

THE HARMS OF CONSENSUAL SEX

Robin West

In earlier chapters several lines of thought were encountered that opposed the consent standard of sexual libertarians and liberals. Some opposition came from the conservative strands of liberal theory- in particular, the Kantian view that consent is not sufficient when the participants still treat each other as mere means, and the Thomistic natural law view that marriage and procreation are also required for sexual activity to be morally permissible. In this essay, Robin West finds fault with the consent standard from a very different (feminist) perspective. She argues that consensual (but unwanted) sex often harms a woman's autonomy in more subtle ways than do rape, assault, and harassment. West provides a compelling picture of the often unhappy circumstances under which much, though not all, everyday heterosexual activity occurs. Even when a woman employs her freedom and rationality in agreeing to sex, if she is consenting to sex that she does not genuinely desire, she may be undermining that same freedom and rationality. At strong consent standard, on West's view, is thereby an arrow in patriarchy's quiver. But west is not an uncritical feminist either. She concludes by questioning whether feminist-liberal reforms of rape laws do not have the unintended consequence of masking (by "legitimizing") these subtle kinds of damage, and whether the radical feminist mantra that all heterosexual penetration is perpetration of illicit sex trivializes these subtle harms.

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Are consensual, non-coercive, non-criminal, and even non-tortious, heterosexual transactions ever harmful to women? I want to argue briefly that many (not all) consensual sexual transactions are, and that accordingly we should open a dialogue about what those harms might be. Then I want to suggest some reasons those harms may be difficult to discern, even by the women sustaining them, and lastly two ways in which the logic of feminist legal theory and practice itself might undermine their recognition.

Let me assume what many women who are or have been heterosexually active surely know to be true from their own experience, and that is some women occasionally, and many women quite frequently, consent to sex even when they do not desire the sex itself, and accordingly have a good deal of sex that, although consensual, is in no way pleasurable. Why might a woman consent to sex she does not desire? There are, of course, many reasons. A woman might consent to sex she does not want because she or her children are dependent upon her male partner for economic sustenance, and she must accordingly remain in his good graces. A woman might consent to sex she does not want because she rightly fear that if she does not her partner will be put into a foul humour, and she simply decides that tolerating the undesired sex is less burdensome than tolerating the foul humour. A woman might consent to sex she does not want because she has been taught and has come to believe that it is her lot in life to do so, and that has no reasonable expectation of attaining her own pleasure through sex. A woman might consent to sex she does not want because she rightly fears that her refusal to do so will lead to an outburst of violent behaviour some time following – only if the violence or overt threat of violence is very close to the sexual act will this arguably constitute a rape. A woman may consent to sex she does not desire because she *does* desire a friendly man's protection against the very real threat of non-consensual violent rape by other more dangerous men, and she correctly perceives, or intuits, that to gain the friendly man's protection, she needs to give him, in exchange for that protection, the means to his own sexual pleasure. A woman, particularly a young woman or teenager, may consent to sex she does not

want because of peer expectations that she be sexually active, or because she cannot bring herself to hurt her partner's pride, or because she is uncomfortable with the prospect of the argument that might ensue, should she refuse.

These transactions may well be rational – indeed in some sense they all are. The women involved all trade sex for something they value more than they value what they have given up. But that doesn't mean that they are not harmed. Women who engage in unpleasurable, undesired, but consensual sex may sustain real injuries to their sense of selfhood, in at least four distinct ways. First, they may sustain injuries to their capacities for self-assertion: the “psychic connection,” so to speak, between pleasure, desire, motivation, and action is weakened or severed. *Acting on* the basis of our own felt pleasures and pains is an important component of forging our own way in the world- of “asserting” our “selves.” Consenting to unpleasurable sex- acting in spite of displeasure- threatens that means of self-assertion. Second, women who consent to undesired sex may injure their sense of *self-possession*. When we consent to undesired penetration of our physical bodies we have in a quite literal way constituted ourselves as what I have elsewhere called “giving selves”- selves who cannot be violated, because they have been defined as (and define themselves as) being “for others.” Our bodies to that extent no longer belong to ourselves. Third, when women consent to undesired and unpleasurable sex because of their felt or actual dependency upon a partner's affection or economic status, they injure their sense of autonomy: they thereby neglected to take whatever steps would be requisite to achieving the self-sustenance necessary to their independence, and fourth, to the extent that these unpleasurable and undesired sexual acts are followed by contrary to fact claims that they enjoyed the whole thing- what might be called “hedonic lies”- women who engage in them do considerable damage to their sense of integrity.

