Pedagogies of Consent: What Consent teaches us about Contemporary American Sexual Politics

by

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Coitus can scarcely be said to take place in a vacuum; although of itself it appears a biological and physical activity, it is set so deeply within the larger context of human affairs that it serves as a charged microcosm of the variety of attitudes and values to which culture subscribes.¹

Twenty-two pairs of eyes gawk at me, bewildered. The sounds of shuffling feet, muffled whispers, and uncomfortable giggles fill the room. “Speak up, they’re here for you!” urges the teacher, leaned up against his desk, arms crossed. The eyes dart around, making connections with anyone but me. No one speaks. I step forward.

“Come on, guys. What’s the first thing you think of when you think of sex?”

“Uhh…” a voice from the back of the room falters into a laugh. I pivot to face the speaker.

“Yeah? What do you think?”

“Well… like, normal sex. You know?”

“Normal sex. Huh, yeah, I don’t totally know what you mean by that. Can you explain a little more?”

“You know, like…” he mutters something unintelligible under his breath.

“Like what?”

“Like vagina.” Twenty-two jaws drop in total shock and severe discomfort.

I smile. “Yeah, totally. A vagina can definitely be something involved in sex. So is the vagina alone, or is there something else going on in ‘normal sex?’” I lift my fingers in air quotes at the end.

“There’s a penis in the vagina,” the boy declares, more confident now.

“Oh, a penis in the vagina. Okay. So are you talking about vaginal sex?”

¹ Kate Millett, Sexual Politics (Garden City, NY: Doubleday, 1970), 23.
The speaker nods.

“Great. Vaginal sex. That’s absolutely one kind of sex.” I turn around to face a white board with “What is Sex(ual Activity)?” scrawled across the top. I scribble vaginal sex under the heading, then I draw an arrow and write, penis in vagina.

“Yeah! So, vaginal sex is one way people have sex. I don’t know that I would necessarily call it ‘normal sex,’” I quote again, “because there isn’t just one way to have sex. Or even one most common one. And who’s really to decide what is or isn’t normal, right?” There is a moment of hesitation, then twenty-two heads begin to nod slowly in agreement.

This conversation unfolds at 8:50 AM in a class called “Adolescent Sexual Health Awareness.” I stand before a classroom seating twenty-two fifteen-year-olds who attend public high school in Connecticut. More often than not, a typical class will begin just like this. We go on to discuss a number of other issues, from reproductive justice to STI prevention to debunking common sex myths, including the most common one: that there is one “normal” way to have sex.

But on occasion, when I ask, “What is sexual activity?” the responses vary.

“Masturbation.”

“Anal sex.”

“Netflix and chill.”

“50 Shades of Grey.”

“Porn.”

And on occasion, “rape.”
“No,” I respond. “Rape is not a sexual activity. Rape is nonconsensual sex. In this class, we’re talking about consensual behavior only.”

* * *

One Wednesday night during my first semester at Wesleyan University, a friend dragged me out of the student center and into a small classroom. The table at the head of the room sported an assortment of condoms, dental dams, Planned Parenthood stickers, and even a wooden dildo. “We’re going to learn how to teach sex ed to high schoolers!” she promised. “It will only take a few hours.”

In those few hours, I gained a wealth of knowledge that carried me through four years of teaching sex ed to countless students. But something else I gathered from these experiences is a sense, albeit limited and inferred, of what these fifteen year olds imagine sex to be. My lesson is perhaps the first, or at least one of the first, codified introductions to sexual behavior for these students. This sense I get elicits more questions than it answers. Particularly, when a student says rape as their first connection to sexual activity, I wonder who (and what) has instructed them to make that association.

As a college student, I know that rape is a daily risk. I don’t need an article or resource sheet to remind me that one in three college-aged women have been sexually assaulted. I know that statistic from my own experience at Wesleyan; in each new course, I look around at my peers and the statistic rings in my ears. One in three.

As a woman, I know that I am at greater risk of sexual assault. But, as a white, cisgender, able-bodied and able-minded woman, I am aware that the threat of assault can be far greater for others than it is for me.
Still, as a sex educator who does not want to instill her students with fear of sex, I am troubled when the first word spoken by a student in my classroom is that of violence. To mitigate the moment, I draw on a notion of “consent,” the tool that will, I hope, conceptually and practically dissociate rape from the sex I want to teach.

As a conceptual tool, popular feminism has adopted consent as a movement for empowerment for women and marginalized people to claim power where they may traditionally be afforded less. It is an instrument to setting a scene of sexual equality. As a practical tool, teaching consent enables my students to demand respect and equality, and to recognize when that respect is violated. As a legal category, consent can act as a measure to adjudicate and to penalize malice.

But as a pedagogical tool, I use consent to teach my students a model of healthy sexual behavior. “You need consent,” I tell them. “Before, during and after sex. Rape is nonconsensual sex. That’s not the kind of sex we’re talking about today.” Underlying this message is the lesson that they should not be having nonconsensual sex. “Don’t rape,” I am telling them.

Implicitly, perhaps, I’m saying: “Don’t get raped.” As if it’s up to them. From the facts and the statistics that I witness in higher quantities with every day I add onto my college experience, I know that the risk of rape is not escapable by the simple adoption of a model of consent. Consent, though developed as a reaction to violence, does not solve the problem of violence. Still, it remains the modern moral measurement, the line that divides good sex from bad sex. The good is consensual, and the bad is everything else.
I came to this thesis, an exploration of the concept and discourse on consent, by questioning how consent has become the seemingly ubiquitous standard for talking about sexual behavior. I wondered why my discussions of sex seem so dichotomous; I constantly found myself separating the good from the bad. As an anthropologist, I knew that moralizing categories are not as simple as they seem and that they do cultural work that often remains implicit in their everyday use. What makes something good or bad is rooted in histories of normalization and othering. So, in approaching this thesis, I questioned how the moralizing tool of consent operates. It does more than separate sex into the violent and nonviolent. It marks some sexual behaviors as good and others as bad. Consent marks some people as victims and others as perpetrators. It teaches broad narratives of violence and assault. It elicits a sense of autonomy and agency (for some), while crafting a dominant narrative of sexual behavior. Through this thesis, I explore the history of these categories as well as how these effects are manifested.

I focus especially on the use of consent in juridical and educational domains. Although originally intended as a tool of affirmation and empowerment – especially for women – in power-laden and often sexually violent dynamics, the dominance of narratives and practices that center on consent have also had some interesting, and perhaps unwitting, effects on sexual politics more broadly. This thesis aims to delineate some of the lesser recognized effects and ultimately contribute to our collective understanding of the ways in which consent – in discourse and practice – has shaped the contemporary public imaginary about sexual behavior.
In the fall of 2015, I took a class for the Anthropology major in which I crafted a short ethnography about the role of language in the sex education classroom. For that project, I conducted in-depth interviews with six former members of Wesleyan’s Adolescent Sexual Health Awareness (ASHA) community service student group. We spoke of peer education structures, designations of “appropriate” language, and dynamics of our positionality as student educators. Though I use none of their words or particular notions in this thesis, their thought-provoking conversations substantially helped me in the formation of my questions for this thesis. With these conversations as an entry point into my understanding of the nuance of a sex education classroom, I began thinking about ASHA as a site for a more in-depth project.

Another entry point into this work for me has been my close attention to various rape trials tracked and publicized by major news outlets. I frequently follow cases from accusation to trial to incarceration (or acquittal), and I often find myself unsettled. Foremost, I’m interested by the seemingly constant portrayal of the accused as unknowing or naive as though they (often he) simply did not understand the concept of consent. Some of these cases have made my way into analysis, since, because they received such intense public scrutiny, they help us understand U.S. sexual politics more broadly. I choose these hyper-public sample cases because they helped shape my understanding of rape and consent. They reached my eyes not through research, but rather caught my attention from mainstream news—as they did
for many others. As such, these cases serve as popular notions of sexual behavior in the United States.

Though I entered my thesis with a foundation of popular knowledge and personal musings, I sought to develop a more holistic understanding of American sexual culture through historical analysis, extensive reading of newspaper articles and other mainstream media publications, legal analysis, and reflexive analysis of my own experiences teaching sexual health education. I examine the sexual politics that emerge from popular representations and mainstream media. Discussions of sex are seemingly everywhere and nowhere at once. Historian Sharon R. Ullman writes, “Studying everyday sexual culture requires that it be seen, yet sexual practice itself – from which such a visible culture will emanate – takes place almost entirely behind closed doors.” Though sexual content is often deemed inappropriate for certain audiences and, thus, mostly relegated to the private sphere, as we know, representations of sexual politics are pervasive; from high school hallways to *Saturday Night Live*, I gathered a sense of how my topics are defined, debated, and discussed. My review is not intended to be exhaustive, rather it should elicit a sense of some of the unintended implications of sexual consent’s presence in modern sexual politics. This sense is the same one I found emanating from the wayward glances of my students, the one that drove me to interrogate questions of consent and sexual politics in this thesis.

Attention to rape and consent surfaced in the 1970s with Susan Brownmiller’s 1975 book *Against Our Will: Men, Women and Rape*. Brownmiller posits that the

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conversation on consent has largely been dominated by a fear of false accusation, more so even than the focus on the ethical wrong of rape itself.\textsuperscript{3} During the 1980s, the issue of rape gained increased academic attention as research emerged to suggest that it was statistically a greater risk than had been previously assumed. New data proved that between 15 and 24 percent of women would experience rape during their life. In addition, reports emerged showing that the stigma associated with this particular crime influenced significant underreporting and related misestimating.\textsuperscript{4} As attention to the issue became increasingly imperative, methods of research changed. Reviewing research on sexual victimization, psychologist Nicola Gavey reports that, in the new research, “women were asked not whether they had been raped but rather whether they had had any experiences that matched behavioral descriptions of rape,”\textsuperscript{5} showing that the concept of “rape,” and thus also of “consent,” is both variable and in need of interpretation.

Gavey outlines two prominent movements in academic discourse that requested deeper investigation of rape and the sexual culture surrounding rape. First, the common narrative of stranger rape was replaced by the idea that rape and other forms of sexual violence often occur between people who already know each other in some way. This changed as sociologist Diana Russell proved that “women were far more likely to be raped by husbands, lovers, boyfriends, and dates than by strangers,”\textsuperscript{6} effectively upending the previously accepted narratives. Second, the

\textsuperscript{3} Nicola Gavey, \textit{Just Sex? The Cultural Scaffolding of Rape} (New York, NY: Routledge, 2005), 17.
\textsuperscript{5} Ibid., 59.
\textsuperscript{6} Ibid., 60.
conceptual notion of rape expanded to a broader question of sexual violence. Gavey writes, “while rape is the extreme act, it is regarded as being on a continuum with more subtle forms of coercion, from an unwanted kiss to unwanted sexual intercourse submitted to as a result of continual verbal pressure.”

Gavey notes the conflation of a wide range of activities under the umbrella of sexual violence to highlight the challenges that new policies and political endeavors would face in trying to encompass such a nuanced issue.

In the early 1990s, an uproar of attention to sexual consent surfaced with Russell’s newfound evidence and the popular prominence of Antioch College’s Sexual Offense Prevention Policy (SOPP), which I will attend to in Chapter Two. These movements incited attention and research from federal organizations including the U.S. National Institute of Justice and the Centers for Disease Control and Prevention. Though attention has risen, sexual consent is still a substantially understudied realm. Sociologist Melanie A. Beres cites a literature review that she conducted in the early 2000s with attention to consent, rape, and assault, revealing, “searching for the term ‘sexual consent’ yielded between 30 and 42 results, while searching for ‘rape’ yielded between 2705 and 8145 results, and ‘sexual assault’ yielded between 1016 and 2006 results.” Consent’s prominence in discussions of sexual violence is only beginning to emerge, and thus my thesis presents a review of some of the perhaps yet unexamined unintentional effects of consent’s presence in this discourse.

7 Ibid.
8 Gavey, Just Sex?, 60.
Since the 1990s, when affirmative consent emerged as the new standard for consensual sexual behavior, the conversation on sexual violence, rape, and consent has oscillated through a series of complex arguments both affirming and critiquing affirmative consent. The 2014 California state policy on consent (which I will describe more fully in Chapter Two) differs majorly from SOPP only in that SOPP required explicit verbal affirmation, while California’s policy allows for nonverbal indications to be recognized as consent. This distinction has become the foundation for much of the recent discourse. One argument suggests that consent as a conceptual tool might be ineffective or an incorrect approach to the issue of sexual violence. Another posits that consent, as a social script, does not translate practically to modern sex culture. Though the history of discourse on sexual assault is complex, the conversation on consent, and more specifically affirmative consent, points to the ways many sought to address on both material and societal levels.

My examination of sex and consent begins with a review of sexual politics at large. In her 1970 book *Sexual Politics*, feminist writer Kate Millett offers a detailed assessment of the theoretical and political conversations on sex beginning in 1830. She offers an analysis of sex rooted in histories of patriarchal and racial domination. A seminal notion for feminism at the time of publication, Millett writes:

> What goes largely unexamined, often even unacknowledged (yes is institutionalized nonetheless) in our social order, is the birthright priority whereby males rule females… [S]exual dominion obtains nevertheless as perhaps the most pervasive ideology of our culture and provides its most fundamental concept of power.\(^{10}\)

\(^{10}\) Millett, *Sexual Politics*, 25.
Tracking the progression of sexual revolutions across political, literary, and philosophical realms, Millett’s analysis reminds us that sexual violence cannot and should not be isolated from the histories of structural inequality that made space for violence to occur, let alone separated from the actors and circumstances that allow for the violence to be normalized. For this reason, attending to consent and rape culture also means attending to the histories of white supremacy and patriarchy that dictate who can and cannot consent (more in Chapters One and Three).

Movement toward affirmative consent in sexual activity is often tied to the rise of new perspectives on sexual autonomy and freedom in feminist progressions. Historian Shani D’Cruze points to the correlation between the rise of consensual sex and the progression of positive perspective on sexuality in the late nineteenth century. She posits that “with the approach of modernity, sexuality became more central to identity and, by extension… sexual violence became increasingly an aspect of sexuality.”

Revealing that much of this identity building grew out of new narratives of the relationships that allowed for sex, historian Sharon Block digests a history of sexual behavior in the U.S.. “Early Americans, like their early modern European counterparts, officially sanctioned sexual relations only within marriage. Thus, inappropriate sexuality included (among other acts) all heterosexual intercourse outside marriage.” These notions of sexuality are solidified in law, but they also provide guiding morals upon which much of the popular literature of the time was


12 Sharon Block, Rape and Sexual Power in Early America (Chapel Hill, NC: The University of North Carolina Press, 2006), 17.
based. Block refers to “increasing popularity in the early Republic of novels and sentimental stories that made seduction (and, less often, outright rape) integral to a story’s plot and morals. These stories emphasized ruined chastity as the worst horror that could befall a virtuous woman, regardless of the force used in the sexual encounter.”

The social and political contexts in which sexual assault occurs informs the motive for its existence. Sexual assault cannot and should not be isolated from the histories of structural inequality that made space for violence to occur, let alone separated from the actors and circumstances that allow for the violence to be normalized. Through an analysis of popular literature and judicial cases throughout the eighteenth century, Block draws out a framework of sexuality in early America that supported male social superiority through the sexual subjugation and dominance of women. She writes of a romanticization of physical and social force in sexual encounters that “promoted an image of white men as seducers rather than rapists… [which] would critically affect the hardening of racial lines in the early Republic, making ideologies of rape a fertile ground for the enactment of racial boundaries.”

