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## Article – Speaking the Unspeakable? Nicola Lacey’s *Unspeakable Subjects* and Consent in the Age of #MeToo

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### Abstract

In the midst of the #MeToo movement, a woman named Grace came forward describing an experience – that she had labelled sexual assault – with actor/comedian Aziz Ansari. This encounter did not reflect a clear and dichotomous giving or withholding of consent in line with a yes or no to sex. Because of this ambiguity, Grace’s assault became somewhat of a catalyst for #MeToo. The movement was divided into critics on the one hand, who argued her evening with Ansari was no more than an episode of bad heterosex, and supporters on the other, for whom Grace’s account resonated and who subsequently backed the need for deeper conversations on the topic of sexual consent. Considering these debates and Grace’s experience, this paper looks to the work of Nicola Lacey in *Unspeakable Subjects* to analyse how current ideas of sexual consent, in the 2003 Sexual Offences Act and beyond, fail to reflect a nuanced understanding of sexual harms, consequently neglecting ambiguous experiences in heterosex – like Grace’s – of consented to unwanted sex. Through an exploration of Lacey’s concept of sexual integrity, scholarship in the area of BDSM and other sociolegal approaches to considering consent and sex more ethically, this paper advocates expanding our view of consent to involve a critical analysis of how multiple power dynamics can intersect to affect individuals’ abilities to freely and meaningfully consent in heterosex.

### Introduction

Nicola Gavey observes that, ‘to say that women often engage in unwanted sex with men is paradoxically both to state the obvious and to speak the unspeakable’ (Gavey, 1992: 325). It is undoubtedly complex to analyse the ‘wantedness’ of women’s sexual experiences (Bay-Cheng and Bruns, 2016; Muehlenhard and Peterson, 2005). To explore the wantedness of sex involves an exploration of consent, which is often considered in line with a binary of yes or no, while sexual encounters are thought to exist in isolation from their wider cultural, political and social context (Muehlenhard and Peterson, 2005; Beres, 2007). In law then, consent (or lack thereof) is often grounded in the protection of the individual to make free choices as to one’s sexual relationships and contacts (Cowan, 2007b: 91). But, should consent be considered as something to be measured against a liberal, individualised standard as this one? As Nicola Lacey asks: ‘why should it be that the contemporary criminal law dealing with sexuality has such an oblique relationship with social attitudes about what is valuable about sexual experience and what is wrong with certain forms of sexual behaviour?’ (Lacey, 1998: 106).

With this considered, I will illustrate that given consent exists as a central part of English rape law, Nicola Lacey’s writing on consent is as important and relevant in the #MeToo era as it was 20 years ago. *Unspeakable Subjects* offers a foundation to explore whether sexual consent, as framed within the 2003 UK Sexual Offences Act, has a valuable place when thinking specifically about consented to unwanted sex in heterosexual relationships. This phenomenon

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is more ambiguous than a traditional understanding of sexual misconduct, albeit potentially as harmful. Looking to the present day, I use the allegation against US actor/comedian Aziz Ansari, which came to light as part of the #MeToo movement as an example of consented to unwanted sex. The problem may well be that the most vocal – or at least the most heard – part of rape and sexual assault discourse, is one that draws on the law for much of its language and concepts. This then makes it difficult to persuade anyone that instances involving sexual abuses that are profoundly normalised occurrences for women (like consented to unwanted sex), but that are not recognised under or in the law as assaults, include the same absence of respect found in other gender-based violence. To examine this, the analysis that follows will consider whether and how consent can be ‘authentically’ given. Lacey’s view of sexual integrity and other modern approaches to conceptualising consent and sex will be reflected upon here. These examples will be put forward as ways to better understand the everyday workings of heterosexual consent while simultaneously offering a way to acknowledge the wrongfulness of certain forms of sexual behaviour, which may not be thought of as constituting rape or sexual assault but may reflect the actuality of heterosexual women’s experiences. The argument in this paper will unfold first by exploring how consent is reflected in the law in England and Wales, going on from this to analyse the Aziz Ansari allegation and locating this within a broader discussion of consented to unwanted sex. Following on from this, I will examine how some of the criticisms aimed at the Ansari story mirror the anti-victim feminist sentiments of the 1980s and 1990s. The paper continues to examine the literature in relation to the reasons one might consent to unwanted sex and concludes by considering ways to reconsider the concept of sexual consent, bringing in Nicola Lacey’s notion of sexual integrity and the work of authors in the area of BDSM, as well as others.

## 1. Consent – The Law in England and Wales

The UK Sexual Offences Act 2003 – based on the 2000 Home Office Review, *Setting The Boundaries* – has offered the latest contribution to reforming and evaluating the offence of rape, in England and Wales at least (Sharpe, 2017). Section 1(1) of the 2003 Sexual Offences Act grounds the foundations of the actus reus of the offence of rape, defining it as non-consensual penile penetration (vaginal, anal or oral) of another person in circumstances whereby the defendant does not reasonably believe in consent (Finch and Munro, 2006). In each of these elements, lack of consent is a key ingredient (Lacey, 2001). Section 1(2) explores the mens rea, stating that the reasonableness of the defendant’s belief in consent will be determined by reference to the surrounding circumstances including the steps taken to ascertain whether the complainant was consenting. Under this legislation, consent follows a statutory definition found in Section 74 of the 2003 Act, which defines consensual sexual activity as: ‘*if he [sic] agrees by choice and has the freedom and capacity to make that choice*’. In addition to this, the Act seeks to impose guidelines for decision making on the presence or absence of consent (Finch and Munro, 2006: 304-5). For example, under Section 75, the Act gives an exhaustive list of circumstances in which consent and reasonable belief in consent is presumed to be absent. These circumstances include (I have not covered the full list here), whether the complainant is asleep or unconscious, whether force or threats of force were used against the complainant and whether physical disability impairs the complainant’s ability to communicate consent. The aim of this list was to clarify and explain the law, ‘setting clear boundaries for society as to what is acceptable and unacceptable behaviour’ (Temkin and Ashworth, 2004: 4). Alongside this and under Section 76 of the 2003 Act, two circumstances are stated in which the presumption that consent is absent is conclusive: where the defendant has intentionally deceived the complainant as to the nature or purpose of the act or has intentionally induced the

