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CONSENT 101

Bodily Autonomy: The Principle behind Consent

Discussions of sexual violence and consent are frequently dominated by legalistic approaches, which in many Western jurisdictions have their roots in property law rather than the very messy, human lived experience of sexuality. Part of the reason for this is that the law, and how it defines rape and consent, reflects cultural attitudes and practices and is, to some extent, *constitutive* of those practices: it shapes how we think about and express our sexuality. In this chapter, we will explore a range of approaches to consent, as well as how it is affected by rape culture and the law. First, though, it is worth taking a step back and elaborating the key principle that a feminist approach to sexual consent is grounded in: bodily autonomy.

Bodily autonomy is the idea that you get to decide what you do with your body, what happens to it, who else has access to it, and how that access is obtained and exercised. And you should be able to make those decisions without external pressure, coercion, or others wielding power over you. Your exercise of bodily autonomy can range from the everyday (you get to decide what you wear, what and when to eat, when and how much to sleep) to your interactions with a wide range of social institutions and practices such as medical care (you should not be forced into medical treatment you don't want), reproductive rights (you should not be forced to carry an unwanted pregnancy to term or, conversely, be sterilized against your will), and even death (you should be able to decide what happens to your remains, including whether you donate any of your organs). The legal recognition of bodily autonomy is far from universal. It *is* implied or recognized by the courts in countries such as Ireland, the United Kingdom, the United States, and Canada, though even in those countries it may be applied selectively in both law and cultural practice.

A Brief History of Approaches to Consent

Applying a high-level principle like bodily autonomy to our daily lives is not always straightforward. As a result, consent is very much a contested and evolving concept, and

the history of its development to date is far from linear. Competing ideas of sexual consent have been co-existing and co-evolving since at least the feminist movements of the 1960s and 1970s. There are four broad approaches that it would be helpful to understand at this stage: the radical feminist approach, the "no means no" and "yes means yes" conceptions of consent, and recent developments that can be broadly summed up under the heading of "sex-critical."

The radical feminist tradition emerged in the late 1960s and peaked in its influence in the mid 1980s. It was primarily interested in social power structures and how they operate to oppress women as a class. In the area of sexuality, some radical feminists argue that sex and violence, intercourse and rape, are so intimately intertwined (both legally and socially) that it becomes difficult to tell the difference. Consent negotiation does not happen on a level playing field where both parties have equal power to say yes or no. Social attitudes and upbringing condition girls and women to believe that their purpose is to satisfy men's sexual needs. And even the way the law defines rape (both at that time and to an extent even today) leaves plenty of room for violence and force, constructed as a normal part of male sexuality. In this social and legal environment, it is difficult to tell when consent is genuine, free, and uncoerced, and thus it becomes meaningless.[1]

The "no means no" approach to consent emerged from feminist campaigns against sexual violence in the late

1980s and 1990s. These campaigns were prompted by a growing awareness of the phenomena of "acquaintance rape" and "date rape"—unwanted, non-consensual sexual contact between individuals who already know each other to some degree or who may be romantically or sexually interested in each other. "No means no" emphasizes the responsibility of men to listen to and respect women's expressions of non-consent, and not to pressure women further in the hope that they will change their minds. "No means no" also has roots in legal reform campaigns, challenging legal definitions of rape that require the presence of physical force or threat rather than simply focusing on whether consent was present or not.

The "no means no" approach is fundamentally different from the radical feminist approach, as it focuses on personal agency and consent negotiation between individuals. The assumption here is that women are free to and do say "no" when they do not want sex, and that this "no" is being ignored by men, who go on to pressure, nag, threaten, or even use violence to obtain sex. This does indeed describe a significant number of rape cases, and thus "no means no" is both an important development in understanding consent and a key part of dealing with sexual violence. Yet it is far from the whole picture. One criticism commonly leveled against the "no means no" approach to consent is its inability to cover a wide variety of situations in which "no" has not been said

and yet consent is still not present. These may be situations where an individual would normally be able to say "no" or negotiate consent but is impaired from drinking alcohol or by being asleep, for example. Power differentials may also play a role in making individuals feel unable to deny consent, such as when someone in a position of authority demands sex from a subordinate.