The cases that Block analyzed notably only deal with assaults involving white men and women. Other stories would not have achieved such publicity in the time. Ullman analyzes the rationale for this in her book, Sex Seen. Much of the history of early sexuality is only available to the modern day researcher through the records of rape cases. Given histories of who was allowed to be raped, which I will examine in

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13 Ibid., 17-18.
14 Ibid., 52.
Chapter One, documented history is not only selective, but also skewed by the owners and managers of written history.

In her work, Brownmiller asserts that rape is an action removed from the socially or culturally sexualized concept of the body. Rape, for Brownmiller, is, at its core, an act of “violence, not sex.” Given context, however, rape can and should be understood as a crime of specific intent, which often manifests as an act of gender- or race-based violence in the, perhaps implicit, aim of upholding of white male societal, political, and economic dominance. Brownmiller writes, “Rape in slavery was more than a chance tool of violence. It was an institutionalized crime, part and parcel of the white man’s subjugation of a people for economic and psychological gain.” Feminist activist bell hooks builds on and extends Brownmiller’s argument to understand the way the social justification of raping black women has tracked mainstream sex culture beyond the end of slavery. She writes, “The designation of all black women as sexually depraved, immoral, and loose had its roots in the slave system… From such thinking emerged the stereotype of black women as sexual savages, and in sexist terms a sexual savage, a non-human, an animal cannot be raped.” These stereotypes continue to pervade popular assumptions and prejudices in the discourse of sexual behavior, hooks argues, and orient dominant sexual politics in racist ways.

Out of an examination of contextual and historical sexual behavior comes a critique of the ways standards of sexual behavior have been implemented and enforced on various groups of people in (often disparate) ways. In the early 1980s,

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feminist legal scholar Catherine MacKinnon wrote extensively about her feminist perspective on sexuality and the policing of sexual behavior. A widely read 1983 *Signs* article, “Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence” examines how feminists conceive of rape and violence in relation to sex and gender and the “women’s condition.” MacKinnon asserts, “the point of defining rape as ‘violence not sex’ or ‘violence against women’ has been to separate sexuality from gender in order to affirm sex (heterosexuality) while rejecting violence (rape).” The issues of consent in the way it functions as a legal category is something I will more fully attend to in Chapter One, but it is important to understand how consent is historically exclusionary, relevant only for very specific sexual identities and situations. MacKinnon asserts that consent is a term that encompasses a number of underlying suggestions about sexual behavior, including murky definitions of “woman’s will” and violence. As such, consent stands in as a figurative measurement or marker to separate rape from intercourse. “If sex is normally something men do to women, the issue is less whether there was force and more whether consent is a meaningful concept,” she asks. Through an analysis of gender in relation to sexual violence, MacKinnon discusses the issue of coerced consent, asserting that, in a Foucauldian sense, consent does not truly exist for women because consent is defined by the law, which is itself a product of male supremacy. She writes:

> When a rape prosecution is lost on a consent defense, the woman has not only failed to prove lack of consent, she is not considered to have

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17 Catharine A. MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," *Signs* 8, no. 4 (July 1983)
18 Ibid., 646.
19 Ibid., 650.
been injured at all. Hermeneutically unpacked, read: because he did not perceive she did not want him, she was not violated. She had sex. Sex itself cannot be an injury. Women consent to sex every day. Sex makes a woman a woman. Sex is what women are for. (emphasis hers)

In a prominent movement for feminist discourse, MacKinnon posits that sex is a fundamental preoccupation of women’s very existence. Feminists in recent years have moved away from MacKinnon’s structuralist approach to rape under patriarchy, yet some of her insights remain important.

With regards to affirmative consent, which differs from other conversations of consent particularly in the notion that there must be communication between sexual actors, the discourse revolves around what communication can look like in practical implementation. In an attempt to better grapple with the complexity of the communication of consent, Lois Pineau, a philosophy professor at Kansas State University, began developing an approach to consent in the late 1980s and early 1990s that she called “communicative sexuality.” Maintaining the dominant pattern of combining conversations of sexual consent and sexual violence, Pineau argued for legislation that would “better serve women’s interests and leave them less vulnerable to sexual violence.” She was particularly concerned with heterosexual date rape, which was, at the time, defined as “nonaggravated sexual assault, nonconsensual sex that does not involve physical injury, or the explicit threat of physical injury.”

Pineau posited that the omission of physical injury in this explanation of rape allows for an act that is, in fact, sexual assault, to be misconstrued and delegitimized by falsely naming it an act of seduction. To identify an act of assault as a form of

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seduction actively protects the perpetrator, who would then be able, both legally and morally, to continue asserting his dominance in situations where his advances are nonconsensual.\textsuperscript{21}

These complex histories of power, race, gender, and sexuality continue to inform the way we think about, talk about, and litigate rape. They are the crucial background to understanding consent and sexual violence. Throughout this thesis, I interrogate what consent teaches and what cultural work the concept of consent does to structure and complicate dominant popular narratives of sexual behavior and politics. In Chapter One, I look to consent’s prominence in legal and juridical settings. Through an analysis of three notable cases concerning sexual consent, I examine how consent law defines sexual behavior, how consent is adjudicated, and how consent law defines the characters it adjudicates. I ask, who is systemically and historically capable of consenting? How have popular reactions to legal cases revealed a broader and more nuanced understanding of sexual behavior?

In Chapter Two, I interrogate the concept of affirmative consent, as it has become the centerpiece of political and feminist work on fighting sexual assault. I look to the development and design of affirmative consent to understand the role it is intended to play. Then, I question if affirmative consent fulfills its intention. I examine the scholarly and public reactions to affirmative consent to understand how the project has guided the development of sexual politics since the early 1990s.

\textsuperscript{21} I use “his” here because it is the terminology Pineau used in her argument. She was preoccupied with a particular form of assault in which the victim and perpetrator were familiar with one another, and in which the victim was always female and the perpetrator always male. This is, of course, problematic, and I do not intend to represent her gendering of these characterizations as in any way legitimate.
In Chapter Three, I analyze how the lessons of consent inform and educate popular notions of sexual behavior. I employ auto-ethnography to reflect on my work in ASHA as a teacher of consent and witness to the variety of understandings of sex that a pedagogy of consent can elicit. I ask what teachings of consent are supposed to insinuate, further than their teachings as a practical tool of communication.
Chapter One
Who Can Consent?
The Legal and Social Terrain

A fifteen-year old girl and an eighteen-year old boy meet up on the campus of their small, prestigious boarding high school. Their rendezvous is planned. The students on campus call this kind of a meet-up a “senior salute.” The “senior salute” is a tradition in which a senior student can ask a younger student to hang out and to have sex. What exactly the sex consists of is not laid out so explicitly. But for these two students, the specifics of this intimate date would soon fall under the scrutiny of millions.

This case piqued particularly widespread popular attention, but it is just one among scores of similar stories that reach the press each year. Each case analysis is a story of a jury’s search for consent through a maze of violations of comfort, miscommunications about expectations, and, outright sexual violence. With the rule of law in hand, the jury faces the task of deciding if there has been an action that deserves criminal punishment. Consent, as a legal category, is used as a tool to measure this question of violation. The definition of consent varies from state to state, but more troublingly, the very existence of consent is usually hidden behind a mountain of complicating factors such as age, sobriety, and coercion.

This chapter examines the way the United States legal system attempts to demarcate what does and does not count as consensual sexual behavior. I refer to the legal system through four different lenses. First, I deal with penal codes and legal definitions regarding consent law. Second, I deal with how those laws are
implemented in case-by-case situations. Third, I look at the history of whose consent matters in court. Fourth, I am interested in the way that these cases and implementations of consent law have served to assist in the construction of the public imaginary of sexual behavior (teaching what is consent and what is sex). Thus, I pay attention to media and public reactions to these cases, as well. The laws of consent intend for it to function as a concrete definition that can be used to objectively adjudicate sexual violence. However, through my analysis of the legal system’s usage of consent at large and specifically, I will reveal that consent law does not actually fulfill its intention. Consent law is manipulated to evaluate the merit of a person’s ability to consent, rather than evaluating whether or not a person has actually consented. As such, consent law evaluates not the actions of the subjects, but rather the plausibility of their actions. Consent law ultimately takes action on the accused by adjudicating whether or not the survivor is a plausible victim.

Moreover, utilization of consent law implicates a number of things about the culture of sexual behavior and sexual violence, and, through media coverage, outlines for the public what that culture looks like. By even the most tangential tracking of mainstream news and media, the public learns what type of subject can count as a victim, and what criteria an experience must meet in order for a victim to have their consent violated. In this chapter, I question how this subject is constructed by and for the U.S. legal system.

Case Studies

Soon after the aforementioned boy and girl meet up, the girl reports the encounter to her school. One year later, a *New York Times* headline, one of now over 30 articles about this encounter, reads “Owen Labrie of St. Paul’s School Is Found Not Guilty of Main Rape Charge.” Only sixteen years old when her case reaches the state court, the girl remains anonymous, but headlines are filled with substitute epithets purporting qualifications of her character and advertising her trauma: “*New Hampshire Sex Victim Says School Didn’t Take Attack Seriously*,” “*Accuser in St. Paul’s Rape Case Defends Account in Cross-Examination*,” “*In Girl’s Account, Rite at St. Paul’s Boarding School Turned Into Rape*” (emphases mine). The labels direct attention to the girl’s violated innocence, her tarnished purity. They comment on her ability to accuse, to make criminal, and, most importantly, to be a victim.

In contrast, the headlines suggest something much more passive about Labrie, compared to his “accuser,” Chessy Prout. If only the headlines are read, one might think the rapist was not an eighteen year-old boy, but rather an abstract toxic hookup culture. Take, for example, the already mentioned “*In Girl’s Account, Rite at St. Paul’s Boarding School,*” along with “*Rape Case Puts Focus on Culture of Elite St. Paul’s School,*” and “*Elite Prep School Tackles ‘Hookup’ Culture Amid Rape Case.*” The source of malice here is not a person, but rather a set of structures that normalize and allow for such violation and wrongdoing.

Reading past the headlines, however, reveals an unsettlingly convoluted and logically murky conclusion to the case. The *Times* reports that Labrie was convicted of “three misdemeanors related to the girl’s age and involving penetration with his penis, mouth and finger,” but acquitted of “the more serious accusations of
aggravated sexual assault.”22 This may seem like a contradiction in the most general terms of sexual assault—that he was at fault for wrongful penetration but that was considered separately from the assault. The Times suggests that the confusing outcome may have been the result of “a compromise among the jurors.”23 However, the contradiction is justified by a more nuanced facet of his charge—that his guilty actions are only considered guilty when in context of “the girl’s age.” His actions would not be considered criminal had both actors been adults, but, as an act against a minor, they are legally punishable.


In January of 2015, two Stanford University graduate students are walking across campus when they spot a man and woman on the ground behind a dumpster. The woman is not moving. The graduate students call the police, the victim is taken to a hospital, and by the end of the month, nineteen year old undergraduate student Brock Turner is charged with five counts of felony sexual assault.24 The case unfolds

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23 Ibid.
before the nation’s eyes as every major news source from Breitbart\textsuperscript{25} to Teen Vogue\textsuperscript{26} to The Washington Post\textsuperscript{27} reports on the assault.

As the details trickle out, it becomes clear that both the man and woman were significantly intoxicated at the time of the incident. A Sports Illustrated exposé on the case reveals that this fact was used by Turner’s counsel to claim that, because both parties were under the influence of alcohol, the encounter could have been consensual. In a moving letter written for the defendant and presented during the trial, the victim vehemently fights the insinuation that similar inebriation could in any way be seen equal to sobriety.\textsuperscript{28}

Later, it becomes evident that the woman was also unconscious at the time of the rape. With this information, the question of consent seems crystal clear; an unconscious person could in no way have consented to any sexual act. Turner’s trial adjudicated his behavior as objectively nonconsensual, and thus, criminal. Time Magazine reports that “Turner was convicted on three felony counts of sexual assault: assault with intent to commit rape of an intoxicated or unconscious person,

\begin{footnotesize}
\begin{itemize}
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penetrating an intoxicated person with a foreign object and penetrating an unconscious person with a foreign object.”

When proof emerges that Turner did not actually use his penis to penetrate the victim, only a “foreign object,” the rape charges are dropped. In California, the definition of rape is such that a sexual organ must be the item of penetration. *Time* interviews Michele Dauber, a Stanford Law Professor close to the case, who explains, “‘It’s very arcane, but I think in layman’s terms, it’s just the difference between a penis and a finger.’” Just over a year following Labrie’s sentencing, Brock walks free after serving just half of a six-month jail sentence for his actions.

**State of New Jersey v. Jesse Timmendequas (1999)**

In the summer of 1994, a seven-year-old girl named Megan Kanka became her 36-year-old neighbor’s tragic victim in a notoriously heinous case of abduction, rape, and murder. As the story came to light, major newspapers, television networks, radio channels, and magazines reported extensively on the gross nature of the crime. A 1996 special report by the *New York Times*, titled “STRANGER ON THE BLOCK” opens, “Her name was Megan. Most people do not know his name. He confessed to strangling and raping her in 1994, the police say. She had just finished first grade. He lived across the street.”

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30 Ibid.
Kanka’s innocence and victimhood stood at the forefront of every report. Two decades later, a follow-up story by *New York Daily News* crafts a narrative of the peace that preceded the horror: “The soon-to-be second-grader had friends living all around the neighborhood. She’d often stop to pet the neighborhood dogs through backyard fences. Sometimes, she’d come back carrying a handful of flowers for her mother that she had picked from neighbors’ yards.”32 The message is clear: no one could have possibly predicted the evil that was to befall this purely innocent child. At the time of the assault, the story immediately sparked fear in the national public. It was a specific fear, that of a strange mysterious man who has the capacity to violently and sexually attack a young, innocent girl. Not to mention, he had been quietly living just across the street for years.

*Legal Definitions and Penal Codes*

As a legal category, consent has no standardized definition. The FBI just recently updated their definition of rape. In the past, rape was defined as “the carnal knowledge of a female forcibly and against her will.” In 2013, they updated it to “penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the

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victim.” On a local level, however, penal code definitions of consent, rape, and sexual assault differ by state, and, in some cases, the differences can be drastic.

To better understand the disparity between these definitions and what the consequences might be, I use a resource tool provided by the Rape, Abuse and Incest National Network (RAINN) website to compare consent laws between California, where Brock Turner’s case was tried, New Hampshire, where Owen Labrie’s case was tried, and Texas, where laws are often more conservative than the former two states. To understand these differences through a sampling of various definitional elements, refer to the figures below.

