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978-0-521-82926-7 - Consent to Sexual Relations
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CONSENT TO SEXUAL RELATIONS

When does a woman give valid consent to sexual relations? When does her consent render it morally or legally permissible for a man to have sexual relations with her? Why is sexual consent generally regarded as an issue about female consent? And what is the moral significance of consent? These are some of the questions discussed in this important book, which will appeal to a wide readership in philosophy, law, and the social sciences. Alan Wertheimer develops a theory of consent to sexual relations that applies to both law and morality in the light of the psychology of sexual relations, the psychology of perpetrators, and the psychology of the victims. He considers a wide variety of difficult cases such as coercion, fraud, retardation, and intoxication. We can all agree that “no” means “no.” This book suggests that the difficult question is whether “yes” means “yes.”

ALAN WERTHEIMER is John G. McCullough Professor of Political Science at the University of Vermont. He is the author of *Coercion* (1987) and *Exploitation* (1996) and has published articles in *Ethics*, *Philosophy & Public Affairs*, *Law and Philosophy*, and *Legal Theory*.

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To Susan

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Preface

Although this book ranges more widely, its central organizing question is this: when does a woman give valid consent to sexual relations? Put slightly differently, when does a woman's consent render it morally or legally permissible for a man to have sexual relations with her? Some very special cases aside, I take it to be uncontroversial that it is morally impermissible and should be legally impermissible to have sexual relations without consent. What should count as the sort of consent that is morally or legally transformative is a more complicated question. Or so I shall argue.

Most philosophical discussions of sexual consent have taken different tacks. Some have focused on the "ontology" of consent. They have asked whether consent is a state of mind or an action. And, if consent is an action, they ask whether consent must be explicit or verbal, or whether tacit or nonverbal signals are sufficient. Many other discussions have been prompted by some infamous cases in which defendants claimed that they mistakenly believed that the woman consented. Were they guilty? Can there be rape without rapists? These are all interesting and important questions, but they are not the questions with which I shall be primarily concerned. Assuming that everyone knows what is happening, when should we regard a male's behavior as morally impermissible or as a legal offense?

I have long been interested in consent. My doctoral dissertation, "Consent and Elections in American Politics" (1968), asked whether the electoral process is sufficient to support the view that we are ruled with the consent of the governed. I argued that it does not.

After a period in which I worked on the philosophy of punishment, a project on plea bargaining and retribution brought me back to consent in ways that I had not anticipated. It has been argued that when a prosecutor threatens a much more severe punishment if a defendant is convicted at trial than if he should plead guilty, it follows that a defendant's subsequent guilty plea is coerced and involuntary. I thought that the argument must be mistaken, but I was not sure why. Having found that the case law on plea

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bargaining provided important grist for my philosophical mill, I decided to cast my philosophical and legal nets more widely. When are contracts made under duress? Marriages? Confessions? When does someone commit a crime under duress? I tried to answer these questions in *Coercion* (Princeton: Princeton University Press, 1987). I did not consider rape or coercive sex in that book. Because I was younger and less courageous (wiser?), I was reluctant to enter what I took to be the sensitive waters of sexual coercion.

My work on coercion transmogrified into a project that resulted in *Exploitation* (Princeton: Princeton University Press, 1996). I argued there that it was important to distinguish consensual and mutually beneficial exploitation from nonconsensual and harmful exploitation, and that we should be reluctant to interfere with consensual and mutually beneficial transactions, exploitative though they might be. Although I did consider sexual exploitation in psychotherapy as a paradigm of harmful exploitation, I continued to shy away from a more direct analysis as to when sexual relations were consensual or exploitative.

Before I could settle on another project, I was invited to participate in an informal symposium on sexual consent at the University of San Diego Law School in 1995. I had not written explicitly on the topic, but I decided that if Larry Alexander thought I might have something to say, then maybe he was right. It has taken a long time, but this book is the result. I could not think of an appropriate one-word title.

Acknowledgments

According to what John Rawls calls the Aristotelian Principle, human beings enjoy the exercise of their capacities and the enjoyment increases with the complexity of the task. I suppose that I must be motivated to write, but I cannot say that I always enjoy it, save for the opportunity to acknowledge publicly the help and support that I have received.

The stimulating presentations and comments by the participants at the University of San Diego Law School symposium were crucial at the formative stage. I thank Larry Alexander, Donald Dripps, Heidi Hurd, Heidi Malm, Joan McGregor, Stephen Schulhofer, and Emily Sherwin. Stephen Schulhofer also gave me extended comments on parts of the manuscript.

My colleagues in the Department of Political Science at the University of Vermont, Pat Neal and Bob Taylor, read a draft of the entire manuscript and were, as always, enormously generous with their time, comments, and encouragement. Colleagues in the Department of Philosophy allowed me to present several chapters to our informal discussion group. I thank David Christensen, Arthur Kuflik, Don Loeb, and Sin-Yee Chan.

Friends and colleagues at other institutions were also extraordinarily helpful. Albert Dzur provided me with detailed comments on every chapter. Peter Westen kindly allowed me to read a draft of his own manuscript on sexual consent. Arthur Applbaum was crucial. I did not keep the meter running, but over the course of several years, we must have spent the equivalent of several full days discussing this project. He convinced me that I should write this book and then showed me at least some of the places where I had gone wrong.

Gerry Postema, the general editor of Cambridge Studies in Philosophy and Law, was both supportive and appropriately critical. An anonymous reader saved me from numerous errors and forced me to rethink several issues. It has been a pleasure to work with Hilary Gaskin, Alison Powell, and Jan Chapman of Cambridge University Press.

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Acknowledgments

When I try to consider matters from an impartial point of view, it is truly amazing that one can actually be paid to engage in this sort of philosophical reflection. I am grateful to the University of Vermont for a sabbatical leave during which I held a fellowship from the National Endowment for the Humanities.

Finally, nothing that I do would be possible without the love and support of Susan.

Abbreviations

EEA	environment of evolutionary adaptation
FH	formula of humanity
NMN	no means no
PTSD	post-traumatic stress disorder
PVC	principles of valid consent
PVC _L	principles of valid consent for the law
PVC _M	principles of valid consent for morality
RVNS	rape is about violence, not about sex
SSSM	Standard Social Science Model