

# Consensual Sexual Dysphoria: A Challenge for Campus Life

Robin West

## Introduction

The subject of this symposium, and of the essays generated by it, echo the debates regarding civil rights on university and college campuses of the past half-decade: the severity and frequency of sexual assault on those campuses, the challenge to equal education opportunity those assaults constitute, and what schools should, and should not, be doing to address it. The nonconsensuality of sexual assault—both rape and lesser degrees of sexual assault—have framed many of those debates. Both on campus and off, we currently argue over how consent and nonconsent are to be defined when what is consented or not consented to is sexual, whether the consent required for sex to be legal should be manifested by affirmative words or acts, how nonconsent relates to force and how to coercion, whether rape should or should not definitionally require both the presence of nonconsent *and* coercion, or nonconsent *and* force, or perhaps all three, or, put affirmatively, whether nonconsensual sex alone, with no other requirements or qualifiers—full stop, so to speak—constitutes rape.<sup>1</sup> If rape is so defined—simply as nonconsensual sex—does it over-criminalize sex that, while concededly immoral, should not be regarded as a crime, such as, perhaps, sex procured by fraud?<sup>2</sup> Or does rape, so defined, undercriminalize sex that, while concededly consensual, should nevertheless be criminalized in some way, as is sex procured through coercive threats?<sup>3</sup> However we should define

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1. A voluminous literature spanning several decades addresses the troubled relationship of consent or nonconsent to rape. For significant contemporary contributions, see Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431 (2016) (proposing a definition of rape that eliminates the requirement of nonconsent, and instead focuses on power inequities); Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013) (proposing that rape laws be based on principles of self-possession rather than sexual autonomy); Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1820 (2016) (defending the definition of rape as nonconsensual sex and the use of an affirmative consent standard in campus adjudications of sexual assault); Scott A. Anderson, *Conceptualizing Rape as Coerced Sex*, 15 ETHICS 20 (2015) (proposing a definition of rape based on coercion rather than nonconsent or force).
2. See Rubenfeld, *supra* note 1.
3. See Anderson, *supra* note 1, at 71-76.

rape, though, sex-without-consent—nonconsensual sex, for short—is without question *some* kind of wrong, and the goal of a substantial body of scholarship, of multiple scholarly colloquia and symposia, of classroom discussions across a range of disciplines, and maybe most important, of informal conversations in dorm rooms, on quads, and in dining halls, all over the past half-decade at least, has been to be clear on exactly what that wrong is. Sex-without-consent is clearly a violation of autonomy and, as such, it is also clearly a crime, but perhaps it is also, as borne out by countless women’s experience, much more besides. As many have argued, nonconsensual sex is or can also be a political act predicated upon and then reaffirming a woman’s physical insecurity and hence her civic and political inequality. It seems to intersect in some still unclear way with many women’s and some men’s civil rights to equality, and perhaps with their constitutional rights to equal protection of laws. And, when prevalent on college campuses, nonconsensual sex is *also* an educational wrong: Particularly when unaddressed, its occurrence, the threat of its occurrence, and its repeated occurrence violate a woman’s civil right to equal educational opportunity, as guaranteed by Title IX of our Civil Rights Acts. These crimes, in other words, are also civil rights violations, when they are committed on campus or when they interfere with the enjoyment of equality of educational opportunities.

*Accusations* of sexual assault on campus, however, *also* present civil rights challenges. These accusations of rape or assault, typically but not always brought by a female college student against a male student, whatever else they do, generally trigger campus disciplinary processes against the accused student. Those disciplinary proceedings in turn provide some procedural and substantive safeguards for falsely accused students, but those safeguards unquestionably fall short of the civil and constitutional protections offered defendants in criminal cases charged with similar wrongs. This is not as shocking as it may first seem: What is at stake, after all, in these college and university disciplinary proceedings is not the abridgment of liberty occasioned by jail time, as in a state criminal case, but a disciplinary sanction—at worst expulsion from the college. Nevertheless, that sanction—expulsion—is hugely consequential for the individuals so charged, and for that reason alone the disciplinary procedures that threaten to impose it have become an object of considerable anguish and protest and organized resistance, not only by accused students, but also by their advocates on the faculties and in the administrations of the schools charged with the duties of complying with Title IX’s mandate of equal education opportunities.<sup>4</sup> At the end of this essay I will return to this vexed subject—the threat to the equal educational opportunities that Title IX promised that is posed by nonconsensual sex on campus, and the challenge to various moral if not constitutionally required rights of due process and fair hearing posed by the disciplinary proceedings we have devised to respond to allegations that such sex has occurred. I want to ultimately suggest what I

4. See Jeannie Suk Gersen, *Shutting Down Conversations of Rape at Harvard Law*, NEW YORKER (Dec. 11, 2015), <http://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school>.

hope might be one way—not sufficient, but nevertheless I think one way, and a way that might be necessary—to address the problem of nonconsensual sex on college campuses in a way that respects the educational aspirations of all of us—ourselves, our sons, our daughters, our teachers and our students—and that are either frustrated or realized on these campuses that we all so cherish. We do not want to either experience or remember, or have experienced or remembered by those we love, our campuses as either places of soul-killing threat and danger, or as places of unwarranted persecution and manifest injustice.

So, toward the end of this essay, I will briefly return to the subject of this symposium: the occurrence of, the accusations of, and the disciplining of nonconsensual sex, assault, rape on college campuses. First, though, I want to change the subject, somewhat. I would like to focus these remarks not on nonconsensual sex on campus—not on rape, and not on sexual assault—and not on the adequacy or inadequacy of campus responses to the possible occurrence of those crimes—but rather on something that our conversations about nonconsensual sex have often marginalized, and that is the harms occasioned by sex that is fully consensual and entirely nonassaultive, but unwanted, or not mutually desired, by both partners. I want to focus, that is, not on rape, or the definition of rape, or the sufficiency of nonconsent as a definition of rape, or the harms of rape, but rather, on sex that is *not* rape and not regarded by rape as anyone: sex that is consensual, legal, and not a violation of anyone's civil rights, but is nevertheless unwanted and unwelcome. I want to discuss, briefly, the possible harms *that* sex might occasion. To be more precise: I want to discuss “nonconsensual but unwanted sex,” by which I mean sex that is consensual on both sides, but which one party does not physically desire and does not emotionally welcome, *and which* is not pleasurable. I want to argue that the party who does not physically desire, does not emotionally welcome, and does not take pleasure in sex has sometimes been harmed by that sex by virtue of its unwelcomeness, and that the harm is serious enough that we need to attend to it. Further—the harms caused by this sex are not simply psychological or emotional. They are political. The sufferance of unwanted, undesired, unpleasurable, and unwelcome—albeit consensual—sex over time can undermine a woman's or man's equality in a social and legal world that presupposes the moral as well as legal sufficiency of consent as a measure of subjective well-being.