How is consent defined?
Table 1

<table>
<thead>
<tr>
<th>California</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Consent” is defined to mean positive cooperation in act or attitude pursuant to the exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>New Hampshire</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lack of consent can result from</td>
</tr>
<tr>
<td>(1) physical force;</td>
</tr>
<tr>
<td>(2) victim’s “helplessness”;</td>
</tr>
<tr>
<td>(3) coercion through physical force or threat of force;</td>
</tr>
<tr>
<td>(4) coercion through threat of retaliation;</td>
</tr>
<tr>
<td>(5) imprisonment, kidnapping or extortion;</td>
</tr>
<tr>
<td>(6) administration of any intoxicating substance which mentally incapacitates the victim;</td>
</tr>
<tr>
<td>(7) disability;</td>
</tr>
<tr>
<td>(8) concealment or surprise;</td>
</tr>
<tr>
<td>(9) filial affinity;</td>
</tr>
</tbody>
</table>

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35 Ibid.
Texas

Under Texas law, sexual assault “without the consent” of the other person arises when:

(1) the actor compels the other person to submit or participate by the use of physical force or violence; (2) the actor compels the other person to submit or participate by threatening to use force or violence against the other person, and the other person believes that the actor has the present ability to execute the threat;

(3) the other person has not consented and the actor knows the other person is unconscious or physically unable to resist;

(4) the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it;

(5) the other person has not consented and the actor knows the other person is unaware that the sexual assault is occurring;

(6) the actor has intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge;

(7) the actor compels the other person to submit or participate by threatening to use force or violence against any person, and the other person believes that the actor has the ability to execute the threat;

(8) the actor is a public servant who coerces the other person to submit or participate;

(9) the actor is a mental health services provider or a health care services provider who causes the other person, who is a patient or former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor;

(10) the actor is a clergyman who causes the other person to submit or participate by exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual adviser; or

(11) the actor is an employee of a facility where the other person is a resident, unless the employee and resident are formally or informally married to each other under the Texas Family Code.
Table 2

<table>
<thead>
<tr>
<th></th>
<th>California</th>
<th>New Hampshire</th>
<th>Texas</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does the definition require “freely given consent” or “affirmative consent”?</td>
<td>Yes.</td>
<td>Yes.</td>
<td>No.</td>
</tr>
<tr>
<td>At what age is a person able to consent?</td>
<td>18 years old.</td>
<td>16 years old.</td>
<td>17 years old.</td>
</tr>
</tbody>
</table>

As evidenced by the tables, definitions of and penalties for sex crimes vary considerably from state to state. Foremost, the terminology itself varies. While California’s primary penal code is titled “rape,” New Hampshire attends to “Aggravated Felonious Sexual Assault,” and Texas broadly addresses “Sexual Assault.” California’s 25-item penal code sees rape as “an act of sexual intercourse accomplished with a person not the spouse of the perpetrator,” with a separate code for “rape of a spouse.” A Time Magazine article examining the Brock Turner case reveals, “some states, including Minnesota, Nebraska and New Mexico, have laws against sexual assault but don’t charge specifically using the term rape.” For the purpose of dealing with this terminology across the myriad of definitions, I will refer to violations of consent as sexual violence when discussing it generally. In attending to specific cases, I will use the language defined by the cases to keep in line with the literature to which I refer. I acknowledge that these inconsistencies might seem

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38 Sayler, "Why We Can't," Law.
unnecessarily convoluted, but it may serve to highlight the trouble embedded in the larger legal system’s inability to settle on more concrete definitions.

Some penal codes, like that of New York State, pay special attention to the capacity an individual has to consent based on limitations of their mental stability, while others, like California, spend more time detailing the specificity of just how much inebriation would limit the consent-giver’s decision-making capacity. As such, even within the United States, it matters where in the country a person is raped if there is legal action to be taken.

**Histories of Consenting Subjects and Offenders**

If the variation between codes reveals what consent looks like strictly as a legal category, then understanding how the codes function in action brings to light the ways that they act on and influence the subjects whom they claim to protect and regulate. Some elements of these codes, like age stipulations, end up carrying more weight than others, thus the impact of these codes can only be understood wholly through an examination of the codes in action. To break down these definitions of consent, I use the work of sociologist Melanie Ann Beres who argues that legal definitions of consent have two prominent aspects. First, a penal code sets out the subject who can give consent. Second, the definition outlines “how consent is communicated or ‘what counts as consent.’” This model is helpful to my analysis of these cases because it addresses the subject of consent, which is often, as in Texas’s

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39 See, for example; Sex offenses; lack of consent., N.Y. Penal Law § 130.05.
40 See, for example: Cal. Penal Code § 261.7.
penal code,\textsuperscript{42} specified in great detail, as well as the subject’s action of giving consent.

The first half of Beres’ outline asks who can give consent. This is another way of asking whose consent can be violated or, more bluntly, who can, by law, be raped? Through an analysis of the way the three aforementioned cases treat their subjects, I will conclude that consent law does not operate with the base assumption that all subjects have the same ability to consent. Consent, as an active\textsuperscript{43} legal term, separates the subjects into two categories. For the purpose of this thesis, I will label these categories the “unrapeable” subject and the “always raped” subject. The “unrapeable” subject is a category of persons who can consent and, by some nature of their being, are perpetually in a state of consent. No matter the violation of concern, this subject’s consent is virtually obsolete in that it is taken for granted. The “always raped” subject, on the other hand, represents a category of persons who cannot consent, and thus their consent is necessarily violated in any sexual scenario. Consent law cares not whether or not the subject has performed an action of consent, rather it operates to assess whether an accuser’s personhood meets the standards to qualify as a victim.

In framing the subjects who can and cannot give consent, the law serves as a discourse that, in a Foucauldian manner, produces the subjects it names.\textsuperscript{44} In the case of law as a disciplining power, Foucault says that laws create the very subjects they

\textsuperscript{42}Refer to Table 1.
\textsuperscript{43}I use the word “active” in the sense that the legal definition does not operate statically. The definition is used, manipulated, and instilled with contextual specificity on a case-by-case basis. As such, consent as a simple term does not separate people into categories, but rather its usage in court, as I present through this chapter, does the categorization work.
regulate. In defining the subject to whom the law adheres, the subject itself is created. In consent law, that subject is the victim of assault. The subject appears based on whether or not their personhood is deemed eligible of victimhood according to the stipulations and usage of consent law. Beyond the letter of the law, sexual assault penal codes and consent laws have been manipulated to exclude certain subjects. As I present below, the qualifications to be a victim are both written into the law, such as age requirements, and also emerge through histories of usage of the law, as in in-court representations of sexual promiscuity. Though this is not an all-encompassing history of consenting subjects, the provided examples should evoke a broad understanding of how and why various subjects have been excluded, their agency as a person with a capacity to consent erased, by the usage of consent law.

The State of New Jersey v. Jesse Timmendequas case is not a story of nonconsensual sex. In fact, the term “sexual consent” does not appear once in the transcript of the conviction hearing, nor does any alternate wording of the concept.\(^\text{45}\) Still, it is evident that Kanka did not, and would not have possibly been able to, consent to Timmendequas’s actions. Part of the reasoning might be attributed to Timmendequas’s noted and thoroughly proven dominating violence, but another feature of the rationale derives from Kanka’s young age. It seems obvious that a seven-year-old would be incapable of giving consent for any sexual activity, and the New Jersey statutory rape penal code supports this notion with a noted sixteen-years-old age of sexual consent.\(^\text{46}\) Legal scholar Joseph J. Fischel argues that the question of

consent in U.S. law is often clouded by numerous stipulations that attend to the character of the victim or offender as opposed to the verification of their actions. Fischel writes about the weight of age in court discussions of consent, pointing out how the age provision becomes a stand in argument for the act of consent.\textsuperscript{47} Though, theoretically, a sexual violence case would seek to address the moment when a victim approved or rejected advances by the perpetrator, the age stipulation effectively halts and bypasses this examination. If a sexual act occurred and the victim could not have consented, the act is necessarily a violation and thus criminal. The State of New Jersey v. Jesse Timmendequas does not question whether or not the seven-year-old Kanka explicitly agreed or denied Timmendequas’s actions in any way. Rather, her ability to act is categorically replaced by her youth. She is seen, through the implementation and action of consent law, as an “always raped” subject.

On the flip side, consent law is also used to characterize victims in a way that wholly erases any trace of victimhood, creating the “unrapeable” subject. Often times, this appears as a deliberately skewed depiction of the victim’s sexual history as evidence of their ability to consent. Still, the question is not whether or not the person gave consent, but rather if that person is a subject with the capacity to give consent.

Marital standard is one standard that has historically made a subject’s agency to give consent effectively obsolete. Though it has been debated widely across a multitude of cultures, faiths, and family structures, U.S. legal code has yet to settle on a standard of consent that exists within a potentially long-standing and, more importantly, legally bound relationship. Sociologist Raquel Kennedy Bergen writes

\textsuperscript{47} Joseph J. Fischel, \textit{Sex and Harm in the Age of Consent} (Minneapolis, MN: University of Minnesota Press, 2016), 6.
about the complexities of marital rape, exploring the history of marriage and the development of the concept of “irrevocable consent.” She writes, “[w]ithin the United States, women historically did not have the right to say no to their partners because they were married; thus, it was assumed that their consent was a given.”

Sociologists David Finkelhor and Kersti Yllo add to the discourse on the “marital-rape exemption” with an analysis of how marital rape is normalized to the public through popular representations of this sort of conflict as “petty” and more coercive than violent. For example, *Gone with the Wind* offers a portrayal of marital rape when protagonist Rhett Butler, portrayed by American icon of chivalry Clark Gable, seduces his wife, Scarlett O’Hara, against her active and verbal resistance to yield to his sexual advances. Finkelhor and Yllo write, “*Gone with the Wind* presents a most dangerous image of marital rape, for it powerfully advertises the idea that women secretly wish to be overpowered and raped, and that, in fact, rape may be a good way to reconcile a marriage.” In the subsequent scene, O’Hara appears genuinely happy and undisturbed by the events of the night previous. Though this representation, and numerous others like it, are not questions of marital rape on trial or in court, the practice of normalization through popular media contributes to the construction and acceptance of the notion that marriage stands in for consent.

In 1975, South Dakota was the first state to outlaw marital rape, prompting the American Civil Liberties Union to call for a federal redefinition of rape, but it was

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almost 20 years before significant progress took form. Early public attention to the legal status of married women in rape accusations against their husbands arose in 1978, following the first case wherein a wife prosecuted her husband on charges of rape while living together.\(^{51}\) Reflection on the issue began to shift throughout the 1980s and into the 1990s until, in 1993, rape in marriage became standardly “criminalized under at least one of the sexual offense codes in all 50 states.”\(^{52}\) Before 1993, married women were made almost irrelevant in the discussion of sexual violence and consent. A woman’s signature on a marriage document permanently erased her ability to perform the act of giving consent again. Should she feel violated in any way, her victimhood would be deemed illegible by the use of consent law. By nature of her legal status, a married woman represented the “unrapeable” subject.

Often times, this conversation is an extension of a critique of patriarchal control and policing of women’s bodies, sexuality, and reproductive rights. It should be noted that marriage was not legal for same-sex couples until section three of the Defense of Marriage Act was struck down in the historic 2013 Supreme Court case United States v. Windsor.\(^{53}\) Thus, the bulk of research and writing on this topic centers on marriages between men and women, with women most often understood to be the victim or accuser. Furthermore, cases of violence in intimate relationships that are not heterosexual have an equally, if not seemingly more, problematic history of illegibility and “unrapeability” in the U.S. legal system.

\(^{51}\) Bergen, an overview of marital rape research in the United States, 21.

\(^{52}\) Ibid., 20.

Though the marital rape exemption attends to the legal qualifications of a person’s sex life, negative portrayals of a victim’s sexual background offer an entry point into another problematic history of manipulating the standards of victimhood in rape prosecutions. Legal scholar John M. Conley and Anthropologist William M. O’Barr offer an analysis of legal power in the courtroom, evidenced by the language used to cross-examine rape victims about their sexual histories. Conley and O’Barr explain their understanding of this defense tactic as a research in “microlinguistics” that might “lead to more effective rape reform” by identifying and evaluating the manipulations of powerful language against victims’ court testimonies.⁵⁴ The use of a victim’s sexual history as evidence for the invalidation of their ability to consent is most often evident in the case that the victim is a sex worker. In a 2000 review of recent literature on prostitution and sexual exploitation, psychologists Melissa Farley and Vanessa Kelly write, “94% of those in street prostitution had experienced some form of sexual assault; 75% had been raped by one or more johns. In spite of this, there was a widespread belief that the concept of rape did not apply to prostitutes.”⁵⁵ The idea that a prostitute is unrapeable may derive from social perceptions surrounding the controversial politics of sex work, but it is also advertised through extensive evidence of court cases that rule against a raped sex worker on the basis of the nature of her occupation.

One widely cited example of this type of court case might be the 1986 trial of Daniel Zabuski who allegedly violently raped and robbed a prostitute in the midst of a

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sexual transaction and was dismissed of all charges. In a review of what became a highly contentious decision, *The Los Angeles Times* reports that the judge, against the advisement of his jury, dismissed charges against Zabuski, citing that “the man could force the prostitute to engage in sexual intercourse and sodomy without being criminally liable, as long as he didn’t physically abuse her.” With attention to the microlinguistics of the trial, the judge distinguishes the victim’s character, and thus her testimony, as unreliable and irrelevant. *The Los Angeles Times* details that the judge often referred to the victim as a “whore,” and a review of the same case by sex worker activist Norma Jean Almodovar reveals that, in interviews, the judge “repeated his belief that the law did not afford prostitutes protection against rape or sodomy.” With the publicity of cases such as this one, an underlying message is contributed to the ongoing discourse of whether previous sexual behavior might be necessary to an understanding of a victim’s capacity for consent. The jury for this case, on the other hand, felt differently from the judge. *The Los Angeles Times* quotes one juror’s reaction: “They are difficult cases,” she said, “because people in the community hold certain prejudices. But a prostitute can be raped. Just because you agree to one form of sex doesn't necessarily mean you agree to everything.” The question of irrevocable consent in marriage becomes relevant in the case of sex workers because, though they did not sign a legal document, their profession is often understood or represented to preclude their ability to consent.

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58 Arax, "Judge Says."
Much of the history of early sexual violence is only available to the modern day researcher through records of rape trials. Given extensive histories of who was allowed to be raped or understood as a victim, histories that exclude wives and sex workers, documented history on these issues is at best selective, and at worst erased. Another category of people that are historically read as “unrapeable” is black women. Historian Diane Miller Sommerville writes about slave rape trials in the 1800s, tracing the histories of class, race, and gender through the accusations and public responses to these cases. She navigates the intersections of sexism and racism, acknowledging the multitude of occasions where Black men were easily written off as rapists when the victim was a white woman. However, Sommerville complicates these histories, as well, positing that the “distrust of women in many instances weighed more heavily as a concern and overcame any anxiety about the sexual threat of black men.”

The intersection of sexism and racism takes new form in instances in which the victim is, instead, a Black woman.

Historian Estelle Freedman takes up this point with the case of Julia Hayden, a young Black woman raped and murdered by two white men in 1874. Freedman uses this case to analyze the social and legal understandings of Black women’s bodies in the Antebellum South and throughout the following several years. At the time, much of the legal code on rape and assault was codified to apply explicitly and exclusively to white women. Freedman writes of how “white men still deemed all black women to be sexually available… Even if the men who approached her knew that Hayden was an educated, middle-class woman, they may have targeted her sexually because

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her school threatened to disrupt the local racial hierarchy.⁶⁰ One amongst many, cases like Hayden’s built the foundation of the movement in the late 1800s to reform rape laws. In 1871, during the congressional hearings on the Ku Klux Klan, many southern black women testified about the outpouring of sexual violence committed against them. Freedman writes,

As former slaves began to assert greater control over their own persons, and armed with the right to testify in court, at least some black women took the unprecedented step of turning to state authorities to prosecute sexual assailants. They could do so because southern state legislatures began to remove the term *white* from rape statutes when they rewrote their legal codes, effectively criminalizing sexual assaults on black women.⁶¹

However, the redefinitions only went so far. Freedman attests that racism continued to, and still does, pervade the courtroom.