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complainant to consent by impersonating someone known to her (see *R v Jheeta* [2007] EWCA Crim 1699 and *R v Tabassum* [2000] 2 Cr App R 328 for discussion of the former circumstance) (Finch and Munro, 2006: 305). Working all together, the definition of consent under Section 74, the exhaustive list of presumed circumstances of non-consent under Section 75 and the two conclusive circumstances of non-consent under Section 76 have been considered to represent a ‘three pronged approach’ to consent (Finch and Munro, 2006: 305).

Of course, the view that individuals have freedom when it comes to choosing sexual partners has positive beginnings. To recognise women in particular in this way means to acknowledge their independence as human beings, to make choices and decisions as they wish, free from criticism or punishment (Day, 2000). This personal autonomy is then, to an extent, progressive. It involves women’s self-governance and dissolves the idea of women as dependent individuals (Reynolds, 2015). Policies which invoke broad notions of choice and freedom may also be useful in the context of sexual violence, particularly when we think about increasing the impact of gender-based, structural challenges and calls to reform (Munro, 2010).

Yet these provisions have also come under considerable criticism (Temkin and Ashworth, 2004; Laird, 2014; Rumney, 2001). Some have questioned the way in which the Act seems to set up a ‘hierarchy of rape’, implied in this three-pronged approach to consent (Finch and Munro, 2006; Temkin and Ashworth, 2004). There too have been apprehensions in regard to the practical application of these provisions. For example, it is not clear what freedom and/or capacity looks like; as Temkin and Ashworth point out, all questions about how much liberty of action satisfies the definition of freedom and capacity under Section 74 remain unclear (Temkin and Ashworth, 2004; Finch and Munro, 2006). Also, even if factual situations seem to fit squarely within the Section 75 list, it is not certain that these provisions will have an effect on the outcome of the case – it depends on how they are interpreted and applied to the circumstances in every individual case (Finch and Munro, 2006). Additionally, the provisions continue to operate by placing the complainant, and her freedom and capacity, at the centre of judicial scrutiny (Finch and Munro, 2006; Rumney, 2001). Although this greater emphasis on the complainant’s right to sexual autonomy might be viewed in line with attempts to strive for equality for cisgender women, Sharpe rightly asks what it means for transgender and other gender non-conforming defendants, particularly when considering the law pertaining to consent obtained by fraud (Sharpe, 2017; see further: *R v McNally* [2013] EWCA Crim 1051). The notion of ‘free agreement’ would be unproblematic here if sexual communication were always clear and unambiguous, where men accepted the clear communication of non-consent and if sexual consent was not assumed (Rumney, 2001). Indeed, the *Setting the Boundaries* Review states that: ‘in today’s world it is important to recognise that sexual partners are *each* responsible for their own actions’ (emphasis added) (Home Office, 2000: 17). As Rumney observes, this is potentially problematic as it might bolster a belief that women are in some way to blame for rape when they have not communicated their non-consent clearly (Rumney, 2001: 901). It is in light of this that many have criticised the decision to make the list of circumstances in Section 75 of the 2003 Act exhaustive, lamenting the failure to include situations which involve more dubious negotiations of consent, for example where the complainant has been subjected to *pressure* other than that of a violent nature (Finch and Munro, 2006; Temkin and Ashworth, 2004). I will explore this failure in more detail shortly, looking at the allegation against Aziz Ansari as part of the #MeToo movement.

The UK Act more broadly establishes that issues of capacity and coercion, for example, are connected to consent, yet it fails to acknowledge questions relating to *freedom* (Cowan, 2007a:

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55). I take issue with this here as the question becomes, what counts as free consent, particularly in those non-violent but subtly coercive situations? As Robin West observes, consent, though perhaps an adequate legal framework for distinguishing rape from sex, leaves under-theorised sex that is consensual but may not be desired (West, 2008). West notes this experience can implant in one's body 'the truth that one's subjective pleasures and interests don't matter' and can alienate women from their desires as a result (West, 2008; Gong, 2014). The instinctive response here may well be that sex in these situations is not experienced through a free choice, however it seems unlikely that cases of this type would ever reach a court or be considered as such *in court* (Cowan, 2007a: 55).

