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A Phenomenological Approach to Sexual Consent

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Abstract

Rather than as a giving of permission to someone to transgress one's bodily boundaries, I argue for defining sexual consent as feeling-with one's sexual partner(s). Dominant approaches to consent within feminist philosophy have failed to capture the intercorporeal character of erotic consciousness by treating it as a form of giving permission, as is evident in the debate between attitudinal and performative theories of consent. Building on the phenomenology of Maurice Merleau-Ponty, Ann Cahill, Linda Martín Alcoff, and others, I argue that taking consent to be an intercorporeal and dynamic coexistence of desiring bodies opens up new ways of thinking about the role of consent in sexual ethics. I suggest that phenomenology's theories of embodied consciousness, operative intentionality, and the direct perception of others provide a better groundwork for conceptualizing the role of ambiguity and subtle power dynamics in sexual encounters than attitudinal or performative accounts of consent. I also defend my view against Jonathan Jenkins Ichikawa's argument for doing away with the concept of consent in sexual ethics due to consent's stubborn and infelicitous presupposition of permission-giving.

Keywords: consent, sex, sexual ethics, phenomenology, feminist theory, feminist phenomenology, embodiment, Merleau-Ponty, Ann Cahill, Linda Martín Alcoff

Introduction

In recent decades, consent has been at the fore of sexual ethics. Consent is taken to have the unique ability to transform otherwise impermissible acts into permissible ones: consent distinguishes sex from sexual violation. The focus on consent in academic debates among philosophers and legal scholars is also found within public discourse, where affirmative and enthusiastic consent are routinely championed on college campuses, in op-eds, and in books for parents and teens. At the same time, feminist theorists have long taken issue with consent, contending that it is a limited or even misguided way of distinguishing sex from sexual violation (Pateman 1988; MacKinnon 1989). Far from guaranteeing sexual equality, consent is often subtly coerced due to patriarchal social scripts; one may even consent in order not to be raped (Alcoff 2018, 114). And while purportedly a gender-neutral concept,

consent is widely figured as something that women give and men receive or demand: it depends on gender asymmetries and puts the onus on women to decide how far things will go (Pateman 1988, 164; see also Gavey 2005). Moreover, the legalistic overtones of consent do not accommodate the complex, intercorporeal character of sexual encounters. Laws are poor analogues for ethical negotiation, especially when subtle power dynamics are at work. Feminists drawing on phenomenology in particular have highlighted the insufficiencies of consent discourse for capturing the complex, embodied character of sexual experience (Cahill 2001; Diprose 2002; Alcoff 2018).

Consent additionally papers over the ambiguity of many sexual encounters, preventing individuals from taking responsibility for cultivating nuanced attention to the desires of sexual partners. If all one needs is a red or green light, then very little communication with one's sexual partners is needed. Standard accounts of consent often imply an implausible level of ignorance about sexual partners' nonverbal expressive behaviors, even when those partners are strangers. As a result, such accounts overlook capacities for cultivating respectful attention and communicative efficacy, as well as potential for unlearning detrimental social scripts that often negatively affect partners without their knowledge. And while standard accounts of consent implausibly presume that the intentions of others are completely mysterious to us in the absence of a clear "yes" or "no," they also implausibly presume that our own intentions are transparent to us. Yet people are frequently ignorant of their own desires, and their intentions may unfold in complex ways over the course of erotic encounters.

Historically and legally speaking, sexual consent became important once women were considered to have sexual autonomy. Under liberalism, sexual assault is a violation of autonomy, and this violation is often conceived as the absence of consent (Shafer and Frye 1977, 334; Schulhofer 1992, 67; Primoratz 2001, 201). Yet Ann Cahill (2001, 182) points out that the legalistic assumption that humans can sign away their bodies through consent is morally problematic because it implies that the one consenting owes the activity involved to the recipient of consent: hence, the recipient can claim harm if the consenter does not deliver. Susan Brison (2021) argues that conflating rape with nonconsensual sex is an epistemic injustice against victims because it turns the widespread sociopolitical problem of harm against women into a problem of personal choice. This indicates a further problem with legalistic consent: it may more successfully protect perpetrators than victims, because a perpetrator who received, or claims to have received, a token of consent from the victim may then deny any wrongdoing (Alcoff 2018, 138).

Yet feminist philosophers disagree on what to do about these problems. Three responses have come to the fore. The first is to reject consent altogether. Jonathan Jenkins Ichikawa (2020) argues that having ethical sex does not require consent at all,

and Joseph J. Fischel (2019) uses a wide range of case studies to reject consent as a guideline for sexual ethics. Rosalyn Diprose (2002) and Quill Kukla (2018; writing as Rebecca Kukla) suggest norms of generosity and gift-giving as alternatives. The second response is to acknowledge a role for consent but dethrone it from its position as the ultimate norm guiding sexual ethics. Linda Martín Alcoff (2018) argues that consent is just one aspect of sexual ethics, while Caleb Ward (2020) draws on phenomenology to advocate a capacious theory of "sexual agency."

The third response is to redefine consent. Kukla (2021) has recently developed a nonideal theory of sexual consent arguing that consent comes in degrees, while Manon Garcia (2021) takes consent to be a conversation. Some feminist philosophers have also suggested drawing inspiration from the Latin origins of consent, which do not involve contractual negotiation or permission-giving. Etymologically, consent means "feeling-with," combining *con-* (with) and *sentire* (to feel). An alternative to the orthodox view of consent as permission-giving is thus baked into the etymology of the word. Alcoff, Garcia, and Kelly Oliver (2018) raise this point in order to lay the groundwork for an alternative theory of consent, though none has worked out this alternative in detail.

In this essay, I pursue this third line of thinking by developing such an alternative theory of consent as "feeling-with." Using phenomenology, I sketch an affective account that is attentive to the complexities of embodied consciousness and gendered power dynamics. Ichikawa (2020) has recently argued against redefining consent. While I agree with him that the main problem with consent is that it is widely understood as a form of permission-giving, I do not take this connotation to be essentially tied to "consent." I suggest redefining the term by returning to its original meaning of "feeling-with," and I build out an account of this using phenomenology. This approach shifts the distinction between consensual and nonconsensual sexual experiences away from the legal domain and toward an interpersonal one. While legal questions around the nature of sexual assault are no doubt essential, modeling sexual ethics on the legal domain gets things backwards.

