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Feminist Critiques of Consent

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### **Abstract**

Consent is at the center of feminist politics and theory; the importance of this concept is evident in the recent campus activism around sexual assault. Because consent has become so critically important, it is necessary for feminists to interrogate the concept of consent. In this dissertation, I argue that consent is necessary but insufficient to create just political or ethical relations through evaluating and critiquing feminist liberalism. Within feminist liberalism, consent serves two functions: to determine wrong or injustice, and to limit the acceptable scope of state power. I argue that the structure of consent itself leads to serious problems when feminist liberals attempt to use consent in this expansive way; instead, we need to rely on substantive norms.

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## Chapter 1: Introduction

### Introduction

Consent is a defining concept in popular feminism and mainstream feminist activism. Feminism in popular culture is often reduced to “giving women choices,” or “respecting women’s choices.”<sup>1</sup> A satirical newspaper was not far off the mark when it parodied feminism as “women now empowered by everything a woman does.”<sup>2</sup> Parodies aside, within mainstream feminist activism and theory consent is the delineating line between subordination and empowerment. For example, anti-sexual assault activists on university campuses generally define sexual assault as nonconsensual sex. Liberal mainstream efforts at addressing the problem of rape and sexual assault have focused on attempting to educate men about consent. Arguably, much of the “choice” rhetoric of popular feminism, mainstream feminist activism, and sex-positivism has its roots in academic theories that prioritize consent, autonomy, and individualism.<sup>3</sup>

Many of the contentious issues in feminism have their roots in disagreements about the ethical and political role of consent. For example, those who argue in favor of fully legalizing the prostituting of women claim that it is necessary to respect women’s sexual choices.<sup>4</sup> Similarly, some feminists justify their promotion and acceptance of violent sexual practices on the basis that anything that is “consensual” is acceptable. While some feminist activists argue against pornography because of the violence men inflict upon women and girls in the production and

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<sup>1</sup> Miranda Kiraly and Meagan Tyler, eds., *Freedom Fallacy: The Limits of Liberal Feminism* (Redland Bay: Connor

<sup>2</sup> “Women Now Empowered By Everything A Woman Does,” February 19, 2003, <http://www.theonion.com/article/women-now-empowered-by-everything-a-woman-does-1398>.

<sup>3</sup> Kiraly and Tyler, *Freedom Fallacy*.

<sup>4</sup> Drucilla Cornell, “Freed Up: Privacy, Sexual Freedom, and Liberty of Conscience,” in *Varieties of Feminist Liberalism*, ed. Amy R Baehr (Lanham, MD: Rowman & Littlefield, 2004), 235–64.

consumption of pornography,<sup>5</sup> others claim that pornography is protected by the individual right of free speech. The question then becomes, “Is consent sufficient to create just ethical and political relations?”

My answer to the above question is going to be no. In this dissertation, I will argue that consent is a necessary, but not a sufficient, condition for creating minimally just ethical and political relations. Instead, I will argue that consent serves to legitimate an interaction, practice, or institution only when there is nothing else that could be ethically or politically objectionable about the interaction, practice, or institution. I will argue that it is important to focus consistently on the substantive content of our norms, practices, and institutions, rather than merely on someone’s consent to those norms, practices, and institutions.

In this dissertation, I will argue that consent is sometimes used to determine whether something is an instance of wrong, injustice, or harm; and as the justification for failing to address certain harms and injustices because of concerns about individual choice, liberty, autonomy, or the preservation of the private sphere. While my claims about consent can be expanded to any instance in which consent is invoked in the ways described below, I am focusing in particular on the problems certain claims about consent raise as they apply to feminist issues. The problems with the claims that are made about the ethical and political role of an individual’s consent take on new dimensions in a context of oppression. I am using feminist liberals as my interlocutors in the interests of charity: because they are liberals, they have a strong theoretical framework for defending consent; because they are interested in feminism, they are also attuned to many of the historical problems with liberal theory and have attempted to rectify them (in various ways). I am not arguing that liberals necessarily adopt all the claims

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<sup>5</sup> Catharine A. MacKinnon, *Only Words* (Cambridge, MA: Harvard University Press, 1993).

about the ethical and political role of consent that I describe (in the sections below). I am arguing that to the extent that liberals adopt these claims, they will be faced with problematic implications described in this dissertation.

In this chapter, I will provide some of the groundwork for this dissertation. First, I will explain why I am discussing claims about consent in this dissertation rather than autonomy or individual liberty. I will also discuss the specific claims about the ethical and political role of consent, as well as potential claims about the relation of the consent to the normative relevance of harm. I will next discuss the various ways in which one can critique consent and the types of consent that liberals can possibly evoke in defense of their claims. Lastly, I will provide an outline of the dissertation.

### Consent, Liberalism, and Harm

In this section, I will first explain why I am focusing this dissertation on claims about the ethical and political role of consent. I argue that consent, as the practical instantiation of the value of autonomy or individual liberty, is politically and ethically doing the normative work of making interactions, practices, and institutions permissible. I will then explain, in very general terms, the sorts of claims that a liberal might make about the ethical and political role of consent as well as the relation of liberal claims about consent to harm. I will also describe the types of consent to which liberals might appeal in making their claims about the ethical and political role of consent.

### **The Role of Consent in Liberalism**

Consent plays a central role within liberal theory. The core commitment of liberalism is the preservation of individual liberty, although theorists will have various ways of describing

liberty.<sup>6</sup> Ann E. Cudd, for example, describes liberalism's commitments to protecting the liberty of the individual in terms of two commitments which are in tension with each other: "(1) to protect or maximize *liberty*; (2) to protect or enhance the standing of the *individual* as a free agent [emphasis in the original]."<sup>7</sup> One might put liberalism's commitments even more broadly, by claiming that "freedom is normatively basic, and so the onus of justification is on those who would limit freedom, especially through coercive means."<sup>8</sup> Individual liberty is a core commitment of liberalism.

In this dissertation I am discussing liberals' ethical and political claims about consent, rather than individual autonomy or liberty. Even though consent per se is not a primary liberal value, it is one of the most politically important ones precisely because it is the *practical* means of instantiating the liberal values of autonomy and individual liberty within our actual political, ethical, and social lives. Individual choice or autonomy is the theory, but consent is the practice. If an individual fails to consent to the interaction or relationship, one can presume it was not an expression of individual choice. An individual's consent is taken to legitimate an interaction or relationship as an instance of her individual choice. In this way, consent is a (supposedly) clear standard by which one can judge whether an individual's autonomy has been violated or not.

Consent also does the heavy normative work when it comes to the preservation of the sphere of individual choice and limiting coercive state intervention. Consent is what politically delineates the public and private spheres; establishing that an interaction is nonconsensual takes it from the protected sphere of the private—at least theoretically—and puts it in the public sphere

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<sup>6</sup> Gerald Gaus and Shane D. Courtland, "Liberalism," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Spring 2011, 2011, <http://plato.stanford.edu/archives/spr2011/entries/liberalism/>.

<sup>7</sup> Ann Cudd, "The Paradox of Liberal Feminism: Preference, Rationality, and Oppression," in *Varieties of Feminist Liberalism*, ed. Amy R. Baehr (Lanham, MD: Rowman & Littlefield, 2004), 40.

<sup>8</sup> Gaus and Courtland, "Liberalism."

where government intervention is permissible.<sup>9</sup> For example, what happens between “consenting adults” is presumably within the sphere of the private, and therefore is not open to government intervention (and according to some theorists, not open to critique), whereas a lack of consent (however it is defined) makes it “public” in the sense that it is open to government intervention.<sup>10</sup> Consent legally and ethically makes the difference between a private party and kidnapping.

Even when not discussing practical consent (e.g., legal standards of consent), consent still plays a critical role as the expression of individual liberty. One cannot discuss individual liberty without discussing consent.<sup>11</sup> The idea of the “consent of the governed” is foundational to contract theory, even though the consent in question is generally hypothetical rather than actual consent.<sup>12</sup> I am not claiming that liberal claims about individual liberty or autonomy are really claims about consent. Rather I am arguing that consent does the work of justifying a norm, practice, or institution for the purposes of preserving or expressing individual liberty or autonomy.

There are several very general claims that one might make about the role that consent plays within liberal theory:

(1) The presence or absence of an individual’s consent determines whether an injustice, wrong, or harm has been committed. Alternately, one might say that consent as an expression of

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<sup>9</sup> Catharine A MacKinnon, “Privacy and Equality: Notes on Their Tension,” *The Tocqueville Review/La Revue Tocqueville* 21, no. 2 (2000): 77–85.

<sup>10</sup> *Ibid.*, 81–82.

<sup>11</sup> Fred D’Agostino, Gerald Gaus, and John Thrasher, “Contemporary Approaches to the Social Contract,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Spring 2014, 2014, <http://plato.stanford.edu/archives/spr2014/entries/contractarianism-contemporary/>; Daniel I. O’Neill, Mary Lyndon Shanley, and Iris Marion Young, eds., *Illusion of Consent: Engaging with Carole Pateman* (University Park, PA: Pennsylvania State University Press, 2008).

<sup>12</sup> D’Agostino, Gaus, and Thrasher, “Contemporary Approaches to the Social Contract.”

individual liberty or autonomy is given priority over other potential ethical and political considerations (such as harm).

(2) The presence or absence of an individual's consent determines the sphere of individual liberty where it would be wrong for the government to coercively interfere (e.g., the "private sphere").

Most theorists, with the exception of extreme libertarians, would not consider consent to be a sufficient justification for any and all personal and political relations.<sup>13</sup> Even classical liberals, such as J.S. Mill or John Locke, believed that one could not sell oneself into slavery.<sup>14</sup> In addition, there are certain conditions which must hold in order for one's consent to be considered legitimate (that is, to actually make the interaction permissible). Thus, there are two additional conditions when consent can be used to justify ethical or political relationships:

(3) An individual's consent is legitimate to the extent that it occurs without coercion, deception, or manipulation (the "background conditions" of consent).

(4) An individual's consent is legitimate to the extent that it operates within certain constraints (that is, the scope of what consent can make permissible may be limited).

(5) An individual's consent is legitimate to the extent that the individual consenting is free and equal.<sup>15</sup>

While most liberals will agree that one does not consent when one is subjected to direct physical threat (the cliché case of handing a mugger one's wallet), there is wide disagreement about what other forms of coercion, deception, and manipulation should be considered ethically

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<sup>13</sup> Susan Moller Okin, "The Sexual Contract," *Ethics* 100, no. 3 (1990): 658–69.

<sup>14</sup> Gaus and Courtland, "Liberalism."

<sup>15</sup> Being "free and equal" is both the moral presupposition of liberalism, and necessary for consent to matter: "Only if women are seen as "free and equal individuals" is their consent relevant at all." Carole Pateman, "Women and Consent," *Political Theory* 8, no. 2 (May 1980): 152.

or politically relevant. In addition, there is some disagreement over the proper scope of consent; liberals, in keeping with their commitment to individual liberty, generally want to have a wide scope of what consent can make permissible. However, most are also going to have at least some limitations on the scope of what consent can make permissible (most might be willing to acknowledge that some forms of chattel slavery and murder cannot be made permissible by consent).

### **Consent and Harm**

While the purpose of this dissertation is not to defend liberalism or its commitments, there is intuitive appeal in the idea that an individual's consent should determine wrong or injustice. This idea is intuitive because violations of our autonomy, in many cases, are a genuine wrong or injustice and because it appears to prevent problematic paternalism in which the government can legislate individual's life choices on the basis of what is perceived to be good for her or good for society.<sup>16</sup>

Even from the radical feminist perspective, which has been highly critical of liberalism, an important aspect of oppression is the experience of constraint and frustration in one's ability to pursue one's life projects.<sup>17</sup> Women's lack of autonomy is rightfully considered part of their oppression. Part of the wrong of sexual objectification and sexual violence is that men fail to respect women's wants, desires, and needs. Feminist liberals argue that part of the project of

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<sup>16</sup> This is not to say that liberals are always against paternalism. Many liberals might be in favor of some forms of paternalism, for example, legally requiring people to wear seatbelts while riding in cars or to wear helmets while riding bicycles.

<sup>17</sup> Part of the famous "birdcage" metaphor employed by Marilyn Frye evokes precisely the idea that women are frustrated in their ability to freely roam (metaphorically and literally) throughout society under conditions of oppression. Women may literally be unable to walk the public streets due to fear of sexual violence and harassment; metaphorically, women are unable to participate or participate fully in all aspects of social life due to violence or discrimination. Marilyn Frye, *The Politics of Reality: Essays in Feminist Theory*, The Crossing Press Feminist Series (Trumansburg, N.Y.: Crossing Press, 1983), 4–5.

feminism is to support the “imaginary domain” for women and girls in order to encourage the development of new “ways of being” that challenge patriarchal socialization.<sup>18</sup>

Problematically, paternalistic institutions often get what is “good for” individuals tragically wrong. Even well-intentioned people frequently misinterpret what is good for us, and thus what is “good for us” seems better left to the individual himself.<sup>19</sup> We need only examine current and historical theocracies to see the effects of problematic paternalism. For example, historically and currently lesbians and gays are subjected to various attempts to force them into heterosexuality, ranging from “reparative therapy” to various forms of torture (e.g., electroshock) and forced sexual reassignment surgery. The rationale for some of these horrific practices has been that homosexuality is both harmful for society and harmful for the individuals themselves. Understandably, then, liberal founders such as J.S. Mill were deeply concerned about paternalism and argued that it was inherently oppressive.<sup>20</sup> To value the individual is to value the individual’s ability to determine the course of her own life without interference, provided that this did not cause (non-consensual) harm to other people.

A liberal need not believe that all harm is normatively irrelevant. Instead, they can hold a variety of different positions that nonetheless prioritize consent and autonomy over harm. Thus, when presented with a harmful practice or institution, liberals might have one of a number of responses.<sup>21</sup>

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<sup>18</sup> “It is our capacity to imagine other ways of being, apart from the social norms that now constrain us. The imaginary domain is the repository from which alternative conceptions of norms and social structures might arise. Liberal feminism, then, must support the imaginary domain.” Cudd, “The Paradox of Liberal Feminism: Preference, Rationality, and Oppression,” 57.

<sup>19</sup> Kyla Ebels Duggan argues that beneficence can show a disrespect for one’s lover. Kyla Ebels Duggan, “Against Beneficence: A Normative Account of Love,” *Ethics* 119, no. 1 (2008): 142–70.

<sup>20</sup> John Stuart Mill, *On Liberty* (Indianapolis, IN: Hackett Publishing Company, 1978).

<sup>21</sup> I am grateful to C.J. Pereira di Salvo for articulating these potential responses.

(1) Harm is normatively irrelevant. The presence or lack of an individual's consent determines wrong or injustice.

(2) Harm is normatively relevant, but there can be reasonable disagreement about what constitutes harm. Thus, we should defer to an individual's consent or lack of consent to determine harm.

(3) Harm is normatively relevant, and all normatively relevant harm can be captured by consent.

(4) Harm is normatively relevant, but the preservation of autonomy is more important than preventing or addressing harm.

Even when liberals might acknowledge that a norm, practice, or institution is harmful, their commitment to individual liberty limits the type of social changes that the state can enforce. Concerns about the legitimate realm of state interference in the supposedly private lives of individuals are especially germane to women's issues; as Ruth Abbey describes it, "The issue between the feminist liberals on the one hand and critics such as Eisenstein, Pateman, and MacKinnon [...] on the other, is [about] how much social change a liberal society can tolerate or perhaps legitimate."<sup>22</sup> There are several levels of potential intervention that can be employed in redressing harms (when feminist liberals acknowledge that there is in fact a harm): the first is coercive state intervention (e.g., criminal law); the second is non-coercive state intervention (e.g., public service announcements); and the third is informal and private intervention (e.g., non-profit organizations, private individuals). Liberals will be most concerned about coercive state intervention, and perhaps additionally non-coercive state intervention, whereas individual or "civil" action is almost always permissible.<sup>23</sup>

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<sup>22</sup> Ruth Abbey, *The Return of Feminist Liberalism* (Ithaca, NY: McGill-Queen's University Press, 2011), 211.

<sup>23</sup> "Almost always" in the sense that this will be constrained by the bounds of individual liberty.

## Practical Consent, Hypothetical Consent, and Substantive Autonomy

There are several types of consent liberals can employ to justify their claims about consent.<sup>24</sup>

(1) Practical consent: The first type of consent is practical consent; this is the type of consent that might be invoked in actual ethical or political relationships. This is also the type of consent that is employed in legal cases.

(2) Hypothetical consent: Hypothetical consent focuses on what an individual could possibly consent to. Contract theory has traditionally relied heavily upon hypothetical consent: “The aim is to model the reasons of citizens, and so we ask what they would agree to under conditions in which their agreements would be expected to track their reasons.”<sup>25</sup> Hypothetical consent does not necessarily take actual individuals as the givers of consent; instead, one can think of the givers of consent as individuals under hypothetical conditions (e.g., Rawls).<sup>26</sup>

(3) Substantive autonomy: Substantive autonomy is another way of legitimating consent which combines elements of both hypothetical consent and practical consent. It combines elements of practical consent in the sense that a substantive view of autonomy is attuned to, and requires, that autonomy involve material and social elements (that is, under a substantive view of autonomy one cannot be autonomous and starving). It is similar to hypothetical consent in that it posits an ideal of autonomy, which is not necessarily instantiated in any current society.

The last type of consent is of particular concern to feminist liberals and other liberals who are concerned about issues of social justice. Substantive autonomy or equality requires that equality or autonomy must exist in practice rather than merely in theory; in other words, it must

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<sup>24</sup> I am grateful to Kyla Ebels-Duggan for articulating these potential forms of consent.

<sup>25</sup> D’Agostino, Gaus, and Thrasher, “Contemporary Approaches to the Social Contract.”

<sup>26</sup> John Rawls, *A Theory of Justice*, Rev. ed. (Cambridge, MA: Belknap Press of Harvard University Press, 1999).

be lived in order to be real. Someone who takes a substantive view of equality, for example, recognizes that equality requires that the individual be free from forms of social subordination that interfere with her ability to equally exercise her rights and requires that she be treated by others as a free and equal citizen. Thus, those who are concerned with substantive equality will be concerned about “informal” and social forms of discrimination rather than simply formal, legal forms of discrimination. For example, it may appear to a libertarian that women are not discriminated against in the workplace because there are, ostensibly, no laws against women entering certain professions. Someone with a substantive view, on the other hand, would argue that the presence of sexual harassment, the various ways in which girls are socialized to discourage them from entering the workforce and instead to prioritize marriage and childrearing, and the lack of childcare options for workers all create conditions under which women do not have equal opportunity within the workplace.

