

## Contours of Consent

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Presently, the notion of consent frames public discourse about rape in the West (Archard 133). Although Western thinkers have conceptualized rape in various ways—some misogynistic, some liberal, some feminist—public discourse about rape remains limited to the concept of consent (Kavanagh 44).<sup>1</sup> Our collective reliance on this concept (in conversations about rape) is worth interrogating because the terms we use to describe an experience shape the questions we ask about it, the aspects of it that we respond to, and the overall experience itself. The function of consent is to mostly serve as a litmus test to either classify one's experience as normative (sex) or deviant (sexual assault) (Frye and Shafer 334). Thus, the primary question evoked by dominant consent-based discourses about rape is whether it is provable that a person's consent was violated—never what harms that person is experiencing. Still, people tenaciously retain the concept of consent, which reflects consent's unquestionable conceptual status in mainstream Western culture. In this paper, I question the

<sup>1</sup>Non-western thinkers, of course, have also conceptualized rape in various ways. My intention here is not to discount them but rather to be transparent about the scope of my paper.

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implications of consent-based understandings of rape's harms in order to make sense of the inherent contradictions and limitations of sexual consent.

Although most people generally agree that rape is a unique and profound violation of one's autonomy, dominant discourses about rape fall short of accounting for how such a violation is experienced. In fact, it is a stretch to say that the notion of consent or non-consent—which is typically where dominant discourses about rape begin and end—offers an understanding of rape at all because all this concept concerns itself with is the identification of rape. By only distinguishing between sex and rape, the category of non-consent (beyond which there is little shared knowledge about rape) focuses our attention not on the lived experience of rape, but on the crime of sexual assault. Consent-based discourses about rape ultimately lead us to question whether sexual consent was denied, not how one experienced the harms and wrongs of rape. The person who has been harmed and violated becomes lost in translation between the experience of rape and the crime of sexual assault, and we are left with uniform legal citizens with state-recognized rights instead of people with substantive experiences, identities, and needs. It is in this translation that the category of non-consent emerges, even, perhaps, at the expense of the true experience of rape.

Conviction, when consent is found to be absent from a sexual encounter, is considered the standard for justice practices of consent theory.<sup>2</sup> Yet, consent theory fails at delivering its own version of justice, as the kinds of things which institutions have been interpreting as either the giving or taking away of consent have been consistently rooted in patriarchal systems of thought (Pateman 149–64). Moreover, what constitutes consent is itself unclear. Is consent merely one's will, one's communication of their will, or one's right to do as they will to do? Consent theory leaves many such critical questions unanswered or perhaps, unanswerable. For instance, to what extent is consent an entirely pure and self-directed faculty, given social and political forces? The extent to which women hold the capacity to consent, given heteropatriarchal structures, is in itself an ongoing debate that spans across decades (MacKinnon 171–237). On the other hand, liberal feminists

<sup>2</sup>By using the phrase 'consent theory,' I am primarily drawing from Carole Pateman's definition of it as "a specific example of a broader voluntarist theory of society which argues that relationships of authority and obligation must be grounded in the voluntary acts or commitments of individuals" (Pateman 151). As per this definition of consent theory, we may consider non-consent (in a sexual interaction) as a punishable offense broadly in that it violates the requisite of individuals' voluntary act or commitment. In the next section, I briefly discuss consent theory in light sexual consent.

have argued that consent theory guarantees individuals (a term which has only recently extended itself to non-male populations) the right to bodily autonomy which, in cases of rape, is taken away from them (Frye and Shafer 334). But can rape then be thought of as theft of a rightful possession (i.e., sexual consent)? In which case, how does robbing someone of their right to consent differ, in the nature of its harms, from being robbed of other rightful possessions? Another prominent way of conceptualizing rape in the feminist tradition is to see it as (patriarchal) violence (Brownmiller 510–55). However, conceptualizing rape as patriarchal violence provokes the following question: Is rape experienced any differently from non-sexual forms of gender-based violence? Some feminists have argued that heterosexual sex and rape are not completely distinct but situated within an overarching violent spectrum of heteropatriarchy (MacKinnon 215–50). Such a theory of rape evokes new questions: If heterosexual sex is not all that distinct from heterosexual rape, do women have any sexual agency at all? How may we differentiate heterosexual rape from heterosexual sex? These questions bring us back in a full circle to the concept of sexual consent or non-consent. Since consent frames the dominant discourse about rape in the West, I limit my discussion to the limitations of consent theory, in the backdrop of which victim-survivors' experiences of rape are situated.

