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SAYING YES TO SEX IS NOT LIKE SAYING YES TO A CUP OF TEA

What is consent? Is consent a legal issue? A moral one? Are we talking about the same thing when we talk about sexual consent and consent in general? To understand and evaluate the contemporary debates on consent in intimate relationships, these are the first questions to address. And in so doing, we will need to address a further important question: Why are we intuitively convinced that there is something about sex that makes it different from other activities we do with other people, like going on a hike, or drinking tea together?

This is not a purely theoretical question. We are trying to figure out what elements of philosophical, legal, and historical thought about consent in general we can use in order to understand sexual consent. It seems self-evident that sexual consent is a subcategory of consent; that it is the phenomenon of consent as it appears in sexual encounters. Knowing if that is indeed the case has important practical consequences: if we understand sexual consent as a particular case of general consent, then we can draw lessons about our sex lives from analyses of political and legal consent, and from moral consent to mundane actions like lending one's bike or agreeing to join another person for a cup of tea. But if sexual consent is radically different from these other types of consent,

then analyzing sexual consent on the basis of thought experiments about our nonsexual lives—as some analytic moral philosophers do—is likely to lead us astray.

In this chapter, I consider the meaning, traditional uses, and ambiguities of the notion of consent in law, politics, and ordinary life to show that the consent at work in sexual relations is not the consent of contract law, of citizens to political power, or of mundane interactions. The very specific place given to sex in society means that we cannot simply apply a general analysis of consent to the sexual realm to understand what sexual consent does, how it works, or how it should work.

A General Definition of Consent

When we talk about consent, we refer either to the *action* of consenting or to the *result* of this action. To consent is an action that consists in giving one's agreement. For instance, I consent to buy something from someone when I enter a sales contract with that person. Consent is also the agreement that results from this action—for instance, the consents exchanged during a wedding.

These examples emphasize that consent is social: to consent is to give *somebody* one's agreement on something. One cannot consent alone; there is always another person involved in the action of consenting.

Moreover, it is generally admitted by lawyers and philosophers that consenting consists in granting someone a right that they would not have in the absence of consent. When I consent to lend my car to a friend, I give them the right to take my car, whereas they would be trespassing my property right if they were to take my car without my consent. To consent is therefore to give someone one's agreement over some claim, such that one grants through that agreement a right to oneself or one's possessions.

Three Domains of Consent

Although consent is initially a legal term, it is nowadays a core notion in three different domains: law, politics, and intimate interpersonal relationships, in particular those of marriage and sex.

In law, consent refers to the agreement through which someone contracts with someone else. It is central in legal systems grounded heavily in precedents or judicial rulings—usually called common law systems, like the United States and the United Kingdom—as well as in legal systems in which jurisprudence has less influence on codified statutes and ordinances, called civil law systems, like the French one. Consent is "at the essence of contract law."[1] The centrality of consent is most easily identified in civil law systems, as consent figures directly in the definition of contract. Contract is defined in the official English translation of Article 1101 of the French Code civil as "a concordance of wills of two or more people intended to create, modify, transfer, or extinguish obligations." As an agreement between individuals that creates reciprocal obligations, contracts are different from unilateral legal acts, such as wills and testaments. Obligation, here, is to be understood in its technical legal sense, meaning the legal bond by which one or several people (debtors) are required to provide goods or services to one or several other persons (creditors). Consent is one of the fundamental notions of contract law, as it is a necessary condition for the validity of a contract: a contract cannot be legally valid if the parties do not consent to it. Article 1128 of the French Code civil thus states that the first condition of the validity of a contract is "the consent of the parties." The consent of the parties is so central to the contract that there are, in French law, contracts that exist only through the exchange of consents and do not need to be legally formalized. This is what law calls a consensual contract, defined as follows: "A contract is consensual when it is formed by the mere exchange of consents, in whatever way they may be expressed."[2] The notion of consent

is therefore at the foundation of contract law and of individuals' ability to contract with one another.