Before setting out that claim, though, why does consensual but unwanted sex even happen? Why might a young woman, or a young man, or a mature woman or man, consent to sex—whether with an occasional partner, or a boyfriend, or a spouse—she does not want? Let me narrow the focus first to heterosexual penetrative sex, unwanted by the woman who consents to it, and then I'll refocus more broadly. As most women who have been heterosexually active for any part of their adult or teenage lives know, girls and women—and sometimes but less often men and boys—consent to sex they do not want, do not welcome, do not desire, from which they do not anticipate feeling any

pleasure, and from which they feel no pleasure, for any number of deeply familiar, although rarely discussed, reasons. A young woman in college or a girl in high school or middle school may consent to sex she doesn't want because of peer pressure, or to ward off a boyfriend's foul mood, or to retain a high-status boyfriend's affection. A woman with children who is economically dependent on a man may do so to ensure that her partner will pay the rent or leave enough money for the kids' school lunches the next day or to forestall his real or threatened violence should she not consent. A woman in a threatening environment who fears violent sex from some quarter may consent to sex she does not want with a man whom she may not desire but whom she does believe will protect her, and thus represents the lesser of evils: She consents to unwanted sex with one man to ward off the danger of rape by another. A girl or woman at any point in her education may do so to ensure that she will receive a deserved or an undeserved high grade in a class, just as a worker may do for a promotion or pay raise on a job—which may then be a Title VII or Title IX violation. Obviously, and perhaps most pervasively, a woman or girl may consent to undesired, unwanted, and unwelcome sex because her material security depends on it. Throughout time and globally, women have consented to sex they don't want, don't welcome, and from which they derive no pleasure because they quite correctly believe their religion demands it of them, or because they believe it is their obligation as a wife to do so, or because they believe, correctly, that their communities expect it of them. And so on. In virtually none of these scenarios has the woman been raped; in all these cases she has consented—including the one in which she worries about a vague threat of violence in the future. The threat conveyed by a combination of size and athleticism plus a menacing manner or the lack of transportation home or the prospect of walking in an unfamiliar neighborhood or the danger of violent sexual assault by others is not itself sufficient to make the sex that ensues a crime. In all these scenarios, though, the woman or girl has consented to sex that she does not physically desire, does not emotionally welcome, and does not find pleasurable. Consensual but unwanted sex, both within and outside marriage, and both on campuses and off, is ubiquitous. And of course, when consensual but unwanted sex is followed by a consensual but unwanted pregnancy, the harm occasioned by that sex is magnified.

I want to suggest here that this unwanted but consensual sex—on campus and off—can carry with it its own distinctive harms that are related to, but different from, the harms occasioned by rape. Our focus on nonconsensual sex, coerced sex, forced sex, sexual assault, and rape, therefore, tends to at best marginalize and at worst to legitimate these quite widespread experiences, and mute or forestall discussion of the harms that these sexual experiences might cause. The focus particularly on consent as the marker of both legal and moral sex, and on nonconsent as the marker of both injury and criminality, runs the risk of virtually defining the harms caused by consensual sex out of existence, or at least minimizing their significance.

So, in the remainder of this essay, I will make three major claims about consensual but unwanted sex and suggest steps we might take, culturally, to interrupt those harms. First, I will argue that consensual, nonassaultive, but nevertheless unwanted sex can nevertheless be harmful in spite of its consensuality, and that those harms are borne disproportionately but by no means exclusively by women. Although it's a mouthful, I want to label the cluster of harms occasioned by such sex as "dysphoric" and the political condition it entails "consensual sexual dysphoria." Like all dysphoric conditions, this one occasions an alienation from and a profound discomfort within one's body. Second, I will argue that the dysphoric harms occasioned by consensual but unwanted sex are not only psychologically debilitating but also *political*. The experience of unwanted sex occasions an alienation of the choosing self from the integrity of the body. That alienation undermines one's sense of physical security in the social world, and hence one's equality in it. Third, I will suggest some reasons—grounded in presuppositions of liberalism, libertarian politics, political theory, and feminism—that these dysphoric harms of consensual sex are so peculiarly invisible to us in our contemporary legal-sexual and cultural-sexual climate.

After spelling out these claims, I will return briefly to the subject of sexual assault on campus, and our seemingly intractable and stalemated debates over how to fairly deal with these accusations when they arise. I want to suggest that in addition to whatever might be the harms occasioned by consensual but unwanted sex, the ubiquity of that sex may have contributed to the rise of all forms of sexual assault, including nonconsensual sex and rape, on college campuses as well as off. Therefore, if we want to address the causes of the spike in the number of accusations of unwanted sex, as well as simply respond with disciplinary actions when these accusations are made, we should perhaps attend to the apparent ubiquity of unwanted consensual sex: By attending to the latter, and its causes, we may actually drive down the number of assaultive sexual crimes on campus and off.

In my conclusion I will sum up my normative claim, to wit, that one major but largely unattended and undertheorized condition for the morality—although not the legality—of consensual sex is that it be mutually desired or welcomed. Consent may be enough to make sex legal, but it is not enough to make the sex good, in any sense of the word "good." Sex must be mutually welcomed for it to be moral, for it to be ethical, for it to be truly in your interest, for it to be aligned with your own dignity, for it not to sap your strength, for it to be consistent with your own worth, and yes, for it to bolster rather than undermine your social and political equality. So the lesson we should be teaching ourselves and our young children and teenagers is to not have sex unless both partners desire or welcome it—even if both are consenting, willing, or game. That straightforward change in our sexual education, our sexual ethics, and hence our sexual culture might go some way toward mitigating the harms of an otherwise unbound libertarian sexual ethic that now dominates our sexual discourse, culture, and actions both on campuses and off. That

libertarianism has come to entail, for too many, a mandate that coerces—albeit not violently and not typically with force—sexual compliance. It is a mandate that serves the interests of the powerful, in the sexual sphere as in so many others, not by overcoming the will, but by extracting the consent, of the weak.

