



COMMENTARY

Sexual consent and relational rights: a call for relational repair

Kamaria B. Porter 

Education Policy Studies, The Pennsylvania State University, State College, PA, USA

Email: porterkb@psu.edu

(Received 14 December 2023; revised 16 December 2023; accepted 17 December 2023)

Sexual violence on college campuses remains pervasive and concerning. In 2020, the American Association of Universities released climate study data from its 33 member institutions ($n = 181,752$) on rates of sexual violence (Cantor et al. 2020). Researchers found over a quarter of women undergraduates (25.9%) and 22.8% of Trans/GenderQueer and Nonbinary students (TGQN) experienced sexual assault by force or without the ability to consent since beginning their college career. For intimate partner violence, incident rates were 14% for women and 21.5% for TGQN students. More than half of undergraduate women (59%) and nearly two thirds of TGQN students experienced at least one form of sexual harassment, including unwanted sexual advances and sexualized insults.

Universities have multiple legal obligations – under Title IX, the Violence against Women Act, state regulations and the Clery Act – to respond to sexual violence (Brubaker et al., 2017; Konradi 2017). Creating sexual consent policies is one of many policy actions institutions have taken to aid in prevention education, defining misconduct and adjudicating reports of sexual assault (Jozkowski 2015). In this year’s Law and Society Association Presidential Address on relational rights, Dr Laura Beth Nielsen discussed the case of these sexual consent definitions and their efficacy in changing student sexual behavior. Nielsen argued for a relational rights framework to mobilize our field’s strengths of socio-legal critique and empirical research to “build a bold view of the possibilities for law” toward justice through championing social relationships. Considering the legal history of sexual consent and its uneven and largely symbolic application in university policies, I agree that a relational rights perspective is needed to actualize the equity goals of Title IX on college campuses. Furthermore, as a Black feminist scholar of sexual violence in higher education, I want to extend Dr Nielsen’s analysis to argue for research and action on sexual consent that centers “relational repair” and Black women. To do so, I draw on an interdisciplinary set of sources, as well as my own research on university sexual assault policies and Black women’s narratives of sexual violence.

The history of sexual consent as law is deeply intertwined with the denial of rights to all women, with Indigenous women and Black women at the most extreme position of sexual and social subordination (Collins 2000; Freedman 2013). Definitions of rape and consent corresponded to the gendered racist hierarchal social structure of the early colonies, denying enslaved African women the right to withhold consent, alongside all wives, all poor women and sex workers across race (Freedman 2013). This disordered relationship with consent extended to the land itself, through the violent conquest of Indigenous land and heritage. Violence to Indigenous people was perfectly legal, as depicted in the 2023 film, *Killers of the Flower Moon*. A key element of the Reign of Terror against the Osage People in Oklahoma in the 1920s involved interracial marriages and murder to steal oil profits from the tribe.

Historical social science research on adjudicating rape and consent in the nineteenth and twentieth centuries revealed the question of who can consent to sex and with whom, reinforcing hierarchal power relationships (Collins 2000; Freedman 2013; Jacquet 2019). In the book *Injustices of Rape*, Jacquet (2019: 14) wrote:

stereotypes and constructions of racialized gender alternately left Black women, Black men, and white women vulnerable to hostility and injustice at the hands of the courts and to suspicious disdain in the eyes of the dominant [white male] society.

As documented in McGuire's (2010) "At the Dark End of the Street," the racial terror regime of Jim Crow centered on the frequent abduction of Black women by gangs of white men, resulting in violent gang rapes and beatings. Black women did not remain silent but reported these incidents at great personal and community risk. For instance, after being abducted outside her church, gang raped and beaten, Recy Taylor reported the violence to the Henry County, Alabama, sheriff's office. Taylor, her husband, and children received numerous threats of violence, including a firebombing of their family home (McGuire 2010). A review of rape cases in Mississippi between 1940 and 1965 revealed all-white courts "convicted only ten white men of raping black women and girls ... a drop in the bucket of the presumably thousands of cases of white-on-black rape" during that period (Jacquet 2019: 43). By contrast, Black men faced disproportionate legal consequences for rape. After any sign of resistance to white supremacy by Black communities, "rumors of black-on-white rape conveniently surfaced" (Jacquet 2019: 25), resulting in extralegal lynching and *legal* executions of Black men. Of the 455 men executed for rape in the USA between 1930 and 1965, 405 of these men were Black (Jacquet 2019).