### **The Patriarchal Contradictions of Consent Theory**

The roots of consent theory extend far back into the birth of liberalism, an ideology that contested individuals to be “naturally free and equal” (Leviathan 94). Assuming that all human beings are equal and free posed a new difficulty: if all humans were to be equal and free, how and why would they be governed by something external to themselves, such as a state (Cahill 170)? In order to resolve this difficulty of authority, liberal theorists such as Thomas Hobbes and John Locke relied on the idea of “tacit consent”—that free and equal individuals, by simply being born in a certain state, commit themselves to a relationship with the state that limits their autonomies (Cahill 174). Liberal conceptions of consent are rooted in the idea that consent should be assumed so long as it is not actively and vehemently revoked (Archard 8–14). These assumptions about tacit (or implicit) consent have had dire consequences on Western sociocultural and legal understandings of rape. The historical and philosophical evolution of consent theory is reflected in Carole Pateman's observations of consent theory in rape law, which reveals an emphasis not on the non-consent of women, but more so on men's assumptions of women's consent:

Accused rapists almost invariably offer as a defense that the woman actually consented, or that they believed she did . . . One reason why this defense is so successful, and why such a small proportion of cases of rape are ever reported, is that a woman is unlikely to convince either the public, the police, or a judge and jury that she did not consent to sexual intercourse unless she is badly physically injured or unless she can prove that she resisted. (Pateman 156)

Sexual consent of women has been loosely based on misogynistic ideas to the extent that non-sexual behaviors of women (such as wearing certain clothes, drinking, being out at certain times, etc.) have been deemed as being communicative of consent. Despite catastrophic confusion about what sexual consent and non-consent really looks like, women's sexual consent is treated as a default assumption. To disprove this assumption, usual signs that are considered sufficient in communicating "no" in other situations (such as saying no or being unresponsive) are not considered enough in (hetero)sexual contexts. In practice, consent theory puts the onus on women to prove that they went above and beyond (even if such resistance increases risk) to affirm their non-consent during an incident of rape. What is considered valid "proof" of such resistance is typically physical injury (Pateman 157). Without physical injury accounting for non-consent, the Western legal system—and by extension, its sociocultural counterparts—more often than not fail to acknowledge that victim survivors were harmed at all (Pateman 158). Thus, physical injury, in cases of rape, not only serves as the standard of harm but also as proof of a legally recognized wrong that warrants socio-legal consequences for the perpetrator.

If physical injury is rendered the primary site of rape's harm, then the harms of rape and other non-sexual forms of physical violence become uniform and indistinguishable in that they all include physical injury as evidence that the interaction in question was harmful and non-consensual. In failing to see non-physical impacts of a form of violence that is intricately sexual in nature, consent theory, in legal practice, reduces rape to sexual assault. Thus, cases of rape in which there are visible physical injuries become the standard for recognizing rape, allowing only a very small portion of rape's harms caused in an extremely limited number of rape cases to fit in dominant conceptual understandings of rape. There is little room in this understanding for the profound harms that rape causes beyond the physical realm. Further, because cases of rape that do not leave behind physical scars do not typically fit into consent theory's criteria for non-consent, dominant consent-based understandings render us incapable of even recognizing rape, let alone its harms. When we base rape's harms

primarily on empirical evidence of physical injury, we assume that its harms are experienced uniformly and temporarily. Perhaps, this is partly why victim-survivors are even less likely to be believed or taken seriously if they do not report their cases immediately after victimization (Parcher 19). In reducing rape's harms to physical injury, we guise rape as merely a physical attack. Since the disbelief in women's capacity to deny sexual consent runs so deep in our culture, theorists and legal practitioners often reduce rape to physical assault deliberately by eliminating the sexual nature of sexual violence so that cases of rape become more comprehensible and reprehensible for the criminal justice system (Cahill 23–27).

The widespread disbelief in women's non-consent is a by-product of how consent as a concept evolved historically. In liberal theory, "consent" was historically the centerpiece of marriage contracts in a state that was presumed to be made of heteropatriarchal nuclear families (Pateman 152). The patriarchal head of the family, i.e., the husband/father, was assumed to have "consented" to the authority of the state if he had not protested it (not that much could have happened if he did protest it). The wife's consent to the authority of the state was assumed through her husband's tacit consent (Pateman 152). Such a skewed function of consent confirmed the exclusion of women from the status of "naturally free and equal individuals," which meant that the capacity to consent/non-consent did not apply to them altogether (Pateman 154). Although the dominant manifestation of consent theory has been shifting in the past century, its history is of practical relevance today because it explains the fundamentally gendered nature of sexual consent. In practice, liberal consent theory is set up for failure by the inherent contradiction between its alleged gender neutrality and its distinctly gendered application (Cahill 173).