In an analogous way to how one might have a substantive as opposed to formal understanding of equality, one might have a substantive or procedural approach to autonomy: “procedural approaches seek to define autonomy using morally neutral conditions such as reflective endorsement or nonalienation” while “substantive theories build in normative conditions, for instance moral attitudes towards oneself or background moral conditions.”<sup>27</sup> One need not have a substantive theory of autonomy or equality in order to recognize the importance of social and material conditions as necessary for the realization of individual liberty or autonomy. For example, Hartley and Watson argue for substantive equality for women using the framework of political liberalism, which seeks to avoid grounding political justification on any

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<sup>27</sup> Natalie Stoljar, “Autonomy and Adaptive Preference Formation,” in *Autonomy, Oppression, and Gender*, ed. Andrea Veltman and Mark Piper, Studies in Feminist Philosophy (Oxford: Oxford University Press, 2014), 231.

particular comprehensive doctrine or conception of the good.<sup>28</sup> For the purposes of this dissertation, these distinctions are not critical to the success of my arguments. Instead, my argument relies only upon the presupposition that my interlocutors are at least partially committed to the idea that social and material conditions, and not simply government repression, are politically relevant to equality, autonomy, and liberty.<sup>29</sup>

### **Practical Consent, Hypothetical Consent, and Women's Subordination**

While liberals may want to appeal to substantive autonomy or hypothetical consent in order to justify their positions on certain practices or institutions, *practical* consent is actually at play in actual political, social, or ethical relations (e.g., sexual violence).<sup>30</sup> Although liberals may have historically relied upon hypothetical consent, the type of consent that is most relevant to women's lives is practical consent:

The relationship of consent in everyday life to the (postulated) consent of citizens to the liberal democratic state remains unexplored. Consent theorists fail to consider those areas of social life where consent is of practical importance to individuals, but the problems involved form part of the general difficulties and evasions of consent theory. Women are thus easily ignored, because consent in everyday life particularly concerns them.<sup>31</sup>

Feminist liberals, unlike Pateman's interlocutors, are not simply ignoring women. However, they have a similar problem of moving between practical consent and ideals such as hypothetical consent or substantive autonomy as it is not always clear *what* type of consent is providing justification for their claims.

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<sup>28</sup> Christie Hartley and Lori Watson, "Is a Feminist Political Liberalism Possible?," *Journal of Ethics & Social Philosophy* 5, no. 1 (2010): 1–21.

<sup>29</sup> There are liberals who consider themselves feminist and align themselves more with the libertarian view. In the interests of charity, however, I will be focusing on liberals who acknowledge the importance of social and material conditions. Amy R. Baehr, "Liberal Feminism," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Winter 2013, 2013, <http://plato.stanford.edu/archives/win2013/entries/feminism-liberal/>.

<sup>30</sup> Pateman, "Women and Consent."

<sup>31</sup> *Ibid.*, 150.

This problem is perhaps inherent given the situation of women's subordination.<sup>32</sup> One could use a hypothetical notion of consent in order to evaluate the legitimacy of women's practical consent (which, although not without its own problems, would be a reasonable approach). However, one cannot do the inverse; one cannot use women's practical consent in order to defend hypothetical consent or an ideal of autonomy. For example, the purpose of the private sphere is the practical instantiation of the ideal of protecting individual liberty. One might think that the private sphere is justified and delineated not by practical consent but instead by hypothetical consent or an ideal of substantive autonomy. Problematically though, practical consent is what keeps activities and practices sanctified by the sphere of the private sphere, even though it is precisely the *lack* of conditions of equality which would legitimate consent that makes the private sphere so problematic.<sup>33</sup>

An example of the shift between types of consent is evident in the discourse around adaptive preferences.<sup>34</sup> This includes women "choosing" to engage in certain social norms and practices as part of their "conception of the good life" (although this is often discussed in terms of "traditional" ethnic or religious minorities, it is just as applicable to sex-positivist claims about "liberated" sexuality or claims about the importance of "gender identity"). Amy R. Baehr argues that feminists should only use "public reasons" (whatever those may be) in order to advance their aims, and indeed that their aims should be constrained by public reasons. Instead of describing any specific ideals, the purpose of feminism should instead "empower them [women] to develop

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<sup>32</sup> This problem is not limited to feminist liberalism. Some liberals argue that truly liberal societies require actual, participatory consent by the populace. Pateman and some theorists who espouse deliberative democracy take this view. See D'Agostino, Gaus, and Thrasher, "Contemporary Approaches to the Social Contract"; Carole Pateman, *The Sexual Contract* (Cambridge, UK: Polity Press, 1988); O'Neill, Shanley, and Young, *Illusion of Consent*.

<sup>33</sup> MacKinnon, "Privacy and Equality."

<sup>34</sup> For discussions of the problems feminist liberals face because of adaptive preferences, see for example Cudd, "The Paradox of Liberal Feminism: Preference, Rationality, and Oppression"; Abbey, *Feminist Liberalism*, 174–178.

their ‘unfolding views’ about what a good life consists in, and to live something like the life they value.”<sup>35</sup> Problematically, however, there is an unspoken assumption that the expression of individual freedom, and the preservation of individual freedom, would involve the adoption of ways of life which involve women in subordinate gender roles. Critics such as Lisa Schwartzman have argued that this is an illegitimate assumption that liberals make in order to justify *current* conditions of inequality and the preservation of gender hierarchies that currently harm and oppress women.<sup>36</sup>

It is perhaps easier to see where the shiftiness is occurring. Since ideal conditions of autonomy have never occurred, women’s practical consent under conditions of systematic violence, gender socialization into submission, and (oftentimes state-sanctioned) terrorism can hardly be considered a metric of what women *might* consent to under the ideal conditions. Thus, one cannot use the existence of current subordinating norms, practices, and institutions to indicate that a non-practical form of consent would be able to justify ethical and political relations which reinforce the subordination of women. Some feminist liberals have been attentive to this worry, and as a result have argued instead that liberals should question the legitimacy of consent under systematic social domination because “what persons may accept given an inferior social position is not the same as what they would find reasonably justifiable as free and equal citizens.”<sup>37</sup>

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<sup>35</sup> Amy R Baehr, “Liberal Feminism: Comprehensive and Political,” in *Feminist Interpretations of John Rawls*, ed. Ruth Abbey, Re-Reading the Canon (University Park, PA: Pennsylvania State University Press, 2013), 163.

<sup>36</sup> Lisa H. Schwartzman, “Non-Ideal Theorizing, Social Groups, and Knowledge of Oppression: A Response,” *Hypatia* 24, no. 4 (Fall 2009): 177–88; Lisa H. Schwartzman, “Feminism, Method, and Rawlsian Abstraction,” in *Feminist Interpretations of John Rawls*, ed. Ruth Abbey, Re-Reading the Canon (University Park, PA: Pennsylvania State University Press, 2013), 40–56.

<sup>37</sup> Hartley and Watson, “Is a Feminist Political Liberalism Possible?,” 12.

## Criticizing Consent

As stated above, there are three conditions that determine the legitimacy of consent (that is, the ability of an individual's consent to make something permissible): first, the background conditions (e.g., lack of ethically and politically relevant coercion, deception, or manipulation); second, what one is consenting to (e.g., one cannot usually consent to be enslaved); and third, that one is free and equal. In this section, I will address the various ways in which one can critique consent based upon the above conditions that determine the legitimacy of consent. In this section, I will provide some of the groundwork for the arguments in the remainder of this dissertation.

### **Levels of Critique**

Carole Pateman's critique of contract theory provides two ways one can critique consent to justify ethical and political relations. The first form of critique is to critique the conditions under which one agrees to the contract (whether these conditions are conditions of coercion, manipulation, or deception). These might be considered "procedural" concerns and have been the usual focus for liberals.<sup>38</sup> The second form of critique is whether the terms of the contract itself create relationship of exploitation or domination; that is, one can criticize contracts on the basis of the terms of the contract itself and whether these terms are ethically or politically problematic.<sup>39</sup> These are more substantive concerns.

Analogously, critics of consent such as Pateman argue that one cannot determine the justness of norms, practices, and institutions by the purely procedural aspects of whether

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<sup>38</sup> Jane Mansbridge, "Carole Pateman: Radical Liberal?," in *Illusion of Consent: Engaging with Carole Pateman*, ed. Daniel I. O'Neill, Mary Lyndon Shanley, and Iris Marion Young (University Park, PA: Pennsylvania State University Press, 2008), 101–102.

<sup>39</sup> *Ibid.* In this dissertation I will be addressing both aspects.

individuals have consented to those norms, practices, and institutions.<sup>40</sup> A procedural view will not necessarily examine the justness of the *content* of our norms, practices, and institutions on their own terms, independently of the conditions under which individuals have agreed to these norms, practices, or institutions. On the other hand, one can think that the content of these norms, practices, and institutions must be evaluated independently of whether individuals have consented to them. For example, a purely procedural view might consider assault or abuse to be defined simply by the fact of whether someone has consented or not consented to bodily contact. On the other hand, someone who is concerned about the substantive content of our norms might define abuse by whether the perpetrator intended to cause pain or injury to the victim. Asking questions about the substantive content of our norms, practices, and institutions goes beyond the question of whether it follows a certain procedure to *what* these norms, practices, and institutions will actually be like for people who live under them.

### **The Reversal**

Now I am in a position to better explain the problem with using consent to justify ethical and political relations. I argue that consent, by itself, does not change the ethical or political situation. This may seem to be a trivial point; as stated above, most liberals would agree that there are limitations on the permissible scope of consent. However, my claim is that consent is sometimes used to justify the lack of exactly the sort of normative conditions that would be necessary in order for consent to be legitimate in the first place. In order to illustrate this point, one can think of a seemingly simple case of going to the dentist. This seems to be a clear case where consent is doing the sort of normative work we expect it to do; we are, in some way, giving the dentist our consent to do things that would otherwise be assault.

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<sup>40</sup> Pateman, *The Sexual Contract*.

However, in the dentist case, what the dentist does is permissible with the patient's consent because it already meets a whole host of substantive normative conditions. The dentist extracting the tooth can do so because she is licensed by the appropriate organizations, her office is a sterile environment, she uses the appropriate amount of anesthetic, and she can demonstrate with a reasonable amount of evidence that pulling the tooth confers a medical benefit that is outweighed by the risks. In the case of going to the dentist, the *only* thing that could be objectionable about the dentist pulling the tooth is that she did it without the patient's informed consent.

The dental procedure example is not simple at all; instead, it relies upon institutions and practices prior to the point at which consent could be invoked to do the normative work of making the interaction morally permissible. Going to the dentist only appears simple and unproblematic because there is an array of institutions, practices, and norms that create the conditions in which the consent to the procedure can be given. If any of these institutions or practices were not present—the dentist learned dentistry from the internet instead of an accredited school, her tools were unsanitary, the tooth was perfectly healthy, and she did not believe in anesthetic—then the patient's consent would no longer be what determines the act of pulling the tooth as either permissible or impermissible. Instead, the dentist pulling the tooth would be impermissible because it failed to meet the preconditions for the patient's consent to be given. The mere fact that the patient consented does not erase the importance of the institutions, practices, and norms surrounding dentistry (e.g., using sterile instruments). A patient's consent can make the dentist extracting a diseased tooth permissible precisely because institutions, practices, and norms which may not even be acknowledged are already in place. Consent actually does not begin to do its normative work until far down the line of a list of normative

requirements, at which point the lack of consent could be the only remaining element needed to make the tooth extraction morally permissible.<sup>41</sup>

But the problem with women's issues is precisely that the norms, practices, and institutions that govern conditions of consent—as they do at least theoretically in the dentist case in the form of best medical practices, licensing, medical ethics, and so on—are structured in such a way that they systematically disadvantage and subordinate women. The problematic way that consent works in many instances of political and ethical discourse, and why it can never be sufficient to establish rightful political or ethical relations, is that consent is often used to *justify* conditions of inequality, exploitation, or oppression. To illustrate, we can look at the case of certain sexual practices such as BDSM (bondage-discipline, dominance-submission, sadomasochism). In the dentist case, what would be objectionable about the tooth extraction (all other things being equal) would be the lack of informed consent by the patient. In the BDSM case, the action would be objectionable (abusing or torturing someone), and consent is used to make it appear unproblematic. Consent is working in reverse; instead of the lack of consent being what would be objectionable (all other things considered), consent is used to justify what would be objectionable unless it was for the magical properties of consent.

I am not making the claim that consent has no normative power; instead, I am going to claim that consent cannot be used to normatively justify the conditions of subordination and, importantly, it cannot be used as a means of ending the conversation around what is politically or morally permissible. Consent has a rather limited role in the sense that consent works as a justification in an “all things considered” type of way; all things considered (that is,

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<sup>41</sup> The idea that consent does not change the moral permissions in this case is recognized in law; in the United States at least, someone who practices medicine without a license can be charged with battery regardless of whether the patient gave his consent. I would like to thank Raff Donelson for pointing out this fact to me.

presupposing certain conditions are in place), consent has the normative power to make something permissible. While the absence of consent is always a wrong, the presence of consent is never sufficient to end the ethical or political discussion around what is just or normatively permissible.

Problematically, some theorists believe that certain harms or inequalities must be tolerated because of consent, not in spite of it. The problem is that consent must presuppose what it seeks to establish; that an institution or practice is justified because the person consenting is in such conditions that her consent would be legitimate. This is particularly problematic for feminist liberals, however, if they have a substantive view of liberty, autonomy, or equality. The more that feminist liberals endorse substantive content to our autonomy (that is, that equality or autonomy requires certain material and social conditions), the more that the substantive content is actually doing the normative work (rather than consent). Once the conversation shifts to the substantive content of our norms and practices, we can instead focus on the content of those norms and practices. This thus opens up the possibility of addressing the lived harms that women experience—but also diminishes the role that consent can play in these discussions.

My argument is that because” systematic coercion, deception, and manipulation are present under conditions of subordination, consent should have no normative power at all. But this seems untenable; even radical feminists want to argue that there is an important political, ethical, and legal distinction between the consensual and nonconsensual in some contexts even if they do not want to rely solely on consent to determine potential wrong or injustice. In addition, if I want to sincerely argue that consent only has normative power in the presence of appropriate background conditions, then it seems that no woman’s consent under patriarchy could be considered legitimate.

There are several potential responses to this objection. The first response is that some of these concerns are allayed in circumstances in which there are strong background norms that ensure respectful treatment of persons (including the enforcement of this treatment). This response, however, does not allay all potential concerns, since even in a context in which there are strong background norms (even though this situation has never actually been in place, at least for women, racially marginalized, or poor people) one should still be concerned about coercion, manipulation, or deception. In addition, it will not allay the concern that women's consent seems to have no normative power while under a condition of subordination. In order to address this latter worry, the second response I have to the concern that consent has no normative power is to distinguish individual instances where consent might be legitimate from the broad use of consent to legitimate conditions of subordination which undermine consent. In doing so, I emphasize that the legitimacy of consent is always open to further political and ethical evaluation.

The first response is that the presence of coercion, manipulation, and deception are more worrisome the more that one relies upon consent to justify relationships, practices, or institutions. The presence of strong background norms mitigates ethical or political concerns one might have about potential coercion, manipulation, and deception. To presuppose the presence of strong background norms and conditions would be to eliminate most of the conditions of coercion, manipulation, and deception. For example, in a non-patriarchal society women would not be systematically economically dependent upon men or have less control than men over the material resources in a society. In addition, a non-patriarchal society would not involve patriarchal propaganda and indoctrination.

However, my argument appears to be stronger; that humans as such are easily manipulated or coerced by others, and that means that consent cannot have normative power

even in the best of circumstances. Presumably, however, in ideal circumstances there would be norms against exploiting one's authority or emotional connection to someone in order to coerce or manipulate her. One might still be concerned that the central point that we are coerced by our social norms (even in our act of resistance, we are resisting against the imposition of social norms) undermines the legitimacy of consent. This might be a concern, if one took autonomy to the central, or the only, value that mattered.<sup>42</sup> But importantly, one does not need to think that all forms of social norms and social coercion are pernicious. Social coercion into norms of justice, respect, or non-violence may be strongly imposed but are morally unproblematic. The central difference is the *content* of the norms into which we are coerced; it matters whether the norm into which we are being socialized is "hurting others is unacceptable" or "women are sex objects for men." Problematically, however, liberals may have limited resources to make judgments on the content of our norms because of their reliance on autonomy and their commitment to individual choice.<sup>43</sup>

The second objection is more problematic; it appears that I would have to deny that women's consent under conditions of subordination is ever legitimate because, by definition, the material and social conditions of equality or ethical and political norms which fully value women as human beings do not exist (and possibly never have). However, this objection seems to be trading off of the ambiguity between actual consent and hypothetical consent or substantive autonomy. One could argue, and rightfully so, that the "personal is political" and that the actual consent of women cannot be divorced from discussions of the political legitimacy of consent. One cannot divorce the supposed legitimacy of consent as hypothetical consent or substantive

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<sup>42</sup> Not all liberals are necessarily committed to the idea that autonomy is the only value; see Clare Chambers, *Sex, Culture, and Justice: The Limits of Choice* (University Park, PA: Pennsylvania State University Press, 2008), 229.

<sup>43</sup> Chambers, *Sex, Culture, and Justice*; Stoljar, "Autonomy and Adaptive Preference Formation"; Cornell, "Freed Up: Privacy, Sexual Freedom, and Liberty of Conscience," 47–55.

autonomy from the actual decisions that women make since it is precisely the individual choices that people make in their everyday lives that require protection in the liberal view.

However, if liberals want to argue that consent is justified by appealing to hypothetical or substantive consent, they will face the same problem that women's *current* consent under non-ideal, oppressive conditions (in which there is not even the theoretical, let alone substantive, guarantee of basic rights) cannot be considered legitimate. If feminist liberals want to argue that women's consent under current oppressive conditions is legitimate, then they cannot appeal to hypothetical consent or a substantive view of agency in order to justify their views. But appealing to women's actual consent is going to be rife with problems (of which feminist liberals are already aware); women's actual consent in a context of subordination, as Pateman notes, is indistinguishable "from habitual acquiescence, assent, silent dissent, submission or even enforced submission. Unless refusal of consent or withdrawal of consent are real possibilities, we can no longer speak of "consent" in any genuine sense."<sup>44</sup>

Most feminist liberals would agree that current conditions of supposedly liberal societies, such as the United States, are unjust and insufficiently protect women against physical or sexual violence. Most feminist liberals would also agree that women have a right to be free of physical or sexual violence (however that is defined). The problem of consent under conditions of subordination is thus going to be a problem with any view that attempts to justify a practice, institution, or norm with anything other than women's *practical* consent.

One need not think that consent can never play any normative role at all in the absence of a fully liberated society. For example, it is at least logically possible that women can have fulfilling, mutually pleasurable and non-violent sexual experiences with men under patriarchy in

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<sup>44</sup> Pateman, "Women and Consent," 150.

a way that is—at least in the *individual* instance—morally unproblematic. However, this is a individual circumstance that occurs in spite of the prevailing social norms, institutions, and practices. It would require that the partners actively resist the prevailing social norms around sexuality. While theoretically possible, such an unproblematic interaction is both not the norm and occurs in a context in which there are no institutional or social protections for a woman's bodily integrity. The mistake would not be to assume that consent never, under any circumstances pre-liberation, has any normative power; the mistake is to presuppose that one can *generally* justify an institution, practice, or norm by appealing to women's consent under conditions of subordination.