### The Harms of Unwanted Consensual Sex

So what are the harms of unwanted sex? When I first started writing about this in the early nineties, virtually no research existed on the subject. That is no longer true: In the past fifteen years, empirically minded social workers, psychologists, and sociologists have begun to look at some of the harms caused by the sufferance of unwanted consensual sex, at least among college-age women—and in a way that carefully distinguishes those harms from the harms caused by nonconsensual sex, or rape, which has been the subject of intense and extensive study for at least fifty years.<sup>5</sup> The work is still in its infancy, but it is growing. To summarize: According to a number of studies—perhaps a dozen, total—young middle school and high school girls and college and university women who engage in unwanted but consensual sex disproportionately suffer from depression and related psychological and emotional harms; they are less likely to use or insist upon birth control, so they are more likely to also suffer unwanted pregnancies; and they have reduced self-esteem and sexual agency.

The empirical research is welcome and overdue, but it is also still limited, both in terms of the number of such studies and in their scope and depth. In particular, what has not been studied is the possibility that the sufferance of all of that unwanted consensual sex—what Shari Motro calls “sex against desire,” (or SAD, for short)<sup>6</sup>—regardless of the age of the women or men who engage in it, might carry distinctly political and psychic harms, in addition to the emotional harms to self-esteem and health that have been studied to date.

5. A growing body of social sciences scholarship focuses on unwanted sex engaged in by college students and young adults of both sexes, some of it inspired by and informed by feminist concerns that the willingness of young women to consent to sex they do not want is a function of gender role stereotyping. Emily A. Impett & Letitia Anne Peplau, *Why Some Women Consent to Unwanted Sex with a Dating Partner: Insights from Attachment Theory*, 26 *PSYCHOL. WOMEN Q.* 360 (2002); Sarah J. Walker, *When “No” Becomes “Yes”: Why Girls and Women Consent to Unwanted Sex*, 6 *APPLIED & PREVENTIVE PSYCHOL.* 157 (1997); Susan Sprecher et al., *Token Resistance to Sexual Intercourse and Consent to Unwanted Sexual Intercourse: College Students’ Dating Experience in Three Countries*, 31 *J. SEX RES.* 125 (1994); Lucia F. O’Sullivan & Elizabeth R. Allgeier, *Feigning Sexual Desire: Consenting to Unwanted Sexual Activity in Heterosexual Dating Relationships*, 35 *J. SEX RES.* 234 (1998); Charlene L. Muehlenhard & Stephen W. Cook, *Men’s self-reports of unwanted sexual activity*, 24 *J. SEX RES.* 58 (1988); Miriam Lewin, *Unwanted Intercourse: The Difficulty of Saying No*, 9 *PSYCHOL. WOMEN Q.* 184 (1995); Pamela I. Erickson & Andrea J. Rapkin, *Unwanted Sexual Experiences Among Middle and High School Youth*, 12 *J. ADOLESCENT HEALTH* 319 (1991). I have found only one article on the propensity of married women to consent to sex they don’t want, and that involves young married brides in India. K.G. Santhya, Nicole Haberland, F. Ram, R.K. Sinha & S.K. Mohanty, *Consent and Coercion: Examining Unwanted Sex Among Married Young Women in India*, 33 *INT’L FAM. PLAN. PERSP.* 124 (2007).
6. See Shari Motro, *Scholarship Against Desire*, 27 *YALE J.L. & HUMAN.* 115 (2015). The phrase originates with MARCIA DOUGLASS & LISA DOUGLASS, *THE SEX YOU WANT: A LOVERS’ GUIDE TO WOMEN’S SEXUAL PLEASURE* 110 (2002).

Those psychic and political harms have *not* been so closely studied by either social scientists or social workers, although they are obliquely evidenced in one extraordinary but still unpublished qualitative study of unwanted sex by Alyson Spurgas, a feminist sociologist.<sup>7</sup> And they are much more explicitly and extensively discussed in feminist autobiographies and memoirs, perhaps most powerfully, but certainly not exclusively, by the late Andrea Dworkin, and more recently in feminist blogs and web pages.<sup>8</sup> What might they be?

Let me start with the psychic harm, which I am calling “sexual dysphoria.” When we consent to any change in our world, but particularly when we consent to transactional changes in our world—when in a market economy we buy a consumer product, or take a college course, or commence a job—it is widely presumed, in theory and practice both, that the change increases the well-being and promotes the interest of he or she who consented. There is, in other words, a presumed correlation between the increase in our objective wealth when we consent to a transaction and an increase in our subjective well-being, happiness, or pleasure. That is, indeed, the entire justification of not just market economies, but also of what I have elsewhere called and will below refer to as an “ethic of consent” that broadly underscores the moral view behind liberalism itself. But what if, contrary to this definitional presumption of an increase in well-being resulting from consensual transactions, there just isn’t? Isn’t an increase in felt well-being? Not really. Not subjectively. Yeah, we bought the couch, but we don’t much like it. “Buyer’s remorse.” But what if it is more intense? What if the trade or bargain or change to which we’ve consented and committed ourselves leaves us not just remorseful over a bad purchase, but miserable? What if the work we’ve agreed to perform for a wage leaves us sickly and suffering or bored and disabled? What if the consumer product we’ve agreed to buy leaves us not just unsatisfied with the product, but with nothing but a residue of dissatisfaction?