A key insight that allowed feminists to expand and move beyond the "no means no" view of consent is that heterosexual sex in our society seems to operate on a "contractual" model of consent. The idea here is that certain non-sexual actions and cultural practices, such as wearing a short skirt, or accepting a drink from a man, are seen to generate a contract on the part of women to have sex—specifically, penile-vaginal intercourse—with a man. This "contract" is reflected in how we think and talk about sexual situations, and in how the law interprets them. We tend to think of women who wear certain types of clothing, or flirt, or drink alcohol around men as women who want *and consent to* sex. Effectively, actions that are completely unrelated to either sex or consent are taken as synonymous with an expression of consent.[2]

The "yes means yes" conception of consent (also known as "enthusiastic consent" or "affirmative consent") is a reaction to both the radical feminist approach and the deficiencies of the "no means no" approach. In emphasizing the need for a clear, articulated "yes," this approach seeks

to address some of the gaps that "no means no" leaves. It puts the responsibility on men to not only respect a clear "no" but also to ensure that their partner genuinely, enthusiastically wants sex and is able to say so. In law, this approach is reflected, for instance, in recent changes in the guidelines provided by the Crown Prosecutions Service in England and Wales for prosecuting rape cases. Greater attention is now being paid to how the defendant ensured consent was present, with, in theory at least, less leeway for assuming consent from the absence of a "no" or from unrelated behaviors.

At the same time, "yes means yes" is a "sex-positive" approach. Sex-positive feminism seeks to reclaim sex as a joyous experience that can be enjoyed by everyone. In this way it is a direct reaction to radical feminists' bleak outlook on sexuality and sexual violence. The emphasis on enthusiastic, clearly expressed consent seeks to reaffirm women's agency in consent negotiation.[3]

Both the "yes means yes" and "no means no" approaches to consent place significant emphasis on individual agency in consent negotiation. At their core, they assume that we are all free individuals who at all times are able to exercise our agency without others exercising power over us; know and understand our own desires, and express them clearly; make ourselves understood to others, and in turn understand them, thereby reaching a mutual agreement through negotiation. This reflects

the kind of neoliberal thought that has been dominant in Western cultures over the last forty or so years. Neoliberalism sees individuals as rational and in possession of unlimited agency, unencumbered by structural factors or power relations. The "neoliberal subject" (someone who is seen as the ideal kind of person according to neoliberalism, or someone who has internalized this view) takes responsibility for their own actions, seeks to better themselves, and has unlimited freedom and choice when it comes to different courses of action.

Yet when it comes to negotiating consent, these approaches do not account for a significant range of sexual encounters that are experienced as violations by individuals but would not be classified as rape, whether legally or under either of the "yes mean yes" and "no means no" models of consent. They leave a number of questions unanswered: How do our conceptions of ourselves, for instance, impact our decisions to consent to or even initiate sex? What does it mean to be feminine or a woman in relation to the choices we make about sex? What does it mean to be masculine or a man? What do our ideas about virginity or marriage tell us about how we should conduct our sexual and romantic relationships? How about ideas of what counts as sex, who should be having sex, what a "normal" amount of sex is? Our society has a lot of dominant ideas about sexuality, many or all of which we internalize, and which then shape our choices and actions.

As a result, some feminists have more recently returned to some of the questions raised by radical feminist approaches about issues of structures and power imbalances as they relate to consent negotiation. This has led to the development of a variety of "sex-critical" approaches to consent.[4] Like radical feminist approaches, these pay attention to issues of power in consent negotiation. But sex-critical feminists also tend to have a more nuanced conception of power, not as a monolithic, top-down oppressive force, but as an interaction of multiple forces, all pushing in different directions. Many of these approaches put less emphasis on legal frameworks and more on the role of culture (both in the sense of popular culture and in the sense of our everyday practices) in creating the conditions under which sexual violence thrives and the conditions for tackling it.

