Women and Consent

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THE HISTORY OF MODERN CONSENT THEORY over the last three centuries largely consists of attempts by theorists to suppress the radical and subversive implications of their own arguments. More recently, writers on consent have been assisted in this endeavor by the contemporary consensus that women, and the relationship between the sexes, are of no special relevance to political theory. Yet an examination of the question of women and consent highlights all the problems that generations of consent theorists have tried to avoid.

Contemporary consent theory has no room for two fundamental questions: first, why consent is of central importance to liberal theory and practice; second, how far theory and practice coincide, and whether genuine consent is possible within the institutions of the liberal democratic state. Consent is usually discussed only in a narrowly conceived political context in the course of arguments about political obligation. Most consent theorists are content to accept the verdict that

> the idea of "consent" has survived . . . as a constituent element of democratic ideology: as a specification of an essential characteristic of democratic regimes which distinguish them from the non-democratic.[1]

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The straightforward assertion that liberal democracies *are* based on consent avoids the "standard embarrassment" that occurs when theorists attempt to show how and when citizens perform this act.[2] This assertion also avoids the question of who consents, and therefore glosses over the ambiguity, inherent in consent theory from its beginnings, about which individuals or groups are capable of consenting and so count as full members of the political order. However, embarrassment is spared by reducing the concept of consent to meaninglessness. Consent as ideology cannot be distinguished from habitual acquiescence, assent, silent dissent, submission, or even enforced submission. Unless refusal of consent or withdrawal of consent are real possibilities, we can no longer speak of "consent" in any genuine sense.[3]

The relationship of consent in everyday life to the (postulated) consent of citizens to the liberal democratic state remains unexplored. Consent theorists fail to consider those areas of social life where consent is of practical importance to individuals, but the problems involved form part of the general difficulties and evasions of consent theory. Women are thus easily ignored, because consent in everyday life particularly concerns them. The most intimate relations of women with men are held to be governed by consent; women consent to marriage, and sexual intercourse without a woman's consent constitutes the criminal offense of rape. To begin to examine the unwritten history of women and consent brings the suppressed problems of consent theory to the surface. Women exemplify the individuals who consent theorists have declared are incapable of consenting. Yet, simultaneously, women have been presented as always consenting, and their explicit nonconsent has been treated as irrelevant or has been reinterpreted as "consent."

It might be objected that today women have been granted equal citizenship with men in the liberal democracies, so any major difficulties about their consent must lie in the past. To show why this appearance of equality between men and women is misleading, it is necessary to return to the origins of modern consent theory. Consent theorists in the seventeenth and eighteenth centuries were clear why consent was so important both in the state and in the relationship between the sexes. The starting point of early social contract and consent theory was a specific conception of individuals as "naturally" free and equal, or as born free and equal to each other. The idea that individuals are "naturally" free and equal raises a fundamental, and

revolutionary, question about authority relationships of all kinds; how and why a free and equal individual can ever legitimately be governed by anyone else. Unlike philosophical anarchists, liberal and democratic theorists argue that this question can be satisfactorily answered. It is possible to find a justification for the exercise of authority, but there is only *one* acceptable justification: If their freedom and equality is to be preserved, free and equal individuals must voluntarily commit themselves—for example, by consenting—to enter into such a relationship. Consent theory is thus a specific example of a broader voluntarist theory of society which argues that relationships of authority and obligation must be grounded in the voluntary acts or commitments of individuals.

From the beginning, consent theorists have attempted to avoid the revolutionary implications of voluntarism. They have adopted two main strategies to neutralize the impact of their arguments: First, they have turned to hypothetical voluntarism;[4] second, they have excluded certain individuals and social relationships from the scope of consent. The most familiar example of hypothetical voluntarism is Locke's notorious "tacit consent." Not only did Locke argue from a hypothetical social contract, but his "consent" is merely an inference from, or reinterpretation of, the existence of specific social practices and institutions. Most contemporary discussions of consent are little more than modernized versions of Locke's claim that the consent of future generations (to the social contract made by their forefathers) can always be said to be given if individuals are going peacefully about their daily lives, even though there are "no Expressions of it at all."[5] The reinterpretation of certain actions as "consent" appears at its extreme in Hobbes's theory. His willingness to take individualism to its logical conclusion allowed him to argue that all authority relationships are based on consent, even between parent and infant. The parents' domination over a child derives not from procreation but from "Consent, either expressed, or by other sufficient arguments declared." For Hobbes, overwhelming power is sufficient argument, so that in the state of nature the infant's "consent" to its mother's rule can be assumed.[6] Hobbes's concept of "consent" merely reinterprets the fact of power and submission; it makes no difference whether submission is voluntary or obtained through threats, even the threat of death. Because Hobbes argues that fear and liberty are compatible, "consent" has the same meaning whether it arises from submission in fear of a conqueror's sword, or in fear of exposure by a parent, or whether it is a consequence of the (hypothetical) social contract.

Hypothetical voluntarism avoids the "standard embarrassment" of arguing from actual consent, and the embarrassment is more securely circumvented if only some of the inhabitants of the state of nature or civil society are included in the category of "free and equal individuals." Voluntarism presupposes that individuals are rational, that they have, or are able to develop, the moral and intellectual capacities necessary to enable free commitment to be given. "Free and equal individuals," to use Lockean terminology, own the property in their persons and their attributes, including their capacity to give consent. The individual is the "guardian of his own consent."[7] However, the latter formulation should be read literally; the consent is *his* consent. Neither the classic contract theorists nor their successors incorporated women into their arguments on the same footing as men. Contract and consent theory developed partly as an attack on patriarchal theory, but it is necessary to emphasize the limited character of the attack on patriarchal claims that political authority had a "natural" basis in a father's procreative powers and that sons were "naturally" in subjection to their fathers. Contract theorists did not extend their criticism to the relationship between men and women, or more specifically, husbands and wives (who are also fathers and mothers).