The result, I suggest, is a disconnect, or a disjuncture, or a dysphoric relationship between our objectively understood individual interest, as measured by our individual wealth—which again definitionally is increased with every single consensual trade we ever enter into—and our subjectively

7. Alyson Spurgas’s work on the gendered implications of changing diagnoses of women’s sexual desire “disorders,” and the implications of those diagnoses for women’s political lives, is most promising. See, e.g., Alyson Spurgas, *Interest, Arousal, and Shifting Diagnoses of Female Sexual Dysfunction, or: How Women Learn about Desire*, 14 *STUD. GENDER & SEXUALITY* 187 (2013) [hereinafter Spurgas, *Interest*]; Alyson Kay Spurgas, *Circuits of Desire: Science, Therapy, Trauma, Femininity* (2014) (unpublished Ph.D. dissertation, City University of New York) (available at CUNY Academic Works, [http://academicworks.cuny.edu/gc\\_etds/387](http://academicworks.cuny.edu/gc_etds/387)); Alyson Spurgas, *Low Desire, Trauma and Femininity in the DSM-5: A Case for Sequelae*, 7 *PSYCHOL. & SEXUALITY* 48 (2013); Alyson Spurgas, *Sexual Carework and Feminine Socialization in Intimate Relationships: Embodied Invisible Labor Among Low-Desiring Women* (Aug. 2015) (paper presented at Annual Conference of the American Sociological Association) (on file with author).
8. See ANDREA DWORKIN, *INTERCOURSE* (1987). For contemporary legal-feminist analyses of unwanted consensual sex, see Motro, *supra* note 6, and Susan Appleton, *Toward a “Culturally Cliterate” Family Law?*, 23 *BERKELEY J. GENDER L. & JUST.* 267 (2008).

experienced, and experiencing, hedonic selves: the selves, that is, who experience pain and pleasure, who feel the wind at our backs or the gale-force hurricane in our faces, who feel comforted or who suffer blows to our natural bodies when touched, who thrive when healthy and who sicken and die, who are either bored or humiliated at work, or who thrill to their workplace accomplishments, who love and nurture those children so fully consensually brought into the world, or who can be so wounded by them. A disconnection between the presumed increase in the well-being of the transactional self that is assumed to follow from the transactional exchange and a felt increase not in well-being but in misery of the hedonic self might alienate us from the latter. When that disconnection is dramatic or extreme, I call that condition “dysphoria”: an alienation and disorienting dislocation, or discomfort, with the evidence of our subjective, desiring, pained selves.

When we consent to a change in our sexual world—when a heterosexual woman consents, for example, to penetration and intercourse—again, as with any transaction, it is presumed that that consensual change will leave her better off and, more specifically, with a net increase in physical pleasure: that the consensual transaction increases her felt physical pleasure and her felt satisfactions along with her overall well-being or welfare. But again, what if it doesn’t? What if she reaps not pleasure or satisfaction but pain and discomfort and boredom and invasion and alienation from the sexual transaction to which she has consented, and which is therefore presumed to increase her overall net satisfactions in life? The result of that disjunction is an alienation not only from felt subjective life, as described above, but an alienation from her most profoundly *embodied* subjective hedonic life—it is a disjunction, after all, between the felt pleasures and pains of her body and the presumed pleasures and pains of her body, and the body’s interiority at that. You’re supposed to be and you’re presumed to be feeling pleasure, but instead you’re feeling pain.

One way to resolve the dissonance is by occupying, so to speak, the thinking, rational, calculating transactional self—the self that calculates benefit by reference to the exchange value of consensual transactions—and alienating the hedonic self, or crudely by squelching the latter in deference to the former. The pained, subjective, feeling self, in other words, gets the blunt end of the stick. The resulting alienation of the feeling, experiencing, hedonic self, and of that self’s significance, is what I’m calling consensual sexual dysphoria. It is an alienation from one’s own physical and sexual desires, pains, and pleasures as a distinctive guide to one’s own sexual self-interest and well-being. The alienation of that self, I suggest, can have lifelong debilitating consequences.

And now, the political dimension of this. I can find no empirical research on this question.<sup>9</sup> Nevertheless, there may be a cluster of distinct, albeit related,

9. Spurgas’s work alludes to these harms, but doesn’t spell them out in detail. She refers to the general phenomenon I am addressing in the text as the “husbandry” of female sexuality, and hence of female bodies. Spurgas, *Interest*, *supra* note 7, at 205. Andrea Dworkin’s work on intercourse can largely be read as a study of the undocumented and largely undiscussed political harms of consensual and unwanted sex as distinct from the much more studied

political harms, as well as psychic harms, incident to consensual sexual dysphoria. They might be partly inferred simply from the divergence between the nature of the “self” so constructed by these consensual choices and the nature of the “self” presupposed by liberalism and neoliberalism. First, as with the woman who carries an unwanted pregnancy, one’s physical integrity and sense of self as having physical integrity is invaded when opening oneself up, physically and literally, not only to penetrative sex but to other forms of sex as well, that one does not want and does not find pleasurable. The penetrated body becomes, to that degree, fluid, or porous. The body becomes boundary-less in ways that are inconsistent with—I think violently inconsistent with—the conception of the bounded body that is vitally central to liberal theory. One is creating a “self” through one’s consensual choices that is inconsistent with the unified and bounded self-presupposed by liberalism itself. So the first harm of consensual but unwanted sex is to the boundedness, and integrity, of the liberal body.

Second, and again like the woman who bears an unwanted pregnancy, a woman or girl who consents to unwanted sex compromises her self-sovereignty: She willfully subjugates her body and her will to someone else’s. She acts in ways inconsistent with her own desire, and not in furtherance of her own pleasure. And here again, the “self” she creates through these choices stands in contrast to the willing, choosing, and preferring “self” assumed by but also partly constructed by liberalism, the self with desires and pleasures that are manifested in preferences, choices, and acts. The woman consenting to undesired sex, by contrast, prefers, chooses, and acts on the basis of her partner’s pleasures and desires rather than her own. Although we can’t impose our desires upon the actions and choices of other free agents in the world, it is a hallmark of contemporary liberalism to insist that we can do precisely that with respect to our own bodies: that the choices we make, which we then effectuate through bodily movement, are presumed to reflect our own preferences, pleasures, and pains, not those of others. So a woman who consents to sex she does not want and from which she derives no pleasure is willing away her self-sovereignty in a profoundly physical and illiberal sense: She is committing her body to the satiation of the desires and the fulfillment of the preferences of someone else.

