

SEX AND HARM IN THE AGE OF CONSENT. By Joseph J. Fischel. Minneapolis: University of Minnesota Press, 2016

Meg Mott
Marlboro College

In 1993, Antioch College launched a campaign to end date rape, called “Ask First.” Students would be taught how to ask before acting, how to confirm that the cuddling was consensual, and how to bring consciousness to the frenzy of sex. The national response was immediate and satirical. “The comedy routines almost write themselves,” began a *New York Times* editorial.¹ While credited with good intentions, the editorial board concluded that the policy was “almost impossible to implement.” It was one thing to tell adolescents “what’s unacceptable, in no uncertain terms,” but “legislating kisses won’t save them from themselves.” According to the editors, Ask First was deeply flawed. Given the opportunities of coeducation, the liberties of the liberal arts, and the sexual freedoms of the 1990’s, young people were not going to accept any restrictions on their behavior. Better to regret an unfortunate encounter than to repress one’s sexual passions.

Thirty-four years later and the young people are demanding to be saved not from themselves but from a campus culture that promotes sexual violence. In 2011, the Department of Education distributed the famous “Dear Colleagues” letter, demanding that colleges and universities were in violation of Title IX by perpetuating a culture that condones rape. If they wanted to keep their federal funds, they must institute a quasi-criminal justice system that treated complainants with dignity and respect and that held offenders accountable. At the heart of this campaign to end “rape culture” on college campuses, was the notion that young people could

¹ Editorial, “Ask First at Antioch,” *New York Times* (October 11, 1993).

learn to have consensual sex through proper training. Those who didn't follow the rules, should be dismissed. Suddenly, Antioch's folly became the template for a nationwide training on consensual sex.

A training video called "Tea and Consent," which uses stick figures and a British male voiceover, exemplifies the consent campaign.² "If you ask them if they care for a cup of tea and they say, 'No, thank you,'" says the voiceover, "don't make them drink it." If they initially say, 'yes,' and you put the pot on for tea, but by the time the tea is made they have changed their mind, the lesson still holds. "Don't make them drink it." The lesson is simple. "Just as it is ludicrous to force people to have tea when they don't want tea, then how hard is it to understand when it comes to sex?" "Whether it is tea or sex," concludes the video, "consent is everything."

Although created by a British police department, the video became an instant success with American college administrators. The stick figures might be male, female, transgendered, white, Black, Asian, Latino, or Native American, straight or queer and the lesson still holds true. But the fact that the stick figures are distilled of any bodily attributes suggests that the lesson may be inapposite. Tea may be stimulating but the comparison to sex is misleading. The stick figure does not suffer from tumescence. There is no blushing, no constricted speech. Is this really an effective teaching tool? "Absolutely!" say student activists. And yet, even with all these efforts to change student behavior through consent, the statistics never change.

According to Know Your Title IX (KYIX), an organization geared to "empowering students to stop sexual violence," 1 in 4 women will be sexually assaulted during their time in

² Thames Valley Police, "Tea and consent," (published Nov. 16, 2015). Available at: <https://www.youtube.com/watch?v=pZwvrxVavnQ>

college.³ Colleges are the sites of nonconsensual sex because, argues KYIX's website, "schools across the country continue to tolerate campus violence and mistreat survivors." When administrators point to good faith efforts to confront a so-called "rape culture," such as consent training and bystander intervention programs, the KYIX activists are unimpressed. Since rapes continue to happen on college campuses it must be because the administration wants women to be raped. No one questions the efficacy of the campaign itself.

In the Spring of 2016, students at Hampshire College in Amherst, Massachusetts disrupted classes and admission events, pressuring the administration to do more to stop sexual assaults. Protest leader Mia Nan claimed that "administrators and residential life staff are silencing victims of on-campus sexual assault and failing to hand down consequences to known perpetrators."⁴ While it is impossible to know the details of any Title IX proceedings, one can conclude that the student protest followed a decision that did not favor the complainant. Consent, it turns out, does not make it easier to determine whether or not a sexual assault occurred. Even with the quasi-criminal justice system, the lower standards of proof, and the need to prove consent, panels do not always get sufficient evidence to determine that the sex was nonconsensual.

Not surprisingly, as victim advocates call for stiffer penalties, the accused have started to fight back. The "sequel" to "Tea and Consent" reveals just how flimsy is the defense of consent. In "Tea, it's a bad idea," the lead stick figure has seen "Tea and Consent," and believes he can

³ Know Your Title IX website "Basics." Available at: <http://knowyourix.org/basics/>. Accessed July 26, 2016.

