

## Sexual Consent: As an Ethic, as a Model

The prominence of consent as a significant concept in American youth culture has exploded in the last two decades, and most of the ensuing discussion has to do with sex. A sexual ethic focusing on consent is broadcast by educators and columnists, and it is heavily rebroadcast by young people themselves, both in their ideological speech and in ways that are better described as flirting or signaling. In all of these areas, consent is referenced very directly; moreover, it seems commonly taken for granted in youth culture that the term “consent” implies or defaults to “sexual consent.”

This is a relatively new phenomenon. In the 19<sup>th</sup> century, consent was almost an absent concept in sexual ethics, whose framing vocabulary was based on property rights. Rape (or “seduction”) was acknowledged, but primarily framed as a species of trespass or vandalism with a male victim: the father or husband of the woman. This understanding of rape also differed in scope from our modern position: it could include apparently consensual sex outside of marriage or color lines, and it did *not* include coercive sex within marriage. The first framing of *marital* rape in the US would not occur until 1886, in the infamous Markland Letter, published by the anarchist journal *Lucifer*.

With some radical exceptions, 19th-century feminists tolerated this property ethic of sexuality in order to get more leverage on other campaigns, such as suffrage, economic rights, and temperance. By the middle of the 20<sup>th</sup> century, those battles were largely over: suffrage and the core battles for economic rights had been won, temperance had been lost. Feminism began to focus increasingly on specifically sexual topics, and these met in an uneasy confluence with a sexual liberation movement that was arguably indifferent or hostile to feminism *per se*. Between 1968 and 1976, the ratio of divorce to marriage in the US doubled; whether this was a cause or effect of the sexual revolution, it became untenable for Americans to discuss sexual ethics primarily through the lens of marriage contracts. The result was a shift to what I would term a virtue or values ethic of sexuality.

The values ethic emphasized that sexuality was virtuous within healthy, committed relationships, a category that for this purpose replaced, and substantially overlapped with, traditional marriages. This allowed for the inclusion of unmarried couples (eventually including gays and lesbians), while simultaneously excluding abusive relationships (even within marriage). The values ethic tended to denigrate “casual sex”, prostitution, and sexual deviance. In contrast, the property ethic had implicitly sanctioned deviant heterosexual practices within marriage as the husband's prerogative, and quietly defended prostitution as well. Within sex education, a recurring theme of the virtue ethic was that a series of monogamous relationships were healthy, but young people should “wait until they were ready”.

The values ethic received a boost in the 1980s from the AIDS epidemic and queer liberation. AIDS pressured sex educators towards a renewed focus on monogamy, heterosexuality, and sexual norms. Meanwhile, after some tactical debate in the 1970s, advocates of queer liberation united on a rhetoric that emphasized that all sexual orientations were equally virtuous precisely because they were *not* choices. Social conservatives responded by denigrating queerness as a mere “lifestyle choice”, and for a generation of sexual progressives, the very concept of “choice” in sexuality became tainted with a conservative agenda.

Yet by the early 1990s, the values ethic was being strongly challenged by a consent ethic that has, by the cusp of 2013, become mainstream in large swaths of the culture. The consent ethic prioritizes consent as the primary or even sole ethical touchstone for sexuality. It immediately refers all critiques of sexual behavior to a question of consent, whether the behavior is gay or lesbian, casual sex, deviant sex, or even (especially?) all three at once. It is typical of this ethic that extremely deviant acts are gleefully validated as being consensual, and thus ethically co-equal with the most chaste and traditional forms of sexual expression. Writers like Dan Savage, Natalie Krinsky, and the hundreds of pundits in what Alex DiBranco calls “the student sex column movement” have largely adopted consent

as their ethical standard, a fact that Rick Santorum, among others, has vocally deplored.

