Introduction

When Consent Isn't Sexy

Enthusiastic consent is necessary for both parties to enjoy the experience.

—Gigi Engle

In the summer of 2017, *Teen Vogue* taught its young, impressionable readers how to have butt sex. Well, not exactly, but that is what you would have gathered from the fury that followed the publication of the essay. The self-proclaimed "Activist Mommy," Elizabeth Johnston, posted a video of herself burning the magazine in outrage (Activist Mommy 2017). The video has been viewed by millions reports Fox News, and the Activist Mommy used it to spearhead a campaign to boycott the magazine. Conservative parent activists are as impassioned as they are unoriginal, and so Johnston predictably tarred *Teen Vogue* as a pedophilic peddler while posturing her politics as above politics: "They should not be teaching sodomy to our children. [. . .] This is not a Republican issue or a Democratic issue. This is not a conservative issue or a liberal issue. This is a parent issue" (Starnes 2017; see also Edelman 2004, 1–32).

I will have more to say about *Teen Vogue*'s article "Anal Sex: What You Need to Know" in the fifth chapter of the book, but for now I note simply that the article is pretty rad and young people ought to have accurate sexual information more readily available to them. The essay, penned by author and sex educator Gigi Engle, is written candidly and cutely ("Here is the lowdown on everything you need to know about the butt stuff") and emphasizes the importance of sexual communication between partners. While Engle does not shy away from explaining the pleasures of anal sex (for example, nerve endings for all, prostate massages for some) and its possible problems (for example, tightness of

the anus, poop), she stresses dialogue: "Whether you are planning to give or receive anal sex, a conversation must take place beforehand." She encourages her young readers to be "honest about your feelings," and returns to the importance of maintaining "regular communication" during the act itself so that partners can convey their pain or discomfort. Engle enjoins her readers to start small (begin with a finger or small toy in the anus before graduating to a penis or bigger toy) and to always use lubricant for the at-first-unreceptive orifice—gems of insight that I imagine especially inflamed conservative ire (Engle 2017).

The values and lessons of the anal sex guide resonate with the arguments and provocations of *Screw Consent*. The more accurate and accessible sexual information for young folks, the better, and the more we can destigmatize sex talk, the more likely we are to have pleasurable, not just bearable, sexual experiences.

But—and it is a big *but* (see what I did there?)—as the reader might gather from the title of this book, I cannot sign on to Engle's pitch for consent: "Enthusiastic consent is necessary for both parties to enjoy [anal sex]." Neither, I think, should you.

Permit me to start with the empirically obvious. However we define the "enthusiastic" element of "enthusiastic consent," it is simply untrue that enthusiastic consent—or for that matter, and here is a phenomenological whopper, *any* consent—is *necessary* for a sexual experience to be enjoyable. Teenage Billy or teenage Becky might hesitantly consent to butt sex, or vaginal sex, or oral sex, that turns out to be the best, most mind-blowing sex ever. Becky might even slip a finger in Billy's butt without Billy consenting in advance, and Billy might absolutely, unequivocally love the sensation. Conversely, Billy and Becky might emphatically consent to penetrate each other's anuses; they might even discover sexual pleasure in the very agreement. And yet the ensuing anal sex might be thoroughly terrible. It might be unenjoyable, painful, and . . . shitty (see what I did there?).

So we can haphazardly or ambivalently consent to sex that is fantastic, and consent fantastically to sex that is resolutely unfun. This latter observation is perhaps not entirely fair as a critique of Engle's point, for she argues that "enthusiastic consent" is necessary for sexual experiences to be enjoyable (it is not), but she never states outright that it is sufficient. Still, insofar as we can assume that "enthusiastic consent" signals desire for Engle, and insofar as "enjoy the experience" signals pleasure, then Engle is saying something like this: *Enthusiastic consent, from which we can read desire, is not simply a baseline for sexual pleasure but nearly its guarantor.* In that case, "enthusiastic consent" is

pretty darn close to being held up as both necessary and sufficient for experiencing the joys of anal sex, with the provisos that Billy and Becky use lube, go slowly, and initiate penetration with small toys or fingers. More precisely, these provisos are meant to ensure ongoing desire: who would enthusiastically consent to rapid anal penetration with a nonlubricated enormous dildo?

Still, Becky might strongly dislike being anally penetrated, even gently, by Billy's small and lubricated penis, however enthusiastic Becky's consent.

