THE COLONIALITY OF CONSENT

Jordan Pascoe

ORCID: : 0000-0001-8495-7966

Forthcoming, Fall 2023, in Consent: Gender, Power and Subjectivity, edited by Laurie James-Hawkins and Róisín Ryan-Flood. Routledge 2023.

The MeToo Movement generated a feminist insistence that we "believe women." But the men accused of assault, harassment, and other violations frequently defended themselves with the insistence that they had always "respected women" – sometimes, going so far as to get numerous women to sign letters swearing that these men had always respected *them*. This common MeToo defense reveals the core inconsistency – and the core entitlement – at the heart of misogyny and sexual injustice: *some* women deserve respect. But the duty to respect those women relies on an invisible entitlement to *disrespect* – indeed, to assault, harass, dominate, or exploit – others. This chapter explores consent's role within the superstructure of misogyny and sexual injustice, arguing what consent is a key apparatus of white supremacy. It argues that consent has been constructed through dynamics of colonial and racist sexual entitlement, mapping some (white) women as deserving of respect and the right to consent, while marking other women as expendable or disposable within the sexual economy. This means not only that consent is historically constructed as white, but also that whiteness, and in particular, white womanhood, is constructed through consent. Thus, white women's right to consent – or to refuse – is premised upon the *inability* of other women to do so. In this way, the right to sexual consent does not disrupt the norm of male sexual entitlement. Consent has always been premised on non-consent, from coloniality and slavery to contemporary porn, which offers a vision of the world without proper consent, so that granting consent to actual women is an exceptional practice, an "act of respect." By including race and class alongside gender in my analysis of consent, I argue that contemporary feminist visions of sexual justice must do more than defend or ameliorate consent, but develop intersectional interrogations of sexual justice that reckon with the complicities of consent.

One of the central lessons of the #MeToo movement is the importance of sexual consent: the need for more consent, and for better consent. Legal jurisdictions, college campuses, and workplaces have taken up this charge, instituting, refining, and enforcing consent policies. We are getting better at consent, and better at recognizing non-consent as a serious violation, as well as an insidious form of injustice.

This chapter asks what is at stake in getting "better" at consent by pushing on consent's lineage, and its limits. In some ways, asking "what is consent?" is harder for us now, precisely because of how deeply consent has come to shape not just our sense of sexual morality, but our conceptions of gender, autonomy, and power. When our concepts and our social practices are intertwined,

institutional and legal definitions may not reflect social practices or everyday use (Haslanger 2012, p. 368). In the case of consent, where so much analysis centres on legal and institutional definitions, this gap is particularly pernicious, undermining our ability to understand how consent and social practices organize one another, and how they, in turn, subvert institutional and legal definitions. This chapter explores these questions, naming the limits and premises of sexual consent to make space for us to more carefully engage the question of what consent is – and what it could be.

In asking "what is consent?", I adapt a set of tools Sally Haslanger has developed to scrutinize the concepts that organize our world. Haslanger identifies three ways to scrutinize socially charged concepts (2012, pp. 367-371). In the case of consent, we can distinguish between *manifest* consent, or how consent is explicitly and publicly defined, and *operative* consent, or how it is implicitly understood and practiced on the ground. Thus, if a state law or college policy defines mutual, affirmative consent, but enforces the policy primarily by tracking whether a clear "no" or act of resistance signified non-consent, then we have a disconnect between how consent is manifestly defined, and how it operates on the ground. And likewise, if we include in our definition of consent a right to terminate a sexual encounter at any time, but in practice, women feel unable to do so without a really good reason, then consent is not operating *in practice* in alignment with our manifest definitions. If revising and refining our manifest definitions does not produce shifts in how things operate on the ground, then we need to pay attention to the limited power of manifest definitions in socially charged circumstances.

While manifest and operative definitions can help us understand what something like consent *is*, and how it works, then a third approach, what Haslanger calls the *ameliorative* approach (2012, p. 376), asks: what *should* consent do? Ameliorative revisions have historically refined consent and rape law, moving us from a resistance model of rape towards one in which "no means no", and now in the direction of mutual, affirmative consent. This work of ameliorating consent has been a central project for feminist, LGBTQ+, disability, and campus activism, as well as global movements against sexual violence, and it has positioned sexual consent as a key tool for sexual and gender justice. This chapter engages the gaps between manifest and operative definitions of consent to identify some difficulties with which those seeking to ameliorate consent must grapple. My argument points to the limits of such ameliorative projects, and to the necessity of thinking beyond consent.