It would also be fair to say that for the radical feminist, unlike for some liberals, consent is at best the beginning of an ethical and political discussion rather than being the last word. Thus, even with consent, I would argue that an interaction is always open for further political and moral evaluation. Consent never really conclusively gives us the answer to ethical or political permissibility.

### **The Private Sphere**

I will not endeavor to discuss the private sphere in depth in this dissertation, as that would be a project in itself. However, if I can provide sufficient reason to question the normative power and role of consent, this undermines the distinction between the public and private spheres within liberalism insofar as liberals rely upon consent to delineate the private and public sphere (if they do not want to rely on consent to justify the private and public divide, they will have difficulty claiming that the private sphere is necessary for the preservation of individual liberty). In addition, many of the points in my argument apply to consent generally. The argument thus

has wide-sweeping implications for the use of consent to justify our ethical and political relationships.

### Outline of the Dissertation

The second chapter of this dissertation will provide a general overview of feminist liberalism and radical feminism. While this overview cannot be comprehensive due to the wide scope of feminist liberalism, the purpose is not to discuss every potential feminist liberal response. Instead, the purpose is to illustrate the sort of problems that emerge when liberals make the claims about consent that have been discussed in this chapter and to provide an alternative perspective on feminist issues. This chapter will describe some of the basic tenets of radical feminist theory as well as the radical feminist perspective on sexual exploitation and gender.

The third chapter will discuss the problems with the conditions under which consent is supposedly given. In this chapter, I will argue that social coercion is an inherent problem in using an individual's consent to justify ethical or political relationships. These problems are exacerbated and take on new dimensions when there are conditions of subordination. Subordination entails that there is systematic and systemic coercion, exploitation, manipulation, and deception. I will argue that using consent in order to justify ethical and political relations results in the problem of allowing an arbitrary amount of coercion.

The fourth chapter will discuss problems with using an individual's consent to determine harm, wrong, or injustice. I will argue that using an individual's consent to determine harm, wrong, or injustice results in another arbitrariness problem; in order to be consistent I will argue that this is politically and ethically unacceptable, and in fact becomes more unacceptable if (feminist) liberals subscribe to a substantive view of equality or autonomy.

The fifth chapter will argue for what I call the “problematic presupposition.” The problematic presupposition is that one must presuppose certain social and material conditions about the individual consenting in order for the individual’s consent to be considered legitimate. I will argue that these presuppositions hide substantive content about the social and material conditions of the individual consenting that cannot be expanded to the social conditions of oppressed persons. I will argue that attempts at avoiding discussing the substantive content of our norms and practices will be ultimately futile, as substantive equality demands that we address the substantive content of our norms and practices. In order to genuinely and truly create the substantive social and material conditions under which someone can be considered free and equal—the necessary precondition for the individual’s consent to be legitimate under a liberal regime—we must address the content of our norms and practices. Thus, to use an individual’s consent in order to justify the lack of substantive social and material conditions of equality is self-undermining.

### Conclusion

While consent has played a central role within mainstream liberal theory, in this dissertation I will argue that consent, while necessary, is not sufficient to create just ethical or political relations. I will demonstrate this through examining the implications of making the claims that liberals sometimes make about the ethical and political role of consent with regard to feminist issues. Because of these problems, I argue that consent should have a limited role and instead we should consistently focus on the content of our norms, practices, and institutions to determine whether they are just.

## Chapter 2: Feminist Liberalism and Radical Feminism

### Introduction

As a preface to my arguments in the remainder of this dissertation, in this chapter I will be discussing how certain claims about the political and ethical role of consent (see the Introduction for specific details on these claims) conflict with substantive equality for women. Specifically, I will discuss how feminist liberals' commitment to substantive equality and feminist liberals' commitment to individual liberty are in tension. I will argue that these tensions are not the result of pragmatic concerns but principled concerns about the ethical and political role of consent. I will then discuss an alternative view which will inform my criticisms of feminist liberalism throughout the remainder of the dissertation.

### Problems with Liberal Standards of Consent

One of the challenges in critiquing liberal claims about consent is that there are ambiguities and inconsistencies in the standards of consent that they employ. As discussed in the previous chapter, there is an inherent ambiguity between the role of practical consent and other forms of consent. Additionally, even when discussing issues of practical consent (such as those pertaining to sexual consent), there are often inconsistencies in their standards of consent. Lastly, there is an ambiguity between two distinct forms of justification: justifying something on the basis that an individual consents, and justifying something on the basis that something fulfills an individual's preferences, desires, or conception of the good.

### **Inconsistency of Consent Standards**

In the previous chapter, I discussed the ambiguities between whether liberals are employing a standard of practical consent and hypothetical consent or substantive autonomy.

Another ambiguity lies within the standards of practical consent. This is especially problematic insofar as one uses a woman's consent or lack thereof as a metric for conceptualizing harm or injustice and is most evident in discussions of sexual consent.

Often, feminist liberals will attempt to use "consent" in order to justify certain sexual practices and institutions. Problematically, the standards of consent that would be necessary to justify these practices do not meet the standards of consent that they might employ in other contexts of sexual consent. Thus, rather than having a consistent standard of consent regarding sexual consent—such as the affirmative consent standard in which sexual participation must be active, voluntary, and explicit—they instead use consent as an umbrella justification without examining, or simply presupposing, that the practices in question meet the standards of consent.

An example of an inconsistency is the near-universal support for sexual harassment law while some feminist liberals argue in favor of prostitution. Watson argues the pro-prostitution or pro-legalization stance is incompatible with sexual harassment law.<sup>45</sup> Watson notes that while pro-prostitution liberals argue that men buying sex from women is "work like any work," they cannot extend the same worker protections to prostituted women as they do to other employees.<sup>46</sup> She explains that not only is prostitution incompatible with health and safety standards, it also violates sexual harassment law. In particular, she argues that liberals cannot recognize quid pro quo sexual harassment, which is supposed to protect women from unwanted sexual advances in the workplace, as the nature of prostitution itself is such that prostituted women have little or no ability to refuse unwanted sexual acts.<sup>47</sup>

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<sup>45</sup> Lori Watson, "Why Sex Work Isn't Work," *Logos Journal*, accessed May 23, 2015, <http://logosjournal.com/2014/watson/>.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

At a deeper level, the pro-prostitution stance presupposes that women's bodies are mere commodities to be used by men and fails to acknowledge economic coercion. Taking this perspective to its logical conclusion—that men forcing sex upon women through economic coercion is acceptable, and that men having sex with women is the same as women doing any other service—means that every woman should be rightly subject to sexual exploitation for her material survival. As Watson argues, this stance means that women no longer have the right to sexual autonomy; they cannot refuse sex to anyone that they wish. This would also, as described above, mean that there could be no sexual harassment law; any employer could force his female employees to be subjected to any sex act he demands, or else lose their jobs. If liberals want to claim that prostituted women agree to engage in sexual services, all an employer would have to do is include “other duties as assigned” in the job description. All women could be forced, at any time, to be subjected to any degree of sexual violation. If she does not acquiesce, her only other option is either to attempt to find an employer who is benevolent enough not to demand sex, or economic destitution. This would also mean that it would be perfectly acceptable for the government to legally traffic women; if women do not engage in “sex work”, then they can be denied unemployment or social welfare benefits for refusing to work. If one were to argue *consistently* for the “consent” standards that are used to justify prostitution, then this is exactly what would result.

Why is it important to determine whether feminist liberals are consistent on consent? Problematically, when feminist liberals are inconsistent on their standards of consent they are clearly open to the charge of being ideological, in the pejorative sense. They are simply using women's ostensible consent as a blanket justification for whatever institution, practice, or norm that they want to include. Unless liberals are consistent on the standards of consent they are

employing, they are employing no standard at all. I am not claiming that all forms of consent need to be the same standard; we might make meaningful distinctions between sexual consent and medical consent. However, importantly, it appears that some feminist liberals might be inconsistent on the standards of consent which they employ.

### **Confounding Preferences with Consent<sup>48</sup>**

Another potential ambiguity lurks in the distinction between justifying a practice or institution on the basis of consent, and justifying a practice or institution on the basis that it fulfills an individual's preferences, desires, or conceptions of the good. For example, Cudd describes the "paradox of liberalism" in this way:

Liberals have typically construed this zone of privacy as the domain of free choice, that is, *as the domain in which persons may choose according to their preferences*, whatever those preferences turn out to be [...] Under conditions of psychological oppression, preferences tend to be molded by oppressive forces in a direction counter of the good of the oppressed [...] Women's choices, then, may tend to reinforce their oppression. [emphasis mine]<sup>49</sup>

Earlier in the same article, Cudd acknowledges that women's choices do not always track their preferences: "I don't want to say that one can read preference directly from choice here [...]" However, it would appear that even if women's preferences would not be for the oppression-reinforcing action, they still have an incentive to choose it, all things considered.<sup>50</sup> Chambers also describes extensively how women may not choose based upon their preferences but based upon the fact that they feel they have few other options.<sup>51</sup> There is a perverse logic to women's choices under patriarchy, where what women "choose" has little to do with what they want because they have few other options in order to achieve their aims (whether this be their needs

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<sup>48</sup> I am using the term "preference," but this could easily be replaced with value, desire, practical identity, or conception of the good. Regardless of what one inserts for "preference," the argument would be the same.

<sup>49</sup> Cudd, "The Paradox of Liberal Feminism: Preference, Rationality, and Oppression," 38.

<sup>50</sup> *Ibid.*, 48.

<sup>51</sup> Chambers, *Sex, Culture, and Justice*, 24–40, 118, 167–197.

for social acceptance and validation, avoidance of social sanctions for non-compliance, and basic food and shelter).<sup>52</sup> MacKinnon put it most succinctly in her criticism of the private sphere that “in light of the realities of sex inequality, what is called ‘consent’ often includes what one cannot avoid putting up with, what, under unequal conditions, one has no choice but to tolerate. Although the private is presumptively the free, it cannot be so presumed under conditions of inequality, because what one lets happen under unequal conditions may not be the same as what one wants.”<sup>53</sup>

Feminist liberals are generally aware that what one wants and what one consents to are two very different things, particularly for women for whom the only feasible options (physically, socially, or psychologically) are those that conform to their subordinate role.<sup>54</sup> The problem emerges when one relies upon the implicit presupposition that what women choose represents their preferences, values, or desires. It is problematic because justifying a practice or interaction because of what one wants and justifying a practice because of consent are two very different standards.

There are numerous instances in which we do not want to claim that consent is illegitimate if it does not represent our preferences; we might prefer not to undergo a necessary surgery or write our dissertation, and yet our consent to do these things seems unproblematic. On the other hand, it appears that at least some of the motivation for preserving the private sphere of individual choice is, as Rawls would put it, the preservation of individuals’ ability to pursue their conceptions of the good. In the same article, for example, Cudd argues for a solution to the

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<sup>52</sup> Stoljar, “Autonomy and Adaptive Preference Formation.”

<sup>53</sup> MacKinnon, “Privacy and Equality,” 83.

<sup>54</sup> “A woman might be unable, for example, to avoid homelessness or destitution unless she is partnered with a man. On the other hand, she also might be subject to such strong social pressures from her family to marry that she is unable to see herself as having any alternatives.” Anne Phillips discusses the problem of distinguishing “free” from “coerced”, illustrated by the issue of arranged marriages, in *Illusions of Consent*, “Free to Decide for Oneself,” 99-118.

“paradox” by arguing that it is important to allow for conceptions of the good that people in a current patriarchal society cannot yet imagine, and asks the question, “How can we abolish oppression without violating the preferences of the already oppressed?”<sup>55</sup> Cudd thus appears to be making the mistake of presuming that women’s preferences relate in any significant way to their choices and presuming that preference-satisfaction is a justification for non-interference in women’s choices. But both these assumptions are unwarranted, especially if one considers that justifying a practice on the basis of satisfying women’s preferences and justifying a practice on the basis of respecting women’s choice are two very different things.

If one acknowledges that justifying something on the basis of consent and justifying something on the basis of preference-satisfaction are different, then one can solve the paradox but not in a way that liberals might like. If one is justifying a practice, interaction, or institution on the basis of consent rather than preference, then preferences cease to be ethically or politically relevant. Thus, the “paradox” is solved, but only at the expense of eliminating one of the major justifications for protecting individual choice in the first place; that is, that individual choice allows the individual to satisfy their “preferences,” instantiate their personal values, or pursue their conception of the good.<sup>56</sup>

A liberal might want to argue that an individual’s consent is not legitimate unless the consent represents her preferences, values, or conception of the good. This would be well and good, except that this would in turn create an even greater burden upon liberals to ensure that a woman’s consent does in fact represent her preferences. In some cases, such as the dissertation

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<sup>55</sup> Cudd, “The Paradox of Liberal Feminism: Preference, Rationality, and Oppression,” 58.

<sup>56</sup> The implicit conflation between preferences and consent allows one to hold conflicting positions; for example, the idea that a practice can be at the same time justified on the basis that women “like it” (e.g., “but some women like to be hurt!”) while claiming at the same time that women’s desires are irrelevant as to whether a practice is justified (e.g., unwanted, violating sex is acceptable because the woman consents).

case stated above, it may not be morally required or even desirable to attempt to ensure that her consent perfectly tracks her preferences or desires. In other cases, it may be imperative to ensure that one's consent tracks one's desires, such as in the case of sexual activity.

Part of the reason why this implicit assumption is problematic is because it presupposes certain social facts about the individual who is consenting. It presupposes that the individual who is consenting is in the type of social circumstances which permit him to be free from the type of coercion, material deprivation, social pressures, and socialization that would interfere with his choices *actually* realizing his preferences. The case of sexual consent brings the asymmetry of the consent of men and women into focus; sex is something that always happens because someone wants it. But in the context of patriarchy, the "someone" is a male; our social norms are such that sexuality is structured around male desire, male sadism, and male pleasure, with female pleasure either irrelevant or antithetical to sex (at best, female pleasure is mere "foreplay"). The idea that both men and women are "consenting" on equal footing—either in terms of the conditions under which they give consent, or what they are consenting to—is simply false.

The pro-prostitution stance is a good example of how confounding consenting with wanting results in obfuscations and failure to examine the ethical or political implications of the practice in question. Pro-prostitution advocates often claim that prostitution should be legal because "women want it." The first problem is, as stated above, that this confuses women's preferences or desires with to what they consent even and perhaps especially when this "consent" is coerced. The second problem, which applies to any argument in favor of a potentially subordinating or harmful practice, is that one could not simply take a poll of the participants to determine if a practice is harmful, abusive, or exploitative. One would not, for example, take a poll of slaves to determine whether slavery was morally acceptable. It would be even more

ridiculous to claim that because a few slaves preferred to remain slaves, then slavery as an institution and practice is morally acceptable. Yet this is precisely the form of the argument with prostitution; because some women “want” to be prostitutes, they argue for the preservation of an extremely harmful and violent industry (one study found that which 89% of prostituted women want to exit and 63% suffer post-traumatic stress disorder).<sup>57</sup> The problems described above make it even more difficult for feminist liberals to employ consent as a means of justifying a potentially harmful or oppressive practice.

### Tensions within Feminist Liberalism

In the introduction, I claimed that consent was fulfilling several roles within liberal theory:

- (1) The presence or absence of an individual’s consent determines whether an injustice, wrong, or harm has been committed. Alternately, one might say that consent as an expression of individual liberty or autonomy is given priority over other potential ethical considerations (such as harm).
- (2) The presence or absence of an individual’s consent determines the sphere of individual liberty where it would be wrong for the government to coercively interfere (e.g., the “private sphere”).

In the following section, I will describe how adopting these two claims about consent cause tensions when attempting to address the subordination of women. The first problem is addressing and defining injustices within the private sphere. The second problem is “patriarchal leakage,” in which injustices in the private sphere leak into the public sphere. The third problem

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<sup>57</sup> Melissa Farley et al., “Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder,” *Journal of Trauma Practice* 2, no. 3–4 (2004): 34.

is the social construction of our preferences, desires, and identities such that subordination is perpetuated.

### **Defining and Addressing Injustices in the Private Sphere**

The first problem which feminist liberals face is defining and addressing injustices in the private sphere. One of the reasons why the slogan of the feminist movement was “the personal is political” is that the injustices and violence men inflict upon women overwhelmingly occur within the “private sphere,” and thus have been considered personal issues rather than political ones. Besides preventing women from conceptualizing issues affecting them as political issues of social-sexual subordination, it has also been used to justify the state’s failure to protect women and children from violence or exploitation within the home. This leads to the rather absurd result that women within the “private sphere” are less protected from violence than they are within the public sphere, or, as MacKinnon aptly puts it, the farther women are from the sphere of the private the more equality they have with men.<sup>58</sup> A particularly glaring example is the fact that marital rape was completely legal in the United States prior to the 1990s. Feminist liberals have at least, to some extent, acknowledged that the sphere of the “private” cannot always and necessarily be off-limits for critique or social intervention. Okin famously noted that excluding the family from the sphere of justice means that gross inequalities and abuses, in fact those that affect women most intimately and profoundly, will never even become issues of justice.<sup>59</sup>

But insofar as consent is ostensibly the means of capturing injustices, or relatedly as a justification for non-intervention (at least in any material and substantive sense), the injustices

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<sup>58</sup> “Substantively, women are least equal at home, and most likely to be treated as equals in forums as far away from home as possible. The closer to home women are, the less power and rights they have; the further away from home women go, the more power and rights they have.” MacKinnon, “Privacy and Equality,” 79.

<sup>59</sup> Susan Moller Okin, *Justice, Gender, and the Family* (New York, NY: Basic Books, 1989).

and inequalities within the “private” sphere are imbued with legitimacy. The sacred sphere of the “private,” because it is the private, makes it such that the inequalities and injustices become normatively invisible and thus permissible:

The home is man’s castle and woman’s prison: the location of domestic battering, exploitation in domestic labor, marital rape, and sexual abuse of children. What women get there is what they can get from an individual man; whether with ease or with difficulty is up to him. Law, we are told, does not belong there; this is private. So women’s privacy can be constantly invaded in private and nothing will be done about it. Indeed, the private is precisely where women’s privacy can be invaded because it is where women have no recourse. Recourse is, by definition, public.<sup>60</sup>

Feminist liberals are committed to the public/private distinction and its preservation—thus creating a genuine problem for how they define the private/public distinction and how they address injustices within the private sphere.<sup>61</sup>

### **Patriarchal Leakage**

The second problem can be referred to as “patriarchal leakage.” Part of Okin’s critique was that failing to address inequalities or injustices in the private sphere could lead to inequalities in the “public sphere.”<sup>62</sup> Many other feminist liberals have recognized that one cannot easily cordon off the power imbalances in the supposedly “free” private sphere from feminist critiques.<sup>63</sup> Even if there is ostensible equality of opportunity in the “public sphere,” patriarchal norms and practices (and the resulting abuse and violence) can “leak out” in the public sphere. For example, women often bear a greater responsibility for child care and housework than men. As a result of this greater burden, women are at a disadvantage when it comes to participation in the economic sphere. If they have children, they may be forced to take

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<sup>60</sup> MacKinnon, “Privacy and Equality,” 79.

