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Sex, Law and Consent

Robin West

Liberal legal theory primarily, and liberal feminist legal theory derivatively, have jointly shaped much of our contemporary understanding of the various relations between sex and law. At the heart of that familiar liberal legalist paradigm is the distinction between consensual and non-consensual sex. That distinction serves two central purposes. First, the absence or presence of consent demarcates, broadly and imperfectly, sex that should be regarded as criminal from that which should not. Non-consensual sex, generally, ought to be regarded as rape, or, if not rape, as a lesser but still quite serious sexual assault.¹ To whatever degree, and it is still considerable, the law fails to criminalize non-consensual sex, to that degree, according to liberal legal theorists and reformers, the law should be criticized and changed. So for example, not only forcible, violent sex between strangers, but also (liberals argue) non-consensual but non-violent sex between dates or cohabitants, non-consensual marital sex, sex coerced through particularly egregious fraud, sex imposed upon unconscious, intoxicated or mentally incapacitated victims, and sex coerced through implied threats of future violence, or of a nonviolent violation of rights -- all of this sex should be understood as some degree of criminal sexual assault, regardless of whether or not the sex is accompanied by force, regardless of whether or not the woman resisted, and -- at least for some liberal reformers -- regardless of whether or not she verbally expressed her non-consent. Liberal feminists from Harriet Taylor and John S. Mill² from the nineteenth century to Susan Estridge, Michelle Anderson and Stephen Shulhofer of the twentieth and twenty-first³ have

generally pressed for broader definitions of rape and sexual assault, and broader enforcement of existing laws so as to bring the law on the streets and in the bedrooms in line with this basic moral claim: non-consensual sex is wrong in all circumstances, and so wrong as to be properly regarded as a serious crime.

The second purpose, implicit rather than explicit, served by the distinction between consensual and non-consensual sex, within liberal legalism, is rhetorical rather than legal, and might best be called that of “legitimation.” Liberal legal scholars typically, if not invariably, urge that consensual sex not only should not be criminal, but that legal regulation of any sort, including the imposition of civil sanctions, and perhaps non-legal community disapprobation or political critique likewise, is uncalled for. We should loosen, or liberalize, and perhaps entirely prohibit, unduly moralistic regulatory control of all consensual sex, whatever the source of the regulation, and whatever the target. Thus, over the last thirty years, liberal scholars and reformers have argued that the production and consumption of pornography should be insulated against regulation, so long as all sexual acts required for its production (and consumption) were consensual⁴; that obscenity regulations premised on offense to community morality should be likewise eliminated entirely or severely cut back,⁵ that prostitution should be de-criminalized and if regulated at all only toward the end of protecting the health of participants,⁶ that consensual sex between partners of the same gender should be constitutionally protected against state regulation,⁷ that the availability of the right to marry should not depend in any way on the sexuality, the gender, or the sexual practices of would-be participants,⁸ that contraception and abortion should be freely and fully available, and the right to obtain them should be constitutionally protected against regulation,⁹ and that sexual

harassment laws should be read narrowly so as to protect consensual sex and sexual speech in workplaces and in schools.¹⁰ Consensual sex, perhaps quintessentially for contemporary liberal legalists, wherever it happens, and whatever its form, and whatever the motivation -- whether it be in cars, bordellos or on screen sets, between persons of the same sex, opposite sex, or no discernible sex, whether it be anal, oral, vaginal, missionary, marital, non-marital, vanilla, non-vanilla, sado-masochistic, or something other, whether it be for pleasure, for reproduction, for money, for status, for friendship, or for the approval of one's peers -- should be deregulated. It ought to be left alone: by law, by the community, by various would-be moral censors, and by politically motivated interrogators.

Arguments for de-regulation of consensual sex vary, depending upon different strands of liberalism, but all, in some way, rest on the legitimating function of consent to sex. Within libertarian legal theory, the point is familiarly put in terms of victimless crimes and undue state paternalism: if two or more parties consent to sex, then the sex is victimless, and therefore any state regulation -- whether criminal or civil -- would be paternalistic and unwarranted.¹¹ For more traditional Millian liberals, the reason has more to do with individual autonomy, or identity, than with the dangers of state regulation: the sexual activity to which we consent is akin to expression, and is central to one's conception of the good life; to interfere with it is to interfere with an important dimension of individual autonomy.¹² From the sometimes aligned normative law-and-economics camp, the claim is more sweeping: assuming no third party effects, and assuming competent parties, *any* consensual sexual transaction -- sex for money, sex for pleasure, sex for a favor, sex for protection, sex for shelter, and so on -- as is true of any

non-sexual consensual transaction, is presumptively of positive value to both parties – if it weren't, why would they consent to it?¹³ And, if it is presumptively of positive value to both parties, and no one else is hurt, then it is value-, wealth- or efficiency-maximizing. Liberal feminists add a feminist twist to all three arguments: denial of the worth of consensual sex has often been accompanied by and sometimes been motivated by a vitriolic denial of the equal worth of women's sexuality and capacity for sexual pleasure.¹⁴

Thus, consent to sex renders the sex that follows victimless, central to autonomy and identity, of positive economic value, and emblematic of the equal worth of she who gives it. The arguments converge, though, on a common conclusion: consensual sex, because it is consensual, ought to be not only non-criminal but also shielded from legal regulation, and moral or political critique. To regulate consensual sex acts, or render them the object of civil sanctions or even community disapproval is at best undue state or community intervention -- overly paternalistic, voyeuristic, nanny-state-ish, inefficient, moralistic, or just unnecessary – and at worst, disruptive of the creation of value, autonomy-sapping, identity-robbing, equality-compromising and virtually by definition coercive. Consent legitimates the sex that follows; the effect of which is to insulate it from not just criminalization, but more broadly, from legal regulation likewise.

The liberal (and liberal feminist) reliance on consent as demarcating the distinction between sex and rape has attracted a good bit of critique, not only from defenders of more traditional and more restrictive definitions of rape (that require, in addition to or instead of lack of consent, the use of force by the perpetrator and resistance from the victim, and still impose numerous restraints on the criminality of marital sex)

but also from radical strands of feminism, and more recently, from queer theory. The broadly legitimating role consent plays within liberal understandings of sex and law has not attracted nearly as much critical attention, either from feminists, queer theorists or liberals themselves. In the bulk of this piece I would like to suggest some reasons why it might be worth our while to reverse this trend. Consent works relatively well, I will argue, as the demarcation of non-criminal from criminal sex; or at least, radical feminist and queer theoretic arguments against it are unconvincing. By contrast, the political and moral legitimization of wide swaths of sexual behavior that is affected by the liberal deregulatory projects, more or less given a pass by liberalism's leftwing and feminist critics, has quite real and relatively unreckoned costs.

One such cost – and the only one I will elaborate in this essay -- is that here as in other spheres of life legitimation effectively renders invisible – and in some versions of liberalism, even incoherent -- what may be significant harms caused by the conduct so legitimated. More specifically, I will argue that consensual sex, when it is unwanted and unwelcome, often carries harms to the personhood, autonomy, integrity and identity of the person who consents to it – and that these harms are unreckoned by law and more or less unnoticed by the rest of us. The possibility that the liberal valorization of consensual sex that is so central to liberal de-regulatory projects legitimates these harms ought to concern us far more than it has, at least to date. That doesn't mean we should seek to broaden the definitions of either sex crimes or the contours of private law so as to punish or compensate for a wider range of conduct. I do not think we should or could. We do though need a better understanding of the relation between our understanding of what is

criminal or tortious behavior and why – and what that does, or doesn't, imply about the value, worth, and pleasures of our non-criminal sexual behaviors.

The chapter is organized as follows. As noted, the first part of this four part chapter argues briefly that both the (relatively new) queer theoretic and the (getting on now) radical feminist arguments against the liberal reliance on consent as the demarcation between rape and sex are misguided. They both fail to grapple with the distinctive harms that come from a sexual perpetrator overriding the will of a weaker partner, although they do so for opposite reasons and with drastically different consequences. The remainder of the chapter concerns the legitimating role of consent in liberal conceptions of law and sex. In part two, I will describe, or at least delineate one specific type of harm – the harm caused by unwanted and unwelcome but nevertheless fully consensual sex -- that the legitimization of consensual sex has the consequence of denying or at best obfuscating, and argue why those harms are important, even if they are not and should not be the target of criminal sanction. In the third part I will try briefly to account for our relative failures to better understand them. Specifically, I will explore some of the reasons they have generally escaped the notice not only of liberal legalists concerned with rape and rape law reform, but also of liberalism's critics, primarily radical feminists and queer theorists. Finally in the conclusion I will suggest that those are not good reasons, and that we – meaning legal theorists, and not only moral or political philosophers -- should focus more than we do on consensual sexual harms and their relation to law, in the intimate sphere, no less than we do in our political and economic lives.