A key insight can be gained from these sex-critical approaches, and it has implications for our thinking on consent. We can see the seeds of this idea in the contractual model of consent: that linear progression identified in the contractual model, from wearing a short skirt to having a few drinks to intercourse, can be thought of as a script—a set and progression of actions and behaviors we can easily follow. And that progression is by far the most dominant sexual script in our society. It shapes the way we think about what sex is (penile-vaginal intercourse), who has sex (exactly one non-disabled cisgender man and

one non-disabled cisgender woman), and as a result what actions might require consent (intercourse) and what actions might constitute or be read as consent (following that script right up to intercourse).

Sex-critical approaches to consent recognize these cultural practices and dominant ideas as something that may shape our thoughts and actions, and may constrain our ability to exercise bodily autonomy. Ultimately, they ask what the conditions are under which we can *freely* say "no" to sex, as those are also the conditions under which our "yes" becomes truly meaningful.

Rape Culture and Rape Myths

The cultural practices and beliefs that sex-critical feminists have identified as limiting our agency and ability to exercise bodily autonomy belong to a wider "rape culture" or "rape-supportive culture." This comprises dominant attitudes to gender, sexuality, and sex that create an environment where saying no to sex is more difficult than saying yes, where unrelated actions are taken to imply consent, and the benefit of the doubt is given always to the perpetrator and never to the victim. It also includes a culture where not only gender, but also race, sexual orientation, age, disability, and myriad other differences are wielded as tools of power, marginalizing

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some groups and making them even move vulnerable to sexual violence.

A key part of what makes our culture "rape-supportive" is an array of rape myths: ideas we hold about the kinds of people who commit rape, the kinds of people who experience it, what rape actually is, what a rape victim looks like and how they should behave, or whose responsibility it is to prevent rape. It is worth examining some of these myths in detail to understand how they may travel between our cultural environment and our legal system, thereby both reproducing rape culture and limiting our ability to freely negotiate consent.

Perhaps the most common rape myth is that rapists are strangers who jump out of dark alleys with weapons. In fact, the vast majority of sexual violence is committed by people known to the victim: acquaintances, family members, colleagues, partners, husbands. What this myth does is make rape seem like an extraordinary event when in reality, for many victims, it can be very ordinary and downright domestic. As a result, it also makes rapists seem like extraordinary monsters rather than the everyday people they actually are. The practice, still common in some jurisdictions, of calling character witnesses to speak in favor of the defendant in rape trials reflects this rape myth and shows the damage it does to victims' prospects of getting justice. Ultimately, this myth detracts from both the importance and the complexity of consent

by suggesting that only one type of rape exists, and that it is obvious when that has occurred.

Another common myth is that rape always involves other types of physical violence. This myth conflates sexual violence with other physical violence, thereby dismissing all the cases of rape, sexual assault, and boundary and consent violations where the victim does not sustain other visible injuries. Where the stranger rape myth suggests that we can tell if it was a rape from the circumstances and the relationship between victim and perpetrator, the violent rape myth suggests that we can tell whether rape allegations are true from the physical state of the victim, again detracting from the core question of consent.

The idea that women always put up token resistance to sex, but in reality they want it, is another pervasive rape myth. It works side by side with the myth that unless a woman put up the *utmost resistance* (screamed, kicked, fought, tried to run away, and sustained other physical injuries in the process), she consented. These two myths cast women's expressions of consent and non-consent as ambiguous and untrustworthy. They give rapists permission to ignore a first (and second, and third) no, to keep pushing and violating boundaries until they get what they want. They allow rape complaints to be dismissed and victims to be blamed for not resisting vigorously enough. They ignore the realities of rape experiences: that victims freeze, especially when assaulted by someone they know

and trust; that fighting back puts them at greater risk of additional injuries; that rapists use intimidation and manipulation more than physical violence.

