

## CHAPTER ONE

*Introduction*

It is commonly thought that we should regard it as morally and legally permissible to engage in sexual relations if and only if the parties consent to do so. With appropriate qualifications, I think this view is correct. But, as with many other principles, it raises more questions than it resolves. Among those questions are the following.

First, *what is the moral significance of consent to sexual relations?* A law professor is reported to have remarked that “consent turns an act of rape into an act of lovemaking.”<sup>1</sup> That seems improbable. Acts of prostitution can be consensual, yet fall quite short of acts of love. If consent is not sufficient to render sexual relations a positive good, is it sufficient to render sexual relations morally permissible? Does consent render sexual relations consistent with Kant’s formula of humanity, the principle that we should always treat others as ends in themselves and never merely as a means?

Second, *in what ways are nonconsensual relations harmful or wrongful?* And are harm and wrong identical? In posing these questions, I do not mean to imply that nonconsensual sexual relations are not (almost always) harmful or wrongful. Still, it may be less clear precisely why this is so. Consider forcible rape. Is it a simple harm to the body, similar to the harm of a nonsexual assault? Or is it a harm in virtue of its contact with the victim’s sexual organs? If so, why is such contact especially harmful? Is it harmful because of the victim’s psychological reaction? Is the harm of rape (at all) a function of cultural norms, of the way in which a particular society views the act? Would it be a better or worse world in which rape was viewed and experienced as less harmful? Or is the harm of rape an “objective” matter because it is a violation of the victim’s autonomy or rights, independent of the way it is experienced by the victim or viewed by society?

<sup>1</sup> Jean Hampton, “Defining Wrong and Defining Rape” in Keith Burgess-Jackson (ed.), *A Most Detestable Crime: New Philosophical Essays on Rape* (New York: Oxford University Press, 1990).

Third, *in what does consent fundamentally consist?* Is consent (solely or primarily) a state of mind or is it an action? Can one consent to sexual relations by adopting the relevant mental state? If an act of consent is necessary, is it sufficient? Can one give (valid) consent to sexual relations that is not accompanied by the relevant mental state? If consent is an action, what sorts of actions are required? Is verbal consent required? Is tacit consent possible?

Fourth, and perhaps most importantly, *when is consent valid?* Some think that we can define nonconsensual sexual relations as those cases in which A has sexual relations with B even though B says “no” or fails to say “yes.” I disagree. I shall argue that the important question is not whether “no means no,” but whether “yes means yes.” When is consent *valid* or *morally transformative* or *legally transformative*? When does someone’s “token” of consent to sexual relations render it permissible for the other party to proceed? It is often said that valid consent must be suitably competent, voluntary, and informed. How should we understand those criteria? Can minors give valid consent to sexual relations? The mentally retarded? Can one give valid consent while intoxicated? What about coercion? It is uncontroversial that one’s consent is not valid if it is offered in response to the use or threat of physical force, but what about other threats? Is one coerced by the threat to be abandoned in a remote area? By the threat to end a dating relationship? By the threat to be fired (or not promoted)? Can one be coerced by an attractive offer? Does inequality or economic pressure compromise the validity of consent? And what about deception? Does fraud or misrepresentation invalidate consent? If not, why not? If so, when?

Finally, and with some trepidation, I want to ask a question about consent to sexual relations within the context of long-term relationships. *Given that the parties may have asymmetrical desires for sexual relationships, when should someone consent to sexual relations?* Does the less desirous party have moral reason to consent to sexual relations that one does not (otherwise) desire? Might there be something like a just distribution of sexual satisfaction among intimates?

The purpose of this book is to develop a theory of consent to sexual relations, one that begins to answer the sorts of questions I have described. I say *begins*, because even though the book is clearly quite long, full answers to many of these questions require moral and empirical analysis that are beyond the scope of this project. The most important task is to develop a general account of what I shall call the *principles of valid consent* (PVC), a set of principles that itself can take two forms: the principles of valid consent

for the law ( $PVC_L$ ) and the principles of valid consent for morality ( $PVC_M$ ). Both  $PVC_L$  and  $PVC_M$  are *moral* principles, but the moral principles that indicate when consent should be regarded as legally valid are not identical to the principles that say when a person's consent renders another's action morally permissible.