Whether Becky's slipping her finger unannounced into the anus of the pleasantly surprised Billy ought to be lawful or morally permissible, and whether that slipped finger is enjoyable or unenjoyable, are separate questions that we should continue to keep separate, not only for legal but also for political and philosophical reasons. One worry running under this book is that in the current moment of sexual politics—let's call it the Consent Moment—we risk collapsing consent into desire into pleasure, not (yet) as a matter of law or policy (more on this below) but as a matter of political rhetoric and quite possibly phenomenological experience (more on this, too, below).

SCREW CONSENT, KIND OF

I will take the opportunity offered by Gigi Engle's anal sex guide, with its meditations on consent, pleasure and pain, to telegraph now—but to be elaborated later—what I do and do not intend by "screw consent." Perhaps to the relief of many but to the disappointment of a few, by "screw consent" I do not mean *fuck consent, go ahead and have whatever sex you wish, unimpeded.* Nor do I advocate screwing, as in jettisoning, consent as a core component of sexual assault law. In fact, I shall argue that an "affirmative consent" standard is the least-bad standard available for sexual assault law, compared to "force," "resistance," or nonconsent standards. So if we should screw consent neither when it comes to *sex* nor when it comes to sex *law,* where should we screw it? In our sex *politics*. In our activism and advocacy for an egalitarian, feminist, and more democratically hedonic sexual culture, consent talk at best diminishes and at worst perverts our sexual justice politics. And if we cannot jettison *consent* from our sexual justice politics altogether, we should, taking our cue from the *Oxford English Dictionary,* "exert pressure" on consent by "twisting, tightening, or pressing" upon it,[1] releasing consent's capture of our imaginations in order

to invite more-promising values, norms, and concepts into our efforts for building a safer, more democratically hedonic culture.

One key problem with the primacy of consent in our sex politics is that its conceptual thinness has been remedied by increasingly more robust, sometimes ridiculous redefinitions of consent as enthusiastic, imaginative, creative *yes*-saying. But the unfortunate corollary is the cultural coding of nonenthusiastically desired sex as sexual assault, which generates conservative and sometime feminist backlash ("Bad sex is not *rape,* after all," sings this chorus) and perhaps exacerbates one's sense of injury when sex goes awry (Way 2018; B. Weiss 2018).[2]

A second key problem with the primacy of consent in our sex politics cuts the other way. Bad sex, even if consensual, can be really bad, and usually worse for women: not just uninspired, unenthusiastic, or boring, but unwanted, unpleasant, and painful (Loofbourow 2018; Traister 2015). *That* problem cannot be addressed by consent. Worse still, the problem of bad-as-in-really-bad sex is automatically deprioritized by the consent-as-enthusiasm paradigm, which divides sex into the categories *awesome* and *rape* and leaves unaccounted and unaddressed all the immiserating sex too many people, typically women, endure.

I revisit these two key problems of the consent paradigm for sexual justice politics in chapter 5 and the conclusion of this book, and later in this introduction. In the chapters in between, I address these key problems obliquely, shoring up the limitations of consent for thinking about and regulating sex across encounters and intimacies that are nonnormative, atypical, or weird.

In any case, it is these concerns with and for sexual politics that animate my wish to screw—tinker, tighten, and pressure, rather than altogether dispense with—consent. And so I want to rupture the chain of equivalences that are not quite made by Gigi Engle but are well on their way, in which consent = desire = pleasure. These are dangerously mistaken equations, though not, I believe, for the reasons other feminist and legal scholars have suggested. The following section ("Is Consent the End of Liberal Democracy?") challenges objections that consent reforms have gone too far, wrongly emboldening federal and bureaucratic powers. The next section ("Is Sexual Consent Meaningless?") then canvasses the provocative and regularly misinterpreted counterargument, championed by Catharine MacKinnon and others, that consent is of limited or no legal (or moral) utility in a world saturated by sex inequality. These antithetical objections to newfound political investments in consent differ from mine, and the contrasts anchor and

clarify this book's arguments. I restate these objections because they are likely more familiar to readers, and I wish to forge a rather different path away from consent.

IS CONSENT THE END OF LIBERAL DEMOCRACY?

