

## Chapter 7 : Sex as a Conversation

(Last chapter of Manon Garcia, *The Joy of Consent: A Philosophy of Good Sex*,  
forthcoming in October 2023)

If the picture painted in this book so far seems quite grim, there is hope on the horizon. The mainstream conception of consent does not live up to its promises: it does not allow us to make a clear distinction between sex and rape, and the liberal intuitions at its foundations are part of the “cultural scaffolding of rape.” But, in the light of the preceding analysis, we can develop a new understanding of consent, creating a tool for understanding what good sex is and how we can seek it. The goal of this moral and political study of sex is to know how to have good sex, in the double sense of sex that is not impaired by unjust social norms—such as the norm of female submission, which prevents women from asserting what they want and like—and sex that fosters a good life. Consent cannot automatically provide us good sex in either sense, and, when understood on conventional terms, it actually reinforces unjust social norms. But a different, contextually sensitive approach to consent can accomplish what mainstream ideas of consent fail to. If consent is going to be our aid, then it cannot be liberalism’s abstract vision that we rely on. Rather, we need a model of consent that is embedded in the real world—and the bedroom: consent that responds to the specifics of sexual situations.

Throughout this book, I have used detailed case studies and hypotheticals because, in these details, we find the realities of sex that we need consent to respond to. We must be attentive to the details of the situation, as well as to the broad organization of society, in order to understand what is going on between partners when they have sex. Indeed, the partners must be so attentive, and they can be if they break the silence and mystery, and the sense of antagonism, that surrounds sex. Here is our solution: talk to each other. If the aim is to contest gender injustices while preserving the sexual autonomy of all—if the aim is, in the words of the feminist icon Gloria Steinem, to “eroticize equality” rather than domination—then sexual consent, conceived as an erotic conversation, is the future of love and sex.<sup>1</sup>

There is a third way of conceiving consent, one that is neither the traditional sexist model in which women are prey who consent by giving in, nor the liberal notion of authorization to use each other’s body parts. The third way understands consent as respect, affirmed in the context of an erotic conversation. The focus is less on how consent is given—what facts must be in place so that we can know, in the legal sense, that a party has consented—than on the conditions that enable consent. Instead of wondering if women have said yes or no, we ask what the partners can and should do for each other in order to build pleasure together.

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1 “Big Think Interview with Gloria Steinem” (online video), Big Think, November 2010, <https://bigthink.com/videos/big-think-interview-with-gloria-steinem>.

I am placing consent in a novel register: that of all partners. Today, women, insofar as they are structurally at risk of having sex imposed on them, are understood as the ones who should give or refuse their consent. In other words, consent as commonly practiced presumes that the partner having less power, who does not take initiative, is obligated to consent or withhold consent. Against this view, which places the whole responsibility for consenting on one person, I argue for a relational understanding of consent: in sex, consent is created by the partners through the ongoing exchange of agreement with one another.

In a just world, this exchange would be perfectly symmetrical. But we do not live in a just world. Our world is riven with social inequalities; we cannot usefully think about consent outside of the social situation of the partners and outside of the power dynamics at play. This means that the more powerful party in the dynamic—often the man in a heterosexual context, but not always, considering the roles of race and class—is the one with primary responsibility for building consent. Consent is a collective effort, but as long as we live in such an unequal society, the powerful must take the leading role in ensuring that mutual respect is possible. Therefore, in most circumstances, men have a greater responsibility in fostering the conditions for an egalitarian sexual conversation.

### **Sex Should Not Be a Battlefield**

The consent of mainstream discourse is grounded in the idea that, by definition, relations between sexual partners and between genders are conflictual. Sex is seen as a sort of compromise between partners with diverging desires and interests. This is as true in the eighteenth-century model of man as hunter and woman as prey as it is in the contemporary assumption that it is women who need to consent.

Liberalism has not swept away the old model; it is still with us. In this world, women are passive, they consent; men do not consent, they act (and they fuck, as MacKinnon would say). As such, making consent the touchstone of sexual ethics implies that it is up to women to intervene against the insatiable and uncontrollable desire of men. Men want sex all the time—and therefore can never themselves be raped—and women, whether they want it or not, must say they don't, until a man makes them give in.

To contain the ill effects of this sexist framework, many of us have turned to consent-as-contract. Here, the partners consent in the sense that they renounce their right to the guarantee of their physical and sexual integrity. Intercourse appears as a quasimarket transaction: it is not a matter of love or desire but rather of exchanging sexual services with minimal risks and surprises. This is the sex of Tinder and Grindr, in which one hedges against the unknown by sending detailed photographs and agreeing ahead of time on everything that will happen. It is an efficient process, as if to make sure of losing as little time as possible, gaining as much pleasure as possible, and giving as little as possible in exchange. It is as though pleasure were scarce and subject to a zero-sum logic: if you get more, I get less.

Consent is caught between the sexist model of old-fashioned love and a capitalist model of exchange among absolutely independent individuals who do not wish for and probably will never experience any emotional bond. In these two models, the relationship between the partners is implicitly

understood to be antagonistic: it is necessary that the husband triumphs over his wife; I need to be sure to optimize my practices to give as little as I can to the other while taking as much pleasure as I can from them.

This competitive approach, in which the desires of the parties are conceived as fundamentally their own, without reference to each other's pleasure, is the foundation of continual misery. Indeed, as we have seen, one of the main sources of violence and suffering in sexuality is that it is seen as a sphere in which men want one thing (orgasm), women want something else entirely (marriage), and men do something to which women respond. As Nicola Gavey has shown, three major theses undergird this state of affairs: (1) the idea that men always want to have sex; (2) the idea that women do not want sex for its own sake but as a means of obtaining a stable, monogamous relationship; and (3) the idea that sex is the penetration of a woman's body by a man's penis. In short, women want love, men want sex, and the price women would pay for love is that sex is imposed on them. These ideas constitute the cultural scaffolding of a sexual order in which men violate women and in which women have great difficulty refusing men's desire.

But of course these three theses are not facts of nature; they reflect and shape cultural tendencies, and yet real people defy them. Men may lack sexual desire.<sup>2</sup> Men may be coerced into sex, by other men as well as by women.<sup>3</sup> Men may want romantic relationships; women may want sex for its own sake and not as a bargaining chip. And sex is not just penile penetration.

Instead of recognizing these realities and allowing them to influence how we have sex, we persistently assume that the partners in a sexual relationship cannot want the same thing and therefore are fundamentally engaged in an exchange in which they must give up something in order to obtain what they desire. For the man, what must be given up is freedom: he is at risk of being confined in monogamy by a woman in love, who would prevent him from having the sex and the life he wants. The woman, meanwhile, is at risk of granting sexual favors without obtaining the social and moral stability of marriage—hence injunctions to make the man wait, repeated over and over again in manuals that pledge to help women “hook” men once and for all.<sup>4</sup> In such an antagonistic context, respect, politeness, and love are the prerogative of women, while men often steer clear of respect lest they be trapped by it: a respectful man risks appearing as “husband material” and is therefore a threat to himself. Paradoxically, the gender norms of a society obsessed with sexual morality serve to distance sexuality from morality, asserting that sex is a battlefield on which men serve their own interests by avoiding considering women as partners, equals, and friends, and the only regulation is legislation against sexual violence.

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<sup>2</sup> A 2006 survey finds that one-fifth of French men aged eighteen to twenty-four have no interest in sex or relationships. Michel Bozon and Charlotte Le Van, “Orientations en matière de sexualité et cours de la vie. Diversification et recomposition,” in *Enquête sur la sexualité en France. Pratiques, genre et santé*, ed. Nathalie Bajos and Michel Bozon (Paris: La Découverte, 2008), 539.