Another set of common myths is that women provoke rape by wearing revealing clothing, drinking too much to be able to protect themselves, or walking alone after dark and that, conversely, men can't help themselves when provoked in these ways. These myths mean that for women, drinking too much is reason to blame them, but for men it is reason to excuse their behavior. They function to move responsibility from rapists to victims. Rather than saying to potential perpetrators, "Don't rape," they tell potential victims, "Don't get raped." They limit women's ability to move freely in public spaces or dress the way they want. Fundamentally, these myths suggest that indications of consent are not to be found in what a woman says in a potentially sexual situation, but in her actions in entirely unrelated situations.

Rape culture does not affect us all equally. There are myths about specific, marginalized groups that make them even more vulnerable in this environment of pervasive sexual violence. There is, for instance, a myth that sex workers cannot be raped—that the nature of their work means they waive the right to withhold consent. This is untrue: sex workers have the same right to bodily autonomy that anyone else has. Yet this myth is widespread in culture as well as in the criminal justice system and other

support services, and this is one of the factors that expose sex workers to greater risk of sexual assault.

The racialization of some groups—their construction as "other" based on skin color or origin—also significantly contributes to rape culture and the marginalization of racialized groups. The United States, for instance, has a long cultural history of conceptualizing rape as a crime perpetrated predominantly by black men against white women.[5] This construction is part of a deliberate effort to reframe and erase a history of white men raping enslaved black women and indigenous women, and it has profoundly oppressive effects on black and indigenous women to this day. Black and indigenous women experience sexual violence at much greater rates than white women. These cultural myths carry over into the criminal justice system, as both black and indigenous women are less likely to be believed when they report sexual assault, and they are less likely to have their cases taken further by investigators and prosecutors. Similar myths also operate to render other women of color more vulnerable to sexual violence.[6]

These myths, and other, more subtle ones, are widespread in our culture, both in how we think about issues of sex and sexual violence on a day-to-day basis and in how these issues and sexuality more generally are represented in popular culture. They function to deflect blame and responsibility for sexual violence from those who perpetrate it to its victims. They play a significant role not only in

how we as individuals relate to issues of sexual violence (think, for instance, of what your first response would be if a friend confided in you that they had been raped), but also in how our media and even the law treats the issue.

Consent and the Law

So far in this chapter, we have only touched on the role of the law in sexual consent briefly and tangentially, but it is important to understand not only what the law has to say about consent but also how it operates in practice when it is required to intervene. This is because law—both as legislation and as it is implemented in practice through the criminal justice system—plays a significant role in shaping how we think about consent and consequently how we behave.

We tend to think of the law as a coherent, consistent body of rules that governs our lives. Yet this is far from legal reality. Laws evolve over time, are reinterpreted by the courts, and lawmaking generally involves compromise, which in turn leads to some interesting inconsistencies. Marriage laws for instance tend to view sex—specifically, penile-vaginal intercourse—as an integral part of marriage, and procreation as the main purpose of marital sex. This is why there is a consummation requirement for different-gender marriages in English and Welsh law,

and why historically marital rape was not considered an offense. Even with the more recent recognition of marital rape as an offense, the consummation requirement remains, making different-gender marriage conditional on at least one instance of penile-vaginal intercourse regardless of consent. This discrepancy highlights the fact that the law is not unified and consistent, but frequently contradictory.

Legally speaking, sexual offenses tend to be rooted either in property law (an offense against your right to limit others' use of your property, in this case your body), or in ideas about public order (certain sexual acts are seen as socially undesirable and therefore prohibited). While feminist and queer legal reform campaigns have had some success in updating legislation, bringing it more in line with contemporary social attitudes, and eliminating some of the most egregious injustices, the law remains a blunt tool that does not actually reflect the sometimes messy experience of human sexuality, or what we as a society or as individuals may value about our sexuality.[7]

How exactly the law defines rape can tell us a lot about dominant social attitudes and their historical development, as well as our values when it comes to sex and consent. Legal definitions of rape and other sexual assault tend to start from the point of view of non-consent, and they do vary somewhat by jurisdiction. In the United Kingdom, rape is broadly speaking defined as non-consensual