The state of nature is usually pictured as inhabited by patriarchal families.[8] It was also widely argued that fathers of families entered the social contract, wives being "concluded by their Husbands."[9] In Locke's conjectural history of the state of nature, fathers become monarchs with the "scarce avoidable" and tacit consent of their adult sons. Locke does not mention mothers in this context, but his unspoken assumption is that the wife and mother also gives her "consent" to this transformation of her husband. Indeed, such "consent" is part of the marriage contract, for Locke agreed with Filmer that a wife's subjection to her husband had "a Foundation in Nature," and that the will of a husband should "take place before that of his wife in all things of their common Concernment."[10] However, this means that women are excluded from the status of "individual" that is basic to consent theory; if a wife's subjection to her husband has a "natural" foundation, she *cannot* also be seen as a "naturally" free and equal individual. Only if women are seen as "free and equal individuals" is their consent relevant at all.

Even in the seventeenth century, marriage was seen as a contractual relationship.[11] Today, a husband's authority is not merely taken for granted as "natural," but is said to be based on the consent of his wife; therefore, it can be objected, women are seen as capable of consent

in everyday life at least. This appearance of consent, whether three centuries ago or today, should not be taken at face value. It obscures a fundamentally important question: Why should a free and equal female individual enter a contract that *always* places her in subjection and subordination to a male individual? Logically, two free and equal individuals should be expected to govern their families jointly. The past and present *content* of the marriage contract reveals the underlying assumption that women are *not* free and equal. Women are not "individuals" who own the property they have in their persons and capacities, so the question of their "consent" to the authority of men never actually arises. Rather, their apparent "consent" to the authority of their husbands is only a formal recognition of their "natural" subordination. Having been under the authority of their father, they do not, like sons, enter a new status on maturity, but are "given away" by their father to another man to continue in their "natural" state of dependence and subjection.

The implications of the convention that a wife must bow to the authority of and be economically dependent upon her husband, who is "head of the household," are obscured more thoroughly in the late twentieth century than in earlier times, because it is now firmly held that marriage can properly be based only on the consent of two individuals. But this appearance of equality between two individuals cloaks the unequal status of husband and wife created through the marriage contract. In the 1980s, the authority of husbands can be explained only because the apparent "consent" of one "individual" is not consent at all. The contemporary significance of the contract theorists' reconciliation with patriarchalism has been hidden behind the liberal conviction that marriage is a matter of "individual" choice.

Ironically, Rousseau, the only contract theorist who pursued the radical implications of the doctrine, is the most explicit about the reasons why women must be excluded from its scope. Rousseau accepted the patriarchal assertion that women were "naturally" subordinate to men. He gives a full account of the contrasting "natural" characters of the sexes, a contrast which, he argues, must be given expression in the sexual double standard.[12] Rousseau provides a clear statement of the claim that women are incapable of consent, but, at the same time, he also denies this and reinterprets explicit nonconsent as its opposite. Rousseau attacked the hypothetical voluntarism of Hobbes's and Locke's versions of the contract argument as a fraud and tantamount to a contract of slavery, but he advocated precisely

such a contract as the basis of the relationship between the sexes. In Rousseau's participatory, voluntarist political order, women must remain excluded because of their "natural" moral characters and their deleterious influence upon the morals and civic virtue of men. In time-honored tradition, Rousseau divides women into the good and the dissolute, or whores. Women can remain good only if they stay within the shelter of domestic life. Geneva, following the ancient world, provided an example of civic virtue because its *circles*, social and political clubs, were sexually segregated. The sexes were allowed to come together only where it was proper for them to do so; this is "the plan of nature, which gives different tastes to the two sexes, so that they live apart each in his [sic] way." In the *circles,* men are able to educate themselves for civil life. They "can devote themselves to grave and serious discourse without fear of ridicule" from women, and without fear of becoming "feminized" and so weakened as citizens.[13]

The successive transformations of human consciousness or "nature" that Rousseau charts in the *Discourse on Inequality* and the *Social Contract* are actually transformations of male consciousness.[14] Emile alone can be educated in the independence and judgment necessary in a citizen who gives consent and is capable of further education through political participation. Sophie's education fosters the characteristics—a concern with reputation, dependence, and deceitfulness, for example—that Rousseau condemns as "vices" in men. She is educated to serve and obey Emile. Women, Rousseau declares, "must be trained to bear the yoke from the first . . . and to submit themselves to the will of others,"[15] that is, the will of men. The influence of women, even good women, always corrupts men, because women are "naturally" incapable of attaining the status of free and equal individuals, or citizens, and incapable of developing the capacities required to give consent.

