

WHAT COMES AFTER YES: THE ETHICS OF SEX

AN HONORS THESIS

**SUBMITTED ON THE EIGHTEENTH DAY OF APRIL, 2022**

TO THE DEPARTMENT OF PHILOSOPHY

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS

OF THE HONORS PROGRAM

OF NEWCOMB-TULANE COLLEGE

TULANE UNIVERSITY

FOR THE DEGREE OF

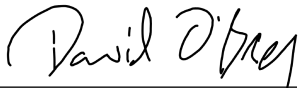
BACHELOR OF ARTS

WITH HONORS IN PHILOSOPHY

BY

  
\_\_\_\_\_  
MARY EKSTROM

APPROVED:



David O'Brien  
Director of Thesis



Alison Denham  
Second Reader



Menaka Philips  
Third Reader



Mary Ekstrom. *What Comes After Yes: The Ethics of Sex*.

(Professor David O'Brien, Philosophy)

This thesis examines moral, legal, and social considerations related to sex, particularly sex that is consensual but unethical. My goal is to redefine how we approach the relationship between sex and consent so that we can unlearn some of the ingrained norms and practices that invite harm into our sexual interactions. Chapter 1 lays the foundation for thinking that more than consent matters in determining whether a sexual interaction is ethical. Chapter 2 introduces two further necessary conditions for ethical sex—the knowledge and desire conditions. Chapter 3 explores whether the knowledge and desire conditions should be incorporated into the legal system or social codes. Ultimately, this venture into the moral, legal, and social facets of ethical sex adds to a body of work advocating for better, safer sex. I intend this thesis to serve as a useful addition to the under-examined area of consensual but unethical sex.

## CONTENTS

|  |    |
|--|----|
| Introduction.....  | 1  |
| Chapter 1: Is Consent All that Matters.....                      | 4  |
| Historical Origins of Consent.....                               | 5  |
| Expressions of Consent.....                                      | 11 |
| The Adequacy of An Affirmative Consent Standard as a Proxy ..... | 15 |
| Conclusion .....   | 24 |
| Chapter 2: What Else Matters for Ethical Sex? .....              | 26 |
| The Knowledge Condition: A Little More Questioning Needed.....   | 27 |
| The Desire Condition .....                                       | 31 |
| Objections .....   | 34 |
| Conclusion.....  | 37 |
| Chapter 3: How Do We Do It? .....                                | 39 |
| The Legal System.....  | 40 |
| The Social Code.....   | 47 |
| Objections.....  | 55 |
| Conclusion.....  | 58 |
| Conclusion.....  | 60 |

## Introduction

Sex is not inherently bad for us. Indeed, it's quite the opposite. It is fun, emotional, pleasurable, thrilling, and more. But all those positives are predicated on the interaction being ethical. We want to have the best sex possible, and an important part of doing that is understanding what constitutes ethical sex. Just like a physical condom protects us from harm, society needs to learn how to better wear its ethical condom. As people, we should care about one another and protect each other during such intimate encounters.

Consent is a critical and an unquestionable part of sexual interactions that are morally, legally, and socially permissible. Without consent, these sexual interactions are assault. But the presence of consent does not mean that an ethical sexual interaction has taken place. There is a gap between consensual and ethical sex in which individuals lack the language and resources needed to discuss their experiences.<sup>1</sup>

This thesis addresses the gap between consensual and ethical sex. It investigates the nature of consent and proposes two further necessary conditions for sexual interactions to be morally permissible. After addressing the morality of sexual interactions, the thesis then addresses questions of how best to bring our social practices closer to matching these moral standards. It asks whether practicing ethical sex in society should be left purely up to personal moral decision or should be enforced by legal or social codes.

Before outlining the plan for the thesis, for the sake of clarity I want to take a moment to lay out certain terminology that I will use throughout. Terms such as “sexual interactions”, “sexual activities”, and “sex” will be used interchangeably throughout. I

---

<sup>1</sup> See (Woodard, 2022) for a more thorough discussion of the various terminology that has been used to characterize this gap.

will not and could not create a comprehensive list, inclusive of all genders and sexualities, of every possible sexual activity. Ultimately, the sexual nature of an act is defined by its participants. I assume that that the reasonable reader will be able to determine from context which behaviors are sexual.

The thesis begins with an examination of the origins of the widespread use of consent. In chapter 1, I scrutinize political philosophy's adoption of consent as a tool for legitimizing governments, considering in particular the claim that political philosophers and politicians used consent as a façade to uphold socio-political power structures. My first interim conclusion is that the origin and use of consent gives some reason to worry that consent is not a neutral standpoint from which to discuss interpersonal relations.

Despite these worries, consent, not only as a political tool but also as a legal and social one, has become too ingrained in society to completely reimagine. In this chapter I then examine the most plausible views about valid consent in interpersonal interactions. My second interim conclusion is that, in the case of interpersonal interactions, the affirmative consent standard is the most plausible proxy for of the correct moral standard of consent. However, I then argue that a standard of affirmative consent only offers a blurred, incomplete picture of ethical sex and that there must be further essential criteria for ethical sex in addition to consent.

In chapter 2, I develop and defend two further necessary conditions for sexual interactions to be ethical, which I call the knowledge and desire conditions. Both conditions are predicated on the understanding that sexual activities are high-risk interpersonal interactions and therefore should be subject to a higher ethical standard than

they currently are. The knowledge and desire conditions both seek to remedy the gap between consensual and ethical sex discussed in chapter 1.

The knowledge condition focuses on an epistemic exchange between sexual partners. This condition focuses on the quality of knowledge shared and not necessarily on the quantity of verbal communication. The desire condition addresses the genesis of one's desire and insists that the desire to participate in a sexual interaction must be an innate, rather than external, desire. This chapter will conclude by defending the knowledge and desire conditions against two possible objections.

After establishing the case for these further necessary conditions for ethical sex, chapter 3 turns to the question of whether the knowledge and desire conditions should be enforced by either legal or social codes. The legal section focuses exclusively on the American legal system and examines the system's present approach to sex crimes. Due to current systemic problems, incorporating the knowledge and desire conditions into the law is unlikely to help survivors nor will it improve the legal system's quality. However, I then argue that incorporating these two conditions into the social code is more promising. Social codes are effective tools for enforcing social practices. The conclusion of the chapter is that the integration of the desire and knowledge conditions into our social codes can be justified.

## CHAPTER 1: Is Consent All That Matters?

### Introduction

Individuals are not morally free to do whatever they want to each other. Our laws and social norms recognize that violating another's person or property is normally a moral wrong. But our power to consent—roughly speaking, to freely give others permission to do things to our own person or property—seems to change the moral picture. However, it is difficult to give an account of what it takes for the morally relevant kind of consent to be present. A variety of social factors, institutional power imbalances, plain misunderstandings, and contradictions between verbal and nonverbal signals complicate the picture.

Consent matters most in high stakes situations where there is a potential for severe harm to the individuals involved. Sexual interactions are regarded as such situations. This type of harm can be serious and long-lasting with a variety of consequences. Yet, despite consent's importance, one might think that consent is an ill-fitting theoretical tool to fully grasp the morality of sexual encounters. That is the question that I want to consider at length here.

This chapter consists of three sections. Section 1.1 demonstrates how the creation of social contract theory by Western political philosophers significantly contributed to the prominence of consent as a political tool. This section will call attention to how consent, as a part of social contract theory, was manipulated to ensure a hierarchy of socio-political classes. Maintaining that hierarchy effectively subordinated marginalized communities along multiple axes of discrimination including, but not limited to, gender and race. Because of that history, there is a worry that consent is not a neutral starting



point for thinking about the morality of sexual interactions. Broadly, this section will motivate the thought that there is an underlying oddity in applying a term that historically governed political relations to judge interpersonal relations.

Section 1.2 surveys some major views about expressing valid consent in interpersonal interactions. Each of these views focuses on and values a different manner of how an individual communicates her consent to another. This section will examine strengths and shortcomings in these modes of expression.

Section 1.3 operates on the assumption that, whatever the ultimate moral facts about consent, the affirmative consent model is the most plausible proxy for that moral standard. Despite that, this section will argue an affirmative consent standard is, in itself, inadequate. In some respects, the standard is implausibly high and in other respects implausibly low. Requiring fully autonomous agreement, along with the issue of misrepresentations, sets too high of a standard to be realistically met. But, on the other hand, emphasizing a ‘yes/no’ verbal requirement sets too low of a standard that does not readily encourage the presence of desire and dialogue among other wanted values in ethical sexual activities.

Ultimately, the interim conclusion at the end of this chapter is that consent is an imperfect tool to capture the complex morality of sex. Therefore, this chapter is motivation to think there are further considerations, beyond consent, that determine ethical sex.

### **1.1: Historical Origins of Consent**

The prevalence of consent in our contemporary legal and social framework traces its lineage back to the inception of social contract theory. Social contract theory emerged

when political philosophers transitioned away from the supposed divine right of kings and began searching for a new source of authority to legitimize political rule. Consent became that new source.

The act of consenting legitimized the ruling body because citizens *chose* to be subjected to that body's rule. The inclusion of choice within a justifiable framework of political rule is essential because it takes into account ownership of oneself. Ownership of oneself, or the notion of property in the person, stresses that an individual has legitimate control over what is done to her body and her life. That control is something to be valued and protected. Thus, a mechanism must exist for a person, or government, to legitimately control or act upon another person. Consent is that mechanism. If an individual gives consent to another, that consent transforms an act from impermissible to permissible.

John Locke's consent of the governed theory demonstrates how consent operates politically. Individuals are motivated to give up some of their freedoms to become citizens only because of the benefits that a government brings. Crucially, the decision to become governed must be made by the individual. It cannot be forced on them. Additionally, if an individual consents to becoming a citizen, she may revoke her consent if the government acts unjustly. The characteristics of freely giving and revoking consent are crucial components that underpin how consent is justified politically. These components have also been translated into how consent operates in interpersonal relations. This shift of consent from the political to social sphere has had a number of influential ramifications.

One prominent example of political consent's social impact is how it justified socio-economic classes. Carole Pateman's influential work, *The Sexual Contract*, provides a

framework for understanding how social contracts work to marginalize certain groups. She develops this framework by analyzing how the ‘sexual contract’ between men and women reinforces the patriarchy by keeping women sexually subordinate to men. In other words, the sexual contract is a societal function to keep the dominant class (men) in power over the subordinate class (women). Importantly, Pateman’s work highlights how consent functions as a tool within the social contract theory to uphold types of socio-political subordination. Pateman’s work focuses specifically on the sexual contract but her analysis is incredibly useful in understanding how many types of social contracts operate.

Part of the reason why social contract theory is implicated in socio-political marginalization is because most politicians and philosophers in the theory’s early period falsely believed that the only kind of equality that mattered morally is equality among white, property holding men. Summarizing Pateman’s work, O’Neill, Shanley, and Young, note “that for Hobbes, Locke, and others the original contract is both the modern means of ensuring rule by men as a fraternal brotherhood of equals, and of subordinating women.”<sup>2</sup> Political documents of the time reflect the disconnect between the progressive ideals of equality and consent and the actual social documents. For example, the Declaration of Independence was written exclusively by men, some of whom were slaveholders, yet it opens with “we hold these truths to be self-evident, that all men are created equal”. The Declaration also states that “that to secure these rights, Governments

---

<sup>2</sup> O’Neill, Shanley, Young (2008), pg.4. Other forms of subordination include white supremacy: see Charles Mills’ *The Racial Contract* (1997). Although there is not an oft-cited work for cis-supremacy, one can easily extend the patriarchy and white supremacy contracts to a heteronormative one which suppress the LGBTQ+ community.

are instituted among Men, deriving their just powers from the consent of the governed.”<sup>3</sup> Individuals who were motivated to maintain their social position used social contract theory, whether intentionally or not, as a means of doing so.