In intraracial rape cases in Chicago, for example, defense attorneys in the postwar decades increasingly tried to discredit black women’s testimony. They cross-examined them about their sexual histories and implied that they had been sexually promiscuous. Any black woman who had been out on city streets at night, the questioning suggested, was likely to be a prostitute who had consented to sex.⁶²

The intersection of racism and sexism effectively makes Black women far more susceptible to manipulation by a legal system that upholds these prejudiced standards. Consent law plays no part in their trials because, by the very nature of their existence, their testimony is both untrustworthy because they are female and irrelevant because they are black. A Black woman’s personhood, under such laws, epitomizes the definition of a Foucauldian “docile body” in their subjugation and erasure through the very design of the laws that define them.

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⁶⁰ Freedman, *Redefining Rape*, 73.
⁶¹ Ibid., 77.
⁶² Ibid., 273
In the circumstance of the married woman as a contractual sex object, or of the sex worker who has, by the very nature of her career, forfeited an ability to consent, or of the Black woman who is always consenting according to the color of her skin and her assigned gender, consent law historically skews certain bodies and personhoods to be “unrapeable.” As the legal system produces and records these histories, a narrative emerges that constructs the public imaginary of both who can be a victim and along the same lines, what counts as sexual assault. Sociologist Gregory Matoesian proposes that consent law does not “determine if there was consent or non-consent from an individual woman’s or man’s point of view, at least not directly, but determines instead if she consented to patriarchal standards of sexuality, sexual access, and sexual availability.”63 A reading of Freedman and Sommerville highlights the prevalence of white supremacist standards of sexuality, as well.

Not only do these characterizations attend to the nature of the accuser, they also assist in the construction of a dominant identity of the accused subject. Freedman notes that, while some women “chose to break the taboo on interracial sexual relations, others hesitated to acknowledge that they had unwanted sex with black men, knowing the consequences these men faced in the racist South.”64 Descriptions of the Kanka case and the proceedings are loaded with terms that characterize the persona of Timmendequas: a perpetrator, a pedophile, and a “pathetically sick man.”65

63 Gregory M. Matoesian, Reproducing Rape: Domination through Talk in the Courtroom, 2nd ed. (Chicago, IL: The University of Chicago Press, 1993), vii.
64 Freedman, Redefining Rape, 277.
A state representative involved in the case said, "I believe he is exactly the kind of predator that the legislature had in mind when it enacted the death penalty."\(^{66}\)

The Kanka case, with its wide publicity and politicization, proves to be a critical moment in the formation of the characters that pervade popular understandings of sex crimes and sexual assault. Timmendequas became the quintessential hidden evil in an otherwise perfect neighborhood, and the Timmendequas persona became a model after which many more cases would observe the pattern of a previously convicted offender who couldn’t help but violate the innocent child. It is not unlike the story of a violent rape by a stranger in a dark alley, that which is not by any means the story of every sexual assault, but that somehow looms over every story as the most evil, the most scary, the most inevitable.

A 1997 CNN report cites that Timmendequas had previously been “convicted in a 1981 attack on a 5-year-old child and an attempted sexual assault on a 7-year-old child.”\(^{67}\) When the Kanka case came to light, the public asked how the government could have best prevented such an atrocity. This case and the emphasized attention to Timmendequas’s previous crimes provoked a policy push, resulting in then-president Bill Clinton’s action to adopt a set of policies called “Megan’s Law” in May of 1996. “Megan’s Law” is a catchall term that refers to the variety of similar legislation that has now been passed in all 50 states and the District of Columbia, commonly known as sex offender registration laws. The policies mandate that convicted sex offenders

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\(^{66}\) Ibid.
\(^{67}\) Ibid.
must notify their communities about their history and current living situation.\textsuperscript{68} The directives are premised on an assumption that the offender is likely to recidivate, and there are specific levels of discretion based on the severity and number of previous offenses. The National Institute of Justice explains:

> Offenders who represent the lowest risk are placed in tier one. They are only required to notify law enforcement officials and the victims after release. Tier two classification represents moderate risk of reoffense and requires notification of organizations, educational institutions, day care centers and summer camps. Tier three offenders are predicted to present the greatest risk to reoffend. Placement in this category generates the most legal resistance because it calls for the broadest level of notification.\textsuperscript{69}

In a video recording of the solemn presentation and signing in of these laws, provided by the Clinton Presidential Library, President Clinton begins his announcement in the Oval Office first by greeting each member of the Kanka family individually, then turning to a slew of reporters, and in effect the American public, to explain how and why these laws will better safety and crime prevention standards for all. He alludes to the dangers of the “predators” who live among us, and he warns of the statistically significant probability that they will reoffend. He speaks of the innocent youth that these laws seek to protect. “Today, America warns: if you dare to prey on our children, the law will follow you wherever you go, state to state, town to town. Today, America circles the wagon around our children.”\textsuperscript{70}


\textsuperscript{69} Ibid.

In the publicity surrounding Brock Turner’s recent rape case, most of the national headlines boasted just one epithet to tag the content of the article: “ex-Stanford swimmer.” Many blogs and smaller publications picked up on this seemingly ignorant, or perhaps just attention-seeking, nuance. An article for the blog The Intercept cites that

Associated Press, USA Today, TIME, CNN, Sports Illustrated, MSNBC, and the BBC were criticized by readers for failing to immediately identify Turner as someone who had committed sexual assault. TIME referred to Turner as a swimmer and didn’t note that he had committed a sexual assault until the third line of the story. The magazine called him a “former Stanford student and star swimmer.”

His status as a star athlete and scholar became essential to the reach and weight of the case. CNN reporters Janette Gagnon and Emanuella Grinberg review how sexual assault is adjudicated for athletes compared to the general population, suggesting “little to no time in jail or prison is common among college athletes convicted of first-time sexual offenses -- if they are charged at all.” The piece cited Kristy L. McCray, an assistant professor of Health and Sport Sciences at Otterbein University, who claimed “it was hard for society to embrace this Midwestern, white, blonde privileged young man doing this crime.” Because his character appeared inconsistent with the narrative of how sexual violence often appears, the sentence accordingly fell inconsistent with the nature of the crime. Serving only three months in jail, Turner garnered national attention for the brevity of his sentence. The media

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attached to this case not only because it was a disturbingly light sentence in contrast with a public response that deemed it so unambiguously malicious and immoral, but also because the sentence was not actually that surprising.

In a similarly unsettling resolution to a controversial case, The *New York Times* ties the difficulty of drawing a verdict in the Labrie case to the jury’s fundamental lack of knowledge about a categorical definition of consent. Reporter Jess Bidgood asserts, “Missing from the trial, some experts said, was a broad discussion about the meaning of consent. There was no testimony about the definition of consent or about how victims of rape and the accompanying trauma typically behave: A possible government witness prepared to speak on those matters was stricken from the list after a defense motion.”73 Still, the jury managed to acquit Labrie of three felony charges—the primary rape charges. He was charged with four misdemeanors and a felony, resulting in a sentence of one year in jail, five on probation, and a mandatory registration as a sex offender.74

The jury ruled that Labrie’s actions were not legitimately rape, but still they acknowledged a lack of consent. In other words, Prout did not object enough to make Labrie’s actions rape, but the question of whether or not she consented went unsolved because her age made such an action irrelevant. The trial was long, upsetting, and covered by every major news outlet. At Labrie’s sentencing, the presiding judge

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74 Ibid.
declared to Labrie: “This is a case where lives have been destroyed: yours and the defendant’s.”

Returning to Beres’s theoretical structure of consent law, the second half of a penal code outlines the requirements for a declaration of consent. Must it be verbal or can consent be adequately communicated nonverbally? Is consent unconditional, or does it have temporal and contextual limitations? Do those have to be defined previous to engagement in sexual activity? In the New York Times piece that detailed the trial of Owen Labrie, district attorney specializing in the prosecution of sexual violence Jennifer Long explains, “‘It’s natural to wonder, is that fully understood or accepted by the jury or a community as a whole – the idea of consent, that it can be withdrawn, that consent to one sexual activity doesn’t mean consent to anything and everything?’” The ideas surrounding the nature of a transaction of consent are changing, as I will introduce in Chapter Two.

The convictions and sentences of rape cases, especially in the age of new media, preach a moral lesson about who and what the U.S. legal system identifies as an actor in sexual assault. As the public watches, they learn an implicit narrative of victimhood and standards of sexuality. In turn, the social response to these cases and similar events contributes to the development and progression of the legal system. An ABC News: Nightline special video report on the Labrie case questioned the nature of sentencing as to whether it was affected by the particularly high media attention to this case. Through interviews with various experts involved in the case, the report posits:

75 Ibid.
76 Ibid.
There's no question the judge knows the world is watching. And if he had sentenced Owen Labrie to probation, there would have been a rhetorical price to pay in the media, social media, et cetera. Does that mean that's why he did it? No. But are judges human? Yes…. This case is setting a precedent that is going to put most parents who are paying attention on alert. It is time to have conversations not only with your daughter, but with your son, about what consent looks like, how to make sure you have consent.\textsuperscript{77}

In Chapter Three, I will look at how cases like this invigorate the movement for more comprehensive consent education. As \textit{ABC News} reminds its viewers, the lessons an onlooker takes from these cases are not static; they fuel conversation, and build momentum for greater awareness and attention to sexual assault and consent. It is worth returning to the judge’s concluding comments at Labrie’s sentencing: “This is a case where lives have been destroyed: yours and the defendant’s.”\textsuperscript{78} This moment of morality in question is suggested to be that which permanently ruins a life. The judge’s point suggests not only that the trauma for the victim is everlasting, but also that the destruction of a life stems from both the assault and the process of seeking justice. Furthermore, he suggests that the damage is equal: even one with the power to enact such violence still deserves some pity. The judge puts forth that perpetrators, too, are victims.


\textsuperscript{78} Bidgood, "Owen Labrie," U.S.
Chapter Two
“Yes Means Yes”
Teaching Affirmative Consent

On September 28, 2014, California Governor Jerry Brown signed Senate Bill No. 967 into law,\textsuperscript{79} revolutionizing the national political discourse on sex. Popularly known as the “Yes Means Yes” bill, “Sexual Assault on College Campuses” enacted a definition of sexual consent known as “affirmative consent” for all state-funded colleges in California. “Affirmative consent” is the name for a specific type of communication, one that necessitates that all parties involved in a sexual activity agree to participate with an explicit acknowledgement of assent. The phrase “yes means yes” reflects a redefinition of the basic premise of sexual consent. In the past, assent to sex was assumed as long as the actor does not reject the advances of their partner. This standard epitomized in the “no means no” anti-rape slogans of the late 1980s and 1990s; “no means no” attempted to address sexual violence by emphasizing the importance of respecting a partner’s refusal.

“Yes means yes,” however, necessitates that all sexual participants provide the affirmative “yes” before sexual activity. Bill No. 967 requires that, in order for colleges and universities to receive contracted state funding, they must uniformly accept and adopt the definitions and policies about sexual consent and assault as defined by the bill. As written, the law specifies:

\begin{quote}
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
\end{quote}

\textsuperscript{79} Sexual Assault on College Campuses, S. 967, 2014 Leg. (Cal. 2014).
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.  

Not only does this bill specify the active participation of each actor, it also highlights that this action must be restated at the time of each new encounter. Under this law, consent cannot be expected or assumed. Largely understood as a step forward for sexual empowerment, “yes means yes” is now the forefront of numerous social activist campaigns that fight sexual assault. Both in support and in critique, the concept of affirmative consent has captured the attention of the conversation on sexuality and sexual behavior, asserting a modern variation on sexual politics of consent.

In the last chapter, I presented an analysis of how consent law is used in the legal system to codify and create the hypothetical subject of sexual activity. Loaded with histories of exclusion and erasure, consent law in action disseminates, for the onlooking public, a nuanced portrayal of sexual behavior that defines both violence and victimhood. In this chapter, I use the understandings of those edifying depictions to examine contemporary discourses surrounding affirmative consent. Looking to the development and reception of affirmative consent in both popular and scholarly circles, this chapter questions the design of affirmative consent as an instrument with which to combat pervasive structures of sexual violence. In my analysis, I will attend to affirmative consent’s success as a feminist movement in conversation with patriarchal structures of violence, while highlighting the ways it falls short of

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80 Ibid.  
fulfilling its intentions of ending sexual assault. This chapter examines how affirmative consent provides a new vocabulary for the contemporary discourse surrounding sexual politics in the United States.

At the time of the 2014 passage of the “yes means yes” bill, national attention was already pivoting towards the search for ways to better address issues of sexual violence, especially on college campuses. A *Washington Post* article written by California state senators Kevin de León and Hannah-Beth Jackson asserts that this legal movement developed out of a “need for an affirmative, unambiguous standard of consent for sexual contact.”82 León and Jackson cite a report from the Association of American Universities that substantiates this need with data to prove the frequency and severity of the problem of sexual assault on college campuses:

> Based on one of the largest surveys of college students ever conducted — more than 150,000 students from 27 universities participated — the report found that nearly one in four female students said they had experienced unwanted sexual contact. The assaults were carried out by force or threat of force, or while the victim was intoxicated.83

Though the information is not particularly new or groundbreaking, León and Jackson argue that this report clearly shows that previous attempts to deal with the issues of violence have been wholly unsuccessful. “No means no” was the most prominent slogan used to mark discussions of sexual violence, but the theory to substantiate that movement is largely critiqued as both problematic and inherently flawed. The fundamental theory behind “no means no” places the onus of consent on the victim, who might already feel threatened, coerced, or unsafe.

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83 Ibid.
In a move to reorient the burden of proof and shift the conversation away from victim-blaming tendencies, “yes means yes” surfaced. In their 2016 conceptual review of sexual consent and college students, “The Complexities of Sexual Consent Among College Students: A Conceptual and Empirical Review,” psychologists Charlene Muehlenhard, Terry Humphreys, Kristen Jozkowski, and Zoe Peterson ask why the motion to standardize affirmative consent across an entire state happened now, and why this issue has become the trend topic of the movement. They cite a heightened awareness both in popular culture and legislative progress to sexual assault as grounds for fostering an environment in which an idea like affirmative consent could be convincing. Awareness develops from knowledge of statistics like those presented by León and Jackson, but it also is encouraged by the widespread attention in popular culture.

An example of this development might be the 2015 collaboration between musical artist Lady Gaga and New York Governor Andrew Cuomo. Together, Gaga and Cuomo published an article for Billboard Magazine supporting “a bill requiring all New York colleges and universities to address sexual assault by adopting affirmative consent policies.” At the 2016 Oscars, Gaga performed her emotional tribute to survivors of sexual assault, “Till It Happens To You,” a song Gaga wrote for the acclaimed documentary about sexual violence on college campuses, The Hunting Ground. In the nationally televised event with 32.9 million U.S. viewers,

85 Ibid., 457.
Gaga invited over 50 survivors and advocates to join her onstage.\textsuperscript{87} Lady Gaga has become a monumental figure in popular activism against sexual assault. She often uses her celebrity as a platform from which to speak out against gender-based and sexual violence. In collaborating with Governor Cuomo, Gaga bridged the gap between political and popular movements by connecting the ongoing social movement to better address sexual violence to current legislative and political processes. Gaga, and Cuomo, united often-isolated methods of activism to produce instrumental progress in raising awareness and inviting action.