I begin by critiquing the dominant view that consent is permission-giving, focusing particularly on the debate between attitudinal and performative theories of consent. I assert that this debate depends on a liberal model of selfhood that overlooks key feminist insights into interdependence and embodiment. I explain why I do not think that generosity and gift-giving are viable alternatives. I then outline an alternative picture of consent, drawing on phenomenological approaches to embodied consciousness, operative intentionality, and the direct perception account of perceiving others. This allows us to develop a rich picture of consent that accounts for the influence of intercorporeal affectivity, sedimented social scripts, and individual patterns on sexual experiences. I conclude by defending my account against Ichikawa's contention that trying to redefine consent is likely a dead end for sexual ethics.

1. The Standard View: Consent as Giving Permission

The view that consent is a form of giving permission is ubiquitous. Philosophical literature on sexual consent takes consent to transform an otherwise impermissible action into a permissible one: consent transforms rape into intercourse by giving someone permission to take what is rightfully one's own—namely, one's own body (Hurd 1996, 123; McGregor 2005, 115). Nathan Brett (1998, 69) writes, "To consent is to give permission; a person acts without consent where no such permission has been obtained." Ichikawa (2020, 11) argues that this ubiquity in scholarly debates also exists in ordinary language, where "consent to ϕ" generally presupposes that "someone else is trying to get one to ϕ." That is, A wants B to do something, and B can choose to go along with A's wishes or to reject them. B's consent derives its intelligibility from being a response to A's request. It implicitly assumes A requests B's permission (27). Plus, figuring consent as permission-giving implies that the opposite of consent is *withholding* permission. For instance, Emily Sherwin (1996, 209) writes that people "should be entitled to give or withhold sex through the mechanism of consent."

1.a. Attitudinal and Performative Accounts of Consent

Standard accounts of sexual consent tend to fall into two camps: attitudinal and performative. Attitudinal approaches, sometimes called subjective or mentalistic, view consent as an intention or state of mind; performative approaches view consent as a behavior or act. Joan McGregor (2005, 118) summarizes the distinction by saying that the attitudinal approach views consent as something one *has*, whereas the performative approach views consent as something one *does*. Both take for granted that consent gives permission (Ward 2020, 23–27).

Heidi M. Hurd, a key proponent of the attitudinal approach, writes of the "moral magic" of consent. On Hurd's (1996, 121) view, consent is a "subjective mental state" of intentional willing that renders otherwise impermissible actions permissible. Hurd suggests that consent is significant as an expression of autonomy, arguing that the conditions of consent parallel the conditions of liability. Consent is a mental state that one has*,* akin to *mens rea* (Hurd 1996, 121). Ideally, it is communicated, but communication is not essential to consent itself. In contrast, the performative view holds that consent is an act of communication to one or more other person(s). As McGregor, an advocate of this view, describes it, consent involves behavior that signifies a mental state. It is disclosed as an "illocutionary act" in J. L. Austin's sense: consent is a verbal and/or gestural public act of communication that signifies a mental state (McGregor 2005, 116). As with the attitudinal account, this view proposes that consent is morally and legally transformative, permitting actions that would otherwise be impermissible. Consent can turn "rape into intercourse" (115).

Yet the assumptions of both of these views of sexual consent are unsound. The claim that consent transforms rape into intercourse bizarrely makes consensual sex intelligible only against the backdrop of sexual assault.[1] It also treats the body as a mere piece of property over which the mind has ownership, an outcome of mainstream sexual ethics' legalistic bent. As noted in the introduction, this account reductively treats desires as transparent to agents and naïvely imagines agents as atomic individuals existing on a neutral playing field of rights and duties. The complex embodied and intersubjective dimensions of sex are nowhere to be found.

The root of the problem is that both attitudinal and performative views of consent are grounded in liberalism, depending on a picture of the self as *homo economicus*. *Homo economicus* is the "free and rational chooser and actor whose desires are ranked in a coherent order and whose aim is to maximize desire satisfaction" (Meyers 2018, 2). This picture of the self, which stems from liberal economic theory, dominates debates about sexual ethics in Anglo-American philosophy. It is a convenient picture of selfhood because it presumes that agents freely make decisions out of self-interest. However, it sits uncomfortably alongside the purportedly feminist aims of much of sexual ethics. *Homo economicus* and its various guises have rightfully been the target of feminist critiques, given that they depend on masculinist myths of independence that deny our reliance on others and our embodied imbrication with their bodies at organic and affective levels from infancy (Anderson, Willett, and Meyers 2020). The boundaries of the self are always porous and often indistinct; they are especially so in intimate contexts (Russon 2014, 69). The liberal view of selfhood additionally overlooks the ways desires are shaped by social scripts and implicit biases. In the case of sexual ethics, heteronormative and patriarchal scripts shape norms of consent such that they are deeply gendered (Cahill 2001, 174; Pateman 1988, 164). As Nicola Gavey (2005, 124) concludes, "When we understand ourselves as culturally produced in these ways and as always inevitably and thoroughly socially embedded, the liberal notion of a rational autonomous individual freely picking and choosing the assumptions and values they will live by, and the acts and forms of relationship they will enter into, starts to look rather fantastical."

An example developed by performative theorist Alan Wertheimer is particularly illustrative of the insufficiencies of both sides of the consent debate. In order to critique the attitudinal view of sexual consent, Wertheimer (2003, 146) encourages his reader to imagine the following scenario. B leaves her car on the street and hopes it will be stolen so that she can collect the insurance: that is, she consents to its being stolen. If her car is in fact stolen, however, the person who stole it is still

[1] Thanks to an anonymous reviewer for helping me clarify this point.

morally and legally culpable, because they did not *know* that she consented to its being stolen.