Consent and Sexual Injustice

During his trial, Harvey Weinstein's defense lawyer Donna Rotunno made the case for the value of sexual consent: "If I was a man in today's world, before I was engaging in sexual behaviour with any woman today, I would ask them to sign a consent form" (Honderich 2020). It is striking that such a defence of consent came from Weinstein's camp, even as feminists called for more sexual consent as a remedy for the forms of injustice the MeToo movement had exposed. Despite the epistemic divisions that characterized the MeToo era, there was consensus on this point: consent was supposed to protect everyone: women, from sexual violation of various stripes, and men, from unfounded accusations of sexual assault and harassment.

Consent was often deployed as a defence by men accused of MeToo violations. Weinstein famously insisted, throughout his trial, that "all sexual encounters were consensual" (Levenson 2020); Les Moonves, the CEO of CBS, responded to claims that he had bullied and coerced

women into sexual encounters by insisting that he always stopped when women said no (Farrow 2018). Louis C.K. proudly asserted that he always asked for consent before masturbating in front of women – but failed to pay attention to whether that consent was granted (C.K. 2017). These cases reveal the degree to which, as Kate Manne has argued (2022), sexual consent still operates through an assumption of male entitlement to consent. Thus, even as feminists ameliorate consent, agitating for refinements to its manifest definitions, it often operates as a defence of male sexual entitlement -- which is, after all, how consent was originally constructed.

In its earliest legal iterations, sexual consent could only be denied through "resistance to the utmost of her abilities": the presumption of male entitlement to consent was so strong that only a measurement of the degree of resistance on the part of the victim – skin under fingernails, bruises, tearing – was sufficient to establish that a man was not, in fact, entitled to consent. The resistance standard assumed that only violent or earnest resistance could make a woman's refusal legible to men; her physical resistance, made sex forcible, making it possible for him to know he was raping her. The "no means no" standard asserted that women's *words* were sufficient to produce this knowledge — as long as that word was "no". It created, in Susan Estrich's words, a new "reasonable man" standard: "reasonable men should be held to know that no means no" (1987, p. 92). In doing do, it expanded the definition of rape beyond forcible sex, to include non-consensual sex. But at the same time, it left presumptive consent intact; it assumed that women were saying yes to sex just unless they weren't.

Consent is thus best understood as a *reform* of rape law and rape culture, one that produced critical and targeted transformation, but that tacitly endorsed existing understandings of sex, gender, violation, and power. Consent required, really, only one significant shift in epistemic practices: the resistance standard assumed that men could only know that a woman did not want to have sex with him if she resisted "to the utmost of her ability" (Estrich 1987, p. 33); consent replaces resistance with spoken refusal. But in doing so, it doesn't reject the underlying assumption that sex is something men are entitled to just unless a woman can make her refusal legible to him. Rather, it enforces the established structure of sex and sexual availability, understanding sex as what men take it to be, and women as the gatekeepers of sexual access.

So it is perhaps not surprising that despite widespread consent education, many women retain the habit of thinking that refusing consent will be dangerous, that even consent to other activities -- accepting a drink, a date, a drive, an invitation to his dorm room or apartment -- produces male entitlement to consent. This shows that the *operative* definition of consent has remained remarkably resilient, even in the face of decades of feminist work to ameliorate consent. The murkier cases of #MeToo gave us occasional glimpses of the ways in which consent is *part of* the superstructure of sexual injustice: though consent was designed to make refusals of sex legible, consent has scripted women's participation in sex, ensuring that men were primed (one hopes) to hear that "yes" or "no", but often silencing other articulations of boundaries, desires, preferences, and limits. As the #MeToo movement illustrated, again and again, sexual violations often involve the coercion of consent, the silencing of other kinds of sexual speech acts, and the pervasive habit of believing that one ought not to terminate a sexual encounter once it is begun or expected (a belief premised on the assumption that a heterosexual encounter properly concludes with male orgasm). The #MeToo movement revealed the way that, even as feminists, LGBTQIA+, and disability scholars and activists have engaged in a variety of practices to ameliorate consent, our celebrations of "active" or "affirmative" consent can blind us to the ways

that consent operates not as an articulation of one's own desires or preferences, but as an agreement to the desires or preferences of another.