Another danger of consent in social contract theory – a danger which exacerbates socio-political subordination of certain marginalized classes – is the validity of the claim that every individual has the power to meaningfully consent. This power is a façade. As previously demonstrated, consent is built on the availability of choice. If an individual is *choosing* to consent, it follows that the ability to not consent must also be viable. But institutionalized power dynamics, or a simple lack of other opportunities, effectively eliminates the ability to not consent to government, making ‘choosing’ to consent the only option available. This dynamic is what motivated John Locke to develop his theory of tacit consent: the idea that any interaction with society is considered beneficial, and by accepting those benefits, the individual has consented to be governed.<sup>4</sup> Tacit consent puts a bow on the fact that there is no choice but to engage with some aspect of society; the alternative, not engaging, would be to live on a private island by yourself, isolated from the rest of the world. But without the accrual of capital, how is one individual going to transport themselves to that island? Without choice, consent becomes an illusion; the more marginalized an individual is, the less power they have, and the more their choices diminish. As Moira Gatens notes, “if ‘choices’ available to those who own nothing but their property in the person is highly constrained” (i.e., poor white men), then “the ‘choices’ open to those deemed nonpersons (women and slaves) are sham.”<sup>5</sup> However,

---

<sup>3</sup> Jefferson (1776)

<sup>4</sup> Here it is important to note that Locke’s theory of tacit consent is one specific theory that should not be taken as fully representative of all other philosopher’s consent theories of the time.

<sup>5</sup> Gatens (2008), pg. 34 in *Illusion of Consent: Engaging with Carole Pateman*

this “sham” is important to the illusion of legitimacy which contributes to subordination under the guise of consent. If everyone has ‘chosen’ what to do with themselves, then attention can be diverted from the factors that are actually responsible for that ‘choice’.

For example, Ryan, a mother of four, with no access to education or trade, decides to enter a contract of servitude for seven years in exchange for a wage to send back to her starving children. Her boss holds that this contract is legitimate because Ryan has ownership of her body; thus, Ryan *chose* to consent to the contract. However, as Gatens notes, the choices that Ryan effectively has are extremely limited; the notion that she has meaningful control over what happens to her person is practically a myth. These myths keep the dominant socio-political group in power by controlling the narrative that true, autonomous consent is available to everyone.

These writers’ arguments suggest that there is reason for skepticism of consent even in its original use of consent in a political sphere. But this original use has also transitioned into the prominent, contemporary use of consent to govern interpersonal interactions. That is not to say that before social contract theory emerged, asking another for permission was an unheard-of practice; rather, the point is to demonstrate that prior to the rise of consent, the instances when other individuals sought permission to perform actions to another were based on the latter’s socio-economic status not whether the individual was consenting to the action.<sup>6</sup> However, with the transition to a contractual society, consent has become broadly incorporated as a morally relevant consideration in interpersonal relations.

---

<sup>6</sup> Refer to Gatens (2008), p.31 for further discussion on a larger transition that was happening to Western society in the 18<sup>th</sup> century from a status-based society to a contractual one. She references Sir Henry Maine’s *Ancient Laws* circa 18<sup>th</sup> century as a pivotal text in this shift.

Arguably, consent historically derived from an attempt to justify *unjustifiable* social arrangements because it assumed, falsely, that there was no injustice or social inequality in those arrangements and/or that people had many more choices available to them than they in fact had. Insofar as our contemporary accounts of consent have *inherited* the inadequate features of these historical accounts of consent, there is a reason to worry about whether consent is the appropriate standard to meet in interpersonal encounters, including sexual ones.

Moreover, there is reason to think that the foundation of consent is not a *neutral* starting point because as discussed above it assumes equally situated persons can find mutually acceptable terms on which to live together. However, as demonstrated by the Pateman's idea of a sexual contract, there are grounds to believe that institutional factors sometimes prevent us from entering consent on equal terms in the first place. These considerations demonstrate why there is reason to be skeptical that consent is a morally neutral starting point in thinking about ethical sex.

To clarify, I am not arguing that consent can never be useful in establishing the legitimacy of interpersonal relations; rather, there is reason to think using consent as the moral standard for behavior in high risk scenarios is problematic. There is, however, also an underlying oddity in taking an originally political term to apply to interpersonal interactions. As Catharine MacKinnon perfectly summarizes, "consent as a concept was not originally most strongly developed to apply between two people in civil society".<sup>7</sup> Here the primary contributing factor to the oddity of extending political consent to sexual consent is mapping the binary nature of political consent on to the complexity of sexual

---

<sup>7</sup> MacKinnon (2019)

interactions. Because these high-risk, interpersonal interactions are so different in nature from political interactions, it is questionable whether a concept that was not originally established to apply to them is all that is relevant to their morality.

## **1.2 Expressions of Consent**

In the previous section, I demonstrated that there are worries about using consent as the sole standard for determining the morality of a sexual encounter. Despite its limits, however, consent remains an important component of sexual interactions. As such, in this section I first isolate and then scrutinize varying views about expressing valid consent. These differing expression models highlight distinct manners in which consent can be expressed—through body language, mental permission, or verbal communication. I will conclude that the affirmative consent standard is the most plausible proxy for the kind of consent that is morally relevant in interpersonal interactions.

### *Behavioral Consent*

In a behavioral consent model, an individual communicates her consent through her bodily actions. Bodily actions include, but are not limited to, the ways an individual physically positions herself relative to others, for example if she is placing herself close to others or standing across the room, what actions she is doing with her hands, legs, and other body parts, or her facial expressions. Her overall mannerisms, expressions, and actions communicate to another partner or partners whether she consents to participate in an activity. Verbal communication will be addressed later as a part of mental consent. For now, behavioral consent exclusively features physical actions and comportment.

One strength of the behavioral consent model is that it allows for spontaneity in sexual interactions. For example, the mental consent model requires verbal communication to express consent. In healthy long-term relationships, requiring verbal communication as the consent standard would be unrealistic and draconian because it would likely make spontaneous sexual activities impermissible. If a partner had to ask for permission before every sexual act, spontaneity could not exist.<sup>8</sup> But a behavioral consent standard allows for a fluid succession of events between partners, which engenders spontaneity.

Another strength of the behavioral consent model when compared to other models, especially the mental consent model, is that behavioral consent is more communicative between individuals. Bodily expressions are more indicative of an individual's consent than verbal cues. An individual's behaviors are continuous throughout an activity which constantly gives the other participants feedback about consent whereas verbal communication cannot be present at every moment of the interaction. These two strengths offer initial support for a behavioral consent model.

*Objection: Misinterpreted Behavior*

However, I argue that there is reason to reject behavioral consent due to the problem of misinterpretations—instances where an individual has good reason to believe that their interpretation of another's behavioral consent is right, although in actuality it is not.

Misinterpretations do not include cases where an individual is plainly ignoring their partner's extreme behavioral signals (e.g., actively trying to flee). Rather,

---

<sup>8</sup> Pallikkathayil (2020) recognizes the importance of sexual spontaneity and responds to these concerns with her modifiable consent standard idea.



misinterpretations stem from instances of non-extreme behaviors, where the clarity of what the individual is attempting to communicate is heavily context dependent. Consider the act of kissing. On the one hand, kissing could indicate the person's comfort, signaling his readiness to transition to the next activity; on the other hand, kissing could indicate the individual's desire to wrap up the activity and transition out of having sex. In that case, behavioral consent proponents would say that context clues would be sufficient to properly interpret what the individual's kissing is indicating. However, I argue that despite the presence of extensive context clues, misinterpretations are always a possibility.

Misinterpretations can also happen on a systemic level. Studies have shown that women's behavior is routinely misinterpreted by men as more sexual than women intend.<sup>9</sup> These studies give reason to believe systemic misinterpretations are already in play the moment a heterosexual interaction begins, increasing the probability of a misinterpretation. In addition to reading non-verbal cues as more sexual, it appears that misinterpretations between men and woman may run deeper, with men fundamentally misunderstanding women's motivations for performing certain actions. Claudia Card offers an example of this misrepresentation when she argues that the "ever-present threat of rape from childhood through old age" makes women seek out male friendship as a form of protection from abuse from other males.<sup>10</sup>

---

<sup>9</sup> One study from Jozkowski (2011) and Kitroeff (2014), cited in Pallikkathayil (2019), pg. 112, has shocking results: only 10 percent of women say they express sexual consent using body language or nonverbal cues. However, 61.2 percent of men indicate that they interpret whether their partner is consenting based on that partner's body language or nonverbal cues.

<sup>10</sup> Card (1996) pg.7. Card finds this "friendship" problematic because it is not a friendship formed exclusivity from equal fondness. Rather a woman knows that this specific man will sustain from abusing her and will provide her protection from other men who would attempt to abuse her.

To illustrate these concerns, consider a hypothetical example. Imagine a woman, Jan, leaving the bar. She grabs her friend Mark, a heavy set, six-foot three man. Jan finds Mark incredibly annoying but knows Mark will never take advantage of her, regardless of how drunk she is. Mark offers protection to Jan because he simultaneously will not harm her while offering protection from other men on the 2 a.m. walk home, despite his incessant ramblings about anime. But from Mark's perspective, he believes that Jan is quite fond of him and that is why she chooses him for the walk home over any other man. Although he can acknowledge that Jan walking home alone would be unsafe for her, he believes that his role in her life is that of mutual friendship, whereas Jan simply tolerates Mark for the safety he provides her. This example reveals the deep influence that the patriarchy has on motivating women's behavior and the inability of men to fully grasp the patriarchy's deep-seated, systemic effects.

When relationships are in various ways unhealthy or formed under conditions of gender injustice, like in the case of Jan and Mark, the behavioral standard no longer seems appropriate.

### *Mental Consent*

Another expression of consent is when an individual has mentally given permission. Understanding how one could argue for this view is worthwhile, as the ramifications of that argument are explored in the following two chapters. If an individual's decision is what matters for consent, then how consent should be expressed becomes quite simple—did the individual want or not want this action done to them? This approach prioritizes an individual's desire and their internal states. It also offers a direct, albeit overly simplistic, theoretical approach in discerning the permissibility of the sexual interaction.

However, there are worries about the viability of mental consent as the sole expression requirement. The misuse of mental consent as the sole requirement is exemplified by the phrase, “she was asking for it”. This phrase has been echoed throughout men’s clubs and courtrooms as justification for rape and sexual assault. Of course, the explanation of *how* “she was asking for it” is rarely anything that would remotely resemble a plausible understanding of consent. For example, an individual’s supposedly promiscuous outfit has been oft cited as the outward expression of their pre-decided mental consent to engage in some form of sexual activity that night. To be clear, the promiscuous outfit case is incredibly different from the prior misrepresentation case. Here, there was no attempt to synthesize context clues with other indicators—just an attempt to find anything that could be construed as an extrapolation of mental consent, while ignoring that no communicative process, like a conversation, has taken place.

The clothing case suggests that while nothing is innately wrong with the mental consent view, there is a worry about using mental consent as a sole expression of consent. As seen in the context of social contract theory, an individual should make the mental decision that she wants an action to happen to her person. Thus, mental consent is plausible individually; the worry over an isolated expression of mental consent concerns how rampantly society has misconstrued the presence of mental consent in ways that harm individuals.