Wertheimer uses this example to conclude that consent cannot reasonably be considered *a mental state*: it needs to be communicated in some way, and hence he opts for a performative view (147). Surely Wertheimer is right that ethical sexual activities between persons involve the communication of desires, not just a subjective alignment of them (see also McGregor 2005, 125). His example successfully identifies the weakness of the attitudinal view. Yet I think, *pace* Wertheimer, that it equally shows the insufficiency of the performative view. B is taken to be analogous to a mental state, and her car to her body. Her sexual assaulter is analogized to a car thief, and B and the car thief are strangers who never even interact face to face. While Wertheimer's example is a hypothetical meant to test intuitions about communicating consent, the success of this analogy depends on viewing consent as a contracting out of the body by a mind. Take, for example, McGregor's (2005, 107) suggestion that performative consent is "the mechanism by which we treat each other as equals, by asking for consent before crossing another's border or taking what is rightfully theirs, whether it is their property or their body." McGregor states that consent involves having one's bodily borders transgressed—or, what's more, having one's body willingly *taken* from them. In the attitudinal view, consent is located in the mind; in the performative view, consent is located in the performative act, which (ideally) expresses the mental state of the consenter (Wertheimer 2003, 147; McGregor 2005, 125). In both views, *homo economicus* gives permission to someone to do something *with* one's body, conceiving the body as property.

This debate envisions sexual partners as having distinct sets of intentions, without access to the other's "mental states" in the absence of the clearest possible communication. This implies an overly rationalistic account of erotic experience, in which agents meet on an even playing field with transparent access to their desires before communicating them. Yet in truth, regardless of whether partners are long-term lovers, strangers, or something in between, sex involves complex dynamics of perception, desire, intention, and willing that cannot simply be reduced to giving permission to another person to transgress one's boundaries (Diprose 2002, 69). In facing theorists with the alternative of viewing consent as a mental state *or* an act, this debate dualistically treats the body as the property of the mind (Cahill 2001, 170, 183; McGregor 2005, 107). As we will explore below, this fails to register structures of lived experience, which phenomenology is far better equipped to address than liberal consent theory. Permission-giving is an infelicitous framework for sexual encounters.[2]

[2] Some theorists have responded to the shortcomings of the attitudinal and performative views by constructing a hybrid between them. However, the hybrid approach remains unsatisfactory because it fails to think sex outside of the debate's

1.b. Invitation and Generosity as Inadequate Alternatives

The choice between an attitudinal and performative view depends on an impoverished approach to sexual ethics. It is telling that much of this debate happens among legal scholars, where the most important concern is identifying grounds for sexual assault. Here, legal fictions around the nature of the mind may be necessary. But what do we lose when we model sexual *ethics* on legal arguments surrounding rape? What might we gain from a richer phenomenological account of sexual consent as it appears in a wide variety of interpersonal situations?

In this vein, philosophers such as Quill Kukla and Rosalyn Diprose advocate moving from permission-giving to gift-giving, invitation, or generosity. Yet while I share their interest in rejecting existing accounts, I worry that their alternatives import the very presuppositions that make permission-giving problematic. As Ichikawa argues, what makes consent infelicitous for sexual ethics is its presupposition that one consents *to something another person is trying to get someone to do*, making sexual experiences a matter of assenting to or rejecting another's wishes. But an invitation equally involves this presupposition: I invite someone to (do) something, and this invitation presumes that I am trying to get them to (do) this thing. Kukla (2018, 82) notes that invitations are "welcoming without being demanding." However, the underlying issue with consent-as-permission-giving is not that consent implies a demand; it is that consent is something offered (or withheld) by individuals who have straightforward desires that they hope the other will grant them if communicated. This fails to recognize the intercorporeally unfolding nature of sexual encounters in time (on which more will be said below).

Gift-giving and generosity hardly fare better, *pace* Kukla and Diprose. Giving a gift implies freely handing over goods that would otherwise belong to you. In the same way that consent-as-permission-giving figures consent as involving "moral magic," transforming an act that would otherwise be rape into permissible sex, gift-giving transforms an act that would otherwise be stealing into a permissible act—namely, receiving a gift. Both imply that individuals have fixed boundaries that they can choose to permit others to transgress.[3] That is, "giving" and related concepts do not

terms. Emily Sherwin (1996, 216, 209–10) argues that the hybrid approach views consent as both a subjective decision and a social act, where the act expresses the subjective choice. Yet conjoining consent as a mental state with consent as a social act accepts that mental states exist outside of social acts and that social acts are intelligible without mental states; otherwise, we would not need to "bridge" the gap between them through a hybrid view.

[3] Diprose seeks to avoid these implications by defining generosity as a "prereflective corporeal openness to otherness" (2002, 5), rather than a disposition toward giving

significantly depart from the existing framework of consent: both conceive of sex as beginning with a giving of permission. Both imply a metaphysics of borders between self and other, whereby one's body is "one's own," and may be shared with another when a wish for them to transgress one's borders is communicated.

2. A Phenomenological Account of Consent

While legal understandings of sexual ethics are of course important, especially in assuring justice for survivors of sexual violation, they should not serve as the primary framework for understanding sexual ethics. Instead, sexual ethics should begin from a phenomenological account of lived experience. Just as phenomenology is critical of scientific modes of understanding that get matters backward by beginning with third-person explanation rather than phenomenological description, we should be critical of the sexual ethics that gets things backward by beginning with a legalistic framework. A core principle of phenomenology is that understanding essences requires beginning with direct descriptions of existence. As Merleau-Ponty (2012, lxx) states, "The world is always 'already there' prior to reflection," and the goal of philosophy is to "rediscover this naïve contact with the world in order to finally raise it to a philosophical status." This requires suspending causal explanations from the sciences in order to focus on situated, lived experience in the first- and second-person. Scientific explanations are built upon the lived world and thus secondary to it (Merleau-Ponty 2012, lxxii). We may say the same about legal justifications. Law is built upon the lived experiences of individuals, which are deeply rooted in relationships and cultural scripts. Constructing sexual ethics around legal fictions that we are then asked to read back into first-person experiences, rather than the other way around, dooms us to misguided explorations of sexual ethics—even as precisely such explorations have dominated philosophies of sexual ethics.

As phenomenology emphasizes descriptions of first-person lived experience, it illuminates how experience is situated within broader ideologies of gender, sexuality, and personhood. First-person experience is imbricated with second- and third-person experience, as well as quasi-transcendental structures rooted in culture and history.[4] This approach offers ample resources for reframing discourse within

away what is one's own. This definition has similarities to my phenomenological account of consent but to my mind falls short of the insight. Generosity, even redefined in this way, depends on the notion of giving (what is one's own), and "longing to and borrowing from the bodies of others" (Diprose 2002, 89). What is needed instead is a more radical recognition of the intercorporeality of existence.