<sup>3</sup> Charlene Muehlenhard and Stephen Cook, “Men's Self-Reports of Unwanted Sexual Activity,” *Journal of Sex Research* 24, no. 1 (1998): 58–72.

<sup>4</sup> An example of these manuals is the US bestseller Ellen Fein and Sherrie Schneider, *The Rules: Time-Tested Secrets for Capturing the Heart of Mr. Right* (New York: Warner Books, 1995).

Another way is implicit in the very etymology of “consent”—cum sentire, literally to feel with.<sup>5</sup> Feeling together can be an avenue toward respect for the other. The deep, genuine promise of consent lies in the possibility of an eroticism that builds equality through the sexual relationship instead of presuming equal and independent partners. Here consents are exchanged rather than given unilaterally. In this view of consent, what matters is not isolated individuals using each other toward their possibly incompatible private ends but rather the relation built through sex, whether this relation lasts minutes or years.

### **Sexual Intersubjectivity: Consent as Respect**

To not be raped or assaulted does not suffice to have a fulfilling or joyful sexual experience. Yet the moral question of what is positively good sex tends to go missing from debates about consent, which overwhelmingly focus on preventing bad sex. The secondary importance granted to thinking about good sex has undoubtedly contributed to the sexual revolution’s failure to fulfill all its promises for women. We still live in a world where men use women as objects of their pleasure rather than as subjects with whom to have a real sexual relationship.

By “relationship,” I don’t mean a long, monogamous pairing based on love. I mean any encounter in which the participants focus on the fact that they are doing something together, cooperatively. They are not just “having” sex, an expression tends to erase the partner. They are deciding together on which sexual activities to do with one another, and their own satisfaction cannot be conceived outside of a common satisfaction. There is no such thing as “sex” that one can “have”—no predefined set of practices. There are sexual activities to do together. And there is no singular model of the sex relationship. A one-night-stand can be a relationship, provided that the other is treated with respect. A friend-with-benefits is by definition a relationship; this is what the word “friend” signals. A booty call could be a relationship if it were understood as cooperative, but the sexual objectification at play in the name itself suggests that this is improbable.

What do people need in order to have good sex? In the present context, with the representations and social dominations that structure our sexuality, individuals are not fully autonomous and equal, so consent-as-authorization cannot by itself get us to good sex. Consent understood as verbal agreement helps to prevent rape and keep sexual interactions outside the most problematic areas of the gray zone, but it doesn’t make for positively good sex. So what does? What, at last, are the predicates of positively good sex?

### **Sexual Desire Is Not Enough**

At first sight, it seems that good sex is sex that is both motivated by and satisfies physical desire, but this is a misleading intuition. For one thing, it is quite possible to experience sexual desire and yet not want sex and be unwilling to consent to it. This is what happens when a person in a monogamous

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<sup>5</sup> Philosopher Ellie Anderson also recently developed an idea of consent as feeling-with. See Ellie Anderson, “A Phenomenological Approach to Sexual Consent,” *Feminist Philosophy Quarterly* 8, no. 2 (2022).

relationship meets someone to whom they are sexually attracted and yet honors their commitment to their partner. For another thing, as we have seen, patriarchy shapes our desires so that we might experience wanting certain experiences—for example, sexual submission—without wishing to act on these desires.<sup>6</sup>

Furthermore, it is not the case that the only good sex is sex we desire. Consider the following comparison: it is universally recognized that, in everyday life, people take actions they do not wish to because these actions, though themselves unwanted, are means to desired ends. For example, I don't enjoy cleaning my apartment, but I do want to have a clean apartment, and because this is a worthwhile end, I am willing to undertake undesirable activities to obtain it. Although, as noted elsewhere, it is widely appreciated that sex is special in some ways—distinct from mundane activities—I see no reason to believe that sex should be thought of differently in this context. Many disagree, but it is not clear what is the rational basis for believing that engaging in sex for a morally good purpose other than sex itself is morally unacceptable. Perhaps especially in cases of long-term, loving relationships, there should be little controversy over this point. One can easily imagine a case in which Toni, observing that long-term partner Jo is stressed out, and knowing that Jo will feel better after sex, chooses to have sex with Jo in order to improve Jo's mood. Because Toni knows and loves Jo, Toni can decide to have sex with Jo whether or not Toni feels physical desire during the moment of sexual interaction. If, in Jo and Toni's relationship this kind of care goes both ways, then Toni's choice to have sex with Jo is not only is morally permissible but may be morally good.



Having studied the widespread motivations underlying sex—and abstinence—sociologists Jennifer Hirsch and Shamus Khan encourage us to think about what they call a “sexual project”:

A sexual project encompasses the reasons why anyone might seek a particular sexual interaction or experience. Pleasure is an obvious project; but a sexual project can also be to develop and maintain a relationship; or it can be a project to not have sex; or to have sex for comfort; or to try to have children; or because sex can advance our position or status within a group, or increase the status of groups to which we belong. A sexual project can also be to have a particular kind of experience, like sex in the library stacks; sex can be the goal rather than a strategy toward another goal. People don't just have one sexual project. They can have many. Wanting intimacy doesn't mean not wanting other things, like to hook up from time to time.<sup>7</sup>

One might add to this list the controversial project of making money. While there is no doubt that sales of sex are steeped, in practice, in patriarchal norms of sexuality, it is reasonable to argue—without resolving once and for all the question of what position the state should take on sex work—that exchanging sex for money is one sexual project among many. This brings us back to the agency dilemma discussed above and to the importance of a struggle against patriarchy that is not opposed, in a paternalistic way, to the preservation of sexual autonomy.

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<sup>6</sup> On the challenge to feminism posed by women who experience submissive sexual desires, see Claire Richard, *Les Chemins de désir* (Paris: Le Seuil, 2019), as well as her radio documentary, *Soumission impossible*, Arte Radio, 2019.

<sup>7</sup> Jennifer Hirsch and Shamus Khan, *Sexual Citizens: A Landmark Study of Sex, Power, and Assault on Campus* (New York: W. W. Norton, 2020), 15.

## Consent Is Not an Admission Ticket

The fundamental question, then, is not how to ensure that everyone takes only pleasure from sex but rather that each of us has only sexual experiences that are wanted and valued. Consent can help us in this regard.

Consent in the sense of surrendering one's rights to physical integrity is of little help here; this definition is far removed from what partners experience in a fulfilling sexual relationship. But we can learn something from the push for affirmative consent and the debate surrounding it. Here is how California defines affirmative consent in its 2014 law implementing an affirmative consent standard on university and college campuses:

“Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.<sup>8</sup>

Although I do not believe this law guarantees that all legally compliant sex on California college campuses is good sex—indeed, no law, in any circumstances, could guarantee good sex—it does point to something crucial concerning the relationship between consent and good sex: in the case of good sex, and not just sex subject to affirmative consent, consent is “ongoing throughout the sexual activity.”