These harms- particularly if multiplied over years or indeed over an entire adulthood- may be quite profound, and they certainly may be serious enough to outweigh the momentary or day-to-day benefits garnered by each individual transaction. Most debilitating, though is their circular, self-reinforcing character, the more thorough the harm- the deeper the injury to self-assertiveness, self-possession, autonomy, and integrity- the greater the likelihood that the woman involved will indeed not experience these harms

as harmful, or as painful. A woman utterly lacking in self-assertiveness, self-possession, a sense of autonomy or integrity will not experience the activities in which she engages that reinforces or constitute those qualities as *harmful*, because she, to that degree, lacks a self-asserting, self-possessed self who *could* experience those activities as a threat to her selfhood. But the fact that she does not experience these activities as harms certainly does not mean that they are not harmful. Indeed, that they are not felt as harmful is a consequence of the harm they have already caused. This phenomenon, of course, renders the “rationality” of these transactions tremendously and even tragically misleading. Although these women may be making rational calculations in the context of the particular decision facing them, they are, by making those calculations, sustaining deeper and some degree unfelt harms that undermine the very qualities that constitute the capacity for rationality being exercised.

Let me quickly suggest some reasons that these harms go so frequently unnoticed- or are simply not taken seriously- and then suggest in slightly more detail some ways feminist legal theory and practice may have undermined their recognition. The first reason is cultural. There is a deep-seated U.S. cultural tendency to equate the legal with the good, or harmless: we are, for better or worse, an anti-moralistic, anti-authoritarian, and anti-communitarian people. When combined with the sexual revolution of the 1960s, this provides a powerful cultural explanation for our tendency to shy away from a sustained critique of the harms of consensual sex. Any suggestion that legal transactions to which individuals freely consent may be harmful, and hence *bad*, will invariably be met with scepticism- *particularly* where those transactions are sexual in nature. This tendency is even further underscored by more contemporary post-modern sceptical responses to claims asserting the pernicious consequences of false consciousness.

Second, at least our legal-academic discourses, and no doubt academic political discourses as well, have been deeply transformed by the exchange theory of value,” according to which, if I exchange A for B voluntarily, then I simply must be better off after the exchange than before, having, after all, agreed to it. If these exchanges are the source of value, then it is of course impossible to ground a *value* judgement that some voluntary exchanges are harmful. Although stated baldly this theory of value surely has more critics than believers, it nevertheless in some way perfectly captures the modern

zeitgeist. It is certainly, for example, the starting and ending point of normative analysis for many, and perhaps most, law students. Obviously, given an exchange theory of value, the harms caused by consensual sexual transactions simply fade away into definitional oblivion.

Third, the exchange theory of value is underscored, rather than significantly challenged, by the continuing significance of liberal theory and ideology in academic life. To the degree that liberalism still rules the day, we continue to valorise individual choice against virtually anything with which it might seem to be in conflict, from communitarian dialogue to political critique, and continue to perceive these challenges to individuals' primacy as somehow on a par with threats posed by totalitarian statist regimes.

Fourth, and perhaps most obvious, the considerable harms women sustain from consensual but undesired sex must be downplayed if the considerable pleasure men reap from heterosexual transactions is morally justified- *whatever* the relevant moral theory. Men do have a psychosexual stake in insisting that voluntariness alone ought be sufficient to ward off moral or political inquiry into the value of consensual sexual transactions.