Gaga’s activism is just one of a number of calls for greater political attention to consent on college campuses in recent years. Preceding the California Bill, the Obama administration instigated a major push in 2011 to prioritize the betterment of policies regarding sexual violence. Former Vice President Joe Biden and Secretary of Education Arne Duncan introduced a set of guidelines for U.S. colleges that pushed for an understanding of sexual violence as “a type of sex discrimination prohibited by Title IX and that schools are legally obligated to investigate and resolve complaints of student-on-student sexual violence, even if the incident occurred off campus.”\textsuperscript{88} After California passed the “yes means yes” law, New York followed suit in 2015 by passing similar legislation, thereby fulfilling one of Cuomo’s “legislative priorities” for the year and setting new precedent with a statewide definition of “affirmative consent.”\textsuperscript{89}


\textsuperscript{88} Muehlenhard et al., “The Complexities,” 458.

\textsuperscript{89} Susanne Craig and Jesse McKinley, “New York’s Lawmakers Agree on Campus Sexual Assault
While California’s legal progress fueled the movement for progressive legal development in other states, it also provoked a less agreeable reaction from a notable segment of those it affects. Some argued that the bill was useless because, though it might work in theory, it would be completely inconceivable as an applicable, real-life practice. For instance, one college senior sarcastically asked the *Long Beach Press Telegram*, “‘Are there guidelines? Are we supposed to check every five minutes?’”90 Others argued that implementing further regulation was a distraction from, or an empty action pretending to fix, the more systemic issues of violence and rape that stem from patriarchal, oppressive rhetorics of sexuality and sexual behavior.91 In the following pages, I will detail the cultural setting out of which affirmative consent grew. Further, I will provide an overview and analysis of the landscape of reactions to affirmative consent, both as a conceptual model and as a practical tool.

*The Emergence of Affirmative Consent*

Affirmative consent first surfaced in the public sphere in the early 1990s. Antioch College, a small liberal arts school in Ohio, housed a radical group of feminists called the Womyn of Antioch. The group grew out of a protest movement in response to several on-campus rapes reported by students. Founding the group was part of what the members understood to be a much larger social revolution against the sexual objectification and oppression of women. Bethany Saltman, an Antioch

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College alumna and early members of the group, narrated the origin of the group in a piece she authored for *New York Magazine*, “We Started the Crusade for Affirmative Consent Way Back in the ‘90s.” In her description of the group’s origins, she explains the alternative spelling of “womyn” as “a spelling we liked because we felt it freed us from the patriarchal male root of the word/everything else.”

In 1990, as reports of rapes began surfacing in increasing quantities at Antioch, the Womyn of Antioch installed an on-campus campaign against sexual violence. They crafted a student judicial policy against assault that they hoped would better address and adjudicate the violations of safety and security that they were witnessing and experiencing. Their petition to the president’s office asked that the student government adopt their “Sexual Offense Prevention Policy” (SOPP), and their demands were quickly granted. SOPP provided a definition of consent that requires an active, verbal offering of permission, as opposed to a lack of refusal, to a sexual encounter of any degree. In other words, it moved the campus policy from the “no means no” era into the movement of “yes means yes,” albeit before the now-popular phrase was coined. SOPP is still in use today at Antioch College. Since expanded, the current version of SOPP declares, “‘consent’ shall be defined as follows: the act of willingly and verbally agreeing to engage in specific sexual contact or conduct.”

The passing of the Antioch policy proceeded more or less smoothly within the confines of the small, liberal, progressive college. However, it was met publicly with

an inundation of criticism. A notorious *Saturday Night Live* sketch in the form of a game show called “Is It Date Rape?” mocked the relative specificity of the policy.\(^9^5\)

Saltman explains the sketch as,

a game show hosted by Phil Hartman (“the dean of intergender relations”) in which two Antioch students, one played by Chris Farley, a nose-tackle, frat guy (as if … we had neither sports nor fraternities), and Shannen Doherty, a junior in “Victimization Studies” (that’s a little more realistic), compete to see who can judge situations correctly as date rape.\(^9^6\)

Critiques of this skit were multifaceted. In one sense, it stereotyped the character of a rapist. *SNL* reified the already common notion that rapes are always perpetrated by men who can physically commit violence against the archetypal helpless woman. This notion maintains the common oversight that assumes rape is necessarily violent and existing only in heterosexual relationships. On a grander scale, however, the skit highlighted a growing resentment for the radical feminist movements of the early 1990s. The use of humor and mockery subverted the realities of violence that the Womyn of Antioch fought against, and, in so doing, redirected the popular discourse on the issue to a superficial reading of SOPP’s intent. Viewers of the *SNL* skit learned not about the experiences of feeling threatened or vulnerable amidst a violently patriarchal rape culture, rather they learned of a seemingly arbitrary semantics of consent and communication that was only beginning to take shape.

The Womyn of Antioch primarily focused their efforts on combatting the rape culture implicated by structures that promoted dominating patriarchal notions of female objectification and normalized gender-based violence. SOPP functioned as a

\(^{9^5}\) Here, I use the term relative, by which I mean relative to the incredible specificity of modern policies of consent that attend to the consenting individual’s agency in a wide variety of ways, including but not limited to physical capacity, mental stability, and legal freedom to consent. To be addressed later.

\(^{9^6}\) Saltman, "We Started."
material method of action through which the administration of the university could both assign blame for wrongdoing and seek justice for victims. But in a grander sense, the Womyn’s principal mission sought to radically shift the cultural structures that allowed for such malice. The alternative spelling of “womyn” served as one way they epitomized the feminist rhetoric that violence was, in part, produced by the dominance of patriarchal, white, male supremacy, even (or perhaps especially) on their liberal college campus.

Literary critic Nicolaus Mills wrote, “The Saturday Night Live put-on made it almost impossible to have a serious discussion in the media about the Antioch rules, and before long even The New York Times was talking about the difficulty of ‘legislating kisses.’” Mills alludes to an editorial in The New York Times from 1993 entitled “‘Ask First’ at Antioch.” This opinion piece critiqued Antioch’s new policy by first recognizing the validity of the need for such a policy, then proceeding to dismiss any potential for real application of it. The editorial suggests that halting a sexual interaction to ask for affirmative consent, as opposed to continuing until someone intervenes to stop the activity, be it a participant or bystander, would be logistically infeasible in a moment of passion.

This anonymous editorial severely misreads, or perhaps simply misunderstands, the practical circumstances under which assault can occur. The writer puts forth: “It's from such moments, accompanied by ‘I'll never let that happen

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again,’ that people learn.”⁹⁸ The author misconceives the very agency of the victims by positing that a victim of rape “let” the assault occur or that they are passive participants in act that may have been violent, coercive, or manipulative. A more accurate, though certainly not universal, narrative of victimhood might reveal that the acts leading up to, and including, assault are often not “bad choices.” Rather, the moment before is often the result of a lack of choice or capacity for agency on behalf of the victim, due to some circumstantial coercion, explicit or structural.

Further, the editorial represents the Womyn’s intention as naive. *The New York Times* suggests that asking young people to respect the bodies and boundaries of their peers is an overestimation of their maturity and decision making capacity. The editorial concludes: “Adolescents will always make mistakes — sometimes serious ones. Telling them what’s unacceptable, in no uncertain terms, is fine. But legislating kisses won’t save them from themselves.”⁹⁹ This statement echoes a common trope in the greater discourse of sexual behavior and sex education: that young people are simply incompetent when it comes to sex. This sentiment certainly tracked the Womyn of Antioch, far beyond the confines of their campus.

Long since their matriculation, the Womyn of Antioch are still met with sometimes harsh criticism, tracking them as far as a 2007 *LA Times* article entitled “Who killed Antioch? Womyn” that cites the “hysteria of political correctness” and the “infantilizing dogma of the new left”¹⁰⁰ as prominent reasons why Antioch

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⁹⁹ Ibid.
College moved to close its doors as an academic institution. Today, as institutions of higher education, including but not limited to all California state-funded universities and many of the Ivy League universities, are in the process of adopting new policies of affirmative consent, the Antioch policy is resurfacing as a rich example for examination. It offers a model of policy institution that developed out of practical need by students for students, and it looks almost identical to the modern adaptations of such a policy.

A Landscape of Reactions

From Antioch’s model, it is evident that affirmative consent developed out of a specific context and culture of sexual violence that absolutely necessitated the pivotal change to affirmative consent. However, the popular cultural reactions to their movement reveal an underlying sense of insufficiency from affirmative consent that warrants a deeper examination of affirmative consent’s tangential effects on the public imaginary of sexual behavior and culture. With the knowledge that consent is not an all-inclusive category (as evidenced in Chapter One) and the obvious proof that affirmative consent has not wholly eradicated the issue of sexual violence, I turn to popular and academic reactions that delineate the ways that the design of affirmative consent allow for it to tackle, and sometimes fail to fully address, sexual violence.

As a conceptual tool, affirmative consent developed with a particular intent of upsetting the dominant patriarchal and violent standards of sexual behavior, at least

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101 Antioch College did in fact shut down the year after Daum’s piece was published, but has since reopened and renewed its academic accreditation.
within the setting of Antioch College. The “Womyn of Antioch” reacted not just to the reports of rape on campus, but also to the greater structures of power that fostered an environment in which this violence was tolerated and, in complicity, endorsed. However, some critics of affirmative consent, beyond those who ridicule the Womyn with SNL-esque mockery, argue that the intent to use a structural approach to address sexual violence is misguided.

Legal scholar Janet Halley argues that the “vigorous new trend” of affirmative consent directs the discourse on sexual violence in a conservative more than progressive direction. She writes,

> [I]n its prolonged engagement with the state as a, and even the, primary engine for women’s emancipation, it has cooperated with male paternalist elites and moved rightward… [T]he campaign for affirmative consent requirements is distinctively rightist and that it would be even more conservative than it is today if it were not making political compromises to its left with male paternalist elites.

Through a mostly critical, though not wholly negative, examination of affirmative consent, Halley asks if feminists truly believe the costs of progression outweigh the benefits of the reform. She states that affirmative consent is a fundamentally flawed concept causing more harm than help to feminist endeavors. Halley focuses predominantly on the legal and political implications of affirmative consent law, building on MacKinnon’s arguments. Halley also highlights the way the political agenda of affirmative consent interacts with the greater theoretical feminist discourse on the formation and reification of gender roles, sexual freedom, and sex positivity. She returns to the questions posed by MacKinnon of male dominance and the

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103 Ibid.
Foucauldian notion that law (in this case, affirmative consent law) produces the very subject it polices. MacKinnon articulates,

To tell what is wrong with rape, explain what is right about sex. If this, in turn, is difficult, the difficulty is as instructive as the difficulty men have in telling the difference when women see one. Perhaps the wrong of rape has proven so difficult to articulate because the unquestionable starting point has been that rape is definable as distinct from intercourse, when for women it is difficult to distinguish them under conditions of male dominance.\textsuperscript{104}

Furthermore, Halley posits that the legalization of affirmative consent redirects the conversation of sexual morality not to praxis but rather to an evasion of criminalization. Halley writes:

\begin{quote}
[T]o a lawyer, a successful defense says that no wrong occurred; a successful excuse concedes that the wrong occurred but that the accused can be excused for committing it. An excuse of belief that consent has been granted necessarily acknowledges that the accuser’s performative consent matters: it will be the basis of the argument for an excuse. But this might be merely evidentiary.\textsuperscript{105}
\end{quote}

In her 2014 article “Rethinking the concept of consent for anti-sexual violence activism and education,” Beres puts forth that “the use of the concept of consent for anti-sexual violence campaigns is premised on a number of assumptions related to consent. One is the idea that people should be informed of consent law.”\textsuperscript{106} This premises the discussion of consent not on some improved social behavior but rather on some means to evade or manipulate criminal law.

Another dominant critique of the movement to standardize consent as a legal category alongside recent progress with sexual assault policies suggests that supposed victims can manipulate the law to accuse former partners, even when consent existed.

\begin{footnotes}
\item[104] MacKinnon, "Feminism, Marxism," 647.
\item[105] Halley, "The Move."
\item[106] Beres, "Rethinking the concept," 376.
\end{footnotes}
Alternatively, some say that victims can falsely criminalize partners who simply misinterpreted their partner’s communication. The argument of manipulation through miscommunication posits that our societal focus should be preventing and criminalizing aggressors who intend to ignore consent and assault the victim, and that focusing on miscommunication is a distraction from the “real issue.” In sociologist Kathleen Bogle’s critique of the “Yes Means Yes” policy, she writes, “rapists do not care whether the victim is consenting or not.” Halley, too, questions the way the law might function in this manner. Fischel, in his 2016 book *Sex and Harm in the Age of Consent*, writes that “consent crowds out other terms and modes of thinking that might make for more sexually just worlds.” For Fischel, the consent law serves as a means to produce subjects of dominant narratives, rather than a means to assess or explore violence.

Though the critiques of affirmative consent as a conceptual tool focus on its ability to fully address issues of structural violence, a secondary argument critiquing affirmative consent asserts that it might be ineffectual as a practical tool for real application. Along the same lines of some of the criticisms of Antioch’s policy, this argument addresses consent as a tool of action, asking if the social script could be appropriated into the contemporary standards of sexual behavior in any realistic way. In their 2016 analysis of affirmative consent, Muehlenhard, Humphreys, Jozkowski, and Peterson look to a three-faceted model of consent that breaks down the methods of communication into more manageable and feasibly applicable components. Not necessarily in sequential order, their comprehensive version of consent consists of an internal state of willingness, a particular act of explicitly agreeing to something, and

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107 Bogle, "Yes Means."
finally a behavior that someone else interprets as willingness. Though helpful, this
definition leaves several questions: What does “explicitly” mean? Is it verbal, or
nonverbal, direct or indirect? Further, what is the “something” agreed upon? Where is
the line of intimacy where consent becomes necessary? In more general terms, what
qualifies as sex?

One of the most widely expressed and popularized contentions with
“affirmative consent” is the notion that it is unlikely, if not impossible, to translate
this idealized script to the modern social scripts of common sexual behavior.
Muehlenhard et al assert that the “traditional sexual script” is that which involves one
man and one woman, penetrative vaginal intercourse, and specified roles and
behaviors pre-attributed to each actor. “The man’s role is to begin sexual activity with
the woman; if she is not willing, it is her responsibility to refuse or resist his sexual
advances.” Though this is obviously not the context under which many sexual
encounters occur, the very premise presents a number of problems. They write:

First, it puts the burden for stopping the behavior on the woman. If
nonconsensual sex occurs, she might be blamed for not doing enough
to stop it. Second, there are many reasons why the woman might not
refuse or resist, despite being unwilling: She might be passed out or
intoxicated to the point of incapacitation. She might be paralyzed by
fear. She might be confused about what is happening, given that most
nonconsensual sex does not fit the stereotypic stranger-with-a-weapon
rape script. Some sexual behaviors—groping, rubbing, and even
genital penetration—can occur quickly, before she has time to refuse.
Third, in some versions of this traditional sexual script, men continue
their advances even if the woman refuses. They might continue hoping
that she is merely acting reluctant so as not to appear “easy,” or hoping
that she will get aroused and change her mind, or hoping that she will
eventually just stop resisting.\textsuperscript{10}

\textsuperscript{10} Muehlenhard et al., "The Complexities."
\textsuperscript{10} Ibid., 464.
\textsuperscript{10} Ibid.
The narrative outlined here is exactly what many will call the sexual expectations that are synonymous with rape culture. Gavey asserts, “in representations of normative heterosexuality, women are portrayed as the passive recipients of an active male desire.”\textsuperscript{111} Some posit that consenting people, especially young people, must know exactly what they want and under what circumstances they want to engage in those things in order to properly express affirmative consent. Muehlenhard et al. acknowledge that this can be complicated by questions of “ambivalence and uncertainty.”\textsuperscript{112} The question of whether or not people can consent without fully understanding what they do and do not like or want has been taken up as a technical question of implementation. It relies on a characterization of the sexually incompetent, yet sexually obsessed, teen. I will return to this in Chapter Three.