Yet, at the same time, in sexual relationships, the "consent" of women is all-important. Moreover, their consent can always be assumed to be given—even though apparently it is being refused. According to Rousseau, men are the "natural" sexual aggressors; women are "destined to resist." Rousseau asks "what would become of the human species if the order of attack and defense were changed?"[16] Modesty and chasteness are the preeminent female virtues, but because women are also creatures of passion, they must use their natural skills of duplicity and dissemblance to maintain their modesty. In particular, *they must always say "no" even when they desire to say "yes."* And

here Rousseau reveals the heart of the problem of women and consent. Apparent refusal of consent can *never*, in a woman, be taken at face value:

> Why do you consult their words when it is not their mouths that speak? . . . The lips always say "No," and rightly so; but the tone is not always the same, and that cannot lie. . . . Must her modesty condemn her to misery? Does she not require a means of indicating her inclinations without open expression?[17]

A man must learn to interpret a woman's "consent" when, as in Locke's civil society, there are no obvious expressions of it at all.

> To win this silent consent is to make use of all the violence permitted in love. To read it in the eyes, to see it in the ways in spite of the mouth's denial. . . . If he then completes his happiness, he is not brutal, he is decent. He does not insult chasteness; he respects it; he serves it. He leaves it the honor of still defending what it would have perhaps abandoned.[18]

Rousseau's view of the relationship between husbands and wives also shows that the contradiction between the appearance of consent in the marriage contract and the reality of its content goes far deeper than I indicated in my earlier remarks. Rousseau, for example, argues that when married to Emile, Sophie can rule by love "if you make your favours scarce and precious." Her refusal must not be capricious, but reflect her modesty, so that Emile can "honour his wife's chastity, without having to complain of her coldness."[19] But whatever the intrinsic merits of this advice, a wife is unlikely to be able to carry it out. The consequence of entering into the marriage contract is that the subsequent "consent" of the woman to her husband's sexual demands is legally and socially presupposed. The legal basis for the belief that the initial "consent" of the woman in the marriage contract can never be retracted remains unexamined.[20] This fact, together with the difficulties encountered in attempts at reforming rape law to extend its provisions to women within marriage (success to some degree has been achieved only in Sweden, South Australia, and in some states of the United States) testifies to the tenacity with which popular and legal opinion clings to the conviction that rape is impossible within marriage.

Legal writers in the period of classic contract theory left no doubt about the status of wives and their "consent." A wife, as Blackstone wrote in his famous *Commentaries on the Laws of England*, was a legal nonperson; "by marriage, the husband and wife are one person in law; . . the very being or legal existence of the woman is suspended. . . ."[21]

In what is "still the most quoted authority on the British law of rape,"[22] Hale's *History of the Pleas of the Crown,* it is stated that

> the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.[23]

It is hardly surprising that feminists in the midnineteenth century so frequently compared wives to the slaves of the West Indies and the American South, for legally and socially a wife was seen as the property of her husband; she could be legally imprisoned in the matrimonial house and could be beaten. John Stuart Mill was moved to comment that although he was

> far from pretending that wives are in general no better treated than slaves . . . no slave is a slave to the same lengths, and in so full a sense of the word as a wife is. . . . [A husband] can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations.[24]

A century later, a separate legal personality has been granted to women, but their formal legal status is contradicted by social beliefs and practices.

In certain areas of the law where "consent" is central, notably in the law concerning rape, social reluctance to recognize women as "free and equal individuals" denies in practice what the law proclaims in principle. Rape is central to the problem of women and consent in everyday life. Rape is widespread, both in and out of marriage, but although women of all ages and classes are attacked, the majority of rapes are not reported.[25] Here I shall concentrate on the implementation of the criminal law in the courts, because evidence is available, and because it reveals in a dramatic fashion how contradictory beliefs about women and consent are embedded in liberal democratic social institutions.

Rape law has recently been described as a "parody of justice."[26] Of the many reasons for this, the most fundamental is the manner in which the "consent" of the victim is interpreted—or ignored. In this matter, popular opinion and the courts are Hobbesian; they identify submission, including enforced submission, with consent. Accused rapists almost invariably offer as a defense that the woman actually consented, or that they believed she did (and I shall return to the question of belief in a moment). One reason why this defense is so successful, and why such a small proportion of cases of rape are ever reported, is

that a woman is unlikely to convince either the public, the police, or a judge and jury that she did not consent to sexual intercourse[27] unless she is badly physically injured or unless she can prove that she resisted. However, the criterion for resistance, too, tends to be physical injury. To prove nonconsent, "the showing of physical damage beyond the simple evidence of penetration has, almost, the status of a legal standard."[28]

The identification of submission with consent, unless resistance can be proved, is bound up historically with a legal distinction (that obtained before the Criminal Law Amendment Act of 1885) between acts "against the will" of a woman, which were performed by force in the face of her resistance, and acts which were "without her consent." This distinction was crucial in cases where intercourse was obtained through impersonation or subterfuge. Such cases have fascinated legal writers on consent and rape, and one commentator has stated that "since 1925 the sparse legal discussion . . . has remained focused on cases of intercourse induced by fraud"—not perpetrated by force.[29] For example, in cases where a husband, to whom the woman would have consented, was impersonated and no force was used, it was generally held that the act was not "against her will" and so was not rape.[30] Legal opinion wrestled for many years with the problem of whether fraud vitiated consent, and the issue is still not fully resolved. The Sexual Offences Act 1956 (UK) makes it an offense to obtain intercourse through the impersonation of a husband, but remains silent about the impersonation of other men.[31] Moreover, there is still a large area of legal uncertainty about the acts that constitute an instance of "force" or "threat" that separate forced "submission" from voluntary "consent."