This gendered analysis may seem poorly attuned to the new, gender-neutral consent policies proliferating across legal jurisdictions and college campuses. But these manifest definitions tend to obscure both how rooted the legal framework of consent remains in heterosexual assumptions about defilement, penetration, and male orgasm, and how the discipline of consent reproduces gender as a pattern of proposal and acceptance. In these ways, consent operates as a normative gender project that shapes what women can know, want, and ask for, even as it expects so little from men that it teaches them to be poor listeners, poor knowers, and poor moral agents (Pascoe 2022); it operates to norm and enforce both male entitlement to sex and compulsory heterosexuality. Thus, projects that seek to ameliorate consent, to generate better, more egalitarian, inclusive, and gender-neutral variants of consent, must grapple with the gender discipline embedded in the structure of consent, and with the ways that these norms are extended through consent as it is revised to become inclusive in gender-neutral forms. This tension is reflected in our current reckoning with sexual injustice, which arrived at the end of a decade that saw the legalization of same sex marriage, and the mainstream acceptance of terms like "transgender" "cisgender" and "nonbinary." Yet #MeToo was pointedly heterosexual, refocusing our attention on systemic sexual and gender injustices under patriarchy: as a project of transitional justice (Wexler et al 2019), #MeToo allowed us to find the power dynamics of heterosex problematic at precisely the moment at which their peculiar heterosexuality became legible for us.

My goal, in making these arguments, is neither to reduce consent to compulsory heterosexuality in an exclusionary key, nor to undercut the power of consent as a tool for combatting sexual and other violations and injustices. The inclusive project of ameliorating consent – reflected in this volume – has transformed our understanding of permissible sex, of the law's role in combatting rape culture, and of the myriad violations that shape our interactions with one another, from hospitals and doctor's offices to the workplace and the family.

But as consent has become a hegemonic discourse which shapes the terrain of both sexual violation and sexual injustice, we have sometimes lost the critical distance to ask: what *is* consent? What kind of mechanism is it? How is it constructed? What does it assume? What legacies and inheritances are smuggled in with consent? What possibilities does it open up – and what does it foreclose? Is consent *sufficient* for crafting a vision of sexual justice? How do we ensure that competing visions of sexual justice will not simply be *reduced to consent*?

In asking these questions, I seek to engage consent with the kind of scrutiny that we often bring to other inherited concepts, to see what assumptions and habits are embedded in both the ideal and praxis of consent, which need to be grappled with in any project aiming to ameliorate consent, or to make it more inclusive. In doing so, my aim is to open spaces for other ways of knowing about sexual justice, by identifying *how* consent operates as a distinct and peculiar way of knowing.

Consent and the Racial Contract

Sexual consent has its roots – like so many modern ideas – in the Enlightenment, when consent was constructed as the foundational political right of the modern era: the basis for the social

contract, which reconfigured political power as subject to the *consent* of citizens. The right to consent – or refuse – distinguished citizens from slaves, and "civilized" men from "savages". In this sense, as Charles Mills has argued, it is not only a *social*, but a *racial* contract, one which embedded a prior epistemological agreement about who had the right to consent in the first place (1997). This explains, Mills argues, how the very ideals of equality and consent that shaped modern political conceptions of freedom and equality simultaneously justified enslavement, settler colonialism, imperialism, and patriarchy: these ideals were never meant to be universal. Thus the social contract, premised on the right to consent, is also a domination contract: those without the right to consent can – and must – be subject to domination.

Sexual consent has long worked in the same ways (Pateman and Mills 2009; Freedman 2013). Sexual consent emerges as a legal right against the backdrop of slavery and coloniality: the right to consent to sex – and the legal definition of rape – coalesce in historical conditions in which only *some* women could consent, and in which racial and colonial domination were premised upon exclusions in the emergent right to sexual consent. In the U.S., the right to consent was inscribed in rape law as a *white* woman's right during the era of enslavement (Freedman 2013, p. 28). Ann Stoler has traced the ways that, in colonial settings around the globe, the arrival of white women necessitated an "embourgoisement" of colonial settlements, including the establishment and enforcement of laws against sexual violation (1989, p. 640): without white women, there *were* no problems of sexual violation, since "native" women were considered sexually accessible. From colonial Indonesia (Stoler 1989) to the Cape (Scully 1995) to the American South (Freedman 2013), the right of white women, of upper-class women, of "respectable" women to consent was made legible against the inability of *other* women – enslaved women, "savage," "native" or "oriental" women, sex workers, poor or low-class women -- to consent. Chattel slavery explicitly operated through sexual exploitation and the rights of white men to the bodies (and reproductive capacities) of enslaved women; the enforcement of this entitlement became a critical dimension of enforcing the racial and colonial order in the wake of legal slavery (Freedman 2013; Scully 1995; Sharpe 2016).