Many have argued that consent simply doesn’t translate as a social script. This is a notion specifically in mainstream, heterosexual, sex culture, but it isn’t the case for all circumstances of sexual activity. Muehlenhard et al point to the fact that “there are communities in which explicit consent is encouraged; for example, in consensual bondage/discipline, dominance/submission, and sadism/masochism (BDSM) relationships, consent is often negotiated explicitly.”\textsuperscript{113} An examination of these frameworks through which consent plays out is particularly interesting because they have theoretically operated with a necessity for consent that mainstream sex culture does not seem to require. Beres points out that consent is most often talked about in

\textsuperscript{111} Gavey, "I wasn't raped, but...": revisiting definitional problems in sexual victimization, 60.
\textsuperscript{112} Muehlenhard et al., "The Complexities," 463.
\textsuperscript{113} Ibid., 462.
the way it does not occur but should, however, alternative sex cultures present variations of sex cultures that begin with consent, as opposed to beginning with violence.

Psychologist Dulcinea Pitagora writes, “explicit consent is the single most common characteristic in BDSM sexual interactions and is considered a fundamental tenet among those who practice BDSM.” BDSM relates to consent in a number of specific ways that differ from what is commonly conceived as mainstream sexual behavior. First, it is temporally bounded. Consent operates under the provision that after an agreed-upon amount of time, the relationship can move away from the sexual context outlined by the stipulations of consent. Second, consent in BDSM applies to a specific set of activities. Those activities are negotiated and agreed upon previous to the commencement of sexual interaction, and consent operates consistently throughout the duration of the sexual event. Third, BDSM often operates fundamentally differently than majoritarian ideas of pleasure. Actions that might be read as aggressive or violent in mainstream sexual behavior can be understood in BDSM as essential to the pursuit of pleasure. Fourth, and not so differently from the first, BDSM requires attention to consent after the fact, as well as beforehand. “This is the process of care and attention paid to the more emotionally and physically spent participant after the scene concludes, and often includes comforting physical contact or verbal processing of the scene,” Pitagora explains. “The concept of aftercare might be seen as integrated within the overarching theme of consent, which includes negotiation, the designation of a safeword, and a collaborative return to a baseline

114 Beres, "‘Spontaneous’ sexual."
cognitive and emotional state.” In BDSM, the use of a safeword is a tactical tool to facilitate the maintenance of consent, without having to explicitly re-state consent multiple times. Though there is discourse surrounding the fine line between consent and coercion that becomes particularly complicated regarding the culture of boundary-pushing practices, the premise of consent emphasized in BDSM provides a model though which we can understand a practical application of the ideas of affirmative consent. Through an analysis of the BDSM perspective on sexual consent, it seems clear that it isn’t completely infeasible to have mutually agreed upon terms of behavior as a function of sex culture, but somehow it still doesn’t apply to the way mainstream sex culture operates. Further, BDSM is necessarily premised around a discussion of consent.

Research on Communication

In reaction to the seemingly perplexed reception of affirmative consent as a model of an applicable social script, a number of endeavors in empirical research sought to evidence a more concrete answer to the question of how communication of affirmative consent might occur. In 1999, psychologists Susan E Hickman and Charlene Muehlenhard performed research with 67 university students to better understand methods of communication about sexual consent, using a secondary framework of understanding gender difference in handling intimate relationships and scenarios. Their findings were reported in The Journal of Sex Research: “‘By the Semi-Mystical Appearance of a Condom’: How Young Women and Men

116 Ibid., 29.
117 Ibid.s
Communicate Sexual Consent in Heterosexual Situations.” Hickman and Muehlenhard argued that the gendered aspects of these interactions were understudied, and they worked to uncover how gender role stereotypes manifest in communication during sexual activity. In their study, they categorized four types of consent that have since been utilized repeatedly for similar empirical research. The categories are (1) direct verbal signals, (2) direct nonverbal signals, (3) indirect verbal signals, and (4) indirect nonverbal signals.118 Regardless of gender, all “participants were more likely to be able to imagine themselves initiating sexual intercourse nonverbally than verbally.”119 This speaks to the wider discourse on the subversion of popular discourse on consent. Modern social standards limit the publicity of issues of sexual behavior and consent in the ways it is distinguished from other realms of discussion. For example, in TV and film, the inclusion of sexual content is one way that media can be categorized as inappropriate for consumption by people under a certain age. The ability to see sex represented in media parallels the way we protect the conversation from permeating various groups of people, commonly distinguished by age. Just as a person under the legal age of consent is “unrapeable” by law, the dominant sex culture directs conversations of sexual activity away from the sight of those who society deems should not be involved in sexual activity.

In Hickman and Muehlenhard’s study, one of the most perplexing conclusions arose from a discontinuity of results between two categories that the researchers analyzed separately. Hickman and Muehlenhard asked the same set of questions

119 Ibid., 265.
under a variety of circumstances; some in which the students were asked to report back the ways in which they gave consent, and others in which they were asked to reflect on ways in which they have interpreted consent. They found that the behaviors reported as most often indicated and most often understood were inversely related; both men and women reported that they most frequently conveyed consent by making no response to a partner’s initiation of sexual behavior, but the behavior reported as most indicative of consent was direct expression, both verbal and nonverbal. In other words, “making no response was rated as the most frequent way of expressing consent but as least indicative of consent. Directly expressing consent either nonverbally or verbally was rated as the least frequent way of expressing consent but as most indicative of consent.”

The reported disjuncture in behavior necessitates an examination of circumstances of mutual understanding and the dangerous alternative of misunderstanding and miscommunication. It relates specifically back to the last line of California’s “yes means yes” definition, which touches on the rarely discussed concept of “indicators of consent.” The Hickman and Muehlenhard study assessed 10 indirect nonverbal signals that included a variety of intimate behaviors, including but not limited to fondling, kissing, hugging, undressing, and decreased physical proximity between partners. Under current notions of consent, which are mostly preoccupied with direct verbal signals, the categories that Hickman and Muehlenhard assess can better be understood as indicators, rather than agreements.

A more recent work by Muehlenhard, in collaboration with psychologist Terry Humphreys, Professor of Community Health Kristen Jozkowski, and psychologist

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Zoë Peterson, addresses these indicators. The review helpfully calls these indicators “consent cues.” They offer the analysis that, “interpreting willingness to go home with someone… is treated an *indicator of likelihood* -- as a behavior that the observer uses to make an inference about the other person’s willingness -- rather than as an agreement to have sex.”121

In discussing indicators, the discourse begins to shift more to issues of miscommunication than of malicious assault and violence. Nonconsensual sex, and the implicit assault, cannot solely be credited as the product of an insufficient definition. In the analysis of their 1999 study, Hickman and Muehlenhard recognize:

> As a result of the miscommunication hypothesis, women have been advised to clearly communicate their sexual intentions to prevent being raped. This ‘prevention strategy’ is problematic, for it suggests that it is women’s responsibility to ensure that men understand their sexual intentions, not men’s responsibility to listen to their partner or date or to get clear consent before proceeding. It encourages victim blaming, for women are held responsible when their communication efforts ‘fail’ and they are raped.122

Since the nature of most of these psychological and sociological studies is founded on methods of self-reporting, there are several confounding variables with which researchers must contend. In studying how gender affects sexual behavior, as in the Hickman and Muehlenhard study, there is more to be understood than gender identity. Foremost, many studies deal only with a particular set of relationships; most of the older studies focus exclusively on heterosexual relationships. Studies that do attend to same-sex relationships address the issues in a much less complex manner, implying that gender is the most influential factor that can be studied. Not only does that logic reify the existence and power of the gender binary, it also perpetuates the

121 Ibid., 480.
122 Hickman and Muehlenhard, "By the Semi-Mystical," 270.
idea that each gender as static and categorical in nature. The most notable difference assumed from this study was that, “when assessing their heterosexual partners’ consent, women were more likely to look for verbal cues and men were more likely to look for nonverbal cues.”123

Still fewer studies attempt to engage with other non-normative relationships. Hickman and Muehlenhard effectively call into consideration the influence of an individual's sexual history. A more extensive sexual history might simply provide more experience for the subject to draw on when reporting back, as opposed to the relatively limited knowledge of a person with less experience engaging in sexual behavior. Further, not every study addresses the fact that consent functions differently in long-term relationships as opposed to short-term relationships or sexual encounters that do not occur in the context of any relationship, a concept that is well addressed in the way legal definitions address relationships. Familiarity with a partner influences ability and willingness to communicate, as well as ability and willingness to interpret a partner’s verbal and nonverbal, direct and indirect cues. That said, familiarity does not prevent sexual violence from occurring. In consideration of coercion, familiarity can actually be a means for a perpetrator to manipulate their victim and affect their ability to properly consent. A more recent 2007 study by Terry Humphreys, published in The Journal of Sex Research, attends to this particular phenomenon of familiarity, and cites the 1999 Hickman and Muehlenhard study as one that could have better accounted for the influence of this factor. Humphreys writes, “As the length of an intimate relationship grows, the sexual relationship also changes… The degree of

123 Beres, "Rethinking the concept," 375.
familiarity with one’s partner is therefore an important variable in assessing perceptions of sexual consent.”

Moreover, the nature of performing empirical research on consent is something that deals with the issue of quantifying a unique, contextual, and historical moment. Legal anthropologist Sally Engle Merry asserts that we live in a world of quantification, where there is every endeavor to make scientific any social issue that we do not understand. With the pervasive nature of sexual violence in modern U.S. culture, sexual consent has emerged as a moment of intense scrutiny that might benefit from a more concrete definition. The empirical research seeks to achieve that definition through a more social scientific approach.

Though affirmative consent does not seem to have the capacity to wholly address sexual violence, nor to rectify the histories of exclusion delineated in Chapter One, the emphasis on communication of consent has provoked a number of new means of thinking about consent as a functional tool to better the conditions that normalize the inherent violence in sexual behavior. Feminist author Jaclyn Friedman proposes:

Consent isn’t a question. It’s a state. If, instead of lovers, the two of you were synchronized swimmers, consent would be the water. It’s not enough to jump in, get wet and climb out-- if you want to swim, you have to be in the water continually. And if you want to have sex, you have to be continually in a state of enthusiastic consent with your partner.

Her analogy is helpful in its complication of the idea of static consent; it epitomizes and literalizes the idea of consent as metaphorically fluid. As new imaginations of

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consent emerge, the focus on communication increases and those conversations filter into the popular discourse on sexual behavior. In the next chapter, I locate myself in the ASHA classroom where I am not only responsible for explaining consent, but I learn, from my students, how discussions of consent have surfaced in the popular sphere.
Chapter Three
The Subject of Sex Education

The lesson plan in my hands tells me that the next item on the curriculum is “Affirmative and Enthusiastic Consent,” but I don’t need to read on to know what to say. For the past four years, I’ve taught sex education in local Connecticut high schools through the Wesleyan student-run community service group, ASHA: Adolescent Sexual Health Awareness. This year, I not only teach through the program, but I co-direct the group, so I’ve even taught all the other teachers how to teach. After all this practice, teaching this curriculum is almost second nature to me.

“No, let’s talk about consent,” I say to my students. “When we talk about consent during sex, we’re talking about saying yes. Good consent happens before, during and after any kind of sexual activity.” I point to a chalkboard filled with scribbles from earlier in the lesson. The heading reads, What is Sex(ual Activity) and lists a variety of terms: blow job, vaginal sex, anal sex, kissing, sexting, masturbation. The list is generated for the most part by the students (with guidance and much prompting from us, the teachers) so it differs from class to class.

“When you talk with your partner about consent, you need to make sure that both you and they feel totally comfortable with what you’re doing. And it needs to be out loud. We’ve talked about this already; taking off someone’s pants might mean two different things to two different people. For you, it could be a sign you want to have, say, vaginal intercourse, but to someone else, they might just want to hold your hand without pants on.”
They smirk at one another. *Ridiculous,* they must be thinking. Maybe I am exaggerating, but I want them to get the point: you cannot tell what someone wants based on their nonverbal actions. You only really know what your partner wants if you are communicating out loud.

“And you really shouldn’t be trying different sexual activities if you don’t know that the other person actually wants to be doing those things also. So then we have this thing called enthusiastic consent. Does anyone have an idea what that might mean?”

Just as I expect, no one speaks.

“Think about it this way,” I offer. “You ask your partner if they want to have, say, oral sex, and not only do you need them to give you affirmative consent and say yes, you want them to say yes and mean it. YES!” I shriek. They giggle. “Because, well, think about it, do you really want to be doing any of these things?” I refer back to the *What is Sex(ual Activity)* board, “if they don’t *really, really, really* want to be doing them, too? You and your partner should both be excited about doing these things if you’re going to do them, and, why not? They’re exciting things.”

I refuse to be the teacher who instills fear in these children. They have to know that they can want to have sex and that it is not only just okay for them to want it, rather it can be a great and respectable desire.

“Of course, there very well may be a reason why not. Which is also totally okay. Remember the boundary list we made?” I refer back to another chalkboard scrawled on with bullet points titled *Why/Why Not.* “There are so many different reasons you might want to or not want to do any of these things,” I point back to the
first board. “Religion, parents, peer pressure, attraction, sexual orientation, feeling horny.” They giggle and make eye contact again.

“If you’re feeling horny, you might really want to do these things, but if you’re not super attracted to the person, even if you’re horny, you might not want to! Which is totally ok! There are so many things that go into making these decisions, and that’s why you should start thinking about them now. Think about what your boundaries might be and then, when you’re in a position to make these decisions, you can decide, through a conversation with your partner, whether or not you’re ready to consent enthusiastically to whatever is at hand in the moment. And you can do that by using any of the communication phrases we’ve come up with.” I point to a third board titled Communication Phrases. “I like this. I don’t like that. Do you like it when I do that? Would you be more comfortable with me doing this? Instead of this, can we do that?”

I remind these uncomfortable adolescents that they can and should talk to one another by providing an assortment of phrases they can use that might help them start a conversation about what they want or don’t want in sexual activity. These are tangible ways for them to learn how to express themselves.

To me, this explanation feels perfectly appropriate for the room full of fifteen-year-olds sitting before me, giggling and making stealthy eye contact across the room every time I say “vagina.” From my perspective, they need to hear these words and phrases out loud so that they can begin to use them in private. How are they supposed to know they need to ask if their partner enjoys what they are doing if they have never heard anyone tell them that some people feel different ways about sexual activity? To
me, it might seem like common sense and basic respect, but it’s not an essential
element of the sex culture most people are living in. In learning about sex, these kids
will probably learn the right way to use a condom, how to obtain some method of
birth control, and probably, through a quick internet search, a plethora of different sex
positions. But for some of the students in my classes, this 50 minute crash course in
sexual health and behavior from two Wesleyan students they’ve never met before
might be one of the only times they learn about consent.