From the spring of 2011 onward, colleges and universities overhauled their sexual misconduct policies and procedures. These reforms were initiated by student activists and student survivors of sexual violence who aimed to hold academic institutions accountable for their failures to redress sexual violence under the sex nondiscrimination guarantee of Title IX of the Education Amendments of 1972 (Gassó 2011).[3] Contemporaneously, the Obama administration enumerated and expanded universities' Title IX compliance obligations (Assistant Secretary, Office for Civil Rights 2011; see also American Council on Education 2014). While the federal directives address disciplinary procedures, standards of proof, and reporting requirements, inter alia, they do not, as of this writing, mandate the adoption of a specific consent definition into sexual misconduct codes. Nevertheless, it is this reform—encoding or redefining consent to be "affirmative," as a performance of positive agreement rather than as the absence of refusal—which has garnered the most media attention and public criticism. In addition, some states have enacted laws that require their public universities to adopt an affirmative consent standard (along with certain disciplinary procedures); over the past few years, the American Law Institute (ALI) has debated whether to similarly redefine the consent standard for sexual assault in the Model Penal Code (Flannery 2016; McArthur 2016).[4]

Harvard law professor Janet Halley is one of the most vocal critics of the potential MPC revisions, affirmative consent, and, more generally, Title IX–based reforms to university sexual misconduct policies and procedures. "The campaign for affirmative consent requirements," she warns, "is distinctively rightist" (Halley 2015; see also Gruber 2015). Among her many concerns: an affirmative consent standard authorizes broader administrative and statutory intervention that "will often be intensely repressive and sex-negative"; feminists are "seeking social control through punitive and repressive deployments of state power [and] are criminalizing as a first rather than a last resort to achieving social change"; an affirmative consent standard potentially invites women to claim as rape sex they enthusiastically desired but later regretted; the standard reinstalls gender norms of women as emotional and weak and men as

sexually predatory and (yet) responsible for absorbing all risk; to the extent that affirmative consent policies will result in greater surveillance and punishment, populations already targeted by the criminal justice system—black men, for example—will disproportionately suffer under these new regimes (see also Gruber 2015, 692). Finally, the most panic-inducing consequence of affirmative consent for Halley is that the standard culminates in the criminalization of *undesired* sex. It is not merely forced sex, sex under threats of force, or even nonconsensual sex that will qualify as a criminal sex offense. Now, or soon, affirmative consent standards will shift the threshold from force to nonconsent, to affirmative consent, all the way to *wantedness,* which for Halley represents nothing short of totalitarianism (or "governance feminism" gone ballistic): "A requirement of positive consent will deliver the boon many feminists are seeking: sex that women have that is dysphoric to them at the time will be punishable" (Halley 2015; 2006, 20–22; see also Gersen and Suk 2016, 923).

Halley is not alone in her outspoken dissent. Her fellow Harvard law professors Jacob Gersen and Jeannie Suk (2016) argue that we are now "living in a new sex bureaucracy," in which the federal government and nongovernmental organizations—chief among them institutions of higher education—are enacting and enforcing ever-expanding regulatory policies and procedures over sex. Insidiously enfolded into this "bureaucratic sex creep," they warn, is the regulation of "ordinary sex" itself (883, 885). By broadening definitions of, and requiring more robust administrative responses to, sexual violence, sexual harassment, and sex discrimination, "the bureaucracy" is regulating and attempting to renorm ordinary sex, which the authors define as "voluntary adult sexual conduct that does not harm others" (885). Gersen and Suk share Halley's concern about state overreach and about entrusting more and more power to institutions to solve social problems and to govern our everyday lives (913–18). They express an additional concern that the expansion of "ordinary sex" to regulatory capture *as* sexual misconduct inadvertently trivializes actual sexual violence and harassment (886–87).

For Gersen and Suk, newly revised affirmative consent standards of campus sexual misconduct codes exemplify acutely and extend invasively such regulatory oversight to ordinary sex. By redefining consent to entail "enthusiasm, excitement, creativity, and desire," colleges and universities are reregulating norms of sex full throttle, likewise punishing students who fail to meet the companionate, "marriage-like" sex ideals of university bureaucrats (930–31). The authors list Gordon College, Elon University, University of Wyoming, and Georgia Southern

University (925–26, 928–30), among others, as drafting especially unreachable and moralized definitions of consent. For example, Georgia Southern defines consent as "a voluntary, sober, imaginative, enthusiastic, creative, wanted, informed, mutual, honest, and verbal agreement." (However, this revised "definition" tells only part of the story of consent and campus sex norms; I will return to these supposedly wild and crazy expansions of consent definitions anon.)