Third, a girl or woman who consents to sex she does not want is stunting her own autonomy when she subordinates her own hedonic ends to those of another. She is simply not choosing a future course of action that will promote her interests, pleasures, or satiate her desires; she is choosing a future course, again, that promotes the interests, pleasures, and desires of another. And finally, her own moral integrity is undermined if she lies to her partner and herself about her own pleasures or reasons for consenting to the sex she doesn’t want. Physical integrity, moral integrity, autonomy, self-sovereignty,

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harms of rape. See DWORKIN, *supra* note 8. An extensive discussion of the value, lack of value, or possible harms of engaging in “maintenance sex”—unwanted consensual sex necessary to maintain an intimate relationship—can be found on feminist blogs, including JEZEBEL.

and self-possession are all central components of the liberal, political self. When women and girls willfully relinquish them in their sexual lives they are in effect relinquishing their entitlement to the enjoyment as well as the challenges of that widely lauded, widely expected—and intensely political—way of being in the social world.

Women in long-term relationships who routinely and over time—sometimes over the course of an entire adult lifetime—consent to unwanted and unpleasurable sex are likely harmed all the more profoundly. A mature woman’s physical integrity—her ownership of her body’s boundaries—is obviously far more severely compromised if she quite literally and routinely and even as a matter of self-identity opens up her body in service of another’s pleasures, will, and ends over the course of adulthood. That permeable, fluid body, after all, defines her adult body, not just her occasional participation in casual sex. Likewise, a mature woman’s agency and sense of agency will be even more badly compromised than the college student’s if she routinely, and over years, puts herself and her body to the work of participating in an activity she does not want or welcome.

It is simply hard to imagine a healthy sense of one’s own agency either developing or being sustained over the course of an adult life in which a woman as a matter of identity and habit bends her will regarding her own body for the sake of another’s physical pleasure. The “self” as understood by liberal thought—meaning a self that both constitutes and asserts a unity of choice, desire, pleasure, and preference—might be badly diminished in long-term relationships in which a woman habitually and over years acts and chooses to act, against the teaching of her own pleasures, preferences, and desires, and instead on the basis of and reflecting the physical pleasures, desires, and preferences of her partner.

So, these are the clusters of harms, or the types of harms, I want to collectively call “dysphoric”: the damage done to a woman’s or girl’s sense of physical integrity, autonomy, self-sovereignty, and moral integrity by virtue of her consensual commission of her body in sex she does not desire and from which she receives no pleasure. Of course, we all, in the course of our lives, make choices to use our bodies in ways that we fervently hope will maximize the well-being of others—others whom we love, or admire, whom we willingly and happily serve, or to whom for whatever reason we are or feel obligated. We make our children’s lunches in the morning, we go to work all day at jobs we may abhor, we change diapers and clean our houses, we care for our elderly parents, and so on, and in all of these activities we use our bodies in ways that don’t directly contribute to our pleasure, and may very well intensify the pleasure of others. And that may be why we do it. We don’t, though, routinely do these daily and loving tasks in such a way as to render our bodies passive vehicles for the physical pleasure of others, with no expectation of our own pleasure. And these are not activities the understood point of which is and should be pleasure and affection, while the felt reality is displeasure, pain, and alienation. Nor are they as physically invasive: When we make lunches and cut

the lawn and clean the house, we are not using our bodies in ways that leave us physically invaded and vulnerable to impregnation.

When we do these tasks, we are not doing them in ways that directly alienate us from our own bodies and the pleasures and pains they sustain, precisely in a field of action in which pleasure is or should be the point, or close to it. We don't, when we do these loving tasks for others, turn our bodies over so that our bodies themselves become tools for the fulfillment of the desires, preferences, actions, and choices of others. We don't do them in ways that so compromise our physical integrity, self-possession, self-sovereignty and moral integrity, or in ways that so profoundly sever the connection between pleasure, desire, preference, choice, and act. We don't do so in ways that leave us so thoroughly alienated from the functionality of our own bodies as united with our own desires, pleasures, pains, choices, actions, hopes, ambitions, and futures. We don't do so, in short, in ways that promote such a deep, albeit consensual, dysphoric sense of strangeness, and alienation, from our own physicality.

What I want to stress, which I believe goes beyond the claims made in the empirical literature on the psychological harms occasioned by unwanted consensual sex, is the possibility that these dysphoric harms to selfhood sustained either occasionally by girls and boys and young men and women, or, over time and more persistently, by mature women, could and should be characterized as *political*, and not only *psychic*. All of them collectively—the compromise of sovereignty, of physical integrity, of autonomy, and of integrity—undermine the unity of self that is central to liberalism: a self that forms preferences on the basis of one's desires, then forms choices on the basis of those preferences, and then takes actions on the basis of those choices. The liberal self quintessentially acts in the world in a way that reflects and is deeply rooted in desire, as mediated through preference and choice. The woman who habitually consents to unwanted sex, and then sometimes to unwanted pregnancy, by contrast, acts in the world in a way that reflects, is rooted in, and then serves the sexual desires, sexual preferences, and sexual needs of others, and then the survival and biological needs of fetal life.

Now, of course, a woman or man who engages in hotly desired sex, or a woman who undertakes a fiercely desired pregnancy, also is performing a mode of selfhood that is at odds with liberal presuppositions: a pregnant woman's selfhood and a partner's boundaries in sex are fused with the needs, interests, passions, and desires of the other in non- and illiberal ways. In fact, just that fusion, I have argued elsewhere and repeatedly, is a poignant and persistent and vitally important reminder of the fallacy and the partiality of liberalism itself. When pregnancy or sex is wanted, the experience of pregnancy and the experience of sex are both profoundly important counterexamples to the overdrawn atomism of liberal individualism. We value and treasure those experiences largely for just that reason. When they are not wanted, though, that fusion, that blurring of self, that loss of boundary, that relinquishment of physical and moral integrity, that immersion of one's self in the interests and needs and ends of the other—is not poignant in the slightest; it is, rather,

to quote Mark Kelman's description of a quite different phenomenon—it is, rather, just an oppression. Desire makes all the difference.