The book is primarily analytic not programmatic. I shall not be advocating particular legal reforms nor shall I defend a single or general substantive thesis about the conditions under which consent to sexual relations should be treated as valid. Indeed, I will be at pains to argue that no analysis of the concept of consent can answer the questions in which we are interested. The criteria for what constitutes valid consent will always involve moral argument and empirical evidence that is sensitive to the reasons for adopting a more rigorous view of  $PVC_L$  or  $PVC_M$  as balanced against the reasons for adopting a less rigorous view of PVC. And the reasons go both ways. There is a deep tension between what we might call the positive and negative dimension to respecting an agent's autonomy. We respect an agent's negative autonomy when we say that it is legally or morally impermissible for others to have sexual relations with her that do not reflect her competent, informed, and voluntary consent. We respect an agent's positive autonomy when we make it possible for her to render it permissible for others to engage in sexual relations with her. Unfortunately, we cannot simultaneously maximize both dimensions of autonomy. To the extent that we seek to protect an agent's negative autonomy, we should set high standards for what qualifies as valid consent. We will say that she does not give valid consent in many marginal cases (for example, when she is retarded). On the other hand, setting high standards for what qualifies as valid consent may encroach on the agent's ability to realize her own goals and desires. It may, for example, prevent a retarded woman from experiencing sexual pleasure and intimacy. And that is why it is very important to properly understand in what ways nonconsensual or marginally consensual sexual relations are harmful. For we cannot determine just how far we should go towards protecting a woman's negative autonomy unless we understand in what ways she is harmed when we fail to do so.

And that leads me to mention several "methodological" commitments that underlie much of what follows. First, I share Martha Nussbaum's view that "philosophy cannot do its job well unless it is informed by fact and experience."<sup>2</sup> To say that facts matter is not to say that they determine the best moral view in any straightforward way. There is no naturalistic fallacy

<sup>2</sup> Martha C. Nussbaum, "Public Philosophy and International Feminism," 108 *Ethics* 762 (1998), 765.

here. It is to say that the most defensible normative positions cannot be developed in the absence of the relevant set of facts. In particular, I do not think that we can develop a satisfactory theoretical account of the distinction between consensual and nonconsensual sex without first examining the experience of nonconsensual sex from the perspective of perpetrator and victim. And that is where I propose to begin. More specifically, I think it is impossible to think sensibly and sensitively about consent to sexual relations without a clear and honest understanding of human sexual behavior and psychology. Although I shall not resolve these issues (to say the least!), I hope to say something about them and to point to the relevant sorts of data and the way in which different assumptions about the data might support different views about the validity of consent.

Unfortunately, much writing on the issues that lie at the center of this project is, in my view, highly ideological. To take an example, almost at random, D. Kelly Weisberg writes that there is a “consensus among feminists . . . that rape is quintessentially a crime of aggression and hostility, not a form of sexual release.”<sup>3</sup> I will consider this particular claim in some detail later on. The present point is simply that the question of what motivates those who engage in nonconsensual relations with others is fundamentally an *empirical* question about the psychology of perpetrators. This is not an issue about which feminists – defined as those committed to gender equality – need to have a position. Similarly, the question whether women frequently say “no” when they desire to have sexual relations or are likely to change their mind is an empirical question, the answer to which may or may not be important in shaping the best set of principles with regard to what should count as valid consent to sexual relations.

Second, and related to the previous points, I believe that biology matters. It is an old but true saw that sound normative theories must be rooted in a sound understanding of human nature. And this applies to a theory about sexual relations as much as it does to politics or economics. There is considerable evidence that there are important psychological differences between males and females with respect to their sexual attitudes and behavior, and that these differences can be partially explained in evolutionary terms. Biology is not destiny, and biology never justifies or excuses. But it matters. I hope to show how and why.