This is new. Today, for instance, it is not uncommon to see posters, clothing, accessories, and even condoms emblazoned with pithy slogans about consent; it's also not uncommon to find young people arguing about whether or not this gimmickry dilutes the notion of consent as an ethical imperative. Recently, culture jammers from Baltimore created a fake line of Victoria's Secret underwear with the phrase "Got Consent?" on them, which gained widespread notoriety on the internet. Nothing like this was happening in 1985; it would have been unthinkable in 1955, let alone 1885.

I believe that consent is a better model for framing sexual ethics than either virtue or property rights. Yet I am not sure that reverse is true: sexuality may not be an especially good metaphoric reference for all other forms of consent. Before I discuss the ramifications of this, though, I want to establish that my anecdotal perceptions have some basis in quantifiable fact.

## Consent and the Young

My overview of the participants for an online survey on consent in 2009 suggested that the three youngest age categories of respondents were substantially more likely to say that consent was important "to their outlook on the world". The youngest age category (15-17), were apt to list consent as "the most important part of their outlook on the world".

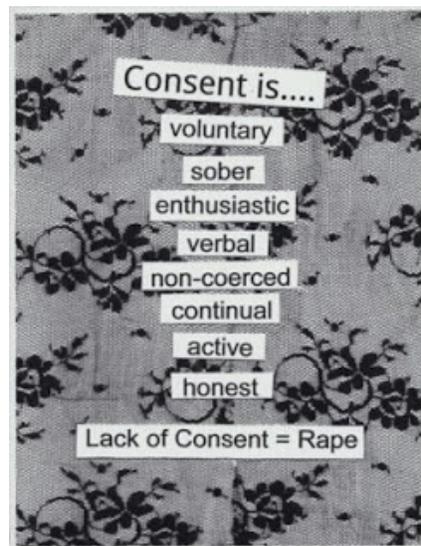
Also in 2009, I took two broadcast samples of consent tags, one using Google Adwords and one using Technorati. The mechanics of these sources make them both reasonably good proxies for the English-speaking internet as a whole. To these I want to add a third sample, taken from the tags on the microblogging platform Tumblr. According to the demographic data from [Quantcast](#), Tumblr users tend to skew much younger than internet users in general: the 18-24 year old age bracket is overrepresented, 223% of background. The older age brackets are also significantly under-represented: this is a young crowd. Tumblr users are substantially more likely to be non-white and somewhat more likely to be female than the internet as a whole. Since those categories are both underrepresented in most web-based research, this is helpfully corrective.

I looked at 250 Tumblr posts tagged "consent". Of these, 91% were sexual in nature. Sex features significantly in the two previous samples, as well, but not to nearly such a degree. For instance, in the Technorati sample of blog entries tagged "consent", the secondary tag "sex" was only as common as "taxes". Even combining the count of blogs tagged "sex", "rape", "pregnancy", and "BDSM" gives a smaller figure than either "law", "medicine", or "politics", independently.

The specific sexual focus is different as well. In the previous two studies, a large portion of the sexual topics consisted of age-of-consent issues. In the Tumblr sample, only 2% of the posts reference the age of consent. The overwhelming majority of the sex-related consent posts on Tumblr have to do with rape, harassment, depictions of sexual consent in the media, and BDSM.

In both previous samples, a substantial weight was placed on medical and legal issues (aside from sex), and in the case of AdWords, political concepts of consent made a fairly strong appearance as well. These patterns are much more muted on Tumblr: medical consent makes up only 1.2% the total (all of it sexual in nature); political consent is only 0.8%, roughly a tenth of its prevalence in AdWords. Legal matters pertaining to consent *as such* don't appear at all in the Tumblr sample.

Finally, many of the discussions of sexual consent on Tumblr only reference sex obliquely: in several cases, sex is only specifically mentioned in the tags. For instance, in the graphic post below, only the last word necessitates that the topic in question is *sexual* consent. Yet in the milieu of Tumblr—and, I am arguing, contemporary American youth culture in general—sexuality is assumed as the default arena for any discussion of consent.