### **1.3: The Adequacy of An Affirmative Consent Standard as a Proxy**

While both the behavioral and mental consent views fail as viable models for consent expression, an affirmative consent standard attempts to address some of these failures.

The affirmative consent standard is the most widespread institutional standard of consent and the most plausible proxy for the kind of consent that is morally relevant. An affirmative consent standard requires two elements: an explicit, verbal “yes” and continuously positive body language. Thus, affirmative consent incorporates aspects of both behavioral and mental consent.

Moreover, an individual must voluntarily satisfy these requirements under informed conditions.<sup>11</sup> Each aspect of these requirements for affirmative consent requires further clarification. ‘Voluntary’ means the person’s consent is not in response to coercion or duress. If the voluntary aspect is not present, an individual cannot give consent. Any consent given under coercion or physically forced is not valid consent., The term ‘informed’ stipulates the individual has enough relevant information about the present situation and the other participants to fully understand the effects of giving consent. One common example is that an intoxicated person cannot give informed consent because they are too impaired to fully grasp the situation.

An explicit affirmative answer to indicate consent has been broadly interpreted as a “yes” or a “no” to indicate non-consent.<sup>12</sup> A yes or no answer is unambiguous, clearly communicating whether the individual is giving permission or not. For example, Flea says “no” to Anthony’s request to borrow his guitar. If Anthony still takes the guitar, Anthony is clearly violating Flea’s wishes and consent. Using the affirmative consent standard, it would be hard to find a legitimate reason, unless it’s ‘opposite day’, for how

---

<sup>11</sup> The Oxford Dictionary defines affirmative consent as “explicit, informed, and voluntary agreement to participate in a sexual act”.

<sup>12</sup> Aside from extrapolating the standard of “yes” from the affirmative, explicit elements included in the definition, there are societal movements that support the use of “yes” as well. Starting as “no means no” movements, these movements have broadly transitioned into “yes means yes” movements. Activists have led the “yes means yes” movement in popular culture and on college campus.

Flea could understand Anthony’s “no” as permission. Furthermore, “yes” and “no” have a universal implication, no matter the lexicon. This unambiguity absolves individuals from large amounts of epistemic work, resolving some of the prior issues in behavioral and mental consent. Remedying the issues present in the prior two broad views offers initial reason to accept affirmative consent, at least as a proxy for the kind of consent that is morally relevant.

As further evidence that it is the most viable model of consent in practice, it is worth noting that American societal practices and law have begun adopting affirmative consent as the standard for how consent is conveyed and received in sexual encounters. California was the first state in 2014 to adopt an affirmative consent standard and require universities that received state funding to also adopt it. The definition rejects the “common ‘no means no’ standard” in favor of activists “yes means yes” standard.<sup>13</sup> The law reads as follows:

Affirmative consent means affirmative, conscious, and voluntary agreement to engaging sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other and others to engage in sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent.<sup>14</sup>

Looking at California’s definition, one can clearly see the explicit requirement that each partner must state a verbal “yes” and that must be communicated prior to the activity. However, California’s definition does not clearly state what the behavioral expression of consent must be. That a “lack of protest or resistance does not mean consent” is just saying that the lack of these two behaviors does not equal consent—the law says nothing

---

<sup>13</sup> Chappell (2014)

<sup>14</sup> Dougherty (2015), pg.226

explicit about what behaviors constitute consent. The problem of that ambiguity will be explored further below.

In the rest of the thesis, I will assume that the affirmative consent model, or something like it, is the most plausible view about the kind of consent that is relevant to the morality of sexual interactions. But I am going to argue that consensual sex is not always fully ethical sex. To build this case, I start by noting some initial reasons to doubt that the affirmative consent standard matches our judgments about when sex is ethical. In the conclusion of the chapter, I then begin to explain the mismatch.

### *Too High a Standard*

The affirmative consent standard for morally permissible sex creates, in some ways, too high a standard and, in other ways, too low a standard. First, the voluntary and informed elements of affirmative consent create an unrealistic burden that all relevant information must be known by the individual.<sup>15</sup> I am not thinking here of coercion, which automatically invalidates any apparently expressed consent, or of deception and fraud, in which an individual is intentionally and maliciously withholding or fabricating information, also invalidating consent. In those instances, there is a clear moral wrong. Rather, I am thinking of cases of misrepresentation, in which an individual falsely states something but without malicious intent because it is seemingly insignificant to the speaker. In cases of misrepresentation, the ‘voluntary and informed’ element of the

---

<sup>15</sup> Refer back to the Oxford Dictionary definition of affirmative consent—being informed is an element.

affirmative consent standard is not satisfied. But are these misrepresentations enough to morally invalidate an individual's prior given affirmative consent?<sup>16</sup>

To help determine this question, consider the following hypothetical scenario: Eric and Vance, two friends, are chatting on their walk home. Vance is being rather aloof, so Eric asks Vance if he is in a bad mood. Merely deep in a daydream, Vance, without much thought, offhandedly responds “yes”, just to stop the conversation. On their walk, Eric and Vance pass the gym, and Vance asks Eric to a bout at the gym. Eric, although feeling somewhat sickly, agrees, believing that Vance is in a bad mood and thus the bout will cheer him up. But Vance's bad mood was a misrepresentation. At the gym, Vance's endorphins kick in and sickly Eric ends up badly losing, leaving him quite sore for the next couple days.

Vance did not have any malicious intention, which is why his representation of a bad mood is a misrepresentation rather than a deception. However, the lack of malicious intent does not invalidate the fact that Eric can have a complaint. If he knew the truth at that time, then he would have made a different decision. Thankfully, the harm that Eric suffers in this case is not extreme. But in sexual interactions, we may think that the harm resulting from a misrepresentation is significant. For example, imagine that James, like Vance, responds off handedly to Hunter's question about political parties. Unbeknownst to James, his political affiliation was a major deciding factor for Hunter about whether he would sleep with James. After a few days, Hunter is extremely upset, experiencing emotions of disgust, regret and guilt, upon learning about James true political affiliation. The danger of misrepresentations is that because they are innocent, neither individual

---

<sup>16</sup> For further reference—Oxford University Law professor Jonathan Haring on the podcast “Conversations about Consent” speaks about the role that misrepresentations play in consent.

realizes that they are occurring. These incidents undermine the informed requirement of affirmative consent. But to prevent misrepresentations, a person would need to be an omnipotent being, privy to all possible information. That is an impossible task and therefore suggests that an informed requirement is too high a standard.

In addition, institutional epistemic influences may erode the ‘informed’ factor. For example, Catharine MacKinnon states in her dominance theory that no woman can truly consent to a sexual interaction with a man because there will always be a power imbalance at play.<sup>17</sup> Additionally, Amia Srinivasan describes instances where women feel a societal pressure during sexual interactions. There is an entrenched expectation that once a sexual interaction has started, in order to not be labeled a ‘tease’, a woman must finish out the interaction.<sup>18</sup> These theories give cause to question how societal influences can undermine the “informed and voluntary” requirement of affirmative consent. Without taking a stand on MacKinnon’s dominance theory or Srinivasan’s view, the relevant point here is that, since it seems to require individuals needing to know all relevant information about other participants and being cognizant of background societal influences, affirmative consent sets too high an ethical standard.

### *Too Low a Standard*

On the other hand, an affirmative consent model sets too low a standard in three ways. First, the standard is vague in what behaviors are affirmative and, of these behaviors, which ones should be present to satisfy the behavioral requirement. Second, the explicit verbal “yes” requirement problematically makes affirmative consent similar to a contract.

---

<sup>17</sup> See for example: *Feminism Unmodified: Discourses on Life and Law* (1987)

<sup>18</sup> Srinivasan (2021)



Third, portions of the affirmative consent framework, in practice, result in bad social conduct. I expand on each of these claims in what follows.

First, an important characteristic of any theory is that it has clear prescriptions. In the context of the affirmative behavior requirement, the affirmative model does not clearly prescribe what constitutes affirmative behavior. Interpreting what a physical action means is heavily context-dependent. Recall the earlier kissing example. By simply changing some of the facts about the case, a kiss could indicate anything from that individual earnestly wanting to continue the sexual activity to just simply wanting to end a conversation. In the first scenario, a kiss would constitute an affirmative behavior. In the latter, it would not. This ambiguity muddles how one satisfies the requirement of affirmative behavior.

Additionally, the affirmative consent standard is unclear as to when an action is sufficient to be indicative of affirming an individual's sexual interest. For example, is an individual draping her leg over another person's leg enough of an action to indicate sexual interest? Or would she have to physically be sitting on top of that person's lap for the action to reach a level of affirmative sexual behavior? The lack of clarity in the affirmative consent standard is worrisome because of how this ambiguous standard has been used by individuals to justify engaging in unethical sex.

Second, the explicit verbal requirement of affirmative consent standard necessitates a clear "yes" from the parties to proceed with a sexual activity. That is not to say that during a sexual activity, the participants may only ever say the words "yes" and "no". But a yes must be said to satisfy the standard of consent. Relying on a yes or no framework causes the verbal portion of the affirmative consent model to function like a

contract. Similar to a contract, in which an individual either signs or does not sign, a yes or no framework forces the individual to either explicitly agree or not agree. This binary nature is problematic because it does not acknowledge the importance of conversation between parties participating in the sexual interaction. This framework forces an individual into a summation of all their feelings into a single word. Importantly, it's not as if affirmative consent is restricting the speech of the individuals. But it is lowering the standard of what is verbally required to constitute a permissible sexual interaction.

Here is another way of putting the point. The affirmative consent model suggests a picture of a series of negative duties existing between individuals. Examples of these negative duties can be easily conjured: not stealing, not physically touching others, and not using others' properties. Individuals can then be released from a negative duty through another's consent. Not having sex with others is one of these standing negative duties, from which one is released through consent.<sup>19</sup> If the consent mechanism used is affirmative consent, then as discussed above one worry is that a "yes" is not sufficient to release an individual from their negative duty, because sex is a high-stakes interaction. But Quill Kukla echoes a slightly different concern in her work, worrying that describing sex as a duty to do or not to do to others "makes sex sound asymmetrical" like a "forced and odd" activity instead of something that is "actively choose[n] and do[ne] together".<sup>20</sup> Without rejecting the 'negative duties' discourse about sex altogether, it seems to model the morality of sexual interactions in an implausible way on the kinds of political consent relevant in social contract theory. It does not encourage an understanding of sexual interactions as *collaborative* interactions but rather as something an individual does or does not do *to* another.

Third, affirmative consent does not eliminate all problems associated with the motivation of bad actors; therefore, the model is arguably simply rebranding instead of raising the standard of consent needed. Historically, in both the social and legal spheres, the understanding was that if an individual did not say no, then she was consenting to whatever was taking place. The rather recent adoption of the affirmative consent standard sought to change that understanding. That change is seen in the explicit requirement of a yes. However, philosophers and advocates, like MacKinnon, have questioned the efficiency of that change. MacKinnon believes that the new affirmative consent standard is merely a “shift in the goalposts” so that instead of when “men had to stop when a women said no” now men “just have to get women to say yes”.<sup>19</sup> The worry is that the new emphasis on yes does nothing to stop bad actors; it merely changes how they justify engaging in non-ethical sex.