;) Some conservative commentators have replied that this is an onerous demand that undermines pleasure. They argue that it is ridiculous to imagine that consent could be secured at, say, every change of position. On this view, consent must occur, once and for all, at the threshold of sexual activity; anything else is not only unrealistic but perhaps impossible. As philosopher Vanina Mozziconacci and sociologist Cécile Thomé show, the idea of consent as a “love-killer” that would interrupt the “natural” unfolding of the sexual act is widespread. According to this view, the demand for consent is analogous to the demand for using condoms: it can be justified for safety reasons but is an unpleasant formality that goes against the impulses of desire and pleasure.<sup>9</sup> The conservative opposition to ongoing consent is therefore understandable even if conservatives agree that consent is important (which not all do): if consent kills the mood, we should want to minimize it. In that case, a single expression of consent, before sex begins, is the most that can be tolerated.

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<sup>8</sup> California Senate Bill No. 967, “Student Safety: Sexual Assault,” Section 1, 67386(a), 1, September 28, 2014, [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201320140SB967](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201320140SB967).

<sup>9</sup> Vanina Mozziconacci and Cécile Thomé, “Penser la sexualité pour penser l'éducation à la sexualité. Corps, utilisation du préservatif et conceptions du consentement,” in *Ce qu'incorporer veut dire*, ed. S. Fleuriet, J.-F. Goubet, S. Mierzejewski, and M. Schotté, 81–102 (Villeneuve-d'Ascq: Presses universitaires du Septentrion, [2021]).



;) But consent is not like an admission ticket—a toll paid for entry to the highway of sex. Such a representation is problematic first of all because it wrongly naturalizes a social fact: seeing consent as only a threshold matter implies that once the partners say yes, all know where sex is going because sex inevitably follows its preordained course. In truth, the presumed “natural” course of sex is determined by social norms and cultural practice. Discomfort with the idea of establishing ongoing consent is rooted less in concerns for interrupting a natural process than in patriarchal cultural representations according to which the man should triumph over the woman’s resistance and unleash his natural drive. After all, verbal exchange during sex often enhances the excitement; yet talking about consent during sex is supposed to be an insurmountable cure for desire?

;) This representation is especially problematic because it implies that respect for and attention to the other, though necessary in nonsexual interpersonal relationships, is not necessary in sex and should even be absent. Being polite and caring, and asking people what they want and like, would seem to be the right way to behave in every human activity except sex. We are dealing here with a puritanical reflex that seeks to preserve the mysteries of the natural and possibly sacred against heretics who would profane it with their words.

Reason counsels against this position. If we understand morality as a function of evaluating the quality of our actions, then why should the usual moral standards not apply between people who love each other or who have intimate relationships with each other? On the contrary, the vulnerability created by feelings of love and affection requires heightened moral care. Our actions are not necessarily good, nor are we absolved of moral responsibility, in the name of intimacy. Indeed, if we take seriously the vulnerability involved in sex and in loving feelings, if we give credence to sex as a source of both immense joy and great suffering, how can we not make the effort to care for our partners?

### Sex as a Relationship among Equals

! The fundamental problem with so much consent talk is that it treats autonomy as something that must be protected against attacks but not as something that needs favorable conditions for its development. The mutual care I have just referred to is a part of these conditions. In order for sexuality to fulfill its promise, partners must be allowed to flourish as persons and as embodied subjects, who desire, think, and want. As Ann Cahill, one of the philosophers we’ve previously encountered, puts it, the problem that patriarchy poses to our sexualities is that it prevents them from being lived as experiences in which the subjects recognize each other as subjects of desire and pleasure.<sup>10</sup> Such recognition is at the heart of a Kantian vision of good sex. To realize this vision requires a form of consent whose ambition is not to prevent negative outcomes but to respect the person as a person. In sexual interactions, as in all other circumstances, the other person cannot be treated only as a means; they must be an end in themselves.

A positively moral sexuality requires first the development of a sexual subjectivity, which philosopher Linda Alcoff describes as follows:

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<sup>10</sup> Ann Cahill, “Recognition, Desire, and Unjust Sex,” *Hypatia* 29, no. 2 (2014): 303–319.

This involves more than our arousal patterns and our conduct or sexual choices. It also includes a complex constellation of beliefs, perceptions, and emotions that inform our intrapsychic sexual scripts and affect our very capacity for sexual agency. Because our sexual subjectivity is interactive with others and our social environments, it is always in process, changing in relation to our experiences. For this reason, our sexual subjectivities are constitutively or intrinsically vulnerable.<sup>11</sup>

=> The crucial question for my sexual subjectivity is “whether I have the ability to participate in the making of my sexual self.”<sup>12</sup> Sexual autonomy is therefore important here, and—among women in particular, but not only among women—it is endangered by gender norms. This idea of sexual subjectivity echoes the important place that Simone de Beauvoir gives to erotic experience in *The Second Sex*:

The erotic experience is one that most poignantly reveals to human beings the ambiguity of their condition. They feel there as flesh and as spirit, as the other and as subject. Woman experiences this conflict at its most dramatic character because she seizes herself first of all as an object and does not immediately find a confident autonomy in pleasure; she has to reconquer her dignity as transcendent and free subject while assuming her carnal condition: this is a delicate and risky enterprise that often fails. But the very difficulty of her situation protects her from the mystifications by which the male lets himself be duped; he is easily fooled by the fallacious privileges that his aggressive role and the satisfied solitude of the orgasm imply; he hesitates to recognize himself fully as flesh. The woman has a more authentic experience of herself.<sup>13</sup>

This passage testifies to the fact that subjectivity is corporeal: to be a subject, and in particular a subject of desire, is both to be and to have a body—that is, both to be a subject in a body and to have a body that is an object for others. For Beauvoir, authentic existence involves recognizing this ambiguity of being both subject and object, both autonomous and caught up in gender norms. This ambiguity is part of the human condition, so it affects us all. But men have the power to represent women in a way that allows men to avoid confronting this ambiguity. Beauvoir’s highly original analysis reverses the usual perspective: it shows that fulfilled sexual life is not on the side of men. On the contrary, male domination deprives men of a fulfilled sexuality by proposing to them a self-centered, inauthentic conception of their own eroticism. Men are compelled to conceive of women in a way that deprives men of an authentic relationship with women.<sup>14</sup>

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11 Linda Martín Alcoff, *Rape and Resistance: Understanding the Complexities of Sexual Violation* (Cambridge: Polity Press, 2018), 94–95.

12 Alcoff, *Rape and Resistance*, 70.

13 Simone de Beauvoir, *The Second Sex*, trans. Constance Borde and Sheila Malovany-Chevallier (New York: Vintage Books, 2011), 416, translation modified.

14 On harms of masculinity, see Filipa Melo-Lopes, “What Do Incels Want? Explaining Incel Violence Using Beauvoirian Otherness”; [forthcoming in *Hypatia*] and Manon Garcia, “Masculinity as an Impasse: Beauvoir’s Understanding of Men’s Situation in *The Second Sex*,” *Simone de Beauvoir Studies* 32, no. 2 (2022): 187–206.



Beauvoir's analysis is important for us because it helps to specify what a successful erotic experience should look like from the point of view of the individual's relation to themselves. A successful erotic experience is not simply one in which pleasure is maximized, although maximizing pleasure is often desirable. Rather, a successful erotics is one in which the human being experiences corporeally, carnally, what they are in all their ambiguity. And in this experience, the relationship with the other is absolutely essential. It is alongside the other, because I conceive them as another, that I recognize myself as a subject. It is through the view of the other that I know myself as an object and therefore discover myself as essentially both subject and object. And what gives dignity and freedom to the subject is precisely their holding together this ambiguity of being at the same time subject and object. This ambiguity is a source of vulnerability but also the very condition that enables the joys of the erotic experience.