Let me comment in a bit more detail on a further reason why these harms seem to be underacknowledged, and that has to do with the logic of feminist legal theory, and the efforts of feminist practitioners, in the area of rape law reform. My claim is that the theoretical conceptualisations of sex, rape, force, and violence that underscore both liberal and radical legal feminism undermine the effort to articulate the harms that might be caused by consensual sexuality. I will begin with liberal feminism and then turn to radical feminism.

First, and entirely to their credit, liberal feminist rape law reforms have been on the forefront of efforts to stiffen enforcement of existing criminal sanction against rape, and to extend that sanction to include nonconsensual sex, which presently is not cognisable legally as rape but surely should be. This effort is to be applauded, but it has the almost inevitable consequence of valorising, celebrating, or, to sue the critical term, "legitimizing" consensual sexual transactions. If rape is bad *because* it is nonconsensual- which is increasingly the liberal-feminist position on the badness of rape- then it seems to follow that *consensual* sex must be good because it is consensual. That non-consensual transactions- rape, theft, slavery- are bad

because non-consensual does *not* imply the value, worth, or goodness of their consensual counterparts- sex, property, or work. It only follows that consensual sex, property, or work are not bad in the ways that non-consensual transactions are bad; they surely may be bad for some other reason. We need to explore, in the case of sex (as well as property and work), what those other reasons might be. Non-consensuality does not exhaust the types of harm we inflict on each other in social interactions, nor does consensuality exhaust the list of benefits.

That the liberal-feminist argument for extending the criminal sanction against rape to include non-consensual sex *seems* to imply the positive value of consensual sex is no doubt in part simply a reflection of the powers of the forces enumerated above – the cultural, economic, and liberal valorisation of individualism against communal and authoritarian controls. Liberal feminists can obviously not be faulted for that phenomenon. What I want to caution against is implied is the ever-present temptation to *trade* on those cultural and academic forces in putting forward arguments for reform of rape law. We need not trumpet the glories of consensual sex *in order* to make out a case for strengthening the criminal sanctions against coercive sex. Coercion, violence, and the fear under which women live because of the threat of rape are sufficient levies to sustain the case for strengthening and extending the criminal law against those harms. We need not and should not supplement the argument with the unnecessary and unwarranted celebration of consensual sex- which, whatever the harms caused by coercion, does indeed carry its own harms.

Ironically, radical feminist rhetoric, which *is* aimed at highlighting the damage and harm done to women by ordinary “normal” heterosexual transactions- *also* indirectly burdens the attempt to articulate the harms done to women by consensual heterosexual transactions, although it does so in a very different way. Consider the claim, implicit in a good deal of radical feminist writing, explicit in some, that “all sex is rape,” and compare it for a moment with the rhetorical Marxist claim that “all property is theft.” Both claims are intended to push the reader or listener to a reexamination of the ordinary, and both do so by blurring the distinction between consent and coercion. Both seem to share the underlying premise that that which is coerced- and perhaps *only* that which is coerced- is bad, or as a strategic matter, is going to be perceived as bad. Both want us to re-examine the

value of that which we normally think of as good or at least unproblematic because of its apparent consensuality- heterosexual transactions in the first case, property transactions in the second- and both do so by putting into doubt the reality of that apparent consensuality.

But there is a very real difference in the historical context and hence the practical consequences of these two rhetorical claims. More specifically, there are two pernicious, or at least counter-productive, consequences of the feminist claim which are not shared, at least to the same degree, by the Marxist. First, and as any number of liberal feminist have noted, the radical feminist equation of sex and rape runs the risk of undermining parallel feminist efforts in a way not shared by the Marxist equation of property and theft. Marxists are for the most part not engaged in the project of attempting to extend the existing laws against *theft* so as to embrace non-consensual market transactions that are currently not covered by the laws against larceny and embezzlement. Feminists, however, *are* engaged in a parallel effort to the extent the existing laws against rape to include all non-consensual sex, and as a result, the radical feminist equation of rape and sex is indeed undermining. The claim that all sex is in effect non-consensual runs the real risk of “trivialising,” or at least confusing, the feminist effort at rape reform so as to include all truly non-consensual sexual transactions.