### *Overall Evaluation*

I have suggested that there are reasons to doubt the adequacy of the most prominent views about consent, including the affirmative consent, as a complete picture of the ethics of sex. That motivates considering a different approach to sexual ethics. Understanding the flaws in theories of consent suggests that consent is not a fully adequate tool for judging ethical sex. Perhaps consent, properly understood, is just a necessary condition for permissible sex. A new approach would need to address many of these concerns by identifying and defending some further necessary conditions, other than consent, for sex

---

<sup>19</sup> (Srinivasan, 2021)

to be ethical. In the final section below, I draw on the discussion above to suggest one approach.

#### **1.4 Conclusion**

In this chapter, I have argued that we have a strong reason to believe that something other or more than consent is necessary to fully capture ethical sex: sex where all parties privy to it actively and continuously communicate their desires, reservations, and other feelings. Moreover, it is the kind of sex where everyone's pleasure is prioritized. I will argue in Chapter 2 that this should be seen as a *standard* sexual interaction, not an *exceptional* interaction. Here I briefly explain why the presence of consent seems not to fully match our judgments about when sex is morally permissible and begin to explain why not. In Chapter 2, I then draw on this discussion to propose and defend two further necessary conditions for sex to be permissible.

If consent was all that mattered, a very odd picture of ethical sex would emerge. A consent-only model turns sex into a contract-based duty. Harkening back to social contract theory, the problem seems to be that the binary nature of consent does not map onto the complexity of sexual interactions. Political consent demonstrate that subordination of social groups can curtail an individual's ability to meaningfully consent. So, when an individual cannot meaningfully consent, that individual is forced to agree to whatever is set upon them by the governing body. If we accept that consent is more meaningful if an individual has the ability to negotiate, a contract like model of political consent is worrisome. Without an ability to negotiate, an individual can only accept or decline the contract. With that worry in mind, it seems odd to take that picture and then

map it onto sexual interactions. In sexual interactions, we want to prioritize negotiation between parties about different aspects of the interaction; Chapter 2 will explore this thought further.

The dominant theory of consent, in multiple ways, fails to grasp the complexity of sexual interactions. Moreover, it fails to express the underlying fact that sex is not in itself bad. Sex is not like being governed or acquiring a duty to obey. Therefore, sex should not be treated like a contract. It should not be like a boardroom meeting where only the CEO is speaking and the rest of the board is nodding. Something more than consent is needed to move beyond treating sex as such.

## Chapter 2: What Else Matters For Ethical Sex?

### Introduction

The presence of consent is important in judging whether a sexual interaction is ethical. Yet using consent as a sole ethical standard is incredibly limiting in scope. Chapter 1 demonstrated how even affirmative consent, the most plausible model, operates on a binary model that fails to capture the complexity of sex and, therefore, fails to capture the complexity of what constitutes ethical sex. In failing to do so, what is and isn't ethical in sexual interactions is a shockingly complex area. In this chapter, I try to clear up some of that murkiness by introducing and arguing for two additional necessary conditions that must be present to have ethical sex. While not exhaustive, the conditions introduced herein are important requirements that help build a robust sexual ethics theory.

It cannot be argued that sexual activities are not high-risk interactions. The heightened risk is derived from the potential for severe harm, meaning a harm that is long-lasting with any combination of incredibly damaging mental, physical, and legal consequences. Because of this heightened risk, there is an increased interest in preventing harm in a sexual interaction. To do so, the moral requirements for sexual activities need to ameliorate this risk by creating a higher standard of ethical sex than affirmative consent standard currently does. This chapter, throughout its three sections, will argue how two new conditions raise that ethical standard. Underlying that motivation is the intuition that safer, more ethical sex is better sex.

Knowledge is the first proposed condition. Section 2.1 explains how the knowledge condition is a heightened requirement for interpersonal communication between parties involved in the sexual activities. This section demonstrates how the

knowledge condition solves dangerous epistemic gaps in sexual interactions left by the affirmative consent standard.

Section 2.2 proposes another condition—the desire condition. Paralleling section 2.1, this section will introduce the condition and examine how it ameliorates gaps left by the affirmative consent standard. The desire condition prioritizes an individual being motivated by an innate desire to engage in sexual conduct, by which I mean that this desire should not be formed in response to external factors. Through focusing on a case of two partners after a day of work, this section will illustrate why distinguishing between internally and externally formed desires is ethically important. Furthermore, this section will examine duties to others and duties to oneself, in order to justify the desire condition.

The third section, section 2.3, addresses two objections to my proposal, the first in response to the desire condition and the second in response to the knowledge condition. These objectors worry that a duty to oneself permits an implausible amount of selfish behavior. But, by establishing a threshold for this duty, I will show that the duty does not license overt selfishness and rather protects an individual from harm. The objectors also worry that the knowledge condition is implausible because it would render all casual sex morally impermissible. It is true these conditions do lead to the judgment that most casual sex is morally questionable. However, I stress that this judgment is not as worrisome as one might initially believe. This chapter concludes with a summary of how the knowledge and desire conditions operate in a sexual interaction and how these conditions further the understanding of what ethical sex is.

## **2.1: The Knowledge Condition: A Little More Questioning Needed**

### *Introduction*

Mind-reading techniques have found their home in the lands of superheroes, witches, and wizards but not so much in sexual ethics. Most of us have thought about what we would do with mind-reading powers—does our crush (really) like us, does that person (really) have a meeting to attend, does the barista (really) hope I have a nice day? But that mind-reading may be an important moral tool for perfectly ethical sex is probably not the immediate thought. Chapter 1, through concerns over three consent models, gently touched upon the lack of parties' knowledge during sexual activities. In the absence of mind-reading, it seems almost impossible to find a realistic way to obtain a perfect understanding of a sexual partner's thoughts. Though perfect knowledge is an unrealistic goal, current consent standards find themselves in the opposite territory. These standards require parties to share little information, both in quantity and quality, a rather worrying ethical practice for sex. In such an emotionally and physically compromising situation as sex, shouldn't there be a higher standard? Shouldn't partners strive to learn the most about each other in order to facilitate a pleasurable experience? In this section I try to account for those judgments.

### *Knowledge*

The amount of knowledge shared between parties during sex is often limited. This lack increases the potential that the parties suffer harm resulting from the interaction. By requiring more knowledge to be exchanged, the knowledge condition seeks to lower the potential for harm.

To illustrate the idea, consider the following scenario. Emma and Josh meet at a local bar. The two begin to flirt and have a couple of drinks while doing so. They chat for about an hour, mostly about their favorite sports teams and their current jobs. Josh asks



Emma if she would like to go home with him, Emma says yes. After arriving at Josh's home, the two start partaking in foreplay based on each other's inviting and mutual body language. Josh asks Emma if she wants to have sex, and she says yes; the two then have sex. Afterwards, Emma heads home.

This interaction is representative of a typical one-night stand. From an affirmative consent standard, this scenario contains no glaring red flags that any wrong has occurred. In fact, by this standard, *nothing* ethically wrong has taken place—affirmative body language and an explicit yes were present. However, I believe there is reason to suspect that Josh and Emma's interaction is unethical because of a lack of relevant knowledge shared between the parties. In this case, Josh and Emma may be able to recall each other's favorite quarterback but they cannot explicitly recall any sex positions that each other hates. The lack of relevant sexual knowledge heightens the risk that an individual will experience discomfort or a trauma trigger.

The affirmative consent standard gets the wrong judgment in this case because of its reliance on a simple yes standard with no 'defeating' factors present (like lying or coercion). As demonstrated in Chapter 1, this standard operates like a contract. A yes answer gives a green light for sexual activities to commence, even if it is not clear what exactly those activities will consist of. Affirmative consent proponents may respond with a qualification that a yes must be present before every new activity. I don't necessarily find that qualification objectionable. However, the qualification does little to fix that inherently a yes or a no answer communicates barely any interpersonal knowledge. One just knows that, for whatever reason, that individual does or does not want to proceed. No knowledge is obtained about why the individual arrived at that answer, what the

individual's specific preference is for proceeding forward, or other similarly important motivations. This qualification mistakenly conflates increased communication with increased knowledge. Simply adding more yes's do not make them clearer.

That is not to say that yes's do not matter. The Emma and Josh case is meant to illustrate a more nuanced way of thinking about the ethicality of a sexual interaction. Consent still and must be present in a sexual interaction.

As stated earlier, the underlying intuition is that more ethical sex is better sex. One aspect of how the knowledge condition works actualizes that intuition. In the Josh and Emma case, the two do not have any knowledge exchange about sex positions before starting. Say that Emma has prior trauma attached to a specific position during sex. But that information has not been shared. So Emma is left hoping that Josh and her do not start to move into that position. Of course, Emma can say no when the position starts. But by that point, she has already started experiencing some of her trauma. If the knowledge condition was present, there is an exchange of knowledge upfront, an individual is able to share what characteristics they'd like to avoid. These types of characteristics are vast. It could be everything from certain sex positions to certain activities like choking. There is comfort in knowing that these will be avoided. And that throughout the interaction there is not uncertainty as to if these will come up or not. This same model can be applied to things that the individual does want to experience during the interaction.

### *Defining The Knowledge Condition*

By emphasizing the importance of starting a dialogue, the knowledge condition seeks to provide individuals with a route of voicing their concerns and worries in an effort to prevent these kinds of wrong from occurring. While in defining the condition I would not

like to standardize the questions involved, I would like to encourage the standardization of *questioning* to cultivate a sexual ethics of dialogue. I am envisioning questions aimed at offering individuals an outlet to express any discomfort, possible sources of pressure, or any other concerns that are important to them. By offering, instead of placing the burden on individuals to voice their concerns, this condition is curating an environment of safety and communication— traits that it is also plausible to think are more than agreeable and desirable to have in a sexual interaction. That is what the knowledge condition requires.

## **2.2: The Desire Condition**

Another necessary condition for ethical sex is what I will call desire. I define desire, for my purposes here, as one's innate will to engage in an act. This condition requires that the desire be internally and not externally generated, which I will address further on. Again, to illustrate the idea, consider the case of Adonis and Beatrice. This particular evening, Beatrice is on the couch watching television when Adonis comes home from work. He comes in, tired and cranky from a long day, thinking about what would make him feel better. Adonis asks Beatrice, who is watching television, if she would like to engage in sexual activities. She says yes and begins kissing Adonis; the couple proceeds to have sex.

Judging by the affirmative consent standard, there is nothing morally amiss in this situation. However, I believe there is reason to suspect that Adonis and Beatrice's interaction is unethical because there is a lack of internally generated desire on Beatrice's

part. Proponents of an affirmative consent standard may say that of course desire is present. Beatrice gave both a verbal yes and had affirmative body language. Adonis did not coerce or pressure her in any meaning. If Beatrice did not desire to have sex, then she would have said no. But this type of thinking is dangerous because it fails to capture the nuance in how desires are generated. By judging that a yes and affirmative body language is fully indicative of an individual's desire to participate, the affirmative consent theorist is focusing solely outward expressions of desire and not the motivation behind those expressions. That motivation is critical to determining whether a person is acting based on their internal desire or acting in response to someone else's wishes. There is a distinction between the two and that distinction does matter. Revealing further facts about the Adonis and Beatrice case illuminates that distinction. Ideally, Beatrice would rather continue watching her television show than have sex because she's not really horny. However, Beatrice loves Adonis and she knows that engaging in sex will make him happy. She is responding, not to an innate desire, but to an adjacent desire of hers to make Adonis happy.