A. Consent and Rape

As is fairly well known, beginning in the 1980s, radical feminists in law and outside of law, but most forcefully Catherine MacKinnon, have argued in various ways that the sharp line drawn by liberals between consensual and non-consensual sex falsifies the degree of coercion imposed upon women by men in our ordinary sexual lives.¹⁵ That which is perceived as consensual sex, according to this now familiar radical feminist critique, is more often than widely believed the result of coercive forces, ranging from believable threats of future violence, to social or economic pressures, to a ubiquitous sexualized and pornographic culture that only somewhat paradoxically forces women and girls to consensually give it up, and all the better if they do so desirously. Echoing Marx's parallel accounting of the role of consensuality in labor relations,¹⁶ MacKinnon and other radical feminists argued that in the sexual sphere no less than in the economic, "consent" is not a meaningful marker between autonomy and coercion. Thus, radical feminism tended to conflate consensual and non-consensual sex, finding all of it the product of coercion.

Radical feminist critiques of consent and of rape law have garnered an enormous response, both from liberals, and from liberal feminists, the former arguing that the radical position, if codified in law, would over-criminalize non-violent and sometimes only reckless or negligent behavior, and the latter, that the radical position (whether or not reflected in law) denies women's "agentic" power, feeds pernicious stereotypes of women incapable of saying no to unwanted sex, and implicitly, and wrongly, assumes women's strong aversion to sex generally.¹⁷ I am not going to pursue those arguments

here (I have elsewhere).¹⁸ I want to focus instead on what I think is a problematic feature of the radical feminist critique of the liberal paradigm that for various reasons has not been much addressed, either by liberals or liberal feminist theorists, to wit, that the radical feminist critique of rape law denies the distinctiveness of the *experience* of non-consensual sex, and hence, the distinctiveness of its harms. Even if we assume, that is, that there is a good deal of coercion in the background conditions that produce consent to sex (just as there is a good deal of coercion operating in the background conditions that produce consent to alienating labor, or consent to bad governance) it doesn't follow that consensual and non-consensual sex are in all ways the same, or that the "coercion" is or feels qualitatively similar, or that the harms they occasion are not different. Thus, there is a quite real felt difference between those coercive forces that elicit consent – no matter how bad the bargain struck – and the coercive force employed by an actor who overrides or ignores the lack of consent. It is *not* necessarily a difference in the degree of harmfulness – as I will argue below, the former might be in the long run be more damaging and to more people, than the latter. It is, though, a difference in qualitative experience, and there are real costs involved in conflating them.

Being burgled in one's home, or robbed on the street, feels different than being exploited by an unscrupulous employer in an unequal and capitalist economy. Robberies occasion a fear that one will be killed – that one's existence, and not just one's dignity, will be obliterated. It is traumatic and frightening in a way that exploitation is not. It is a departure from the normal course of life, which, however exploitative the conditions of one's life might be, does not include a constant fear that one will be killed in the next few seconds. It is upsetting for just that reason, in a way that exploitation is

not – exploitation, after all, may well *be* the norm against which the trauma of a robbery stands in relief. That does not make the robbery, all things considered, *worse* than economic exploitation: exploitation in an underpaid and alienating job through the course of adulthood might well be far more damaging than having been the victim of a one-time robbery, in the long run. Certainly, exploitation is more insidious, more invisible, and more easily masked – it’s harder to name and blame both the harm and the perpetrator. Constant workplace exploitation may also be, in the long run, more important politically than occasional robberies: the very phenomenon of private sphere economic exploitation unchecked and largely unregulated by an unconcerned state, suggests the existence of an unjust community, an unjust social structure, and an unjust legal regime, while the robbery or burglary suggests aberrant behavior, against which both the interests of that unjust legal regime and its exploited citizens are jointly aligned. A trauma, once identified, can be recovered from, and both the state and the citizen have stake in seeing that they don’t happen – that they are both deterred and compensated. An unjust social order -- maybe not.

The same is true of sex. Heterosexuality may well be compulsory in all the ways argued by Adrienne Rich in her classic mid-seventies essay¹⁹: girls are given no or little choice but to enter the world of heterosexuality, the culture willy-nilly propels all of us toward early heterosexual intercourse, (social conservative resistance notwithstanding), men and boys feel an entitlement while women and girls feel an imperative to participate, all of this is reinforced explicitly by a constant stream of cyber and real-space pornography, and then underscored, rather than meaningfully challenged, by mainstream religion traditions, that may quibble over the timing and circumstances of the

compulsion, but hardly over the central command: while pornography pushes girls and women to submit to sex across the board, religious tradition dictates that women should become wives, who then must and should submit to their husbands' sexual demands, virtually world over and for most of recorded history. That's a lot of coercion. If there's any truth at all to this account, then it's sensible enough to say that what that coercion produces is an awful lot of consent to an awful lot of dreadful sex; I'll argue as much explicitly in the next section.

Forcible rape, however, is "coercive" in an entirely different way. The physical invasion of the self and body, the interruption and denial of sovereignty over one's physical boundaries that the invasion entails, the fear of death foremost in the mind of the victim, the sure knowledge that one's will is irrelevant, the immediate and total reduction of one's self to an inanimate being for use by another, and the sustenance of multiple injuries, both vaginal and non-vaginal, internal and external -- all of this, simultaneously experienced, typify -- constitute -- the experience. The experience of the compulsion of which Adrienne Rich spoke might share in some of these features, but the contrasts swamp the shared point of contact. The compulsion in "compulsory heterosexuality" creates constricted identities, and expectations, and certainly social roles, all of which in turn might *elicit* consent to sex. The latter -- the coercion used by a rapist at knife-point, gunpoint, or with overpowering threats of force -- overrides the *lack* of it. The sex that results from compulsory heterosexuality, whatever else it is, is consensual, as we normally use the term and certainly as the law understands it. The sex that results from the coercive wielding of knives, fists and guns is rape. Again, this doesn't mean the latter is "worse" than the former: compulsory heterosexuality *might* do more widespread

and longer-lasting damage both in the individual case and in the aggregate than rape, in the same way that economic exploitation *might* do more widespread and longer lasting damage, and to more people, than theft. Compulsory heterosexuality that elicits consent to unwanted sex over a lifetime undermines an individual's self-sovereignty even as an ideal, while the traumatic experience of rape might ultimately underscore, for the victim, the importance of both autonomy and self-sovereignty as essential for a well-led life. In the aggregate, compulsory heterosexuality is certainly more pervasive, harder to name and blame, more insidious, and so on. Further, as with economic exploitation, the state has little interest in deterring it, addressing it, or even noticing "compulsory heterosexuality": whether or not it does so, depends on other state interests entirely – in eugenics, or population control, family policy, or the various sorts of bio-projects of which Foucault spoke and wrote. It is not central to the *raison d'être* of the state, to deter compulsory heterosexual intercourse – to deter the conditions that prompt consent to sex. The state has a direct interest, however, in the criminalization of violent rape.

They are, simply, different. Why conflate them? There is not much to be gained by doing so, and I think there is quite a bit to be lost. Let me note two such costs. The first is to the success and even coherence of liberal rape law reform movements. The claim that current definitions of rape under-criminalize, and that a good bit of non-consensual sex ought to be but currently isn't criminal, and that there is more ordinary rape in the world than most realize or care to admit, is the basis of an important and largely liberal reform agenda. That agenda is not furthered, it is undercut, when it is confused with the claim that rape is ubiquitous. If rape is ubiquitous, the claim that there exists a class of under-criminalized non-consensual sex that ought to be criminalized

becomes trivially true, but inconsequential, if it is viewed as part and parcel of a political view that can't possibly be the basis of a serious reform of the criminal code. If all sex is literally rape, there is no norm against which to define the wrong the Code is designed to target.

It is clear now, and it was certainly clear to many of us at the time, that it was never the intention of theorists, particularly Catherine MacKinnon, to expand the criminal code so as to include and prosecute as “rape” all sex, or all heterosexual sex – and MacKinnon is right to insist that she never said as much.²⁰ Nevertheless, it is also clear that the claim was *heard* in this way. One reason it was so heard, is that the claim was made, and often, that the experience of women who are rape victims, conventionally described, and of women having consensual sex within a patriarchal regime, is more similar than dissimilar, and that they are so by virtue of the coerciveness of both.²¹ It is that claim, I believe, which not only mis-describes the experience of both. If understood as a call to criminalize far more sex than is envisioned by even the most far-reaching of the reforms of liberal feminist rape activists, it undercuts rather than bolsters liberal rape reform projects.