There is, though a second cost to the radical feminist rhetorical claim, which I hope these comments have by now made clear. The radical feminist equation of rape and sex, no less than the liberal rape reform movement, gets its rhetorical force by trading on the liberal, normative economic, and cultural assumptions that whatever is coercive is bad, and whatever is non-coercive is morally non-problematic. It has the effect, then, of further burdening the articulation of harms caused by consensual sex by forcing the characterisation of those harms into a sort of “descriptive funnel” of non-consensuality. It requires us to say, in other words, that consensual sex is harmful, if it is, only because or to the extent that it shares in the attributes of non-consensual sex. But this might not be true – the harms caused by consensual sex might be just as important, just as serious, but nevertheless *different* from the harms caused by non-consensual sex. If so, then women are disserved, rather than served, by the equation of rape and sex, even were that equation to have the rhetorical effect its espousers clearly desire.

Liberal feminist rape reform efforts and radical feminist theory both, then, in different ways, undermined the effort to articulate the distinctive harms of consensual sex; the first by indirectly celebrating the value of consensual sex, and the latter by at least rhetorically denying the existence of the category. Both, then, in different ways, underscore the legitimation of consensual sex effectuated by non-feminist cultural and academic forces. My conclusion is simply that feminists could counter these trends in part by focusing attention on the harms caused women by consensual sexuality . minimally, a thorough-going philosophical treatment of these issues might clear up some of the confusions on both sides of the "rape/sex" divide, and on the many sides of what have now come to be called the intra-feminist "sex wars," which continue to drain so much of our time and energy.

Study questions (from Alan Soble)

1. in arguing that the liberal's consent standard does not adequately protect women, is West's position ultimately paternalistic, and thus also injurious to women's autonomy? That is, in claiming that more than a woman's agreement must be in place to allow her to avoid unwanted sex, are we not robbing her of the freedom to consent to sex on her own terms? Compare West's position with Antioch's "sexual offence policy" (chapters 29 and 30), which has also been criticised for reducing autonomy paternalistically, even as it aims at promoting autonomy.
2. it is known that some women apply various kinds of pressures on men (and women) to engage in sexual activity, without that pressure necessarily amounting to force or coercion that would make these sexual acts rape or nonconsensual. (see for example, Peter Anderson and Cindy Struckman-Johnson, eds., *Sexually Aggressive Women: Current Perspectives and Controversies* [New York: Guilford, 1998].) does this consensual sex harm men? When and how? Might there be a difference between men and women in their ability to withstand the consequences of unwanted but consensual sex?
3. what if one partner in a couple desires to engage in sex more than the other partner, but both desire sex in general. This scenario seems rather the rule than the exception in many partnerships. What are the implications for it for West's position? Try to oppose the conclusion reached by Alan Wertheimer about this scenario (chapter 19) to the position found in West.

4. is desire a more reliable moral criterion than consent? Granted, there are difficulties specifying what the consent standard demands, but what does West's no-harm standard mean in practice? What are the conceptual and normative differences between West's view and that of Robin Morgan, who focuses on desire: "rape exists any time sexual intercourse occurs when it has not been initiated by the woman out of her own genuine affection and desire.. .How many millions of times have women had sex 'willingly' with men they don't want to have sex with? ... How many times have women wished just to sleep instead or read or watch the Late Show? ... Most of the decently married bedrooms across America are settings for nightly rape" ("Theory and Practice: Pornography and Rape," in *Going Too Far: The Personal Chronicle of a Feminist* [New York: Random House, 1977]. 163-69, at 165-166)?

5. does the analysis West provides of the background cultural assumptions responsible for the consent standards currently in force in sexual morality and the law add to or diminish the case for legalising prostitution? Note that Yolanda Estes' objections to prostitution (chapter 23)- its psychological harmfulness, for example- are meant to apply to those cases in which the woman *does* consent.