⁴ Chris Lindahl, "Student protest continues at Hampshire" *Daily Hampshire Gazette* (4/20/16).

now negotiate a successful encounter.⁵ When another stick figure comes calling, our hero does not force tea on their guest. The guest, takes the tea, wants a second cup of tea (and even biscuits!), and still the hero does not force tea on the guest. But in the following days, the hero sees pictures of the guest posted on social media, pictures of the guest drinking tea with lots of other people – so many different people that the hero contacts a doctor to see if there is risk of a sexually-transmitted disease. The results come back negative and our stick figure thinks that’s the end of it.

But the encounter with tea was riskier than our hero imagined. Some time later, the guest determines that maybe that encounter was only “meh.” “That’s against the law!” shouts a mate. “If you only had tea because you felt bad for them, that’s not consent! That’s coercion.” The police come, our hero is beaten about the head and shoulders, and is taken to jail, charged with the act of forcible tea. But what about his consent training? He tells an attorney that he followed the rules and never forced the guest to drink tea. “You missed the important one,” the attorney explains, “the one where you each retain an attorney and fill out the pre-consent form.” Consent is only meaningful with an “acceptable form of documentary evidence.” Without the documentation, he can expect to be listed on the Forcible Tea Registry. His only hope is that the NSA had him under surveillance at the time of the tea-drinking. The lesson for this video is “Don’t have tea. People aren’t smart enough or honest enough to have tea.”

For students afraid of being charged with sexual misconduct, this video captures the risks of engaging in anything “consensual.” Once charges have been filed, or accusations made to a disciplinary body, proving consent dissolves into a case of “he said, she said.” Even if the police

⁵ Casper Lynn, “Tea, it’s a bad idea,” YouTube (published Nov. 23, 2015). Available at: <https://www.youtube.com/watch?v=yX6va9glqgA>

do not bang down the door and beat them about the head and shoulders, expelled students carry the stigma of being a sex offender.

If college campuses are as unsafe as the KYIX website suggests, one would think that more effective methods of ending unpleasant sexual encounters would be put in place. Maybe we need to rethink coed dormitories, or reintroduce dorm parents, or ban sex outside of marriage. At least those changes would recognize the temptations of the flesh. Or maybe we should reintroduce force as a better definer of rape. At least with the element of force, the accused would have a greater chance of proving that his crime was actually an assault. But these are not the conversations happening in state legislatures, the Department of Education, or on college campuses. Instead, despite the acknowledged fact that sex is risky for both victims and initiators, we continue to give prime time slots to teaching consent as if consensual sex will fulfill both parties expectations.

A new book by Yale professor Joseph J. Fischel, *Sex and Harm in the Age of Consent*, provides all the evidence for abandoning consent training and yet, confusingly, ends up endorsing the consent-based campaign. Consent, he argues, is most effective at what it produces: categories of persons. The consenting adult is valorized against the sex offender, who does not recognize consent, and the child, whose consent should not be recognized. Both the child and the sex offender are cast beyond the capacities of consent. Unlike the consenting adult, “the sexually moral agent and the free citizen,” the sex offender and the child are “consent’s and therefore the polity’s outsiders.” (20). Those of us who are not children, and not marked as sex offenders, are attracted to consent because it appeals to our self-image. We want to believe that we are sexually autonomous beings and that our sex laws support that freedom.

Fischel's research and analysis on both the production of the sex offender and the child are compelling. The book opens with the story of a Florida sheriff's office, which fulfilled its Sex Offender Registration and Notification requirement by planting official signs in front of the residences of known sex offenders. We have to let the community know, explained Sheriff Smith, exactly where the "pervert" resides. "Sheriff Smith, like many local authorities, national politicians, and pundits, talks about sex offenders as if they are addicted to sexual violence, as if their sexual acts are uncontrollable, as if their errant desires are fully constitutive of who they are, and as if they are always already coming after the children" (2-3). Consent plays into the making of this particular monster. The sex offender is worthy of our repugnance because he is a creature that "violates the dictate of consent, either against an unwilling woman or, in our contemporary, collective imaginary, against an incompetent and innocent child" (2). This "pervert" must be marked for life, must have his residence known, in order to protect the "innocent."