If not all partners internally desire to participate, then an ethical wrong has occurred. When Adonis initiates sexual activities with Beatrice, he is acting immorally because he is placing his immediate desires (i.e., to rid himself of crankiness) over Beatrice's innate desire (i.e., to continue watching television). If that judgment seems surprising, I would urge one to examine why. If the answer is that it's because consent is present, then I believe that answer indicates a lower lack of regard for a sexual partner. I believe that many of us prioritize our self-pleasure more than we would care to admit and so we 'want' Adonis and Beatrice's situation to be ethically okay. But the fact remains

that even though Adonis obtained consent, he still placed his desire for relief over Beatrice's internal desires. That act, I claim, is unethical. I believe that we, as individuals, ought to sacrifice a little bit of self-pleasure to reach a higher standard where all participants' desires are respected in the right way. What could I explain why there is an ethical wrong in this case? In this case, I suggest, Beatrice is acting immorally by violating a duty of authenticity to herself.<sup>20</sup> Individuals owe it to themselves to act in accordance with their authentic desires. Here, the mark of authenticity relates to the desire's genesis. As already alluded to, an external desire originates from responding to concerns other than an internally generated feeling of wanting to participate in sex. Imagine if an individual is placed in a nice, comfortable void and asked: would you participate in sexual activities right now? Are you horny? If those answers are yes, then that would be indicative of an internal desire.

Conversely, an answer like "No, but if it's Mark then yes" is indicative of an external desire. This answer invites speculation as to what external facts about Mark are causing this individual to transition from a negative desire for sex to a positive one.<sup>21</sup> Whatever the facts are that the individual is responding to, the importance is that the individual is *responding*. Her desire is stemming from external factors rather. Because of that, an external desire is not authentic and does not fulfill the duty of authenticity.

---

<sup>20</sup> See (Kagan, 1998), pg. 145-152 for further discussion on duties to oneself, particularly the duty to promote one's own well-being and the duty of self-respect.

<sup>21</sup> That is not to say that the individual cannot qualify that he wants to have sex but only with a certain person. An answer like "yes but only with Mark" could be acceptable as it could still be indicating an authentic desire to have sex. The individual is horny but would only proceed with sexual activities if it's with Mark. That answer differs from the initial answer described above.

The desire condition morally differentiates between a sexual motivation of an internal origin and one that is of an external origin. It dictates that the moral standard should be innate desires.

### **2.3: Objections**

#### *Against a Duty to Authenticity*

If there is always a duty to authenticity to oneself, then it might seem that it would be permissible for an individual to do whatever they please, which would license objectionable selfishness. For example, if Marsha has a holiday trip but her mother falls sick, commonsense morality would say that Marsha should skip her trip to take care of her mother. But a duty to authenticity would say that Marsha should still go on her holiday trip because she would very much rather do that than take care of her sick mother. Here duties to self-produce a judgment that is at odds with the commonsense moral judgment, providing reason for suspicion about a duty of authenticity.

There are two possible replies to this. One route is to reject the commonsense moral judgment and say that Marsha should still go on her trip, her mother can find someone else to take care of her. Another route, more plausibly, is to say that a duty to authenticity must be weighed against the consequences at stake. So, in the Marsha case, if this is any regular holiday trip, the consequence of not being true to her desire (i.e., experiencing disappointment) pales in comparison to the consequence of her mother left unattended (i.e., death). However, when those consequences are shifted, as in sexual interactions, it is plausible to place the duty to authenticity in a very high regard. When there is that heightened risk, behaving authentically is not selfish because it is protecting oneself from harm that can result from behaving inauthentically.

Another worry is that the duty of authenticity would prevent individuals from doing any nice acts for another person. If the nice act did not match an internal desire, then the duty of authenticity would prohibit the act. Consider a non-sexual interaction between Amelia and Jessie. Jessie suggests watching ‘Bob’s Burgers’. But she doesn’t really want to; she just wants to make Amelia feel better. If Amelia was in a better mood, Jessie would want to be reading Jane Austen. Seemingly, the duty of authenticity would make it impermissible for Jessie to watch Bob’s Burger’s with Amelia. That result seems implausible.

Again, the existence of a threshold in the context of harm circumvents this judgment. When not behaving authentically results in very little harm, the duty is not in effect. Plausibly, Jessie suffers a low level of harm in missing a couple of hours of reading. Her harm could even be offset by the amount of joy she gets from making Amelia happy. So, although Jessie may miss some hours of classical reading for a delicious comedy, that harm seems to pale in comparison to the harms of not truly being invested in a sexual interaction.<sup>22</sup> When there is a heightened risk of harm above a certain threshold, the duty of authenticity to oneself applies.

Overall, then, a duty to authenticity to oneself comes with two thresholds. First, the benefit of acting authentically must outweigh others’ interests; that threshold prevents illicit selfishness. Second, behaving inauthentically is not impermissible as long as it

---

<sup>22</sup> (Woodard, 2022), pg. 11. Woodard describes scenarios where women have had “to choose between two selves: a sexual agent or a ‘dutiful’ wife or partner, or between prioritizing her (lack of) desire or sleep (or simply emotional tranquility)”. That choice is *distressing* to these individuals, who feel that in some way their sexual agency was undermined. Woodard additionally notes that this type of psychological pressure can happen “despite no explicit pressure from her partner at the time”.

results in no harm or a low level of harm to the individual. But past a certain point of harm, an individual has a duty of authenticity to herself.

### *Prohibiting Casual Sex?*

I turn now to a different objection. A strong interpretation of a knowledge condition seems to imply that most casual sex is unethical for the simple reason that individuals cannot read each other's minds.

A strong reading of the knowledge requirement would render all one-night stands unethical, on account of a lack of knowledge between individuals. Participants in one-night stands are commonly meeting in dating apps, bars, dancing halls, parties. These are places where individuals are not necessarily having a lot of conversation, and certainly not a lot of knowledge exchange, before consenting to engage in a sexual interaction.

The first worry is that rendering one-night stands unethical ignores the valuable attributes of them. Supporters of this view would point to the fact that a one-night stand, because of its spontaneity, are fun and exciting; those are valuable and desirable attributes for sexual interactions to have. The second worry is that the knowledge condition having this implication means that the theory is overreaching because a vast number of sexual interactions would be deemed unethical; therefore, the knowledge condition is invalid.

In response to the first worry, although these attributes are indeed valuable (we want sex to be fun and exciting), those attributes do not outweigh the risk that one-night stands pose to individuals. What's losing a little bit of spontaneity to ensure that both individuals feel safe and fully informed in their decision? Not a lot is lost while much is



gained. Furthermore, spontaneity and knowledge are not fully mutually exclusive. Individuals taking the time to satisfy the knowledge condition before engaging in sex does not completely destroy the spontaneity and excitement of the interaction.

In response to the second worry, that the knowledge condition would judge a vast amount of behavior unethical, does not mean that the condition is invalid. We already have accepted judgments that operate in that manner. For example, intuitively we hold the judgment that slavery is wrong. But back during the trans-Atlantic slave trade, holding the judgment would mean saying that majority of individuals in society are acting immorally. Yet, no one would say that because the judgment that slavery is wrong has a wide-reaching implication means that the judgment is wrong. Just because a moral condition affects a lot of individuals, or implies that many people are acting wrongly, is not grounds for rejecting a theory. As Shelly Kagan puts a standard reply to such objections, “If this shows just how difficult it can be to live without violating morality, so be it.”<sup>23</sup>

## **Conclusion**

Critically, the risk of significant harm predicates why ethical sex is so important. As demonstrated in this chapter, the affirmative consent standard does not fully address the complexity present in sexual interactions and the gap between consensual and ethical sex. I have presented and defended two further conditions, the knowledge and desire conditions, as further necessary conditions to fill in that gap. These two conditions do not

---

<sup>23</sup> (Kagan, 1998)

represent an exhaustive list of what constitutes ethical sex. Rather, I have proposed these two conditions as a starting point for thinking about which further conditions matters.

## **Chapter 3: How Do We Do It?**

### **Introduction**

In Chapter 2, I established the case for the knowledge and desire conditions as necessary conditions for ethical sex. That leaves an overarching question of whether these conditions have any practical significance in our lives or whether they are merely moral considerations. This chapter will explore what, if any, roles that the desire and knowledge conditions should play in our legal and social practices. It will also look at how the desire and knowledge conditions would function, given the role that consent is already playing.

America has problems with sex, problems that permeate both legal and societal arenas, resulting in concerning legal results for sexual assault survivors and concerning ethical practices for individuals engaging in sexual activities. The American legal system has low reporting rates for sexual assault and even lower rates for convictions. Yet these low rates juxtapose with the high rates of sexual assault within American society. This chapter will elucidate some of the background of these problems, specifically how consent's role in our practices ameliorates or worsens these problems.

Section 3.1 focuses on the currently dismal legal landscape. Statistics as well as infamous court cases show how little recourse the system gives survivors. At every step of the process, survivors are met with disbelief and dismissal. This section will particularly focus on the fact that the systemic failure results in low reporting rates and inequitable sentencing. As a subsection, this part examines the extensive weight that the court places on whether consent was present in a sexual interaction. Whether consent is present then legally determines if the interaction was assault. This section looks at how states' consent definitions are rather lacking. It then investigates whether incorporating

the desire and knowledge condition into the law would have positive effects. Ultimately, it is concluded that incorporating these conditions legally would have negative effects.

Section 3.2 considers the plausibility of incorporating the desire and knowledge conditions instead into our informal social codes. This section analyzes how a social code effectively enforces societal members' behaviors. Because of the effectiveness of the social code, this section argues that the desire and knowledge conditions do have a place in the social code and that we have reason to incorporate them into it.

Section 3.3 considers an objection to the incorporation of the desire and knowledge condition into the social code. The worry is that, in addition to not being of legal concern, these conditions should also not be of concern in our social codes. This objection worries that enforcing the desire and knowledge condition via social consequences, although effective, would nevertheless be inappropriate. In response, I stress that if the ultimate goal is to create more ethical sexual practices, then it is imperative that the desire and knowledge condition are enforced via the social code.

### **3.1: The Legal System**

Chapter 2 concluded that sexual activities are morally permissible when consent, innate desire, and knowledge are all present within the interaction. Naturally, the question of legal permissibility follows. Moral permissibility does not imply legal permissibility and legal permissibility does not imply moral permissibility. Therefore, although Chapter 2 answered the question of whether the knowledge and desire conditions are morally relevant, the question of whether they are legally relevant still remains.

Consent's differing roles in the moral versus legal sphere demonstrates how moral and legal requirements diverge from one other. Remind yourself again of the Beatrice and

Adonis case. In that case, two partners engaged in *consensual* but *not fully ethical* sexual activities. Although that case could be taken to a “moral court”, it could not be taken to a legal court because the activities were consensual and, therefore, lawful. I find that the legal standard consistently demands less of parties in a sexual interaction than a moral standard. Whether the gap should be closed between these two standards is important. I will argue that narrowing this divergence by working our moral requirements into the legal system would likely harm survivors and that for this reason further moral requirements, the desire and knowledge conditions, should not be incorporated into the American legal system.