In a rape case in Britain in 1975, the judge stated of the accused: "I have no doubt you instilled terror into this woman when you went into that room and made your intentions quite clear"[32]—yet the accused was found not guilty of rape. Although the law holds that submission gained under threat of death or severe bodily harm is not "consent," in practice threats that "instill terror," or lesser threats, may not be held by the courts to show nonconsent. The Maryland Court of Appeals recently overturned a conviction for rape "on the grounds that the victim did not have sufficient cause to think she was in danger," although she had unwillingly entered a house and was "lightly choked." The court held that the circumstanees did not give grounds for "reason-

able fear" that harm would result if she resisted.[33] There is also considerable legal doubt about "consent" and threats by persons other than the rapist, or threats to persons other than the victim, for example, her children or relatives.[34] The law provides that a contract entered into under "threat" or "duress" is voidable, and a person can offer as a defense to a criminal charge that an offense was committed only under threat of severe bodily harm or death. But although, historically, contracts in economic life and consent in sexual relations derive their importance from the same complex of social and theoretical developments, it is significant that legal interpretation of "duress" in (non-criminal) contract law is much wider than the interpretation of "threat" in rape cases. The standard of "consent" in rape has been formulated within the same narrow boundaries as "duress" in the performance of criminal acts.[35]

The legal failure to distinguish between "acts of sexual assault and consenting sexual relations among adults,"[36] or between enforced submission and consent, is grounded in a complex of beliefs about the "natural" characters of the sexes. Eminent lawyers as well as the public are convinced that the "naturally" sexually aggressive male must disregard a woman's refusal as merely a token gesture that hides her true desires.[37] Rape victims are divided into "good" and "bad" women, and even where violence has unquestionably been used, "consent" can be held to have been given if the victim can be said to be of "doubtful reputation" or have "poor" sexual morals.[38] It is also very difficult for a woman to convince a court that she did not consent when standard works on evidence reinforce the view that women, especially "unchaste" women, are "naturally" deceitful and prone to make false statements, including false accusations of rape.[39] Hale's words have been regularly cited in courtrooms for three centuries; "rape . . . is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[40] Yet a high proportion of rapes that actually are reported are rejected by the police as "unfounded."[41] Even allowing for problems of evidence, it is hard to account for these practices except as a direct outcome of an extraordinary perception of women's "natural" characters. The same perception underlies the conventional requirement that the rape victim's evidence must be corroborated; it is "only rape complainants, along with children, accomplices and witnesses in treason trials who are [treated as] notoriously unreliable witnesses."[42]

Because so few cases of rape are reported, and because so many of these are rejected, the offenses that come before the courts are usually only the most vicious and brutal. It has recently been claimed that "the facts about rape are even more elusive than most,"[43] but there is rarely much that is very elusive if a case is prosecuted—at least, not if "consent" has any meaning. Ambiguous cases that involve complex matters of social convention and expectation do not usually reach the courts. For example, the courts are not usually judging cases where a woman unwillingly submits to a man who has taken her out for the evening, because it is "expected" that she should "pay" for her supper, or where she submits to an employer or foreman to retain employment. In cases where an accused comes to trial, "consent" in any genuine sense of the concept is not usually at issue.[44] This does *not* mean, however, that the victim's nonconsent is therefore taken seriously. Instead, the beliefs of the accused about a woman's consent, even his unreasonable beliefs, are often taken to be the most relevant "fact about rape" for the verdict of the court.

The beliefs and intentions of accused persons are a central criterion for establishing criminal responsibility. A mental or subjective element, *mens rea*, must be shown to be present for guilt to be proved. It must be shown that an accused intended to commit a criminal act; "intention to do the act forbidden by law, or something like it, is . . . generally *necessary* for serious crime. . . ."[45] The problem in rape cases is not this criterion as such but the manner in which it has been interpreted, in particular in the Morgan case in Britain and in the Mayberry case in the state of California.[46] These cases created "a totally new defense to the crime" of rape, the defense of a mistake-of-fact as to consent.[47] It was ruled in Morgan that a man's belief in a woman's consent did not have to be a reasonable belief, and in Mayberry that a jury must specifically reject a defense of reasonable but mistaken belief in consent. The impact of this defense can be illustrated by the case referred to earlier, in which the man had "instilled terror" into the victim. The defense was successfully presented that—although the accused had broken into the woman's flat—he genuinely believed she consented. In another case, the bizarre results of the Morgan ruling, and also the peculiar legal view of the relations between husbands and wives, were further reinforced. It is impossible for a husband to be prosecuted for the rape of his wife in Britain. However, in common law, he can be prosecuted for aiding another man to do so. In Regina v. Cogan and Regina v. Leak (1976), a

drunken man punished his wife by forcing her to have intercourse with his drunken friend, and he was found guilty of aiding and abetting the rape of his wife—but the friend was found not guilty of rape. The defense was that the latter believed the wife to consent, even though there were no reasonable grounds for the belief and an appeal judge stated that intercourse took place "without her consent."[48]

One writer on rape has argued that the legal reasoning in Morgan is "clearly correct if the rights of the man accused of rape [are] to be maintained."[49] But it is far from obvious that it is "clearly correct" (even if it is held that the belief must be "reasonable"). In Morgan, a judge argued that if a sexual act took place because a man had falsely believed that the woman consented, then it would generally be held that, although the man might be careless, he did not commit rape.[50] But would it so be held? And should it? Certainly, many lawyers seem to think so. The Morgan decision has been defended on the grounds that