The second cost of the conflation of compulsory heterosexuality and coercive sex is less immediately felt, but may be more consequential. The rhetorical conflation of the compulsion that sometimes produces consent to heterosexual sex, and hence produces some consensual sex, with the coercion that produces rape, overstates the role of rape in the perpetuation of patriarchic hierarchies. Rape, understood either conventionally (as forced sex, with utmost resistance by the victim, imposed on someone other than one's wife) or as liberals would re-define it (as non-consensual sex), is an aberrational act that

violates sovereign interests in social and public stability as well as women's interest in physical security. The state prosecutes it when it can. By contrast, the sex that results from consent that is given within social structures that embed gendered inequality – consensual sex, where the consent is elicited in part through societal compulsion – is, at least arguably, ubiquitous. If we define the latter as “rape,” then rape is indeed central to patriarchal control of women by men, and the struggle against “rape” so understood, is likewise central to ending it. But there is a danger in putting the point this way. If we reference, either intentionally or not, the conventional, criminal-code definition of “rape” to describe the phenomenon of “compulsory heterosexuality,” because coercion is central to both, then we invite the mistaken conclusion that promoting greater enforcement and prosecution of rape crimes, as understood by the state, will end patriarchy.

But this conclusion is just not warranted, and not simply because the sex described by the inclusive definition of “rape” above, is not what the state will prosecute, no matter what the definition of rape. It isn't warranted, more fundamentally, because the compulsory conditions that elicit consent to unwanted sex might be more central to those obnoxious regimes than the knives and fists employed by rapists to override their victims' will. Even if it is true, as MacKinnon begins her most important book, that “sexuality is to feminism what work is to Marxism: that which is most one's own and most taken away,”²² then the conflation of rape and consensual sex seems all the more particularly ill-advised: wiping out all theft, through a more aggressive use of the criminal law, will not return their alienated work to laborers, and likewise, ending rape, through a more aggressive use of the criminal law, will not fundamentally return sex to women. Economic exploitation of laborers is not the result of a state's under-

enforcement of laws against theft, and likewise, sexual exploitation is not the result of the state's under-enforcement of laws against rape. By conflating the problem of exploitative and expropriated sexuality with the problem of rape, we engage not only in conceptual confusion, but strategic misdirection. Much of third wave feminism – the Take Back the Night rallies, self defense and anti-rape education initiatives on high school and college campuses – although arguably vital to ensuring women's safety on the street, might be over-sold as a means to ensuring women's equality, and an end to their sexual exploitation. We *do* need to address the conditions, states of mind, and social structures that so overwhelmingly prompt, suggest, or compel women to consent to sex they don't desire or want: that is the deepest, most vital, and profoundly historic claim at the heart of MacKinnon's re-construction of radical feminism. That sex, however, is not rape, and we don't come any closer to addressing it by calling it what it is not.

Let me turn to the very different – in fact, quite opposite – objections to liberal understandings of rape, and the role of consent within it, put forward more recently by queer theorists. The queer theoretic critique of the liberal reliance on consent as the demarcation between sex and rape is not that by so doing liberals under-state the amount of wrongful sex in the world. Rather, the worry is that by so doing, they over-state it: they are led to over-regulate, condemn, or punish what ought to be non-criminal and de-regulated sexual conduct. Thus, and in a modern echo of a very old argument – that rape is too easily alleged, too difficult to disprove -- queer theorist Janet Halley has argued over the last half decade that in a culture such as ours that is overtly hostile to sexual variation and unduly hostile to sex itself, claims of non-consensual sex – claims of rape – are often the product of a “sex panic,” rather than an actual assault.²³ The claim that

some particular sexual encounter is “rape” masks the likely truth of the matter, which is that the sex was in fact both desired by, but also abhorred by, the complainant. The “victim” calls the sex a “rape,” so as to negate any possible suggestion that she may have enjoyed it. Non-consent is an unreliable marker of rape from non-rape, then, simply because in a sex-phobic culture it is too often falsely claimed. Somewhat more broadly, Michel Foucault argued toward the end of his life, that even a child’s lack of consent to sex ought neither to be presumed, nor should an affirmative declaration of consent be even required, so long as the child does not actively resist the adult’s sexual advance.²⁴ Presumably, if even a *child’s* lack of express consent should not trigger an accusation of rape, the same should hold with respect to adult women. In the context of United States understandings of rape, then, it is not unfair to infer that Foucault implicitly advocated a return to a “perpetrator’s force plus victim-resistance” – rather than lack of consent – definition of actionable rape. Lastly and most sweepingly, Law Professor David Kennedy suggested in the wake of the Lewinsky-Clinton scandals from the 1990s that in the world of sexuality (perhaps unlike elsewhere) such liberal banalities as “consent,” choice, and autonomy are all just not as important as we have believed.²⁵ Non-consensual sex, in this telling, like sado-masochistic sex or sex within hierarchies, is simply another form of unconstrained sex, and unconstrained sex – whether non-consensual, sado-masochistic, hierarchic, or thoroughly vanilla -- is of such great hedonic value – that it simply should not be sacrificed to legal niceties. We should, in effect, quit fetishizing consent. Sex, and more particularly the sexualized, eroticized power that drives it, is good, not to be lightly tossed aside. We don’t need consent to police it.

To generalize: all three of these theorists share a deeply positive stance toward all forms of sexual expression, including those often abhorred as aberrant, those often mistakenly viewed as coercive or non-consensual, and those (such as sado-masochism) that overtly or covertly employ, require, celebrate, or revel in the hedonic uses of power, a deeply skeptical stance toward claims of both self-identified victims, and adults speaking on behalf of children, that the sex imposed by a stronger party on a weaker party was unwanted, unwelcome, undesired, and not enjoyed – and certainly that it should ever be presumed to be such, and a belief that the harms of truly non-consensual sex are not particularly grave. They all accordingly share a skeptical stance toward sexual regulation, and a skeptical stance toward “consent” as the marker of much of anything. Hot, transgressive sex, particularly sado-masochistic transgressive sex, has all the markings of non-consensuality. From there, it’s a short step to the conclusion that perhaps non-consensual sex itself is an over-rated harm, and a too-often prosecuted crime. This is the view I’m labeling, I hope not unfairly, as “queer theoretic.”

The queer theoretic critique of the role of consent as the marker of illegality has attracted some feminist response (although not much of a liberal one): to summarize what will no doubt be a growing cottage industry, the idea of a “sex panic” motivating false rape claims might be little but an urban myth, the proposed deregulation of sex crimes and the trivialization of sexual injury on which it rests threaten second and third wave feminist gains, and the denial of the importance of consent and choice to our assessment of the relative costs and benefits of laws governing sexuality simply ignores women’s and gay men’s experiences of rape, which have not been transgressively ecstatic.²⁶ Here again, though, I want to focus on a different problem with the queer critique, and one

which it shares with radical feminism, for all its dramatic and much proclaimed oppositional stance to that movement. The queer theoretic critique, like the feminist, *also* obscures the distinction between consensual and non-consensual sex, and like the radical feminist argument it attacks, it does so by ignoring the experience of victims, and focusing instead on the power inherent in both consensual and non-consensual sex. The difference between radical feminism and queer theory – and it is indeed a dramatic one -- is that queer theorists do this *not* toward the end of asserting the wrongness and ubiquity of oppressively sexualized power regardless of consent or its lack, but rather, toward the end of asserting, and then valorizing, the ubiquitous transgressiveness of sexualized power – and therefore its value. But the shared ground is considerable. Like feminists, the queer critic sees in all sex – both consensual and non-consensual -- the presence of a power imbalance – although this time to applaud the power imbalance rather than condemn it. As the radical feminist conflates consensual sex with sex infused with power, so as to condemn it all, so the queer theorist conflates non-consensual sex likewise with sex infused with power – so as to affirm it all.

This parallelism is much noted (and lauded) by queer theorists themselves.²⁷ Not so noted, though, is the flimsiness of the shared premise: just as there is nothing to sustain the radical feminist identification of a power imbalance between parties with a lack of consent, and therefore sex with rape, here likewise, there's nothing to sustain the lack of consent that might define rape with the power imbalance that might define hot and desired sex. Even if it is true, in other words, that sex (to many, obviously not all, but not an insignificant number either) is pleasurable, ecstatic and transgressive precisely because of the power – and power imbalances -- that infuse it, it doesn't follow that non-

consensuality likewise is inconsequential or pleasurable, just because it too involves an imbalance of power. A rape victim is not a bottom. The experiences aren't comparable. Sado-masochistic sex is not rape, regardless of the presence of handcuffs, rope, chains and the like in the former and the lack of all that in the latter. The affirmation of the transgressive pleasures of sado-masochism does not imply that we give rape a pass – unless we just blithely ignore these differences.