How do these harms become political? Why might they have political repercussions? Briefly: A woman who routinely engages in unpleasurable, unwanted, and unwelcome sexual activity, even if consensual, and marital or not, might come to regard herself, and others may regard her likewise, as being in effect the “kind of person” who has no physical integrity; who might of course *have* pleasures and pains, but whose pleasures and pains are irrelevant or marginal to her body's actions; who may have and act on her own choices, but whose choices do not reflect her own desires; and who obviously has a body, but one that exists for the purpose of another's sexual fulfillment. As this becomes normalized and routinized, she may become that much less a “liberal subject”: She may become that much less a person who is prepared and presumed to interact in a world in which a subject's consent to actions, trades, bargains, and institutions track the subject's preferences and her desires. She consents to all this sex, but that consent—*her* consent—does not, at least in a very important dimension of her life, track her own preferences and desires rather than her partner's. This is a different political harm than the harm done to a woman who has been raped: The woman who consents to unwanted sex is acting and experiencing herself as acting in a way that is contrary to the unity that we assume in the liberal self—a unity of desire and preference and choice, or action.

The political harm of consensual unwanted sex, then, if this is right, is that the woman's or girl's capacity to live as a “liberal self” is badly undercut. Quite plausibly, although again there's no research on this, at least that I can find, that might in turn limit both her viability and her potency in a liberal world hardly designed to accommodate someone so constituted. She becomes an illiberal subject in a liberal world. It may not be quite so surprising that such illiberal women in liberal societies have a greater tendency toward self-abnegation, self-denial, sacrifice, and altruism than their more atomistic husbands, brothers, fathers, and sons. It may not be so surprising, even, that they don't raise their hands in law school classes very often and that they aren't very adept at bargaining for a decent price when buying a new or used car. All of that unwanted sex to which women and girls and less often men and boys consent might be part of the problem, and for that reason alone, if no other, it should count as a harm. Again, the libertarian's valorization of autonomous sex is seemingly blind to it.

### The Invisibility of Dysphoric Sexual Harms

So, why? Why are these dysphoric harms of unwanted consensual sex—both the psychic and the political—so invisible? Why are *those harms* so invisible to what Gerald Bradley and Robert George, in a debate on related topics twenty years ago, fruitfully called the “liberal imagination”?<sup>10</sup> I think there are at least

10. Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995).

six major reasons, which I'll briefly name and then offer a very quick note on each: first, liberalism itself, and its valorization of consent as a guide to well-being; second, sexual libertarianism, and its valorization of sex as an almost axiomatic human good; third, the deep structures of feminist thought, and its embrace of either liberty or equality, rather than subjective well-being, as guides to political action; fourth, our culturewide overinvestment in legalism, and our aversion to moralism, as concomitant to our commitment to individual liberty; fifth, philosophically, the disavowal of hedonic life as a guide to well-being and self-interest; and sixth, politically, sexism, pure and simple. I'll comment briefly on each.

The first of these—liberalism itself, and its valorization of consent—has little or nothing to do with sex, but has everything to do with consent, and with the role consent now plays in political and legal liberalism, or to some of its variants. As I've argued elsewhere, the very idea of "consensual harms," in some economically grounded versions of liberalism, is virtually oxymoronic: Consent is widely regarded within economic liberal theory as the mechanism by which value is created, with the consequence that consensuality precludes the possibility—and hence visibility—of harms that may be caused by any consensual transaction. Pareto-optimal transactions just can't be harmful, and consensual sex, whatever else it is, is pareto-optimal. Consensuality is also central, though, to some libertarian as well as feminist interpretations of liberalism: The free or autonomous individual, for the libertarian and liberal feminist, simply *is* the individual who chooses between options, whether in economic or political or intimate markets. For noneconomic libertarians and liberal feminists, then, consent is emblematic of as well as constitutive of autonomy; consent itself is a sort of intrinsic as well as instrumental good. If consensual transactions are intrinsically good, then obviously the same is true of consensual sexual transactions. Increasing the number and availability of opportunities for consensual sexual transactions increases not only the wealth of the world, as per the economic legalist, but the autonomy of the world likewise, as per the libertarian.

Sex, however, is also distinctively and peculiarly valorized within contemporary liberalism, and so *consensual* sex is all the more so: Consensual sex, then, combines the prima facie value of consensuality with the prima facie value of sex. Sex, in the "liberal imagination," to borrow again the expression from Stephen Macedo and Robert George's exchange, and as Tom Grey argued some time ago, is decidedly *not* the product of "dark forces," the repression of which makes civilization itself possible.<sup>11</sup> Rather, sex, in the modern liberal imagination, is about as non-Freudian as sex can possibly be: Sex, *contra* Freud, is expressive, private, universal, a matter of taste, generative of pleasure, and imposing no or few costs on others. Sexual moralisms that assume to the contrary have imposed irrational and profound harms on vast swaths of the community, and for no sensible reason—as modern or contemporary liberals from Bertrand Russell to H.L.A. Hart to Michel Foucault to David

11. Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 L. & CONTEMP. PROBS. 83 (1980).

Richards and to Stephen Macedo have all, in different ways, argued. So long as consensual, there simply are no further conditions for the morality of sex. So, the idea that sex also ought to be mutually desired as well as mutually consensual—not only in the workplace but everywhere—just doesn't enter the picture. Consent is moral condition enough.

Third: These harms disappear, in part, because of the structures of contemporary feminism. Liberal feminism, still by far the most dominant form of feminism, both culturally and legally, tends to follow liberalism in identifying wrongs to women with violations of consensual ethics. For centuries, after all, women were indeed harmed by virtue of roles and responsibilities and infirmities imposed upon them without their consent and against their will, from rape itself to involuntary pregnancy and motherhood. Insistence on the necessity of consent, however, has carried an unfortunate and unwarranted inference: From the insistence on the necessity of women's consent to the institutions and cultures that frame their lives, liberal feminists, that would be most of us, have too quickly assumed the sufficiency of that consent as well. If we chose it, whether the "it" be pregnancy, motherhood, careerism, or heterosexual intercourse, we wrongly conclude that it simply must be an improvement in our well-being, since the imposition of those institutions and conditions without our consent so manifestly was not. But, of course, this doesn't follow; again, consent is just not enough to ensure goodness, even if the lack of it is quite bad indeed. The goodness of work doesn't follow from the wrongness of slavery, the goodness of commerce doesn't follow from the wrongness of theft, and, likewise, the goodness of sex doesn't follow from the wrongness of rape. Liberal feminists, in short, have been far too quick to acquiesce in the value of consensual sexual relations, an acquiescence originating in an unjustified inference from the wrongness of coercive imposition.