> the opposing view was that a man could be convicted of rape . . . if he was stupid (unreasonable) in forming that belief. To convict the stupid man would be to convict him of . . . inadvertent negligence—honest conduct which may be the best this man can do but that does not come up to the standard of the so-called reasonable man . . . it would be wrong to have a law of negligent rape.[51]

Such legal opinions imply that many, perhaps most, rapists are not criminal or vicious men, or men clearly deficient in concern for the well-being, integrity, and respect of other persons, but merely stupid or careless. This ignores the empirical evidence about rape. As many as 70% of rapes are planned in advance,[52] a high proportion involve two or more men in an attack upon one woman,[53] and there are "documented incidences of organized rape as a social institution."[54]

Furthermore, such arguments about "carelessness" and "stupidity" pay no attention to the manner in which the belief is formed. If a man's defense is that he believed the woman to consent "then we must assume that he considered the possibility that she was not consenting, and rejected it."[55] The circumstances in which a man might so deliberate, and come to an honest, but mistaken, belief about consent, are unlikely to be straightforward or simple—and surely would preclude explicit, prolonged manifestations of refusal by the woman and threatened or actual physical violence by the man. The mistake-of-fact defense is based upon "the objective reasonableless" of the mistake; it "must be one that you or I or anyone could reasonably have made under the circumstances."[56] This defense is already recognized in cases of carnal knowledge

(statutory rape). Most people would agree that a genuine mistake is possible today about the age of a boy or girl (and objective evidence of date of birth can be produced). But how could "you or I" make such a mistake about a woman's consent? And is it the kind of slip that results from ordinary human failings? How often is it a "mistake" at all? The circumstances that lead to most prosecutions for rape, and the very high incidence of planned rape, suggest that usually, far from a minor mistake being made, the very assumption that a woman's consent has been considered at all is misplaced. Most rapes occur not because a stupid or careless man has engaged in faulty reasoning about a woman's consent, but as a result of a deliberate attack.

However, in this matter, it is not sufficient to state what might seem an obvious point. There is an additional, fundamentally important problem about "reasonable mistakes" about consent. Curley has pointed out that in rape cases, "the imposition of objective standards of liability does not always represent the triumph of utility over justice."[57] But it is not possible, in the present state of sexual relationships between men and women, to arrive at an "objective standard" of "reasonable" conduct.

At present it is widely believed that a woman's "no" does *not* constitute a refusal, that it *is* "reasonable" for men to put a lesser or greater degree of pressure on unwilling women in sexual matters, and that it *is* "reasonable" for consent to be inferred from enforced submission. In short, unless accompanied by visible signs of severe physical violence, rape is not actually seen as a serious crime—or even a crime at all—despite its formal legal status. If this seems a doubtful argument, reflect for a moment on all the "jokes" about rape in popular variety and comedy programs, on the sexual activities of heroes of films and novels, and on legal judgments such as that in the Appeal in Regina v. Holdsworth where a man's sentence for a sexual attack, causing most serious injury, was set aside on the grounds that it would harm his career.[58] Rape is conventionally presented as a unique act that stands in complete opposition to the consensual relations that ordinarily obtain between the sexes. The most tragic aspect of even a brief consideration of the problem of women, rape, and consent is that rape is revealed as the extreme expression, or an extension of, the accepted and "natural" relation between men and woman.[59]

The problem of "objective standards" and "reasonable mistakes" in rape highlights the extent to which "consent" and "nonconsent" have been emptied of meaning. That this fact appears unremarkable is tribute

to the success of three centuries of mutual accommodation between liberalism and patriarchalism, which reinforced the contradictory perception of women and their consent and resulted in their present highly uncertain and ambiguous status as "individuals." Despite the apparent importance of women's consent, it is legally and socially declared irrelevant within marriage, and a woman's explicit "no" is all too frequently disregarded or reinterpreted as "consent." However, if "no," when uttered by a woman, is to be reinterpreted as "yes," then all the comfortable assumptions about her "consent" are also thrown into disarray. Why should a woman's "yes" be more privileged, be any the less open to invalidation, than her "no"?

There can be no answer to this question until women are admitted unequivocally as "free and equal individuals," guardians of their own consent. At present, notwithstanding their formal civic status, women are regarded as men's "natural" subordinates, and hence as incapable of consent. In the light of the character of existing relations between the sexes, it is therefore not surprising that in matters of women's consent in our everyday lives, so wide a gulf exists between appearance and reality. Moreover, the problem extends further than our everyday lives. If the problem of women and consent is to be resolved, some radical changes are required, reaching much further than necessary reform of rape law into the the heart of the theory and practice of the liberal democratic state. The consent of women, and the example of rape, is only one dimension of the problem of consent—of men and women—which itself is part of the more fundamental problem of whether the ideal of free commitment, or voluntarism, is to be taken seriously in liberal democratic theory and practice.