Now, crucially, this ambiguity is possible only in the condition of relation, and it is for this reason that Beauvoir finds the feminine experience more authentic than the masculine: in sexuality as elsewhere, men can avoid the relation—they are able to believe themselves alone and independent. However, according to Beauvoir, this is a lie men tell themselves because our being-in-the-world is a being-with-others, and it is in our relation to others that our subjectivity is constructed, progressively and mutually.<sup>15</sup> Thus, for Beauvoir, male domination is an obstacle to erotic fulfillment, and even more so for men than for women, because it leads men to deny what they really are.

But if a man renounces domination, if he accepts the true realization that he is essentially in relation to others, then erotic fulfillment is possible both for him and for his female partner, no matter that female sexuality is shaped by gender norms. Beauvoir writes:

The asymmetry of male and female eroticism creates insoluble problems as long as there is a battle of the sexes; they can easily be settled when a woman feels both desire and respect in a man; if he covets her in her flesh while recognizing her freedom, she recovers herself as the essential in the moment she becomes an object, she remains free in the submission to which she consents. Thus, the lovers can experience shared pleasure in their own way; each partner feels pleasure as being their own, while at the same time having its source in the other. The words “receive” and “give” exchange meanings, joy is gratitude, pleasure is tenderness. In a concrete and carnal form the reciprocal recognition of the self and the other is accomplished in the most acute consciousness of the other and the self . . . the dimension of the other remains; but the fact is that otherness no longer has a hostile character; this consciousness of the union of the bodies in their separation is what makes the sexual act moving; it is all the more overwhelming that the two beings who together passionately negate and affirm their limits are fellow creatures and are yet different. . . . What is necessary for such harmony are not technical refinements but rather, on the basis of an immediate erotic attraction, a reciprocal generosity of body and soul.<sup>16</sup>

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15 See Manon Garcia, *We Are Not Born Submissive: How Patriarchy Shapes Women's Lives* (Princeton: Princeton University Press, 2021), ch. 3.

16 Beauvoir, *The Second Sex*, 415.

Against the idea that good erotic experience is an experience of using the other, which corresponds to the model of male sexuality, we see that the moral quality but also the joy and pleasure of good sex comes from giving—giving of oneself—and receiving. Women, then, have easier access to fulfilling sex than men do. The main barrier to women's fulfillment is men who, because of the norms of masculinity, deprive themselves and women at the same time. It is clear that a fulfilling erotic experience on these terms requires not romantic love but "reciprocal generosity"—the mutual, or intersubjective, recognition that is the basis of treating the other as a person.

This intersubjective recognition is difficult to acquire. Gender norms generate epistemic inequities whereby men are invited to actively ignore the subjectivity of their partners and see them as occasions for sexual pleasure, while women are discouraged from expressing and even conceiving their pleasure and desire. Intersubjective recognition is also difficult to acquire because sexuality tends to be conceived as an economic terrain in which one maximizes one's pleasure at the least possible cost. But such recognition is indeed the condition of an authentic sexual relationship in which partners engage as equal human subjects committed to reinforcing their equality. And this recognition absolutely can be achieved when consent is understood as conversation.

### **For an Erotic Conversation**

In the face of all the difficulties imposed by patriarchy, it seems that the solution to good sex is to be found not in the exchange of consents once and for all but in a conversation between consenting subjects about their consent. In such a framework, consent is no longer to be understood as a formal agreement reached all at once but as the manifestation of the sexual autonomy of the partners, which must occur continuously during the sexual encounter. This brings us closer to the Kantian idea that taking into account the consent of the other is inseparable from treating the other not only as a means but also as an end. Such treatment, as we have seen, implies respect for and attention to the other, their present situation, their limitations, and the power differentials that may exist between the other and oneself.

The patriarchal approach to sex, including the forms of consent available to it, are arrayed against this Kantian approach. While there are few studies of female desire, those that exist suggest the very idea of consent being exchanged before the sexual encounter is based on a masculinist model of sexual desire. According to this model—which describes the experience of many men, but not all—arousal and desire are effectively the same. Both are present prior to the encounter, through which arousal is discharged. In contrast, women more often experience a distinction between desire and arousal. Desire is present before sex, but arousal occurs gradually in the midst of it.<sup>17</sup> This difference between arousal and desire suggests that the presence of sexual arousal at the outset of sex is not enough to determine that partners want it. In addition, sociological studies show that the conception of sexuality as something intimate, private, and possibly dangerous or shameful results in people tending to ask few

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17 Rosemary Basson quoted in Ann Cahill, "The Female Sexual Response: A Different Model," *Journal of Sex and Marital Therapy* 26, no. 1 (2000): 51–65, 53

questions about their “sexual projects,” which makes it hard for people to know what they desire and what they want.

If we want to recognize the complexity and unpredictability of desire, the fact that we may not know exactly what we want or don’t want until the moment presents itself, and that we may be unsure of whether a practice is pleasurable until we have tried it, then we must create the best possible conditions for erotic experimentation. Analyzing sex through the prism of the philosophy of language, the philosopher Quill Kukla proposes conceiving of sex as a series of negotiations that take into account the indirect quality of erotic language: we rarely say simply yes or no, and some erotic language is metaphorical. In particular, Kukla proposes that we understand the initiation of the sexual act on the model of an invitation or gift. In everyday life, invitations and gifts involve speech acts governed by very precise rules. There are particular kinds of language we are expected to use when offering invitations and gifts, when accepting or declining them, and when responding to acceptance and refusal. For example, one can be disappointed at the refusal of one’s invitation, but one cannot be offended. And there are more and less polite ways to refuse an invitation. Kukla shows convincingly that there is value in understanding the initiation of sex outside of an ongoing relationship as an invitation and, in some established relationships, as a form of giving. Kukla also shows that BDSM’s system of safe words could be productively introduced to the wider world of sex, where it could be used to accept and refuse propositions and practices during intercourse. Such a system both prevents miscommunication stemming from the indirect nature of erotic language and provides tools that positively facilitate sexual experimentation. Finally, Kukla’s view of sex as negotiation emphasizes that only the collaboration and communication developed between partners can allow for the exploration of sexual submission, for instance the rather complex BDSM practice of voluntary temporary nonconsent.<sup>18</sup>

These proposals are extremely useful in conceiving of what a moral sexual relationship might look like, serving not only to protect sexual autonomy and integrity but also nurturing the development of subjectivity and autonomy. This places sexual morality in the register of personal choice and growth, rather than straitjacketing it behind claims that, for instance, only sex between people who love each other could be moral. On the contrary, the goal is to create conditions allowing for the greatest diversity of sexual practices, because the development of personal autonomy requires the possibility of experimentation.

However, rather than conceive of these exchanges as a negotiation, it is more fruitful to consider them a conversation. Negotiation puts one in mind of sexuality as a battlefield—the model in which each person maximizes their individual pleasure, even at the expense of the other. Negotiation also implies that collaboration occurs at some stage of the process—probably the beginning—and then is meant

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18 R. Kukla, “That’s What She Said’: The Language of Sexual Negotiation,” *Ethics* 129, no. 1 (2018): 70–97. While the analogy between propositioning sex and inviting someone to an event is useful, it should not be taken too far. For instance, if someone does not show up at an event for which they have accepted an invitation, this would clearly be ungracious and could justifiably provoke offense. But Kukla does not suggest the same of sex: one cannot permissibility hold against a person the fact that they withdraw from sex after consenting.



to end once agreement is reached. In contrast, conversation implies no end state. In a real conversation, not “talking at” but “talking with,” interlocutors pay attention to each other throughout. In the sexual conversation, the participants note each other’s potentially shifting desires, movements, and situations. Throughout, the focus is on the deeply relational character of sexual practice. One can come to sex as an individual, only to discover that one of the great joys of sex is undoubtedly the relationship that develops, even if it does not last and is not a relationship in the romantic sense of the term.