As the right to withhold consent was wholly denied to women of color, white women could not reliably claim it either (Freedman 2013). Courts, run by white men, dictated the proper behavior of believable rape victims, basing proof of non-consent on the utmost resistance by the victim. Courts required women to be thoroughly examined by a physician for "mental and moral delusion" (Jacquet 2019: 24). Creating the terms of sexual consent along gendered and racialized lines, white jurists and lawmakers guaranteed white men would never face punishment for rape, even intraracial rape. This scholarship clearly demonstrates that the legal and social concept of consent was rooted in protecting the domination of wealthy white men over nearly every other category of people. Leading sexual violence and trauma researcher

Dr Judith Herman (2023) reflects on this history as evidence: “Our legal system was not designed initially to redress the harms done to women or to enslaved or Indigenous people. Often, in fact, it has been an active instrument of those harms” (44–45).

Largely due to feminist legal activism, sexual consent, as “law on the books,” has evolved from the use of force (by the assailant) and demonstration of resistance (by the survivor). Sexual consent encompasses a broader set of instances wherein a person cannot legally consent to sex, including being asleep, incapacitated by alcohol or drugs, too young, having a disability and being subject to supervisory power in the home (incest) or workplace (*quid pro quo*). On college campuses, sexual consent definitions can be more expansive (Muehlenhard et al., 2016). Affirmative consent definitions elaborate on the characteristics of consensual sex, providing guidelines for sexual behavior that is both ethical and legal. As part of an in-depth study of sexual misconduct policies, my colleagues at the University of Michigan and I coded and analyzed 381 sexual consent definitions in university sexual misconduct policies. Elements of affirmative consent include sex that is voluntary, active, affirmed in an ongoing manner and given without coercion. Only eight schools in our sample of 381 required that sexual consent be exchanged verbally, with most policies acknowledging verbal and non-verbal communication would suffice.

Returning to Dr Nielsen’s address, research on the efficacy of Title IX regulations shows that sexual consent definitions “on the books” in university Title IX policies are incomprehensible to traditional-aged students, requiring a reading ability needed for the Harvard Law Review to understand (Albrecht et al. 2023). Fraternity men may be hanging bed sheets declaring “Consent is Mandatory” outside their houses, but the message is not reliably penetrating their practices. Interviewing college men about sex and consent, Nicole Bedera (2021) found participants more often interpreted ambiguous cues from women (moans and eye contact) as consent, foregoing the affirmative consent policy recommendations to verbally check in with a partner. In their study of sexual assault at Columbia University, Hirsch and Khan (2020) demonstrated that while many students could recall the school’s consent policy, students rarely incorporated affirmative consent practices in their sexual interactions. Looking at the adoption of sexual consent definitions at 381 schools, our research at Michigan found that college campuses serving a greater percentage of Pell Grant recipients and enrolling more Black and Latinx students were less likely to include affirmative consent elements in their definitions. Elite, highly resourced, selective institutions have greater ability to employ skilled compliance professionals (Edelman 2016) in Title IX and sexual assault response offices to insure policy definitions are comprehensive. Students of color continue to be systematically sorted into institutions with fewer resources (Hamilton and Nielsen 2021) to devote to prevention. The strain of inequality that has run through this legal right continues to college campuses, denying women of color students full access to it.

What can be done? One of the first college campus policies to elaborate on affirmative consent was Antioch College’s 1990 Sexual Offense Prevention Policy (SOPP). Though it was memorialized in a *Saturday Night Live* skit, its history is quite instructive (Rosman 2018; The New York Times 2018). After two women made reports of rape on campus, women students organized and generated a list of demands. Their first attempt, described by an activist, “was very punitive,” outlining the punishments for assaults; but the students wanted something bolder: to create a culture of safe,

positive sexuality (Rosman 2018; Saltman 2014). Led by a multiracial group of women, the students started talking about consent. The approach of the campaign was rooted in the kind of relational rights perspective Nielsen described. The activists recognized that students needed tools to navigate the anxieties of sex and to understand that how they treated each other was rooted in larger issues of power and autonomy. Sexual consent, pivotal to the policy, was defined as willing, verbal agreement to sexual activity, at every stage. The policy was accompanied by educational events, workshops and discussions throughout the year (Reedy 2018). The broader goal of creating “a campus culture of positive consensual sexuality,” and the whole campus community taking responsibility for educating toward that goal, was lost on the detractors. The SOPP became a cornerstone of Antioch campus life and community, requiring that every community member, even visitors, review and agree to it.

Listening to the Presidential Address, I was struck by Dr Nielsen’s reference to Patricia Williams’ quote about rights “tast[ing] good in the mouths of historically marginalized and racialized groups.” In my own study of 46 Black women and non-binary students’ experiences with sexual assault exposure, sexual consent came up often from participants. In some cases, Black women reflected on never being able to exercise that right, even as girls, experiencing childhood sexual abuse in their homes or sexualized harm in their high schools. Coming to college, consent was often a new concept that brought the promise of self-determination of their sexuality and bodies. Yet, the gendered and racist power dynamics of university life still left Black women unprotected from a wide spectrum of sexual harassment and violence.