Put more generally, a benign, desired, and consensual power imbalance in a sexual relationship is not the same thing as the coercion in a non-consensual rape, anymore than a *non*-benign power imbalance between actors in a consensual but hierarchic relationship is coercive, and therefore rape. Neither hot, desired, transgressive sado-masochism, nor the dreary, dull, “compulsory heterosexuality” in hierarchic relationships, is rape. They aren't rape, furthermore, whether the rhetorical point of the conflation is to condemn it all as rape or praise it all as hot. The experience of rape is shot through with an unwilling invasion of the body, fear for one's own imminent death, and the pain of non-consensual physical touching; none of that is present in either consensual sado-masochistic or hierarchic sex whether hotly desired or not. One could conflate or confuse these drastically different subjective experiences only by ignoring, willfully or not, the experience of the rape victim. There's no good reason to do that, and plenty of good reasons not to.

At the heart of this odd convergence between feminism and queer theory, I believe, is not simply (as is claimed by queer theorists who have noted the same convergence) a shared objective view of the nature of sex, with then different affective stances toward it. Or – it is not only that. Rather, what radical feminists and queer

theorists share (or also share) is a philosophical premise: they both over-endow sexual power (and perhaps power itself) with hugely exaggerated normative significance, and for just that reason, they both downplay – or forthrightly deny -- the normative significance of subjective experiences of harm. Thus, radical feminists tend to see coercion wherever they see sexual power, and accordingly give it a negative valence, regardless of whether or not the sex it produces is consensual, regardless of whether or not it is accompanied by desire or pleasure, and regardless of whether its participants experience it as harmful or injurious. Consent, then, pales as a marker of coercion and autonomy, and hence of legality and illegality, and the subjective experience of harm or injury pales as the trigger of both legal intervention and justified communal concern. Sexual inequality, and hence unequal sexual power, and hence the expression of sexual power, is bad, *per se*, so to speak, with or without attendant harm. Queer theorists identify transgressive pleasure– almost definitionally -- with sexualized power, and therefore give it a positive valence -- with or without attendant harm, generally dismissed by queer theorists as either imagined or trivial. The experience of all that sexualized power as either welcome or not, desired or not, consensual or not, and harmful or not, is inconsequential. From either perspective, then, consent fades in significance as power looms: for radical feminists, sexual power is coercive with or without consent, and for queer theorists, sexual power is transgressive and pleasure-enhancing, with or without it. The consequence of all of this is a mis-description of the experience of rape and a misappraisal of the seriousness of its harm – as well as a misapprehension of its boundaries. Radical feminists tend to overstate the importance of rape and rape law in the perpetuation of patriarchal regimes, while queer theorists understate rape’s

destructive power in the individual lives of the women so victimized. Against the implications of these critiques, the now old-fashioned -- but nevertheless still quite liberal -- reliance, by liberals and liberal feminists, on consent as the demarcation of criminal and non-criminal sexual conduct looks, basically, right.

B. Consensual Sexual Harms

What doesn't look right, though, is what is too often inferred by that liberal reliance: that because consensual sex is and should be non-criminal, it is also, thereby, harmless, and should be shielded from all forms of legal or even communal regulation likewise. As a moment's reflection should show, that a transaction is consensual, and with no third party negative effects, doesn't imply that it is therefore harmless, or good for both parties, or in their interest, or good for the world, or, just good, period. The consensual transaction with no third party effects might well be *pareto superior*, or efficient, or wealth-maximizing (one can and normative legal economists often do typically define those terms in such a way as to make all of that tautologically true²⁸), but that doesn't make it good or harmless, in anything remotely resembling our ordinary usage of either word. At most, the consensuality of the transaction implies *only* that *if* the transaction is harmful, or bad, it is so for reasons other than the harmful or bad consequences that flow from the exercise of coercion or force.

In non-sexual contexts, this is not so difficult for most of us to see. An exchange of labor for wages -- or even, a gift of that labor for nothing in return -- if consensual, is not "slavery," so if it's harmful, it's harmful for reasons that are different from whatever it is that makes slavery bad. It doesn't follow from the fact that it's not slavery, that it is

therefore good. It might be a good deal or a bad one; it might be harmful, or harmless; if harmful, it might be trivially or profoundly so. That it is consensual doesn't tell us that it is harmless, or good, or beneficial. All we know from the fact that it is "consensual," is that *if* it is bad, it is bad for reasons other than coercion. It still might have been exploitative, alienating, or grossly unfair. The trade itself might be, for the laborer, only the next best thing to starvation – not good at all, and quite harmful indeed, but nevertheless better than the alternative. It might infect the laborer with cancer-causing asbestosis. It might be unsafe, endangering life and limb. It might be grueling and unpleasant and monotonous and alienating. The noise alone might be so loud and repetitive as to numb his brain and deafen him. It might be underpaid and sap too many hours, days, weeks or years of a man's life. It might require tedious motion for long hours at low wages. It might also be harmful to the laborer in more subtle ways. It might, for example, have the effect of legitimating in the minds of the worker and the employer both a larger injustice, as numerous critical legal scholars have maintained – it might make both feel that the world, and their place within it, is a moral and good place, and thus squelch both the sympathetic and reformist instincts of the more powerful and the organizing instincts of the less powerful.²⁹ If any of this is true, then even if the transaction is consensual, the consensual labor contract might well do more harm than good, might undermine progress, and so on. If consensual, it doesn't enslave anyone. If consensual, it might indeed create wealth -- we can define wealth in such a way that it does so by definition. But it isn't therefore good, and the world it leaves is not necessarily an improved one.

The same can be said of the sale of a thing for money. The consensual sale, for example, of a kidney for life saving purposes, or of skin to a skin graft bank for cosmetic purposes, or of eggs to an infertile couple for reproductive purposes, if consensual, are not thefts. The seller or donor is not the victim of a theft, and the buyer or donee has not perpetrated one. It doesn't follow, though, that the sale of body parts is good for the parties or for the rest of us. Such sales – or gifts -- might unduly alienate the seller from parts of his or her body that are and should remain so integral to personhood as to be inalienable. Alienating body parts for sale might constitute a serious injury to personal integrity. Likewise, the sale or purchase of a service – say a medical procedure -- may be consensual, but it clearly is not therefore good. Virtually every consensual surgery is by virtue of the consent therefore not a battery; it doesn't follow that it was medically indicated, that it was a wise decision, that it was well-performed, that it wasn't profoundly injurious, or that it was what the patient needed. Plenty of consensual surgeries are negligently performed, some fatally so.

Surely the same is true, roughly, of sex: that a sexual transaction is consensual and with no third party repercussions doesn't imply that it is harmless, or good for either party, or good for both of them, or good for the world. For various reasons, however, even the logical possibility of some of these harms is broadly denied, in law and in culture, and as I will argue in the next section, in queer and feminist legal theory likewise. But first, what are they? Consensual labor can be exploitative; consensual sales of that which should not be commodified might be alienating, and so on. What is the harm in consensual sex?

Let me begin my answer by highlighting an ambiguity, and hence a complexity, in the phrase “consensual sex,” and then distinguishing between two very different sorts of harm that consensual sex, depending on how the ambiguity is resolved, might carry. The ambiguity is this: “consensual sex” might be desired, or wanted (whether or not ultimately enjoyed, or pleasurable), or it might not be. Sometimes, maybe more often than not, maybe less often than not, women consent to sex that we want, or desire, and entirely for its own sake. We consent to sex, in other words, because we actively desire the sex. Sometimes, though, we consent to sex that we don’t want at all, and some women and girls, and some men and boys as well, might do that quite a bit.

Why would anyone do such a thing? Think first of married women. For years – centuries – married women have consented to sex that they do not want with their husbands out of either a sense of religious obligation, fear of their husbands’ violence, or from their understanding of the requirements of their wifely role. Until well into the twentieth century, in this country alone, a married woman’s consent was not required by law – forcible sex without consent between a man and his wife was not rape -- and her pleasure and desire likewise were either irrelevant or their importance minimized by social norm. It was her *availability* that was expected of her, and that defined her sexual being, not her rapturous participation. This state of affairs obviously did not turn on a dime when married men lost the legal power of chastisement, in the nineteenth century, or when they lost the legal immunity to rape prosecutions with the abolition of marital rape exemptions in the last quarter of the twentieth: as a casual perusal of advice columns and women’s magazines from the mid to late twentieth century will show (or just ask your mother), married women continued to consent to unwanted marital sex out of a

learned conviction that that their lack of desire evidenced their own problematic and neurotic frigidity, an alienation from their own suppressed desires, or just a selfish unwillingness to get along. What lack of sexual desire within marriage did *not* constitute, for married women, was a good reason to resist the imposition of invasive, undesired penetration of their bodies by their husbands. Married, mid-twentieth century women consented to undesired sex, in other words, well after they were formally and legally entitled to say “no,” in part because a chorus of advice from well meaning or not so well meaning friends, family members, marriage counselors, advice columnists and religious advisors urged them to do so.