To understand good sex as a conversation is also to distinguish it from a dialogue or a discussion. The term “conversation” emphasizes collaboration, the fact that the partners work together toward a common goal rather than possibly talking past each other or trying to advance their own arguments. In a conversation, we progressively lose track of the authorship of ideas, as the conversation itself becomes something generative that steers participants in unforeseen directions.

To understand sex as a conversation also means attending to the different temporalities of consent: people need to agree to start this conversation, but they also need to agree, as the conversation progresses, to keep the conversation going. Let’s recall the idea, developed by BDSM practitioners, that consent occurs before, during, and after sex: a conversation is a better model than a negotiation if we want to accommodate this temporality. We can look back on a conversation to elucidate its qualities and its weaknesses. Finally, the image of the conversation emphasizes skill-building, which is also relevant to good sex. One is not born a good conversationalist; good conversation is a practice that develops with experience, as we learn to use words and gestures, to attend to silences and hesitations. Likewise, developing sexual skills—which also involve words and gestures, silences, and hesitations—takes time and experience.

Here, a worry arises: How can we have good sex if good sex requires an art of erotic conversation that we do not already possess? I believe that this is where consent could be emancipatory. When we practice this erotic conversation, we are not only practicing better sex, we are also learning about our desires and our pleasures and those of our partners, thus creating conditions for better sex in the future. Most importantly, we are progressively inventing a way to talk about these pleasures and desires, and this way of talking can be transmitted to others. My hope is that the more people practice erotic conversation with partners, the more comfortable they will become at talking about sex, during sex and outside of it. When we talk comfortably about sex, we are breathing new language into the world, which others can use to help themselves have better sex, know themselves better, and in turn contribute to a collective capacity to talk about sex. One of the important obstacles to good sex is the discomfort most of us feel when talking about sex and the lack of vocabulary that goes with it: it is only with direct words to describe our body parts, what feels good and what doesn’t, that we will be able to reach knowledge of ourselves and of others as sexual people. With these conversational skills at our disposal, we may attune our capacities to interpret and understand what the others are saying or showing about they want. In this way, consent that really gets at the heart of our wants and desires is bound up in erotic conversation.<sup>19</sup>

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19 I am grateful to Maxime Tremblay for helping me pinpoint this hermeneutical dimension of the erotic conversation.

Given the state of our world, this conversation is unlikely to be among equals. But the idea of a conversation helps us to identify the practical consequences of this fact: we know from our daily life that when a professor has a conversation with a student, a parent with their child, a boss with their employee, a socially privileged person with an oppressed person, the person in the position of power has an ethical responsibility to make sure the person who has less power can express themselves without fear. It is to some extent possible, through this care of the powerful person, to create from a situation of inequality the conditions for a conversation between near-equals. In the context of sex, too, this is possible—the powerful person can make an effort to create conditions for equality. For instance, a heterosexual man is responsible for recognizing the threat that male violence constitutes to women's autonomy and for doing something about this, in his own life. His duty is to bring comfort to potential sexual partners so that they need not fear rejecting him and incurring a wrathful response.

Sex as an erotic conversation corresponds with what sex is when it takes place in a respectful way between equals. It is also what sex should look like if it is to be a practice of the larger social equality that egalitarian-minded people call for. Such a conversation implies that partners have enough mutual respect to recognize each other as subjects of desire and pleasure who seek, together, to give each other pleasure (and possibly pain) and to explore their desires. But these practices of erotic conversation are also emancipatory in that they are about practicing equality and, through this practice, challenge gender norms. In essence, they achieve what has been identified as liberating in BDSM relationships while fighting against the reinforcement of gender hierarchies.

### What Comes Next

How, in concrete terms, can we promote this understanding of consent as an erotic conversation with emancipatory potential for sex, love, and therefore our lives in general? Can we somehow make it into law and change society that way? Should we trust individuals to take up the call and then hope for the best?

With respect to law, there is not a lot that it can, or should, do to promote a new sexual order. Law can be used to prosecute rape and other forms of assault but it cannot inspire or incentivize us to achieve emancipation through good sex. A first issue is that people commonly conceive of consent in its liberal, nonemancipatory form and will bring this conception to their application of consent law. Indeed, it is already the case that consent law is interpreted along liberal lines even when the language of it diverges from liberal commitments. Legal philosopher Roseanna Sommers has established from empirical investigation that people's moral intuitions about consent are completely different from the legal (and philosophical) understanding of consent, to the point that the commonsense understanding consistently fails to consider that deception invalidates consent.<sup>20</sup> She assumes that this commonsense understanding explains, for example, why judges have difficulty considering that, in the sexual realm, deception can invalidate consent and thus that someone who obtained sex by lying could be

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<sup>20</sup> Roseanna Sommers, "Commonsense Consent," *Yale Law Journal* 129, no. 8 (2020): 2232–2324.

prosecuted for rape.<sup>21</sup> Put in general terms, the law needs to be applied in order to have an effect on the social world, and this application is done by people who have representations about what the words comprising laws mean. It follows that a law that introduces views far from the commonsense view risks being ineffective.

Second, it is not clear that criminal law is able to marshal any version of consent toward even the protection of autonomy, much less the development of autonomy and subjectivity. The figures are striking: less than 3 percent of sexual assaults lead to a felony conviction.<sup>22</sup> This is partly due to the fact that victims are not listened to or taken seriously. Pursuing charges against an abuser can also lead to secondary victimization: the abused person's life is questioned by investigators and during trial; if they do not fit the image of the "good victim," it is unlikely that the perpetrator will be convicted. And so victims often stay silent rather than suffer a second injustice, this one created by the criminal process itself. Indeed, society as a whole suffers, because impunity maintains rape culture. And even when investigators and prosecutors want to do right by victims of sexual violence, they are often stymied during the criminal process. The fact is that criminal defendants have rights, as most of us believe they ought to. Where consent is the difference between rape and sex, a prosecutor cannot just say that consent was not provided—they must prove it with evidence that meets demanding standards. This is often impossible, given that typically there are no records of what goes on in the context of intimate relationships. Moreover, in the United States, attempts to write consent, and in particular affirmative consent, into law as a criterion for defining sexual assault have left much to be desired. The statutes lack definitional clarity about consent, a problem that has worsened over time.<sup>23</sup>

The law as it exists incorporates two forms of nonconsent, both of which are problematic. There is statutory nonconsent, which holds that certain individuals lack the capacity to consent because their youth, mental capacities, or some other status that renders them insufficiently autonomous. And there is situational nonconsent, which is invoked when a person deemed capable of consenting is determined not to have done so in a particular instance.<sup>24</sup> Statutory nonconsent poses moral problems in that it excludes, even if for excellent reasons, from the capacity to consent some people who ought to be granted that capacity. For example, one would ideally want a person with severely diminished

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21 See also Jed Rubenfeld, "The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy," *Yale Law Journal* 122, no. 6 (2013): 1372–1443.

22 According to data compiled by the Rape, Abuse & Incest National Network, out of every 1,000 sexual assaults, 310 are reported to the police, and 28 lead to a felony conviction. "The Criminal Justice System: Statistics," Rape, Abuse & Incest National Network, <https://www.rainn.org/statistics/criminal-justice-system>, accessed March 3, 2023.