<sup>61</sup> Abbey, *Feminist Liberalism*, 12–15.

<sup>62</sup> Okin, *Justice, Gender, and the Family*.

<sup>63</sup> Abbey, *Feminist Liberalism*, 13.

jobs that involve fewer hours or careers which are less demanding (and thus those that often pay less). Women are also overwhelmingly more likely to exit the economic sphere entirely in order to devote their lives to childrearing, putting them at a severe disadvantage for any future career prospects and, more alarmingly, hindering their ability to leave an abusive relationship.

Another example is the perpetuation of stereotypes around women and science, math, and engineering and computer science. As a result of these stereotypes, women are not encouraged to develop the requisite skills, are often actively discouraged, and thus tend to be highly underrepresented in these disciplines.<sup>64</sup> From birth, girls are subject to domestic exploitation by their parents, who are more likely to force them to do a disproportionate amount of domestic labor, denying them the leisure and play time afforded to male children, and either refusing to compensate them for their labor or compensating them less than male children.<sup>65</sup> Okin identifies an even deeper problem: treating women and girls unjustly within the private sphere undermines women's and girl's sense of self-worth and thus women will not have the requisite self-respect when they come to the public sphere.<sup>66</sup>

### **Adaptive Preferences**

This leads us to the third problem of the social shaping of our choices. Adapting one's choices to one's social circumstances is not always pernicious; one might, for example, adapt to only "want" the foods that are available in one's particular culture or locale (although, as stated earlier, preference and consent are two different forms of justification). More perniciously, however, our choices and our very identities are structured by socialization into gender norms

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<sup>64</sup> This is due to a variety of factors of course: harassment, women being called on less frequently in classrooms, not being provided toys that develop spatial reasoning and coordination and instead socializing women for domesticity, etc.

<sup>65</sup> "Time, Money, and Who Does the Laundry," in *University of Michigan Institute for Social Research*, no. 4, (January 2007).

<sup>66</sup> Okin, *Justice, Gender, and the Family*, 104–109.

predicated upon the social-sexual subordination of women by men. For example, one of the arguments against pornography is that the consumption of pornography socially and physiologically conditions our sexual desires. Pornography conditions men and boys to find hurting, coercing, abusing and, especially with the mainstreaming of increasingly violent pornography, torturing and mutilating women to be arousing. It teaches women and girls that physical and sexual abuse and coercion is “normal” sex, and that their worth consists in being a sexual object for men, and that sex is solely about men’s pleasure (even at the expense of women’s physical and emotional health).<sup>67</sup>

This is a quandary for feminist liberals who take individual choice to trump concerns about material and social equality for women. On the one hand, if they allow women’s choices “as is” they fail to address the systematic coercion that structures women’s choices and identities (including to what they believe they are entitled and how they believe they should be treated). Allowing women’s “free choice” in this manner may lead to very few free choices at all, especially as the choices that women make may effectively undermine their own autonomy.<sup>68</sup> On the other hand, hypothesizing about what women would want in absence of subordination is also a problematic option. First of all, this sort of speculation about women’s actual “authentic” choice appears counter to the liberal commitment to anti-paternalism. Secondly, the mere practice of psychoanalyzing women’s choice to determine its “authenticity” can lead to

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<sup>67</sup> Gail Dines, *Pornography: The Production and Consumption of Inequality* (New York: Routledge, 1998).

<sup>68</sup> “It’s not that they [women] will prefer oppression to justice, or subordination to equality, rather they will prefer the kinds of social roles that tend to subordinate them, make them less able to choose, or give them fewer choices to make.” Cudd, “The Paradox of Liberal Feminism: Preference, Rationality, and Oppression,” 38.

problematic and possibly biased idealizing, and thus is open to the charge of imposing one worldview upon all women.<sup>69</sup>

Amy R. Baehr describes, in a modified form, how the liberal commitment to individual liberty seems to create a dilemma. Her discussion of this problem demonstrates how using the framework of individual liberty is deeply limited in conceptualizing oppression, where subordination is implicitly defined in relation to women's choices rather than to the social-structural institutions, norms, and practices that enforce male domination:

She [the feminist liberal] may respond that free choice isn't really what's important after all; what's important is that women make certain kinds of choices, live certain kinds of lives [...] This is the perfectionist answer. Or she may respond that liberty is indeed what's important, but if women were really free, they'd choose as men do. (That's why their relative lack of these goods can count as evidence of their lack of freedom.) This is what I'll call the sameness-essentialist answer. Neither is attractive for the feminist liberal. The first is not attractive because the liberal does not want merely to appear to value liberty but really to do so. The second is not attractive because it creates for feminist liberalism an immense justificatory burden.<sup>70</sup>

This creates a serious bind, where it appears that feminist liberals must either respect "individual liberty" that perpetuates oppression or posit a comprehensive conception of the good.<sup>71</sup>

Attempting to address feminist issues while maintaining the commitment to individual liberty makes determining how much sexism is permissible, and of what kind, even more complicated. At what point can we say that women are unequal, and deserving of protection? What metrics do we use to determine whether women are "equal enough"—for example, how does women's susceptibility to violence and lack of personal security factor into this assessment, particularly given that many forms of this violence are shielded by "free choice" and the private

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<sup>69</sup> Cudd accuses Nussbaum of perfectionism, and argues that one of the dangers is that the state could be promoting the wrong ideal. Cudd, "The Paradox of Liberal Feminism: Preference, Rationality, and Oppression," 51–52.

<sup>70</sup> Cornell, "Freed Up: Privacy, Sexual Freedom, and Liberty of Conscience," 3.

<sup>71</sup> Abbey, *Feminist Liberalism*, chap. Contemporary Feminist Liberalism.

sphere? Insofar as feminist liberals acknowledge that certain aspects of our social values and practices—such as those surrounding our sexuality—are subordinating, it becomes a problem for liberalism as to how to determine what inequalities should or should not count, or at what point the inequalities become problematic in the face of the competing value of liberty. It seems, then, that insofar as liberalism remains dedicated to using consent as a justification for inequalities, *it* is going to be caught in a trap of being unable to address inequalities particularly when it comes to issues of women's subordination.

### Feminism versus Liberalism

In this section, I will describe the difference between pragmatic and principled concerns, and I will argue that the tensions within feminist liberalism are due to principled concerns. I will also address the objection that the private sphere must be preserved for the sake of individual freedom, in spite of the fact that this will result in women's social and material inequality.

#### **Pragmatic versus Principled Concerns**

The paradoxes that feminist liberals face are not merely pragmatic issues, but are problems that emerge as a result of the principles to which feminist liberals are committed. A pragmatic problem would merely be a question of the most efficacious way of solving a problem. To illustrate the difference, the best method of dealing with child abuse is not always to take the child away from her parents and put the parents in jail. Sometimes, with some forms of child abuse, it might be in the best interests of the child to remain with her parents but instead engage other potential types of intervention: family therapy, childcare assistance, social assistance, and so on. It is not a question of *whether* one should intervene to stop child abuse (and whether child abuse should be illegal) but *how* best to serve the rights and interests of the child.

However, the problems that feminist liberals face are problems about their principles themselves; there is a conflict between their commitment to (substantive) equality for women, and how they interpret their commitment to individual choice. For example, Abbey questions whether it would be possible or even desirable for us to move towards a post-gender society because of the value people ascribe to gender identity.<sup>72</sup> Additionally, Abbey questions whether it would be possible within a pluralist society to ensure equal outcomes for women (presumably, social equality) or whether we would need to permit comprehensive sexist doctrines.<sup>73</sup> Thus, for feminist liberalism, it is not merely a question of how best to implement protections or conditions of equality, but whether it is possible given their other political commitments.

It can be difficult to untangle the pragmatic concerns from the principled concerns. Pragmatic and principled concerns are not necessarily distinct, as how one achieves a particular aim will be constrained by ethical concerns. But another reason is that feminist liberals may appear to be making claims about pragmatic concerns when they are, in fact, making claims about principles. For example, Elizabeth Anderson in her reply to Schwartzman's critiques of liberalism claims that a certain degree of "unreasonable pluralism" must be tolerated.<sup>74</sup> Anderson admits that there is a genuine tension between feminist commitments and liberal commitments to "liberty,"<sup>75</sup> and that a liberal society must allow practices which will harm women and girls within the sphere of the family and home.<sup>76</sup> Here, however, is where Anderson seems to be shifting between a principled concern about the limits of state power and pragmatic concerns. Anderson makes several claims about why it would be illegitimate for the state to interfere with

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<sup>72</sup> Ibid., 54–56.

<sup>73</sup> Ibid.

<sup>74</sup> Elizabeth Anderson, "Toward a Non-Ideal, Relational Methodology for Political Philosophy: Comments on Schwartzman's Challenging Liberalism," *Hypatia* 24, no. 4 (Fall 2009), pp. 134–135.

<sup>75</sup> Ibid., 131.

<sup>76</sup> Ibid., 141.

the subordination of girls and women in the home and the promotion of “comprehensive doctrines” which enforce their inferior status: the first is that the state cannot be trusted to make the determinations feminists would want the state to make; the second is that it would violate the “genuine moral rights of individuals practicing reasonable conceptions of the good;”<sup>77</sup> and the third is that it would incur immense cost whilst being unlikely to change people’s minds. For this reason, Anderson advocates for civil action.<sup>78</sup>

There are several problems with Anderson’s view. While the second reason Anderson provides is a principled reason against state interference, the first and third appear to be pragmatic reasons. However, these are actually principled reasons masquerading as pragmatic reasons. Her first point appears to be that because the state does such a bad job at enforcing equality it should not be given the task. This appears to be a pragmatic reason. Yet the state is notoriously horrifically bad at protecting children from sexual or physical abuse; more often than not, the state is complicit in children’s and women’s abuse rather than protective of them in children’s and women’s abuse. The norm is for the state to protect men who abuse women and children while actively punishing women who dare to report, or defend themselves against, abuse. Supposedly, Anderson would be committed to the idea that the state should provide protection for women and children against at least some forms of physical abuse. Anderson would need to give an argument why the general incompetence and injustice of the state (which is the norm, not the exception) is a reason against state intervention in the case of protecting girls from the harms of gender socialization but not against the state intervening in cases of other

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<sup>77</sup> There is an apparent inconsistency here, since Anderson stipulated that patriarchal conceptions are unreasonable and harmful. Supposedly, Anderson means that the type of interference necessary to address injustice against women and girls would violate the “moral rights” of people practicing reasonable conceptions (i.e., non-subordinating) of the good.

<sup>78</sup> Anderson, “Toward a Non-Ideal, Relational Methodology for Political Philosophy,” 143.

forms of child abuse. As Schwartzman notes in her response to Anderson, “emphasizing the limits of government responsibility in this way suggests that we may have already reached this point.”<sup>79</sup> Schwartzman further argues that it is dangerous to hypothesize about what would result once the state has done everything that it could reasonably be expected to do, as it “seems to involve a troubling form of abstraction that calls attention away from actual situations of oppression and injustice.”<sup>80</sup> This is, in a way, a problem analogous to the problem of moving between practical consent and hypothetical consent; liberals are basing what would occur in a non-actual hypothetical situation on what occurs in an actual situation of oppression and injustice.<sup>81</sup>

In addition, the perhaps throwaway comment that state intervention “would not change people’s minds” seems completely false. She would have to deny, for example, that potential social sanction for violation of women and girls has no impact on how men treat women and that enforcing social sanctions also has no impact on the formation of women’s and girl’s self-conception. The implicit idea that feminists should bring their concerns to “civil society”—while not in itself problematic—and that would be efficacious also seems problematic for creating change. Misogynists have an equal right to take action in the civil sphere, by petitioning corporations to stop promoting women-friendly media or products; to promote patriarchal practices and ideas; and to ridicule gender non-conforming women and girls. They also have the advantage of some one hundred thousand years of patriarchal norms and practices, as well as greater traction in the larger (patriarchal) society and greater resources (thanks again, to patriarchy). Although agitating in “civil society” is a legitimate form of activism, the most

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<sup>79</sup> Schwartzman, “Non-Ideal Theorizing, Social Groups, and Knowledge of Oppression,” 183.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

successful activism (such as the Civil Rights Movements) has been inherently disruptive toward the society they are critiquing and, importantly, aimed at changing the law.<sup>82</sup> Thus, while the pragmatic and principled concerns undoubtedly overlap, it is important to maintain the distinction between when feminist liberals are making pragmatic or principled claims.

### **Privacy and Individual Freedom**

A feminist liberal might concede that the concerns that they have are principled concerns, but that the principled concerns are important. In particular, they argue that society must maintain the sanctity of the private sphere in order to preserve individual freedom. The oft-cited objection from liberals is that the government should not be able to police people's bedrooms or kitchens. To do so would require the sort of massive government surveillance and interference which would violate any semblance of individual civil liberties. Government surveillance of citizen's private lives—social media activity, financial transactions, and private conversations—is a clear violation of individual freedom and expression that threatens the very core of democracy itself. The sphere of privacy is intended to circumscribe the ability of the government to monitor and interfere with the lives of individuals.

This objection is somewhat misplaced against radical feminists, since the private and public distinction is a commitment of liberalism. Since radical feminists are not liberals, and not committed to political liberal values or institutions (for further details, see section below), the problem of justifying and preserving the private sphere in the face of criticisms is the task of liberal theorists and not feminists. Radical feminists are not necessarily committed to the institution of the government, although radical feminists such as MacKinnon may employ the

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<sup>82</sup> This goes for feminist activism as well; changing rape laws, promoting the reproductive rights of women, and so on.

machinery of the state for feminists ends. (Abbey derogatorily refers to this strategy as “MacKinnon ‘talks’ revolution but ‘walks’ legal reform” and “question[s] what is at stake in her seemingly draconian attacks on the liberal tradition.”<sup>83</sup>)

Nonetheless, there are several potential responses to this worry. First, the rationale for the private sphere is not itself entirely clear—even among liberals—and thus the way that liberals draw the line around the private sphere is potentially ideological. One could argue that liberals should redraw and reconceptualize the private sphere in such a way that it does not systematically depoliticize the harms women experience or conceal oppression. Second, it is not clear that the rationale for certain individual liberties could even justify what some liberals presume that they would.

The private sphere, insofar as it is being invoked as a justification for permitting or not interfering with certain harms to women and girls, requires justification and a clear standard for delineation. It is not entirely clear, though, that the bounds of the private sphere are consistently defined and justified. As MacKinnon argues,<sup>84</sup> as well as others scholars,<sup>85</sup> the right to privacy may not be a fundamental right but a derivative one. In addition, the lines between the private and public are not always clear as they might change depending upon the situation: “civil society” of public expression or private enterprise might be part of the private sphere, but is subject to government regulation (such as anti-harassment and anti-discrimination laws in the workplace); child-rearing is almost universally considered to be part of the private sphere, yet by its nature it involves the non-consensual participation of certain members (namely, the children who are unable to consent because they are not autonomous).

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<sup>83</sup> Abbey, *Feminist Liberalism*, 19.

<sup>84</sup> MacKinnon, “Privacy and Equality.”

<sup>85</sup> Judith DeCew, “Privacy,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Fall 2013, 2013, <http://plato.stanford.edu/archives/fall2013/entries/privacy/>.

It cannot be simply that whatever domain of human activity with which liberals do not want the state to interfere is protected by the “private sphere,” which also happens to be the same domain of human activity in which women (and children) are most often subject to harm and oppression. It seems that there might be an analogous problem with the private sphere as with the inconsistency on standards of (sexual) consent; rather than having a standard by which to determine rightness or wrongness, the private sphere is used as a blanket justification. This has serious implications for the ability of liberals to conceptualize or address women’s subordination. Presupposing that patriarchal institutions, practices, and “conceptions of the good” are protected by the private sphere “could perpetuate the idea that it is only the preferences, choices, and values of individuals that matter” rather than “analyzing and altering the hierarchical social structures that shape and perpetuate systems of oppression.”<sup>86</sup> As Schwartzman argues, this move threatens to de-politicize issues affecting women; since the problems that face women are not political problems, the harms that women face cannot be a source of injustice.<sup>87</sup>

Even if one were to take certain liberties as important to preserve (as stated previously, it is unclear even among liberals whether privacy should be considered a right derived from other rights, a “legal fiction” that emerges from certain liberal doctrines,<sup>88</sup> or a right necessary for the protection of the individual<sup>89</sup>) it is not entirely clear that the lines would get drawn the way that liberals seem to think that they would. For example, while many liberals claim that it is necessary to preserve the production of pornography (regardless of the harm that is inflicted

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<sup>86</sup> Schwartzman, “Non-Ideal Theorizing, Social Groups, and Knowledge of Oppression,” 184.

<sup>87</sup> *Ibid.*, 183–184.

<sup>88</sup> MacKinnon, “Privacy and Equality.”

<sup>89</sup> Anita Allen, “Coercing Privacy,” in *Varieties of Feminist Liberalism*, ed. Amy R Baehr (Lanham, MD: Rowman & Littlefield, 2004).

upon women) to preserve “free speech,” one must ask the question: “Is this really necessary to preserve the individual right of free speech, given what we consider the value of free speech to be?”

Let us presuppose that the value of free speech is to allow individuals to criticize the state or other institutions of power, to express themselves as individuals (politically, personally, or artistically), and to allow the free exchange of ideas. Let us also suppose that, in our hypothetical liberal society, it is illegal to pay anyone to engage in any form of physical or sexual contact whatsoever. It is also illegal to coerce or manipulate anyone into sexual activity or physical contact with another person. Even in this “extreme” case—which would disallow not only pornography but movies or theater involving sex scenes—would the *individual* right to free expression (supposedly, what the liberals want to preserve) be threatened? I think that a liberal would have a very hard time arguing that it is, particularly if we consider that it is not an individual’s right to use other people for his “speech.”<sup>90</sup> Even if we were to have the “extreme” case, the individual would be just as protected in expressing whatever ideas he wished as before.<sup>91</sup>

While I do not pretend to have a fully worked out theory of the legitimate bounds of state intervention, I think it is justified to say that we cannot presume that the preservation of our civil liberties would necessarily require the same restrictions on state intervention that liberals sometimes presume that it would.

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<sup>90</sup> MacKinnon, *Only Words*.

<sup>91</sup> Some would argue that disallowing an individual from using methods such as economic inducement or coercion to make others participate in his projects is an affront to his personal liberty. However, as I will argue later in the dissertation, it only does so in a trivial sense.

## Radical Feminism

In this dissertation, I will be using radical feminism as an alternative perspective by which one can conceptualize women's social-sexual subordination. There are several reasons why radical feminists serve as good interlocutors for feminist liberals. The first is that radical feminists have been some of the strongest and most sustained critics of consent and these critiques have often stemmed from an examination of the conflict between liberalism's own commitments to equality and individual liberty.<sup>92</sup> While radical feminists make substantive claims in order to challenge feminism and often theoretically diverge (e.g., their rejection of individualism), they nonetheless engage with liberalism as practice and liberalism as theorized on its own terms. Pateman, for example, takes as her primary method of critique the internal problems with social contract theory itself and how it cannot exclude—and indeed, creates—relationships of subordination.<sup>93</sup> Catharine MacKinnon, similarly, does not attempt to defend the idea of sex-equality but takes it as “an agreed-upon social ideal” and instead sees her purpose as a description of the social and material realities of women that belie the pretension that there is sex-equality in practice.<sup>94</sup> Thus, even one of liberalism's most infamous detractors takes as her starting point the ostensible commitments of liberalism rather than necessarily positing different ones (although, like many radical feminists, she would argue that these ideals require substantial reconceptualization and radical reformulating); her critique is an internal critique of liberalism.<sup>95</sup>

The second reason is that radical feminists have presented strong challenges to the feminist liberal framework with which feminist liberals have been forced to engage in both

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<sup>92</sup> See, for example, Pateman, *The Sexual Contract*; Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989).