Trumpeting a similar note, Yale law professor Jed Rubenfeld (2014) laments in the *New York Times* that his university's definition of sexual consent reclassifies ordinary sex as rape: "Under this definition [of sexual consent] a person who voluntarily gets undressed, gets into bed and has sex with someone, without clearly communicating either yes or no, can later say—correctly—that he or she was raped. This is not a law school hypothetical. The unambiguous consent standard requires this conclusion." In her polemic against the transformation of campus sexual misconduct codes and policies propelled by the federal expansion of Title IX's regulatory reach, cultural critic and Northwestern professor Laura Kipnis (2017b) opines that "sexual consent can now be retroactively withdrawn (with official sanction) years later, based on changing feelings or residual ambivalence, or new circumstances. Please note that this makes anyone who's ever had sex a potential rapist" (91).

On the one hand, Halley, Gersen and Suk, Rubenfeld, Kipnis, and several others are right to shine light on these fast-paced, sometimes half-baked developments that can seem motivated more by threat of liability than by sex nondiscrimination. And students, like the rest of us, risk disempowering and depoliticizing themselves by surrendering social agitation and democratic deliberation to third-party declarative fiat. Take, for example, the Northwestern University students who demanded that Laura Kipnis be sanctioned, rather than debated, for her writings about sex between professors and students (Kipnis 2015).

On the other hand, this scholarly sex panic about our campus sex panic seems, at times, even more panicky than the alleged panic. For even as Kipnis writes, "I don't mean to be hyperbolic," she nevertheless terrifies her readers by claiming that on campus, via campus codes, "virtually all sex is fast approaching rape" (2017b, 121). This is hyperbolic.

Let's take the sex terror alert level down a few degrees. Contra Kipnis, sexual consent *cannot* "now be retroactively withdrawn (with official sanction) years later" (2017b, 91). Kipnis is reporting on a relationship that soured between a graduate student and a philosophy professor at Northwestern; the student subsequently accused the professor of

initiating an inappropriate relationship with her and, on one occasion, having sex with her without her consent. The accusations triggered a Title IX investigation of the professor, who was eventually forced out of the university (the student subsequently filed a Title IX complaint against Kipnis herself for writing about the incident; Kipnis 2015).

But this is the important part: the student claimed to have *not consented* to sex with the professor on one drunken night, not that she consented and retracted that consent. Based on conflicting evidence, Title IX administrators concluded that they could not determine whether the sex was nonconsensual and found the professor in violation of university policy on other (shaky) grounds (Kipnis 2017b, 114). There are many ways in which the Title IX officers and other stakeholders at Northwestern bungled and perhaps manipulated this case. But even according to Kipnis's own account, Northwestern adopted no policy whereby consent to sex could be retroactively withdrawn. The student simply said she never consented! If she is lying, that is a question of fact. The student might have "flip-flopped" on consent, but the university in no way ratified the flip-flop. Codifications of affirmative consent do not weaponize sexual regret.

As I have written with a colleague elsewhere, Jed Rubenfeld's imagined scenario—whereby a man who has sex with a woman who "voluntarily" gets undressed and into bed with him has committed "rape" under Yale's new definition of consent—is not simply far-fetched but nigh impossible (Boyd and Fischel 2014). First, Yale's consent standard, like nearly all university and college consent standards, does not require a verbal *yes* for the subsequent sex to be permissible, so the woman in the scenario need not "clearly communicat[e] either *yes* or *no,*" at least not verbally (Rubenfeld 2014).[5] Second, whatever the woman "voluntarily" does will likely adequately meet the affirmative element of affirmative consent. Third, Rubenfeld misleadingly refers to such conduct as "rape" and to university sexual misconduct hearings as "rape trials." Halley also slips into the language of "crime," "criminalization," and "carceral" in reference to university policies and procedures (Halley 2015). To be clear, the severest forms of punishment for violating a college's sexual misconduct policy is suspension or expulsion, not imprisonment. While Gersen and Suk convincingly document that the sex bureaucracy "operates largely apart from criminal enforcement [. . .] [though] its actions are inseparable from criminal overtones and implications" (2016, 891), it is one matter to look like a duck ("overtones and implications") and another matter to be a duck (throwing hapless fraternity brothers into prison).