Consent is central to liberal democracy, because it is essential to maintain individual freedom and equality; but it is a problem for liberal democracy, because individual freedom and equality is also a precondition for the practice of consent. The identification of enforced submission with consent in rape is a stark example of the wider failure in liberal democratic theory and practice to distinguish free commitment and agreement by equals from domination, subordination, and inequality. Writers on consent link "consent," "freedom," and "equality," but the realities of power and domination in our sexual and political lives are ignored. Contemporary consent theory presents our institutions as if they were actually as consent demands, as if they were actually constituted through the free agreement of equal persons. The reduction of "consent" to a mere "constituent" of liberal democratic ideology

leaves consent theorists unable to ask many vital questions. This includes the question whether the character of our socio-political institutions is such that consent ought to be given to (all or some of) them, by men or women. Most liberal theorists would wish to argue that there is one relationship, at least, to which consent ought not to be given. A person ought never to consent to be a slave, because this totally negates the individual's freedom and equality and hence, in a self-contradiction, denies that the individual is capable of consent.[60] However, if this argument is accepted, then should not consent theorists look searchingly at existing institutions, as J. S. Mill examined marriage in his own day, to ensure that there is no denial, or tendency to deny, the very status of individuals that is claimed to be upheld? The problem with this suggestion is that it requires that three centuries of argument about consent be overthrown and that theorists formulate a *critical* theory of voluntarism including both men and women.

At present, consent theorists have failed to recognize even the obvious problems posed for arguments about political obligation by popular belief and the ambiguous status of women as "individuals." Furthermore, if the subordination of women to men is not considered, neither is the class structure of the liberal democratic state. If consent theorists do not discuss the marriage contract, neither do they discuss the employment contract or the "despotic organization"[61] of capitalist production. The consent of women is treated as irrelevant, and the consent of men is assumed to be given in political and everyday life when there are "no expressions of it at all." Walzer is the only theorist who has treated consent, or its absence, as a genuine moral and political problem, and he has concluded that the facts of liberal democratic citizenship are "a reflection on the moral quality of the modern state. They may well constitute an entirely sufficient argument for its radical reconstruction."[62] But Walzer, too, fails to consider the special problem of women and consent. When that is also taken into account, we have an entirely sufficient argument, not only for the democratic reconstruction of the liberal state, but for a simultaneous reconstruction of our sexual lives. Indeed, these two dimensions are inseparable if there is to be a democratic transformation of our social life.

To work toward such a reconstruction is also to begin to transform the legacy of the early contract theorists. The importance of consent in liberal democratic theory can be fully understood only in the light of the arguments of the originators of modern theory three centuries ago. However, part of their heritage is the assumption that "consent" and

"consent theory" are coextensive with voluntarist political theory, an assumption that prevents a proper understanding of the real character of the liberal democratic state. Consenting is only one way, and not the most important way, in which free and equal individuals can mutually commit themselves or assume obligations. I have explored the wider relationship between consent and voluntarism, and some of its implications for democracy, in *The Problem of Political Obligation,* but one final point about women and consent must be made here. The conventional use of "consent" helps reinforce the beliefs about the "natural" characters of the sexes and the sexual double standard discussed in this article. Consent must always be given *to* something; in the relationship between the sexes, it is always women who are held to consent to men. The "naturally" superior, active, and sexually aggressive male makes an initiative, or offers a contract, to which a "naturally" subordinate, passive woman "consents." An egalitarian sexual relationship cannot rest on this basis; it cannot be grounded in "consent." Perhaps the most telling aspect of the problem of women and consent is that we lack a language through which to help constitute a form of personal life in which two equals freely agree to create a lasting association together.

NOTES

1. P. H. Partridge, *Consent and Consensus* (London: Macmillan, 1971), p. 23. Michael Walzer's *Obligations: Essays on Disobedience, War and Citizenship* (New York: Simon and Schuster, 1971) is an exception to this complacency. Walzer writes that he will not assume consent exists "without looking for evidence that it has actually been given" (p. viii).

2. R. E. Flathman, *Political Obligation* (New York: Atheneum, 1972), p. 209.

3. A detailed discussion of these aspects of consent theory and arguments about political obligation, including the claim that consent is given through voting, can be found in C. Pateman, *The Problem of Political Obligation* (Chichester: John Wiley, 1979). For empirical evidence on the contradiction between women's status as citizens and popular beliefs about their "proper" place, see M. M. Lee, "Why So Few Women Hold Public Office: Democracy and Sexual Roles," *Political Science Quarterly* 91 (1976), pp. 297-314.

4. I have explored this concept at length and discussed its importance for classical contract theorists and their successors in *The Problem of Political Obligation.*

5. J. Locke, *Two Treatises of Government,* ed. P. Laslett (Cambridge University Press, 1967) II, § 119.

6. T. Hobbes, *Leviathan,* ed. C. B. Macpherson (Harmondsworth: Penguin Books, 1968), pp. 253-254.

7. Flathman, 1972, p. 230.

8. Hobbes is a notable exception to this generalization. He was consistent enough in his individualism to argue for the freedom and equality of all individuals in the natural state, irrespective of sex. There is no assumption that a female will always "consent" to (submit to) the authority (protection) of a male. On this point, and for a more detailed account of the arguments of Hobbes and Locke on the relation of husbands and wives in the state of nature and civil society, see T. Brennan and C. Pateman, "'Mere Auxiliaries to the Commonwealth': Women and the Origins of Liberalism," *Political Studies* 27, 2 (1979), pp. 183-200.

9. The words are those of Locke's friend Tyrrell; cited in G. J. Schochet *Patriarchalism in Political Thought* (Oxford: Blackwell, 1975), p. 202.

10. Locke, II§75-76; I§47-48.

11. The analogy between the marriage contract and the contract of government was much discussed at the time; see M. L. Shanley, "Marriage Contract and Social Contract in Seventeenth Century English Political Thought," *Western Political Quarterly* 32 (1979), pp. 79-91.