<sup>93</sup> Pateman, *The Sexual Contract*.

<sup>94</sup> MacKinnon, *Toward a Feminist Theory of the State*, xii.

<sup>95</sup> Abbey claims that radical feminists, in fact, cannot “live with or without” liberalism in spite of their “litany” of criticisms. Abbey, *Feminist Liberalism*, 18–20.

political activism and discourse. Importantly, radical feminists have a material account of oppression; that is, the purpose of their analysis is to describe the concrete physical and psychological aspects of oppression within women's concrete lived experience. For feminist liberals, who agree (at least to some extent, though one could argue not consistently) that rights and liberties must be *lived* in order to be real, the critiques that radical and materialist feminists make are a serious challenge. If feminist liberals are dedicated to a substantive view of equality or liberty, then the presentation of such evidence is a challenge that feminist liberals cannot easily evade.

### **Radical Feminism as Alternative Theory**

There are various ways that one can characterize radical feminism. Tong divides radical feminism into two different ideologies. The first form of radical feminism she describes as “libertarian radical feminism,” which she characterizes as committed to an ideal of androgyny and the acceptance of all forms of sexual practice.<sup>96</sup> The second form of radical feminism she describes as “cultural radical feminism,” which, in contrast to libertarian radical feminism, instead glorifies and attempts to reclaim “feminine qualities” and attributes spiritual significance to women's reproductive capacities.<sup>97</sup>

Problematically, however, the radical feminist perspective from which I am arguing does not seem to fit well into either characterization. MacKinnon, for example, disagrees fundamentally with the libertarian position that promotes acceptance of all sexual practices, including pornography and prostitution. However, MacKinnon also does not subscribe to the cultural radical feminist perspective that promotes what are traditionally considered feminine

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<sup>96</sup> Rosemarie Tong, *Feminist Thought: A More Comprehensive Introduction*, 4th ed. (Boulder, CO: Westview Press, 2014), 53–54, 66.

<sup>97</sup> *Ibid.*, 53–54, 57, 66, 82.

qualities, as she critiques the construction of feminine gendered qualities as also a product of subordination.

Instead, the best way to characterize the perspective from which I am critiquing feminist liberalism would be to describe it as post-Marxist. The radical feminist perspective to which I subscribe is Marxist to the extent that it takes a class analysis of oppression and takes the material aspects of our social existence to be fundamental; it is post-Marxist in the sense that it does not limit the material to be the purely economic, but expands the definition to center humans as embodied and includes forms of cultural subordination (following feminists such as Young).<sup>98</sup> The insight of radical feminism is to posit that women constitute a class in the Marxist sense of a group of people that are socially constructed through relationships of power.<sup>99</sup> Radical feminists see sex, in both the biological sense of sex and the social sense of sexuality, as the locus of subordination;<sup>100</sup> MacKinnon states that “Sexuality is to feminism what work is to marxism[sic]: that which is most one’s own, yet most taken away.”<sup>101</sup>

While Jaggar criticizes the sharp distinction that some radical feminists make between sex and gender,<sup>102</sup> MacKinnon follows Jaggar theoretically in the sense that, like Jaggar, she does not claim that we can closely distinguish the biological from the social.<sup>103</sup> Mainly, MacKinnon believes that our social context gives meaning to biological sex. Additionally, Jaggar correctly characterizes radical feminists, contrary to Tong’s characterization of cultural

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<sup>98</sup> Iris Marion Young, *Justice and the Politics of Difference* (Princeton, N.J.: Princeton University Press, 1990).

<sup>99</sup> Alison M. Jaggar, *Feminist Politics and Human Nature*, Philosophy and Society Series (Totowa, NJ: Rowman & Allanheld, 1983), 102.

<sup>100</sup> *Ibid.*, 105.

<sup>101</sup> MacKinnon, *Toward a Feminist Theory of the State*, 3.

<sup>102</sup> Jaggar, *Feminist Politics and Human Nature*, 106–113.

<sup>103</sup> In fairness, Jaggar’s book was published before MacKinnon’s main theoretical work, *Toward a Feminist Theory of the State*, and MacKinnon cites Jaggar and Andrea Dworkin as influences (*Toward a Feminist Theory of the State*, xv). Thus, Jaggar’s criticism is understandable given the time when she was writing.

feminism, as rejecting both supposedly masculine and feminine qualities as products of patriarchy. Instead, radical feminism seeks to transcend patriarchal values.<sup>104</sup>

### **The Methodology of Radical Feminism**

Unlike feminist liberals, radical feminists have very few political commitments. Feminist liberals are liberals who apply their commitments to feminism, whereas other feminist theorists might be considered feminists who qualify their feminism with political ideologies (Marxism, socialism, and so on). On the other hand, radical feminism starts from a materialist standpoint for their analysis without necessarily adopting, or being hindered by, other particular political commitments.

Because radical feminism is “feminism unmodified,” as MacKinnon has described radical feminism, the goals of radical feminism are different than feminist liberalism or other feminist theories that conceptualize sexual subordination through their particular ideological lens. The only genuine political commitment of radical feminists is the complete liberation of all women from patriarchy; the only political goal of radical feminism is the destruction of sex-based oppression. In contrast, Abbey, in her discussion of prominent feminist liberals, argues that rather than being “thinkers [that] are feminists first who qualify their feminism with liberalism, as opposed to Marxist or socialist or radical qualifications”, feminist liberals are those for whom their “feminism is an extension of their liberalism.”<sup>105</sup> For feminist liberals, liberal commitments determine how they conceptualize the harm and wrong of subordination (e.g., what is problematic is that which is non-consensual), the ways in which they can address the

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<sup>104</sup> Jaggar, *Feminist Politics and Human Nature*, 252–253.

<sup>105</sup> Abbey, *Feminist Liberalism*, 8.

subordination of women (e.g., we cannot interfere in the private sphere), and the ultimate goal of feminism as a political project (e.g., liberal equality).

The commitments of radical feminism are very few. Instead, their commitments are limited to a materialist, social-structural methodology based most strongly in consciousness-raising and political activism. Within political philosophy, materialism is most often associated with the historical materialism of Karl Marx and refers to the idea that the true determinant of our social and political life are the material conditions of economic production rather than ideas.<sup>106</sup> The “materialism” of feminist materialism, however, has a broader connotation than the economic, as radical feminists acknowledge that women’s subordination is not reducible to (even though it is intersected by) the economic arrangements of any given society. Instead, the materialism refers to the concrete lived experiences of women.

Jaggar notes that historically liberalism has failed to acknowledge the importance of the body to politics, and thus has failed to provide a “politics of sex.”<sup>107</sup> The materialism of radical feminism, on the other hand, makes the politics of embodiment central to the political and social analysis of radical feminism. The particular and important insight of radical feminism has been the importance of embodiment, not simply in terms of the importance of physical violence as politically and socially relevant, but the special way in which women’s sexuality becomes the center of their oppression. Radical feminism fundamentally rejects the duality between body and mind that has been presupposed by the traditional liberal notion of rationality.<sup>108</sup>

Even more importantly, radical feminists claim that there is a unique relation between our personhood and sense of self, and indeed our social status as human beings, and our sexuality.

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<sup>106</sup> This, of course, is an oversimplification. For a more nuanced view, see Charles W. Mills, “Determination and Consciousness in Marx,” *Canadian Journal of Philosophy* 19, no. 3 (1989): 421–45.

<sup>107</sup> Jaggar, *Feminist Politics and Human Nature*, 186.

<sup>108</sup> *Ibid.*, 28–29.

Radical feminism gave a theoretical and political language through which women could articulate the central place that sexuality plays in their oppression, as well as the unique experience of sexual violence and sexual violation. Women's subordination is unique because men's violence against and domination of women is eroticized; it is not simply that women are primarily controlled and oppressed through sexual violence, but that the subjugation of women is sexualized.<sup>109</sup>

The broad materialism of radical and materialist feminism is thus a materialism that instead focuses on women's embodied and social experiences within patriarchy, without the distortion of abstractions to which philosophy is prone. As a result, their analysis of wrong and injustice will be materialist in the sense that it is based in women's concrete, embodied experiences of injury, pain, and degradation; and it will be social-structural in the sense that the theory and practice of radical feminism contextualizes these harms within an analysis of the social institutions, norms, and practices in a patriarchal society. The centering of embodiment within the materialist analysis is distinctive of feminist theory, which contrasts it with both traditional Marxism and liberalism.<sup>110</sup>

### *Consciousness-Raising as Methodology*

The feminist movement out of which the theory of radical feminism emerged was strongly based in consciousness-raising. As MacKinnon explains in *Toward a Feminist Theory of the State*, consciousness-raising is a political, not a theoretical, practice which emerged from the consciousness-raising groups of the women's liberation movement.<sup>111</sup> These groups were

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<sup>109</sup> Catherine A. Mackinnon, "Sexuality, Pornography, and Method: "Pleasure under Patriarchy," *Ethics* 99, no. 2 (1989): 314–46.

<sup>110</sup> Jaggar, *Feminist Politics and Human Nature*, 249–255.

<sup>111</sup> MacKinnon, *Toward a Feminist Theory of the State*, chap. 5. Consciousness Raising.

non-hierarchical and contained women from all races and economic classes, the purpose of which was to share their individual experiences as women with other women.<sup>112</sup> Through these groups, women came to the insight that the “personal is political”: that their individual experiences with men and social institutions were not simply their personal problem, but part of a large superstructure of violence and patriarchy.<sup>113</sup>

Consciousness-raising serves as the cornerstone for radical feminist theory in several ways. First and foremost, consciousness-raising provides the “raw material,” as it were, for explicating the ways in which women’s personal experiences of harm and violence are in fact the result of male social-sexual domination. Indeed, as others have argued (e.g., Schwartzman and Jaggar), the methodology and conceptual framework of liberalism is woefully inadequate to explicate or conceptualize the harms of patriarchy.<sup>114</sup>

Second, the methodology of consciousness-raising provides an epistemic advantage over the feminist liberal approach to the description of what constitutes a “harm” and issues of women’s “preferences” (the tensions that result from the deformation of women’s desires under patriarchy are described above). Feminist liberals, ultimately, have an epistemic problem of determining what constitutes a harm. The paradox emerges when they acknowledge that they cannot rely on women’s resistance to gender norms and practices in order to determine whether women are *actually* being harmed; because of their socialization into gender norms and the absence of institutional supports for respectful treatment, women will frequently not recognize when they are being harmed. Worse still, women will absorb messages about their inferiority and genuinely conform to their subjugation, especially given that there are (often severe)

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<sup>112</sup> Ibid., 84–85.

<sup>113</sup> Ibid., 95–103.

<sup>114</sup> Jaggar, *Feminist Politics and Human Nature*, 181–184, 355–358; Schwartzman, “Non-Ideal Theorizing, Social Groups, and Knowledge of Oppression.”

punishments for non-compliance. Radical feminists have a means of determining patriarchal harms that does not fall into this paradox through the transformative process of consciousness-raising; consciousness-raising helps to solve this epistemic problem by both acknowledging that patriarchy shapes our self-conceptions and providing a means of unveiling the subordination to the women themselves.<sup>115</sup>

One might argue that consciousness-raising is insufficient to distinguish radical feminism methodologically, since liberal feminists also argue for consciousness-raising as part of their feminist practice. How, then, is radical feminist consciousness different from feminist liberal consciousness-raising?

It is not necessary to argue that consciousness-raising is the only aspect that distinguishes radical feminist methodology and theory from feminist liberalism. It is also not necessary to deny that some feminist liberals consider it to be an important aspect of feminism (at least informally, in the “civil” sphere). To the extent that feminist liberalism incorporates consciousness-raising it is something that feminist liberals borrow from radical feminism (in both theory and practice), rather than emerging from feminist liberalism itself. Consciousness-raising serves a fundamentally different role within radical feminist theory as opposed to feminist liberalism. Consciousness-raising is not merely an optional addition: within radical feminist theory, consciousness-raising provides an alternate epistemology by which to conceptualize the social world. Consciousness-raising is not something that might be good for feminists to do—it is a necessary precondition for radical feminist theorizing.

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<sup>115</sup> “Feminism, through consciousness raising, has grasped the completeness of the incursion into who one really becomes through growing up female in a male-dominated society. This effect can be understood as a distortion of self. It is not only one’s current self one is understanding, but the self that understand what one has become *as* a distortion.” MacKinnon, *Toward a Feminist Theory of the State*, 103.

*Prioritization of Harm*

Radical feminism is a harm-based, rather than autonomy-based, conception of subordination. This is evident in their discourse; in their arguments against contentious issues such as prostitution and pornography radical feminists primarily discuss the harm and violence that women experience through these practices.<sup>116</sup> On the other hand, some feminist liberals argue that the only normatively or politically relevant harm is what violates someone's autonomy or that the preservation of "individual choice" or the "private sphere" is more important than protecting women and girls from harm (as described in the Introduction).

Radical feminists would understand harm to be an "objective"<sup>117</sup> phenomenon. While the subjective distress or non-consent of women is a critical part of feminist analysis and ethically and politically relevant, it is *only* subjective distress that factors into a discussion of actual harm. One might experience subjective distress and not be harmed, or one might not experience any ostensible subjective distress and yet be harmed. In keeping with a materialist focus that prioritizes women's lived and embodied experiences, harm refers to the experience of physical or psychological pain or degradation. Harm is thus defined by the concrete physical, emotional, or social experience of women.

For radical feminists, harm is not merely "subjective" in the sense that it is not necessarily determined by what the individual herself considers themselves to be harmed. The experience of pain is a subjective harm in the sense that it is experienced by the individual, and only by the individual. However, this is a somewhat trivial point, as all harm is subjective in this way (unless, of course, one believes that groups can be harmed; radical feminists would agree

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<sup>116</sup> Feminist critiques of pornography frequently address the harm that is inflicted upon women in its production and consumption, see MacKinnon, *Only Words*; Dines, *Pornography*.

<sup>117</sup> Objective is being here contrasted with the purely subjective, not objective in the sense of impartial or without a perspective.

that women are harmed as members of a group but not necessarily be committed to the metaphysical idea of groups accruing rights or experiences in the same way that an individual does).<sup>118</sup> However, harm is “objective” in the sense that there is a fact of the matter about whether someone has been harmed. There is a fact of the matter as to whether someone is actually in pain or has been injured, even though the experience is necessarily “subjective.” Additionally, harm is objective in the sense that one can feel that one has been harmed without having actually been harmed legitimately—for example, many men perceive women’s refusal to be completely submissive to be harmful. Women may also not believe that being abused is harmful because they do not feel entitled to minimally respectful treatment.

Some might think that there is a tension within radical feminist theory, because it appears their account of harm is a phenomenological one and at the same time claim that women may not experience something as a harm when it actually is a harm. However, this tension is purely superficial. When women are abused, they are, objectively, harmed and it is harmful to them. If a woman is physically assaulted, it is not as though she does not experience pain or injury. Instead, she may merely not view it as a harm *normatively* speaking, since she may believe that such assault is a “normal” part of relationships or that she deserves it, or even that she really enjoys it because she “chooses” it. Similarly, a man may experience distress at being refused sexual access, and consider *it?* a normative harm (since he is being denied that to which he feels entitled) but is not harmed.

This is, of course, somewhat complicated by how victims react in a traumatic situation. Victims of trauma may adapt to their abusive circumstance, even to the point of “craving” the abuse, or they may dissociate or become numb to the abuse, or they may rationalize and defend

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<sup>118</sup> Catharine A. MacKinnon, “‘The Case’ Responds,” *American Political Science Review* 95, no. 3 (September 2011): 709–11.

the abuser (even vociferously), or they may repress memories or experiences of the abuse in order to psychologically survive the situation.<sup>119</sup> If victims of abuse are able to process their trauma, they may experience different reactions to their abuse during the healing process, such as numbness, extreme distress, anger, or grief (once again, their subjective distress might change). However, this in itself does not generate a tension, since there is still a fact of the matter as to whether they have been harmed.

This understanding of harm as the concrete experience of women is not something entirely new to feminist liberalism. Cudd, for example, defines oppression as “an institutionally structured, unjust harm perpetrated on groups by other groups through direct and indirect material and psychological forces.”<sup>120</sup> The notion of harm that Cudd employs is never fully defined, but is merely presupposed. Presumably, when Cudd is invoking the concept of harm she has in mind something similar to what radical feminists have in mind, for example, something which causes women pain, injury, trauma, or distress.<sup>121</sup>

### *Anti-Individualism*

Importantly for feminism, the experience of harm must also necessarily be contextualized within an analysis of the social structures and institutions. Radical feminism cannot focus simply on harm to women as individual persons but harm (or injustice) to women as women.

MacKinnon describes how the methodological framework of Marxism helped to provide the starting points for feminist analysis:

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<sup>119</sup> Jeanne Sarson and Linda McDonald, “Torturing by Non-State Actors Invisibilized, A Patriarchal Divide and Spillover Violence from the Military Sphere into the Domestic Sphere,” *Peace Studies Journal* 2, no. 2 (Winter 2009): 16–38.

<sup>120</sup> Ann E. Cudd, *Analyzing Oppression*, Studies in Feminist Philosophy (New York: Oxford University Press, 2006), 28.

<sup>121</sup> Cudd provides examples of “indirect” psychological harms such as shame and low self-esteem, false consciousness, and deformed desires. *Ibid.*, 176–184.

Marxism is its [MacKinnon's feminist theory] point of departure because Marxism is the contemporary theoretical tradition that—whatever its limitations—confronts organized social dominance, analyzes it in dynamic rather than static terms, identifies social forces that systematically shape social imperatives, and seeks to explain human freedom both within and against history. It confronts class, which is real. It offers both a critique of the inevitability and inner coherence of social injustice and a theory of the necessity and possibilities of change.”<sup>122</sup>

For radical feminists, feminist analysis cannot occur on the level of individual experiences.

While individual experiences provide the “raw material” out of which the feminist analysis is constructed, analysis can never stop at the individual experiences. Just like in Marxist analysis, the analysis must take into account the ways in which the basic social institutions and practices of society (law, social norms around sexuality, language, education, and so on) systematically and systemically subordinate women *as a class* by men *as a class*.