Third, I argue that whereas facts matter a lot, words do not matter much at all. In particular, I shall argue that no linguistic analysis of the concept

<sup>3</sup> Editor’s introduction to section on rape in D. Kelly Weisberg (ed.), *Applications of Feminist Legal Theory to Women’s Lives* (Philadelphia: Temple University Press, 1996), 412.

of consent or related concepts will answer the legal and moral questions in which we are interested. We will not settle anything by determining what consent “really means.” If, for example, someone wants to say that a woman does not “really” consent to sexual relations if she agrees to sex in response to a man’s threat to break off their relationship, then one can say that if one wants.<sup>4</sup> But that leaves open the question whether we should regard A’s behavior as morally or legally impermissible. Similarly, one can say that one cannot give genuine consent if one is intoxicated, but if a woman unambiguously tokens consent to sexual relations after voluntarily consuming several drinks, that leaves open the question whether we should regard the man’s behavior as morally or legally permissible. The question is whether  $PVC_L$  or  $PVC_M$  would regard such consent as valid and not what consent means or how the word should be used.

#### SOME DISTINCTIONS AND CAVEATS

##### *The bad, the wrong, and the criminal*

A full moral theory of sexual relations would answer at least three questions: (1) when are sexual relations morally *unworthy*, or *bad*? (2) when are sexual relations morally *impermissible* or *wrong*? (3) when should sexual relations be *illegal* or *criminal*? Sexual relations can, of course, also be evaluated in nonmoral terms, for example, aesthetically, hedonically, or medically (safety). Moreover, the moral and nonmoral are by no means independent. One may have moral reason to attend to another’s sexual pleasure. The present point is that we can distinguish between the three moral questions that I have posed. They are all moral questions, but they are different moral questions.

By contrasting moral impermissibility and legal impermissibility, I do not intend the completely obvious distinction between what is wrong and what *is* illegal as a matter of positive law. Rather, I intend the somewhat less (but still) obvious distinction between what is wrong and what *should be* illegal. It is ordinarily wrong to break a promise or tell a lie, but there are good reasons – good *moral* reasons – why it should not be illegal to break some promises or tell some lies. The law is a blunt and expensive instrument, to be invoked with great reluctance, even at the cost of refusing to sanction some behavior that is clearly wrongful. Similarly, it may be wrong to obtain

<sup>4</sup> Charlene L. Muelenhard and Jennifer L. Schrag, “Nonviolent Sexual Coercion” in Andrea Parrot and Laurie Bechhofer (eds.), *Acquaintance Rape* (New York: John Wiley, 1991), 119.

another's consent to sexual relations by lying about one's marital status or one's affections. There may or may not be good moral reasons to regard such behavior as illegal.

Just as what should be legally impermissible is a subset of what is morally impermissible, the morally impermissible (wrong) is a subset of the morally unworthy (bad). The distinction between the bad and the wrong may seem problematic because we have moral reason not to do what is bad as well as what is wrong. But there are moral reasons and moral reasons, and the distinction between the bad and the wrong is meant to capture a distinction among them. Our common-sense morality distinguishes between reasons of justice, obligations, and rights, on the one hand, and a motley variety of other ways in which acts can be morally defective or vicious, on the other. To use Judith Thomson's example, a boy who refuses to share his box of chocolates with his brother may be stingy, greedy, and callous, but it does not follow that he has an obligation to share, or that the brother has a right to the chocolates, or that he treats his brother unjustly.<sup>5</sup>

To put the point in familiar terms, common-sense morality distinguishes between the claim that *A has a right* to do X, and the claim that *A is right* to do X. On common-sense morality, A may have a right to do bad. Some think that there is something deeply problematic about this. If doing X is bad, all things considered, how can A have a *moral* right to do X? Perhaps A does and should have a *legal* right to do X even though doing X is bad. That we can easily grant. But, it may be thought, it does not make sense to say that one could have "an all-things-considered moral right to do what is, all things considered, morally wrong."<sup>6</sup>