Professors Gersen and Suk rightly raise alarms that some of the sex norms that university administrations and student groups are promoting are both suspiciously traditional (for example, campus administrative literature extolling the values of a "more caring, responsive, respectful love life" [929; quoting a brochure from the Dean of Students Office, University of Wyoming]) and convoluted (campus literature that describes nonsober sex, rather than *intoxicated* sex, as nonconsensual and therefore assaultive; 926).[6] Yet I am also inclined to agree with Susan Appleton and Susan Stiritz (2016) that there is no such thing as pre-regulated, "ordinary sex" on college campuses; that sex is always already shot through with norms; and that in the United States, those norms are often informed by sex education curricula that are homo- and erotophobic, are medically inaccurate, and reinforce traditional, restrictive norms of femininity and masculinity. Looked at panoramically, Title IX–based initiatives to facilitate more informed and more egalitarian campus sexual cultures are (or could be) correctives to prior modes of sex regulation and sex superintendence that are largely indefensible (Appleton and Stiritz 2016).

As for the apparently absurd university definitions of sexual consent that incorporate elements such as enthusiasm, sobriety, respect, and verbal agreement, Gersen and Suk are correct that University of Wyoming, Gordon College, Elon University, and Georgia Southern University include these rather lofty, rather dubious notions of consent in their student life brochures or in their Annual Security Reports (ASRs) to the federal government. However, these are not the definitions of consent in the respective institutions' actual sexual misconduct policies. At the University of Wyoming, the policy defines consent, in part, as "a freely and affirmatively communicated willingness to participate in particular sexual activity or behavior, expressed either by words or clear, unambiguous actions." Gordon College defines consent, in part, as "the clear, knowing, and voluntary agreement to engage in a specific sexual activity during a sexual encounter." Elon defines consent, in part, as "voluntary, intentional agreement to engage in a particular sexual activity." And Georgia Southern defines consent, in part, as "words or actions that show a knowing and voluntary willingness to engage in mutually agreed-upon sexual activity." The policy also states that silence alone will not meet the consent standard.[7]

I contacted the deans and other Title IX coordinators at these institutions via email; they confirmed that their schools use their policies' definition of consent, and not the ASR–sexual violence prevention manuals' definition of consent, in their adjudication of sexual misconduct.[8]

Finally, despite the thoroughness and incisiveness with which Professor Halley criticizes the American Law Institute and the State of California for potentially injecting an element of desire into their respective definitions of sexual consent, I do not see it. California, along with a few other states, has legislated that its colleges and universities adopt a standard of consent requiring "affirmative, conscious, and voluntary agreement to engage in sexual activity."[9] Given that the standard is an expressive one, a person could very well be reluctant, ambivalent, or even uninterested in sex, yet the sex will not be rendered assaultive (or rendered in violation of a school's misconduct policy) so long as the person in some way *performs something*—some behavior, some cue, some token of willingness—beyond frozenness or silence (Westen 2004, 65–93). So desire is not an element of consent; communicated willingness is. Halley continually refers rhetorically to the woman who "passionately desired [sex] at the time" but later successfully accuses her partner of rape or sexual misconduct (Halley 2015). The accusation will be found valid, presumably, because even though the woman passionately desired the sex, she made no bodily, verbal, or otherwise communicative indication of her passion. So the woman lies on the bed absolutely motionless and expressionless, passionately desiring and passionately enjoying sex with her partner, and then later accuses him of rape. This seems somewhat implausible.

None of my criticisms of these criticisms are full takedowns, since some of the federal regulatory and university administrative trends in the governance of sexual misconduct are worrisome, not least of which are the secretive hearings with sometimes-arbitrary rules that threaten due process rights of defendants (Kipnis 2017a; New 2016). But it strikes me that the main problems regarding sexual violence, harassment, and discrimination are that incidents still go largely unreported; that women are still largely disbelieved; that student defendants are rarely expelled for violating their universities' sexual misconduct policies; that police, prosecutors, and medical examiners routinely neglect victim complaints or discourage rape victims from pursuing charges; that arrest rates, conviction rates, and sentencing terms for sex offenses are still so thoroughly racialized (Corrigan 2013; Hefling 2014; Kingkade 2014); and that sexual violence, harassment, and discrimination are epidemic (Gavey 2005, 50–75; but see Gruber 2016, 1031–39). Contra Halley, we can protest the racialization of criminal justice enforcement while still making the consent standard for sexual assault one degree more than silent acquiescence (Schulhofer 2015, 677–78). In a racist criminal justice system, all

criminal laws may be enforced discriminatorily. Yet this does not mean we abrogate our responsibility to make better laws and policies. It is neither utopic nor irresponsible to advocate for better laws and policies while also protesting racist enforcement and our current system of mass incarceration (Schulhofer 2015, 679).