I conclude that whether the legal code should attempt to enforce a moral norm depends on whether the legal code would be effective in doing so. In other words, the metric of success depends on if incorporating a moral judgement into legislation would create, in at least one sense, a fairer legal outcome. For sexual assault cases, higher conviction rates are a critical indication of an effective legal system. Additional indicative factors are elements like higher reporting rates, more survivor support, among a multitude of other factors. For the purposes of this thesis, whether the knowledge and desire conditions should become a part of the legal system will be judged by their ability to increase sexual assault survivors to receive more convictions in court.<sup>24</sup>

### *Current Legal Landscape*

To understand why the desire and knowledge condition should not be incorporated legally, it is first necessary to understand how the American legal system handles sex

---

<sup>24</sup> The ensuing legal discussion focuses on the American legal system; although that focus does not mean that the questions posed and the content discussed could not be applied to another countries’ legal systems.

crimes. Currently, sex crimes, like sexual assault and rape, can be tried at either the state or federal level. The specific facts of the cases, like the age and residency of the individuals and any adjacent crimes involved in the incident determine the jurisdiction. Importantly, there is no standardization between the federal and state levels, resulting in a magnitude of different approaches and responses that survivors will experience when moving through the legal process. The lack of standardization means that a survivor is subjected to the attitude of whatever jurisdiction their case ends up being prosecuted in. A jurisdiction's attitude towards sex crimes directly influences the extent to which a survivor's case is treated in a timely and fair manner.

It is important to note that if a criminal conviction is not given, survivors can pursue civil litigation against the perpetrator. Civil litigation can result in monetary fees for the perpetrator; however, civil litigation will never result in incarceration. Because civil litigation requires a lower burden of proof versus criminal court, the judgment resulting from civil court would be that a defendant more likely than not (instead of beyond a reasonable doubt) caused harm to the plaintiff (the survivor). Unlike criminal court, where the defendant would be charged with at least one, often multiple specific crimes, in civil court the defendant would be faced with charges like "intentional infliction of emotional distress" or "battery" but never specifically sexual assault. For these reasons, survivors may prefer criminal action, which will be the focus of this thesis.

Statistics around sexual assaults demonstrate a disturbing trend that the American legal system is failing survivors, seemingly at every stage in the process. Out of every 1,000 sexual assaults, only 310 are reported to the police. Only 50 reports lead to arrest.

Only 28 cases will lead to a felony conviction and only 25 perpetrators will be incarcerated.<sup>25</sup> Those numbers mean that 2/3 of sexual assaults go unreported and of the 1/3 that are reported, few victims will see justice in the form of a conviction. Only 1% of rapes lead to felony convictions.<sup>26</sup> Chillingly, when factoring in unreported rapes, only about 6 percent of rapists will ever spend *a day* in jail, meaning 94% will never.<sup>27</sup>

Beyond the statistics, survivors' stories of their experiences with the justice system, from reporting to sentencing, demonstrate the disregard given to survivors. For example, the now infamous Brock Turner case highlights the system's failure. Turner brutally raped an unconscious woman, Chanel Miller on July 28<sup>th</sup>, 2015. Turner was arrested after two graduate students intervened. During the trial, Miller who at the time was only known as Emily Doe, read a victim impact statement that gained national attention.<sup>28</sup> Her victim impact states propelled the trial to national attention because it was one of the first times that a sexual assault survivor had so directly and honestly addressed the rapist in court. Miller's incredible act of bravery resonated with other survivors. Once the trial concluded, after hearing all of the testimony, the evidence, and the jury finding Turner guilty, the judge sentenced Turner to *six months* in *county* jail. The reason being that Turner was a Stanford student, an excellent swimmer, with no prior criminal record. Turner was released after three months. Such a small amount of jail time is disproportionate to the severity of Turner's crime and insulting to Miller. The disconnect between the crime and the punishment is evidence that even a successful

---

<sup>25</sup> (*The Criminal Justice System: Statistics* | RAINN, n.d.)

<sup>26</sup> (*The Criminal Justice System: Statistics* | RAINN, n.d.). This statistic is an average.

<sup>27</sup> (*Facts and Statistics – Central MN Sexual Assault Center*, n.d.). Additionally, 1 in every 6 American women and 1 in every 33 men have been the victim of attempted or completed rape. When those statistics are compared to reporting statistics, there is a shocking amount of unreported rape. The central MN Sexual Assault Center differentiates between rape and other types of sexual assault.

<sup>28</sup> (*Here's The Powerful Letter The Stanford Victim Read To Her Attacker*, Baker.)

prosecution can still in some ways harm the survivor. Miller, in her victim impact statement wrote: “the probation officer’s recommendation of a year or less in county jail is a soft timeout, a mockery of the seriousness of his assaults, an insult to me and all women. It gives the message that a stranger can be inside you without proper consent and he will receive less than what has been defined as the minimum sentence”.<sup>29</sup>

Though every case does not receive national attention like the Turner case, a quick Google search will return a host of similar cases. Speaking about the Turner case, Cassia Spohn, the director of the School of Criminology and Criminal Justice at Arizona State University, said, “In some ways, the most remarkable aspect of the Brock Turner case was that he was actually arrested and prosecuted”.<sup>30</sup> Even in a case with multiple witness to the actual assault, experts find it surprising that the system went ahead with prosecuting Turner.<sup>31</sup> Spohn’s analysis reveals one reason survivors chose not to report is because legal system has messaged to survivors that reporting is futile because that report not result in any legal action. Furthermore, even if a report does go somewhere, Miller’s overall experience shows that for many survivors moving through the legal system is not worth getting dragged over the coals, having to relive their trauma constantly, for little guarantee of justice.

### *Why the Desire and Knowledge Conditions Have No Place in the Law*

---

<sup>29</sup> (*Here’s The Powerful Letter The Stanford Victim Read To Her Attacker*, Baker.)

<sup>30</sup> (Satish-Van Atta, 2016)

<sup>31</sup> In Miller’s statement: “I thought there’s no way this is going to trial; there were witnesses, there was dirt in my body, he ran but was caught. He’s going to settle, formally apologize, and we will both move on. Instead, I was told he hired a powerful attorney, expert witnesses, private investigators who were going to try and find details about my personal life to use against me, find loopholes in my story to invalidate me and my sister, in order to show that this sexual assault was in fact a misunderstanding. That he was going to go to any length to convince the world he had simply been confused.”



From the beginning stage of an assault being reported to the end stage of sentencing, the legal system is clearly deeply flawed. This section will show how consent, as it is legally defined, only aids these flaws. Within the context of a flawed system, incorporating the desire and knowledge conditions, conditions which are inherently nuanced, would only exacerbate the already steep slope that survivors have to climb to seek justice for their harms.

Whether consent was or was not present is the most decisive legal element in deciding if a sexual interaction is assault or not. Despite consent's importance, there is no standardization in how consent is legally defined. Every state creates its own definition of consent either through case law or statutes.<sup>32</sup> Additionally, these state definitions can be different from the federal code's definition of consent.

The various definitions of consent currently in use are also problematic. In 2018, most states required a show of force by either the survivor or the abuser to indicate that consent was not present. Requiring force means forms of coercion, like blackmailing, does not invalidate the presence of "consent", meaning that, legally, no assault has taken place.<sup>33</sup> Out of 50 states, "only four states—Montana, New Jersey, Vermont, and Wisconsin—have what Tuerkheimer, a professor at Northwestern University's law school who specializes in sexual assault law, considers a strict affirmative consent standard that requires both parties freely consent to sexual activity, rather than relying on the victim to say no".<sup>34</sup> With affirmative consent by far the most plausible theory of consent available currently, it is shocking how little the law reflects this standard. The

---

<sup>32</sup> (*How Does Your State Define Consent?* | RAINN, n.d.)

<sup>33</sup> Barring another other factors that may invalidate consent in other ways like being underage.

<sup>34</sup> (Beitsch, 2016)

majority of states are still working with an archaic consent definition that conflates the absence of force with consent. This variation, again, leaves survivors subject to the whim of their state's politics. The law should track the consent condition, but it should track the same consent condition across all jurisdictions.

There is a gap between the legal standard of permissible sex (i.e., consent) and the moral standard of ethical sex (i.e., consent, knowledge, and desire). However, taking steps to expand the law is not helpful to survivors for two reasons. First, incorporating the desire and knowledge conditions legally would not improve the system's effectiveness in returning convictions.

Because the system is already lacking in its understanding of consent, introducing the knowledge and desire conditions would only further complicate matters. If the legal system already fails to recognize cases where consent is clearly not present, there is no reason to think it will be better at cases where consent is present but there are further ethical complications. Generally, the law favors clarity, it favors separating tough incidents into elements, listed into numbered bullets and subsections. In its present form the knowledge and desire conditions are far too complicated to be represented in a nicely bulleted list that can be included in statutes. With that much nuance, defense counsels will find the way to spin these conditions, only making it harder for victims. Elise Woodard echoes this concern when discussing why rape definitions should not be expanded to include cases of "bad sex," the term she uses to describe sex that falls into the gray area between rape and ethical sex. She writes "It [expansion] also makes it easier for those accused of rape to claim that they did not actually commit rape by the legal definition,

when they did, by saying that the accuser meant the term in a very broad way”.<sup>35</sup>

Broadening the legal definition of consent with the desire and knowledge conditions would cause the legal experience to be more difficult for survivors.

Second, expanding the definition of sexual assault may harm survivors.

Woodard’s work on “bad sex”, highlights that survivors want “room” in understanding their sexual experience “without facing the binary choice between seeing them [the experience] as *rape* or *just sex* as usual”.<sup>36</sup> Additionally, forcing individuals who experience bad sex to identify as rape victims is deeply traumatizing.<sup>37</sup> It would be incoherent to include the desire and knowledge condition in the law, which would effectively expand rape definitions to include unethical but consensual sex, when survivors are advocating that they’re searching for more nuanced understandings of sexual harm.

All said, I am alive to the possibility that one day desire and knowledge could play a meaningful role in the system, because, after *significant* reform, one could see how these conditions could aid the court in understanding the complexity of sexual assault. These factors could be particularly useful in further transitioning courts away from current binaries of “no force/force” or “yes/no” understanding of how assault takes place. But we do not have reason, now, to introduce them.

## **3.2: The Social Code**

### *Introduction*

---

<sup>35</sup> (Woodard, 2022), pg.21

<sup>36</sup> (Woodard, 2022), pg. 18

<sup>37</sup> See (Woodard, 2022) for her more expansive discussion on why the definition of rape should not be expanded to include cases of bad sex. Her discussion includes moral, social, and legal reasons.

Even if there is not a place for the knowledge and desire conditions in the American legal system, another question remains: Is there a place for these conditions in society's social code? Although these conditions should not be enforced through legal statutes, could a round of social shunning be an appropriate means of enforcement? A society's social codes signal to its members what behaviors are expected, odd, admired, forbidden, and other acceptability metrics. A social code forms when messaging about behaviors is combined with social consequences; members of society, in a very circular manner, enforce the social code on each other. That social code then dictates what behaviors or practices are permissible. The knowledge and desire condition, I will claim, do have an appropriate place in the social code. Thus, the social code should enforce these ethical conditions as a part of the society's social code on sex.

For a social code to enforce its practices, the consequences must be significant enough that members of society care about the consequence's ramifications. For this section, I am not concerned with legal consequences such as jail time or fines; rather I am speaking of social consequence such as gossip, shame, jeers, and so on. These examples of social consequences are effective because individuals want to avoid experiencing these consequences. That desire to avoid consequences is then enough to motivate an individual to behave in accordance with the social code. There are some cases where a particular practice has been a part of the social code for so long that fear of experiencing consequences is no longer needed to enforce it. Instead, the longevity of the practice is enough to justify why it should be followed (think of the phrase "That's just the way it is").