It is true that if it is bad for A to do X, all things considered, then A has moral reason not to do X. So if the claim "it is morally impermissible for A to do X" is equivalent to "A has moral reason not to do X," then the objection is sound. It is simply true by definition that it could not be morally permissible to do what is bad.<sup>7</sup> But they are not equivalent, or, if one wants to insist that they are, then the moral distinction I mean to highlight can be expressed in other terms. As Brian Barry puts it, "people do say things like 'I think you ought not to do such-and-such but I concede that you have a right to do it.'"<sup>8</sup> In saying such things, we sometimes signify

<sup>5</sup> Judith Thomson, "A Defense of Abortion," 1 *Philosophy & Public Affairs* 47 (1971), 60.

<sup>6</sup> William Galston, "On the Alleged Right to Do Wrong: A Response to Waldron," 93 *Ethics* 320 (1983), 320 (emphasis added). This article is a critique of Jeremy Waldron, "A Right to Do Wrong," 92 *Ethics* 21 (1981).

<sup>7</sup> This is Alan Donagan's position in "The Right Not to Incriminate Oneself," 1 *Social Philosophy and Policy* 137 (1984), 147.

<sup>8</sup> Brian Barry, *Justice as Impartiality* (Oxford: Clarendon Press, 1995), 79.

that they have (as a matter of fact) or should have (as a matter of morality) a legal right to do it. But, as Barry suggests, such claims often signify that the action is permitted by the moral rules of our society – the rules that define our obligations, rights, and demands of justice – and that we think those moral rules are not “radically defective” or, I would add, that the action would be permitted by what we think *should* be the moral rules of our society.<sup>9</sup>

In addition, we miss the point of the distinction between the wrong and the bad if we focus solely on the participants. To say that A has a moral right to do X or that it is morally permissible for A to do X is often best understood not as a claim about what A has moral reason to do, but, rather, as a claim – perhaps only a placeholder – about what *others* have moral reason to do with respect to A’s doing X, to wit, that others have moral reason not to interfere with A’s doing X.<sup>10</sup> Suppose we think that A has a right to read smut. A cannot appeal to his right to read smut as a reason to read smut. If it is bad for A to read smut, then A has moral reason not to read smut. Yet we can also say that there are moral reasons why others should not interfere with A’s reading smut – for example, that A is not harming others or treating others unjustly or violating anyone’s rights.

The distinctions among the bad, the wrong, and the illegal are purely schematic or analytical. They are neutral with respect to the content of those categories. We could all agree that there is a distinction between unworthy sex, impermissible sex, and illegal sex, but disagree whether (say) prostitution is morally unworthy, or morally impermissible, or should be illegal.<sup>11</sup> A full moral theory of sexual relations would provide the content of these categories. Not surprisingly, I shall not be offering such a theory. In particular, I shall have relatively little to say about morally unworthy sex. I shall have more to say about the wrong and the illegal. On the view that I shall defend, the content of the morally impermissible and the legally impermissible can be captured by the concept of consent. The hard work will be to say what that means.

### *(Non)gender neutrality*

I shall generally prescind from any attempt to frame the issue of consent to sexual relations in gender-neutral terms. I shall generally assume that the

<sup>9</sup> *Ibid.* <sup>10</sup> Jeremy Waldron, “Galston on Rights,” 93 *Ethics* 325 (1983), 325.

<sup>11</sup> One might think that prostitution is not bad at all. One might think that prostitution is bad, but not wrong if consensual. One might think that prostitution is wrong (for the customer or the prostitute or both), but should not be illegal. And one might think that prostitution is bad, is wrong, and should be illegal.

person whose consent is at issue is female and I shall refer to her as B. I shall generally assume that the person who requires such consent is male, and I shall refer to him as A. There are several reasons for adopting this approach. First, it makes things simpler. Second, it reflects empirical reality. With the exception of minors and prison inmates, it is extremely rare for males to claim that they did not consent to sexual relations, whereas this claim is frequently and rightly made by females.