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penetration of the vagina, anus, or mouth with a penis, while other offenses exist to account for penetration with objects or making someone penetrate another person. The Republic of Ireland has two rape offenses, one for non-consensual vaginal penetration by a penis, and a second for anal and oral penetration as well as vaginal penetration by an inanimate object. In the United States, the legal definition of rape varies by state, though there is also a federal definition for the purpose of crime statistics, which defines rape as "the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."[8]

Canadian law is fairly unusual here, in that it does not recognize rape as a separate offense, instead opting for the wider category of "sexual assault," which is defined as non-consensual sexual contact. Like Canada, New Zealand also has a wider category of "sexual violation," though New Zealand law also recognizes rape as a separate crime within that. Through laws on sexual assault, jurisdictions such as the United Kingdom, Ireland, the United States, and New Zealand, which do have separate rape laws, also acknowledge that there are a number of other sexual offenses that do not involve penetration; these offenses, however, are in some ways considered less severe. This kind of "tiering" of sexual offenses, with penetrative rape at the "top," creates a structure that privileges some sexual acts over others,

implying that some sexual acts "count" more than others. This reflects dominant sexual scripts where penile-vaginal intercourse is cast as the endgame, with everything else being relegated to "foreplay." We will return to the impact such tiering of sexual acts has on our behavior and ability to give consent freely in chapters 3 and 4.

Another key factor in legal definitions of rape is to what extent consent plays a role at all. Legal traditions rooted in English law (as seen in the United States, Canada, and Ireland) tend to have consent-centric definitions of rape; that is, the overriding criterion for whether an act is rape or not is consent—in theory, at least. Other jurisdictions (for instance, much of Europe) still require that additional conditions be met to qualify the act as rape—and they range from the victim being subject to threats or force to the victim being impaired and unable to resist. As a result, in countries such as France, Norway, and Switzerland, "no" does not mean "no": victims may have clearly communicated that they did not consent to a sexual act, but unless other factors were also present, their assailants may not be ruled guilty of rape.[9]

There is also the question of consent being extracted under coercion or duress: a person saying yes because they fear the consequences of saying no, such as physical violence or losing a job. Even consent-centric definitions of rape tend to be too vague to cover some of these eventualities. As a result, in legal practice this question is frequently

left to defense lawyers who then focus on verbal and physical expressions of apparent consent rather than whether consent was freely given.

Even some jurisdictions with consent-centric definitions of rape have issues when it comes to what exactly constitutes consent, when it can be given, and when it can be withdrawn. A 1979 North Carolina Supreme Court decision, for instance, holds that once consent for an act of penetration is given, it cannot be withdrawn: a man is not guilty of rape if he continues to have intercourse with a woman who has withdrawn consent. While it is questionable whether courts would interpret North Carolina law in the same way today, the ruling has had an impact on prosecutors' decisions on how to deal with recent cases, and repeated efforts to clarify the law have failed.[10]

Legal definitions of rape and consent reflect and reinforce cultural attitudes and beliefs, and can have a significant impact on how we think about sex. Beyond definitions, there is also a significant body of feminist literature on the law as practice (i.e., what actually happens in courtrooms and other parts of the criminal justice system) when it comes to sexual offenses. Practices of evidence collection, decision making on whether to prosecute a particular case, and what happens in a courtroom all reproduce rape culture, re-traumatizing and blaming

survivors of sexual violence while acquitting those who perpetrate it.

Legal proceedings have a special status in our society, in that their outcome, in the form of guilty or not guilty verdicts, carries the weight of truth, as well as potential consequences for the accused. For that reason, the burden of proof in a criminal trial lies with the prosecution (i.e., defendants are considered innocent until proven guilty), and there is a high standard of proof—the jury needs to be convinced of the defendant's guilt "beyond reasonable doubt." The adversarial trial system only admits one possible version of events, that of the alleged victim *or* that of the alleged perpetrator. The process of establishing that version can be deeply traumatic for victims and frequently fails to actually deliver justice.[11]