In the political realm, the vocabulary of consent is a response to the problem of so-called political obligation. One of the main challenges of any political philosophy is to know why subjects obey laws. If state power is not received from God, and if subjects are naturally free and equal, then only obligation—understood as an individual's freely accepted duty toward others—can explain the functioning of political power. As the political theorist Hannah Pitkin shows, there are at least four problems embedded within the problem of political obligation:

(1) The limits of obligation ("*When* are you obligated to obey, and when not?")
(2) The locus of sovereignty ("*Whom* are you obligated to obey?")
(3) The difference between legitimate authority and mere coercion ("Is there *really* any difference; are you ever *really* obligated?")
(4) The justification of obligation ("*Why* are you ever obligated to obey even a legitimate authority?")

Social contract theories ground political obligation in consent: one has to obey if and only if one consents. Pitkin shows that consent thus is a solution to the four problems of political obligation:

> Your consent defines the limits of your obligation as well as the person or persons to whom it is owed. Legitimate authority is distinguished from mere coercive power precisely by the consent of those subject to it. And the justification for your obligation to obey is your own consent to it; because you have agreed, it is right for you to have an obligation.[3]

Social contract theories assume that subjects' obedience to the laws of the state is established by the contractual origin of the state: because the state is the result of an original pact—or contract—in which each person commits to obey political power, its laws are obligatory, just like any other contract. In return for obedience to the law, the state grants citizens its protection. Since the functioning of the contract is grounded on the idea that an exchange of consents creates an obligation, the notion of consent becomes, in the social contract tradition, the unique source of political obligation and political legitimacy.

It is, in an analogous manner, from law and from the contractual form that the vocabulary of consent became established in intimate relationships. The vocabulary of consent appears first in the context of marriage because marriage is conceived as a contract. The exchange of the betrothed's consent is the necessary condition for the marriage bond to be formed. In Christianity, for instance, the public consent of the betrothed was deemed by the Fourth Council of the Lateran (1215) a necessary condition of the validity of marriage. A whole lexical field related to consent has developed around marriage, from the parental consent sometimes necessary to authorize a marriage to divorce by mutual consent.

By extension of this conjugal use, the vocabulary of consent has progressively emerged in two other contexts: in a literature on love and desire, where consent appears as the virtuous woman's way of loving, and as a norm in discussions about sexual violence. Many countries now use consent as part of the legal definition of rape. In the United States, for instance, the FBI in 2013 adopted a new definition of rape as "penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."[4] In France, however, the definition of rape is different in a key way. According to Article 222–23 of the French Code pénal, rape is "any act of sexual penetration,

whatever its nature, or any act of oral sex committed on someone else or on the author by violence, coercion, threat, or surprise."[5] In France it is therefore only in everyday language and not in court that the norm of consent is used to delineate between rape and normal sex.

The Ambiguities of Sexual Consent

When we focus solely on differentiating the three spheres of consent, we risk missing one of the important problems raised by consent: it is polysemic—it means different things in different contexts and to different people. There is, in other words, nothing simple about the nature of the agreement that consent is supposed to be. Consider the definition of consent adopted by Georgia Southern University: "a voluntary, sober, imaginative, enthusiastic, creative, wanted, informed, mutual, honest, and verbal agreement."[6] If so many qualifications are needed, then agreement in itself is probably too ambiguous to constitute consent.

This ambiguity is evident as well in the legal discourse from which ideas of sexual consent have been imported, which might give us pause. Law rarely defines consent in a straightforward way. In common law systems, consent is not defined once and for all by legal codes; jurisprudence can redefine consent. In civil law, meanwhile, the definition is often taken for granted. For instance, the term "consent" appears more than a hundred times throughout the French Code civil but is never positively defined.