This leads me to the uncontroversial conclusion that young people are especially interested in sex. Moreover, they are relatively unlikely (compared to older samples) to discuss medical, legal, or political formulations of consent that aren't *also* sexual in nature. Nevertheless, within this discourse there is a frequent suggestion that we create a “culture of consent” that goes beyond sex. I have run across efforts to extend insight specifically from a sexual consent ethic to genres such as parenting, education, economics, and even website design. I think this is a wonderfully auspicious concern, but it is also heavily burdened by inconsistencies.

### “Enthusiasm” and Sexual Exceptionalism

The requirement that consent be *enthusiastic*, for starters, is in apparent contrast to the presentation of consent in many common situations. Surgical patients are generally not enthusiastic about signing a waiver, and voters can be notoriously unenthusiastic about casting their ballot. Market transactions in general are not especially enthusiastic, and may even be downright hostile. Few people scream “*yes, god, yes, do it again!*” when they click-verify the licensing on a software download. We might go further and point out that many economic transactions are not active, verbal, or sober, either. Should a culture of consent, in that case, prevent someone from buying dessert because she seems ambivalent about it, or has had a glass of wine with dinner?

The most common rebuttal to this line of thinking is that sex is a special category, and the breakdown of consent in sex—rape—is exceptionally horrible. Indeed, as a metaphor, rape is superlative, generally trumping even murder as the *worst possible* form of coercion. But it is precisely this fact that makes sexual consent a rather extraordinary candidate for the prototype of consent in general.

For instance, there is a somewhat bizarre but still frequently-heard argument about initiating sex with a sleeping partner: a scenario that would only even occur within the preoccupations of a consent ethic. A great many sources on the internet (including sex-education website and sexual politics blogs) assert that this constitutes rape, *even if* the sleeper had previously agreed to it. The logic here is that an unconscious person is by definition not enthusiastic, or even aware of what is going on. But beyond the logic, the *pathos* of this argument is its nightmare narrative of violation while unable to understand or resist what's happening. That is a viscerally compelling image. Yet if we substitute some more mundane pre-arranged activity, this argument seems to fall apart completely. It would preclude, for instance,

getting dental or medical work while under sedation; arranging financial transactions that take effect while you are likely to be asleep; or even asking to be woken up at a specified time.

I am quite aware that comparing the rape of an unconscious person to asking a hotel clerk for a wake-up call is an outrage. Indeed, there is a fairly common rhetorical eddy-current in which someone describes the wait at the DMV or some such trivia by using rape imagery, and the conversation is immediately derailed as people argue about the propriety of the metaphor, and whether or not the speaker should be banned from the forum in question. So we have a remarkable problem: within this (currently pervasive) discourse on consent, the prototypical example of consent is so exceptional that we find it unacceptably offensive to draw parallels from it. It is as if we were proposing to use cannibalism as our reference metaphor for all conversations about diet and nutrition, in a community where many people had been victims of cannibal attacks.

In fact, the inconsistency runs even deeper. We could argue that high-octane displays of enthusiasm are appropriate to sex but irrelevant in the market, but those are not strictly separate categories. The discussion of consent in today's youth culture overlaps very heavily with the tenets of sex-positive feminism. In that sphere, it is commonly argued that sex work (by women, for our purposes) can potentially be understood as a legitimate economic choice made by the women involved. This argument, which is one of the major points of contention between second- and third-wave feminism, specifically insists that sex is *not* a privileged category: that prostitution is a service industry like any other. But again, most economic transactions are not “enthusiastic” in any meaningful sense, and it would be especially hard to define what enthusiasm means in an arena where false enthusiasm is more or less the product.