This history reveals sexual consent as an exclusionary right, one that was never supposed to be universal: the right of white women to consent -- or refuse -- sex is *premised upon* men's sexual access to other women, enforced through slavery, coloniality, sex work, and other forms of domination (Freedman 2013, Pascoe 2016, Stoler 1995). Within this matrix, the right to sexual consent was constructed as a key part of white women's agency – and of their virtue. From the Jim Crow South to the early 19th century Cape, as white men raped Black women with impunity as a mechanism for enforcing white supremacy, white women's sexual agency was often *only* legible when threatened by a Black man (Freedman 2013, pp. 100-101; Scully 1995). Accusations of raping white women served as one of the most reliable justifications for violence against Black and other men of colour, who were punished, imprisoned, and lynched for sex – both real and imagined -- with white women; in both U.S. and global colonial contexts, these imagined threats justified legal innovations that stripped Black and colonized men of their right to move in public spaces (Thornberry 2016 p. 876; Stoler 1995, p. 59). The pervasiveness of these mythologized threats ensured that 19th and early 20th century courts in the U.S. and apartheid courts in South Africa interpreted any sexual contact — even when it was explicitly consensual — between white women and black men as rape; white women, under social pressure, were often complicit in this (Armstrong 1994; Freedman 2013, p. 93). White women's right to consent was explicitly a right to consent *to white men*; 'rape' is historically constructed as a violation of *white* women's bodies, and thus, of whiteness itself. White women's right to consent is thus an apparatus of whiteness,

a form of agency required to make the violation of white women by non-white men legible and monstrous.

The problem, then, is not only that sexual consent is historically constructed as white, but that whiteness, and in particular, white womanhood, is constructed through sexual consent. This is not just history: studies continue to show that in the U.K., black and minority ethnic men are more likely to be arrested, charged, and found guilty for sexual offenses (Uhrig 2016), while in the U.S. criminal justice system, cases in which victims are white are more likely to see charges filed, while cases in which suspects are non-white are more likely to go to trial, and more likely to receive harsher punishments (Shaw and Lee 2019). These patterns echo in universities across the U.S., where a federal statute, Title IX, requires universities to adjudicate sexual assault complaints according to a standard distinct from criminal law.[1] Critics have called attention to the disparate impact of such campus sexual assault and gender discrimination policies on men of colour,[2] even as studies show that Black men tend to be more careful about consent, to seek it explicitly, and to be wary of drunken hook-up culture, attuned as they are to the long history of rape as a tool of criminalizing black men (Hirsch and Kahn 2020, p. 74; Wade 2017, p. 95).As one student puts it, "as a Black man, it feels like a threat to my life in the most basic way to be intoxicated if I hook up…. With white girls, they get impatient. They're like, 'Go ahead. Just *do* it already. Stop Asking!' And that raises my anxiety. Because you can't begin to understand what happens if I just 'go ahead'" (Orenstein 2020, p. 157). These fears illustrate the ways that the exclusions built into consent continue to operate and reverberate, ensuring that Black men have good reason both to be particularly attuned to consent – and to take consent with a grain of salt, knowing the history of Black men lynched and imprisoned for having consensual sex with white women. They also reveal the persistent ways that white women understand the right to consent as a key feature of their agency – 'just *do* it already' -- without attending to the intersectional matrix of domination and exclusion through which their sense of sexual agency is constructed. Thus, in contemporary contexts, sexual consent remains a key apparatus of *white* womanhood – and so projects that seek to ameliorate or universalize sexual consent are complicit in treating the structure of white womanhood as a model for womanhood *per se*, without grappling with the ways that consent was never constructed to be universal.

THE WHITENESS OF CONSENT

[1] For an analysis of how Title IX in the U.S. differs from legal regulation of sexual assault on university campuses in the U.K. and France under the Instanbul Convention, see Rochester, Annia. "Three Countries, One Problem: How the United States, United Kingdom, and France Handle Sexual Assault in Higher Education." *Emory Int'l L. Rev.* 36 (2022): 865.