How we talk about consent day-to-day itself indicates consent's deeply gendered nature. To give a parallel example, the Indian caste system rarely came up as dinner table conversation in my home because my family and I come from a privileged caste of Hindu Indians. The inequities and violence of the caste system did not harm us. Instead, it assigned us a hegemonic status in a violent system. Like any hegemonic structure, the deeply embedded inequities, injustices, and violence of the Indian caste system have been naturalized overtime to the extent that it is often invisible and unquestionable to groups that are privileged by it and complicit in it. Those who are facing the violent system of caste in Indian communities tend to be most conscious of caste-based oppression. The walls are, of course, most apparent to those who regularly run up against them. In essence, the same is true when we observe how sexual consent is talked about and who talks about it. The fact that we talk about sexual consent overwhelmingly in relation to women is, in part, a reflection of this trend. That we mostly

speak of consent in relation to women, but sexual desire and agency in relation to men, is no accident. Sexual autonomy and choice have different meanings for men and women (Cahill 169–76). Yet, consent assumes a status of gender neutrality, in efforts to shield its own heteropatriarchal structures. Consent theory’s principle of gender neutrality misses an important element of heterosexuality: the patriarchy, which presents itself in the personal, political, and sexual. By failing to confront the conditions necessary to actualize the promise of “equality,” consent theory offers little scope to facilitate sexual wellbeing and justice in cases of sexual violation.

### **Limitations of Consent Theory**

Liberal feminist theorists of consent, in their attempts to conceptualize rape, have relied heavily on a conception of agency that is independent of one’s embeddedness in the surrounding world. In their analysis of rape, Marilyn Frye and Carolyn Shafer argued that “to fail to defer to a person’s rightful power of consent is to deny either the actual extent of its personhood or its actual personal identity” (340). The incompleteness of this view is revealed by a host of limitations:

- (a) This view does not take into account the difference in experiences between taking away the “rightful power” to consent in sexual encounters and taking away the “rightful power” to consent in other (non-sexual) circumstances (such as to consent to state authority).
  
- (b) This view implies that the violation of consent only concerns the individuals involved in a case of rape. Such framing of non-consent divorces the self from surrounding socio-political structures, which serve as the conditions under which people are assigned certain possibilities of agency. This conceptualization of sexual consent crumbles especially when we consider that there is no universal power to consent as socio-economic inequalities have produced drastically unequal conditions of autonomy.
  
- (c) This view eliminates people’s substantive identities and experiential differences by suggesting that personal identity lies in an abstract and uniform power to consent. Moreover, naming one’s consent as the site of one’s personhood or personal identity is revelatory of this view’s conflation of consent (a particular exercise of freedom) with the widely debated concept of freedom.

Such a conceptualization of rape does not preserve any space to ask questions about how a particular person has been experiencing rape's harms. By privatizing the experiential specificities of rape, liberal consent-based understandings of rape erase the need to consider how victim survivors experience the harms of rape altogether. In centralizing uniform legal subjects with certain versions of state-recognized rights, consent theory seeks an objective means of determining consent/non-consent for the purpose of punishment. Moreover, consent theory's decontextualizing of rape relies on the ontological assumption that people are apolitical, gender neutral, and uniform subjects, untethered from historical, political, cultural, and experiential contexts by uniform and limitless self-autonomy. This kind of autonomy (that supposedly exists in a void, outside of worldly influences and pressures) can be traced all the way back to Hobbes, who proposed paradoxical ideas for what counted as "consent." He argued that being coerced to say 'yes' (to submit to the demands of another) is still consent. That is, whether "submission" is voluntary or obtained through threats, one has chosen to submit for himself:

For in the act of our submission consisteth both our obligation and our liberty . . . there being no obligation on any man which ariseth not from some act of his own; for all men equally are by nature free. (Leviathan 191)

Here, it is important to notice the nearly synonymous relationship between submitting and consenting. Such synonymity reflects Ann Cahill's observation that "to accede to an offer that a man makes, to accept a given situation, to consent to it, is strikingly different than to seek out a certain situation and to choose it for oneself" (Cahill 173). That we speak of sexual consent in relation to women but sexual desire or autonomy in relation to men is indicative of the fact that, as far as consent theory is concerned, women's sexuality is supposed to be submissive, specifically to men. When Catharine Mackinnon (1989) suggested that heterosexual rape and sex are actually not as clearly distinguishable as consent theory would suggest, she was prompting us to pay attention to such heteropatriarchal constructions of female sexuality that revolve around consenting (or submitting) to men.

