-civil-rights-law-for-students-with-disabilities-concerns-hassan/eaRGm1bAzUy9PG2RC15Q8M/story.html>.

94. Hanna Kozlowska, *Yes Means Yes: The Big Consent Debate*, N.Y. TIMES (Oct. 15, 2014), <https://op-talk.blogs.nytimes.com/2014/10/15/yes-means-yes-the-big-consent-debate/>.

95. Friedman, *supra* note 41.

96. *Id.*

97. *Id.*

98. “Yes Means Yes” & Affirmative Consent, End Rape on Campus <http://endrapeoncampus.org/yes-means-yes/> (last visited Mar. 29, 2018).

99. Friedman, *supra* note 41.

Yes Means Yes tells students who have trouble setting boundaries that a good partner wants to know what your limits are; that if you tell someone what you don't want and they respond badly, they're not someone you want to have sex with.¹⁰⁰

Therefore, while older generations may have problems with the conception of consent, the younger generation seems to understand the conflicting messages and want further explanations to promote sexually healthy lifestyles. Friedman also supports students' choices, including if a student wants to be abstinent.¹⁰¹ Friedman discusses sex in a frank manner and relays the message that every person can choose what they want out of their sex life and that they can do it in a safe way.¹⁰²

RESOLUTION

The need for "Yes Means Yes" legislation is needed now more than ever. Historically, attitudes of rape in the United States have not drastically changed as much as Americans may think. For almost 300 years, a husband was legally incapable of raping his spouse.¹⁰³ In the United States, Judge Hale was often cited to in spousal rape cases, specifically his theory of "ongoing consent."¹⁰⁴ To further illustrate:

In the late 1600s, the Chief Justice in England, Lord Matthew Hale, articulated what would become the most popular justification in modern jurisprudence for the marital rape exemption. Hale understood marriage as granting a wife's ongoing consent to sexual intercourse.¹⁰⁵

Furthermore, author, Michelle J. Anderson, notes that it was not until the 1970s that "feminist reformers began to challenge the marital rape exemption in courts and in state legislatures."¹⁰⁶ As of 2002, only "twenty-four states and the District of Columbia have abolished marital immunity for sexual offenses" compared to "twenty-six states retain marital immunity in one form or another."¹⁰⁷ Anderson highlights the impact these laws continue have today, noting:

The exemption did more than just protect men from being prosecuted for raping their wives. It presaged the devastating impact that a prior sexual relationship between a defendant and a

100. *Id.*

101. *Id.*

102. *Id.*

103. Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465 (2003).

104. *Id.* at 1480.

105. *Id.* at 1479.

106. *Id.* at 1485.

107. Anderson, *supra* note 103, at 1468–70 (For an exhaustive lists of the states and these statutes, please see footnote 8 and 9 of this note.).

complainant has on a claim of rape today.¹⁰⁸

The article highlights how marital rape is psychologically damaging, and erodes a women's sense of security and trust.¹⁰⁹ Furthermore, this is not a onetime offense since intimate partner abuse tends to occur more than once in a relationship.¹¹⁰

Regardless of the facts, unfortunately, people still have a hard time processing sexual violence between intimate partners and people who know each other. This concept is not only evident in college rape cases, but it was part of the 2016 presidential election. In 2015, the lawyer for presidential candidate Donald Trump told reporters, in response to Ivana Trump's old divorce deposition accusing Donald Trump of marital rape, "you can't rape your spouse."¹¹¹ While the lawyer later apologized, it is troubling that a man in 2015, who attended law school, could not understand intimate partner violence. Thus, simply raising awareness about consent is a huge push in the right direction to correct these misconceptions.

To further illustrate the need for "Yes Means Yes" legislation is the fact that people do not know what consensual sex looks like. For instance, in 1998 a survey "found a quarter of adolescents believing that a man on a date has the right to sexual intercourse without the woman's consent if she is drunk."¹¹² Consent advocates have clearly accomplished a lot since 1998, since this form of "consent" is not deemed consent but rather is a form of date rape; though the reporting of date rape crimes may still be low due to continuing social stigma.¹¹³

America must confront these discussions about sexual consent. It is a difficult discussion as it infuses many religious, health, and economic concerns. It is also difficult because it involves people's own personal beliefs on legislation and educational proposals.

The most logical approach is to propose legislation for education that starts in kindergarten, as outlined by the *Atlantic* article above. If people from a young age are able to identify and express safe, healthy ideas about sex, it can prevent sexual abuse and aggressive future behaviors. This will then lead into high school and college where "Yes Means Yes" legislation is explained and applied during sexual activity. Since this concept of healthy sexual interactions will not be new, it will be relatively easy to the youth understand and therefore to practice.

While the federal educational landscape is leaning in a conservative manner, lobbying state legislatures to first adopt "Yes Means Yes"

108. *Id.* at 1474.

109. *Id.* at 1511.

110. *Id.* at 1512.

111. Tanya Basu, *Donald Trump Lawyer Sorry for Saying "You Can't Rape Your Spouse"*, TIME (July 28, 2015), <http://time.com/3974560/donald-trump-rape-ivana-michael-cohen>.

112. Friedman, *supra* note 41 (internal quotations removed).

113. *Id.*

legislation for universities, is the best first step. Then, like California, the educational component can be expanded to 9th grade, and then hopefully beyond until it reaches kindergarten.

Also, in Hollywood, money talks. Thus, by financially supporting films that promote healthy romantic relationships, one can promote the idea of consensual sex. One show, *Jane the Virgin*, has already taken steps in showing affirmative consent in a positive and romantic light.¹¹⁴ After Donald Trump's statements about consent, the show's creator re-filmed a scene to show a more consensual kiss instead of what was originally intended.¹¹⁵ Also, as viewers, we can take a step in the right direction by simply being aware of how movies and television portray women and consent. Furthermore, through understanding that now, more than ever, young children are exposed to multiple conflicting messages of sexuality, and by being open and honest with one's own children, we can promote health sexual relations.

CONCLUSION

The answers to these problems are not simple, and a more holistic approach is needed to combat them. Each person has the power to effectuate change, but perhaps with a problem as complex as this, it is one step at a time. Considering the conservative climate of the federal government, states are the best option for advocacy and pushing local universities to adopt "Yes Means Yes" legislation. This will not only educate our youth, but also raise awareness about what constitutes sexual assault.

114. Joey Nolfi, *Jane the Virgin: Donald Trump May Have Influenced Rewrites*, ENT. WEEKLY (Nov. 7, 2016), <http://ew.com/article/2016/11/07/jane-virgin-donald-trump-rewrites>.

115. *Id.*