12. For an excellent discussion of the sexual double standard—which is "the reflection of the view that men have property in women"—see K. Thomas, "The Double Standard," *Journal of History of Ideas* 20 (1959), pp. 195-216.

13. J.-J. Rousseau, *Politics and the Arts,* trans. A. Bloom (Cornell University Press, 1968), pp. 107, 105.

14. In Rousseau's "true" state of nature, the sexes are equal in their ability to protect themselves. In his conjectural history of the state of nature, Rousseau suddenly asserts that, in the "happy epoch," the "first difference was established in the way of life of the two sexes," a difference that demands the future subordination of women. J.-J. Rousseau, "Discourse on the Origin and Foundations of Inequality," in R. D. Masters (ed.) *The First and Second Discourses* (New York: St. Martin's Press, 1964), p. 147. The reason why Rousseau sees women's "natures" as necessarily subversive of men's civic virtue is discussed in C. Pateman, "'The Disorder of Women': Women, Love and the Sense of Justice," *Ethics* 90, 1980. His general arguments about women are discussed in detail in S. M. Okin, *Women in Western Political Thought* (Princeton University Press, 1979).

15. J.-J. Rousseau, *Emile,* trans. B. Foxley (London: Dent, 1911), p. 332.

16. Rousseau, *Politics and the Arts,* p. 84.

17. Rousseau, *Emile,* p. 348.

18. Rousseau, *Politics and the Arts,* p. 85.

19. Rousseau, *Emile,* p. 443.

20. J. A. Scutt, "Consent in Rape: The Problem of the Marriage Contract," *Monash University Law Review* 3 (1977), pp. 255-288, argues that this belief can be challenged from the judgments in leading cases. The Victorian claim that women lacked sexual passion and were more "moral" than men should also be considered in the context of the belief that married women could not withdraw their initial "consent." See the excellent discussion by N. F. Cott, "Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790-1850," *Signs* 4, 2 (1978), pp. 219-236, especially p. 234.

21. Sir W. Blackstone, *Commentaries on the Laws of England* (London: Sweet, Maxwell, 1844), p. 442.

22. B. Toner, *The Facts of Rape* (London: Arrow Books, 1977), p. 95.

23. Sir M. Hale, *The History of the Pleas of the Crown* (London: Emlyn, 1778), I, p. 629.

24. J. S. Mill, "The Subjection of Women" in A. S. Rossi (ed.) *Essays on Sex Equality* (University of Chicago Press, 1970), pp. 159-160.

25. Both rape and unreported rape have only recently begun to receive attention. Reasonable estimates suggest that no more than a third of (extramatrimonial) rapes are reported, and rates of reported rape appear to have increased in the Anglo-Saxon countries in the last twenty years: See figures in E. Shorter, "On Writing the History of Rape," *Signs* 3, 2 (1977), p. 480. P. R. Wilson, *The Other Side of Rape* (Brisbane: University of Queensland Press, 1978) investigates unreported rapes. The realities of rape are hidden by deeply entrenched cultural myths and stereotypes. One of the most common is that rape is an act perpetrated by a stranger on a woman who probably "precipitated" the attack. In fact, no woman is immune, whether she is seventy or older, a very small girl, or heavily pregnant, whatever her appearance, and whether or not she is within the shelter of her home. About half of all reported rapes are committed by men known to their victim, including relatives—see summaries of evidence in B. Smart and C. Smart, "Accounting for Rape: Reality and Myth in Press Reporting," in B. Smart and C. Smart, (eds.) *Women, Sexuality and Social Control* (London: Routledge, 1978); L. R. Harris, "Towards a Consent Standard in the Law of Rape," *University of Chicago Law Review* 43 (1975), pp. 613-645; C. Le Grand, "Rape and Rape Laws: Sexism in Society and Law," *California Law Review* 61 (1973), pp. 919-941; S. Brownmiller, *Against Our Will: Men, Women and Rape* (Harmondsworth: Penguin Books, 1976). Women are also raped by the police who are to apprehend rapists; in Paris, for example, in 1979, three Guardiens de la Paix were convicted of raping a thirteen-year-old girl, and two police patrolmen were convicted of raping a German tourist in their car "because they were bored." (Report in *Guardian Weekly,* October 21, 1979.)

26. L. Bienen, "Mistakes," *Philosophy and Public Affairs* 7, 3 (1978), p. 229. Rape is an offense where the victim, rather than the offender, is socially stigmatized. Rape victims are frequently held to "have brought it upon themselves" (and psychologists have helped foster the belief that it is women, not men, who are really to blame; on this point, see R. S. Albin, "Psychlogical Studies of Rape," *Signs* 3, 2 [1977], pp. 423-435). More generally, on police and court procedures and attitudes to rape victims, see, for example, Toner 1977, Ch. 7-10, and on press reporting of rape, see Smart and Smart, 1978.

27. Although rape is conventionally defined as penetration of the vagina by the penis, it frequently involves foreign objects and other acts, usually degrading and humiliating to the victim.

28. J. A. Scutt, "The Standard of Consent in Rape," *New Zealand Law Journal* November (1976), p. 466.

29. Harris, 1975, p. 632.

30. See K. L. Koh, "Consent and Responsibility in Sexual Offences," *The Criminal Law Review* (1968) pp. 81-97 and 150-162, and J. A. Scutt, "Fraudulent Impersonation and Consent in Rape," *The University of Queensland Law Review* 9, 1 (1975), pp. 59-65.