Here is one illustration of how this all works: the social practice is that it's rude to leave the dining table before the host is done eating. Julie is hosting her annual New Year's dinner. Before Julie is done eating, Mark gets up and goes to the other room to talk on his cellphone. Upon sitting back down, Mark is met with quite a few immediate side-eye glances and several months go by before he is invited to another dinner, causing him a fair amount of distress.

Although this example is rather benign, a more pertinent example is sexual harassment in the workplace. Until the #MeToo movement, workplace harassment, particularly by men in power, was "just the way it is"; evidenced by the large number of women who spoke out against powerful abusers. However, #MeToo began to instill social consequences for sexual harassment. Whereas sexual harassment had been dealt with between the abuser and victim (and *maybe* HR), #MeToo ushered in the normalcy of social consequences for harassers. Now, harassers are publicly reported via social media and other news outlets, the reports of which are socially damaging to the harassers, resulting in lost work, lost connections, and shunning. Even though #MeToo did not eradicate sexual harassment, the movement shows that social consequences are an effective method of enforcing (or not enforcing) a social practice. When envisioning a place in the social code for the desire and knowledge condition, I am envisioning having these conditions present during sexual interactions as a social practice, one that has negative social consequences if not met.

### *Enforcing Both*

Should society enforce one, either, or neither of the desire and knowledge conditions?

These conditions are basically intertwined; the complexity of sexual interactions makes it

hard to isolate them. The isolation of them would not make sense and therefore we ought to have social norms that try to enforce both or neither of the desire and knowledge conditions. Imagine Michelle and Sarah. Old friends that one night Sarah treats Michelle to an extravagant evening, then the two return to Sarah's place where Sarah asks Michelle if she wants to have sex. Michelle says yes and kisses Sarah. The two then engage in sexual activities. To isolate the desire from the knowledge condition here is possible, but there would not really be a point. Totally isolating the conditions from each other would then miss the instances when the conditions work together in tandem. Look again at the Sarah and Michelle evening. As the case reads, the knowledge condition is not satisfied. Neither party asks each other what activities they want to engage in or avoid. Do they need a safe word? One question in particular can illustrate how the knowledge condition works in tandem with the desire condition. Consider the question "Do you have a way to get home if you wanted to leave?". The answer to this question could point to whether Michelle is engaging in the activity because of an innate desire or convivence. Say outside it is snowy and 15 degrees. Michelle doesn't have a ride home available until 45 minutes later. Revealing this fact through the knowledge condition would raise a flag of maybe Michelle is not engaging because of her internal desire but rather because she feels bad for coming back to Michelle's place who now clearly wants sex. And if Michelle had a ride home immediately, she would have bid Sarah goodbye. But Michelle doesn't want to sit in awkwardness for the next 45 minutes and she's certainly not walking home. So she doesn't really mind having sex, but she'd really rather leave. If Sarah had asked this, then these facts could have come to the surface. This case

demonstrates how the knowledge condition can help aid in revealing an individual's desire.

To isolate the desire from the knowledge condition and vice versa here would defeat the purpose of each. There is a question of whether each is acting from their innate desire and a question of whether an exchange of knowledge took place. These conditions help each other. In obtaining knowledge, there should be innate desire expressed. If desire is there, knowledge exchange should be taking place. There could be a scenario where only one condition is present, like an old married couple who are just going through the motions. There is an extensive amount of knowledge that has been shared between them, but in that case, there isn't really any innate desire. Perhaps, controversially, I would say that this is an unethical situation (although the two are not necessarily wronging each other). However, one should be reminded of what's important here. Just because in actuality there *could* be only one condition present, it doesn't follow that our social codes should only enforce one condition. The social codes should enforce what was found to contribute morally, namely *both* the desire and knowledge condition. Because both are further necessary conditions for ethical sex, it would be odd to just pick one and completely ignore the other.

### *Enforcing Neither*

The current state of our social practices around ethical consent is concerning and certainly a part of the motivation to write this thesis. To motivate introducing the desire and knowledge conditions into it, I will focus on a number of specific issues that introducing the desire and knowledge conditions into the social code would help solve. The discussion of these two conditions gives at least one reason to believe that we ought

to have social norms that enforce the desire and knowledge conditions; therefore, we ought not to have social norms that try to enforce neither because the desire and knowledge conditions move our society closer to practicing ethical sex.

One case that demonstrates a need for both the desire and knowledge condition is a case presented by Amia Srinivasan in *The Right to Sex*. The case takes place between two fellow university students:

In 2014, a student (who will be referred to as Jane Doe, filed a sexual assault case against Kwadwo Bonsu. The two students, who after smoking some weed together, engaged each other. After the interaction, Jane filed a complaint with the university. Although there is a lot of contention about the actions the university pursued against Bonsu, what is clear is the sediment that Jane expressed. She felt pressured by society and by her university's culture.<sup>38</sup>

Srinivasan nicely summarized Jane Doe's experience and the experience of so many other women, writing of that societal pressure: "A woman going on with a sex act she no longer wants to perform, knowing she can get up and walk away but knowing it at the same time that this will make her a blue balling tease, an object of male contempt: there is more going on here than mere ambivalence, unpleasantness and regret." For those who find the notion that a woman not under physical duress would not leave, need to keep in mind that "Sometimes the price for violating these expectations is steep, even fatal".<sup>39</sup> These occurrences illustrate how patriarchal influences, like the pressure to finish what was started, negatively affect individual's sexual experiences. In this case, the effect was so significant that Jane considered it sexual assault.

---

<sup>38</sup> I have borrowed and paraphrased the discussion of this case from Amia Srinivasan's *The Right to Sex*. Srinivasan (2021) pg. 26-28. This case is also an example of how the fear of social consequences (in this case, being called a tease) directly influenced how an individual chose to behave.

<sup>39</sup> Srinivasan (2021), pg..28



First, the knowledge condition helps prevent the influence from systems of oppression by facilitating interpersonal communication. If Bonsu could magically be like Professor Xavier, Bonsu would have known that running through Jane's mind was this host of patriarchal ideologies. He would have stopped once she started feeling discomfort. Without the critical interpersonal communication that the knowledge condition would impose, Bonsu did not fully know when Jane started feeling discomfort. By opening a dialogue between individuals, in other words, requiring an exchange of knowledge, instances, where oppression politics are in play, may be diminished. I acknowledge that communication won't guarantee that oppression no longer plays a role. Nothing can guarantee that except the elimination of oppressive structures. But communication would be a tool for limiting or mitigating the role of oppressive social structures in our social practices. As illustrated by the fact that an employer wouldn't hire an employee without an interview first, there is value in exchanging information. This is because individuals are given an outlet to express these concerns that normally they would fear to express. Similar to an interview, where an employee is given a chance to ask questions about information that isn't explicitly listed, the knowledge condition gives partners a chance to articulate for their needs, wants, and desires. The hope is that by requiring individuals to have open conversations and finding that when these conversations have not taken place there is an ethical complaint, the culture around sex will change in a way that brings more sexual interactions closer to the standards for ethical sex.

Second, the desire condition helps empower individuals in advocating for their innate desires. If the desire condition were incorporated into the social code, then it

would become socially unacceptable when sexual activities take place without all partners feeling some sort of innate desire. To see this, think again of Doe in the Bonsu case. As clearly stated, Doe is not responding to her innate desire in this case. But advocacy that highlighted the desire condition could help Doe recognize this *during* the interaction instead of after. Recognition during the interaction could help Doe speak up and get her out of the situation.<sup>40</sup> But in this situation where the factors of interpersonal pressure and large power differentials are absent (and indeed Bonsu testified that he believed Doe was comfortable), advocacy around desire would afford Doe the power to recognize what she was feeling, communicate her feelings to Bonsu, and exit the situation. This is where the knowledge condition also plays a supporting role. The two conditions are intertwined at parts, one could see how the knowledge condition would help embody the desire condition. For when the exchange of knowledge is the standard, then questions about desire become apparent. It is not my intent to imply that every question about desire needs to reflect a political fact; instead, the vast majority of reflection is likely to be as simple as “I don’t actually feel in the mood; I’m just doing this to make you happy”. And when individuals feel under pressure to perform, it’s more daunting to say those statements, without any normalization or prompting. Incorporating the desire condition into the social code seeks to remedy that issue and empower those individuals.

Without the knowledge and desire conditions at play, the Bonsu and Jane case is again an excellent illustration of how a case of consensual sexual activities is not fully ethical. It is a reminder that judging by a consent standard solely fails to capture all moral

---

<sup>40</sup> Importantly, this statement is *not* to be conflated with saying that the victim has the responsibility. The knowledge and desire conditions apply to all parties.

wrongs. That failure is problematic because it limits how individuals speak about their sexual experiences. A consent model turns the question of whether a wrong took place into a yes/no answer (i.e., was consent present? If yes, then no wrong has taken place. If no, then a wrong has taken place). As demonstrated, there are many cases that fall into an ethically questionable area. Just because consent is present, that does not mean that harm has not taken place. Unethical sex is still harmful.<sup>41</sup> As seen, the desire and knowledge conditions are important because incorporating them as part of our social code for sexual practices diminishes the chance of sexual interactions not being ethical without the consequences that incorporating them into the law would have. Therefore, the desire and knowledge conditions should become incorporated, and thus enforced, via the social code.

### **3.3: Objections**

There is a natural objection at hand. Even if social norms were effective in enforcing the desire and knowledge condition, is it right that they do so? Would it be right to have social norms enforce these conditions, rather than leave the choice of whether to abide by them up each individual?

Proponents of this objection might point to the case of adultery to illustrate their worry. How adultery is punished depends on the country. Some countries, like Taiwan, punish adultery through their legal code, imposing sentences for offending partners. In America, and other countries like the UK, punishing adultery legally has been deemed inappropriate. Yet adultery is still considered very socially wrong, and it is clearly

---

<sup>41</sup> See (Woodard, 2022) for testimonies from individuals about the harm they've experienced in these types of consensual but non-ethical sexual interactions.

normally morally wrong. Our social practices to some degree reflect that (e.g., adulterers are sometimes shamed or talked about). But the natural progression of de-escalating the involvement of state and society suggests that even the social code punishing adultery is too strong. Perhaps, the correct practice is if people independently regulated themselves from committing adultery, without a social code's involvement. So the objector claims. By analogy, then, the same may go for sexual ethics.

The adultery case exemplifies a worry about integrating the knowledge and desire condition into the social code. Opponents of incorporation believe that whether these conditions were present in a sexual interaction is a private question. In this sense, 'private' is indicating that whether a certain act occurred is properly the business of only the individual responsible; therefore, if an act is private, consequences come from the individual themselves. For example, whether or not a reader skips to the last page of this thesis for a conclusion is a private matter. Although the reader may find themselves with some self-guilt for not having the patience for the entire work, that the reader would suffer any social consequences for skipping to the end would be incredibly odd. Similarly, opponents of incorporation find that inserting social consequences into a decidedly private act (sexual interactions) is odd and inappropriate.

I disagree. First, individual motivation is not enough to practice the knowledge and desire conditions in a sexual interaction. Social consequences are necessary to motivate individuals to make sure these conditions are present. Humans are not moral saints so there needs to be some sort of motivation, other than the intrinsic good of the act, to push an individual to behave in that manner. Consider—Alaina may hold the judgment that gossiping is morally wrong but yet when Sunday brunch rolls around, she

engages in copious amounts of gossip. However, this particular Sunday Alaina's mother-in-law is present at brunch. Alain refrains from gossiping not because she is following her moral intuition but because she is trying to make a better appearance. Intuitively, many of us engage in behaviors we know are wrong when we know there is 'no one watching'. Sexual interactions often fall into that category because the interaction is so private. Therefore, there often needs to be another motivation present other than the value of the act (or refraining from the act) itself. Social consequences are that motivation.