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The intention of sex education has always been to make sex safer; the first
major push for sexuality education in school began in the 1800s in response to
outbreaks of cholera and syphilis. As a result, the majority of sex education dealt
with methods to prevent STI transmission. In accordance with the values of the time,
which I will explain more later, the main prevention method promoted was
abstinence. Today, abstinence remains a prominent notion to promote health in sexual
behavior.

According to the Connecticut State Department of Education, in 2010 the
Sexuality Information and Education Council of the United States identified five
methods of teaching sex education in schools: sexual health education, abstinence-
based, abstinence-only, abstinence-only-until-marriage, and fear-based. Connecticut
adopted the first method, which includes “age-appropriate, medically accurate
information on a broad set of topics related to sexuality including human
development, relationships, decision-making, abstinence, contraception, and disease

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prevention.” But, “a report released by the World Health Organization showed that young people felt there was a need for less information about pregnancy and STIs—which they already knew about—and more information on relationships and consent.”

However, no student in the state of Connecticut is actually required to receive the education offered. “Connecticut requires school districts to cover human growth and development, disease prevention and AIDS education. It does not mandate sexual health education.” C.G.S. Section 10-16e informs that “students are not required to participate in family life education programs.” Furthermore, C.G.S. Section 10-19(b), which requires that instruction on AIDS is offered, reads that “Parents/guardians have the right to opt their child out of such instruction.” Ultimately, the decision of the inclusion of sexual health education is “left to the discretion of local or regional boards of education,” and, of course, both the parents and students themselves. This is not unique to Connecticut. A 2015 study from the Guttmacher Institute revealed that only 22 states and the District of Columbia mandate that sex education be taught in schools. Only 13 states require that the information taught in sex education is medically accurate. 

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129 Ibid., 5-6.
As for consent, the California “yes means yes” bill requires that “high school students in California must be educated about the concept of affirmative consent.”\textsuperscript{131} Initially, this movement, as discussed in the previous chapter, was seen as major progress both for handling affirmative consent in higher education institutions and for providing appropriate curricula to be integrated into sexuality education programs in primary and secondary schools. However, though many states have proposed similar legislation, California remains the only state to have passed statewide college and high school affirmative consent legislation.\textsuperscript{132} In 2016, three of the four proposed laws that would impose statewide affirmative consent standards failed: Michigan has a proposal pending, but Oklahoma, Pennsylvania, and Washington all voted down legislation that would incorporate affirmative consent into existing sex education programs.\textsuperscript{133}

The debates around sex education are a focal point of modern politics, and the divide often follows the liberal/conservative line. In fact, a sociological study of over a hundred people on various issues of sexuality and sex education showed that “they were unanimous in believing that people who supported comprehensive sex education were liberal or on the left and those who opposed such sex education and/or who preferred abstinence-only sex education were conservative or on the right.”\textsuperscript{134} Luker posits that the divide currently breaks down around whether the content of the sex education should encourage abstinence or validate sexual activity for young people.

\textsuperscript{133} Ibid.
However, the debate has less to do with any burden of proof or statistical data on pregnancy or STI rates, and more to do with a fundamental stance on the morality of sexuality. And when it comes to political leanings, “for modern social conservatives, the term ‘social’ has come to be… a euphemism for sex.”\textsuperscript{135} This is not only a social discourse on how to talk about sex, but it is also a commentary on who should be having sex, who should be having sex with whom, what kinds of relationship those people should be in, and what the intention of that sex should be. Luker posits, 

Talk to abstinence educators carefully, or to parents who support abstinence education and it becomes clear that even if there were to be an unexpected flowering of contraceptive and prophylactic technology so that every unmarried person could have sex with no fear of pregnancy or disease, abstinence proponents wouldn’t be mollified. The harms they worry about go beyond pregnancy and disease to include social, psychological, and, most important, moral harms, and these harms cannot be addressed by technology.\textsuperscript{136}

In evaluating various methods of sexual education, whether they be healthy ways to be sexually active programs or fear-based, abstinence-only programs, the way to measure their effects is not by statistics of pregnancy, STIs, or violence, because that is not of issue for the opposition. Rather, the effects should be measured through what types of morals they purport.

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Of course, the conversation on sex education is not limited to the academic sphere. Similar debates on sexual ethics surround other educating forces that impose a specific morality on young people, including TV, film, music, and other forms of media. “Teenage sexual behavior… is affected by many forces, only one of which is

\textsuperscript{135} Ibid., 93.
\textsuperscript{136} Ibid., 246.
sex education.” 

Film has, since its invention in the late 1800s, been a source that “both reflected and ultimately helped shape heterosexual practice.” Early films offered portrayals of sexuality in wide variety until censorship regulation arose in the early twentieth century.

This chapter seeks to better understand the moral and ethical implications of sex education, with particular attention to consent. The general questions that pertain to my examination of consent can be understood more broadly through an analysis of the same questions for sexual activity. In other words, to understand who can give consent, I must first ask who can be having sex. I propose, in this chapter, that consent education, and sex education more broadly, across mediums from academia to popular magazines, purports a particular ethics of sexuality that informs the public imaginary of sexuality. Through a reflexive ethnography of my work in ASHA, as well as an examination of the larger discourses on sex education over time, I try to build this imaginary by answering the interrogative questions -- who can give or receive consent, when can consent be given, how is consent given, why is consent given. Further, I ask: by imposing a standard of affirmative consent, how is sexual activity without consent understood morally?

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I know that my work has a particular import for these high schoolers. I have the opportunity to model for them what my/ASHA’s idea of proper sexual behavior looks like. For the past year, the ASHA perspective and my perspective are one and the same; I co-direct ASHA with another senior at Wesleyan. Both of us are white,

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137 Ibid., 251.
138 Ullman, Sex Seen, 20.
upper-middle class, educated, able-bodied, cis-women from affluent areas of the country with access to some of the best and well-funded resources on sex, sexuality, and sexual health. Our privilege does not escape us, so we work to actively recognize and publicly acknowledge that our job is to teach in public schools where the demographics are often substantially different from ours. While our program is a peer-education program (we really are not that much older than the students we teach), our presence inherently imposes some degree of moral superiority as we explain what sexual behavior should or could look like.

Moreover, we do not know the students in any capacity, and so we do not know their sexual histories. We strive to make our curriculum inclusive to people of all ages, bodies, gender identities, sexual orientations, and backgrounds. We do not want to suggest that what we say is the end-all-be-all of sex education, because we are no authorities on the topic by any standard. Our training came from older students who ran the program before us with just as limited knowledge and self-guided research as we hold now.

As I teach, I know that the words I’m saying may not be internalized in the way I’ve internalized them from several years of by rote repetition. To understand the perspective of my students, I reflect on my sex education. I remember being thirteen years old, sitting with my father, an OB/GYN, around our dinner table as he speaks to his only daughter about the importance of condoms. He tells me that I need to make sure every person I engage sexually with had been tested for STDs. So I have to ask to see test results before I give anyone a blow job? That’s idiotic, Dad, I remember
replying. *There’s probably not going to be any time, and why would they have their test results on them?*

In my mind, I also remember thinking, *How incredibly unsexy that would be.*

Teaching sex education in ASHA, I’m sure my students are thinking the same thing. *As I lean in to kiss my partner, I have to ask them to say, “yes, I really really want to be kissed?” Unbelievable.*

I know that the lessons I teach are not going to be taken word for word, but there is something more nuanced that I hope to invoke through my instruction. Whether explicitly or not, I teach about sexual morality. I teach about safety, and I teach about health. I teach about autonomy and agency and the tools my students can use to feel like they have a say in their activity.

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Sex is everywhere. It’s on our screens, in our magazines, in our music. We learn about it when our parents explain how babies are conceived. Author Brian McNair affirms this in his 2002 book *Striptease Culture: Sex, Media and the Democratization of Desire:* “sex is the most important thing in the world. Or if that seems excessive: sex is one of the three or four most important things in the world. We eat, we excrete, we fuck, we sleep, if not necessarily in that order.”*139* Representations of sexual behavior in the media are often skewed to represent a specific situation or a set of particular beliefs. They do not just show sex, rather, more specifically, they show heterosexual sex. In turn, they represent standards of body,

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beauty, and gender roles. MacKinnon, in her seminal 1989 *Toward a Feminist Theory of the State* book, writes:

Socially, femaleness means femininity, which means attractiveness to men, which means sexual attractiveness, which means sexual availability on male terms. What defines woman as such is what turns men on. Good girls are ‘attractive,’ bad girls ‘provocative.’ Gender socialization is the process through which women come to identify themselves as sexual beings, as beings that exist for men. It is that process through which women internalize (make their own) a male image of their sexuality as their identity as women.\(^{140}\)

I always tell my students, “Do not, please do not try to open a condom wrapper with your teeth like you see in the movies. You could rip the condom and then it would be totally ineffective. It might look sexy, but if you are not trying to get pregnant, you probably don’t think having a baby is a sexy outcome of a sexy condom opening.”

But ASHA, too, has an agenda: to answer questions to the best of our ability with absolute accuracy. We have a scripted curriculum, but when questions arise, the teacher can choose to answer if they feel they can do so confidently. In 2012, during an ASHA workshop at Coginchaug Regional High School, one student asked a question about fetishes. The teachers, at their discretion, proceeded to offer a definition and to suggest that pursuing a fetish might fit under the What Is Sex(ual Activity) category. Not unexpectedly, at least one student went home and relayed the in-class conversation to a parent, who then shared it with a friend, who took it upon herself to raise an issue with both the school and ASHA. From her perspective, it was no right of ours to bring up something so outlandish to a class of ninth graders.

Coginchaug Principal Andre Hauser spoke in defense of ASHA in an interview with *Middletown Patch*: “Their program really was about high-risk versus low-risk

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behaviors. Any of the behaviors that were getting talked about were ones the students generated," he said. Hauser’s stance is one ASHA stands by. Every activity we propose is rooted in developing student-generated answers. We ask what they think a sexual activity might be, and we write their language on the board. Should they say blowie, we write blowie. Should they say butt sex, we write butt sex. Should they say normal sex, we might ask them to think more about what normal really means and prod them with questions until they realize that what they probably mean is something more akin to “penis and vagina sex” which is not, by our standards, the only kind of “normal sex.”

Many opponents of sex education in schools “believed that hearing a discussion of values not congruent with the values taught at home is confusing at best and morally destructive at worst. If you were doing the right thing as a parent, they felt, then neither a child nor an adolescent faced any real decisions about sex until he or she was out of the home, and in the ideal case, not until the wedding night.” Of course, they don’t answer how their questions might be answered at the time when they actually face the fact. However, “the twin threats of AIDS and teen pregnancy simply eroded the argument” to keep sex education in the home. No longer was sexual activity a question of moral behavior. Instead, it became an issue of public health, which supplemented the efforts to put sex education in school curricula through the late ‘90s and up to today.

142 Luker, When Sex Goes, 25-6.
Jennifer Burek Pierce opens her 2011 book, *What Adolescents Ought To Know*, dating the origin of sex education to French physician Alfred Fournier’s late 1800s move to protect young people from sexually transmitted infections. She writes, “The preeminent syphilologist of his generation, Fournier had become convinced that the secrecy and shame surrounding syphilis were conditions that allowed it to flourish.” However, Fournier faced great opposition from those who felt sex education would lead to “the deleterious practice of masturbation.” Victorian ideals of sexuality held strong in the aversion to making public any discussion of sexual activity. Fournier and his colleagues’ lessons were not taught in schools, but they did manifest in books in the form of manuals for intimate marriage life. According to Victorian ideals, the only people having sex in that time, of course, were married people. Pierce notes that much of the reaction to these books was that their actual readership was not their intended readership; the critics asked, if adolescents were not supposed to be having sex, why would they need to know about any sexually transmitted disease. “Early twentieth-century medical reformers who wanted the public to consider the evolving research on sexually transmitted infection would confront questions and attitudes that had changed little since the eighteenth century. These older perspectives, which wore the guise of common knowledge, also dismissed the seriousness of venereal disease.” The opposition to Fournier and his colleagues not only wanted to limit the reach of their readership, but also “sought

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144 Ibid., 21.
145 Ibid., 23.
state restriction of virtually all public discourse including sex education and contraception information.”

Understanding the history of who was considered to need sex education constitutes a conversation about who is supposed to even be allowed to have sex. The conversation around consent often deals with the ideals of who can be having sex with whom. The question of the subject of consent is a focal point for the discourse on sex education. The development and widening of the public realm in which sex is an appropriate topic of discussion tracks the societal understanding of who is allowed to participate in sexual activity. One guiding principle that often centers the conversation of sex education is age. Why should we educate those who are not even supposed to be engaging in the topic at hand? In detailing the history of controversy surrounding sex education, Irvine writes, “Sex education debates are particularly volatile because they concern children. Indeed, the ideal of… the Romantic child --- our modern image of a naturally asexual, pure childhood -- is at the heart of century-long conflicts over sex education.”

But even the idea of a teenager, and the specificity of that category, is relatively new. The passivity of the young female subject might be put into consideration when thinking about the manner in which media and advertising targets these actors as a category of consumer, especially in contexts that address the sexuality of the subject. Kelley Massoni and Kelly Schrum write extensively about the development of the teen girl as a category for marketing and advertising, specifically in relation to Seventeen Magazine. Massoni writes, “it was not until…

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147 Ibid., 13.
around the 1940s, that the moniker “teenager” moved into wide circulation in the popular culture discourse,” a move away from the previously conceived “adolescent.”\textsuperscript{148} The development of the concept of the stereotypical teenage girl became literally represented in Seventeen Magazine’s advertisements that revolved around the life of a cartoon ideal reader: a teenage girl named “Teena.” Teena was presented, in advertisements, as engaging in all the activities that Seventeen Magazine found, through extensive surveys and reporting of the people the magazine wanted to target, that their readers enjoyed. Massoni explains, “Teena is portrayed as a young white girl with long straight brunette hair. Slender-- but not skinny-- she has perky round breasts and a small waist. Whenever her face is shown (sometimes it is obscured by the Seventeen magazine she holds), she is smiling.”\textsuperscript{149}

As Teena developed into a well-rounded character that held the burden of representing the tens of thousands of readers, so did the issues that Seventeen decided Teena needed to address: shopping, beautifying herself, reading, finding a boyfriend, and, ultimately, having sex. Her agency was obvious in the actions she was portrayed performing, but the depth of her capacity was clearly limited because her choices were few and obvious: Teena always chose the brands, the practices, and the priorities that Seventeen deemed best. And thus, Seventeen’s authority was established as representative of and catering to the teenage girl.

The way Seventeen Magazine, among numerous other forms of media, addresses their “ideal customer/consumer” frames the way they expect every one of their readers to behave and adhere. In other words, if the advertisement says that

\textsuperscript{148} Kelley Massoni, \textit{Fashioning Teenagers: A cultural history of Seventeen Magazine} (Walnut Creek, CA: Left Coast Press, 2010), 31.

\textsuperscript{149} Ibid., 35.
Teena has a date with a boy tonight that she needs to put on makeup for, suddenly a wealth of readers are learning that they should first and foremost, be sexually interested and aware of their sexuality. Second, that they should be sexually interested in boys. Third, that they should look and dress like Teena if they intend to be attractive to those boys, and fourth, that they should buy the products necessary to make them look like Teena so they can be attractive to the boys that they’re interested in. As Massoni writes, “In the instance of creation of Teena, as the prototypical teenage girl, heterosexual gender socialization took a backseat to the primary goal of consumer socialization.”