What of unmarried women? Why might unmarried heterosexual women and girls consent to sex they don't want? Here's just a laundry list, speculative and anecdotal, of familiar enough reasons. Heterosexual women and girls, married or not, consent to a good bit of unwanted sex with men that they patently don't desire, from hook-ups to dates to boyfriends to co-habitators, to avoid a hassle or a foul mood the endurance of which wouldn't be worth the effort, to ensure their own or their children's financial security, to lessen the risk of future physical attacks, to garner their peers' approval, to win the approval of a high status man or boy, to earn a paycheck or a promotion or an undeserved A on a college paper, to feed a drug habit, to survive, or to smooth troubled domestic waters. Women and girls do so from motives of self-aggrandizement, from an instinct for survival, out of concern for their children, from simple altruism, friendship or love, or because they have been taught to do so. But whatever the reason, some women and girls have a good bit of sex a good bit of the time that they patently do not desire.

So, where's the harm in all of this? First, note a contrast: *wanted* consensual sex carries with it risks of harms that are fairly well understood, and for various reasons often exaggerated, in our law, in our theory, and in our culture -- we acknowledge them, we discuss them with our partners and with our children; we take precautions against them, and we worry a lot over whether or not to regulate against them. Lately, we regulate against them less and less, but we don't deny their existence. Fully desired consensual sex might be harmful for a good number of reasons. Wanted sex might lead to an unwanted pregnancy or to disease, and in either case it might be injurious or even life threatening. The pregnancy, if itself unwanted and carried to term, might curtail a girl's adolescence or young adulthood and lay the path for a difficult, quite possibly impoverished, limited, and pleasure-deprived mid-life. If engaged in with an inappropriate partner, such as a high school or college teacher or work supervisor, wanted sex might result in her expulsion and his dismissal, in which case it might curtail a promising academic career or remunerative employment. Or, it might have negative long-term consequences not so readily tallied: hot desired sex between a graduate student and professor might lock a girl into first an eroticized, but eventually a dreary domestic role. Rather than become a teacher, scholar, or employable adult citizen that graduate student who was so taken by her teacher might instead become a lover, wife, and mother -- which might be just great, or it might ultimately prove to be tedious, boring, unchallenging, and not hot at all. Sex between supervisors and workers or presidents and interns might be eventually harmful over the long haul for similar reasons, even if fully desired by both parties. If consensual, all of this ultimately harmful sex is clearly not rape. If the sex is welcome it is not sexual harassment either. It might nevertheless be

harmful, though, even though it is neither rape nor harassment. It might be harmful even though it is consensual, legal, non-tortious, non-harassing, and much desired by both parties.

Obviously, these harms might attach to unwanted sex likewise. Are there any distinctive harms, though, that attach to unwanted sex? Although it is hard to prove – and understudied – I believe that participation by many women and girls, in unwanted but consensual opposite-sex sex – particularly over time -- carries with it harms that are different than those that attend to wanted consensual sex, are often serious, and are not only unregulated by law, but also, largely *unrecognized*. Consider a relationship extending over weeks, months, years or decades – perhaps an adulthood -- in which a girl or woman repeatedly engages in unwanted and unpleasing sex. That sex is, first, physically invasive. It may also be emotionally abusive; repetitive sex wanted by one party, but undesired by the other, night after night for months, years or an entire adulthood, carries with it the message that her subjective hedonic life – her pleasures, pains, and interests -- are of no consequence. They don't figure into the equation of what to do. That is damaging to a person's self-sovereignty as well as one's sense of self-sovereignty: a woman who endures unpleasant invasive sex over time has implanted in her body, so to speak, the truth that her subjective pleasures and interests don't matter. Her will does – the sex is consensual – but her pleasures don't; they are not determinants of her body's actions. Rather, the subjective pleasures of another determine the use to which she puts her body.

Such sex is likely to be alienating, and in something like the original sense of that word: it alienates a girl or woman from her own desires and pleasures, and from that

sense of unified identity that comes from acting in the world on the basis of one's own desires and pleasures. She internalizes -- literally -- the message that her body is for the pleasure of another rather than herself -- a self image that will not serve her well in an individualistic society that presupposes actors who choose on the basis of self-regarding preferences. Put in less political terms, she trivializes her self, her injuries, and her importance in the world, when she accepts as an existential truth that her own pleasures and pains will not determine her choices or her actions. If the sex that results becomes a central, defining part of a way of life, the reason for her continued existence and for the material support of her partner -- it becomes a threat to the largeness of her self and ambitions. And -- if it becomes a central part of a life that ties her existence, survival, and hence her interests to that of another -- if unwanted sex is the *raison d'être* for a way of life that limits her mobility, her ambition, and the development of her talents or remunerative skills -- it constitutes a threat to her autonomy, likewise.

Of course, unwanted consensual sex is not *always* harmful in any of these ways. Obviously, we consent to do things we don't really want to do for all sorts of benign reasons. I see movies I don't want to see to please my children's or husband's tastes, rather than my own, to say nothing of the social events, household chores, and so on that I not so cheerfully tolerate. Likewise with sex: women and men both might consent to undesired sex on occasion -- even on many occasions -- for benign or harmless reasons. A woman might, on occasion, rather watch television, read, or sleep, but agree to sex she doesn't particularly desire, because she loves her partner, because she's accustomed to trade-offs of this sort that benefit both, because she doesn't feel it as a burden, because

she knows that her lack of desire may give way to desire, and so on. But that some undesired sex is harmless hardly means that it all is.

Is there a way to capture, descriptively, the sub-class of unwanted consensual sex that is harmful, from that which is not? I'm not sure, but a (highly contested) concept borrowed from the law regulating sexual harassment on the job and in schools may help. Unwanted sex or sexual advances at work or school are actionable harassment if they are not only unwanted, as I've used the term above, but if they are *unwelcome*.³⁰ It is not simply *all* sex, welcome or not, that occurs between persons differently situated on various hierarchies – presidents and interns, CEOs and secretaries, professors and students, generals and privates – that is actionable sexual harassment (although many people mistakenly believe it to be). Such sex between unequals at work or school, *if welcome*, may or may not violate a firm's or a school's anti-fraternization policies, but it is not sexual harassment, simply by virtue of the existence of a hierarchic relation. Rather – to constitute sexual harassment, the sex or the sexual advance must be unwelcome. The “unwelcomeness” requirement in law has proven difficult, and vague, and has elicited quite a bit of criticism.³¹ Nevertheless, it is unwelcome sex, sexual advances or sexual innuendo at work or school – not sex within hierarchy – that is the gravamen of a sexual harassment complaint.

My suggestion is that something like the “unwelcomeness” requirement borrowed from sex harassment law might also help us to see when unwanted sex might be harmful, and when not, apart from work or school. When we consent to undesired or unwanted sex that is nevertheless *welcome*, we typically don't suffer the harms attendant to unwanted consensual sex (we might, of course, suffer the harms that attend to all

consensual sex – disease, unwanted pregnancy, and so on). When we consent to unwanted sex for friendship, for love, as a favor, to cement trust, or to express gratitude – none of this is necessarily harmful. Unwanted sex to which we consent for these reasons might also be, and I suspect often is, welcome – we don't want it, but we welcome it anyway, as a part of a relationship that is in its whole constructive, healthy, and pleasing. But when undesired consensual sex is also unwelcome, it is likely to carry the harms to self-sovereignty spelled out above, and it is those harms which, I believe, are seriously under-reckoned by liberal valorizations of consensuality. We don't tend to notice them, we don't dwell on them, we certainly don't use law's regulatory apparatus so as to deter or compensate for them, we don't (much) make movies or write novels about them, and we don't warn our young sons and daughters against them. We also don't theorize much about them, even in those radical traditions where we might expect to. Unlike the role of the exploitative but consensual sale of labor or the alienating but consensual sale of body parts in various strands of neo-marxism, the unwanted but consensual sexual transaction plays a *de minimus* role in radical feminism, virtually no role in liberal feminism, and its coherence as well as its importance is quite aggressively denied in queer theory. Culturally, theoretically, and critically -- we don't much worry about all of this one way or the other.