Rape myths play a key role in how the law reproduces rape culture. Studies of rape trials across a number of Western jurisdictions have shown how rape myths are leveraged by defense lawyers and rarely challenged by judges or even prosecutors. Victims, for instance, are frequently asked about the extent of any resistance they put up, reproducing the myth that anything but the *utmost* resistance constitutes consent. Victims' behavior leading up to the rape is scrutinized, reproducing the contractual model of consent and the idea that unrelated actions, such as how someone is dressed or whether they

flirted, is a better indicator of consent than a clear "no." This interplay between culture and the law allows defense lawyers to manipulate jurors, introducing doubt that, in the context of rape culture, seems perfectly reasonable.[12]

Much like rape culture, the law also does not affect everyone equally, and marginalized groups are structurally disadvantaged by the law—the legislation itself and the ways in which it is enforced. In US legal history, for instance, women of color—black and indigenous women in particular—were not regarded as rapable. Rape was a crime that could only be committed against a white woman. And while the legal inequality has at least in theory been redressed, in practice women of color still face innumerable barriers to accessing justice for sexual violence committed against them. In the case of indigenous women living on lands under tribal sovereignty, a series of legal loopholes mean rapes of indigenous women by white men are under the jurisdiction of the US federal government, which declines to prosecute the vast majority of reported cases.[13]

Feminist legal scholars and activists across many Western jurisdictions have achieved some important legal reforms over the last fifty years, from the recognition of marital rape as an offense to improvements in trial practice, such as making a rape victim's sexual history inadmissible as evidence except in very rare and specific circumstances. It is notable that these reforms have rarely

addressed the kinds of issues that disproportionately affect marginalized women, largely benefiting privileged women instead. Arguably they have also not led to either a significant increase in conviction rates, or a decrease in sexual violence. For these and other reasons, other theorists and activists have argued for the need to *decenter* the law in our approaches to sexual violence. Because the law is a blunt tool, seeks binary yes/no answers, and inevitably invalidates at least one party's lived experience, some feminist scholars and activists argue that it is not fit to deal with the immense complexity of human sexuality.[14] These strands of thought favor cultural change and the use of restorative and transformative justice methods over legal reform.

Beyond Penile-Vaginal Intercourse

One common thread that runs through dominant Western cultural beliefs about gender and sex, legal frameworks on sexual violence, and particularly early feminist approaches to rape and consent is the assumption that sex—and therefore rape and other sexual violence—happens between a non-disabled cisgender man and a non-disabled cisgender woman. In this model of rape, reflected for instance in definitions of rape that focus on penetration of the vagina with a penis, the man is always the aggressor,

the woman always the victim. The act of penile-vaginal intercourse is privileged, legally and culturally, as the one sexual act that requires consent.

This construction of sex and what requires consent has several potentially negative consequences, both for marginalized groups who do not fit the cis- and heteronormative default and more broadly for anyone seeking to exercise their bodily autonomy and negotiate consent in their relationships. Transgender people, intersex people, those whose sexual orientations deviate from the allo- and heterosexual norm, as well as disabled people whose sexual practices may vary from the intercourse-centric norm, are excluded from the cultural and sometimes even the legal discourse on sexual consent and sexual violence. And if we conceptualize penile-vaginal intercourse as the main or only act that requires consent, we risk obscuring a whole range of behaviors that push boundaries and violate bodily autonomy. In the next two chapters, we will explore these issues in more depth by taking a look at how consent negotiation may work in practice, and at the way that operations of power in our society may shape our desires and behavior, limiting individuals' ability to freely negotiate and give consent.

This is a section of doi:10.7551/mitpress/12108.001.0001

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Citation:
Sexual Consent
By: Milena Popova
DOI: 10.7551/mitpress/12108.001.0001
ISBN (electronic): 9780262353595
Publisher: The MIT Press
Published: 2019

The MIT Press

This book was set in Chaparral Pro by Toppan Best-set Premedia Limited. Printed and bound in the United States of America.

Library of Congress Cataloging-in-Publication Data is available.

ISBN: 978-0-262-53732-2

10 9 8 7 6 5 4 3 2 1