Understanding the way that media worked to actively crafting and shaping the idealized young girl – white, heterosexual, oversexualized, and dependent on media to form an identity – pertains to the way we understand what they were learning about sexual behavior. From the earliest developments of mass media, “The cinema [of 1896-1910] was a world at play, and filmmakers very often played by depicting sexuality.”

As the media catered to these interests, a break from the Victorian standards of sexuality became obvious. Not only were young girls encouraged to be interested in romance, and thus their sexuality, the unwritten sphere of silence around young sexuality began to crumble. The development in Seventeen Magazine was followed by a “sexual revolution” in the ‘60s, as Luker terms it, and began a redefinition of what sexual ethics looked like, beyond the confines of the marital bedroom. “Sex was no longer part of a courtship process… Now sex was just another pleasure to be

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150 Ibid., 40.
151 Ullman, Sex Seen, 20.
indulged in whenever two parties agreed.”

The revolution rejected the Victorian standards and asserted “an equality model of sexuality.”

The 1960s proved to be a monumental decade for the growth of sexuality and sex education. Irvine cites that the conversation on “whether to allow discussions about sexual topics in the classroom” was just one of a number of controversial movements regarding sexuality in that era. In terms of what people were reading, *Playboy* opened publication in 1953, *The Ladder* became an openly lesbian magazine “when its editor, activist Barbara Gittings, added the subtitle ‘A Lesbian Review’ so that the word ‘lesbian’ ‘was no longer unspeakable,’” and fiction author Helen Gurley Brown “transformed an antiquated general-interest mag called *Cosmopolitan* into the must-read for young, sexy single chicks” in 1965. As the Beatles rose to unprecedented heights of fame in the early ‘60s, “Critic Barbara Ehrenreich [dubbed] Beatlemania ‘that huge outbreak of teenage female libido’ as thousands of adoring, screaming teenage girls created a rebellious, sexual space.”

In 1964, The Sex Information and Educational Council of the United States (from here on, I will refer to it by its common acronym, SIECUS) was founded. “SIECUS has pioneered a model for comprehensive sexuality education in which young people would receive, from kindergarten through high school, age-appropriate information on a range of topics such as human reproduction, anatomy, physiology, and sexually transmitted infections as well as issues including masturbation and

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152 Luker, *When Sex Goes*, 83.
153 Ibid., 244.
155 Ibid., 21.
homosexuality. Comprehensive sexuality education would offer young people the opportunity to discuss sexual values and attitudes in the classroom.” 158 Though consent is not explicitly part of this description, it has become a centerpiece in many descriptions of comprehensive sexuality education programming.

With newfound media directed to the attention of the teen girl, and an increase in the public sexualization of that media, the development of SIECUS only makes sense. “It has been said that Mary Calderone and her colleagues had not founded SIECUS, someone else would have.” 159 When consent is discussed in the context of what it looks like as an educational model, it is often understood through the intention of promoting safer sex. Safe might mean a number of things, whether that be safe from STI transmission, safe from conception, safe from physical trauma, or safe from emotional upset. While the former two options often become the subject of discussions of sex education regarding the abstinence movement, the latter two become the subject in discussing consent. “Rather than urging young people to avoid petting, masturbation, and premarital sex entirely, [the new generation of sex educators] decided since most young people would be having sex outside marriage, their task was to make that sex safer rather than denounce it.” 160

In ASHA, we present at the beginning of each lesson that the information we want to share should apply to people with any background in sex. What we offer are tools with which the students can make decisions, when the time to act comes. It is, from our perspective, better to offer tools for the future than to teach lessons with which to reflect on past, uninformed choices. And with or without experience, the

158 Ibid., 6-7
159 Ibid., 22.
160 Luker, When Sex Goes, 83-4.
students are curious about how behavior works in this often mysteriously foreign realm of life. Irvine writes, “given the opportunity for open discussion, young people display an indefatigable sexual curiosity.” As I’ve seen in my work with ASHA, the curiosity extends far past the physical and health risks. In fact, those safeties seem all too often taken for granted. Instead, the fears at hand are often emotional and moral. One of the most frequently asked anonymous questions I’ve received is “when is the right age to have sex?” Though of course no answer exists, the imaginary of a sexually moral way to enter the sexualization period of life remains dominant: that there is a standard age, a standard sexual orientation, a standard look to attract a partner.

If the answer is not when married, the next move, in the history of sex education was to be in a committed relationship. More recently, with the rise of attention to “hookup culture,” the standard is not whether or not you are in a relationship, so an emphasis on consent, and affirmative consent, has arisen. There are no presumed connections between the partners; in fact, they may not have ever spoken before. So a precedent of communication cannot be assumed, and therefore people think that we should set new standards for opening that communication. Methods of finding some universal standard of communication have gone viral, especially with the rise of new media.

Take for example, the viral “consent as tea” video. In a video with over three million hits on YouTube, a copyright and shares from Cosmopolitan to

161 Irvine, Talk About, 5.
163 Catriona Harvey-Jenner, ”This is the best metaphor for consent we've heard in a long time,”
Seventeen\textsuperscript{164} to the Washington Post,\textsuperscript{165} the consent script is compared to a tea party between two acquaintances:

If you're still struggling with consent, just imagine instead of initiating sex, you're making them a cup of tea. You say, 'Hey, would you like a cup of tea?' and they say, 'Oh my God, I would love a cup of tea! Thank you!' then you know they want a cup of tea. If you say, 'Hey, would you like a cup of tea?' and they say, 'Uh, you know, I'm not really sure,' then you can make them a cup of tea or not, but be aware that they might not drink it. And if they don't drink it — and this is the important bit — don't make them drink it.

In reducing affirmative consent to something so palatable, videos like this brought the conversation of consent to the public sphere.

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As sexuality moves into a world that has less to do with long-standing relationships and more to do with individual actors, an increased attention to agency and autonomy arises. We ask, how do we treat one another with respect as individuals as we interact sexually?

In heterosexual relationships, MacKinnon argues that women’s sexualization by men is exactly what defines a woman. The sexualization process defines gender roles, which in turn reifies heterosexuality and the patriarchal subjugation of women. She writes, “Sexuality is to feminism what work is to marxism: that which is most one’s own, yet most taken away… Heterosexuality is its structure, gender and family

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its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, and control its issue.”166 Furthermore, she argues that through each sexual encounter, the choice to consent or not consent is a Butlerian act of performing their definition as a woman. “For feminism, asking whether there is, socially, a female sexuality is the same as asking whether women exist.”167 They enact this gender through the lens of their male partner, not through their own wants or desires.

As this is normalized into mainstream sex culture, “women notice that sexual harassment looks a great deal like ordinary heterosexual initiation under conditions of gender inequality. Few women are in a position to refuse unwanted sexual initiatives. That consent rather than nonmutuality is the line between rape and intercourse further exposes the inequality in normal social expectations.”168 But the push for affirmative consent to become part of our standard of sexual behavior is underwritten by a slightly different effort: for women to claim autonomy and agency in what is often an oppressively coercive interaction.

In a moving piece for Education Post, Katelyn Silva writes in support of teaching affirmative consent in early education. Looking to her four-year-old daughter and peers, Silva notes that even young children must learn the values of personal boundaries and space. She describes a situation in which another young boy runs around kissing his friends, including Silva’s daughter. “When he comes to lay one on her, she screams ‘No!’ Other adults watching have responded with approximations of, ‘Aw, come on. He just wants to give you a kiss. He loves you. Let

167 Ibid., 534
168 Ibid., 532.
him give you a kiss.’”¹⁶⁹ But for Silva, her daughter’s rejection of the kiss carries more weight than other parents attribute it. In arguing for better consent education, she writes, “My child needs to know she is in control of her own body.”

Silva begins to allude to the fact that one of the reasons her daughter’s “no” is written off is because she, as a girl, should be the passive receiver of any sexual advances, but MacKinnon states this explicitly. In the patriarchal, heteronormative state of mainstream sex culture, “‘…some fuck and others get fucked.”¹⁷⁰

But consent education, even in ASHA, does not acknowledge the histories or structures that have made it so that women, not to mention more marginalized categories of women, are historically subjugated and objectified in sexual activity.

Luker offers a hefty proposal for better sex education that would incorporate these histories. She writes:

Since the debate about sex education gets its passion from deeply felt ideas about gender, and women’s roles in particular, why not tell young people that? Why not put the hidden agenda on the table and tell young people and their parents that Americans today hold two very different views about sexuality, views rooted in very different notions of the relationship of sexuality to marriage?¹⁷¹

Many educators believe that students might fare better if a more comprehensive presentation of sexuality was introduced at a younger age. Auteri explains, “this attitude reflects a growing movement…for comprehensive sex-education programs that begin as early as kindergarten, to provide students with age-appropriate and

¹⁷⁰ MacKinnon, Toward a Feminist, 4.
¹⁷¹ Luker, When Sex Goes, 258.
medically accurate information that acts as a foundation for later lessons on consent.¹⁷²

*   *   *

“Remember,” I say, “it’s important to think about your boundaries and talk about them with your partner. If your partner isn’t respecting your boundaries or your consent, and they do something that crosses or violates your boundaries or that you didn’t consent to, that’s when sexual assault happens.” My lesson on consent, whether stated or not, is explicit: you have to consent, or you are being assaulted. You have to get consent, or you are assaulting.

*   *   *

Later in the lesson plan, I offer up a scenario for discussion that asks the students to think about what they would do if they witnessed a sexual assault happening (in the context of someone kissing someone who didn’t want to be kissed at a party), and what they could do to support someone who told them that they were assaulted (the person who didn’t want to be kissed who was kissed anyways). We reinforce that it is our job as a community to protect one another, and that in no way was the victim responsible for their assault. Nothing about the way they were dressed, the way they were dancing or acting, the way they were flirting was an invitation for the other person to kiss them without their consent.

We are saying: getting consent means you are not assaulting someone. Or, in other words, we are saying: it is always assault, unless there is consent.

Because I do not know these students in any substantial capacity, I do not know the full effect of my words. I might be giving students the agency to speak up in

¹⁷² Auteri, "When Should."
situations where they may want to avert a dangerous situation, but I also could be providing a vocabulary with which a student can name or identify a past assault.

Maya Dusenbury responds to this position in a piece for the blog, *Feministing*. She writes:

Yes, the old retro male aggressor/female gatekeeper model of hetero sex is slow to die. Yes, we still live in a culture that—through everything from pop songs to anti-rape campaigns themselves—perpetuates very harmful myths about consent. Yes, these messages are so accepted that there are high school boys in this country who literally don’t recognize rape when they see it happening—who witnessed the assault of a girl who “wasn’t moving,” “wasn’t talking,” and “wasn’t participating,” a girl described by her rapist as “like a dead body,” and still did not see that as rape because “it wasn’t violent.” Until that’s not the case, better education on consent—specifically, the exact kind of education required under the California law—is clearly necessary.173

That education is affirmative consent. “I think it's a positive step. It's acknowledging that young people might want to say yes [to sex], and it's giving them more space to say yes,” said Eva Goldfarb, a sexuality educator and public-health professor at Montclair State University, speaking on affirmative consent laws. “But what do parents and administrators expect to happen afterward if consent is all children know and are prepared for? We're spending so much time on the conversation of gatekeeping,” Goldfarb continued. “It still sets a sexual dynamic that's adversarial. Everyone wants to keep people safe, but it's still about avoiding danger rather than exploring positive aspects of sexuality.”174

174 Auteri, "When Should."
Conclusion
What We Learn
Teaching Consent Teaches Us

This past February, I stood before seven or eight Wesleyan peers in a basement classroom of the Public Affairs Center, tasked with teaching them how to teach high schoolers the ASHA sexual health education curriculum. “They probably won’t talk all that much for the first five minutes, and when they get the courage to speak up, it’s probably going to be something inappropriate,” I advised. “There’s always that little boy with spiky hair and bleached tips sitting in the back left corner who’s going to say something like ‘bukkake’ and you’re just going to have to look him in the eyes and repeat it right back at him. We need to use their language, and we can’t impose on them our socially constructed ideas of normality. In fact, normality is exactly what we want to dispel from whatever ideas they think they have about sex. A good teacher is tolerant, patient, and open-minded, but most importantly, a good teacher meets the students on their level.

“I’m not telling you what you should think or believe about sex in your personal life – that’s entirely on you and I have no right to try to change that – but I am telling you not to put your ideas on these students.”

“What if the kid doesn’t say ‘bukkake,’ but instead says something objectively bad, like ‘rape?’” a sophomore asks.

I pause. “It happens. I think that’s a time when you could take that student aside and talk to them privately about approaching the class with respect and maturity, if you feel comfortable doing that. Otherwise, our standard procedure is to
say, ‘Interesting. So now might be a good time to talk a little bit about consent. In this class, we’re talking about consensual sex only,’ and skip ahead to that part of the lesson plan. At its core, this is a sexual health class, and the primary health standard we preach, right up there with reproductive freedom and STI prevention, is consent. But yeah, I would most likely redirect the conversation away from that kid in whatever way possible.”

“But are they wrong to say ‘rape?’” the sophomore prods. “If we’re asking them to announce what they first associate with the idea of sex, and we’re trying to meet them on their level of understanding, why do we dismiss their first suggestion? It might be a genuine answer – they might honestly first think of rape when they think of sex.”

My peer’s comments bring the momentum of teaching a training course I’ve taught ten or more times to a startling halt. Who am I, an amateur sex educator, to advise students only four or five years younger than me on what they should imagine sex to be? I would rather they did not have immediate connotations of violence and trauma associated with the word “sex,” but I also do not want to tell them that they are categorically wrong. I want to teach a sex education class that does not begin with violence, but if that is background of exposure to sex with which a student enters my classroom, who am I to dismiss their answer?

I agree with the sophomore—rape is objectively bad and a problematic first association—but I am unsettled by my instinct to present consent and simply move on.
Consent has become the dominant standard by which our contemporary sexual culture evaluates and mediates all discourse on sex. From the outset of any conversation, we distinguish that the sex we want to explore (academically or otherwise) is either one or the other – consensual or rape. Making my way through this thesis while simultaneously training new sex education teachers and continuing to teach high schoolers, I have endeavored to consider how and why consent has become such a powerful way to orient our understanding of healthy sexual behavior. Whose interests does it serve, and what conversations might it crowd out?

I use this thesis to explore the unwitting effects of a pedagogy of consent. The lessons I examine take shape in the classroom, in the courtroom, in the cybersphere of media, and in popular culture. As a woman, and as a college student, I do not need to be reminded of the existence or threat of rape. But perhaps, instead of seeing consent as the antithesis or answer to violence, I can better understand how and why I have come to this dichotomous understanding by evaluating consent’s unintended lessons.

As I conclude this thesis, I return to the sophomore’s question, not with an answer – I am still no expert – but with a suggestion. “There is no proper lesson to teach the student who says ‘rape,’” I want to tell my peer, “so instead you might learn from them. Ask how they made that association, what cultural figures came to mind in the development of such an answer. And through conversation, you might learn of this student’s positional relationship to sex – how they see sex everywhere and nowhere all at once. How sex is both personal and political. When you ask about consent, you will learn.”


Hickman, Susan E., and Charlene L. Muehlenhard. "'By the Semi-Mystical Appearance of a Condom': How Young Women and Men Communicate


Sex offenses; lack of consent., N.Y. Penal Law § 130.05.

Sexual Assault on College Campuses, S. 967, 2014 Leg. (Cal. 2014).