Moreover, consent can refer either to the agreement itself (to the mental state of giving assent to something) or the manifestation of the agreement (for instance, shaking hands to seal a deal).[7] As renowned legal scholar Jean Carbonnier put it, "Consent is both the will of each contracting party and the agreement of their wills."[8] Thus, in legal contexts, consent is both a mental state

that an individual can have regarding a decision they make and a social phenomenon of reaching agreement with someone. But when we think of sex, does consent reflect both of these realms—those of intention and of action? Do we care what each partner *thinks,* or are we focused on something else—what partners communicate, how they reach agreement, how they manifest agreement? The consequences will vary greatly should we establish that consent to sex is the fact of agreeing, mentally, to a sexual encounter; that it is the fact of manifesting (verbally or tacitly) one's agreement to the sexual encounter; or that it is the fact of deciding together to have sex and signal this decision.

Besides this ambiguity between agreement of will and manifestation of will, consent includes a second ambiguity, between choice and acceptance. When consent is an encounter of wills in order to form a contract, consent manifests a *positive* choice and a positive agreement. Yet consent can also refer to the fact of accepting an offer or a request made by someone else. In that case, consent is in some sense *passive*. This is a common sense of consent in everyday usage: to consent is to accept something that is suggested to us or even to not refuse something that is offered. To consent, therefore, can be to choose (positive) or to accept (passive), and there is considerable difference between the two. For instance, on the normative level—that is, on the level of moral evaluation—choosing to have sex is not the same thing as not refusing sex.

Law needs this polysemy surrounding consent to account for the wide range of behaviors that can generate lawful transactions. For instance, the concept of consent enables law to consider that there is a contract, and therefore an obligation, both when a landlord and a tenant sign a written rental contract and when a person jumps in a taxi. In one case, the parties can come to a careful, negotiated arrangement, affirmed by both through their signatures; in the other case, the contract is tacit and made in

haste. Both of these are legally binding contracts based in consent of very different kinds. But the same polysemy that allows for useful flexibility in contracting is likely to muddy our understanding of sexual consent.

Sexual Consent Is Not about Contract

Now we understand the different uses of the word consent and the problems raised by its polysemy, yet a further question persists: Do we use "consent" in all these contexts because we are referring to similar phenomena, or is there something specific in the meaning of consent as applied to the sexual domain?

That we use the same word in the contexts of contracts and of sex leads to the intuition that we are talking about the same thing. And this intuition is no doubt at the root of the belief held by many people that, if we are going to approach sex through the lens of consent, then we should all sign contracts before having sex with anyone. After all, and as we'll see in later chapters, BDSM practices often involve contracts, as popularly depicted in the novel and film *Fifty Shades of Grey*.

Here is the issue: when we talk about sexual consent, and in particular when we advocate that rape be defined in law as sex without consent, we conceive of consent as a legal norm. (Germany, Belgium, Canada, Greece, Iceland, Ireland, the United Kingdom, and the United States all now define rape as sex without consent.) More specifically, in this case, we consider that consent is a legal notion that allows people to distinguish between criminal and noncriminal behaviors. So it is tempting to think that the "consent" of sexual consent is the same as the "consent" of legal consent.

But this view is false, and understanding why it is false requires a somewhat technical legal explanation. Distinguishing between criminal and noncriminal behaviors in fact is *not* the function of consent in the legal domain most concerned with consent—that is,

contract law. In contract law, consent creates an *obligation,* not an authorization. Consent determines not what others can do to someone but what one must do. When you enter a contract, you consent to the necessary consequences of your act, meaning you are morally and legally obligated to do what you agreed to according to the contract. This conception of consent is not—and cannot be—the one that grounds the understanding of consent as the criterion to distinguish between rape and sex. Indeed, no one conceives of sexual consent as creating an obligation to have sex. As the judge and legal theorist Richard Posner writes:

> The law of rape is not a part of the law of contracts. If on Friday you manifest consent to have sex on Saturday, and on Saturday you change your mind but the man forces you to have sex with him anyway, he cannot use your Friday expression to interpose, to a charge of rape, a defense of consent or of reasonable mistake as to consent. You are privileged to change your mind at the last moment.[9]