C. Invisible Harms

The harms occasioned by wanted and welcome consensual sex are by no means invisible to either law or culture. Quite the contrary: until relatively recently they have long been the subject of intense legal regulation: unintended pregnancies outside of

marriage, the degradation of family relations that might attend adulterous sex, the various real or imagined harms attendant to underage sex, the damage to reputation and the institution of marriage that might be done by sex-for-pay, and of course, the moral corruption attendant to all forms of sexual deviance, have all been targeted by laws regulating and to some degree criminalizing fornication, adultery, abortion, contraception, prostitution, teenage sex, illegitimacy and sodomy. Much – most -- of this regulation is fading fast: some of it has been struck as unconstitutional. We are now aware not only of the risks attendant to wanted or welcome sex, but also the risks attendant to regulating in such a fashion as to minimize them. Nevertheless, even as we forego legal regulation as a way to combat them, we are more than aware of their existence. We weigh them in our own minds, we write novels and make movies about them, we study them endlessly, we rehearse them with our teenage children, and we create school curricula intended to drive the message home. Consensual, wanted, welcome sex, we all know, and we teach our children, comes with risks of quite serious harms, whether they are regulated by law or not: of disease, of unintended pregnancies, of unwanted abortions and unplanned births, of poverty, domestic misery, stunted or altogether missed childhoods and interrupted career paths. Pleasure has its traps, the familiar message goes, so watch out.

By contrast, and with the important exception of some of the harms attendant to unwelcome sex in the workplace and at school,³² the harms of *unwelcome* consensual sex outlined above are almost entirely invisible to law, and for the most part, always have been. We don't regulate against them, we don't attempt to deter them, and we don't compensate for them when they occur. This is not likely to change: the Supreme Court's

groundbreaking decision in *Lawrence v Texas* striking anti-sodomy laws, seemingly holds that virtually all consensual sex is now not only presumptively legal but constitutionally *protected* against regulation -- as Justice Scalia, perhaps a bit too bitterly, but correctly, complained.³³ There's no reason not to think that the constitutional protection now accorded the full-fledged right to consensual sex by *Lawrence* wouldn't include the unwelcome as well as the welcome kind, same-sex or otherwise. Now of course, law isn't the whole story, here or elsewhere. With the sexual liberation and women's liberation movements of the 1960s and 1970s (and with the dismantling of marital rape exemptions) social expectations regarding unwelcome sex have shifted somewhat: many women are now more likely to regard themselves and their sexual desires as of equal importance, and their sovereignty over their bodies as something not to be foresworn lightly in the absence of desire. Nevertheless, the cultural expectation that wives will submit to husbands' sexual advances and that girls and women outside of marriage will likewise comply, to some unknown degree remains in place for large swaths of the population. Law has done nothing to interrupt this expectation. These harms simply have no legal salience. Law's authorities -- whatever might be true of cultural authority -- are silent, with respect to them.

Why, though, have our critical scholarly movements -- liberal, feminist, and queer -- movements that do not, as a rule, make a habit of embracing the logic of Supreme Court decisions -- *also* been silent with respect to these legitimated harms? With respect to liberal legalism, I think the reasons are transparent: as noted at the outset, liberal-legalists, albeit for different reasons, tend to confer consensual transactions across the board -- economic, political, sexual -- with presumptive value that largely overshadows, if

not negates, the possibility that those transactions might also create harm. Liberal aversion to moralistic legislation that interferes with sexual choice is indeed considerably more intense, and sweeping, than liberal aversion to legislation that interferes with economic choice. But this too is not hard to explain. The closeted, privatized, indeed sequestered invisibility of these harms – in women’s bodies, inside homes, and inside intimate relationships – in spaces where privacy is revered, plays a heavy and explicit role, as does a host of cultural factors, not so explicitly acknowledged: the continuing effect of religious traditions that count female asceticism and sacrifice in all things sexual as both a virtue and a duty; the overhang of a fairly brutal family law history that negated or minimized even severe manifestations of these harms, and, we might surmise, a healthy dollop of men’s sexual self-interest. If we put all this together -- the liberal regard for individual choice, the presumptive nexus between consent and value central to economic forms of liberal legalism, the hard-fought-for constitutional and liberal regard for familial and sexual privacy that now surrounds both abortion decisions and same-sex sexual activity, a general hostility to paternalistic and morals legislation and a host of cultural factors to boot -- the liberal-legalist blindness to the harms of unwanted sex is not so surprising. If anything its over-determined.

The story is much more complicated, I think, with respect to radical legal scholarship, and particularly both radical feminism and queer theory. I’ll start with feminism. Radical feminism is hardly wedded to an excessively rosy eyed view of consensual sex, but nevertheless, it too has failed to attend to the distinctive harms of unwelcome consensual sex, outside of the school or workplace. I think there are two reasons. The first is quasi-logical, and suggested by the discussion above: radical

feminism has been committed for some time now to an extraordinarily broad view of coercion, by which whatever is demonstrably bad for women that seemingly follows from consensual choices women make within conditions of inequality, is viewed as necessarily coercive. Therefore, for radical feminists, the category of “consensual harms” is vaguely oxymoronic. If something is harmful, it must be the result of inequality, and if unequal, then coercive, and if coercive, then not consensual. The category of “consensual harms” disappears.

There is, though, a second and I think deeper reason for the invisibility of these harms in radical feminist scholarship and writing, which goes not to their skepticism regarding the viability of consent in conditions of inequality, but rather, to skepticism regarding the distinction between welcome and unwelcome sex. Central to radical feminism for at least the last thirty years has been what is now called a “critique of desire:” sexual desires across the board, according to radical feminist critique, are as socially constructed as anything could ever be.³⁴ Women’s sexual desires, furthermore, are particularly suspect: they are politically and socially constructed by pernicious and patriarchal forces, and are then aimed, like a weapon, against women’s interests, autonomy, dignity, and equality.³⁵ As a consequence, women often desire sex that is on its face debasing, humiliating, and submissive, and, whether known to the woman who harbors the desire or not, the sex so desired is injurious, unequal, and subordinating. This was – and is – an audacious claim, and its stark clarity in many ways accounts for the strength and staying power of the feminist movement it in part defined. The willingness to hold on to it in the wake of the total uproar it elicited from all corners, when it first hit

the public scene in the 1980s, is a lasting testament to the tenacity of those, but primarily Catherine MacKinnon, who held it.

Nevertheless, it might have been a misguided claim, and if it was, one consequence is that its target – women’s actual sexual desires, particularly for submissive or sado-masochistic sex – might have been ill-chosen. I’ve argued elsewhere that it was; that these desires are largely inconsequential and harmless. What I want to suggest here is that it also had an unfortunate and generally unnoticed implication: the radical feminist claim that women’s felt sexual desires are harmful to women’s interests and equality overshadows – and in many ways undercuts -- the claim (made here) that *undesired* sex might sometimes cause harms – precisely because it is undesired. The former claim, after all, rests on a thoroughgoing skepticism regarding the normative significance of desire-- if you desire something, nothing whatsoever follows about whether or not what you desire might be good for you – while the latter rests on an affirmation of desire, and a worry about the choices made against it. The problem with which feminism must centrally reckon, according to radical feminist argumentation, is *not* what is suggested here -- that women often consent to sex that they do not welcome, and that when they do so the sex is sometimes injurious – precisely because it is unwelcome. Rather, the problem is the desires women have, and with the sex women actually welcome – not that they have sex they don’t want. The deepest harm, so to speak, occasioned by patriarchy upon women’s psyches, according to radical feminism, is the contorted nature of female desire, not that we consent to sex against the counsel of our desire. The problem, in short, is our desires, not our choices. The relative invisibility of the harms done by

unwelcome sex, then, is one cost extracted by the theoretical insistence on the harmfulness of the objects of our felt desires.

And lastly, queer theory. Queer theorists likewise fail to see any harm in unwanted sex, and for a simple reason: they deny the existence of the category, or more precisely, they tend to regard it as a null set. As with purportedly non-consensual sex, purportedly unwanted sex is (often, or usually) not really unwanted at all, the claim that sex is unwanted is the result of a “sex panic,” or of undue repression, or displaced shame. Therefore, claims of unwelcome sex, in sexual harassment actions for example, should be viewed skeptically.³⁶ Sex is awfully desirable, apparently, even when it’s not desired: the claim that it isn’t desired is what should be viewed critically, not the sex itself. Whether or not sex is welcome can’t be read off of objective facts about the sex itself: welcome sex can be painful, humiliating, shameful, and of course transgressive. But nor can it be read off of victims’ protestations: victims just protest too much, as we used to say. The result is a highly circumscribed (if that) law of sexual harassment – and no room at all for a critique of sex that proceeds in the absence of desire, and of course no reason to abstain from sex on the basis of its lack.