In addition to this, to assert that consent should be regarded as an individualised notion detaches it in its entirety from the social, relational and affective conditions under which choices can be embarked upon meaningfully. Clearly, the right of each individual to have bodily agency is positive, it involves equality and the capacity to choose, as observed above. But under this view, sexual abuse is determined through an emphasis on the lack of consent which is regarded as abstract and asymmetrical and which reflects a set of arrangements to be initiated (Lacey, 1998). As Lacey notes in *Unspeakable Subjects*, to ignore issues of power and oppression while perpetuating stereotypes of active masculinity and passive femininity through such a consent lens, reflects a certain sense of legal ignorance (Lacey, 1998: 114). What that means here is while the law emphasizes the value of autonomy, ideas of self-expression, connection, intimacy and relationship – things which surely should underpin understandings of what is valuable about sexuality – are absent from this definition of consent (Lacey, 1998: 106). Conversely, the violation of trust, infliction of shame and humiliation, objectification and exploitation find no expression in the legal framework, albeit they surface insistently in argument at the sentencing stage, often used as a means to blame the victim (Lacey, 1998: 106). Lacey observes then that rape victims are effectively silenced with respect to the range of harms they have experienced while giving evidence in court. She notes that victims are caught between the discourse of the body as property, which is framed by legal doctrine but incapable of accommodating their experience, and the narrative of the feminine identity as body, which pre-judges their experience by equating it with stereotypical views of women's sexuality (Lacey, 1998: 116). As a result of this, rape victims are denied the status of personhood and the chance to acknowledge their trauma (Lacey, 1998: 116). Taking this further, we can explore how this way of thinking about consent and autonomy exists beyond the court setting. Particularly if we look to the ways in which wider society comprehends sexual consent and responds to women's experiences of sexual assault, we can observe how women's traumas and experiences are suppressed publicly while stereotypical views of femininity and masculinity are upheld.

## 2. The #MeToo Movement

In October 2017, *The New York Times* and *The New Yorker* published articles which detailed decades of allegations of sexual abuse against Hollywood film mogul, Harvey Weinstein (BBC, 2018; Davis and Khomami, 2018). Since then a significant number of women have come forward – it is considered to be more than 50 – alleging similar instances of rape, sexual harassment and sexual assault against Weinstein (BBC, 2018; Davis and Khomami, 2018). This exposé sparked a seismic shift in conversation about sexual misconduct in the workplace, prompting other women, and men, to come forward with accusations against high profile public figures in Hollywood and beyond (BBC, 2018; Davis and Khomami, 2018; Almkhtar, Gold and Buchanan, 2017; Moniuszko and Kelly, 2017; Criss, 2017). Not long after the allegations against Harvey Weinstein came to light, actor Alyssa Milano began a social media call-to-

action, asking women to disclose their experiences of sexual abuse by using the hashtag #MeToo on social media (Khomami, 2017). Soon this became a movement, with women worldwide posting the phrase on various platforms to draw attention to their familiarities with sexual assault and harassment and to push for the de-stigmatisation of speaking out about such instances (Khomami, 2017; Brinded, 2017). However, 'Me Too' existed long before Milano sparked its use on social media more recently. Tarana Burke, an African American activist and founder of youth organisation, Just Be Inc, began the first Me Too campaign in 2007 (Vagianos, 2017; Rottenberg, 2017; Khomami, 2017; Brinded, 2017; Democracy Now, 2017). For Burke, this was a grassroots movement to aid sexual assault survivors, in particular women of colour and those in underprivileged communities where there were few, if any, rape crisis centres (Vagianos, 2017; Rottenberg, 2017; Khomami, 2017; Brinded, 2017; Democracy Now, 2017). As Burke puts it, 'Me Too' is about 'using the power of empathy to stomp out shame' (Vagianos, 2017; Rottenberg, 2017; Khomami, 2017; Brinded, 2017; Democracy Now, 2017).

In the midst of the movement, a woman came forward with an account which described how she had been sexually assaulted by US actor and comedian Aziz Ansari following a date they had in 2017. The woman, who went by the name Grace, detailed how Ansari had forced her into sexual behaviour that was well beyond her boundaries, ignoring her verbal and non-verbal attempts to put a stop to the sexual encounter (Harmon, 2018; Way, 2018; Filipovic, 2018; North, 2018a; Shih, 2018; Escobedo Shepard, 2018). She went on to state that the experience with him was the 'worst night of her life' (Harmon, 2018; Way, 2018; Filipovic, 2018; North, 2018a; Shih, 2018; Escobedo Shepard, 2018). This account garnered significant media and public attention, in part because of the original reporting of the story which was heavily criticised, and rightly so, for being careless in its telling of Grace's experience; but, also perhaps because Ansari has long claimed to be a feminist and uses feminist concepts in both his comedy and literary endeavours. Grace's experience became somewhat of a turning point for the #MeToo Movement as Ansari's actions did not mirror the allegations against Harvey Weinstein, allegations which all had similar elements to them. The latter were regarded as clear instances, described by many different women, which fitted the traditional perception of rape and sexual harassment. But the former, the experience that Grace had with Ansari, was thought of by some as blurred, a grey area that, as a result, did not belong in the movement. Many took issue with the framing of the evening and labelling of it as sexual assault. An overwhelming amount of people questioned whether it was a *real* assault or just simply bad sex with miscommunication between two individuals. Those who felt unconvinced of Grace's account penned countless op-ed pieces which advocated that this experience was emblematic of 'a woman scorned'; suspected her of regretting the sexual encounter after 'not getting what she wanted'; lambasted Grace for 'harming the Me Too Movement'; and blamed her for destroying Ansari's career (Harmon, 2018; Way, 2018; Filipovic, 2018; North, 2018b; Shih, 2018; Escobedo Shepard, 2018; Anderson, 2018).