[4] The recent turn toward "critical phenomenology" especially highlights phenomenology as a method of inquiry into the normative structures of power that

feminist philosophy around sexual consent by treating consent as an affective, complex, and intercorporeal phenomenon of "feeling-with." Here, I develop this account by foregrounding phenomenology's approach to embodiment and the "direct perception account" of perceiving others, which suggests that another's mental states are not mysteriously hidden behind their bodies but rather directly, albeit complexly, sensed. I show how this relates to erotic perception in sexual encounters, drawing on Maurice Merleau-Ponty and others.

2.a. Embodied Consciousness

Because I noted above that a major issue with the standard attitudinal-versus-performative consent debate is its dualistic assumption that the body is the mind's property, let us begin by explaining phenomenology's nondual view of embodiment. For Merleau-Ponty and other phenomenologists, the lived body is the locus of enactive consciousness. "I am my body," Merleau-Ponty claims, and this body is akin to a work of art rather than to a physical instrument (Merleau-Ponty 2012, 151–52). As Merleau-Ponty famously states, consciousness is not an "I think," but rather an "I can": it is intentionally oriented within a situation that affords it possibilities. The body is an intentional, expressive whole, a "knot of living significations" (153). Importantly, to say that the body is expressive does not mean that it reports on the mental states of an inner sphere, deriving signification only by reference to them. Rather, expression coemerges with what is expressed in a given environment.

Additionally, the body is not an object in space; rather, the body inhabits and anchors space. The body is a unified whole, such that we cannot "distinguish in the total being of man a bodily organization that one could treat as a contingent fact and other predicates that necessarily belong to him" (Merleau-Ponty 2012, 174). Each body expresses differently but is organized by being an expressive whole. As such, the body is the site of both individuation and connection to others. We are all embodied—for each of us, the body is the locus of interaction with the world, or what Merleau-Ponty calls the *I can*—but each of us lives our body in a unique way. It is precisely our modes of *being* embodied that distinguish us from others. To have a body means to have a unique style of moving through the world. As Cahill (2001, 113) writes, "Although every subject is embodied, there are few if any aspects or qualities of embodiment that are shared identically by all subjects. Embodiment is precisely the site of the possibility and necessity of difference." Embodied experience is shaped iteratively within historical, cultural, and personal landscapes.

One key way that phenomenologists indicate the thoroughly embodied character of consciousness is through their accounts of intentionality, especially

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condition first-person experience by taking first-person experience, situated within embodied environments, as its starting point (see Guenther 2021).

operative intentionality. Operative intentionality, first theorized by Edmund Husserl and developed by Merleau-Ponty, is "a practical directness toward the world that is not necessarily present to reflective consciousness but is instead made manifest in the daily operations of a person's life" (McWeeny 2020, 255). Husserl contrasts operative intentionality with act intentionality, the latter being the mode of intentionality of judgments and voluntary decisions. For Merleau-Ponty (2012, 453), operative intentionality undergirds act intentionality—and indeed, lived experience in general. The landscape of conscious experience is largely habitual and prereflective. Reaching for the doorknob or going in for a hug when greeting a friend, my body and my subjectivity are indistinct: "in operative intentionality a person's subjective perspective is not different from his body" (McWeeny 2020, 256). Operative intentionality, moreover, undergirds act intentionality, which may sometimes involve the *sense* of having a subjective perspective different from one's body but does not indicate an ontological separation between the two.

Many elements of our interactions with others primarily involve operative intentionality and may only minimally include act intentionality. This is especially the case in situations that engage desire, such as sexual encounters. Operative intentionality indicates that our orientation toward the world is not encapsulated by states of mind but rather is fundamentally embodied, affective, and intersubjective. Thus, sexual ethics must focus more on the body's agency than mainstream discussions account for, and must account for the operative intentionality that destabilizes a binary between passivity and activity. It is in operative intentionality, for instance, that many social and cultural scripts are reproduced without the individual's awareness that they are reproducing them. This is essential to keep in mind in sexual encounters, which do not occur among self-interested rational actors but rather among subjects radically rooted within particular social contexts, with many habits and beliefs that are not reflectively recognized. Behavior involves layers of sedimented, implicit knowledge and beliefs that orient our bodies toward some activities and away from others.

In addition, act intentionality is conditioned by the experience of being an object for others, an experience central to selfhood. Diprose cogently argues that it is precisely in perceiving myself as an object for the other—even as I cannot see the other as the other sees me—that I become individuated. If I am an object for the other, I must be distinct from the other (Diprose 2002, 69). This distinction is primarily affective, although it also gives rise to reflective cognitive stances of distinction from others (Sartre 1984, 383). "The self," Diprose (2002, 69) writes, with reference to Merleau-Ponty, "is a lived body ambiguously caught between subject and object, inhabiting the world of the other's body even with a lived distance between the two." Erotic experiences in particular individuate the self by giving the body to itself both as a subjective site of desire and pleasure, and as an erotic object for the other (Ward

and Anderson 2022). The subject-object distinction lived in erotic experience is a fluid phenomenal distinction, not an ontological dichotomy. Nor does it map onto a distinction between mind and body: it is embodied consciousness that experiences itself as *both* subject and object.

2.b. The Direct Perception Account of Others

The debate between attitudinal and performative consent takes for granted that others' mental states are originally opaque to us and must be inferred through communication (preferably verbally, ideally through a "yes" or "no"). Yet the phenomenological insight into the nondual character of embodiment goes hand in hand with an alternative account of how we perceive others that has significant potential to reorient discourses of sexual consent. Broadly speaking, phenomenology takes perception to be a dynamic relation to phenomena within the environment. Perception is not opposed to action: consciousness does not first receive a sensation, then reflect on it, and finally act in response. Rather, sensations themselves are responsive. We perceive not by copying percepts in inner space but by constituting them within the space of the world (Merleau-Ponty 2012, 9). Perception, as well as other "mental states," is a social act. As such, the debate about whether consent is a mental state or social act is moot. This also means that I do not perceive others by recognizing their bodily behaviors as signs of their mental states, out in the world for me to decode; rather, others' behaviors are directly expressive of their states of mind.