23 Jacob Gersen and Jeannie Suk, "Sex Bureaucracy," *California Law Review* 104, no. 4 (2016): 881–948, 891–896.

24 I take this distinction between statutory and situational nonconsent from Marie Romero, "Le traitement pénal des violences sexuelles sur mineurs: controverses et débats autour des âges et du consentement. Une enquête au sein de quatre tribunaux français correctionnels et pour enfants" (2010), in *Envers et revers du consentement*, ed. M. Garcia, J. Mazaleigue-Labaste, A.-D. Mornington, 95–116 (Paris: Mare et Martin, 2023).



mental faculties to be both protected from violence and have some of the joys of erotic experience.<sup>25</sup> As for the situational conception of consent, it is easy to see how this fails to protect people. The law usually presumes that there is consent when the victim fails to actively consent but also faces no active moral constraint to consenting—constraint implying that it must be proved that the victim could not but obey. This leads to injustices whereby victims of rape and sexual assault are considered by the justice system to be consenting when they are not.

There is a fundamental point on which the law could and probably should intervene, and that is the moral element of rape and sexual assault. As I noted earlier, a crime is characterized by the concurrence of prohibited voluntary conduct (*actus reus*) and the individual's intention to commit wrongdoing (*mens rea*): in order for a crime to be established, the perpetrator must have acted with intent. However, a considerable number of rape and sexual assault proceedings stumble on this question of intent, on the grounds that the aggressor thought the sexual intercourse was consensual.

Courts could adjudicate intent in ways that reduce impunity. This is so because courts don't just listen to defendants' claims. For example, it is not enough that a defendant argues he believed that the alleged victim consented; this alone, is insufficient to exonerate. Rather, the court establishes intent in an objective way, according to the evidence present and methods of reasonably interpreting that evidence. Often courts consider that it may be reasonable to infer consent from a situation in which the victim has given no positive indication of consent, which allows perpetrators to escape accountability.

This could change, and indeed has changed in some jurisdictions. In 2018 the Swedish legislature, responding to a strong movement against sexual violence, passed a law specifying that sexual intercourse must be voluntary—defined as active participation that is communicated either by word or deed—as well as creating a crime of negligent rape. Of lesser severity than rape, negligent rape was established to penalize individuals who are grossly negligent in seeking their sex partners' consent. For instance, if a person is aware that their partner might not be voluntarily participating in intercourse but, without intending to rape, does nothing to ensure consent, that person may be guilty of negligent rape. Opponents, including many critics outside Sweden, argued that the law will punish people whose partners decide after sex that the act was not consensual, but a detailed scientific paper reviewing actual cases of negligent rape tried by Swedish courts shows that this is not the case: findings are based on what goes on during the sex act, and guilt has been assessed only when it is established that the guilty party has in fact neglected to ensure that the consent of the other partner was valid.<sup>26</sup>

An interesting aspect of this law and its application is that it implicitly recognizes that one can experience violation even when one's partner has committed no wrongdoing, although this is not the most common case. The courts evaluate “the situation as a whole,” which means that they consider what the accused person could infer from the victim's behavior; this has led to some cases in which the victim gives signs of “external voluntariness”—and therefore the accused party is not negligent—

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25 See Quill Kukla's fascinating analysis of the problem of prohibiting sex among people with dementia. Quill R. Kukla, “A Nonideal Theory of Sexual Consent,” *Ethics* 131, no. 2 (2021): 270–292, 274–277.

26 Lisa Wallin, et al., “Capricious Credibility: Legal Assessments of Voluntariness in Swedish Negligent Rape Judgements,” *Nordic Journal of Criminology* 22, no. 1 (2021): 3–22.

and yet the intercourse that happens is nonconsensual. For instance, in one case that went to trial, a woman thought the person next to her was her boyfriend when he was not, and this person didn't have any reason to suspect that mistake.

The idea of a crime of nonconsensual sex, as distinct from a crime of rape, is hardly outrageous. (For the reasons I developed above, however, I think it would be better not to call it “negligent rape” and to retain “rape” only for cases of coercive intercourse.) Such a legal distinction was proposed decades ago by the legal scholar Stephen Schulhofer, and now we see that it is functioning as intended in Sweden.<sup>27</sup> It could work elsewhere, too. This is a promising method for addressing intent as an obstacle to accountability in a society where much nonconsensual sex occurs because men are grossly negligent and are responsible for their negligence. Men who do not have a clear intent to rape can still be responsible for holding patriarchal beliefs on the basis of which they feel they do not need to seek consent. Exposure to criminal prosecution for nonconsensual sex would encourage men to actively pursue consent and would suppress the possibility of pleading a misunderstanding.

But such legal change is not even close to a panacea for the problem of sexual violence, and we should be wary of tacking too far in the direction criminal prosecution as our remedy. Today, many feminist activists and scholars of law, sociology, philosophy, and political science argue against placing our hopes in the criminal justice system, and with good reasons. Explicating all of them would be beyond the scope of this book, but allow me briefly to list a handful. First of all, critics question whether the legal system really can do better on behalf of women, given that complaints of rape so rarely result in convictions.<sup>28</sup> Of course, the hope is that legislative change might change this dynamic. Yet, would we really want it to, given that the rare convictions obtained already are usually of poor, racialized men, whereas victimization figures do not show that rapists fall into any particular class or race?<sup>29</sup> This gives reason to worry that laws differentiating rape from nonconsensual sex would provide a racist and classist justice system new avenues for prosecuting oppressed men, while others retain impunity. Perhaps more importantly, research shows that convicting rapists does not deter them from raping in the future; the recidivism rates among perpetrators of sexual violence do not seem to be

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27 See Stephen Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Cambridge, MA: Harvard University Press, 1998).

28 Obtaining figures on rape complaints versus convictions requires cross-referencing across data sources that are themselves incomplete, so the numbers are never exact. But we can obtain illustrative estimates. For instance, the *Cadre de vie et sécurité* survey finds about 93,000 cases of women who were victims of rape or attempted rape each. Compare this to the French Ministry of the Interior's figures on the number of rape complaints by women in 2018 (16,554) and the rape convictions handed down in the same year (1,269). This suggests a conviction rate of about 1.3 percent. Again, this figure is not exact, but it is robust enough to demonstrate that very few instances of rape and attempted rape lead to criminal findings.

29 Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* (Oakland: University of California Press, 2020).

reduced when they spend time in prison.<sup>30</sup> So there is some question as to whether increasing the rate of successful prosecution actually would serve to protect women from aggression, whether intentional or merely negligent. And again, criminal trials risk secondary victimization, a problem that would not be addressed by creating a structure of culpability for negligent rape.<sup>31</sup> Finally, we know that the gender stereotypes permeating society intervene strongly to the disadvantage of sexual assault victims in criminal trials.<sup>32</sup> For example, women's sexual history is almost always scrutinized in rape trials, and a woman who has had several sexual partners in her life is likely to be perceived as a woman of easy virtue, who, therefore, is not rapeable. These stereotypes and their ill effects won't necessarily recede just because jurisdictions adopt a law against nonconsensual sex.