### 3. Sex Wars Revisited

The sexual assault verses bad sex debate that became evident in response to Grace's story resonates with an earlier set of debates around sex and regretted encounters. I am thinking here of the campus sexual assault debates of the 1990s, in which activists who were seeking to make the prevalence of date rape visible, were met with the likes of Katie Roiphe insisting that women take responsibility for their sexual choices (Cossman, 2018). Echoing the same arguments, Rene Denfeld, Christina Hoff Summers, Camille Paglia and Naomi Wolf, all launched themselves in staunch opposition to what they considered to be 'victim feminism'

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(Cole, 1999). Naomi Wolf notes this type of feminism casts women as ‘beleaguered, fragile, intuitive angels’ and encourages them to ‘seek power through an identity of powerlessness’ (Cole, 1999: 75). As a result, some have considered Roiphe *et al.* to be ‘anti-victim feminists’ or AVFers (Cole, 1999). Cole observes that AVFers became prominent in the early part of the 1990s on the tail of a string of public debates over topics such as date rape and sexual harassment on college campuses (Cole, 1999: 81-2). In *The Morning After: Sex, Fear, and Feminism on Campus* Roiphe (1993) claims that feminists have gone too far in their ‘fascination’ with date rape, sexual harassment, and other forms of sexual oppression (Lacey, 1995: 612). For Rophie, anti-rape activists of the time had manipulated statistics to frighten college women with a non-existent ‘epidemic’ of rape, date rape, and sexual harassment, and had encouraged them to view ‘everyday experience’ – sexist jokes, professorial leers, men’s straying hands – as intolerable insults and assaults (Pollitt, 1993). Roiphe infers that by offering protection to women against this male behaviour, the movement against sexual harassment curtails women’s personal power and in turn paints them as defenceless (Roiphe, 1993 in Cole, 1999: 77). Discrediting the assumptions that women are in need of constant protection and that women have (heterosexual) sex only when men impose it upon them is particularly vital to the AVFers’ challenge to victim feminism (Cole, 1999). In Roiphe’s world then, overwrought fears of men and sex have created this victim culture and as a result such a culture, not date rape or sexual harassment, poses the *real* threat to women (Lacey, 1995: 613). Camille Paglia adds to this, attacking what she regards as the feminist obsession with date rape, a concept she rejects as self-contradictory, stating that ‘a girl who lets herself get dead drunk at a fraternity party is a fool, a girl who goes upstairs alone with a brother at a fraternity party is an idiot, feminists call this “blaming the victim”. I call it common sense’ (Cole, 1999: 78). Roiphe echoes Paglia’s thoughts, by upholding that individual women must learn to assume responsibility for their sexual behaviour: ‘regardless of our level of self-esteem, the responsibility for our actions is still our own’ (Roiphe, 1993: 68 in Cole, 1999). Christina Hoff Sommers espouses the same sentiment, contesting in *Who Stole Feminism* that ‘it used to be fun to be a feminist’, however those involved in ‘victim feminism’ and anti-rape activism have commandeered a movement which now consists of ‘male-bashing, being a victim, being bitter and being angry’ (Hoff Sommers, 1994 in Cole, 1999). The solution to the victim frame of mind identified by AVFers comes in rebuilding individual character to one of a strong, resilient individual who, regardless of what she may experience, refuses to make her suffering the centre of her being (Cole, 1999). To create this, a host of qualities are promoted: individualism, self-advancement, responsibility and autonomy, for example (Cole, 1999: 80). Because of this, Wolf instructs feminists to imitate successful businessmen, affirming that women should behave as men do, as combative and self-interested achievers (Cole, 1999). To an extent, this particular sentiment is not too dissimilar to the more modern feminist principles surrounding the ‘lean in’ discourse, promoted by Facebook COO, Sheryl Sandberg in 2013.

More pertinently, the sentiment expressed by the AVFers of the 90s certainly strikes the same tone as those criticising the Ansari story and the #MeToo movement more generally, particularly if we consider the ideas of choice and freedom as they relate to sexual consent. Caitlin Flanagan suggests that Ansari has been ‘assassinated in a professional sense’ on the basis of one woman’s (Grace’s) anonymous account (Flanagan, 2018). She goes on to accuse Grace, and the women revealing similar experiences to her, of being ‘angry and temporarily powerful’ (Flanagan, 2018). Much like Roiphe, Flanagan questions these experiences, boldly putting them down to women ‘who don’t know how to call a cab at the end of the night’ (Flanagan, 2018). Bari Weiss meanwhile picks up on a similar argument of the AVFers. Through her writing she asserts that the allegation against Ansari transforms a movement for

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women's empowerment (#MeToo) into an 'emblem of female helplessness' (Weiss, 2018). Weiss says that encoded in Grace's story are 'deeply retrograde ideas about what constitutes consent' (Weiss, 2018) hinting perhaps to a link with the campus rape movements of the 90s. In this, she assumes the same 'common sense' position as Paglia, bluntly explaining that 'if you are hanging out naked with a man, it's safe to assume he is going to try to have sex with you' (Weiss, 2018). Beyond the Ansari story, these AVF-esque attitudes are evident in the 100 women (including French actress Catherine Deneuve, who has apologised since) who have signed an open letter denouncing the #MeToo movement as a 'witch-hunt' against men (Willsher, 2018). The similarity between the disagreements with the #MeToo movement and the feminist sex wars of the 1970s, 1980s and 1990s is what Brenda Cossman dubs the Sex Wars 2.0 (Cossman, 2018). Cossman notes that the feminists involved in the Sex Wars 2.0 are not necessarily in favour of sexual harassment and sexual assault, but rather they contest that these behaviours be labelled sexual assault (Cossman, 2018) and we can see this quite noticeably in the debates around whether the Ansari allegation was a true case of sexual assault.