This idea that perceiving others' mental states is a direct, rather than inferential, process is what contemporary phenomenologists call the "direct perception account." The direct perception account contends that all perception is direct, with both (a) the complex components of perception and (b) perception's relation to memory, emotion, and motor activity built into perception itself. As Shaun Gallagher (2008, 538) puts it, perceptual experience "is a richly informed direct grasp of whatever is presented," scaffolded by context and interaction. Gallagher picks up on early phenomenologist Max Scheler's account of perceiving others, which contends that another's body is "a *field of expression* for their experiences," requiring no inference from their behavior to an imagined inner life (Scheler 1954, 9). Even as much perception occurs prereflectively, additional cognitive processes are often not required in order to grasp the complexity of a phenomenon. The vase does not appear as a hard, smooth yellow object but rather as a beautiful container for flowers. This is also true of our perception of other persons, including their behaviors. Someone moving their face toward mine with eyes closed and lips drawn together appears directly to my perception as an embodied subjectivity intending to kiss.

This theory suggests that perception is, as Gallagher (2008, 536) puts it, "smart": perception does not furnish a simple set of raw sensations for other operations of consciousness to interpret. Rather, perception is complex and

interpretive, involving layers of prereflective intentionality. For phenomenologists, "direct perception is nothing mysterious" (Gallagher 2008, 542). It is only by overlaying perception with third-person assumptions borrowed from the natural sciences, and/or with dualistic assumptions about the mind and body, that it appears so.

Direct perception is also affective. Indeed, early phenomenologists' preferred term for direct perception is "empathy." According to Edith Stein and Edmund Husserl, empathy is the basic sense of recognizing another person as a body-consciousness. It is affective, participatory, and initially prereflective, serving as the basis for reflective ways of interpersonally relating. Crucially, it does not require feeling another's feeling as one's own, or even having a strong sense of the contents of the other's feelings; empathy is simply the feeling of foreign consciousness (Stein 1989, 11).[5] In empathizing, I am perceiving another as a subject. The other appears within my perceptual field as an object-that-is-a-subject, and hence as perceiving *me* as an object that is a subject. To perceive another means to feel with them, in the sense of being copresent with a foreign embodied consciousness.

What's more, perception is intersubjective—or, in Merleau-Ponty's preferred terminology, intercorporeal. The relationship between events in the world and individuals' perceptions of them is interactive, and another's perception (while not often the object of my explicit reflection) is the necessary complement to my own. As Merleau-Ponty (2012, 109) writes, "We literally are what others think of us and we are our world." While self and other do not share a single perspective, their distinct perspectives are *of* a shared world and are themselves part of what constitutes this world. The social world is "the permanent field or dimension of existence," and first-person perspectives exist within this world (Merleau-Ponty 2012, 379). Thus, individual perspectives involve rich, yet largely prereflective, negotiations of a given context, as well as sedimented layers of personal and sociocultural history. These perspectives develop through the intersubjective perception of a shared world.

One might object that the direct perception account seems naïvely confident in the ability to understand the intentions and desires of others. If it is, does this not open the door to sexual assault on the basis of perpetrators' feeling unjustifiably confident that "X wanted it"? If the intentions and desires of others are directly expressed through their embodied behaviors, it seems challenging to explain the fact that others' behaviors can be mysterious or misread—and that this can lead to sexual violation. Indeed, difficult cases in sexual ethics are often framed as cases of miscommunication, which is why so much debate concerns just how obvious another needs to make their intentions: Does consent need to be indicated by a "yes" or "no"?

[5] This is distinct from emotional contagion, though emotional contagion undoubtedly occurs in many interpersonal encounters, including and perhaps especially in erotic ones.

Can it be conveyed through other means—and, if so, need these means be verbal or not?

There are two responses here. First, research from social psychology suggests that the idea that miscommunication drives a significant share of sexual assaults is a myth. Such miscommunication appears to be far rarer than assumed in both public discourse and philosophical debates about consent (Beres 2010). For instance, interview participants in a Canadian study of young adults consistently said that their ways of refusing sex were often subtle and nonverbal, including bodily behaviors such as tensing up, pausing kissing for a moment, or pulling away (Beres 2010, 8). They equally recognized such behaviors as forms of discomfort on the part of a sexual partner, with one man stating that "anyone with a shred of 'empathy or perception' should be able to tell when someone is uncomfortable" with proceeding (Beres 2010, 8). These behaviors are directly perceived *as* discomfort, and hence make an ethical claim on oneself.

Some have even suggested that so-called "miscommunication theory" serves primarily as a bad-faith shield for defending against accusations of sexual assault. Psychologists interpreting their study of young Australian men, for instance, write that "the miscommunication repertoire . . . appears, in practice, to serve to rhetorically justify coercive sexual behavior," specifically by men toward women—not to reflect genuine rampant misreading of cues by (women) partners (O'Byrne, Hansen, and Rapley 2008, 188). That is, the study participants exhibited "a sophisticated understanding of subtle verbal and non-verbal means of communicating sexual refusal," in contrast with the premises of the miscommunication model (O'Byrne, Hansen, and Rapley 2008, 173). They only invoked the latter when asked to account for rape. These findings resonate with research suggesting that consent is often communicated by a variety of direct and indirect cues, ones that that even young adults generally understand (Beres 2010; O'Byrne, Rapley, and Hansen 2006; O'Byrne, Hansen, and Rapley 2008; Kitzinger and Frith 1999; McCaw and Senn 1998). Worth noting here as well is that miscommunication theory in practice reinforces the heteronormative and highly gendered assumption that, because men generally initiate sexual activity and women choose whether to accept or refuse it, men are put in the position of interpreting women's cues, while women must bear the responsibility for making their cues as clear as possible (Beres 2010, 2).