This hypothetical illustrates vividly the distinction between consent in contract and in criminal law. According to both civil and common law, there is a contract if and only if there is an agreement of will *and* the creation of an obligation. This means that, absent an obligation, there is no contract. And in contract law, by definition, one cannot legally go back on one's consent as long as it is valid. The possibility of revoking one's consent at any time—what legal scholar Evan Raschel calls a "unilateral and discretionary right of withdrawal"—is contrary to the existence of an obligation.[10] Wherever such a right of withdrawal prevails, there is no obligation. So unless one views sexual consent as binding on the consenting individual—consent that cannot be withdrawn—sexual consent cannot be understood as having the same meaning and function as legal consent.

And, indeed, no one advocates such a view of sexual consent. Even in legal discussions on the use of consent to distinguish criminal from noncriminal sexual conduct, there is never any consideration of sexual intercourse as the subject of a contract in the literal sense. It is never the case that consent to sex is understood in the sense that consent is understood in contract law—the sense in which consent is the criterion of legitimacy.

This does not mean, however, that consent in contract law and consent in criminal law are two entirely different notions. In both fields, the role assigned to consent is based on the theory of the autonomy of the will. Every individual is recognized as autonomous—that is, as literally capable of giving themself their own law. But this principle of autonomy of the will has distinct consequences in the cases of contract law and of criminal law. Under contract law, to be autonomous is to be free to generate *obligations*. In the case of criminal law, to be autonomous is to have the capacity to generate *authorizations*. The increasing role of consent in criminal law—in particular in adjudications of rape—follows from criminal law's invocation of autonomy.[11]

An authorization is "an irrevocable unilateral act, which suspends an incrimination protecting an available interest, either as an obstacle to its material constitution, or as an element of justification." This means that consent can be used in criminal law either to prevent an act from being considered a crime (for instance, consent could be used to distinguish rape from authorized sex) or to justify an action (for example, consent could constitute a mitigating circumstance in the commission of a crime). Nevertheless, in the majority of cases, the victim's consent is not relevant to criminal law: "Since criminal protection is primarily directed at defending the social order, it is beyond the reach of any private permission."[12] In other words, even if one agrees by contract to be murdered, therefore giving an authorization to one's killer, the killer could still be prosecuted for murder. With this in mind, we can appreciate why it is wrong to argue that

affirmative-consent rules mean one would be wise to sign a contract before having sex, as some claim in response to campus policies: in fact there is no contract that can ensure that sex is not rape. Consent is linked to the contract in civil law only and, within this framework, creates obligations. In criminal law, consent can create authorizations and is not linked to the contract.[13] Sexual consent belongs to criminal law and therefore has not much to do with what we usually think about when we think of legal consent and contracts.

The question then arises as to how sexual consent can be established in criminal proceedings and thus what counts as proof of consent. One might answer that, in this context, a signed piece of paper authorizing another's actions could, in some cases, be considered proof of consent. And it does seem plausible that, in a rape trial, the existence of a piece of paper on which the alleged victim has signed a written agreement to have sex with the accused would play a significant role in an acquittal. But it is not reasonable to infer from this hypothetical, as consent opponents routinely pretend in the media, that applying the notion of consent in criminal law means that personal interactions can be lawful only if organized by contracts.[14] Objections to the use of the vocabulary of consent in the legal definition of sexual violence on the grounds that such use would imply signing contracts—or thinking of intimate relationships as though they were commercial relationships, subject to contracts—are wrong and are based on the error of reading consent in criminal law as identical to consent in civil law.

Political and Sexual Consent

What is called consent in the sexual domain is also not the same thing as consent in the political domain. As we have seen above, consent in politics is primarily intended as an answer to the question of why one is obligated to obey the law. According to social

contract theories, political obligation is the consequence of a contract between citizens and the state or between citizens and each other. Here again, consent creates obligation. In the philosophy of John Locke in particular, the concept of consent makes it possible to understand how individuals born into an already-structured society come to be obliged by the law in place. The individual in this situation cannot distinguish their adherence to the social pact proper from their adherence to the regime chosen by the majority of the civil society resulting from this pact.[15] They are thus in a situation where they cannot choose anything other than adherence or nonadherence.