For those who believe that the desire and knowledge condition would be better managed in the 'private' sphere, it is worth testing that thought with our familiar adultery case. It is not contested that there is a judgement that cheating on one's partner is normally morally wrong. But what would it look like if adultery was not enforced in the social sphere, as it is now, but rather left to private? Clearly, lots of people commit adultery, perhaps giving into lustful temptations or seeking revenge. But it's too harsh to legally punish these people. But because there is a judgment that adultery is *wrong*, there is social punishment. Now the current American social code is well published that cheaters will be talked about and ostracized. However speculative, reasonably, there is at least one person, about to cheat, who has thought of social backlash that awaited them if they went ahead with their cheating. It is even more reasonable to think that this backlash gave pause and deterrence to this individual in spite of the temptation presented. That pressure caused the individual to socially act in a manner that paralleled the moral judgement. *If* there was no social pressure, would there have been that pause? Would more people commit adultery? I believe so. Humans are not moral saints. And pleasure is hard to pass up. With just a guiding internal compass, the needle could point the right

way but there is no push. It is incoherent then to have the judgement that something is deeply wrong but then create no consequences for it. Without these consequences, the judgement is just an ideal, not a practice.

Second, as this thesis has demonstrated, our society has very serious problems in having very ethical sex already; there is no reason to think that the desire and knowledge condition, if left in the private sphere, would be abided by. Already there is a large amount of advocacy to make society understand simply what and how consent works. The conversation surrounding ethical sex is a larger, more complex one. Without any sort of social consequences, there is not a reason to think that individuals in a society, already struggling with practicing consent well, would dutifully practice the desire and knowledge condition on their own. Because people are often motivated the wrong way (e.g., adultery) and even properly motivated people can still fail to understand consent, we have good reason to think that external pressure, in the form of social sanctioning behavior, is necessary to move society closer to ethical sexual practices.

Therefore, the idea that the desire and knowledge condition should be left to each individual to regulate fails to capture the importance of these as necessary conditions of ethical sex. Failure to incorporate these into our social codes misses the importance of teaching individuals and normalizing what ethical sex consists of and, more importantly, how to ethically have sex.

## **Conclusion**

Analyzing the legal and social implications of incorporating the desire and knowledge conditions further highlight the gap between consensual sex and ethical sex. This chapter

has demonstrated that institutional enforcement (i.e., the legal code) should not always reflect our moral institutions. In the case of ethical sex, the current state of the American legal system would make incorporating the desire and knowledge conditions a mistake. Most importantly, incorporating these conditions would negatively affect survivor's legal experience. On the other hand, incorporating the desire and knowledge conditions into the social code is appropriate. This incorporation rests in a type of social enforcement that helps, and does not hurt, survivors. Moreover, the social code is an effective way of enforcing how individuals behave. Thus, the incorporation of the desire and knowledge condition via the social code would be a step closer to a more ethical practice of sex.

## Conclusion

There's nothing sexier than ethical sex, and now we know better how to do it. Although it may sound a bit tongue-in-cheek at first, as this thesis has demonstrated, enjoying sex is directly related to moral considerations. Sex is a high-stakes interaction, which can be both uniquely exciting, rewarding, memorable, and pleasurable; however, it also maintains the potential for inflicting severe harm when moral considerations are ignored. Ensuring the former outcome, and mitigating the latter, is the primary motivation for pursuing an ethical standard for sexual interactions. The drive to establish a higher bar in determining the ethicality of a sexual interaction is not to arbitrarily enforce a set of proscriptive principles on how people ought to have sex. Rather, my hope is that increasing the standard of what constitutes a moral sexual encounter will allow us to be more gracious to one another during some of our most intimate moments. By redefining how we approach sex, we can unlearn some of the ingrained practices that invite harm, coercion, power, and injustice into the bedroom (or elsewhere). Ultimately, a more comprehensive view of what constitutes ethical sex allows us to move beyond the current contractual thinking that colors sexuality and expand into a more holistic appreciation of intimacy, which is better attuned to the desires of all.

To illustrate how we can achieve a better understanding of ethical sex, this thesis started with the current framework of consent. Chapter 1 began with the origins of our contemporary consent framework, which was formed by social contract theory. By mapping a political framework onto social interactions, a few key problems were introduced, such as the presumption of equality in consent. Social contract theory was not historically built with the same standards of equality that we hold today. This, among



other considerations, demonstrated that consent as a social tool is not a neutral starting point. However, consent is so ingrained in society that to do away with it would be implausible. By looking at the various existing models of consent, I showed how the affirmative consent standard is the most viable ethical standard, despite its shortcomings. These problems lay the foundation for thinking that more than consent matters in determining if a sexual interaction is ethical.

Chapter 2 is built on the judgment that consent as a sole standard for ethical sex is problematic. This chapter reiterated that sexual interactions are a high-risk activity and used that as motivation for establishing a more plausible standard for ethical sex. I proposed two conditions to do just that—the knowledge and desire conditions. The knowledge condition sought to remedy the bare level of knowledge exchange expected in sexual interactions. The desire condition addressed where an individual’s sexual motivations originate. Consent standards miss the importance of requiring individuals to have an innate desire to participate in sexual activities. The key takeaway from Chapter 2 was that further conditions, in addition to consent, should and do matter for ethical sex and to explain why.

Chapter 3 showed that the American legal system is not serving its purpose to the full extent. Victims are not being treated equitably and abusers are not being punished. Overall, the system is just simply not really working. This chapter showed how the knowledge and desire condition would only negatively make a complex legal process even more complex. Incorporating these conditions would do little to help survivors. On the flipside, this chapter then found that the knowledge and desire conditions do belong in the social code. Because social codes are incredibly effective in determining what

behaviors should be practiced, the social code is the best motivator of making people behave ethically. In this case, the social code serves as a motivation, more so than intrinsic motivation, for individuals to have ethical sex. The key takeaway from Chapter 3 is that because the knowledge and the desire condition matter, we should enforce them in a manner best suited to do so.

This thesis sought to get individuals to start thinking about what ethical sex consists of. Cracking open that door only opens several others that could not be addressed within the confines of this work.

I have taken great care to separate out both the knowledge and desire condition from consent. My goal in doing so is to finely distinguish varying ethical characteristics that are or are not present in our current sexual practices. But I acknowledge that further philosophical research is needed to determine whether the desire and knowledge conditions are truly independent of the most plausible theory of consent. I suspect that the most plausible theory of consent would need further development to fully actualize the desire and knowledge conditions to become an implicit part of that consent theory. But that question is grounds for further philosophical research.

However that question is answered, further empirical research is also needed to investigate exactly how effective social norms would actually be at promoting the practice of the desire and knowledge conditions. Although I believe it would be quite successful, empirical research would make my claim more substantiated. Conducting empirical research along these lines could also open up studies of various other ethical factors present (or not) in current sexual practices.

Ultimately, this initial venture into the moral, legal, and social facets of ethical sex has joins a body of work advocating for better, safer sex. I hope that this thesis has been a useful foray into the area of consensual but unethical sex.

## Bibliography

- Baker, K. (2016). *Here's The Powerful Letter The Stanford Victim Read To Her Attacker*. <https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra>
- Beitsch, R. (n.d.). *#MeToo Movement Has Lawmakers Talking About Consent*. Retrieved March 21, 2022, from <http://pew.org/2F3oK3d>
- Card, C. (1996). Rape as a Weapon of War. *Hypatia*, 11 (4), 5–18.
- Chappell, B. (2014, September 29). California Enacts “Yes Means Yes” Law, Defining Sexual Consent. *NPR*. <https://www.npr.org/sections/thetwo-way/2014/09/29/352482932/california-enacts-yes-means-yes-law-defining-sexual-consent>
- Dougherty, T. (2015). Yes Means Yes: Consent as Communication. *Philosophy & Public Affairs*, 43(3), 224–253.
- Dougherty, T. (2018). Affirmative Consent and Due Diligence. *Philosophy & Public Affairs*, 46 (1), 90–112.
- Dougherty, T. (2021). Sexual Misconduct on a Scale: Gravity, Coercion, and Consent. *Ethics*, 131(2), 319–344. <https://doi.org/10.1086/711211>
- Facts and Statistics. (2011, March 10). *Central MN Sexual Assault Center*. <https://cmsac.org/facts-and-statistics/>
- Facts and Statistics – Central MN Sexual Assault Center*. (n.d.). Retrieved March 24, 2022, from <https://cmsac.org/facts-and-statistics/>
- How Does Your State Define Consent? | RAINN*. (n.d.). Retrieved March 21, 2022, from <https://www.rainn.org/news/how-does-your-state-define-consent>
- Kagan, S. (1998). *Normative Ethics*.
- Kukla, Q. R. (2018). That’s What She Said: The Language of Sexual Negotiation. *Ethics*, 129 (1), 70–97.
- Kukla, Q. R. (2021). A Nonideal Theory of Sexual Consent. *Ethics*, 131 (2), 270–292.
- Levit, N., & Verchick, Robert R. M. (2006). *Feminist Legal Theory: A Primer*. New York University Press.
- MacKinnon, C. (2019). *Butterfly Politics*. Harvard University Press.
- Miller, C. (n.d.). *Chanel Miller On What Happened After Her Victim Statement Went Viral*. BuzzFeed News. Retrieved April 9, 2022, from <https://www.buzzfeednews.com/article/chanelmiller/chanel-miller-know-my-name-book-stanford-victim>
- O’Neill, D., Shanley, M. L., & Young, Iris Marion. (2008). *Illusion of Consent: Engaging with Carole Pateman*. Pennsylvania State University Press.
- Pallikkathayil, J. (2019). Consent to sexual interactions. *Politics, Philosophy & Economics*, 19(2), 107–127. <https://doi.org/10.1177/1470594X19884705>
- Pateman, C. (1900). *The Sexual Contract*. Stanford, Calif. : Stanford University Press.
- Satish-Van Atta, M. (2016). *Brock Turner’s College Athlete Privilege Compounded His White Male Privilege*. Bustle. <https://www.bustle.com/articles/182150-brock-turners-college-athlete-privilege-compounded-his-white-male-privilege>
- Shulze, C., Koon-Magnin, S., & Bryan, V. (2019). *Gender Identity, Sexual Orientation, and Sexual Assault: Challenging the Myths*. Lynne Rienner Publishers. <http://ebookcentral.proquest.com/lib/tulaneu/detail.action?docID=5675559>

- Srinivasan, A. (2018). Does Anyone Have the Right to Sex? *London Review of Books*, 40 (6).
- Srinivasan, A. (2021). *The Right to Sex: Feminism in the Twenty-First Century*. Farrar, Straus and Giroux.
- The Criminal Justice System: Statistics* | RAINN. (n.d.). Retrieved March 21, 2022, from <https://www.rainn.org/statistics/criminal-justice-system>
- Whisnant, R. (2021). Feminist Perspectives on Rape. In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2021). Metaphysics Research Lab, Stanford University. <https://plato.stanford.edu/archives/fall2021/entries/feminism-rape/>
- Woodard, E. (2022). Bad Sex and Consent\*. *Palgrave Handbook of Sexual Ethics*.