Here’s where relational repair is needed. As a field, we need to center the shameful legal and political history of sexual consent and work to repair the dignity of women of color, whose denial of the right to consent created the decaying foundation of this country. We need to listen to Black college women on policy matters, creating definitions that relate to their lives and needs for safety. We need to center women of color feminist scholarship to unearth all the areas of betrayal and harm produced by legal, educational and social institutions. We need to relearn sexual consent from those who have so often been denied it and restore their dignity in the process.

Conflicts of interest. None.

References

- Albrecht, Kat, Laura Beth Nielsen and Lydia Wuorinen. 2023. “Misunderstanding Law: Undergraduates’ Analysis of Campus Title IX Policies.” *Educational Evaluation and Policy Analysis* 45 (2): 247–67.
- Bedera, Nicole. 2021. “Moaning and Eye Contact: Men’s Use of Ambiguous Signals in Attributions of Consent to Their Partners.” *Violence against Women* 27 (15–16): 3093–113.
- Brubaker, Sarah Jane, Brittany Keegan, Xavier L. Guadalupe-Diaz and Bre’Auna Beasley. 2017. “Measuring and Reporting Campus Sexual Assault: Privilege and Exclusion in What We Know and What We Do.” *Sociology Compass* 11 (12): 1–19.
- Cantor, David, Bonnie Fisher, Susan Chibnall, Shauna Harps, Reanne Townsend, Gail Thomas, Hyunshik Lee, Vanessa Kranz, Randy Herbison and Kristin Madden. 2020. “Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct.” The Association of American Universities.
- Collins, Patricia Hill. 2000. *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*. 2nd ed. New York: Routledge.
- Edelman, Lauren B. 2016. *Working Law: Courts, Corporations, and Symbolic Civil Rights*. Chicago; London: The University of Chicago Press.
- Freedman, Estelle B. 2013. *Redefining Rape*. Cambridge, MA: Harvard University Press.

- Hamilton, LT and K. Nielsen. 2021. *Broke: The Racial Consequences of Underfunding Public Universities*. Chicago: University of Chicago Press.
- Herman, Judith. 2023. *Truth and Repair: How Trauma Survivors Envision Justice*. UK: Hachette.
- Hirsch, Jennifer S. and Shamus Khan. 2020. *Sexual Citizens: A Landmark Study of Sex, Power, and Assault on Campus*. New York: WW Norton & Company.
- Jacquet, Catherine O. 2019. *The Injustices of Rape: How Activists Responded to Sexual Violence, 1950–1980*. Chapel Hill, NC: UNC Press Books.
- Jozkowski, Kristen N. 2015. “‘Yes Means Yes’? Sexual Consent Policy and College Students.” *Change: The Magazine of Higher Learning* 47 (2): 16–23.
- Konradi, Amanda. 2017. “Can Justice Be Served on Campus?: An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland.” *Humanity & Society* 41 (3): 373–404.
- McGuire, Danielle L. 2010. *At the Dark End of the Street: Black Women, Rape, and Resistance – A New History of the Civil Rights Movement from Rosa Parks to the Rise of Black Power*. New York, NY: Vintage.
- Muehlenhard, Charlene L., Terry P. Humphreys, Kristen N. Jozkowski and Zoë D. Peterson. 2016. “The Complexities of Sexual Consent among College Students: A Conceptual and Empirical Review.” *The Journal of Sex Research* 53 (4–5): 457–87.
- The New York Times. 2018. “Did Antioch College See #metoo Coming?” *Times Documentaries*, <https://www.youtube.com/watch?v=zyEW1D9xCPg> (accessed December 1, 2023).
- Reedy, Christine. 2018. “Generations of Change.” *Antioch College (blog)*, <https://antiochcollege.edu/2018/03/26/generations-of-change/> (accessed December 1, 2023).
- Rosman, Katherine. 2018. “The Reinvention of Consent.” *The New York Times*, sec. Style, <https://www.nytimes.com/2018/02/24/style/antioch-college-sexual-offense-prevention-policy.html> (accessed December 1, 2023).
- Saltman, Bethany. 2014. “We Started the Crusade for Affirmative Consent Way Back in the ‘90s.” *The Cut*. <https://www.thecut.com/2014/10/we-fought-for-affirmative-consent-in-the-90s.html> (accessed December 1, 2023).