[2] Because the U.S. Office for Civil Rights does not requires institutions to track race in sexual assault cases, this impacts are notoriously difficult to track. For discussion of the difficulty of tracking race in Title IX cases, as well as an argument for why Title IX policies likely disproportionately impacts minority men, see Trachtenberg, Ben. "How university Title IX enforcement and other discipline processes (probably) discriminate against minority students." *Nev. LJ* 18 (2017): 107. For discussion of these raced impacts and their relationship to broader patterns in criminal law, see Yoffe, Emily. "The Question of Race in Campus Sexual Assault Cases." *The Atlantic* September 11 (2017) and Halley, Janet. "Trading the megaphone for the gavel in Title IX enforcement." *Harv. L. Rev. F.* 128 (2014): 103. For discussion of how an intersectional approach to Title IX might redress these impacts, see Scarlett, Kelsey, and Lexi Weyrick. "Transforming the Focus: An Intersectional Lens in School Response to Sex Discrimination." *Cal. WL Rev.* 57 (2020): 391 and Anderson Wadley, Brenda Lee, and Sarah S. Hurtado. "Using Intersectionality to Reimagine Title IX Adjudication Policy." *Journal of Women and Gender in Higher Education* (2023): 1-15. Amia Srinivasan makes a similar point about sexual assault accusations against Dalit men in (Srinivasan, A., 2021.), p. 18.

What does the whiteness of consent reveal about contemporary projects to ameliorate consent? It may seem strange to critique consent, at this moment, when it finally seems to be becoming a widely held tool for sexual and social justice; it may seem strange to draw on this history, when sexual consent has been one of the central victories of the past 50 years of feminism. But this history can help us to see the ways that the whiteness of consent remains *part of* the "moral magic" of consent, or its ability to transform an impermissible activity or use of another person into a permissible one.

First, like whiteness, sexual consent operates through a "rational" market of access and exclusion, in ways that mirror Enlightenment conceptions of property (Harris 1993). It locates rationality in the ability – and willingness -- to consent (for white women) and in the capacity (of white men) to respect that consent. And by extension, it constructs *irrationality* as the inability to consent (for women of colour) and the inability to respect consent (for men of colour).

Second, this "rational" market of access ensures that consent is designed to legitimize relations of inequality. Though we tend to believe that (manifest) consent is an equalizing force, that it is "empowering," creating opportunities for the less powerful person in a sexual situation to assert themselves, in practice, (operative) consent is often the mechanism through which a powerful person makes their will felt by someone less powerful. This isn't a malfunction of consent: it's how consent is built. Consent is structured to treat all persons *as if* they were equal, *as if* the rights and duties that consent transforms were symmetrically distributed. In many cases, consent operates to make otherwise unequal, coercive relationships permissible (Pateman and Mills 2007).

Third, this enforcement of inequality is concealed by arguments about virtue: virtue consists in the ability to refuse, so that it, like other graces of womanhood, was explicitly white, ensuring that non-white women could not be virtuous, since they had no enforceable right to refusal. This justified men in assuming that the duty to "respect women" by respecting their consent referred only to white women, and then only to so-called *virtuous* white women. We saw variations of this assumption at work in defences against accusations of sexual violation during the #MeToo movement, when men from Donald Trump to Brett Kavanaugh insisted that they "respect women" and trotted out daughters, colleagues, and friends, to repeat this claim, or sign joint letters assuring us that the perpetrator in question indeed "respected women" in the sense that he respected *them*. The claim to "respect women" *in general* – to respect women who are *respectable* -- was deployed to excuse his treatment of a particular woman, who is, implicitly, *not* deserving of his respect (Pascoe 2022). The duty to "respect women" – a variant of the duty to ask for and respect consent – names a male virtue premised on the assumption that respecting women will not disrupt male entitlement, since it refers, circularly, only to those women deserving of respect. It is premised, in other words, on the epistemological contract (Mills 1997) that ensures access to women who are not, by the terms of that contract, deserving of respect. This, in turn, makes the respectful treatment of one's wife, or daughters, or mother, consistent with predatory behaviour in other spheres; it allows men to fetishize virginity or purity in one part of their lives while nourishing an addiction to gonzo porn in another.

Fourth, consent legitimizes and obscures these inequalities and exclusions by configuring the right to consent as an *individual* right. Consent is cast as a necessary feature of (white) women's autonomy and agency, the right to be respected as an individual with rights to her own person, to be heard when one speaks, to see one's words – namely, one's *refusal* – gain uptake in the world. What is distinctive to white women, then, is this right to refusal: like other liberal arguments,

my freedom consists primarily in my right to say no. (And in light of this right of refusal, my "yes" – which registers as definitive only when granted to white men – becomes a sign of the value of white men, of their specialness as "proper" men, as men capable of respecting refusal.) Consent prepares white women to understand our agency as organized through rightful refusal and virtuous giving (Manne 2017), and to learn how to *carefully* give and refuse within the rules of the system (which means not asking too many questions about what happens to other women, as well as granting himpathy (Manne 2017) and white empathy where it is due). It is the mechanism through which we come to understand what we must give as *ours to give* (e.g., virginity as sacred gift, the "power" of being wanted/being sexy), to be deserving of respect. Consent here is an individual right, proof of autonomy and the right to oneself.