And even accounting for legitimate concerns over state and university overreach, affirmative consent is just not the bad guy. The bureaucratic buildup, the due process concerns regarding university misconduct hearings, the stringencies and negative externalities of federal reporting mandates—all of these phenomena can be debated and redressed without skewering affirmative consent.

IS SEXUAL CONSENT MEANINGLESS?

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.

—Catharine MacKinnon (1983, 650)

Sex women want is never described by them or anyone else as consensual. No one says, "We had a great hot night, she (or I or we) consented."

—Catharine MacKinnon (2016, 450)

Consent is a pathetic standard of equal sex for a free people.

—Catharine MacKinnon (2016, 465)

The practice of consent shows you care about the desires and the boundaries of each other. [. . .] Sex with consent is sexy.

—Poster for Consent Is Sexy campaign (2011)[10]

The three statements above from renowned feminist law professor Catharine MacKinnon and the messages conveyed in the Consent Is Sexy poster are 110 percent incompatible. So which are right?

MacKinnon is a lot more right. But while her interventions are necessary as social critique, her alternative—excising consent altogether—falters as a reform of rape law.

The fourth epigraph above is from a poster of the Consent Is Sexy campaign, one of many promotional items the organization distributes to anti–sexual violence groups across college and universities.[11] The image in figure 1 is a screen grab from a training video released by the

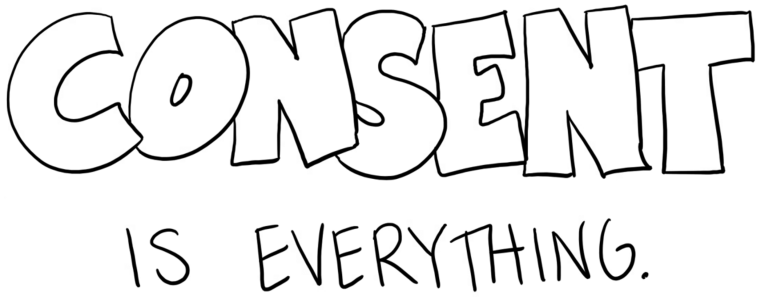

FIGURE 1. Screen grab from Thames Valley Police training video *Tea and Consent*. Blue Seat Studios.

Thames Valley Police in England (Blue Seat Studios 2015). Titled *Tea and Consent,* the video went viral and was circulated widely, even by *Harry Potter* author J.K. Rowling (O'Regan 2016). By analogizing consent to drinking tea with consent to having sex, the video is a clever send-up of men's presumptively willed ignorance ("Unconscious people don't want tea"; "If they say 'no thank you,' then don't make them tea. At all. Just don't make them tea"). The video ends with a public service announcement that is simple, straightforward, and, as I shall argue, (politically) stupid: "Whether it's tea or sex, consent is everything."

Both the Consent Is Sexy campaign and the *Tea and Consent* video have been criticized and lampooned (see, for example, Young Turks 2014; Young 2015). I will not rehash all of those criticisms and satires; but as I hope to have already convinced you, sex with consent is just not always sexy. Literalized as an injunction to verbally request permission for a particular sexual act (*Can I place my finger in your vagina?*), "ask her first" is usually and decidedly unsexy.[12] And the more I read the brochures, posters, and other paraphernalia of the Consent Is Sexy campaign, the more I am convinced that its slogan makes little sense. People, places, things, and fantasies can be sexy; it is hard to discern how the fact of agreement to sex is the top candidate for sexiness. A blowjob with consent might be very sexy indeed, but not summarily *because* it was consensual. A blowjob without consent is not unsexy; it is just sexual assault.

In fact, the most plausible grammatical meaning of "Consent is sexy" is hortatory: *Give consent because consent is sexy!* For example, if jockstraps and Axe deodorant are sexy, I suppose I should wear more jockstraps and apply more Axe. Under this interpretation, the campaign is

pressuring people to consent to sex because consenting is allegedly sexy, the new black. This surely cannot be the objective of the campaign (Graybill 2017, 176).

And consent is *absolutely not everything* "whether it comes to tea or sex." Consent does not give you any information about the heat of the tea, whether the tea is black, green, or herbal, whether the tea is Rishi or some tasteless bag of Lipton. Nor does consent to the present tea-drinking moment tell us anything at all about the tea drinker's past experiences with tea. Does she know about the many options available to her? Does she know there is more in the tea universe than the tasteless Lipton bag, or is her imagination limited by Lipton-only tea education? Does she know that she can create her own tea, experiment with combinations of loose leaves, and forgo the prepackaged bag altogether? I am going to assume you can make the analogic jump from tea to sex yourself.