In the political realm, consent is used in the two senses of choice and agreement previously established, without distinguishing between their different meanings. The individual consents to the social pact, in that they express their will through the establishment of a contract—consent here is a legal synonym of will—or they consent to it in the broader and less technical sense that the regime has already been installed and that they therefore have no option but to consent or else refuse membership in civil society.

At this point, you may be wondering just how political consent is articulated. After all, even if you consider yourself a party to the social contract, no one ever asked you to sign a document expressing your agreement. Locke wondered about this. What, he asked, constitutes "a *sufficient declaration* of a man's *consent, to make himself the subject* of the laws of any government"?[16] Insofar as not all subjects explicitly consent to be members of the society in which they live, Locke argues that "tacit consent" is sufficient to make a free man born under a government a member of the republic. According to Locke, anyone within the territory of a government can be taken as having given their tacit consent.[17]

This shift from active consent—which is the consent of the contract—to passive or tacit consent explains other political uses

of the notion of consent, notably the idea of "manufacturing consent" proposed in 1922 by Walter Lippmann and reused by Noam Chomsky and Edward Herman in their 1988 book *Manufacturing Consent: The Political Economy of the Mass Media*.[18] Chomsky and Herman analyze propaganda as the means of manufacturing mass political consent, where consent is a form of passive adherence. This notion of consent is far from the voluntary and active conception at the heart of sexual consent. Sexual consent has the function of ensuring that the person *wants* to have sex, that they have not been forced to do so in any way, and that their autonomy is fully expressed in the sexual act in question. By contrast, to speak of consent in the political domain refers to the adherence, often passive, of citizens to the regime in which they live. Sexual consent is therefore essentially different from political consent.

Sex Is Special: Why Saying Yes to Sex Isn't like Saying Yes to Tea

Sexual consent is neither the consent of contract law nor that of political theory. It is also not the same as consenting to a trivial everyday act. Sexual consent is not, as a recent UK campaign against sexual violence asserts, like agreeing to someone's offer of a cup of tea.[19] If only it were that straightforward.

Not only media campaigns but also philosophers, especially contemporary analytic philosophers, analyze complex issues using simplified cases considered analogous. The problem with such analyses is that they rest on the presupposition that the two actions to which one consents are comparable. In the case of sex, that presupposition goes against our intuitions: at first sight, having sex and agreeing to a cup of tea are utterly different actions. One might infer that we should instead use a tighter analogy. I recall a discussion on consent between two philosophers in which

one offered the following example: he was often busy or tired at night when his children asked that he kiss them before they went to bed. This philosopher explained that he sometimes had no desire to kiss his children under these circumstances but did so anyway and that he did not think he was deeply affected by giving these kisses despite not having, in some sense, consented to doing so. Would matters necessarily be different if, instead of not-quite-consensually kissing his children, he was having not-quite-consensual sex with his wife?

The question underlying the suspicion that such a comparison is bad (and maybe wrong) is whether there is something exceptional about sex: Is there some special quality of sex that would make it impossible to reason about sexual consent from other kinds of consent? The philosopher Martha Nussbaum asks this question in an article on prostitution.[20] Nussbaum's argument is motivated by Adam Smith's observation, in *The Wealth of Nations*, that "some very agreeable and beautiful talents" are admirable so long as no pay is taken for them. "The exercise" of such talents "for the sake of gain is considered, whether from reason or prejudice, as a sort of publick prostitution."[21] Nussbaum asks whether a commonly held intuition—that it is wrong to receive money or to contract for the use of our sexual or reproductive capacities—proceeds from rationally defensible emotions (that is, from reason) or else from irrational emotions based on prejudice. Her thesis is that the condemnation of prostitution is the result of prejudice and not of rationally defensible intuitions. One of the ways she shows this is through a thought experiment: imagine a person who is paid to have their colon examined with the latest medical instruments, in order to test their capacities. According to Nussbaum, we have no moral problem with this "colonoscopy artist," though they are paid in exchange for being penetrated by medical equipment with their consent. According to Nussbaum, then, the condemnation of prostitution derives from a moralistic view of sexuality in which a prostitute is seen as an evil and dan-