Radical feminism, still the most significant counter to liberal feminism, has not proved here to be a corrective. Radical feminists have tended to view that which harms women not in terms of nonconsent or infringements of liberty, but rather in terms of unequal power and coercion. In the context of sexual harms, this has led to what I have elsewhere called a "coercion tunnel": Radical feminists are attuned to a broad range of harms, but tend to ascribe them causally to some coercive force.<sup>12</sup> This leads to an unfortunate syllogism: If something is felt or experienced as harmful, then it simply must be because of coercion. In the context of sex, this is the kernel of truth behind the common enough charge that radical feminism is committed to the proposition that "all sex is rape": If sex is felt as harmful, then it must be coercive, and if coercive, then it must then be rape, or close to it. But the premise of this syllogism—that if sex is harmful, it must be coercive—is as fallacious as the twinned liberal claim that if sex is consensual it must be good. Harm no more implies the presence of coercion than it implies the absence of consent. Consent is not

12. Robin West, *Sex, Law and Consent*, in *THE ETHICS OF CONSENT* 221 (Franklin G. Miller & Alan Wertheimer eds., 2010).

enough to render sex good, but coercion is not the necessary precondition of harm. If we're consenting to a condition or activity that harms us, that condition or activity is neither necessarily nonconsensual nor necessarily coerced. It nevertheless may be injurious.

Fourth is legalism itself. Large swaths of contemporary culture, by no means all, tend to equate the legal with the good, with the consequence being that harms not consequent to crimes or torts or at least civil rights violations are not cognizable. These harms are of that sort: Sex to which we consent, but which we do not desire, is not going to be the proper object of either criminal or tort law, and is not, absent other circumstances, a violation of civil rights either—it is actionable harassment only if it is a *quid pro quo* that occurs in the workplace or the school, and interferes with a woman's paycheck or grade transcript. I am not arguing here for an expansion of either criminal law, tort law *or* civil rights regimes. It's worth noting, though, that here as elsewhere in liberal societies it's what's legal, not what's illegal, that might be most hurtful, because here as elsewhere it is what's legal, not what's criminal, that is ubiquitous, largely invisible, and the instrumentality of the exercise of significant power.

Fifth—these harms are invisible because they are harms to our hedonic selves, and we are in a cultural and intellectual moment that counsels a distrust of those selves as having either political or moral salience as guides to our well-being. Utilitarians, in their quest for general happiness, gave up the ghost long ago of any reliance on actual pleasure and pain as guides to individual well-being, turning instead to the maximization of satisfied preferences and the fulfillment of individual choice—paving the way for the late-twentieth-century economic movement toward wealth, rather than subjective well-being, as that which we should aim to increase in both our public policy and our private lives. Nonutilitarian moral theorists are even more deeply distrustful of hedonic life as a guide to moral action, positing pain, pleasure, and desire as distractions from a studied focus on principle and rationality as the most humanly distinctive and morally ambitious guide to an ethically sound life.

From within politics, and political theory, Marxists and other critical thinkers have been notoriously distrustful of subjective desire, always alert to the possibility that such desire may be false because coopted by hierarchic powers, as a guide to well-being. Conservative moral theorists and traditionalists have been no kinder, seeing in pain and pleasure and desire little but infantile urges waiting to be tethered to socially and historically sanctioned purposes. Harms that are sustained by our hedonic selves are not going to register as either meaningful objects of moral concern or guides to moral action by virtually any of these moral traditions—which do constitute, in toto, the sum total of our contemporary moral teachings.

And finally, these harms may be as invisible as they are because it is women and girls who disproportionately sustain them. Our shared tendency to ignore the hedonic costs of sexual dysphoria might simply continue the centuries-long trajectory of women's pains and pleasures, particularly in our sexual and

reproductive lives, just not mattering much. Women's pains and pleasures don't much register, and never have, as intellectually interesting, medically imperative, politically salient, or morally significant. Not to put too fine a point on it, but they don't matter much, and haven't mattered much, primarily because of the political power of those who profit by ignoring them.

So: That the hedonic injuries suffered through consensual but unwanted sex go relatively unnoticed is mightily overdetermined. Societally, they are rendered invisible by liberalism's embrace of consent rather than well-being as a guide to policy; culturally, by sexual libertarians' insistence on sexuality as a near-absolute good; politically, by feminism's commitments to liberty and equality, roughly, rather than happiness or flourishing, as political goals that will further the well-being of women; intellectually, by political philosophers' collective distrust of subjective experiences, and particularly experiences of pain, pleasure, and desire, as guides to critical moral and political thought; and historically, by our collective and millennium-long discounting of the moral significance of women's subjective experience across the board, but particularly women's experiences of subjective pain.

To get to the other side of all of this requires some heavy lifting. It requires a willful disavowal of some of the teachings of our intellectual traditions, some critical distance on our consensual choices, some reawakening of a moral sense grounded in sympathy, pain, and pleasure, rather than principle, some old-fashioned consciousness-raising, and perhaps some new-fashioned mindfulness. But the journey may be worth taking. What's at stake may be not only a modicum of sexual health, but also, more ambitiously, a reacquaintance with our hedonic selves as a reliable guide to our own and one another's well-being, and a bit of warranted skepticism about our multiple traditions, from across the political spectrum and through so many of our modern intellectual traditions as well, that teaches a honed contempt for those selves as worthy of moral action, contemplation, or sympathy.