Historically, white women's sexual consent – and their right to sexual refusal – is racially structured so as not to disrupt white men's entitlement to sex. White women's right to refusal is not disruptive precisely because of a sexual economy in which white men are always already entitled to other women's bodies: to the bodies of their slaves or those subjugated in colonial struggle, of prostitutes and others commodified in a racialized sexual economy. This history constructs consent as the sort of right that characterizes liberal white feminism: an individual right that depends implicitly on men's ongoing entitlement to the labour or bodies of other women, just as white women's right to prioritize careers and work outside the home by outsourcing reproductive labour hinges on the development of a racialized global care chain that ensures that men's entitlement to that labour remains undisrupted. The right to consent – and the sexual autonomy that follow from it -- depends upon the outsourcing of normative sexual violation to women of colour, and poor women, ensuring that white male entitlement to sex is undisturbed by this right.

This is not just a historical problem, but one that white feminism is reproducing in new forms, whether in the ways that #MeToo persistently centred the sexual harassment of wealthy, and often famous, white women, while failing to develop sustained and systemic resources for working-class women who face compounded variations of these threats (Alcoff 2021), or in the strict rules and laws surrounding sexual consent *on campus*, which ensure that women protected by institutions have the right to consent, but do not extend to women not protected by the institution.[3] These differences are particularly charged in places like South America, Africa, and

[3] Nigeria, for instance, has passed a Bill to Prohibit and Redress Sexual Harassment of Students in Tertiary Educational Institutions, which defines and provides recourse for victims of sexual harassment in universities, while no such statute exists for women outside universities. Durojaye, E. and Lawal, T., 2022. The Niamey Guidelines to combat sexual violence and its consequences in Africa and sexual harassment: A case study of Nigeria. *Stellenbosch Law Review*, *33*(1), pp.78-99. In South Africa, the 2016 "Rhodes Must Fall" protests against sexual violence on university campuses led to the establishment of new sexual violence policies on university campuses. Macleod, C.I., Böhmke, W., Mavuso, J., Barker, K. and Chiweshe, M., 2018. Contesting sexual violence policies in higher education: the case of Rhodes University. *Journal of Aggression, Conflict and Peace Research*, *10*(2), pp.83-92. For an analysis of how South African student activism reflects different sexual norms on campus than off, see Gouws, A., 2018. # EndRapeCulture campaign in South Africa: Resisting sexual violence through protest and the politics of experience. *Politikon*, *45*(1), pp.3-15. In the U.S., states like New York and California have implemented laws that set a higher standard for sexual consent on college campuses than in criminal law, ensuring that women protected by educational institutions have the right to affirmative consent, while women who do not attend college do not For analysis of how New York's "Enough is Enough" law creates a higher standard of consent on college campuses, see Garcia, Laura. "Enough Is Enough: Examining Due Process in Campus Sexual Assault Disciplinary Proceedings under New York Education Law Article 129-B." *Rutgers UL Rev.* 69 (2016): 1697. For analysis of how on-campus sexual assault policies differ from criminal law, see Tuerkheimer, Deborah. "Rape on and off Campus." *Emory LJ* 65 (2015): 1.

the U.S. where access to abortion is limited in ways that can be circumvented by wealthy women, crystalizing the ways that the right to consent is not only the right to consent to sex, but to pregnancy and all that follows from it. Conservatives like Erica Bachiachi (2022) frame this as creating an opportunity for a new sexual culture in which men *must* respect women's right to consent in a charged atmosphere in which sex might, once again, lead to a pregnancy from which there is no escape. But Bachiachi's argument is premised on the claim that, thanks to feminism and its reforms, women *now have the power* to insist upon that right to consent, without grappling with the ways that this power has always been exclusionary and premised upon the inability of other women to do so.