But in that case, is Catharine MacKinnon right? If consent is neither "sexy" nor "everything," is it also not much of anything at all?

In her earlier work from the 1980s, MacKinnon's criticism of the consent standard in rape was a broadside against patriarchy, not a blueprint for redefining rape law. Her point was that, in a world saturated by sex inequality compounded by other inequalities, liberalism's unit of analysis—the individual who does or does not contract or consent to *x* (here the *x* is *sex*)—cannot possibly take stock of structures and socialization that condition and constrain human exchanges, sexual or otherwise (MacKinnon 1989, 45–48, 164–65). Against a gendered division of labor that diminishes women's options and mobility, against jurors' and judges' sexist interpretations of women's behavior (their resistance as part of "normal" sex, for example), and against heterosexuality as a system of eroticized male dominance and female submission, MacKinnon asserted, consent looks less like a remedy for sexual assault and more like its alibi (1983, 648–50; 1989, 174–75). If women's choices are so constrained, if women are enculturated to be passive and to please others, then their "consent" is not nearly as morally transformative as the good liberal would like (MacKinnon 1989, 177–78; see also Gavey 2005, 155–64). MacKinnon's point back then, though, as I read her, was this: Sex inequality exists. In a host of ways, sex inequality undermines the voluntariness of women's sexual choices that we might otherwise read as consent.

Given the ubiquity of the misattribution, it bears repeating over and over and over that *Catharine MacKinnon never said or wrote that all heterosexual sex is rape* (see also Cahill 2016, 759n3; Oberman 2001,

823–24; Roberts 1993, 369–70). Rather, MacKinnon is commenting that only in the fantasy world of liberal legal equality is the line between rape and sex so cut-and-dried, a line clearly demarcated by the presence or absence of consent. In the real world structured by sex inequality and regressive gender norms, we must much more deeply question the voluntariness of all allegedly voluntary sex and the supreme transformative power we assign to consent. MacKinnon is not alone in her observation that women's consent in no way guarantees women's freedom or equality, let alone their pleasure (see also Pateman 1980; West 2000).

Twenty-five years later, MacKinnon converted her searing social commentary into a proposal for rape law reform, and here things fall apart (2016; see also Halley 2006, 43–50). She argues that consent should be stricken altogether from the legal definition of rape. Her arguments against the consent standard—and against an *affirmative* consent standard—are familiar ones: consent, like affirmative consent, can be forced, intimidated, and manipulated; consent inquiries focus on the woman's feelings and behaviors rather than the man's actions; consent, as a metric for women's freedom of choice, is incapable of targeting the inequality that forces the choice (MacKinnon 2016, 442–43, 454–56, 463–65). Instead, MacKinnon argues for expanding the legal definition of *force* to include social and professional inequalities and, in turn, redefining rape as

> a physical invasion of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability.
>
> [. . .] Psychological, economic, and other hierarchical forms of force—including age, mental and physical disability, and other inequalities, including sex, gender, race, class, and caste when deployed as forms of force or coercion in the sexual setting, that is, when used to compel sex in a specific interaction. [. . .] As in the international context of war and genocide, for a criminal conviction, *it would be necessary to show the exploitation of inequalities—their direct use—not merely the fact that they contextually existed*. (2016, 474; emphasis added)

Anticipating the objection, MacKinnon is careful to explain that she is not proscribing sex across all inequalities outright, but only sex in which the inequality is leveraged for sex. I will revisit sex across vertical status relationships in chapter 2, but I want to suggest that MacKinnon's qualification does not do much qualifying. For what exactly does it mean for gender to be deployed as a form of force? Or for class to be so deployed? MacKinnon does not spell it out for us, but she gives some

indications: she would prohibit all forms of commercial sex, whether in pornography or as prostitution (2016, 447–48, 454; see also MacKinnon 1985; 1993). It seems likely that she would also prohibit most or all forms of sadomasochistic sex (2016, 461–62; see also MacKinnon 2007b, 264, 269–70). And given her reflections on the "welcomeness" standard of sexual harassment law, it seems too that she is willing to criminalize consensual sex that women agree to but do not want, by the very fact that such an agreement is secured through something akin to gender as deployed force (2016, 450–51). MacKinnon writes:

> When a sexual incursion is not equal, no amount of consent makes it equal, hence redeems it from being violative. Call it sexual assault. This statement does not end here. If sex is equal between partners who socially are not, it is mutuality, reciprocity, respect, trust, desire—as well as sometimes fly-to-the-moon hope and a shared determination to slip the bonds of convention and swim upstream together—not one-sided acquiescence or ritualized obeisance or an exchange of sex for other treasure that makes it intimate, interactive, moving, communicative, warm, personal, loving. (476)

I am not entirely sure what she is arguing in this passage, but I think that if sex occurs between people who are socially unequal—paradigmatically men and women, for MacKinnon—it is presumptively sexual assault. The sex is *not* sexual assault if it is equal, but then what makes equal sex equal across inequality is "mutuality, reciprocity, respect," and so on. This is a dumbfounding conclusion. Despite MacKinnon's preemptive strike against those who might charge her with inviting gross state overreach (2016, 477), I do not see any other result from this line of argument. Any sex that women agree to with men for purposes other than "mutuality, reciprocity [. . .] desire" would make the sex rape and the men rapists. Consider—and apologies for perpetrating gender stereotypes—the sorority sister who willingly sleeps with the football quarterback in order to tell the story to her friends but is not all that into the sex and maybe even finds it unpleasant. Consider the wife who agrees to mediocre or even subpar sex with her husband not because she respects him but because she feels obligated, or maybe she wants to have a child. Consider, à la *Teen Vogue,* the teenage girl who tries anal sex at the suggestion of her boyfriend, dislikes it, but tells him, *un*enthusiastically, "it's OK" as he dutifully and periodically checks in with her throughout the regrettable encounter. We should work trenchantly to change the cultural norms that compel the sorority sister and the wife and the teenage girl into blah or less-than-blah sex. But to imprison the quarterback and the husband and the adolescent boy for

rape is worse than absurd; it is unconscionably unfair to the men and offensively disrespectful of the women's choices.

The proposal's prospects are grim even if I have read MacKinnon wrongly. For if we suppose the above scenarios are not instances of rape—that is, if we suppose the inequality between the men and women in these scenarios do *not* constitute force as MacKinnon expansively redefines the concept—then acquaintance rape is left untouched by her suggested reform. Because if consent is removed entirely as an element of the crime of rape, then what crime has occurred if the sorority sister, wife, and teenage girl all say "no"—*or say nothing*—to their partners, who then proceed to have sex with them anyway? The wrong is not best conceived or legally defined as a wrong of force, but as a rights or autonomy violation, indicated by nonconsent (saying "no") or the absence of affirmative consent (saying nothing).

For the reasons raised by MacKinnon and many others, consent is a pretty crappy legal standard for permissible sex, as both a practical and philosophical matter. But it is also the *least* crappy standard from the menu of options (desire, consent, force; see Schulhofer 2015). Insofar as an affirmative consent standard requires neither enthusiasm nor mutuality nor desire, but rather an *indication of agreement beyond silence and frozenness,* then we should, I believe, adopt such a standard into the criminal law of sexual assault, despite Janet Halley's concerns from one direction and Catharine MacKinnon's opposing concerns from the other (Schulhofer 2015, 669).

In law, then, let's not screw consent. The argument of this book is, as I have already proposed, that we should screw consent most everywhere else: in life, activism, and political organizing. In other words, the sex inequality problems MacKinnon exposes—sexual intimidation and coercion, norms of male dominance and female submissiveness, collective disregard for women's sexual agency and desires—are best addressed not by eliminating the consent standard from rape law or abandoning efforts to redefine consent affirmatively, but through social transformation: political debate, public health initiatives, educational interventions, artistic productions, and creative collaboration across student groups and community organizations. There are also other problems of our sexual culture not fully explainable by sex inequality (sexual shame, for example, as well as medically inaccurate sex education curricula and some variants of erotophobia), but if all you have is a sex equality hammer, every problem looks like a sex inequality nail (Halley 2006, 31–35; G. Rubin 1993 [1984]). Of course, such debates, initiatives, and collaborations are already occurring,

but too many of these interventions are conceptually, semantically, politically, and ultimately foolishly rooted in consent. The language of law is attractive because it is definitive, but its bluntness blunts bigger and better thinking and politicking around sex and sexual violence. *Screw Consent* asks: Even if consent really could do all the work MacKinnon says it cannot do, would that be good enough? Even under imagined conditions of perfect sex equality, might we nonetheless demand more—much more—from our sexual ethics and our sexual culture than redefining consent by beefing it up (Gavey 2005, 218)?