Fischel makes it clear that he is not "writing a brief" to pardon specific sex offenders. Rather, his project is to show us how the creation of the sex offender is tied to certain myths about consent. The sheriff in Florida may say he is protecting the community, but what he is actually doing is "functionaliz[ing] consent as the metric that matters for late modern sexual ethics" (3). As long as we focus on the nonconsensual ways of the sex offender, we can imagine ourselves as free because we consent. In that way, the sex offender is not just a scapegoat, "but also an organizing, palliative character that compromises better critical thinking and legal regulation around sex, age, age difference, and gender inequality" (3). We can only think more critically about the actual harm associated with sex if we give up the myth of the pervert.

We also need to give up the myth of the asexual child. Fischel asks us to reconsider age of consent statutes that criminalize sex between minors and intergenerational sex. Depending on the state, the age of consent fluctuates between sixteen and eighteen. Fischel advocates lowering ages of sexual consent “in jurisdictions where the age threshold is higher than the age at which the majority of adolescents are having sex” (99). Instead of focusing on age alone, we should think about whether a young person understands the physical and emotional ramifications of sexual activity” (105). That sort of intelligence can only come from “education, experience, and knowledge of sexual life” (110). Rather than criminalize sex between minors, Fischel urges us to create a richer vocabulary for understanding adolescent sexuality.

Fischel’s method of demagnetizing consent’s attraction is linguistic. Instead of consent, he urges us to think about sexual autonomy, which focuses more on relationships. Instead of predation, he recommends an archaic term “peremption,” “which makes relations rather than bad persons the object of intervention” (14). Instead of innocence, he promotes vulnerability, which is more attuned “to the ways young people are disproportionately prone to imposition and interference” (14). Those terms, he insists, will make it more possible to talk about sexual harm and to promote more egalitarian safer sex programs. As with much critical thought, the real goal of switching out terms is not so much to create neologisms but to make us more conscious of the political/social effects of the terms we currently use. “Once we observe that the child and the sex offender are standing in to substantiate consent, that they are constructs to help recognize and relieve sexual harm, we are called upon to think and regulate sex better” (15).

After switching out the old terms of consent/predation/innocence with the new vocabulary of autonomy/peremption/vulnerability, Fischel proceeds to deconstruct sex crimes in popular culture. In his discussion of the reality TV show, *To Catch a Predator* (which aired from

2004 to 2007), Fischel shows just how the character of the sex offender and the innocent child is produced. Working with an online watchdog group, Perverted Justice, the show lured predators to meet at a decoy's home for sex. The home was wired with hidden video cameras and flirtatious exchanges encouraged until the host of the series rushes in and berates the man for attempting to have sex with "a child" (the actor is an adult playing the part of a child posing as teenager). As Fischel observes, "no sexually violent act ever takes place – unless one considers policemen piling up on a now emasculated man an act of sexual violence" (52). *TCAP*, he concludes, "treats all boys and girls as equivalently vulnerable and spoilable, and men searching for boys and men searching for girls as equivalently predatory and evil" (52).

Fischel ends his analysis of *TCAP* with a provocative question: "Doesn't a social constructivist account of gender and sexuality require a presumption that sex across age is differently inflected by different sexual cultures, socialization, and gendered embodiment?" (54). Given the work of queer and feminist theorists, shouldn't critical thinkers be skeptical of narratives that reinforce gendered identities? And shouldn't that skepticism be directed at public policy that treats sexual harm without any understanding of cultural context? Instead of grappling with these questions using his own words, however, he relies so heavily on his sources that it is often difficult to follow his argument.

For instance, in his analysis of *TCAP*, Fischel draws on three different articles, going into great detail about where the authors align with each other and where they disagree. His tendency to scrutinize his sources, however, detracts from his overall argument. I was less interested to know that "Hawkes and Egan stall on the foregone conclusion of heteronormativity or at-risk heterosexuality," than to see how their analyses might help us rethink the problem of dealing

with sexual harm without reinforcing gender norms (51). That's the nut that Fischel has courageously decided to crack and I would have liked to hear more of his thoughts.

I was also confused by his position on consent. Fischel begins the book with a persuasive critique of the liberalism that undergirds consent. Consent is attractive because it “signals individual contract rather than hierarchy of status” (10). Consent gives permission for adults to engage in gay sex, consume pornography and perpetuates the notion that “other private sexual arrangements are just not your business” (10). Consent alone, however, is inadequate. Consent “can only do the work we want it to do ... if subtended by other fictions: the incompetent child, the recidivistic sex offender, and the decriminalized and de-moralized homosexual” (11). By debunking the supporting fictions, consent will be able to do better work. His linguistic solution is to focus on autonomy and not consent.