Second, the direct perception account can accommodate cases of genuine miscommunication. Direct perception does not imply that others' intentions and desires are always transparent to us, let alone that our interpretations of others are correct. It rather implies that their intentions and desires are not "hidden away" behind their bodies and only contingently connected to their expressive behaviors. Instead, the field of interpreting others' intentions and desires is generally the very perceptual field where we encounter one another. Most often, no inference is

required from another's behavior to a separate interpretive field. Gallagher notes that, even as nonphenomenological accounts of perception tend to place far too strong an emphasis on the opacity of others' behaviors, there are of course cases when their behaviors do not reveal their intentions and/or desires. However, in such cases, a misunderstanding "would only be something that I discover via these means"—namely, the means of direct perception (Gallagher 2008, 540). That is, we discover the mysterious character of another's experience, and have opportunities to misread it, precisely *by means of* direct perception. Perhaps I go in for a hug at the end of a first date I thought went very well, only to see my date recoil. Their recoiling is something I perceive directly, just as I perceived their enjoyment earlier. The recoil suggests to me that their enjoyment was a misperception, but it is through perception itself that I am able to correct for this earlier perception. What's more, perceptual habits themselves can be trained in greater sensitivity to others, enabling greater possible attunement in order to obviate miscommunication in the rare cases that it does occur.

2.c. Consent as Feeling-with

All that we've said about embodied consciousness and the direct perception of others applies to erotic contexts. Erotic perception is direct, affective, embodied, and largely prereflective, involving an operative intentionality that undergirds act intentionality. Now we may explore erotic experience more specifically, developing an account of consent as feeling-with.

In Latin, *consentire* implies an agreement of feelings, similar to the English "sympathy" (which derives from the Greek for "feeling-with"). Oliver notes that the notion of *consentire* as an agreement has been reduced to an agreement to *do something*; we might add that it is often reduced to an agreement to do something *to someone*. Treating consent instead as an agreement of feelings accommodates the largely prereflective and direct character of our perceptions of others, especially in erotic situations. It can additionally accommodate the sense-making that such affective agreement involves: as Oliver (2018, 198) argues, the word "sense" (*sentire*) means both (a) sensation or feeling and (b) meaning or knowing. Thus, feeling-with another does not merely give us the raw material for signification: it is rather itself a form of signification, even if a largely prereflective one. Additionally, feeling-with need not imply having the very same feelings as another, and so consent may be present in situations in which partners have different feelings and motivations from each other. Following the phenomenological account of empathy, an agreement of feelings rather minimally involves recognizing both oneself and other as embodied subjects. In the erotic domain, as we will explore below, feeling-with involves recognizing self and other as embodied subjects of desire for one another and for sharing an erotic experience.

What does it mean that to consent is to feel-with? Phenomenologically speaking, we may define consent as an intercorporeal and dynamic coexistence of desiring bodies, where desire has a triadic structure: one erotically desires the other, erotically desires that the other desire oneself, and desires an unfolding of erotic experience with the other.[6] To feel-with is to desire-with. I erotically desire the other's body as a *lived body*, longing for closeness and caress. I also desire that the other's embodied consciousness be similarly directed in desire *toward me*: as Susan Bredlau (2018, 73) emphasizes, my desire for the other involves a desire for the other to desire me. Third, I desire for the erotic experience to unfold, either through initiation or continuation. In this sense, erotic experience has a futural orientation, even as it need not imply a particular goal (such as orgasm). This unfolding is intercorporeally situated and temporally dynamic. It involves a perceptual copresence with another body, or what Kukla (2021) has recently called a collaboration.[7] The desires involved may also come in degrees, rendering consent more nuanced than a simple green light.

While everything we have said about direct perception above pertains to erotic situations as well, it is worth clarifying that the account of consent I am developing here is grounded in the specific contours of what phenomenologists call *erotic perception*. Erotic perception is the particular mode of direct perception that is directed toward a desired other body (Merleau-Ponty 2012, 159). To say that it is directed is to say that erotic perception is "intentional" in the phenomenological sense, where intentionality designates consciousness's being directed toward something. Its intentionality is affective and suffuses the body (Sartre 1984, 501). And the body I desire is not desired as a mere object in my field of perception but rather as an embodied consciousness that I recognize as erotically desiring me. John Russon (2009, 73–74) writes, "Erotic experience is the fundamental bodily recognition of the presence of another person as a person. Erotic attraction is the stirring of the other in me." Thus, another way to describe consent is as attuned erotic perception.

In contrast with mainstream consent discourse, attuned erotic perception is not primarily cognitive. Merleau-Ponty (2012, 159) and Sartre (1984, 213) go so far as to draw a clear distinction between erotic perception and cognition or understanding, because the former is not defined by a reflective separation between subject and object. For phenomenology, "erotic perception is not a *cogitatio* that intends a *cogitatum;* through one body it aims at another body, and is accomplished in the

[6] This is broadly compatible with John Gardner's (2018) suggestion that sex is a form of teamwork that exhibits collective agency, except that Gardner does not highlight the affective dimension. It is also compatible with Talia Mae Bettcher's (2014) "interactional" theory of sex.

[7] I take this to be an improvement from Kukla's 2018 suggestion that consent be viewed in terms of negotiation, discussed above.

world, not within consciousness" (Merleau-Ponty 2012, 159). Rather, erotic perception is affective, temporally stretched, and directly sensed. One cannot reduce it to mental states and/or bodily acts that *express* mental states. In this sense, a phenomenological account of eroticism overlaps with approaches from queer theory and psychoanalysis, which take sex to be incommunicable from the language of reason or self-mastery. Sex may be described as "the encounter with what exceeds and undoes the subject's fantasmatic sovereignty" (Berlant and Edelman 2014, 2).

I suggested above that consent may be said to involve a triadic structure of desire: in consenting, one desires the other, desires that the other desire them, and desires an unfolding of erotic experience. I am inspired here by Talia Mae Bettcher's (2014, 606) account of sexual attraction as comprising (a) the eroticized other, (b) the eroticized self, and (c) the erotic interactions between the two, which tend toward increasing intimacy. I am not only *attracted* to the other but also erotically *interested* in myself as a locus of attraction, and the increasingly intimate erotic interaction between these two is arousing.