*Rape and nonconsensual sexual relations*

Although there will be numerous occasions on which I shall invoke the word “rape,” that term plays little role in the analysis. Because “rape” is emotionally freighted, it is best to use more neutral language. I do so for two principal reasons. First, we should not assume that if a situation is not well described as rape, then it follows that B has given valid consent to sexual relations, that A’s action should be regarded as legally or morally permissible. Second, we should not assume that if B does not give valid consent to sexual relations, then it follows that A has raped B. There may be good reasons to distinguish between nonconsensual sexual relations that involve the use of physical force, or where the victim is unconscious, and a motley range of other situations in which B does not give valid consent. And it is distinctly possible that what we traditionally call rape is a more serious offense than many other cases of nonconsensual sexual relations. The present task is to make some progress toward identifying the criteria for valid consent and not to say what is and is not well described as a case of rape.

*Generalizability*

There are numerous contexts in which issues of consent arise. Do citizens consent to obey the law? Can prisoners consent to participate in medical experiments? Should adolescent females be able to consent to an abortion (without parental permission)? Given that many women undergo profound changes during pregnancy, can a potential surrogate mother give valid consent to relinquish her child after birth? And so on.

Although this book focuses on consent to sexual relations, I believe that the general structure of the argument is generalizable to any context in which issues of consent arise. It is possible that the principles of valid consent remain relatively constant at an extremely abstract level, but I believe they will demonstrate considerable variability when applied in different contexts. There is, for example, no reason to assume that the informational



requirements of valid consent to a medical procedure are identical to the informational requirements of valid consent to buy a television or to engage in sexual relations. To put the point in now familiar terms, while the *concept* of the principles of valid consent may be identical across contexts, we will find different *conceptions* of those principles in those contexts. It would be easy to explain why this is so on a consequentialist moral theory. I shall suggest that this can also be explained on a contractualist account of morality.

*Plan of the book.* Those are my aims. This is the plan. In chapter two, I briefly review the law of rape – history, statutes, cases, reforms, scholarship. I start with the law because it provides a literature that defines the issues that an adequate theory of sexual consent must confront. Chapters three, four, and five examine the psychology of sexual relations insofar as it bears on issues of consent. In chapter three, I sketch that psychology in general terms and also discuss the evolutionary psychology of sexual relations. Chapter four examines nonconsensual sexual relations from the perspective of the perpetrator. Chapter five examines nonconsensual sexual relations from the perspective of the victim. Because the character of the harm of nonconsensual sexual relations depends on a theoretical account of harm as well as empirical phenomena, chapter five is more philosophical than chapters three and four.

I then turn from sex to consent. I do not think we can say what counts as giving valid consent to sexual relations unless we first understand why consent is valuable. In chapter six, I consider the value of consent to sexual relations. In particular, I consider whether (valid) consent renders sexual relations compatible with the Kantian principle that we should always treat others as ends in themselves and never merely as a means. I also consider whether appropriately robust consent is sufficient to render sexual relations permissible. Chapter seven considers what might be called the “ontology of consent.” In particular, I consider whether consent is best understood as a “performative” or as a mental state. In chapters eight through eleven, I try to sketch an account of the principles of valid consent by considering three sorts of potential defects of consent in those cases where a woman unambiguously “tokens” consent in one way or another. Chapter eight considers defects in voluntariness or coercion. Chapter nine considers defects in information or deception. Chapters ten and eleven consider defects in competence. In chapter ten, I consider issues of age, mental retardation, and false preferences. I devote chapter eleven to an extended discussion of intoxication.

Chapter twelve switches gears. Assuming that we know what counts as valid consent to sexual relations, I consider an issue not unknown to many couples: when should one consent to sexual relations? Assuming an asymmetry of desire for sexual relations, are there moral reasons for the less desirous partner to consent to sexual relations more frequently than she would otherwise prefer?