For instance, in a critique of law professor's Jed Rubenfeld's *Yale Law Review* article on the myth of sexual autonomy, Fischel argues that Rubenfeld missed an opportunity to “reconstruct autonomy in more broad-based, ecological, and relational terms” (204).⁶ Rubenfeld had correctly pointed out the problem that consent creates for sex crimes. Under the reformed statutes, a person could be found guilty of rape by deception, by pretending to be someone they weren't. “[A]ny form of deception that induces sex – not disclosing your HIV status, saying you went to Yale when you went to Wesleyan, ‘make-up and hair dye,’ etc. – corrupts consent” (204). But where Rubenfeld raises the possibility that the “much-maligned force requirement” may not be so maligned, Fischel argues that rape-by-deception would not present a riddle were

⁶ Jed Rubenfeld, “The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy,” *Yale Law Journal* (2013) 122:1372-1443,1372.

we think about consent in terms of autonomy. And yet, it is not clear exactly how autonomy will avoid the problems associated with consent.

In the end, Fischel reinforces the legal priority of consent by siding with student activists. “In a perfectly sexually autonomous world, an affirmative standard of consent would be introduced alongside more egalitarian safer-sex programs that centralize both safety and desire and that articulate the important and respecting and defending sexual choice” (121). Consent, he argues, will do better work when laws that reflect the actual sexual behavior of adolescents replace age of consent laws and when safer-sex education provides the necessary cultural correlate to those statutes. Focusing on changing the culture, however, is not made easier by a quasi-criminal justice system with enormous political pressures to find for the complainants. Consent may be a good habit, but it makes for bad law.

And yet, knowing all the problems associated with consent, Fischel backs Title IX activists. “Unlike other student sexual safety campaigns, IX activists do not inadvertently constrict their ambitions by the language of consent” (198). Disdainful of “consent is sexy” programs, Fischel prefers the tough line taken by KYIX. “Know Your Title IX can call a spade a spade – this is not just about consent, but about prevention, intervention, communication, due process, accountability, and affecting campus sexual climate” (198). Unlike earlier Take Back the Night rallies, which he characterizes as “breaking the silence” and “speaking wounds to power,” KYIX, he claims, is “changing communication, behavior (bystanders’ and partners’) and institutional responses” (199). For KYIX, consent is the mechanism to fight an uncaring administration. But isn’t this rhetoric also functioning to produce the very type of moral panic that Fischel rightfully rejects for sex offenders?

Rather than supporting Know Your Title IX, I would have said that the values of sexual autonomy, “peremption” and vulnerability are more in line with the principles of restorative justice. Some states, such as Arizona, and countries, like New Zealand, are using restorative justice to address sexual violence.⁷ Restorative justice gives victims a chance to be heard and perpetrators of sexual harm a chance to ask for forgiveness. Restorative justice offers just the sort of broad-based, ecological, and relational framework for autonomy that Fischel explicitly calls for. Restorative justice provides a stark contrast to the quasi-criminal justice system that most schools have created to comply with Title IX.

Instead, Title IX has instituted a “trauma-informed approach” to guide handlings of sexual misconduct cases, adding a fourth category to Fischel’s typologies: the traumatized victim. The traumatized victim has given rise to an industry of victim advocates who understand the pain of the victim better than she does.⁸ Instead of recognizing the inner resources of the complainant, the current system assumes she cannot speak on her own behalf. Many feminists are coming to see that these punitive legal systems do not empower women.⁹ By perpetuating a culture of fear, victim advocates align themselves with an unforgiving police state.

Sex and Harm in the Age of Consent shows just how hard it is to speak about sex in this age of consent. Fischel is to be commended for beginning as boldly as he did, for calling into question the draconian laws for sex offenders and the lingering Puritanism of age of consent statutes. That he ended up aligned with Know Your Title IX says quite a bit about the difficulty

⁷ Mary Koss, Jay K. Wilgus, and Kaaren M. Williamsen, “Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance,” *Trauma, Violence, and Abuse* 15(3), 242-257.

⁸ Linda G. Mills, *Insult to Injury: Rethinking Our Responses to Intimate Abuse* (Princeton: Princeton University Press, 2003).

⁹ Leigh Goodmark, *A Troubled Marriage: Domestic Violence and the Legal System* (New York: New York University Press, 2012).

of deprioritizing consent not just in our legal system but in our society at large. Moving away from that metric will take not just legal reforms, but a change in rhetoric in progressive circles. Fischel provides the analytical tools to begin that work. It's up to his readers to carry those insights into the next era.