I would add to Bettcher's account that, in describing the complex relations between eroticized self and eroticized other, we should also attend to the ambiguity between self and other. As queer theorists have emphasized, erotic desire spills out beyond the imagined boundaries between the two, such that it is not always clear where desire for another person ends and desire to be desired by the other begins (Berlant and Edelman 2014; Saketopoulou 2019; Clark 2019). Erotic experience is excessive, and eventful because it involves an irreducible encounter with alterity.[8] Gayle Salamon (2010, 52) picks up on Merleau-Ponty's use of the term "transposition" as a way of denoting "the process by which the desire that houses itself in my body becomes my body itself." For Salamon, sensations of erotic experience become more ambiguous as they intensify, because one's sensing subjectivity spreads out toward the desired other, where desire and body are indistinct.

At first glance, it might seem that the introduction of ambiguity would destabilize the distinction between eroticized self and eroticized other. But ambiguity in the phenomenological tradition is not tantamount to indeterminacy. Rather, ambiguity refers to the dual condition of being both for oneself and for others (Beauvoir 2011, 416). One experiences one's own ambiguity directly and affectively but cannot cognitively grasp it because doing so would require taking a third-person perspective on oneself. Notably, both Beauvoir (2011, 416) and Merleau-Ponty (2012, 171) identify erotic experience as the domain of human existence in which ambiguity is most clearly disclosed. Beauvoir writes that "erotic experience . . . most poignantly reveals to human beings their ambiguous condition; they experience it as flesh and as spirit, as the other and as subject" (2011, 416). Here, the self is experienced in the

[8] This may even also be considered the case in autoeroticism (Anderson 2017).

doubled sensation of being both a desiring subject and an object of the other's desire. The other is experienced as both an object of my desire and a desiring subject themselves. I desire the other, and I desire to continue exploring the erotic experience with them. Sexual consent involves a complex dynamic of feeling with one's partner(s),[9] where self-relation and the relation to others are interconnected. I am both my subjectivity *and* what that the other perceives me to be, and the other who appears as a body in my perceptual field is not an object but rather a perspective (Merleau-Ponty 2012, lxxxvi). As with myself, the other "is his body and his body is the power for a certain world" (109). The complex dynamics between the eroticized other (the source of attraction) and the eroticized self (the locus of attraction) are doubled and dialectical.

In addition to the ambiguity of self and other, the intercorporeal sexual experience may also be considered ambiguous. The relation between partners dynamically tenses, loosens, proliferates, and unfolds in ways that both constitute and shatter identities. One partner might "take the lead" in a given moment, only to let the other's advances wash over them the next; partners may be so taken up in the moment that they feel nothing but a given sensation, or their corporeal experiences may be interwoven with fantasy, self-reflection, or ambivalence. These experiences are also always undergirded by habits that are at once personal and social, including sedimented social scripts that fly under an individual's radar. The body is a nexus of habits and history that shape our behaviors, even as we are not merely passive recipients of them (Merleau-Ponty 2012, 165).

In fact, we might identify ambiguity in sexual experience in at least four valences. First, the human body is both subject for itself and object for others, and it relates to itself both as subject and object.[10] Second, embodied consciousness is both reflective and prereflective, its behaviors at once guided by conscious intentions and unconscious patterns of habit. Third, the body is biological and cultural, without a clear demarcation between the two. Finally, the body is temporally ambiguous, stretched toward the future by virtue of intentions and desires while also existing in the present by virtue of a sedimented past.

Yet the ambiguity of sexual encounters does not imply that it is pointless to probe their complexities. As Caleb Ward argues, ambiguity is not obscurantism (Ward 2020, 166–69). After all, erotic encounters are highly communicative in their ambiguity. Desiring bodies communicate through gesture, and often through speech.

[9] While I focus on sex between two individuals here, the broad strokes of my argument may also be applied to sex in group settings.

[10] I have benefited from Gail Weiss's (2008, 134) helpful exploration of ambiguity in Merleau-Ponty's *Phenomenology of Perception* in developing my account of these valences.

Merleau-Ponty (2012, 163) argues that "speech is, among all bodily functions, the most tightly linked . . . to coexistence." Verbal communication does not eliminate ambiguity; rather, Merleau-Ponty suggests that speech amplifies the ambiguity of subject and object. Speech is not a matter of a fixed subject verbalizing preexisting thoughts; rather, "speech accomplishes thought," and others' speech transforms my own being (183, 189). Speech—including the expression of fantasies, desires, pleasures, triggers, hesitancies, and nos—is part of the shared landscape of experience in a given sexual encounter. In contrast with the consent discourse that treats speech as distinct from nonverbal behaviors and privileges the former (such as "No means no!" and "Yes means yes!" campaigns), phenomenology suggests that speech often plays a key role in erotic intentionality, but so do nonverbal expressions. One might think about how sex with new partners often requires more speech than sex with familiar partners, unless the latter is involving trying new things. Moreover, although erotic perception is intercorporeal, it does not imply transparent access to the other's feelings. As we saw above, direct perception is not infallible, and feeling-with does not entail having the same feeling as the other.

At first blush, it may seem that the direct perception account offered above tames or even blurs the radicality of otherness—that is, that direct perception naïvely implies easy access to others' desires and feelings by suggesting that we encounter these directly through others' embodied behaviors. But we have shown that feeling-with another is an ambiguous phenomenon that precisely reveals the other as a foreign embodied consciousness. Wonder at the mystery of the other finds its place in the phenomenological account of direct perception, whereas the inferential account of perception presumed by standard consent discourse is unable to account for this mystery by treating ambiguity as ideally overcome through the clearest possible expressions of boundaries. By figuring consent as a shared experience, ambiguity appears as that which opens up the erotic space of wonder, rather than as a hindrance to sexual experience. And this account does not implicitly valorize companionate sexual encounters between loving or romantically involved intimate partners. Recall that consent as feeling-with need not involve having the *same* experience as one's partner, or the kind of communication shared by long-term partners.

2.d. Consent and Operative Intentionality

This phenomenological account implies that individuals must become habituated to developing consent, because direct perception can be more or less attuned. This involves working to unlearn toxic social scripts, being aware of one's own positionality, and becoming competent at caring for sexual partners (including in situations in which one does not know one's partner[s] well). It involves reshaping operative intentionality, which has a much broader scope than the act intentionality

on which most sexual ethics focus. Attuning oneself to another, whether an intimate loved one or a one-night stand, requires continual work on factors that lead to inegalitarian agency. Ward (2020, 174) compellingly argues that, in social settings involving stark power differentials (e.g., in heteropatriarchal societies), a "critical orientation toward one's own social positionality is a precondition for relating ethically with another in a sexual encounter." Feeling-with another person requires recognizing one's own positionality in power differentials.