Thinking Otherwise: Beyond Consent

Consent is a critical and valuable reform, but if it is complicit in the structures of whiteness in the ways I am suggesting, then it is one we ought to wield carefully, with close scrutiny of what we smuggle in with consent. And even as consent is poised as *the* solution to a range of violations, it is important to remember that, as Christine Emba put it, consent is just the floor: it was never supposed to be the ceiling (2022). As feminists, activists, and sex educators alike have sought to ameliorate and open the possibilities of what consent can be, we have sometimes claimed that a wider range of sexual communicative practices – sharing desires, negotiating our ends, imagining together what sex could be – are forms of consent. But when we reduce all practices of sexual justice to consent, we mire them in the limits of consent. We make them part of the floor, instead of recognizing them as critical infrastructure that rests upon that floor, reaching up towards the ceiling.

There are many examples of more robust practices of communicative negotiation that are not reducible to consent. And many of these are not far-fetched or aspirational: consider the forms of communication many of us became practiced in through the Covid19 pandemic. During the worst seasons of the pandemic, we had to engage in deep negotiations to see one another. It was insufficient to ask for consent, to say "can I come inside? Can I take my mask off?" or to offer an invitation, "will you come for Christmas?" Instead, we found ourselves engaged in deep practices of negotiation: how will we see each other? In what space and context and with what rules of engagement? If you see me, who else will you see, and how? How careful are you being, and what is "careful" to you? How accountable am I to you when I am away from you? What am I willing to give up for this relationship? How will I live with myself if I get it wrong, and if my choices have implications not just for you but for your family, your network? These questions reveal this not as a project of consent, but as one of negotiation, the work of creating intersubjective ends (Alcoff 2018; Pascoe 2022). These intersubjective ends are not arrived at intersubjectively – but through a process of end-setting, sharing, negotiating, and remapping. They track the ways that, as Michelle Anderson (2004) has argued, sexual negotiations cannot and should not be reduced to sexual consent but understood as a form of communication through which participants construct sex and sexual possibilities for themselves.

The practices of negotiation that many of us engaged in during the Covid19 pandemic are also oriented around questions of accountability, shared risks, and the labour of constructing shared values and limits. These are crucial practices for sexual justice. But they require us to understand our sexual engagements – like our social engagements during Covid – as more than a question of individual rights. They require us to recognize our actions as impacting others in ways we cannot foresee, to understand engagement as a collective assumption of risk, and to reflect on

how our actions impact the inequitable distribution of vulnerability. These are seeds of a non-carceral accountability, which asks us to think of our engagements with others as questions of vulnerability, accountability, and solidarity, rather than of agency and autonomy.

I point to this pandemic example because it offers the hope that many of us have *already* practiced forms of engagement beyond consent, that we have collectively crafted new tools that might inform new approaches to sexual justice. Of course, these tools, too, are flawed: our accountability to one another during Covid was always shaped and limited by unequal entitlements rooted in white supremacy and misogyny, by designations of "essential" or "key" labour that designated some as disposable, and premised the health and safety of others on that designation of disposability. We will need more resources to challenge these entrenched patterns. We need intersectional forms of solidarity that shift our priorities in feminist movement (Alcoff 2021, Srinivasan 2021), movements that insist upon the sexual subjectivity of the most marginalized and vulnerable (Kempadoo and Doezema 2018; Kukla 2021), and aspirational visions of sexual and reproductive justice that envision worlds that have never yet existed (Ross et al 2017; brown 2019). We need to look beyond Western frameworks (Nzegwu 2010) and to harness erotic imaginaries that refuse to think within the boundaries of consent (Lorde 2012). And we need to centre transformational and non-carceral visions of sexual justice and accountability that refuse the narrow framework of individual rights (Burke 2021; Chen 2011; Kaba 2021). My point is simply that if we turn to these tools and imagine them to be variants of consent, then we will fail to recognize the radical possibilities that they offer, and we will wield them as if they could be made consistent with our existing and intersecting systems of domination.

WORKS CITED

Alcoff, L.M, 2021. The Radical Future of# MeToo: The Effects of an Intersectional Analysis. *Social Philosophy Today*.

Alcoff, L.M., 2018. *Rape and resistance*. John Wiley & Sons.

Anderson, M.J., 2004. Negotiating sex. *Southern. California. Law. Review.*, *78*, p.1401.

Armstrong, S., 1994. Rape in South Africa: an invisible part of apartheid's legacy. *Gender & Development*, *2*(2), pp.35-39.

Burke, T., 2021. *Unbound: My Story of Liberation and the Birth of the Me Too Movement*. Hachette UK.

Bachiochi, E., 2021. *The rights of women: reclaiming a lost vision*. University of Notre Dame Press.

brown, A. 2019. *Pleasure activism: The politics of feeling good*. AK press.