#### 4. Consent, Wantedness and Violating Sex

When considering sexual consent here, there are two concepts – wantedness and consent – which often become conflated rather than thought of as distinct from one another (Drouin and Tobin, 2013). For example, consensual participation in unwanted sexual activity refers to situations in which a person consents to sexual activity with a partner without experiencing an associated desire for the initiated sexual activity (O'Sullivan and Allgeier, 1998: 324). There is considerable empirical evidence which suggests this phenomenon of consented to unwanted sex is common among young adults (O'Sullivan and Allgeier, 1998; Sprecher et al., 1994). In Sprecher et al.'s cross-cultural study, approximately one third to one half of non-virgins in three different countries reported having engaged in unwanted consensual sex (Japan, 27%; Russia, 34%; and the US 47%) (Drouin and Tobin, 2013; Sprecher et al., 1994). Impett and Peplau asked their sample of college students in dating relationships whether they had ever been in a situation in which they agreed to have sex although they did not want to – 65% of women but only 40% of men answered 'yes' to this question (Impett and Peplau, 2002, 2003). More recently, Vannier and O'Sullivan's employed a diary method as well as in-depth interviews to assess occasions of consenting to unwanted sex for young people aged 18-24 years old in committed heterosexual relationships (Vannier and O'Sullivan, 2010: 434). Their study showed 46% of participants reported at least one occasion in which they had consented to unwanted sex. (Vannier and O'Sullivan, 2010: 434). More broadly and not just in relation to dating partners, consenting to unwanted sexual activity may happen for a number of reasons. Robin West notes that this may be the type of sex that is consented to in order to avoid a hassle or a foul mood from a partner, to ensure financial security, to lessen the risk of future physical attacks, or sex that is consented to by women in heterosexual relationships from simple altruism (West, 2008). This is the particular phenomenon of interest here. I think it has best been described most recently, and in relation to the Ansari allegations, as sex that feels violating even when it may not be deemed criminal in a legal sense (Gray, 2018). Indeed, Grace indicated that she specifically asked Ansari to slow down and gave cues that she was not comfortable with the sex (Cossman, 2018; Way, 2018). Therefore, as sexual communication is complex, and situational factors often impair people's ability to express willingness or unwillingness, much of sexual interaction may fall into the space between 'no' and 'yes' (Schulhofer, 1992: 366). Arguably, the allegation against Ansari fits in this space.

However, there is a nuance that should be noted here. An experience whereby a woman has consented to unwanted sex (as outlined in the above statistics) does not mean, in every instance, that this experience was inherently *bad*. The phenomenon of consented to unwanted sex is not synonymous with a bad experience; after all, what constitutes *bad*? The answer to this question is something that is lacking significantly in the current literature, which creates confusion. Perhaps bad sex can parallel an encounter in which women get little to no pleasure, which is not uncommon, as research has long documented an orgasm gap in heterosexual relationships, with 39% of women compared to 91% of men usually or always experiencing orgasm in partnered sex (Wade et al., 2005; Laumann et al., 1994). If this is the case, it cannot be definitively stated that all consented to unwanted sex is bad and consented to unwanted sex cannot be conflated with bad sex. Instead it can be recognised that there may be, albeit a minority, of experiences which are consented to but unwanted which involved some element of pleasure.

We can establish that the Ansari narrative revealed a sexual interaction that may not meet the criminal, non-consensual standards, but nevertheless was not entirely wanted or desired by the woman involved (Cossman, 2018). Consent was not given following a linear and dichotomous yes or no in this incident and to an extent the experience does not reflect one of the exhaustive examples of presumed non-consent under Section 75. With this considered, the view of consent (in line with freedom and choice) under Section 74 fails to acknowledge how prevailing discourses about sex, gender and sexuality limit some people's ability to exercise agency and bodily freedom to meaningfully negotiate consent (Gavey, 1992). Grace's experience is not emblematic of a miscommunication of sexual signals between two individuals. That is not to say that miscommunication does not ever occur with regards to sexual intent and interest; in some situations it does. But, we should be mindful here to note that what may seem to be miscommunication, may not actually be an accurate reflection of experience (Kitzinger and Firth, 1999). Rather, perhaps the experience outlined by Grace is the result of social structures that value some individuals' sexual expressions (cis, heterosexual men) over other people's bodily autonomy (Gavey, 1992, 2005; Pateman, 1988; Armstrong et al., 2006; Reynolds, 2015). Gavey observes that our dominant discourses about sexuality provide subject positions for women which prescribe compliance with or submission to male demands (Gavey, 1992: 325). This compliance or submission, for Gavey, is an effect of what she calls, the 'technologies of heterosexual coercion' (Gavey, 1992: 325). These technologies of heterosexual coercion reproduce relations of power and dominance in the domain of heterosexual sex such that men's interests take precedence (Gavey, 1992: 325). The effect of Gavey's technologies of heterosexual coercion is evidenced in Grace's experience. The man dominated, expected the woman's submission and his sexual interests were at the fore. The legal understanding of consent, rape and sexual abuse, fails to reflect this often-experienced nuance of consented to unwanted sex, or ambiguous sex. Under the statutory view of consent, there is little accounting for women's ability to actually *give* consent and have it respected, how this consent is defined, when it begins, what it looks like, or how gendered norms and (hetero)sexual scripts – the effect of technologies of heterosexual coercion – impact the negotiation of sexual consent (Jozkowski, 2011). The current emphasis on individual freedom and choice as it relates to consent obscures and depoliticises, as Phillips observes, the socially gendered reality of sexual violence and sexual consent (Phillips, 2015: 11). With this considered, it is little surprise perhaps that in Holland et al.'s study focusing on young people's sexual experiences they concluded that 'heterosexuality is not, as it appears to be, masculinity-and-femininity in opposition: it *is* masculinity' (Gavey, 2005: 112; Holland et al., 1998: 11). The same authors refer to a 'male dominated, institutionalised heterosexuality',