Beyond the criminal justice context, nonstate actors are also using the norm of consent to create quasilegal instruments that are not necessarily protecting anyone, even as they punish wrongdoing and negligence. On US college campuses, in particular, well-intentioned policies to combat sexual violence through consent rules have arguably given rise to repression, without demonstrating clear success in terms of protection. Legal scholars Jacob Gersen and Jeannie Suk Gersen have highlighted the "sex bureaucracy" generated by the desire to prohibit and punish all forms of nonconsensual sex on campus, and the way in which the institutionalization of consent has left the concept more vague, not less. They argue that in many contexts where authority figures rely on consent to distinguish permissible and prohibited sex, the concept is now so contested and so marred by ambiguities that it is no longer useful in practice.<sup>33</sup> Thus there is reason to fear that both the legal and administrative prosecution of sexual assault does not reduce incidence of sexual violence.

But let us say that legal change could be successful in improving conviction rates in cases of sexual assault. Do we really want the solution to sexual violence to be more men in prison? Amid mass incarceration in the United States, and given how widespread rape really is, it arguably both unrealistic and undesirable to send all rapists to prison. Consider that, by the most modest estimates, doing so would mean imprisoning hundreds of thousands of additional men every year in the United States, bearing in mind that the current prison population is about 2 million. What is more, an estimated 80,600 inmates each year experience sexual violence while in prison or jail.<sup>34</sup> It is undeniable,

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<sup>30</sup> Imogen Halstead, "Does the Custody-Based Intensive Treatment (CUBIT) Program for Sex Offenders Reduce Re-Offending?" Crime and Justice Bulletin, NSW Bureau of Crime Statistics and Research (Sydney), no. 193, July 2016.

<sup>31</sup> Joyce E. Williams, "Secondary Victimization: Confronting Public Attitudes about Rape," Victimology 9, no. 1 (1984): 66–81.

<sup>32</sup> Claire Saas, "L'appréhension des violences sexuelles par le droit ou la reproduction des stéréotypes de genre par les acteurs pénaux," La Revue des droits de l'homme, no. 8 (2015).

<sup>33</sup> Gersen and SukGersen, "Sex Bureaucracy."

<sup>34</sup> According to Department of Justice statistics compiled by the Rape, Abuse & Incest National Network, there are, on average, 463,634 victims, aged twelve or older, of rape and sexual assault each year in the United States. There are no reasons to believe these assaults are mostly committed by repeat offenders. "Victims of Sexual Violence: Statistics," Rape, Abuse & Incest National Network,

moreover, that the anti–sexual violence agenda has, in recent decades, been instrumentalized by those seeking a larger criminalization of sex.<sup>35</sup> For instance, as Joseph Fischel has shown, the notion of consent has played a key role in the construction of the image of the sex offender and of sex-offender registries, with catastrophic consequences. At the same time, interest groups pushing sex-offender registries have used consent to render certain forms of sexual violence, notably sexual violence committed by adolescents, invisible.<sup>36</sup>

More fundamentally, there are those who argue against the idea of punishing our way out of sexual violence. In recent years, and especially in the wake of #MeToo, advocates at the intersection of antiprison and feminist politics have developed a powerful critique of what they call “carceral feminism.”<sup>37</sup> These activists—who include many feminists of color—criticize the tendency, which they identify in corners of the feminist movement, to seek the incarceration of violent men without sufficient concern for the unjust consequences of this incarceration. Those consequences affect the incarcerated, to be sure, but also their loved ones, in particular women.<sup>38</sup> These critics are not against accountability, but in place of imprisonment, they propose transformative and restorative approaches to justice, designed to aid victims and reduce violence using methods available outside the criminal system. Such an approach might escape the criminal justice system’s bias against those who do not fit the image of the “good victim,” while allowing victims to seek protection and support without exposing their abusers—who may be loved ones and, again, are likely known to them—to a justice system that puts them at risk.<sup>39</sup>

Given that criminalization is itself so destructive, we should question the idea that more punishment will lead to more justice. Even if every jurisdiction adopted Sweden’s law, their criminal justice systems

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<https://www.rainn.org/statistics/victims-sexual-violence>, accessed March 3, 2023. For US incarceration figures, see Wendy Sawyer and Peter Wagner, “Mass Incarceration: The Whole Pie 2022,” Prison Policy Initiative, March 14, 2022, <https://www.prisonpolicy.org/reports/pie2022.html>.

35 See the work of Julie Mazaleigue-Labaste and in particular Julie Mazaleigue-Labaste and David Simard, “Le consentement peut-il constituer un critère psychiatrique? Le critère du consentement dans les classifications psychopathologiques des déviations sexuelles,” in *Envers et revers du consentement*, ed. M. Garcia, J. Mazaleigue-Labaste, A.-D. Mornington, 27–59 (Paris: Mare et Martin, 2023).

36 See Joseph Fischel, *Sex and Harm in the Age of Consent* (Minneapolis: University of Minnesota Press, 2016); Sarah Stillman, “The List,” *New Yorker*, March 14, 2016. <https://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes>.

37 See Angela Y. Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003); Chloë Taylor, “Anti-Carceral Feminism and Sexual Assault—A Defense: A Critique of the Critique of the Critique of Carceral Feminism,” *Social Philosophy Today* 34 (2018): 29–49; Anna Terwiel, “What Is Carceral Feminism?” *Political Theory* 48, no. 4 (2020): 421–442; and Gruber, *The Feminist War on Crime*.

38 On the effects of incarceration on relatives of incarcerated people, see, for example, Gwénola Ricordeau *Les Détenus et leurs proches. Solidarités et sentiments à l’ombre des murs* (Paris : Autrement, 2008).

39 Mimi Kim, “From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration,” *Journal of Ethnic and Cultural Diversity in Social Work* 27, no. 3, (2018): 219–233.

=> would still operate in politicized environments where poor and racialized men are punished with greater severity. Women would still be revictimized during the criminal process. Women would still be relying for protection on police, prosecutors, judges, and juries beset by sexism. And there is no guarantee that the puny resources provided for investigations of rape allegations would be expanded, making even well-crafted law a dead letter.<sup>40</sup>

Let us not forget that rape is already a serious crime, carrying crushing penalties for convicted offenders. And yet rape happens often. That alone is reason to believe that the criminal justice system is not going to protect women, let alone contribute to an efflorescence of good sex.

### **Social Change and Nonideal Sexuality**

If not by law, then how can we hope to put an end to sexual violence and to promote the erotic conversation that can help build a more egalitarian sexual future? The solution cannot be simply at the individual level, because, as we saw, the main obstacle to sexual autonomy is gender norms.

! People need to practice erotic conversation with each other because the more we talk about sex, the better at it, and less embarrassed about it, we become. And such a practice can be fostered at the social level through broad discourse and sex education for young people and for adults. The #MeToo movement, though its effects have been modest, has done more than decades of legal change to respond to the question of how we get men to stop raping. Moreover, whatever one thinks of using the criminal justice system, two things are clear: first, the injustices of the gray zone can never be solved by criminal justice; and second, the law will do nothing to advance the kind of sexual conversation that is necessary for a moral, joyful, fulfilling sexual life. Sex and rape constitute a political problem that affects all people; the solution will have to involve the public at large, not just what goes on in courtrooms.

As for sex education, it should be both more detailed—discussing specifics of sexuality—and broader, encompassing the subject of gender equality.<sup>41</sup> Hirsch and Khan, the sociologists who developed the notion of the sexual project, found in their study of college students that “almost no one reported an experience in which an adult sat them down and conveyed that sex would be an important and potentially joyful part of their life, and so they should think about what they wanted from sex, and how to realize those desires with other people in a respectful way.”<sup>42</sup>

The exact form that sex education should take is a matter of debate and, ideally, work—we should want it to improve. But we know that when sex education looks like an awkward eighth-grade biology

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<sup>40</sup> See, for instance, the influence of money on plea bargains in rape cases. “Gender Justice,” Hi-Phi Nation (podcast), May 23, 2020, <https://hiphination.org/season-4-episodes/s4-episode-4>.