C.K. L., 2017. "These Stories Are True." New York Times, 10 November.

Chen, C.I., Dulani, J. and Piepzna-Samarasinha, L.L. eds., 2011. *The revolution starts at home: Confronting intimate violence within activist communities*. South End Press.

Dotson, K., 2014. Conceptualizing epistemic oppression. *Social Epistemology, 28*(2), pp.115-138.

Emba, C., 2022. *Rethinking Sex: A Provocation*. National Geographic Books.

Estrich, S., 1987. *Real rape*. Harvard University Press.

Farrow, R. 2018. "Leslie Moonves Steps Down from CBS." The New Yorker, 9 September.

Freedman, E.B., 2013. *Redefining rape*. Harvard University Press.

Harris, C.I., 1993. Reflections on Whiteness as property. *Harvard. Law. Review. F., 134.*

Haslanger, S., 2012. *Resisting reality: Social construction and social critique*. Oxford University Press.

Hirsch, J.S. and Khan, S., 2020. *Sexual citizens: A landmark study of sex, power, and assault on campus*. WW Norton & Company.

Honderich, H., 2020. "Harvey Weinstein trial: Could written sexual consent stand up in court?" BBC News (online), 12 February.

Kaba, M., 2021. *We do this' til we free us: Abolitionist organizing and transforming justice* (Vol. 1). Haymarket Books.

Kempadoo, K. and Doezema, J. eds., 2018. *Global sex workers: Rights, resistance, and redefinition*. Routledge.

Kukla, Q.R., 2021. A nonideal theory of sexual consent. *Ethics, 131*(2), pp.270-292.

Levenson, M. 2020. "Who's Who in the Harvey Weinstein Trial." *New York Times* (online) 19 February.

Lorde, A., 2012. *Sister outsider: Essays and speeches*. Crossing Press.

Manne, K., 2020. *Entitled: How male privilege hurts women*. Crown Publishing Group.

Manne, K., 2017. *Down girl: The logic of misogyny*. Oxford University Press.

Mills, C.W., 1997. The racial contract. In *The Racial Contract*. Cornell University Press.

Nzegwu, N., 2010. Osunality, or African Sensuality: Going Beyond Eroticism. *JENdA: A Journal of Culture and African Women Studies*, (16).

Orenstein, P., 2020. *Boys & sex: Young men on hook-ups, love, porn, consent and navigating the new masculinity*. Souvenir Press.

Pascoe, J., 2022. "Respect Women": Thinking Beyond Consent After# MeToo. In *The Palgrave Handbook of Sexual Ethics* (pp. 325-338). Cham: Springer International Publishing.

Pateman, C., and Mills, C.W. 2007. *Contract and domination*. Polity.

Ross, L., Derkas, E., Peoples, W., Roberts, L. and Bridgewater, P. eds., 2017. *Radical reproductive justice: Foundation, theory, practice, critique*. Feminist Press at CUNY.

Scully, P., 1995. Rape, race, and colonial culture: the sexual politics of identity in the nineteenth-century Cape Colony, South Africa. *The American historical review*, *100*(2), pp.335-359.

Sharpe, C., 2016. *In the wake: On blackness and being*. Duke University Press.

Shaw, J, and H. Lee. (2019). "Race and the criminal justice system response to sexual assault: A systematic review." *American journal of community psychology* 64(1-2) pp. 256-278.

Srinivasan, A., 2021. *The right to sex: Feminism in the twenty-first century*. Farrar, Straus and Giroux.

Stoler, A.L., 2020. Carnal knowledge and imperial power. In *Carnal Knowledge and Imperial Power*. University of California Press.

Stoler, A.L., 1989. Making empire respectable: the politics of race and sexual morality in 20th-century colonial cultures. *American ethnologist*, *16*(4), pp.634-660.

Thornberry, E., 2016. Rape, race, and respectability in a South African port city: East London, 1870-1927. *Journal of Urban History*, *42*(5), pp.863-880.

Uhrig, N. 2016. "Black, Asian, and Minority Ethnic disproportionality in the criminal justice system of England and Wales." Ministry of Justice Analytical Services Report. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639261/bame-disproportionality-in-the-cjs.pdf

Wade, L., 2017. *American hookup: The new culture of sex on campus*. WW Norton & Company.

Wexler, L., Robbennolt, J.K. and Murphy, C., 2019. # MeToo, Time's up, and Theories of Justice. *U. Ill. L. Rev.*, p.45.