in which there is little room for women's pleasure and desire (Gavey, 2005: 112; Holland et al., 1998: 11). As Lacey states, the idea of autonomy as independence seems directly relevant to the wrong of rape, but it dominates at the expense of the development of a positive conception of the kinds of sexual relationships which are valuable and matter to personhood (Lacey, 1998: 117). Furthermore, to use ideas of freedom, choice and capacity in this area is to be overly-protectionist and unrealistic (Munro, 2010). After all, as Munro observes, none of us – perhaps with the exception of wealthy, white, cisgender, able-bodied men – navigate our lives with absolute freedom in the choices we make, whether about sex or any other matters (Munro, 2010).

## 5. Next Steps?

So, when consent is used in rape law under the guise of freedom and capacity to choose, it leads to a certain failure to account for the contextual factors – gender roles, gender stereotypes about sexual behaviour, sociocultural expectations and influences regarding appropriate sexual communication – that impact the expression and interpretation of consent. This creates a view of consent which lacks nuance in that it neglects sexual violations which are less explicitly coercive, like Grace's experience, and those which involve consented to unwanted sex. Here, consent is bound within gendered norms of sexuality, femininity and masculinity. So, what can be done, in relation to the law and beyond, to offer a more sophisticated view of consent which accounts for the actuality of women's experience? Rather than viewing consent as a binary, a yes or no with a certain person at a certain time, perhaps we can look to understanding consent more as a negotiation of social expectations, a way of expressing a social identity, or of fitting in to a certain social world (Muehlenhard and Peterson, 2005; Beres, 2007).

The set of practices known as Bondage, Discipline and Sadomasochism (BDSM or SM) – and the individuals writing and theorising in this area - provide a unique context to further explore sexual consent (Beres and MacDonald, 2015). Within the SM context, consent is not merely the absence of 'no', but a far more qualitative conversation that involves negotiation, the sharing of fantasies and the setting of limits (Hanna, 2001). Indeed, consent is so vital to BDSM communities that *safe, sane and consensual* – SSC – has been referred to as their mantra (Beres and MacDonald, 2015). However, as Beres and MacDonald point out, this does not mean that BDSM communities are free of instances involving violence and/or coercion, but rather that they establish guidelines with the intention to minimise the risk of experiencing unconsented to violence (Beres and MacDonald, 2015). Consent norms advocated within BDSM communities are composed of two main practices: pre-negotiation of allowed activities, and the use of safe-words or pre-arranged, non-verbal signals to indicate the withdrawal of consent (Beres and MacDonald, 2015). As one participant noted in Taylor and Ussher's qualitative study with self-identified sadomasochists: 'SM is about consent, if there's no consent it's not SM, it's sexual violence . . . it's as simple as that' (Taylor and Ussher, 2001: 298). Taylor and Ussher observe that consent in these communities involves use of careful 'limit negotiation' and safe words to create a 'scene' carefully contrived and from which extraction is easily requested and never denied (Taylor and Ussher, 2001: 298, 293). Beres and MacDonald note that within heteronormative sex, discussing sexual activities in detail with others is somewhat unusual, yet more open communication about intimate behaviours appears to operate in other communities based around common sexual interests, like BDSM (Beres and MacDonald, 2015). Taylor and Ussher give evidence of this, uncovering that dominants who have gone beyond established consent rules around sexual interactions have subsequently become known as 'dangerous' by the SM community and as a result have become ostracised

by potential partners (Taylor and Ussher, 2001; Beres and MacDonald, 2015). Livingston suggests, consent here is more than negotiating pleasure and danger (Livingston, 2015: 80). It means negotiating the practical elements of boundaries, limits, power, privilege, disclosure, risk, respect, community responsibility, and community accountability (Livingston, 2015: 80).

Taking this further, it is crucial to examine the scholarship around the notions of ‘sex critical’ ideologies and consent cultures to make the case that consent cannot be understood fully without a comprehension of how it works in a particular cultural and social context. I would like to do this by now exploring the work of Meg-John Barker, most notably their study which compares the understanding of consent in *Fifty Shades of Grey* (James, 2011) to that in the BDSM blog world (Barker, 2013). In this work, one observation that Barker makes is that in some BDSM blogs authors challenge these simplistic, neoliberal notions present in the yes/no models of consent. Barker’s work shows that writers in this area explicitly address the common tendency of discussions around consent to polarise into either an agency feminist position where everyone is regarded as free and autonomous, or a radical feminist position where freedom is considered impossible under conditions of patriarchy (Barker, 2013). The former argument can be tied back to the criticism of the Ansari story as well as elements of the debates between the date rape campaigners and anti-victim feminists of the 1980/1990s. In response to this liberal understanding of consent, Barker observes that in the BDSM blogosphere, there is an active search for a more ‘sex critical’ position (Barker, 2013). Such a position rejects the freedom/choice rhetoric and acknowledges the multiple intersecting power dynamics within which agency operates (Barker, 2013; Downing, 2012). For example, for Lisa Downing, sex critical means that all forms of sexuality should be equally susceptible to critical thinking about the normative ideologies they uphold (Downing, 2012). Barker points out this movement emerged as a result of conversations amongst BDSM writers about the fact that abusive situations can – and do – occur within kink communities, despite their emphasis on consent (Barker, 2016). Barker uses the work of Millbank here who points out that ‘yes’, or ‘enthusiastic consent’, which is often used by sex positive communities, is arguably not as straightforward as we envision as women are encouraged to respond enthusiastically in all kinds of contexts when they might not *really* feel enthusiasm (Barker, 2013).