<sup>41</sup> See Michelle J. Anderson, “Sex Education and Rape,” *Michigan Journal of Gender and Law* 17, no. 1 (2010): 83–110.

<sup>42</sup> Hirsch and Khan, *Sexual Citizens*, 9.

class, and when it teaches sexism, homophobia, abstinence, and the shame of sex—that is, when it looks like the sex education typically found in schools—it only promotes and preserves rape culture.<sup>43</sup>

;) Beyond schools, we need sex education for adults—we should not give up on good sex for everyone above the age of twenty. Adults, too, are part of humanity’s sexual future, both their own and those of young people who learn from them. Right now, adults need to learn how to hold the erotic conversation. Some activist books, like the old *Our Bodies Ourselves*, can help.<sup>44</sup> But as a policy matter, there is much to be said for a large-scale public commitment to promoting a positive norm of sexual consent through popular education and well-conceived sexual violence–prevention campaigns. These campaigns could take advantage of popular culture, including television series such as *Sex Education*, *Normal People*, *The Sex Lives of College Girls*, and even *Grey’s Anatomy*, which normalize positive consent and illustrate its erotic potential. Public-health campaigns are common, of course—they have been used against HIV, COVID-19, gun violence, and even sexual violence. But such campaigns are rarely oriented toward positive goals. We could continue public campaigns for punishing abusers, with at-best middling success, or we could try something new: a campaign promoting the flourishing that can be attained by talking about sex and thinking about the kind of sex lives we want.

Sex education should incorporate consent education, which could draw on practices developed in the field of bioethics. Bioethicists have developed useful solutions for guaranteeing autonomy in another situation of strong imbalance: that of patients responding to doctors who have both power and knowledge that patients lack. Consent discourse in medicine recognizes even caring physicians struggle to behave morally given the pressures of real life; they may be tired or overworked or, for any number of reasons, unable to put themselves in the shoes of the patient and their family. This makes it hard to ensure genuine consent to medical decisions. In response, bioethicists have developed resources such as *Vital Talks*, a compendium of advice for doctors struggling to convey sometimes-discouraging information to patients. Meanwhile the Conversation Project suggests questions that medical professionals should ask or encourage patients to ask and even provides conversation scripts that support patient education and help to ensure that physicians understand what patients really mean when they give consent.<sup>45</sup> Scripts could also improve our approach to sexuality, whether they are

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43 See the work of Vanina Mozziconacci, in particular *Qu’est-ce qu’une éducation féministe? Égalité, émancipation, utopie* (Paris: Éditions de la Sorbonne, 2022). See also discussion of obstacles to good sex education in Amia Srinivasan, *The Right to Sex: Feminism in the 21st Century* (London: Bloomsbury Publishing, 2021), 62–65, and Gabrielle Richard, *Hétéro, l’école? Plaidoyer pour une éducation antioppressive à la sexualité* (Montréal : Les Éditions du Remue-Ménage, 2020).

44 See Boston Women’s Health Book Collective, *Our Bodies Ourselves* (Boston: New England Free Press, 1970) and the more forty different editions, in thirty-three languages, published in its wake; Dossie Easton and Janet Hardy, *The Ethical Slut: A Practical Guide to Polyamory, Open Relationships, and Other Freedoms in Sex and Love*, 2nd ed. (Berkeley, CA: Clarkson Potter / Ten Speed Press, 2017).

45 Beth Lown, “Difficult Conversations: Anger in the Clinician-Patient / Family Relationship,” *Southern Medical Journal* 100, no. 1 (2007): 34–39. See, for example, the conversation script for delivering bad news: “Serious News: Breaking Bad News Using the GUIDE Tool,” *VitalTalk*, 2019,



conceived as educational materials or as the words we might use in the heat of the moment, if we find ourselves struggling to talk about consent. Lots of us, including adults, would benefit from simulated encounters with concrete sexual situations, so as to learn how to address them. We could use scripts to gain skills in erotic conversation, for instance by distinguishing the kind of erotic conversations one might have with a stranger from those with a long-term partner.

Scripts might also be useful in creating conditions for more people to have sex lives. As it stands, people who are socially awkward or cognitively different from the norm are often unable to experience the joys of sex because they are not perceived as potential partners, because they perceive themselves as unworthy of sex, because they have never been introduced to sexual practices, or because they are uncomfortable pursuing sex. Such people, to the extent that they want sex, could benefit from access to education within a society that provides opportunities for sexual autonomy.

To date, consent discourse has been obsessed with law. Reflecting our liberal intuitions concerning the rights of individuals, we have sought to create both laws and—their relative—rules of conduct that firmly distinguish sex from rape, so that violators may be criminally punished and socially shamed and women thereby protected from assault. Ironically, liberal convictions that strongly constrain state action leave us demanding the protection of states—states built by men who often advance male prerogatives.

Because the primary obstacles to a chosen, moral, and joyful sexuality are the social norms that uphold the politics of patriarchy, the best solutions lie in broad social change and in challenging the social domination of men over women—not in criminalization, with consent as the dividing line between licit and illicit sex. This is not to say that law is irrelevant, but legal change follows cultural change. As philosopher Sally Haslanger shows, legal activism tends to be ineffective when it is not grounded in the collective action of social movements and political advocacy.<sup>46</sup> Sweden's law could not have come about prior to the sexual revolution, and indeed was passed decades later. France's recent legislation adopting a firm age of consent was a result of mobilization by feminists and child-abuse activists.

It is undoubtedly in the feminist movement that the first response to the struggle for better sexualities can be found. But, once again, BDSM participants can lend a hand. Having discovered the scope of sexual abuse within their own community, BDSM practitioners no longer focus strictly on the responsibility of the partners in given scenes—including responsibilities to exchange consent and be limited by the terms of the exchange. Instead, the BDSM community as a whole is now working to foster the circumstances that enable genuine consent—consent among equals—by promoting collective responsibility for what transpires in intimate settings.<sup>47</sup> Even in communities marked by

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[www.vitaltalk.org/guides/serious-news](http://www.vitaltalk.org/guides/serious-news). See also The Conversation Project, <https://theconversationproject.org>.

<sup>46</sup> Sally Haslanger, "How to Change a Social Structure," unpublished manuscript revised January 8, 2022, available at [https://www.ucl.ac.uk/laws/sites/laws/files/haslanger\\_how\\_to\\_change\\_a\\_social\\_structure\\_ucl.pdf](https://www.ucl.ac.uk/laws/sites/laws/files/haslanger_how_to_change_a_social_structure_ucl.pdf)

<sup>47</sup> See Meg Barker, "Consent Is a Grey Area? A Comparison of Understandings of Consent in Fifty Shades of Grey and on the BDSM Blogosphere," *Sexualities* 16, no. 8 (2013): 896–914.

the most liberal, individualistic conception of sexual consent, consent is increasingly understood as conditioned by social situations steeped in gender norms and power relations.

! As Simone de Beauvoir so eloquently demonstrated, no individual liberation is possible without a social transformation produced by large-scale movements. But at the same time, movements comprise individuals. We can, in our own lives, recognize the imperfect but real emancipatory potential of consent by treating it as an invitation to an erotic conversation between equals. And we can encourage others to do the same because this is the version of consent that can not only protect vulnerable people but allow all of us to achieve lives of sexual thriving.