31. Scutt, 1975, pp. 64-65.

32. Toner, 1977, p. 9.

33. Report in *Guardian Weekly,* November 4, 1979, p. 17.

34. See the discussion by J. A. Scutt, "Consent versus Submission: Threats and the Element of Fear in Rape," *University of Western Australia Law Review* 13, 1 (1977a), pp. 52-76, and Harris, 1975, pp. 644-645.

35. Scutt, 1977a, p. 61; Harris, 1975, p. 642-643.

36. Bienen, 1978, p. 245.

37. See Toner, 1977, p. 104.

38. See cases cited by P. C. Wood, "The Victim in a Forcible Rape Case: A Feminist View," *The American Criminal Law Review* 11 (1973), pp. 344-345. Advocates of legal reform have drawn attention to the common use of evidence about the complainant's prior sexual history, mode of dress, general reputation, and so on in rape cases. Harris, 1975, p. 617, notes that because the defense of consent admits essential facts, defense lawyers almost invariably attempt to show that the woman is the "type" who must have consented.

39. See Bienen, 1978, p. 237, and Harris, 1975, p. 626.

40. Hale, 1778, p. 635.

41. In Victoria in 1974-1975 in four police districts, only 50% of rape complaints were accepted as "founded"; evidence in *Royal Commission on Human Relationships* (Canberra: Australian Government Publishing Service, 1977), Vol. 5, Pt. 7, p. 178.

42. Toner, 1977, p. 112.

43. T.C.M. Gibbens, "More Facts About Rape," *New Society* February 10, 1977, p. 276.

44. See Bienen, 1978, p. 242, p. 244.

45. H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1968), p. 115. The other element necessary for *mens rea* is that the act was voluntarily performed (Hart, p. 90). Popular views about rape and the "natural" sexual characters of men would suggest that few men accused of rape are responsible for their actions. It is widely believed that rape is the result of a man being gripped by an "ungovernable passion" or an "uncontrollable urge," and so not acting truly voluntarily. This myth contrasts sharply with empirical evidence about rape.

46. DPP v. Morgan, 1975, and the legal precedents on which the verdict was based are discussed in detail in E. M. Curley, "Excusing Rape," *Philosophy and Public Affairs* 5, 4 (1976), pp. 325-360. *People v. Mayberry*, 1975, is examined by Bienen, 1978. Both are excellent analyses. Bienen (pp. 238-239) argues that one result of Mayberry is that accused rapists in California will not need to take the stand to present a mistake-of-fact defense. The impact of Morgan was somewhat limited by the Sexual Offences (Amendment) Act of 1975.

47. Bienen, 1978, p. 230.

48. See Curley, 1976, p. 342; Scutt, 1977, pp. 259-260.

49. Toner, 1977, p. 107.

50. See Curley, 1976, p. 341.

51. Cited in Toner, 1977, pp. 106-107.

52. Le Grand, 1973, p. 923.

53. Brownmiller, 1976, p. 187.

54. Wilson, 1978, p. 112. One example is found in the country town of Ingham, in Queensland. Since 1972, group rape "as a social activity" has been organized in the town. A woman is chosen and the intention signaled between the group of men (which may be thirty strong) in the hotels (pubs). The history and sociology of organized rape in Ingham is discussed by Schultz in Wilson, 1978, pp. 112-125. It should be noted that an attack by several assailants is not, in itself, necessarily sufficient to uphold a woman's claim that she did not consent. A Solicitor-General of N.S.W. has written that, if pack-rape is to be "rape," the victim "unless virtually insensible or completely overcome by terror or fatigue, ought, so long as she is able, to manifest as to each act some objection even if slight"; H. A. Snelling, "What is Non-Consent in Rape?" *The Australian Journal of Forensic Science* March (1970), p. 106. More recently, a judge in Connecticut acquitted one defendent in a

pack-rape case who pleaded "impotence" with the comment, "you can't blame somebody for trying," cited in *Ms,* November 1978, p. 20.

55. Curley, 1976, p. 348.

56. Bienen, 1978, p. 241.

57. Curley, 1976, p. 355.

58. Report in *The Times,* June 22, 1977.

59. See P. Foa, "What's Wrong with Rape," in M. Vetterling-Braggin, F. A. Elliston, and J. English (eds.) *Feminism and Philosophy,* (Totowa, NJ: Littlefield, Adams, 1977).

60. Some further comments on this aspect of the problem of consent with particular reference to promising to obey, can be found in C. Pateman, 1979, pp. 19-20; 169-171.

61. The characterization is that of B. Clark and H. L. Gintis, "Rawlsian Justice and Economic Systems," *Philosophy and Public Affairs* 7 (1978), pp. 302-325. It should also be noted that another aspect of the "consent" of the wife in the marriage contract is to the exchange of (unpaid) work in the home for subsistence from her husband. For analyses of the history and content of the marriage contract, see C. Delphy, "Continuities and Discontinuities in Marriage and Divorce" in D. L. Barker and S. Allen (eds.) *Sexual Divisions and Society: Process and Change* (London: Tavistock, 1976) and D. L. Barker, "The Regulation of Marriage: Repressive Benevolence," in G. Littlejohn, B. Smart, J. Wakeford, and N. Yuval-Davis (eds.) *Power and the State* (London: Croom Helm, 1978).

62. Walzer, 1971, pp. 186-187.

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