Positive discussions of sex work often lapse into a politico-pornographic fantasy that has been an easy target for paternalistic anti-prostitution activists. At best, they wind up couched in such a conditional tone that the arguments seem to refer to a non-existent group of courtesans in some distant Utopia, in the same way that people of a certain political complexion become agitated about the possible future oppression of androids. The real-world defense of sex work (especially by sex workers themselves) has to acknowledge that it is no more “enthusiastic” than labor in any other industry, and quite possibly less so than most. It's also probably less sober than many industries, and it plays host to almost every type of coercive or persuasive tactic known to man.

On the one hand, then, we have an argument that a middle-class white student at an Ivy-league college *cannot be said to have consented* to sex if she seems slightly unenthusiastic and her date is ignoring the ambivalence of her body language. On the other hand, we have an argument that an eighteen-year-old homeless black prostitute *has the agency to consent* to sex, even though she's silent, struggling with drug addiction and her client is belligerent and threatening. While there may be ways to integrate these two sentiments, some of the obvious ones are quite troubling.

A somewhat more sophisticated version of the enthusiasm requirement focuses on the question of *effort*. Nina Philadelphoff-Puren uses the term “work of refusal” for this, and enthusiasm might be seen as one form of a “work of acceptance”. From that point of view, we could imagine that market participants (including sex workers) are demonstrating their acceptance by some effort other than emotive enthusiasm. When I wish to purchase gasoline, for instance, I go through the fairly considerable effort of driving to the station, pumping the gas, and physically handing my money over to the cashier. My acceptance of the transaction is communicated by this effort, even if I am visibly (or verbally) unhappy about the price. The pattern of responses in my previous survey strongly suggested that people associate effort with consent: for instance, immigrants to a country and active participants in the political process are strongly viewed as having more thoroughly consented to government policies than non-immigrants and non-participants. This focus on effort raises a new set of problems, which I will not discuss here, but it seems a step in the direction of a more global praxis for consent.

## Committed Consent

The most opaque word in the graphic above is “continuous”. In the local jargon, “continuous” means that consent is continually being renegotiated—or at least is available for renegotiation—rather than continuously assumed to be present. We can contrast this with the idea of *committed* consent, in which one or both parties agree in advance to substantially restrict their ability to renegotiate an arrangement during a given span of time. Committed consent is formalized in many ways (oaths, marriages, contract law) and is implicit in many informal social arrangements, starting with such simple things as a shared plan of action.

In 1993, Antioch enacted its soon-famous Sexual Offense Prevention Policy, suggesting that verbal consent must be “reiterated for every new level of sexual behavior.” While this was not, I think, the most interesting element of the document, it briefly became a nation-wide obsession, inviting a fantasy of young lovers talking through their tryst like lawyers interrogating a witness: “*Can I kiss you? Can I touch your left nipple? Can I touch your penis?...*” On the Antioch campus itself, during its heyday, the joke-pickup-line was “*Do you want to enact the Policy?*” And yet this was a potent cultural tonic. Progressive sex educators in the 1990s were not apt to speak of sexual consent in the black-and-white terms of contract law, but they certainly suggested that the required “work of refusal” for sexual consent became Sisyphean once your clothes came off, if not sooner. Almost 20 years later, for a generation whose parents could have been enacting it, the principle underlying the Antioch policy seems fairly mainstream. When I talk with teenagers, they are almost universally adamant that sexual activities can be called off by either party at any point.

And yet.

Beyond the potential for body horror, one of the key ways that sex differs from most genres of human interaction is that it *can* be treated in this moment-to-moment, uncommitted fashion. To put this in bloodless economic terms, sex can be an example of mutual benefit without significant investment at risk. Now, obviously, this is not always the case: rape apologists have produced an endless list of the things men do that cause women to owe them sex, ostensibly as a return on some investment they've made. Not all these arguments are entirely spurious. To take the most direct instance, if a prostitute has been paid in advance, it is hard for those who accept prostitution as a legitimate industry to avoid the conclusion that she owes the client either sex or a refund. Cynicism, misogyny, or both can stretch that argument quite far from the red light district. Yet the fact remains that sex *can* be treated as an act of shared, playful, creativity. It *can* be treated as a mutual gift freely given, rather than a purchased service or a return on an investment. And there are two things to note about sex in this moment-to-moment, “playful” format.