### **Conclusion: Sexual Dysphoria and Rape on Campus**

Finally, let me try to relate our societal acceptance of unwanted but consensual sex with the sufferance of sexual assault and rape on our college campuses. I have already indicated one problematic relation between these two phenomena: Our contemporary focus on nonconsensual sex may indirectly legitimate the harms occasioned by consensual sex, and make the latter all the more difficult to see. After all, if rape is wrong because it is nonconsensual, then it may seem to follow—although it should not—that so long as sex is consensual, and therefore is not rape, it is accordingly good. Just as a focus on the criminality of theft may blur or mask the wrongness of property, and just as a focus on the wrongness of slavery can blur or mask the wrongness of a great deal of wage labor, likewise here a focus on the wrongness of rape, sexual assault, and nonconsensual sex can blur, or mask, the wrongness of many of our consensual practices. That a practice—whether a labor, commercial, or sexual practice—is consensual does indeed imply that it is not wrong by virtue

of the presence of force or coercion that is obviated by the presence of consent. It does not mean, though, that it isn't wrong.

There is, though, a second and perhaps more subtle connection between the ubiquity and relative invisibility of the harms of consensual but unwanted sex and the occurrence on campuses of nonconsensual sex, sexual abuse, and rape. Consensual sex is a transaction, and increasingly viewed as such. Sex is an object of exchange. And, as it turns out, it's not really worth all that much. It's something we'll exchange for just about anything or nothing: not just for security, money, drugs, rent, a grade, or a promotion, but for much less. Perhaps for a tip regarding where we might buy a decent electric blanket, as the late Helen Gurley Brown, the one-time and longtime editor of *Cosmopolitan* magazine, apparently opined in the early 1960s, at least according to one anecdote.<sup>13</sup> Perhaps we trade it for a favor, or for an introduction to someone who may further our career, or for a night out, or for a conversation, or for help with a college paper. Unwanted but consensual casual sex traded for a trifle—unlike unwanted but consensual long-term sex, or sex traded for the material conditions of a livelihood, all of which carry their own profound costs—becomes *incidental* to real human intimacy rather than a part of it; it is neither necessary nor sufficient. It may supply human contact, but particularly when it is unwanted, it doesn't supply much; it's worse than a snack of empty calories.

If we view sex transactionally, as I suspect we are increasingly inclined to do, and as we tolerate more and more consensual but unwanted sex as we do so, then the significance of the difference between consensual and nonconsensual sex, I suspect, narrows. A nonconsensual *transaction*, after all, is a theft, and so nonconsensual sex, viewed transactionally, is more akin to theft than it is to assault. And it's a theft, as it turns out, of trivial value. So perhaps nonconsensual sex should be treated as such: a misdemeanor, perhaps, hardly a federal case.

To put this point clumsily, in a world in which sex has become thoroughly “transactionalized,” the felt difference, particularly to the perpetrator and also perhaps to the victim, between rape and sexual assault on the one hand and consensual unwanted sex on the other is not so great as the difference between rape or sexual assault and nontransactional sex that is desired, enjoyed, and welcomed by both parties. If consensual sex is transactionalized—if it is traded freely for very little and regardless of whether it is wanted, welcomed, or enjoyed—then the theft of it is not as great a commission as the theft of that which is highly valued and closely guarded. Let me put this the way a student of mine put it to me a few years ago: In a world in which sex is transactional and devalued, rape, he said, is like stealing a nickel from the tip jar in your local diner. It is wrong and criminal, but hardly a crime of great moral turpitude.

13. Caitlin Flanagan, Opinion, *The Woman Who Encouraged Women to Be Girly on the Path to Equality*, WASH. POST (Apr. 8, 2016), [https://www.washingtonpost.com/opinions/the-woman-who-encouraged-women-to-be-girly-on-the-path-to-equality/2016/04/08/5acc8a0-f2c5-11e5-a61f-e9c95c06edca\\_story.html?utm\\_term=.6afe1d9ee517](https://www.washingtonpost.com/opinions/the-woman-who-encouraged-women-to-be-girly-on-the-path-to-equality/2016/04/08/5acc8a0-f2c5-11e5-a61f-e9c95c06edca_story.html?utm_term=.6afe1d9ee517).

Now, this conclusion sounds dismal, I realize, but it does suggest a partial strategy for dealing with sexual assault on college campuses that I, at least, have not yet heard articulated. Of course, we need to devise procedures for dealing with rapes that respect norms of fairness and process as well as norms of equality. As I noted at the outset, we don't want our college campuses remembered as places of unfair persecution any more than we want them remembered as places of threat and danger. And, as is also widely now acknowledged, we need to address the culture within which these assaults occur. But if the above analysis is even partly correct, then that culture is not only a fusion of alcohol, sports, fraternity life, undue feelings of sexual entitlement, and the debasement or devaluing of women's autonomy. All of those might contribute to the current and intolerable high rate of sexual assault on campus. But another part of the culture, and another causal factor, may be the transactionalization of sex, and of unwanted consensual sex as, increasingly, a transactional norm.

If that's right, we could and should address it. We should at least discuss it. For sex to be noncriminal, and for it not to be a violation of Title IX, it must be nonassaultive, meaning minimally that it must be consensual. But for sex to be *good*—for it to be morally justified, as well as noncriminal—it must be good sex, and not just a good bargain. This is not just a pun on the word “good.” In our relentless chase to capture the surplus value of our individual and collective exchanges, we may have neglected to attend to the pleasures, pains, and desires those choices reap. This may be happening—I believe it is—in many aspects of our lives, not just the sexual: Across the board, we are neglecting the full extent to which pleasure, pain, and desire may be guides to, rather than impediments to, our subjective well-being, our objective interest, and our moral choices all. In our sexual ethics, however, that disjunction seems to have become a chasm. We should bridge it. The test of good sex is how it feels, not what you got for it. Consent alone is not sufficient to render sex wanted, welcomed, desired, desirable, or a pleasure. And for that reason, consent is not a sufficient condition for the moral goodness of sex. Mutual desire, mutual welcomeness, and mutual pleasure, by contrast, are verifiable hedonic conditions of the moral quality of that which we seek, and of the ways we seek intimacy with those we both love and respect. We should learn, or relearn, to respect their teaching.