In line with this, some BDSM authors employ a Foucauldian understanding of freedom in which people have options, albeit limited ones, to act within a field of power (Barker, 2013: 905). Under this view, consent is possible, but liberal understandings of consent are questioned as the focus shifts to what actions are *really* possible given the ways in which people are shaped by their contact with others and with the world around them (Barker, 2013). Millbank takes this further, suggesting that people ‘have a responsibility equal to the social power they possess to care about and bring about a state of consensuality in their sexual relations’ (Millbank, 2012 in Barker, 2013). Such considerations lead to the suggestion, which I am in full agreement with, that intersections of power and awareness of wider cultural conditions need to be explicitly included in negotiations and conversations about consent, such that limitations and constraints on capacity to consent are recognised (Millbank, 2012 in Barker, 2013). Barker notes the work of another writer in this space, Pervocracy, who suggests that this ideal of consent can be fostered through making narratives available in which communication and negotiation happen in both sexual and non-sexual contexts, making a relational practice of tuning in to one’s feelings and communicating them honestly to others (Barker, 2013). This thought has encouraged writers in this space to raise questions as to whether consent is possible in sex if people are engaging in non-consensual practices in the rest of their relationships (Barker 2016).

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So how can wider cultures be cultivated which make consent more possible? Many authors in this area point out the normalising forms of force, control and pressure in other aspects of relationships, e.g. to use Barker's example, in everyday street harassment when men attempt to engage women in unwanted conversations (Barker, 2016). This move would acknowledge the culturally gendered pressure on people to perform enthusiasm when they do not feel enthusiastic about things (Barker et al., 2018). Taking inspiration from these sex critical and consent culture movements then, perhaps it would be meaningful to encourage individuals to consider consent across *all* kinds of relationships, not just those that are sexual in nature, as well as recognising structural oppressions and power dynamics which exist to make it difficult for people to freely consent or not (Barker et al., 2018; Barker and Hancock, 2017). I am in agreement with Millbank who proposes that when it comes to sexual consent, we must consider freedom but not in the way that it exists in most contemporary definitions of consent (the 2003 UK Act is an example here). The notions of consent which advocate for freedom and capacity to choose, as well as ones which promote enthusiastically giving a yes to sex, subsequently view consent as a one-off moment rather than an ongoing process (Barker et al., 2018). Rather, to quote Millbank, we need to think about how much freedom a sexual partner has to execute the responsibilities we have assigned them, and also consider our *own* responsibilities to offset the pressure we place on consent through the systems of domination in which we participate (Millbank, 2012 in Barker, 2013).

Michelle Anderson's negotiation model of consent offers a useful foundation to consider if we are to explore ways to consider consent. Writing from a US perspective, Anderson notes that a negotiation model of consent requires consultation, reciprocal communication, and the exchange of views before a person initiates sexual penetration (Anderson, 2005). The negotiation model asks, 'did the person who initiated sexual penetration negotiate with his or her partner and thereby come to an agreement that sexual penetration should occur?' (Anderson, 2005). As a standard, then, it seeks to maximise the opportunity for sexual partners to share intentions, desires, and boundaries, something which is totally lacking under the current understanding of consent (Anderson, 2005).

It is important to also note Heidi Matthews' ideas of liminal trust in relation to consent here, which arguably can offer a certain extension of Anderson's thinking. Matthews starts by putting forward the thought that unwanted, or partially wanted, sex can still be 'sexy and transformative' insofar that experimenting with pain or fear can shift previously anticipated sexual boundaries precisely because it engages vulnerable states of being (Matthews, 2018). She gives the example of choking, stating that one can imagine the appeal of choking, for example, as it resides at least partly in the 'genuineness of the fear that it provokes' (Matthews, 2018). I accept the premise of Matthews' argument here as she continues to state that this does not mean that there are no limits in sex, but rather that perhaps we devise limits that align with the erotic potential of the sexual encounters (Matthews, 2018). However, I take issue with and reject the example of choking that she gives, as choking has the potential to be dangerous and fatal. A more appropriate example might be spanking, which allows for a shifting of sexual boundaries, as Matthew's explores, but does not hold *such* an extreme element of unsafety as choking. With this considered, liminal trust works as a space in which partners can explore the value of sexual experiences precisely because they directly engage the line between permissibility and impermissibility (Matthews, 2018).