Here again the unnoted parallelism, and not just the much noted contrast, with radical feminism is telling. Radical feminist and queer theoretic understandings of unwanted sex differ in almost all particulars, but they converge on this point: they both fail to lend normative significance to felt desires. Neither desire, for feminists, nor its lack, for queer theorists, is a trustworthy guide to the interests, the wellbeing, or simply the subjective pleasures and pains of the person who does or doesn’t hold it. For both, desire is not a meaningful distinction within the larger category of consensual sex, just as

consent itself is not a meaningful distinction within the larger category of sex. Thus, radical feminists are skeptical of the authenticity of women's sexual desires, and particularly of non-vanilla sexual desires the content of which seemingly run contrary to objective interest and substantive equality. That women have a desire for it has no normative significance: there is no harm in frustrating women's desires, and plenty of good reason to do so. Again, the problem with which feminism must contend is that women have desires that are contrary to their interest in equality, not that they choose to engage in sex they don't desire. Queer theorists, on the other hand, are skeptical of the authenticity of heterosexual women's felt or expressed *lack* of desire: a felt or proclaimed lack of desire that runs contrary to the transgressive pleasure to be had from sexual power is most likely inauthentic. The specific harm, then, that might follow from consenting to sex one does not desire or does not welcome, just fails to register.

So, note the common ground: Radical feminists critique desire, while queer theorists critique its lack – but both camps build political perspectives on the basis of their devaluation of the veracity and coherence of desire, and I would say more broadly of women's (and some men's) subjective experience. That skepticism, on both sides, carries with it pernicious consequences. Most obviously, but perhaps least consequentially, the radical feminist critique of desire targets sexual desires – particularly desires for sadomasochistic sex – that are largely harmless and politically meaningless. Second, though, and I think more important, the feminist critique of desire leads to a deeply regrettable blindness to a particular form of harm, of which radical feminists in particular ought to be acutely aware: harm caused by women's consent to sex that is in point of subjective fact unwelcome and contrary to what they desire. It may be that some

of our sexual desires are inauthentic in the way argued by radical feminists, and that, when acted upon, they are harmful to us. I don't mean to deny that; I just don't know. But whether our desires are inauthentic or not, many women, very often, choose to participate in consensual sex that they quite strongly do not welcome or desire. We ought to be concerned that the choice to do so might itself be harmful precisely because it is so alienating – precisely because it is contrary to desire. We can't even consider the possibility, if we are mightily distracted by the claim that it is the desires themselves that are suspect.

Queer theorists, in what can charitably be described as an over-correction, have put forward what we could call, following Gowdri Ramadachian's helpful suggestion,³⁷ a "critique of the lack of desire:" when women (or men) claim not to want or welcome sex, we should be skeptical, particularly where those claims in turn are the motivators of claims of rape or sexual harassment. Sexual desire, by the teachings of queer theory, is what is ubiquitous, the claim that one does not feel it is just not believable. We have had too long a history, in this country and virtually all others, of rampant and often vicious denials of sexual desire to simply accept such protestations. This skepticism of course is not pulled from thin air: indeed there are false rape claims, as there are false claims of all sorts. But not much of interest follows from that. There's no evidence that those false claims result from ambiguously felt *desire*, or that the legal system does a worse job here than elsewhere of ferreting them out. When women express a lack of desire for sex, there's no good reason to assume that expression is a panicked response to repressed sexual desire. If the sex is imposed anyway, in the face of her lack of consent, it's a rape, and if provable, ought to be prosecuted as such. If she consents in the absence of desire,

she may have done so for good reason or ill – the unwanted sex might be welcome or not. If it's welcome, more power to both of them. If not -- we should treat that as the canary in the mine it surely is. If unwelcome sex is a constant in a woman's life -- for weeks, months, years, and decades -- it is likely to be alienating and oppressive – in a word, injurious. We might decide for all sorts of reasons that we cannot imagine a legal response to such a private injury. It doesn't follow though that we should deny or ignore it.

D. Conclusion

Liberal, feminist and queer theoretic arguments for failing to attend to the harms of consensual but unwelcome sex are unconvincing. Liberals have been rightly faulted for half a century now for casting a veneer of legitimacy around consensual states of affairs in non-sexual spheres of life – both political and economic. The consent of the governed can be produced by pernicious forces and with disastrous consequences, the consent of buyers of goods or sellers of labor can likewise. Consensual transactions can unduly commodify that which should not be bought and sold, and can worsen rather than enrich our relations with our selves, each other and the natural planet we inhabit. Surely, the same is true in our sexual lives: the sex to which we consent, when it is contrary to our desires, and when within the context of relationships that are less than welcome in our lives, can alienate us from our bodies, from our subjective pains and pleasures, from our needs, our interests, our true preferences, our histories and our futures. Unwelcome sex can carry all of these harms, yet be fully consensual. We don't see this, only if we mistakenly accept “consent” as a reliable marker for wellbeing. Consent may well be a

good marker for the divide between the criminal and non-criminal, in sex as elsewhere; I believe it is. It's not a good proxy for wellbeing. We should not treat it as such.

Feminism and queer theory both, no less than liberalism, have also over-relied on proxies for well being – but different proxies. For radical feminists, the proxy is the power imbalance. Power imbalances poison all transactions which occur within them – desired and undesired both – so the distinctiveness of harms caused by undesired consensual transactions gets subsumed within a larger problem: desires that run contrary to interest. Thus, both desired and undesired consensual sex (as well as consensual and nonconsensual sex) is damned by the imbalance that underscores it all. Inequality becomes the proxy for harm. For queer theorists, power, and particularly sexual power, is the proxy for pleasure and value both. The consequence is a pervasive skepticism regarding the veracity and even the coherence of claims of sexual aggression of all sorts. The result is a complacency at best and complicity at worst with a good deal of sexual violence and oppression both.

We could reverse this tide in one fell swoop by simply honoring the authenticity of women's felt desires, and their lack. And, we could do so while consistently maintaining an openly critical stance toward the possibility that the sexual choices women make, when those choices are contrary to felt desires, are harmful. Thus, when consensual sex is fully desired, there's not much reason to question the authenticity of the desire or the value to its participants, no matter how non-vanilla the flavor. We could, and I think should, abandon the "critique of desire" without losing any of the quite real strengths of radical feminism. On the other hand, when conditions prompt women to consent to sex that they do not desire, there is no reason not to name and contend with the

harms to integrity and self sovereignty to which those choices, and that consensual sex, might lead. We don't need to construct fanciful explanations for that lack. We could drop the critique of the "lack of desire," without losing what might be an important insight at the heart of so much queer theory: that power imbalances in sexual acts are exciting, pleasurable, and largely benign. We should drop, in sum, both the critique of desire developed by the radical feminism of the 1980s, and the critique of its lack developed by queer theory of the last decade. If we do so – and maybe only if we do so - - we might then bring into focus what is otherwise thoroughly obscured by both, and that is the harms occasioned by the unwelcome sex to which women consent, in the absence of any desire of their own. We should at least open an inquiry into the value of the unwanted sex to which we consent, as well as the harms occasioned by the rapes to which we decidedly don't.

¹ See, e.g., Stephen Shulholfer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, (Cambridge, MA: Harvard University Press, 1998); Susan Estridge, *Real Rape*, (Cambridge, MA: Harvard University Press, 1987); Donald Dripps, "Beyond Rape: An Essay on the Difference Between The Presence of Force and the Absence of Consent," *Columbia Law Review* 92, 1780-1806 (1992); Michelle Anderson, "Negotiating Sex," *Southern California Law Review* 78, 1401-1438 (2005); "What Is Rape?," *St. John's Law Review* 79, 625-644 (2005) "Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates," *Hastings Law Journal* 54, 1464-1557 (2003).

The liberal claim that consent should define the boundary between sex that is a crime (either rape or something less serious) and sex that is not, remains a reform proposal. It still does not accurately reflect virtually any state's law – although it is widely and correctly understood as the sensible endpoint of the overall direction of the changes that have occurred in rape law over the last couple of centuries. It has also attracted a substantial body of internal friendly critical attention from legal reformers, legal scholars, and moral and legal philosophers, much of which is concerned with boundary issues: is sex consensual when it is the product of various sorts of promises,

threats, or misrepresentations, is it consensual if induced by fear not of imminent bodily harm but eventual bodily harm, how much duress is required to render consent only apparent rather than real, should non-consensual sex with unconscious or for some other reason incapacitated victims be criminalized to the same degree, if there is no evidence of physical injury, and so on. These issues are all important, and as Alan Wertheimer correctly notes, their resolution requires real-world deliberation and moral reasoning, and not simply elaboration of various possible definitions of consent. Alan Wertheimer, "Consent and Sexual Relations," in *The Philosophy of Sex*, edited by Alan Soble, (Maryland: Rowman and Littlefield 2002). They can also, I believe, be resolved consistently with an insistence on lack of consent as the primary marker of criminal sexual behavior. They are not, however, the focus of this paper.