Besides, consent—a particular exercise of autonomy—points beyond itself to external conditions that make such an exercise of autonomy possible. For example, a minimum condition of consent logically would be that one has to, in actuality, be able to say yes or no. Still, as we saw above in Hobbes' proposition of consent and its liberal evolution thereafter, consent theory denies the very conditions in which one can meaningfully "consent." By dubbing freedom as hyper-individualism, consent theory declares, rather arrogantly, that to be a free individual is to have unconditional control

over one's life. Thus, each of liberalism's "free" and "equal" subjects is unexceptionally responsible for everything she or he experiences. Such a phenomenologically unsound account of autonomy not only rids us of our responsibility to each other but is also bound to lead to victim-blaming. The façade of total autonomy rests on the assumption that the conditions under which one lives have little to do with their experience of the world; one's experiences are entirely self-directed and self-regulated. Thus, by implying that in incidents of rape, victim-survivors failed to exercise a "natural" tool (sexual consent) that they are presumed to possess unconditionally, consent-based dominant discourses shift the blame to victim-survivors, which ultimately causes additional harm in the aftermath of rape. The reason why victim-blaming in cases of sexual violence is such a common experience and fear of victim-survivors is that it is woven into the very logic of what we call consent and non-consent today.

### Beyond Consent Theory

Although consent theory is ridden with serious fallacies in its conceptualization of rape, (active/enthusiastic, rather than assumed) consent is currently used as a minimum requirement for sex. In discussing the contradictions and limitations of consent theory, my intention is not to fully dismiss this current usefulness, but to point out the urgent need to move beyond this conceptualization of sexual autonomy and rape. Consent theory itself points to this need by secretly being dependent on a social ontology that it itself doesn't seem to be aware of: consent theory admits to a kind of ontological relationality by implying that rape is harmful because rape is (a) an unnatural invasion of agency or freedom and (b) an attack on equality. One can only be free if she shares a relationship with an external being, from whom she is free. Likewise, one can only be equal if she is considered to be in an equal relation to another being. Such hazy indication of ontological relationality suggests a kind of fundamentally interdependent order. Yet, consent theory proposes that autonomy is radically unlimited, and that one has absolute control over what happens to her.

Further, by considering victim-survivors' experiences of rape as unrelated instances of individual pathology and not as a social and political crisis, consent theory conceals the need for, and possibility of, radical structural change. The question of rape's harms remains nearly absent from public discourse about rape not because harms are an entirely private matter, or self-understood, or socio-legally irrelevant and un-rectifiable. In fact, on the contrary, victim-survivors frequently express a linguistic and discursive lacking when accounting for their experiences of rape. In his book *On Being Raped*, Raymond Douglas found himself to be just



as “tongue-tied when speaking of [his experience of rape] as anyone else” even though he makes his living “through the use of words” (Douglas 80). Similarly, in her testimony to the Canadian National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG), A.V. found herself confused when trying to explain her experience of rape to the police because her experience was difficult for her to explain in the backdrop of a lacking language and a lacking consent-based discourse about rape (Conty 21–23). The question of rape’s harms is nearly absent from dominant discourses about rape partly because consent—the primary concept that sets the stage for conversations about rape—alienates lived experiences of rape’s harms and privatizes rape’s harms by making them irrelevant in legal, social, and cultural realms. Such privatization of the lived experience of rape has at least two implications: 1) the self and the surrounding world are removed from one another and 2) lived experiences of harms are isolated from the overarching phenomenon of sexual violence. The constructed dichotomy between the self and the surrounding world actively erases various dimensions of harms, as it reduces rape from a socially thematic experience to an isolated and episodic crime.

The only question that consent-based discourses pose is that of classification or institutional recognition of sexual violence as a “crime.” Centralizing dysfunctional institutions in this way rather than lived experiences of rape’s harms, disregards victim-survivors by implying that their experiences and needs are irrelevant in the process of securing justice—i.e., a legal code knows better what is significant enough of their victimization in the justice-seeking process than they do themselves. Currently, consent theory has assumed a status of innocence—even progressiveness—by posing as a post-feminist concept that does not acknowledge its own patriarchal structures. But if consent theory were to acknowledge its gendered-ness, it would not have been able to pose heteropatriarchal constructions of sexuality as natural. Thus, consent theory, like other heteropatriarchal logics, needed to justify the exclusion of women and their experiences of rape from public discourse as accidental. But consent is only one way in which we may mutually commit ourselves to certain relationships and agreements. It is not the only—or even the most important—way of exercising our freedom and autonomy in relationships (Pateman 164). If we are truly vested in justice for sexual violence, it is critical that we move beyond the constraints of consent and towards more emancipatory and equitable models of autonomy.

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