First, it is associated mainly with committed lovers, since the act of finding new sex partners often entails substantial material and/or emotional investment at risk. Thus the playful-sharing mode of sexuality inherits some of the righteousness established by virtue-ethic and property-ethic views of sex. It stands in contrast to sex that is in one way or another purchased, persuaded, or negotiated. Second, this playful-sharing quality makes such sex a fairly unusual form of human interaction. The comparisons, often made in classical anarchistic literature, are to children's play, or to social interactions among friends or family members. But once again, there is little in the economic or political spheres that resembles this even remotely. Sex can be a Nash equilibrium, but most of economic reality makes do with Pareto equilibria. Most projects of any importance, from arranging a dinner party to building a highway, require people to commit in advance to doing things that they may not be enthusiastic about at the time. When such agreements are formalized, they usually include specific contingencies for “buying out” of one's commitments. Notably, even at-will employment (which is ostensibly consented to on an ecstatic, moment-to-moment basis) has informal, and often formal, buy-out mechanisms.

As a case in point, I want to consider a comparison that I've seen in a fairly progressive advice

column. A man had asked a woman on an overnight date and booked a modestly expensive room at a bed and breakfast. At the last minute, the woman changed her mind and sent her regrets. His question was whether or not it would be proper to ask her for half the money he had put up for the reservation: the columnist answered that yes, it was, and that the woman should have offered that compensation with her regrets. We can translate this, I think, as implying that since she had verbally committed to a certain course of action, she was thus responsible for mitigating the problems that would ensue when she broke that commitment.

Fine and good. But we can imagine a scenario in which the woman's ambivalence happened somewhat later, and she arrives at the B&B, they have dinner, but she then tells him she isn't going to have sex with him. At that point, any contemporary advice columnist would say that she owed him nothing whatsoever. Although she may have committed to having sex (specifically or in a general, everyone-in-our-culture-understands-these-signals sense), it was importantly *not incumbent* on her to compensate him for his sunk costs when she broke off that commitment. Indeed, both laws and cultural norms against prostitution effectively insist that sexual arrangements can never be formalized as contracts, while almost all other human arrangements, including marriage, can be.

So there are apparently two standards in play. Where sex is concerned, moment-to-moment subjective considerations trump implied or even expressed commitments. In other arenas, it is assumed that certain types of non-recoverable investment (e.g. time, effort, money) have to be respected by other parties, which may mean that they carry through with (or buy out of) commitments they've made that in the moment they don't want to fulfill.

## Conclusion

The status of sex work *vis-a-vis* consent ethics has been a longstanding dispute among feminists and human rights scholars (c.f. Jo Doezema's work, among many others). Sex work, as such, is an exotic topic, far removed from the everyday lives of most people engaged in this discussion. Yet it is the first and most obvious conceptual problem with operationalizing any sexual consent ethic, let alone extending that ethic to the rest of society.

My intent in this essay is to raise questions rather than to provide answers. I am delighted at the shift of focus towards consent in sexual ethics. It will be interesting to see, in the light of history, whether this has any effect on the rate of sexual coercion. (A recent [survey on consent](#) by the National Coalition for Sexual Freedom suggests, rather dismayingly, that there can actually be a negative association between discussions of consent and the experience of sexual coercion, though the direction of causality is unknown.) I would like to think that younger people's focus on sexual consent signals a shift of focus towards consent as a formula for social organization in a broader sense. That is indeed suggested by many of its advocates. Yet at the moment, I am not convinced that sexual consent ethics are even internally consistent, let alone compatible with the role of consent in a world where most human arrangements are based on unenthusiastic commitments with large sunk costs. Perhaps the problem is not with the ideals, but with the world. Either way, it seems worth defining the conflict as specifically as we can.