gerous woman whose activities are at odds with the morally valid sex that occurs between married heterosexual partners.

But another intuition may be at work here. Is it not the case—whether rightly or on the basis of prejudice—that we think there is something specific about sex that makes payment for sexual penetration different from payment for nonsexual penetration, even where the same body parts are involved? This separate intuition is at work in the definition of rape in French criminal law, which specifies "sexual penetration." French jurisprudence, constructed over a series of cases, has interpreted "sexual penetration" as a matter of intention: what makes penetration by a foreign object sexual is not the body part penetrated or the object employed but the aims and mindset of the penetrator. Consider the case of Theo L., who in February 2017 was attacked by police in a Paris suburb. An officer anally penetrated Theo L. using his telescoping baton and was charged with rape. However, the investigating authority eventually decided that the officer should be tried not for rape but for "deliberate violence resulting in permanent mutilation or disability," a lesser charge.[22] In the French legal system, unwanted anal penetration with a baton could be rape, but in this instance it was deemed something else—something less serious because the intent, violent though it was, was not sexual. This idea that a given material act may or may not be sexual in scope, depending on the intent of the perpetrator, implies that sexual acts are not like other acts. Sexual acts have a specific kind of meaning to which is attached particular importance—a meaning essentially different from other meanings we attribute to things we do with our bodies.

It is difficult to say whether this view—that sex is special in some way that both makes sexual violence more serious than other violence and justifies special protection against sexual violation—is legitimate. People's determinations on this score will depend on their values and belief systems: some people believe sex is sacred, while others consider the very notion of the

sacred to be meaningless. But one pragmatic way of resolving this issue is to recognize that, to the extent that our laws, institutions, norms, and practices give sex a particular importance and make sex a sphere of activity that engages one's autonomy and vulnerability in a particularly acute way, sex occupies a specific moral position—whether or not that position is justified by reason. In other words, the fact that rape is considered legally and morally different from torture or battery, or that prostitution is the subject of specific debates that do not attend other practices of selling physical labor power, means at the very least that sex is not conceived of as an activity like any other. This specificity must be accounted for in analyses of sexual consent, if these analyses are to be relevant to the way people actually feel and live.

This is not to say that nothing can be learned from comparisons to innocuous, everyday forms of consent, but simply that it is a mistake to proceed by analogy without also questioning how the special moral valuation of sexuality in our societies shapes sexual consent. Moreover, sexual consent often takes place in the context of affective and intimate relationships that are not necessarily well analyzed when examined without taking into account their specificity: the role of feelings, the duration of a relationship, and other factors often involved in sex plausibly make sex qualitatively different from other sorts of acts to which one might consent.

The above analysis reaches no conclusions regarding the usefulness of sexual consent or the wisdom of particular moral or legal regimes concerning sex. Instead, this is a starting point. If we are to make sense, and good use, of sexual consent, then we must begin by understanding that the consent at work in sexual relations is neither the consent of the law of obligations, nor that of citizens to political power, nor that of anodyne interactions between individuals in daily life. That those who make use of sexual

consent do not agree on its definition, its function, or the role it can play in an emancipatory agenda makes it a true philosophical *concept*—not a self-evident notion or just a term of media discourse, but a subject of debate in which strong moral and political disagreements are at stake. With these complications in mind, we can proceed to a fuller appreciation of how consent might guide the specific area of human lives that is intimacy and sex and to decide how one ought and ought not behave in that sphere.