² John Stuart Mill, *The Subjection of Women*, edited by Sue Mansfield, (Arlington Heights, Ill.: AHM Publishing 1980). For an excellent history of feminist political reform movements on issues pertaining to sexual violence within marriage during the Victorian era, see Mary Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895* (Princeton University Press, 1989).

³ See Shulhofer, note ___ supra, Anderson, note ___ supra, Estridge, note ___ supra.

⁴ See Nadine Strossman, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*, (NYU Press, 2000), see also Nan D. Hunter and Sylvia Law, "Brief Amici Curiae of Feminist Anti-Censorship Task Force, et al. in *American Booksellers Association v. Hudnut*," *University Michigan Journal of Law Reform* 21, 69-136 (1987-1988).

⁵ See Barry Lynn, "Civil Rights' Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation," *Harvard Civil Rights-Civil Liberties Law Review* 21, 27-125 (1986).

⁶ See Igor Primoratz, "What's Wrong With Prostitution," in *The Philosophy of Sex*, 451-73; Lars Ericsson, "Charges Against Prostitution: An Attempt at a Philosophical Assessment," *Ethics* 90, 335-66 (1980).

⁷ See David A. Richards, *Women, Gays and the Constitution: The Grounds for Feminism and Gay Rights in Culture and Law*, (University of Chicago Press 1998).

⁸ For a discussion and critique of these liberal arguments for same sex marriage and against sodomy laws, see generally Chai R. Feldblum, "Gay is Good: The Moral Case for Marriage Equality and More," *Yale Journal of Law & Feminism* 17, 139-184 (2005).

⁹ For a history see David Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*, (Macmillan, 1994; updated paperback edition, University of California Press, 1998).

¹⁰ See Eugene Volokh, "How Harassment Law Restricts Free Speech," *Rutgers Law Journal* 47, 561 (1995); "Freedom of Speech and Workplace Harassment," *UCLA Law Review* 39, 1791-1872 (1992), "Workplace Harassment and the First Amendment, I," *Encyclopedia of the U.S. Constitution*, edited by Leonard Levy & Kenneth Karst (New York: Macmillan Reference, 2000), 2925.

¹¹ See e.g., Randy Barnett, "Justice Kennedy's Libertarian Revolution: *Lawrence v. Texas*," *Cato Supreme Court Review 2002-2003*, 21-41 (2003); Barnett and Douglas Rasmussen, "The Right to Liberty in a Good Society" in "Symposium on the Constitution and the Good Society," *Fordham Law Review* 69, 1603-1615 (2001).

¹² See generally, Tom Grey, "Eros, Civilization, and the Burger Court," *Law and Contemporary Problems* 43:3, 83-100 (1980); Jed Rubenfeld, "The Right of Privacy," *Harvard Law Review*, 102, 737-807 (1989).

¹³ Richard Posner, *Sex and Reason*, (Cambridge, MA: Harvard University Press, 1992) at 388, and Posner, *Economics of Justice*, (Cambridge, MA: Harvard University Press, 1981) at 60-61.

¹⁴ Strossman, note ___supra, see also Carole S. Vance, ed., *Pleasure and Danger: Exploring Female Sexuality*, (1st ed., Boston and London: Routledge & Kegan Paul, 1984), (2nd ed., with new introduction, London: Pandora, 1992, 1994).

¹⁵ See e.g., Catherine MacKinnon, *Feminism Unmodified*, (Cambridge, MA: Harvard University Press, 1987), 81-93; Catherine MacKinnon, *Toward a Feminist Theory of the State*, (Cambridge, MA: Harvard University Press, 1989), 146, 174; Robin Morgan, *Going Too Far: The Personal Chronicle of a Feminist*, (New York: Random House, 1977), 165-66 ("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 didn'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). See generally Carole Pateman, "Sex and Power" [Review of *Feminism Unmodified* by Catharine A. MacKinnon], *Ethics* 100:2, 398-407 (1990), and "Women and Consent," *Political Theory* 8:2, 149-68 (1980). Reprinted in *The Disorder of Women: Democracy, Feminism, and Political Theory*, (Cambridge University Press, 1989), 71-89.

¹⁶ Catherine MacKinnon, *Toward a Feminist Theory of the State*, note ___ supra, at 1.

¹⁷ See e.g., Kathy Abrams, "Sex Wars Redux: Agency and Coercion in Feminist Legal Theory," *Columbia Law Review* 95, 304-376 (1995).

¹⁸ See Robin West, “Law’s Nobility,” *Yale Journal of Law and Feminism* 17, 385-458 (2005).

¹⁹ Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *Blood, Bread and Poetry*, (New York: W.W. Norton, 1986).

²⁰ See Catharine A. MacKinnon, “Pornography Left and Right,” *Harvard Civil Rights-Civil Liberties Law Review* 30, 143–168 at 143-147 (1995).

²¹ See, e.g., Catharine A. MacKinnon, *Feminism Unmodified*, note ____ supra, at 54 (arguing that it is difficult to sustain the customary distinctions between sex and rape); MacKinnon, *Toward a Feminist Theory of the State*, note ____ supra, at 146.

²² Catherine MacKinnon, *Toward a Feminist Theory of the State*, note ____ supra, at 1.

²³ Janet Halley, “Sexuality Harassment,” in *Directions in Sexual Harassment Law*, edited by Catharine MacKinnon and Reva Siegel, (New Haven: Yale University Press, 2003), 182, 193-98. See also Janet Halley (writing under the name Ian Halley), “Queer Theory by Men,” *Duke Journal of Gender Law and Policy* 11, 7-52 (2004); Halley, “The Politics of Injury: A Review of Robin West’s Caring for Justice,” *Unbound* 1, 65-92 (2005).

²⁴ Michel Foucault, *Politics, Philosophy, Culture, Interviews and Other Writings, 1977-84*, edited by Lawrence D. Kritzman, (New York: Routledge 1988) 204-05.

²⁵ David Kennedy, “The Spectacle and the Libertine,” in *Aftermath: The Clinton Impeachment and the Presidency in the Age of Political Spectacle*, edited by Leonard V. Kaplan and Beverly I. Moran, (NYU Press 2001), 279, 289.

²⁶ I have addressed these problems and others with queer theory elsewhere. See Robin West, “Desperately Seeking a Moralist,” *Harvard Journal of Law & Gender* 29, 1-50 (2006). For a recent and related critique of queer theory on the grounds that it embraces a sexualist ideology that privileges the valorization of sex over life itself, and the tragic repercussions of that ideology during the AIDS crisis of the 1980s, see Marc Spindelman, (forthcoming).

²⁷ *Id.* at 37-38; Bersani, “Is the Rectum a Grave,” *AIDS: Cultural Analysis/Cultural Activism*, 43, Winter, (1987), 197-222 at 213-215.

²⁸ Richard Posner, *Economics of Justice*, note ____ supra, 60-61.

²⁹ See the essays collected in *The Politics of Law: A Progressive Critique*, edited by David Kairys, (New York: Basic Books, 1998), Roberto Unger’s classic essay, “The Critical Legal Studies Movement,” *Harvard Law Review* 96, 561 (1983) and Robert Gordon, “Unfreezing Legal Reality: Critical Approaches to Law,” *Florida State University Law Review* 15, 195-220 (1987) for strong examples of this critical point.

³⁰ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

³¹ See Louise Fitzgerald, “Who Says? Legal and Psychological Constructions of Women’s Resistance to Sexual Harassment,” and Kathryn Abrams, “Subordination and Agency in Sexual Harassment Law,” and Jane Larson, “Sexual Labor,” in *New Directions in Sexual Harassment Law*, note ____ supra, 94-137.

³² See generally, Catherine MacKinnon, *The Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

³³ For a related critique of *Lawrence*, see Marc Spindelman, “Surviving *Lawrence v. Texas*,” *Michigan Law Review* 102, 1615-1667 (2004).

³⁴ MacKinnon, *Feminism Unmodified*, note ____ supra, at 54; *Toward a Feminist Theory of the State*, note ____ supra, at 129-31.

³⁵ *Id.*

³⁶ Halley, “Sexuality Harassment,” note ____ supra, at 197.

³⁷ In conversation, in a workshop at Georgetown Law Center.