In order to illustrate this approach, feminist scholar Marilyn Frye discussed the difference between suffering and oppression. She uses the example of a wealthy white male who is injured in a skiing accident.<sup>123</sup> Although the man might suffer because of his injured leg, he is taken to a good hospital, attended to by doctors, and will gain sympathy for his injury.<sup>124</sup> The suffering in itself is not sufficient to claim oppression; it is how this suffering is produced, reinforced, and responded to by social institutions, practices, and norms.<sup>125</sup> Take, in contrast, a woman who is suffering from endometriosis. Unlike the wealthy white male, doctors are unlikely to take her pain seriously (leading to a lack of treatment for her pain). While women are the majority of suffers of chronic pain, they are also unlikely to receive proper treatment.<sup>126</sup> Rather than

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<sup>122</sup> MacKinnon, *Toward a Feminist Theory of the State*, ix.

<sup>123</sup> Frye, *The Politics of Reality*, 11.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*, 11–14.

<sup>126</sup> This includes, for example, the likelihood that women will be provided with sedatives rather than pain medication. Karen L. Calderone, “The Influence of Gender on the Frequency of Pain and Sedative Medication Administered to Postoperative Patients,” *Sex Roles* 23, no. 11–12 (December 1, 1990): 713–25.

examining physical causes for their pain, doctors generally dismiss, invalidate, and mock women's pain (the modern day equivalent of dismissing women's concerns as "hysteria") and, unsurprisingly, fail to properly treat women's pain.<sup>127</sup> A man who shatters his leg might suffer a similar degree of pain as a woman suffering through an hour of menstrual cramps; however, the social responses to their pain (and the cause of their pain) affirms the man's humanity (and alleviates his suffering) while the social response to a woman's expression of pain is to cause her further suffering and trauma while failing to provide her with proper treatment.

Similarly, the mere experience of constraints or distress is not in itself oppression. Frye provides the famous metaphor of the birdcage; taken individually, the constraints may not seem to be hindrances.<sup>128</sup> Seeing the problems in terms of an individual experience, or divorced from the larger social context, one might only see the wires of the cage. However, taken collectively, one can see the how the intersecting wires of the cage serve to trap the members of an oppressed group.<sup>129</sup> The mere presence of constraints or disadvantage is not itself sufficient to claim oppression; as Frye illustrates, "The physical walls of a prison no more dissolve to let an outsider in than to let an insider out, but for the insider they are confining and limiting while to the outsider they may mean protection from what s/he takes to be threats posed by insiders."<sup>130</sup> Similarly, while non-conformity to masculine gender roles can result in social sanctions and disadvantage (e.g., bullying), conformity to masculinity provides men with the privilege of assuming social-sexual dominance over women.<sup>131</sup>

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<sup>127</sup> Hoffmann, Diane E. and Tarzian, Anita J., "The Girl Who Cried Pain: A Bias Against Women in the Treatment of Pain," *Journal of Law, Medicine & Ethics* 29, (2001), 13-27.

<sup>128</sup> Frye, *The Politics of Reality*, 4.

<sup>129</sup> *Ibid.*, 4-10.

<sup>130</sup> *Ibid.*, 12.

<sup>131</sup> *Ibid.*, 13.

In contrast, women are in a double-bind; women who fail to perform femininity or adhere to the feminine role (of wife, mother, nurturer, and sex object) are socially punished at various degrees of severity, from mockery to sometimes fatal physical violence. But conforming to the feminine role requires pain and self-sacrifice that maintains women in a subordinate position vis-à-vis men:

Consider, by comparison, the discipline of women's cramped physical postures and attenuated stride [...] Like men's emotional restraint, women's physical restraint is required by men. But unlike the case of men's emotional restraint, women's physical restraint is not rewarded. What do we get for it? Respect and esteem and acceptance? No. They mock us and parody our mincing steps. We look silly, incompetent, weak, and generally contemptible. Our exercise of this discipline tends to low esteem and to low self-esteem. It does not benefit us. It fits in a network of behaviors through which we constantly announce to others our membership in a lower caste and our unwillingness and/or inability to defend our bodily or moral integrity.<sup>132</sup>

Frye's perspicacious observation seems to be borne out by more recent sociological research; while women who are conventionally unattractive are denigrated in a society where women's worth is predicated upon how appealing they are to men, conventionally attractive women are considered less competent in male-dominated professions.<sup>133</sup>

Because radical feminists have a social-structural material analysis, radical feminists reject both descriptive and normative individualism. Descriptive individualism is the idea that human beings are atomistic, autonomous individuals.<sup>134</sup> Normative individualism, on the other hand, is the idea that the main object of moral and political concern is the individual.<sup>135</sup>

Feminist liberals can reject descriptive individualism and still endorse *normative* individualism; they can agree that humans are interdependent beings that are strongly influenced

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<sup>132</sup> Ibid., 15.

<sup>133</sup> Hartley and Watson, "Is a Feminist Political Liberalism Possible?," 9.

<sup>134</sup> Abbey, *Feminist Liberalism*, 214.

<sup>135</sup> Ibid., 215.

by their social context, while arguing that the individual is the primary object of our moral concern.<sup>136</sup> Even when the political or ethical claims of an individual might be tied to her membership in a social group (an ethnic or cultural minority, for example), the primary object of moral concern and the primary bearer of political and moral rights is the individual.<sup>137</sup> Cudd, for example, analyzes oppression in a way that takes into account that individuals are oppressed on the basis of their group membership without ascribing any special metaphysical or moral significance to groups themselves.<sup>138</sup>

For the purposes of this dissertation, it is not critically important whether one subscribes to normative individualism. As stated earlier in the Introduction, many of these arguments apply to the claims liberals make about consent and harm generally. Nonetheless, there are important differences in the radical feminist approach as opposed to the feminist liberal approach.

Although radical feminists do not deny the importance of women as individuals, the primary object of political intervention is women as a class who are collectively oppressed by men as a class. Seeing individual women as the target of political interventions thus fails to address the core problem, which is the subordination of women as women. For example, MacKinnon has this to say about sex discrimination:

To empower women to bring civil claims for sex discrimination, as my work on sexual harassment and pornography does, is not to treat them as liberalism's "individuals"—quite the contrary. Both sexual harassment and pornography are sex discrimination claims; sex discrimination is a group-based claim. Women who sue one at a time for sex discrimination are suing for harm to them as women, not for harm to them as individuals.<sup>139</sup>

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<sup>136</sup> Ibid., 214–217.

<sup>137</sup> This, of course, has become complicated with the introduction of the idea of groups rights as such, usually used to justify infringements upon the rights of children and women (for example, arranged marriages which would otherwise conflict with anti-trafficking and child sexual abuse laws). However, insofar as liberals are consistent with their liberalism, they nonetheless cannot justify these practices without either contradiction or an argument as to why “group rights” trump individual liberties.

<sup>138</sup> Cudd, *Analyzing Oppression*.

<sup>139</sup> MacKinnon, “‘The Case’ Responds,” 710.

Thus, the way in which we should both conceptualize and address injustice necessarily needs to move away from individualism to an acknowledgment of the harms to women as a class.

To deny normative individualism is not to argue for collectivism.<sup>140</sup> Theorists such as Young, Jaggar, and Schwartzman argue that it would be wrong to presuppose that our only options are normative individualism or collectivism (in which the group is taken as the primary locus of moral and political concern).<sup>141</sup> It is outside the scope of this dissertation to argue against normative individualism, as the arguments in this dissertation do not necessarily hinge on this refutation. It is sufficient to say that normative individualism does not help in analyzing women's oppression, and is a possible hindrance to it (which is why radical feminists, whose sole purpose is understanding and eliminating patriarchal oppression, are not committed to normative or metaphysical individualism). For example, Cudd in her book *Analyzing Oppression* makes the puzzling statement that men are not always "oppressors" but can be "privileged non-oppressors."<sup>142</sup> Cudd appears to claim that men who do not actively perpetuate oppression<sup>143</sup> are privileged non-oppressors rather than oppressors. This is puzzling, because it seems to undermine the idea that women are oppressed as a group and that men benefit from the oppression of women as a group.<sup>144</sup>

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<sup>140</sup> Schwartzman, "Non-Ideal Theorizing, Social Groups, and Knowledge of Oppression," 181.

<sup>141</sup> Young, *Justice and the Politics of Difference*; Jaggar, *Feminist Politics and Human Nature*.

<sup>142</sup> Cudd, *Analyzing Oppression*, 196.

<sup>143</sup> It would also be unlikely that there are actually any men who can claim to be privileged non-oppressors, as men by virtue of their socialization often unconsciously perpetrate sex-based harm against women.

<sup>144</sup> I am here presupposing that women constitute a class by virtue of their shared oppression under patriarchy. There are many feminists who would dispute the idea that women constitute a class by virtue of different intersecting axes of oppression in addition to sex-based oppression. Others dispute the whole category of biological sex as the basis for oppression. Some authors dispute the notion of women as a class, see for example, Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, 10th anniversary ed (New York: Routledge, 1999); Linda Alcoff et al., eds., *Identity Politics Reconsidered*, 1st ed., *The Future of Minority Studies* (New York, NY: Palgrave Macmillan, 2006). Note, however, that an intersectional analysis does not require that one denies the idea that women are a class by virtue of suffering sex-based oppression. See Kimberle Crenshaw, "Mapping the Margins:

## Radical Feminism on Sexuality and Gender

### *Sexual Exploitation*

One of the many insights of radical feminism was that women's sexuality under patriarchy is objectified, alienated, and exploited just as labor is objectified, alienated, and exploited under capitalism.<sup>145</sup> The dynamic works in similar ways; men use their greater social power to force women to exchange use of their bodies (sexually and reproductively) in order for women to materially survive. The "purest" example of this exploitation is the prostituting of women who are unable to provide for themselves materially except through selling sexual services to men.<sup>146</sup> However, radical feminists such as MacKinnon explain that this sexual exploitation is not purely economic in nature, but also social and emotional; the power that men wield in order to exploit women is not simply through their greater economic advantages (which is certainly the case), but through our social norms and practices. Women's very identities as well as social survival are also dependent upon servicing men; women who fail to comply are subject to various forms of social sanction ranging from negative stereotypes (e.g., spinster, prude, etc.) to violence and death (e.g., corrective rape of lesbians).<sup>147</sup>

### *Gender as Oppression*

Among the most important revelations of radical feminist methodology is the centrality of sexuality in the construction of "woman" as a gender, where women's social-sexual subordination and what it means to be gendered as a woman are inseparable. Through feminist analysis, we can recognize gender and sexuality as social constructions. Many feminist liberals

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Intersectionality, Identity Politics, and Violence Against Women of Color," *Stanford Law Review* 43, no. 6 (July 1991), 1241-1299, and MacKinnon, *Toward a Feminist Theory of the State*.

<sup>145</sup> MacKinnon, *Toward a Feminist Theory of the State*, 3.

<sup>146</sup> *Ibid.*, chap. Sexuality.

<sup>147</sup> *Ibid.*

agree that gender is constructed, but where MacKinnon and many (if not all) liberals part ways is that MacKinnon sees the social construction of gender as inseparable from the social construction of sexuality and our gender and sexual identities are fundamentally socially structured through dominance and submission.

Sexuality both grounds our identity as men and women and, at the same time, is the primary means by which gender is enforced as women's subordination through sexual assault, rape, sexual harassment, pornography, and prostitution, among the other ways in which women are treated as objects to be used.<sup>148</sup> A radical feminist analysis of gender is not that gender is mere "difference." The difference approach to inequality takes sex as a morally irrelevant category when it comes to equal opportunity.<sup>149</sup> However, to interpret the problem of women's oppression as attributing certain rights or privileges on the basis of sex is to misinterpret the more fundamental root of women's oppression, and that is "the relations of domination and exploitation of sexuality that both oppress and define women."<sup>150</sup> Gender is seen by radical feminists not as merely a "social identity" that arises from a pluralistic society and thus must be protected by anti-discrimination laws, but a social construction that serves as the ground and reification of relationships of domination and subordination.<sup>151</sup> Gender socially constructs the dominant class (men) and the subordinate class (women) for the purposes of creating and maintaining male social-sexual domination of women. Gender is unjust not because it gives social significance to morally irrelevant facts (e.g., the fact that some people have female

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<sup>148</sup> That is, as sex objects or reproductive vessels, to which society is trying to deny reproductive rights like abortion, and so forth.

<sup>149</sup> MacKinnon, *Toward a Feminist Theory of the State*, chap. Sex Equality: On Difference and Dominance.

<sup>150</sup> Anthony Simon Laden, "Radical Liberals, Reasonable Feminists," in *Feminist Interpretations of John Rawls*, ed. Ruth Abbey, Re-Reading the Canon (University Park, PA: Pennsylvania State University Press, 2013), 27.

<sup>151</sup> MacKinnon, *Toward a Feminist Theory of the State*, chap. Sex Equality: On Difference and Dominance.

genitalia); the social category of gender itself is unjust because it is constituted by and constitutive of unequal power relations between males and females.<sup>152</sup>

In order to illustrate the analysis of gender, one can make the analogy to race. Some critical race theorists (e.g., Charles Mills)<sup>153</sup> understand the social ontology of race to be constructed by white supremacy; what it is to be white under a system of racial subordination is to be a member of the dominant class. Racial subordination works not simply through a devaluing of perceived differences among people, but through the construction of social categories that create a system in which some people are defined as members of a subordinate class and some people are defined as members of a dominant class. In a similar way that people working for racial liberation might call for the abolition of “race” as a social category—that is, the abolition of social categories which are necessary for the construction of dominant and subordinate social castes—radical feminists call for the abolition of gender. However, there is a crucial difference between race and gender; unlike race, which may involve cultural elements (language, traditions, and so on) there is no “remainder” to be preserved post-liberation. There is nothing else to gender besides the violent imposition of sex roles and socialization into subjugation.

### Conclusion

One does not need to adopt all tenets of radical feminist theory—such as the rejection of normative individualism—for the arguments in this dissertation to gain traction. Indeed, many of the tenets of radical feminism, such as its focus on embodiment and its social and materialist analysis, have been adopted by many feminist liberals. However, adopting elements of radical

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<sup>152</sup> Laden, “Radical Liberals, Reasonable Feminists,” 113.

<sup>153</sup> Charles W. Mills, *The Racial Contract* (Ithaca, NY: Cornell University Press, 1997).

feminist analysis comes at a cost to feminist liberals; it makes the tensions between their feminist commitments and their liberal commitments stronger. In the following chapters, I will be examining in greater depth some of the specific claims about consent which some feminist liberals employ, and I will demonstrate how these claims are problematic.

### Chapter 3: Consent, Deception, Manipulation, and Coercion

#### Introduction

Those who argue that consent is able to justify an ethical or political relationship, practice, or institution (that is, to give consent normative power) agree that coercion, manipulation, and deception vitiate consent. Even the most strident libertarian believes that giving one's wallet to an armed robber does not qualify as *legitimate* consent; that is, consent that makes the interaction ethically permissible. The difference between theorists is not whether coercion, manipulation, and deception vitiate consent, but what types of coercion, manipulation, and deception (and to what degree) vitiate consent. Most would agree that some forms of physical coercion are impermissible; some would also agree that some forms of psychological coercion are impermissible. In this chapter, I will argue that the presence of systematic coercion, manipulation, and deception in a patriarchal society counts against using consent to justify political or ethical relations.

Recall from the introductory chapter that one potential approach to harm is to claim that harm itself is normatively irrelevant. While I claim that this approach should be rejected completely, this chapter will provide arguments as to why even those who take the approach that harm as such is unimportant will still face problems when they use consent to determine injustice and to justify conditions of substantive inequality.

#### Deception and Manipulation

"Informed consent" has traction as a concept because it is generally considered a necessary precondition of consent that one know to what one is consenting. Similarly, most philosophers agree that one's consent is not legitimate when one is deceived or otherwise

manipulated into consent. Importantly, this relates to feminism because patriarchal institutions, practices, and norms involve significant deception and manipulation of women. Insofar as women and girls are subject to extensive manipulation or deception, the legitimacy of using “consent” to justify these conditions should be called into question.

Some liberals might argue that the presence of mere misinformation is itself not problematic for the prioritization of autonomy; affording citizens certain freedoms, such as freedom of speech, requires that society tolerates the presence of misinformation or outright lies in public discourse. It would be illegitimate—so that classical argument of liberalism goes—to keep people from ideas that we know to be false “for their own good.”<sup>154</sup> This, in fact, might be true. However, and importantly, this presupposes that people are in a position to critically evaluate and decide for themselves, and that these falsehoods are merely one of many perspectives.

But the deception and manipulation which women experience under patriarchy are not comparable to the type of falsehoods that might permeate the public sphere as a result of people’s individual “freedom of speech” or freedom of thought. Instead, these are systematic social norms, practices, and institutions that shape our social world. Unlike a mere opinion or personal expression, deceptive patriarchal narratives are distinguished in several ways: they are embedded within our social and cultural norms; they are accompanied by systematic manipulation or coercion; and they systematically disadvantage women.

In order to illustrate a deceptive patriarchal narrative, one can look at the cultural imperative for women to marry and have children. The traditional cultural narrative is that

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<sup>154</sup> Mill, *On Liberty*.

women are not fulfilled unless they are married and have children.<sup>155</sup> Historically, this has been accompanied by the fact that women had little choice as to whether they married and had children. In spite of some changes, the idea that motherhood (specifically, giving birth to one's own biological children) is still considered, if not a woman's only purpose in life, then a very important one.

Why is this patriarchal narrative deceptive? There are two levels of deception. The first is that parenthood is both stressful and tends to negatively impact happiness.<sup>156</sup> The stresses and disadvantages of parenthood overwhelmingly affect women, who still do the majority of housework and childcare.<sup>157</sup> Though women might have more freedom than previously to elect to not have children (even though this freedom is constantly, and not accidentally, eroded by attempts to deny women access to contraception and abortion), women face immense social pressures to marry and have children. This manipulation begins in childhood, in which young girls are groomed (that is, systematically manipulated into accepting a practice to which they may have initial resistance or fear) into motherhood and domesticity. Girls are given toys which reflect their future expected social role; baby dolls and doll houses, baking sets and cleaning tools. As they grow older, they continue to face intense social pressures to reproduce. Parents pestering and pressuring their daughters into "giving them grandchildren" is ubiquitous to the point of being a cliché.

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<sup>155</sup> It is important to note that this narrative has its racial elements as well; while white, middle-class or wealthy women are encouraged to marry and have children, many racial minorities are stigmatized for having children or even forcibly sterilized.

<sup>156</sup> Richard P. Eibach and Steven E. Mock, "Idealizing Parenthood to Rationalize Parental Investments," *Psychological Science*, January 1, 2011; Rachel Margolis and Mikko Myrskylä, "Parental Well-Being Surrounding First Birth as a Determinant of Further Parity Progression," *Demography* 52, no. 4 (August 1, 2015): 1147–66.

<sup>157</sup> Melissa A. Milkie, Sara B. Raley, and Suzanne M. Bianchi, "Taking on the Second Shift: Time Allocations and Time Pressures of U.S. Parents with Preschoolers," *Social Forces* 88, no. 2 (February 7, 2010): 487–517.