In sum, the promise of such contemporary sex debates, like the one that Matthews highlights, is that it offers a new area in which to theorise the limits of truly adventurous and fulfilling sex (Matthews, 2018). When thinking about new conceptualisations of sexual consent, Lacey's contextualised notion of sexual integrity becomes vital to discuss. This is an idea which maintains that the project of personhood requires a more active, positive and embodied view of the sexual self than autonomous consent has allowed (Lacey, 1998). Lacey's idea of sexual integrity is derived from the work of Drucilla Cornell and the imaginary domain (Lacey, 1998: 118). This domain generates the psychic and political space within which sexual equality is realised (Lacey, 1998: 118). Central to this space is the fact that a crucial part of existence for all humans is our status as sexed and embodied beings, our sexual desire, access to the means of expressing such desires and having our sexuality accorded with respect (Lacey, 1998: 118). So, Lacey's notion of sexual integrity stemming from Cornell's argument, puts bodily and affective aspects of sexual life more directly in issue (Lacey, 1998: 118). Operationalising and conceptualising integrity – as a way to rethink freedom and the capacity to choose – means that consent is reconsidered in broader terms, ones which assume mutuality of relationship and responsibility between individuals (Lacey, 1998: 121). This reflects Anderson's negotiation model and Matthews' liminal space to an extent. Within this language of integrity, the real damage and range of sexual abuses might be expressed more fully, recognising the way in which they violate victims' capacity to integrate psychic and bodily experiences (Lacey, 1998: 118).

The conversations initiated through #MeToo and sexual consent more generally create the possibility for the rethinking of sexual harms, as well as of women's agency and the role of law (Cossman, 2018). When we reflect on the future of law in relation to consent and these unwanted consented to experiences, it is important to note as Cowan does, that focusing *only* on the law does not address the fundamental social inequalities, particularly those which relate to stereotypes of gender and sexuality; these must be addressed to see change (Cowan 2007a: 68-9). The critique around the Ansari allegation was that it did not constitute, for some, sexual harassment or sexual assault and therefore was not legally actionable (Cossman, 2018). And, as Cossman indicates, if there is no legally actionable harm then there must not be a harm at all (Cossman, 2018). I am not advocating for this action of ambiguous, consented to unwanted sex to become legally actionable. In fact, I am influenced by the work of Ummni Khan, who criticises carceral and governance feminism for giving rise to more narrow definitions of sexual harms and consent and in turn strengthening and making the criminal justice system more punitive, a system that consistently harms those most marginalised (Khan, 2016; Cossman, 2018). Rather, I, like others who have written about #MeToo and the Ansari story (Nwanevu, 2018; Silman, 2018; North, 2018a; Gray, 2018) contend that experiences like those had by Grace need to be part of a collective conversation – and reckoning to an extent – about consensual and ethical sex (Cossman, 2018).

Osita Nwanevu writes that these experiences need to be subject to criticism (Nwanevu, 2018), but as Cossman states, the law's power to define sexual harm makes a wider discussion almost impossible (Cossman, 2018). It is for this reason that I am in agreement with Cossman and take inspiration from her work here, particularly as it relates to opening up a different conversation about sexuality by moving beyond the either/or of legally accepted sexual harms (Cossman, 2018) to uncover harms which have long gone unrecognised and expand our ideas around sexual consent. This approach mirrors Lacey's idea of sexual integrity in *Unspeakable Subjects*. Sexual misconduct in such a conversation need not be understood as criminal but rather could be reframed in terms of the ethics of sexual interactions; in the language of respect

and desire (Cossman, 2018). As a result, questions of consensual but unwanted or ambivalent sex can come into view (Cossman, 2018).

To think about legal approaches, restorative justice work in sexual violence cases may be worthy of further exploration (Del Gobbo and Illesinghe, 2018; Koss et al., 2014; Cossman, 2018). Research shows that a survivor-centred method reduces reoffending and can help to transform the wider conditions that fostered the acts of violence (Del Gobbo and Illesinghe, 2018; Koss et al., 2014). In addition to this, it might be worthwhile to develop an alternative model for distinguishing sex from sexual violation, one that does not rely on asking whether consent was given at a particular moment in time (Palmer, 2014), thus moving beyond the idea of freedom and capacity to choose. Palmer advocates for replacing the legal standard of ‘consent’ with one of ‘freedom to negotiate’ (Palmer, 2014). In essence, this ‘freedom to negotiate’ looks at the *context* within which any agreement to have sex was given (Palmer, 2014). Palmer asks, for example, was the person free to say no? Did they have an equal say in what kind of sexual activity took place or was it all on somebody else’s terms? (Palmer, 2014). However, I want to exercise some caution with this suggestion here as I understand this idea may contribute to an expansion of the criminal justice system and thus create more severe rates of incarceration, although at the same time, I am aware that in the context of rape and sexual assault, conviction rates are low, and sentences tend to be short. Nevertheless, Fischel notes here that it is possible to protest a racialised and classed criminal justice system while making the consent standard for sexual assault more than silent acquiescence (Fischel, 2019: 10-11). Perhaps the solution then is to advocate for such ethical sex and ‘freedom to negotiate’ models societally and culturally, in policy as opposed to legally – in education for example – so as to allow for an affirmation of sexual harm, without endorsing a carceral state (Cossman, 2018).

To conclude, I think the most fundamental part of *Unspeakable Subjects*, particularly in relation to this topic, is that only if we find new ways to allow women to tell their stories and ensure that these will be heard, will we transcend their experiences and allow a space for recovery rather than continued victimisation (Lacey, 1998: 123). This then offers a path to a more inclusive sexual politics and a deeper, nuanced understanding of the sexual harms and abuses that individuals face (Lacey, 1998: 124). With an inclusive sexual politics, a shift will be generated from the neoliberal understanding of consent to one which acknowledges gendered power relations, environments and societal structures. And this means that consideration will be given to how these factors can affect an individual’s ability to meaningfully negotiate consent.

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