This recognition, while ongoing, is requisite for unlearning habits that serve either to reinforce one's advantage or to encourage accepting one's disadvantage. Ward (2020, 187) suggests that privileged sexual agents, such as cisgender straight men, should engage in a "disruption of self-certainty" as a precondition for ethical sex. Efforts toward self-knowledge, while never eliminating self-opacity, can help familiarize individuals with microdynamics of power and make them better able to engage in sexual experiences in ways that do not reproduce these dynamics. This is largely a matter of reshaping operative intentionality. Awareness of one's social positionality is "often present in an implicit sense of 'knowing how' rather than developed intellectually as theory" (Ward 2020, 175; see also Diprose 2002, 72). Habits are iterative and malleable, and many people already cultivate habits of attention to sexual partners—learning their likes, dislikes, triggers, turn-ons—as they get to know one another (even as feminist research shows the strong asymmetry between men and women on this front). Yet attunement may also be achieved with those one does not know well, provided that individuals engage in the disruption of self-certainty Ward describes.

Indeed, one of the most glaring issues in philosophical debates about sexual consent is their lack of recognition of the historical, contextual, and unconscious factors that impact expressions of consent.[11] While feminists and psychoanalysts have long emphasized these factors, debates about consent—in part due to their grounding in legal theory—often dangerously elide them. As Alcoff puts it, "Relying on consent is the main way many argue we should normatively distinguish between good and bad sexual practices, but consent is always embedded within structures that pose challenges for low-status groups of all sorts" (Alcoff 2018, 77). Overlooking these complexities obfuscates the strongly gendered power dynamics of consent. As noted above, phenomenology offers an alternative view by emphasizing that perception is historically and culturally sedimented. Intentionality is shaded by an individual and collective past, including being oriented by operative intentionality. Merleau-Ponty writes that "our memories and our body, rather than being given to us through singular and determinate acts of consciousness, are enveloped by generality" (165).

[11] For a careful analysis of these, see Gavey's (2005) *Just Sex? The Cultural Scaffolding of Rape*.

This is one way that psychoanalytical approaches to sexuality intersect with phenomenological ones: both take a wide lens on interpreting events by putting them in the context of meaningful wholes (161).

Conclusion: Why Redefine Consent?

Sexual consent as permission-giving is a legal fiction. It relies on misconceptions about consciousness, embodiment, and the perception of others. But, in spite of its infelicity, this fiction permeates public discourse, where sexual consent is codified as a verbal and affirmative form of permission-giving in university brochures and sex education. As it has gained traction in the public imaginary, this fiction may also increasingly hold sway over individuals' experiences: as we've noted, perceptual habits are imbricated in social scripts. As such, it is important that both academic and public discourses move away from permission-giving language around sex. I have argued here that we might do so by reframing consent as "feeling-with," building on the Latin etymology of the term using phenomenology. Yet two possible objections are worth considering in closing.

First is the objection that it is futile to redefine the word consent because consent in ordinary language has such strong presuppositions of permission-giving that it will resist attempts to redefine it. This objection has been compellingly formulated by Ichikawa (2020, 14), who concludes that "consent is not a necessary condition for morally permissible sex." On Ichikawa's view, my attempt to redefine consent phenomenologically as a thick, embodied dynamic of feeling-with would not be helpful, because it is not what ordinary people mean by consent most of the time—and even though language is malleable, the meanings of terms do not easily change at will. I do not take this potential objection to undercut my argument, however. Phenomenology often utilizes technical definitions of terms that do not line up with the way they are used in ordinary language, but that does not mean that these concepts are not meaningful for opening up thinking and shaping possible future meanings of existing terms. Moreover, there is reason to believe that consent's meaning is already transforming, especially in activist communities (Ward 2020, 217–18).

Second is the objection, also formulated by Ichikawa, that broadening the meaning of consent so that "consensual sex" is virtually synonymous with "ethically permissible sex" is tautological. For Ichikawa (2020, 24), "It is neither informative nor a helpful guide to decision-making to be told that for sex to be permissible, it needs to have all the features that are required for sex to be permissible. Consent is supposed to *explain* moral features of sex, not merely redescribe them." However, I am prepared to accept that the view I've developed here describes, rather than explains, moral features of sex. Description is the primary task of phenomenology, and I take it to be both informative and helpful. Given how fundamentally different the

understanding of perception, embodiment, and interaction that ground my view are from standard discourses of consent, the phenomenological description here is far from "merely redescrib[ing]." Instead, phenomenological description is the starting point for engaging in normative critique (Guenther 2021, 7). While I do not claim to present consent as the only necessary concept for sexual ethics, I think it can help move sexual ethics away from the terms of the performative and attitudinal debate. If it is tautological, it is so in a way that is meant to provoke new discourses that better take account of the interactive and embodied character of sexual ethics than the current framework.

A final question concerns what lack of consent looks like in the framework I've provided. As with consent, nonconsent will be an intercorporeal phenomenon that appears within a shared world of perception. Rather than indicating a private state of mind that the other may or may not successfully convey to another through refusing advances, lack of consent would be a lack of feeling-with-one-another. Far from victim-blaming, this alternative suggests that a failure to stop one's advances in a nonconsensual situation is a fault of the initiator not only in a moral sense but often also in a perceptual sense: the initiator may fail to see that the *situation* is nonconsensual due to a lack of attuned perception. This makes consent and nonconsent properties of the social situation rather than of individual agents. As Cahill (2001, 132) writes, "A fundamental part of the violence of rape is that intersubjectivity becomes a one-way street, rather than the dynamic engagement that embodiment calls for." Moving from the "private" sphere of mind to the dynamic phenomenological plane not only follows from a phenomenological account of perception but also makes better sense of the large gray areas between genuinely fulfilling sex and clear cases of sexual violation (where the perpetrator knows that the victim is refusing their advances but disregards their refusals) than standard accounts of consent.

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