The presence of deception and manipulation is reason enough in itself to question the legitimacy of someone giving consent. In a patriarchal context, the reason for this deception and manipulation is to maintain women in a situation of subordination. The psychological and physical harms of bearing children, for obvious reasons, only accrue to women. At the same time, women are also socially disadvantaged for having children; in addition to having responsibility for childcare, women who have children may face additional barriers to leaving abusive relationships because of economic dependence on men. Women who are employed face additional discrimination and disadvantages in the workplace,<sup>158</sup> while being a parent has a positive impact on men's career.<sup>159</sup>

One might argue that a liberal society does not have the obligation to inform citizens of the potential benefits or risks of all the decisions that they may make; after all, the risk of a free society is that individuals are exposed to potentially false or misleading information, and they may be persuaded by this information to lead a certain type of life that may cause them harm (even serious harm). As Phillips puts it, "Anyone who lives in the world (that is, everyone) is subject to pressures and constraints, but precisely because this is true of everyone, it makes no sense to try to disentangle the things we "really" want from those we were coerced to do."<sup>160</sup> Phillips notes that if one takes this view seriously, one is left with an understanding of freedom

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<sup>158</sup> Michelle J. Budig, "Gender, Self-Employment, and Earnings: The Interlocking Structures of Family and Professional Status," *Gender and Society* 20, no. 6 (2006): 725–53.

<sup>159</sup> Melissa J. Hodges and Michelle J. Budig, "Who Gets the Daddy Bonus? Organizational Hegemonic Masculinity and the Impact of Fatherhood on Earnings," *Gender and Society* 24, no. 6 (2010): 717–45.

<sup>160</sup> Anne Phillips, "Free to Decide for Oneself," in *Illusion of Consent: Engaging with Carole Pateman*, ed. Daniel I. O'Neill, Mary Lyndon Shanley, and Iris Marion Young (University Park, PA: Pennsylvania State University Press, 2008), 99–118.

that is thinly defined as a lack of physical restraint—a very unsatisfying view for many liberals.<sup>161</sup>

There are several ways one can object to the claim that deception and manipulation must be tolerated for the sake of individual freedom. The first is that it is not uncommon for liberals to advocate some form of “informed” consent, particularly when it comes to issues that may cause physical harm. Doctors are required—morally if not legally—to provide informed consent to their patients. Deception and manipulation is also something which liberal societies sometimes regulate; in the United State, alcohol and tobacco companies are required to put warnings on their products and are prohibited from advertising to children. Even in “private” and interpersonal interactions, the state has reason to interfere when there is deception and manipulation; at least some feminist liberals might agree that deceiving or manipulating a woman into sex should constitute a form of (legally actionable) sexual violence. At a deeper level, the objection itself relies implicitly upon the public and private divide (the private being the sphere of individual choice, where it would be impermissible for the state to regulate speech). But in contesting the legitimacy of consent, one contests precisely the basis for the public/private divide which supposedly protects the type of manipulation and deception which I am critiquing.

### Social Coercion and Moral Psychology

In order to claim that consent can make permissible certain relations, practices, or institutions that might otherwise be considered harmful or ethically problematic, one must make certain presuppositions about the moral psychology of the individual who is consenting. In this section, I will focus on one aspect of this moral psychology. Since the legitimacy of an

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<sup>161</sup> Phillips argues, as I do in this dissertation, that ultimately these concerns about the difference between “coerced” and “free” can only be resolved by looking at the nature of the relationship, practice, or institution itself. *Ibid.*, 101.

individual's consent is vitiated by coercion, one must presuppose that the individual giving the consent is not being coerced. The fact of social influence and coercion is clearly a problem with feminist liberal accounts of autonomy and individual choice, as evidenced by the way in which they struggle with the (acknowledged) phenomenon of adaptive preferences and the social shaping of our desires and identities.

The problem with this assumption is that humans are very easily coerced. To use one famous, or infamous example, the Stanley Milgram experiment demonstrated that it was relatively easy to get what would be considered psychologically normal men to torture and even murder a stranger. Part of the "success" of the experiment, as it were, was that the experiment was conducted by people who were taken to represent institutional authority (scientists at an academic institution). In fact the experimenters did not need to provide anything more than gentle prodding in order to get the participants to comply with their demands.<sup>162</sup> Psychologists and sociologists have demonstrated multiple times that human beings are highly susceptible to social coercion, and it is perhaps no wonder given our sociality. Some research indicates that being ostracized from social groups can activate the same area of the brain as physical pain and may increase the proclivity to obey in order to gain social acceptance.<sup>163</sup>

If it is so easy for human beings to be coerced into actively engaging in atrocious behavior against someone else, one might expect that it is even easier for someone passively to endure poor treatment. Vicious hazing rituals are common within fraternities, sports teams, and military units. Even those that one would expect to have a sense of entitlement to respectful

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<sup>162</sup> Stanley Milgram. *Obedience to Authority: An Experimental View*. (New York: Harper and Row, 1974).

<sup>163</sup> Kipling D. Williams and Steve A. Nida, "Ostracism: Consequences and Coping," *Current Directions in Psychological Science* 20, no. 2 (2011): 71–75.

treatment from others (white, heterosexual, middle class males) are still susceptible to social coercion.

Related to the first aspect of our psychology, it is inherently difficult for people to say no. Requiring someone to say no puts an emotional and social burden on the person who is supposedly doing the consenting. This is one reason why feminists have argued against standards of consent which take a woman's lack of active resistance as evidence of her consent. Affirmative consent standards are, in some ways, attempts to account for the fact that refusal—particularly when one is in a vulnerable position or one is subject to social or institutional pressures—is difficult and burdensome.

The problems that I have explicated here seem to only be problems when one is addressing practical (actual) consent (rather than hypothetical consent or a substantive view of autonomy). In addition, it also seems that these problems can be mitigated by requiring an affirmative standard of consent rather than a standard of consent that presumes consent is represented by lack of active resistance.

But there is still an ambiguity between the role that practical consent is playing—and the standards which should govern how practical consent can make an interaction permissible—and other possible forms of consent. This problem has been discussed previously in the Introduction. While one could use hypothetical consent or substantive autonomy to judge the legitimacy of practical consent, it seems that it would still be necessary for liberals to take into account the actual moral psychology of individuals because the issues with which I am concerned are issues of practical consent.

In addition, it appears as though a standard of “lack of active resistance” is the standard that some liberal theorists end up employing. Chambers explains that the use of “freedom of exit” as a standard of consent presupposes that consent is a lack of active resistance:

The idea [freedom of exit] states that certain sorts of inequality which would otherwise be unjust become just if the individuals concerned are able to leave the group or social arrangement responsible for the inequality. If they remain within the group, they are assumed to have consented to or chosen the inequality[...] Its [freedom of exit] key problem is that even an account such as Friedman’s cannot escape the fact that cultural practices are inevitably reinforced by the sorts of social norms that undermine an individual’s ability to make the sort of “free” choice that justice would require.<sup>164</sup>

A lack of resistance should not indicate consent, particularly when the ability to protest the relationship, practice, or institution is undermined by one’s participation in the relationship, practice, or institution itself.<sup>165</sup> At a deep level women are deprived of the capacity to resist; both in the fact that they are subject to various forms of punishment (from physical violence to social sanction) for resisting, but also they are socialized into believing they do not deserve respectful treatment in the first place.<sup>166</sup>

Thus, for example, Baehr ironically argues for an “autonomy” based feminism that would nonetheless prevent legal measures such as ensuring that women are entitled to half of their male partners’ income (a proposal initially proposed by Okin).<sup>167</sup> This is ironic because this would mean that a legal form of marriage would be imposed upon all women—regardless of whether they actually endorse the idea that women should be subordinate to and economically dependent

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<sup>164</sup> Chambers, *Sex, Culture, and Justice*, 10.

<sup>165</sup> Chambers extensively critiques “freedom of exit” precisely for the reason that it is untenable in circumstances where adherence to the group norms undermines the ability of the individual to exit. Chambers proposes that instead of focusing on “freedom of exit”—which does not fundamentally address the ways in which the individuals’ autonomy may be impacted—liberal societies institute equality tribunals. *Ibid.*, chap. All Must Have Prizes.

<sup>166</sup> “Few women are in a position to refuse unwanted sexual initiatives. That consent rather than nonmutuality is the line between rape and intercourse further exposes the inequality in normal social expectations. So does the substantial amount of male force allowed in the focus on woman’s resistance, resistance that tends to be disabled by women’s socialization into passivity.” MacKinnon, *Toward a Feminist Theory of the State*, 112.

<sup>167</sup> Baehr, “Liberal Feminism: Comprehensive and Political,” 163.

upon men—that systematically disadvantages women because of men’s greater material resources. A form of marriage in which women do not have equal rights to the household income would effectively reinforce a condition in which women’s “freedom to exit” a marriage (even an exploitative or abusive one) is severely curtailed because of the threat of destitution. This is especially the case for women in “traditional” marriages in which women do not earn any income of their own. Yet the rationale for preserving this type of marriage is because it is necessary for women to be “living lives that are good by their own lights.”<sup>168</sup> The fact that women do not leave a relationship is considered evidence of the fact that it is something to which they “consent” and thus something which must be protected, and yet the preservation of the relationship (e.g., “traditional marriage”) itself is precisely what makes it difficult for them to leave.

As writers such as Pateman and Phillips have explained, the fact that someone may “voluntarily” enter into a relationship initially does not necessarily mean that they are as just free to exit the relationship or that the relationship is non-abusive.<sup>169</sup> As Chambers explains, “Compliance with norms does not, then, necessarily indicate consent, and dissent does not necessarily enable disobedience.”<sup>170</sup> Instead, one must look toward the social, material, and structural barriers that people face:

One must look at the barrier or force and answer certain questions about it. Who constructs and maintains it? Whose interests are served by its existence? [...] Various forces, barriers, and limitations a person may encounter or live with may be part of an oppressive structure or not, and if they are, that person may be on either the oppressed or the oppressor side of it. *One cannot tell which by how loudly or how little the person complains.* [emphasis mine]<sup>171</sup>

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<sup>168</sup> Ibid.

<sup>169</sup> Phillips, “Free to Decide for Oneself.”

<sup>170</sup> Chambers, *Sex, Culture, and Justice*, 43.

<sup>171</sup> Frye, *The Politics of Reality*, 14.

The mistake would be to presume, or to rely, upon the dissent of the oppressed in order to define oppression—particularly when the social-material bases for contesting such treatment are systematically undermined.<sup>172</sup>

### Collective Unfreedom

While human beings are highly susceptible to social coercion, coercion takes on an entirely different dimension when it becomes integrated into our social structures, institutions, practices, and norms. Social-structural coercion does not require that the individual feels coerced or is subject to direct physical coercion or threats by any particular person. Instead, coercion exists at the level of their membership in the group and, while perhaps not directly individually experienced, is inescapable by virtue of the social conditions in which the individual lives.

Part of the inadequacy of an individualist methodology is that it fails to capture the way in which our social norms, practices, and institutions provide the conditions of our choice. Insofar as one presupposes individualism, one abstracts away from social-structural inequalities because it makes the individual the locus of ethical or political evaluation.<sup>173</sup> If one looks only at the individual, one might see an employer and worker making a contract. By all accounts, it appears that it is a completely free choice; there is no physical force, there is explicit and active consent (the worker is actively seeking out the job), and informed consent (the worker knows what the job will entail). The worker, if he does not like his job, has the opportunity to seek employment elsewhere—no one can force him to stay at his job if he does not like it. However, employers, insofar as they possess the material wealth in society, are in the position to dictate

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<sup>172</sup> The epistemological and social barriers to recognizing harm as such will be discussed in greater detail in the next chapter.

<sup>173</sup> Lisa H. Schwartzman, *Challenging Liberalism: Feminism as Political Critique* (University Park, PA: Pennsylvania State University Press, 2006).

terms. In the absence of other social and legal constraints, the worker must accept the terms of the employment contract.

Looking merely at the individual and his consent thus does not adequately capture the way in which coercion operates on a social level. G.A. Cohen uses the metaphor of a number of people trapped in a prison cell. While one or a few people might be able to exit the jail cell, the nature of the prison is such that not all prisoners can exit the jail cell.<sup>174</sup> Even though, as an individual, any particular prisoner might be free to exit the prison, the prisoners are “collectively unfree” because they cannot all exit the prison.<sup>175</sup>

Instead of looking at the individual case of women who *might* (though without any guarantee) escape the worst aspects of male violence and exploitation, or even come into participate in it themselves (e.g., female brothel owners), MacKinnon and Pateman argue that one must take into account the way in which women are subordinated as a class. This goes beyond what liberals might recognize as subordination: overt discrimination, failure to pay equal wages for equal work, or unequal legal protections. Instead, it is embedded deeply into the structure of our legal, social, and cultural norms, something that mainstream media and liberals have come to acknowledge, at least partially, through the idea of “rape culture.” Women are materially vulnerable through lower socio-economic status and subjected (in both public and private) to sexual or physical violence, while this material condition is socially reinforced through cultural norms which normalize and promote men’s abuse, exploitation, and subjugation of women.

Structural coercion is part of the analysis of theorists such as MacKinnon and Pateman on sexual exploitation and prostitution. Like the worker in capitalist society, women are forced to

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<sup>174</sup> G. A. Cohen, “The Structure of Proletarian Unfreedom,” *Philosophy & Public Affairs* 12, no. 1 (1983), 9.

<sup>175</sup> *Ibid.*, 11.

exchange the sexual reproductive use of their bodies for both their material and social survival. These practices include marriage, prostitution, and surrogacy. This does not require the institution of marriage as effective enslavement of women and commodification of women and girls as property of men (although that is still part of our current norms, practices, and institutions). It does not require that a woman be the property of a single man (something which feminist liberals might acknowledge as problematic, in their critiques of “conservative” or “traditional” gender roles). The process that enables the sexual exploitation of women, on both the individual and collective scale, is the social structures, institutions, practices, and norms of a patriarchal society.

This is why the individual “choice” of a woman to enter prostitution only appears as a “choice” when completely abstracted from the large-scale structures of coercion to which women are subject; the economic vulnerability of women; the trafficking of women through the demand for the sex industry (almost exclusively by men); the sexual abuse of children which often leads girls to run away from home and enter prostitution; the coercion and manipulation of young girls by family members or male partners who become their pimps and traffickers; disability, immigration, and global poverty; as well as social norms which assert that women’s sole purpose is to please men and men’s sexual entitlement to women and girls.<sup>176</sup>

There are multiple aspects which constitute the sort of structural coercion that radical feminists have discussed. The first is a material aspect, where men have greater material resources than women and, because they are in control of the material resources in society, are in a position to exploit women’s sexual, reproductive, emotional and domestic labor. Another

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<sup>176</sup> MacKinnon, *Toward a Feminist Theory of the State*, chap. Method and Politics; Melissa Farley et al., “Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder,” *Journal of Trauma Practice* 2, no. 3–4 (2004): 33–74.

material aspect of coercion is women's greater physical vulnerability to men. Radical feminists have described the constant threat of physical, psychological, and sexual violence at the hands of men as a form of terrorism to maintain women's subordinate position. The fact that male violence against women is, in many cases, de jure legal as well as effectively de facto legal means that men have material power over women through the threat of violence that—ironically—results in women becoming further bonded to and dependent upon men.<sup>177</sup>

There is a further way in which women are structurally coerced, which is mutually reinforced by and reinforces the other forms of structural coercion. Women are also coerced on the level of our social norms.

#### Social Norms and Coercion

Our social-sexual norms are such that society eroticizes and normalizes pain, abuse, and domination of women. This can be seen in the increasing prevalence and acceptance of BDSM practices, where there is explicit eroticization of pain, coercion, and subjugation or abuse. However, this also applies to what would be considered “normal” heterosexual relations. Intercourse is so deeply ingrained in our sexual practices that it is considered constitutive of sex, in spite of the fact that it is centered around the male orgasm and is sometimes uncomfortable or painful for women. The sexual activities that are generally more pleasurable for women are not “real sex” but considered “foreplay”: activities often undertaken for the sole purpose of preparing a woman for intercourse. The only change in sexual norms has been to make things even worse for women and girls by changing sexual expectations of “normal sex” from intercourse to even more dangerous, painful, and violent sex acts.

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<sup>177</sup> Dee Graham, *Loving to Survive: Sexual Terror, Men's Violence, and Women's Lives*, Feminist Crosscurrents (New York, NY: New York University Press, 1994), 127–166.

Now let us examine the situation of a woman desiring sexual and romantic relationship with a man (of course, this is again taking on the presupposition that romantic relationships are necessarily heterosexual ones, which is problematic in itself). Let us also presuppose that she does not want to engage in any sexual act that involves physical discomfort and she would not like to engage in intercourse. She might be able to say no to some particular sexual acts (perhaps—though certainly by no means a guarantee—she might be able to avoid some extreme forms of torture). She might be able to say no to intercourse on a particular occasion. But failing to agree to sexual acts—sexual acts which are themselves predicated upon the normalization of pain, injury, and non-mutuality—is not a socially acceptable option.

What are her options? Her options are to either accept these social norms and “learn to like it” or never have a relationship. The first option, to be discussed below, is merely an internalization of the norms. The second option is to preclude the opportunity to have a relationship at all. Certainly no one is entitled to a romantic or sexual relationship with anyone; however, the point is that the conditions of having a relationship with a man involve that a woman is expected to renounce her bodily and sexual integrity. More importantly, women and girls are taught that being physically, sexually, and emotionally abused by men (as evidenced by sexual norms which promote coercion, non-mutuality, and sadism) is “normal” and “expected.”

Some might argue that this relies on the presupposition that no man will ever accept certain sexual boundaries. However, it does not require it; all that we need to know is that these are the prevailing norms, that men and women are socialized into these norms, and that the possibility of acting outside of these norms is going to be difficult and highly stigmatized or punished. A woman could possibly (though not with certainty) avoid sexual and emotional exploitation by never being in the same room with men. Women can also avoid street harassment

by never stepping outside. Avoiding violence, harassment, and exploitation, if not completely impossible, results in severe impediments to women's freedom to exist as persons in public and private. Because of our prevailing norms, the cost to women of accessing or engaging in sexual relations with men is something that men simply do not have to pay (since sexual norms and practices are centered around male pleasure).

What about the first option—learning to like it? Can we say that in this situation she is no longer coerced because her preferences are adapted to her social conditions? I would argue that this is not the case; instead, the shaping of one's preferences, while it is to be expected, does not mean that one's choice suddenly becomes "free." Imagine for a moment that you were presented with a plate full of cockroaches. If you were raised in certain cultures, such as modern American culture, you might react with disgust. This, however, is by no means a natural reaction; in many if not most cultures in the world, insects are eaten as food. While this is a relatively banal and innocuous example, it nonetheless demonstrates that our preferences and desires can be strongly shaped by our social and cultural context to the extent that they even produce in us a visceral and involuntary reaction, such as the reaction of someone who expresses disgust or even feels nauseous at the prospect of eating cockroaches.

The fact that our identities and desires are shaped by our social circumstances provides a serious challenge to the validity of consent when our desires and self-conceptions themselves are shaped through systematic and systemic relationships of subordination.<sup>178</sup> Chambers argues that the reality of social construction poses serious challenges for the liberal notion of autonomy, particularly when it comes to women's subordination. She argues that we have reason to question the legitimacy of consent in a situation in which a particular group of people must

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<sup>178</sup> "If preferences can be socially formed, then autonomy cannot *require* state noninterference on the basis that individuals must be left to make their own choices free from influence." Chambers, *Sex, Culture, and Justice*, 171.

undergo a harm—and importantly, a harm that is solely due to a social norm and not intrinsic—in order to gain some social benefit:

Nobody should have to harm themselves to receive benefits that are only contingently related to that harm, and where the contingency is a social one. This is for the simple reason that harm, by definition, is to be avoided where possible; and where it is only a social norm that requires the harm, it is clearly within the scope of social action to limit that harm.<sup>179</sup>

Chambers uses the example of a woman getting breast implants in order to become famous, but the analysis remains the same: the social norms in place subordinate women, and threaten autonomy, by making women's access to certain social benefits or physical necessities, such as food and shelter, predicted on being harmed in a way that men do not.

#### Arbitrariness of Coercion

Laden makes a distinction between a theory that is shortsighted and one that is blind. A shortsighted theory has the conceptual resources to understand a form of oppression, even if historically or in practice the theory has failed to address these concerns.<sup>180</sup> A theory that is blind, on the other hand, has deeper conceptual issues such that the subordination, oppression, or harm in question cannot appear as politically or ethically relevant.<sup>181</sup> As stated earlier, it is generally understood that deception, manipulation, and coercion vitiate consent; consent is no longer legitimate in the presence of coercion. What, then, are the politically and morally relevant forms of coercion that should vitiate consent? What about emotional manipulation, structural inequalities, or socialization? One could, of course, simply stipulate that certain forms of coercion do not count, but it would be mere stipulation in the absence of a *principled* argument as to why certain types of coercion do not count. If one wants to exclude certain types of

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<sup>179</sup> Ibid., 196.

<sup>180</sup> Laden, "Radical Liberals, Reasonable Feminists," 26.

<sup>181</sup> Ibid.

coercion—such as economic coercion when it comes to prostitution or sexual exploitation, or the coercion of social norms—they can reasonably be accused of theoretical blindness by failing to be sensitive to the ways in which women are coerced and socially-sexually subordinated.

This is going to be a particular problem for feminist liberals, because many feminist liberals acknowledge the types of coercion that radical feminists have explicated as problematic for women under patriarchy. These include emotional coercion, manipulation, and socialization into harmful gender roles. Problematically, however, the more pervasive the level of coercion—that is, when the coercion is so systematic that it becomes deeply embedded in our social and cultural norms and identities—it ironically becomes more difficult to acknowledge as coercion and to address.

I attempted to explicate the problems of this with the earlier discussion on the coerciveness of social norms. We can illustrate this with another example. If I am being told by my boyfriend that I owe him sex, and he uses this to coerce me into sex, one would hope that feminist liberals would acknowledge this as a problematic behavior (radical feminists would recognize this as a form of rape). On the other hand, I have been socialized to believe that my purpose in life is to please men and that I owe my boyfriend sex. Even if he does not mention it, I feel guilty for not sexually serving him. It seems that in this case I am still under coercion, but the coercion has been instilled into me through patriarchal social norms. Can feminists genuinely say that coercion embedded in our social norms that is so pervasive it is part of our very identities suddenly no longer constitutes coercion? It seems that they are just as coercive, if not more so, and yet when they are at the level of our social norms they become too widespread and too structural and systematic to make consent no longer legitimate. When a form of coercion becomes systematic and structural, it becomes “too big to fail.”

One might argue that there are reasonable distinctions to be made between types of coercion, and only certain types of coercion are legitimately the target of political intervention (or in some cases, critique). Cudd, for example, claims that there are direct and indirect forces involved in oppression. Direct forces include discriminatory laws, legal segregation, and direct harassment.<sup>182</sup> Indirect forces include women's choices and internalization of norms.<sup>183</sup> While many of these might be the target of state intervention—such as discriminatory laws or assault—addressing harms such as objectification, hate speech, and harassment causes “a potential conflict [with] freedoms of speech and assembly, which must be balanced against the rights of persons not to be psychologically harmed” and should be addressed by “more subtle social means” (presumably, by non-coercive means).<sup>184</sup> Cudd refines or justifies this view by making a distinction between “formal” and “informal” situations, in which direct oppression might be opposed by coercive force in “formal” situations but not in “informal” situations.<sup>185</sup>

There are problems with this view, however, which Cudd is at least partially aware of.<sup>186</sup> The first is that making the distinction between “formal” and “informal” situations, or between “direct” and “indirect” applications of force, are not necessarily distinct. While I do not deny that there is no morally or politically relevant distinction to be made, for example, between the interpersonal exploitation of a power relationship (e.g., a professor using his social position to coerce students into sexual relations) and social-structural forces (e.g., social norms around sexuality), I argue that both types of forces are coercive. Consider that many group ideologies (both what are traditionally considered “illiberal” as well as “liberal” and even “feminist”)

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<sup>182</sup> Cudd, *Analyzing Oppression*, 136–146, 158–176.

<sup>183</sup> *Ibid.*, 146–154, 176–183.

<sup>184</sup> *Ibid.*, 184.

<sup>185</sup> Cudd, “The Paradox of Liberal Feminism: Preference, Rationality, and Oppression,” 54–55.

<sup>186</sup> *Ibid.*, 55–58.

promote rape or abuse (e.g., the idea that a woman owes her husband sex, the idea that women cannot withdraw consent, the acceptance of sexualized violence and denigration of any woman who refuses, etc.); would women in these situations not be considered the victims of violence unless they explicitly resist these norms that promote rape? This seems to be problematic, as it once again requires that one accept that consent is merely lack of active resistance. Sexuality is an “informal” situation, and yet it seems that “formally” women should be protected from violence. Once again, one cannot merely appear to the private/public distinction, because the private/public distinction is what is under dispute when one disputes the legitimacy of consent.

### Conclusion

I have argued that a fundamental problem with employing consent to justify a norm, practice, or institution is the arbitrariness of coercion; the liberal is left with determining arbitrarily how much coercion is permissible before the consent can no longer be considered illegitimate. I argue that this is a problem because of our moral psychology and our susceptibility to social coercion. In addition, this problem takes on new dimensions under patriarchy because of the way in which social-structural factors, and enforcement and internalization of norms constitute coercion.

In this chapter, I have not assumed that a liberal interlocutor would acknowledge the ethical or political relevance of harm. Although merely excluding the ethical and political relevance of harm is problematic in itself, the arguments in this chapter would apply to any situation in which consent is used to justify a norm, practice, or institution.

## Chapter 4: Consent and the Conceptualization of Harm

### Introduction

Recall from the introduction that there are several potential claims that liberals can make about harm:

- (1) Harm is normatively irrelevant. Violations of autonomy determine wrong or injustice.
- (2) Harm is normatively relevant, but there can be reasonable disagreement about what constitutes harm. Thus, we should defer to autonomy to determine normatively relevant harm.
- (3) Harm is normatively relevant, and all normatively relevant harm can be captured by consent.
- (4) Harm is normatively relevant, but the preservation of autonomy is more important than preventing or addressing harm.

In this chapter, I will be addressing the claim that an individual's consent can be used to capture politically and ethically relevant harm. First, I will argue that using the consent to capture normatively relevant wrong, or injustice causes a distortion effect in which normatively relevant aspects of the interaction are made invisible. This is evident through the way in which attempts to change men's (violent or subordinating) behavior toward women is framed as an impingement upon women's choices. As a result, using consent to determine wrong or injustice results in theoretical blindness to ethically and political relevant aspects of the interaction. Therefore, we should reject the idea that consent can be sufficient to capture ethically and politically relevant harm (claim (3)).

Next, I will argue that there are systematic social, psychological, and epistemological barriers to recognizing harms. The difficulty that even and especially oppressed persons have in recognizing harms as such should be sufficient to reject the claim that the oppressed person's consent can capture all politically and ethically relevant harm (claims (2) and (3)). Analogous to

how “freedom of exit” presupposes that consent is merely lack of active resistance,<sup>187</sup> requiring that the oppressed resist norms, practices, or institutions in order for those norms, practices, or institutions to be considered harmful creates an unjust burden on the oppressed. Requiring such resistance is especially unjust because the norms, practices, and institutions that require resistance are those that deprive the oppressed persons of the material (such as economic independence) and social (such as self-respect) resources that allow them to contest those norms, practices, and institutions.

Lastly, I will argue that failing to acknowledge the ethical and political relevance of harm—independently of whether someone has “consented” or not—leads to another arbitrariness problem with how much violence and harm is permissible. I will argue that there is no principled way one can exclude any form of violence or harm, other than murder, as morally impermissible.

There is no direct way to argue against claim (1), as this is a substantive disagreement. Nonetheless, if one argues for claim (1), the harms of social-sexual subordination that women and girls experience simply do not appear as ethically and politically relevant. This is unsurprising, since physical and psychological harm is not an issue for able-bodied propertied white heterosexual men: as a general rule, they are unlikely to systematically face the type of deprivations that brings one’s bodily needs to the foreground (such as hunger); the caretaking work of the elderly, the ill, and the young are overwhelmingly performed by women; and they do not (at least as adults) need to fear systematic physical or sexual violence. It is not surprising, then, that human rights are rights based upon the violence that *men* experience; abuse in prison is considered a human rights abuse, but the abuse of women and girls within the home is not

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<sup>187</sup> Chambers, *Sex, Culture, and Justice*.

considered a human rights abuse even when it is much more prevalent and frequently more deadly.<sup>188</sup>

The last argument, while not a direct argument against the claim that harm as such is ethically and politically irrelevant, demonstrates how failing to acknowledge the ethical and political relevance of harm leads to an untenable political view. Either one is left with extreme libertarianism (which would force one to adopt claim (1)), or else one must *consistently* acknowledge the ethical and political relevance of harm.

### Distorting Effect of Consent

The purpose of this section is to explicate the ways that using an individual's consent to determine wrong, injustice, or harm (or to make a harm permissible) makes invisible crucial aspects of the situation from moral or political analysis. Using consent to determine wrong, harm, or injustice causes theoretical blindness in several ways: first, it erases the role of other people involved in the interaction (in the case of feminism, it erases the role of men as the oppressors); second, it obscures *whose* agency is being restricted by any substantive restrictions on what someone's consent can make permissible; and third, it obscures ethically and politically relevant aspects of the situation.

### Structure of Consent

In 1974 the performance artist Marina Abramovic stood in a room with a sign, noting that she would take full responsibility for whatever was done to her by the audience. Over the next several hours, several people attacked and assaulted her in brutal and humiliating ways. At one point a man nearly raped her; at another, a man took the gun and bullet that was part of the

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<sup>188</sup> Ann E. Cudd, *Analyzing Oppression*, Studies in Feminist Philosophy (New York: Oxford University Press, 2006), 136–146, 158–176.

“exhibit” and prepared to shoot. This performance art piece—a good illustration of the depravity of humans when there are no consequences for their behavior—is in fact a drastic illustration of consent.

Like Abramovic’s sign, when we “consent” it changes the moral permissions of others so what would, for example, otherwise be considered assault becomes permissible. Consent “changes the moral situation”<sup>189</sup> by removing moral responsibility from the one person (in the above example, Abramovic’s audience) and places it on the person who is consenting (Abramovic). The way in which the person consenting takes moral responsibility is best illustrated by medical consent. A patient who consents to a medical procedure, by virtue of consenting, takes moral responsibility for what the doctor is doing. The act of consenting places responsibility for what occurs, including when this is the direct result of actions by another person, on the person who is consenting. It erases the moral culpability of the doctor for what he does to his patient (i.e., cutting into the patient) and the patient then takes responsibility for the results; the patient’s consent not only makes it such that the doctor’s actions no longer qualify as assault, but also removes legal culpability from the doctor if the results are not as intended or the procedure results in further harm and injury.

When one consents, the actions of someone else (in the above case, the doctor) become an exercise of my agency. The doctor, in this way, is acting “on my behalf” and the responsibility for the results can no longer be attributed to the doctor. In the case above, because Abramovic gave her consent via the sign, there would be no normative difference between Abramovic attempting suicide and a man attempting to murder her. By making the sign, she

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<sup>189</sup> This particular way of phrasing what occurs with consent comes from Seana Valentine Shiffrin, “Promising, Intimate Relationships, and Conventionalism,” ed. Seana Valentine Shiffrin, *Philosophical Review* 117, no. 4 (2008): 481–524.

accepted moral responsibility for the actions of the audience. Because of the structural feature of consent where the person consenting takes responsibility for what someone else does, self-harm and being harmed by others look morally equivalent.<sup>190</sup>

This feature of consent, where what someone else does looks like a function of my agency, distorts how one can conceptualize the interaction and precludes moral or political evaluation of what occurs within the interaction. As I will discuss below in greater detail below, the structure of consent results in several serious distortions: it erases the actions of others in an individual's "choices;" it falsely causes one to conceptualize restrictions on acceptable treatment of persons as an assault on the individual liberty of the person who is consenting; and it causes theoretical blindness to morally relevant aspects of the situation. Because of these distortions, consent cannot be used to adequately capture all morally and politically relevant harm or injustice.

### **Erasure and Normative Evaluation**

As discussed above, the way that consent functions is to remove moral responsibility from one person (e.g., the doctor in the medical consent case) to the person consenting (e.g., the patient). In this way, consent morally erases the role of other people in an individual's "choice." Within the context of feminism, this means that *men's* role in women's subordination, and what men do to women in patriarchal society, becomes morally invisible. Instead, because of consent, it appears instead that what is under normative evaluations are *women's* actions and women's agency.

The philosophical literature on abortion is a dramatic example of how this erasure structures the discourse around women's issues. Rosalind Hursthouse once stated that if an alien

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<sup>190</sup> Thanks to Saniye Vatansever for framing the point in these terms.

were to read all the philosophical literature on abortion, one would have little or no idea what reproduction is actually like and what it actually involves.<sup>191</sup> Aliens probably would not realize that *men* are responsible for pregnancy, as the philosophical literature (and political discourse) makes it appear that pregnancy is entirely a matter of what *women* do.

Similarly, if one were to read much of feminist literature, the discussion focuses strongly on women and women's choices, particularly when it comes to controversial issues such as pornography. It is understandable why feminists would want to discuss women's choices, since women have had very little choice or autonomy over their bodies (with regard to sexuality and reproduction), opportunities to participate in public life, and ability to live their lives without the constraints of sex roles and violence. While focusing on the importance of women's choices might have great rhetorical power, the result is sometimes that patriarchal institutions and practices are discussed without criticizing or mentioning men at all.<sup>192</sup>

Why is erasing other people (in this case, men) problematic? While it should be obvious, a situation in which I am doing something by myself, and a situation which involves the activity of another person (particularly when the other person is doing something to me), are not equivalent. There are important aspects that are present when we are interacting with another person that are not present when we are acting alone. For example, moral concerns about self-harm might include the welfare of the individual who is engaging in self-harm and ethical condemnation of self-harm would either be an outgrowth of concerns about self-respect or concerns about how the self-harm might impact others.

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<sup>191</sup> Rosalind Hursthouse, "Virtue Theory and Abortion," *Philosophy and Public Affairs* 20, no. 3 (Summer 1991): 223–46.

<sup>192</sup> For example, in arguing for her particular brand of feminist liberalism, Baehr used the word "men" *once* (and only in discussion of potentially having men take time off to care for their children). When discussing sexual or domestic violence or the structure of the household in which women are subordinate to their husbands, men are *never* mentioned. Baehr, "Liberal Feminism: Comprehensive and Political."

But these are not anywhere close to the sort of ethical and political concerns arising when someone is being harmed by another person. There should be concerns about coercion, manipulation, or deception, and someone having power over the person they harm. None of these concerns are present in a situation of “mere” self-harm, and the situation itself *in reality* is drastically different. Concerns about coercion, manipulation, and exploitation are always present in these cases and especially when one person is of a subordinate class. Importantly, these types of concerns are not something which disappear by virtue of someone’s ostensible consent.<sup>193</sup>

Erasing the role of other people has real world implications, not only for feminist discourse, but for the approach to feminist issues. Reproduction is one example that has already been discussed where the rhetoric of abortion is often described in terms of women’s “choice” to either continue or terminate a pregnancy. This rhetoric leaves men completely out of the discussion, and all the worse for women; preventing pregnancy is considered women’s responsibility in spite of the dangers of female hormonal contraception. Another illustration of this problem is the social and legal norms around sexual assault; women and girls who are sexually assaulted have to prove their non-consent, and even more “progressive” discussions of sexual assault focus on men “obtaining” consent from women and on the details of whether women have consented rather than how men treat women. The prioritization of consent over other moral considerations—or as a replacement for any other moral consideration—results in men’s actions simply disappearing from the ethical or political discussion. Importantly, as long as consent is taken to either override other types of moral considerations (see claim (4)) or to

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<sup>193</sup> This does not necessarily count against my point earlier; coercion can also operate on the level of the coercion of our social norms and practices. Importantly, however, coercion *only* exists in an interpersonal context; social norms are coercive only because we are socialized by social institutions and interpersonal interactions into these norms. Nonetheless, this does not diminish the ethical relevance of the possibility of *direct* (interpersonal) coercion in the individual instance.

capture all normatively relevant harm or injustice (claims (2) and (3)), one will be effectively blind to the moral or political evaluation of the interaction apart from its consensual nature.

Part of the reason that this critical questions is not only overlooked, but conceptually precluded, is that using consent to determine wrong, harm, or injustice fundamentally distorts *whose* agency is being addressed by restrictions on consent. This is evident when we look at how philosophers sometimes talk about limitations on the acceptable scope of what consent can make permissible; they talk about limitations on consent as limits on to what someone can consent, rather than as limitations on respectful treatment of persons. This may seem like a trivial point, but one need only examine the way consent is used within feminist discussions to realize its importance. Any discussion of the way that men treat women is framed, instead, as a limitation on women's agency—thus obscuring the way in which men create the conditions of women's choices.

The discussion of any restrictions on human behavior as a restriction on "choices" of the person consenting obscures or completely eliminates the focus on the actions of the person to whom the consent is given. This precludes any discussion of acceptable behavior as being about restrictions on the acceptable treatment of persons, and thus casts the discussion in a solely negative light as "restricting choices" or "restricting agency" (some of the more hyperbolic exclamations is that it "takes away women's agency"). As stated in the Introduction, consent makes something permissible in the context of both background conditions (e.g., lack of coercion, deception, or manipulation) and within the constraints of what consent can make permissible (e.g. one cannot consent to slavery). Even when one admits of constraints on what consent can make permissible, it is often described as a constraint on what the person consenting

can do—rather than, for example, a prohibition on someone potentially treating another person as a slave.

An example of this distortion effect can be illustrated through the debate on the appropriate legal response to prostitution. Some feminist liberals, such as Drucilla Cornell, argue that the legalization of prostitution is necessary for the preservation of individual “choice.”<sup>194</sup> Her argument is that failing to legalize prostitution limits women’s “choices” (economic or sexual). In contrast to the pro-legalization approach, the Nordic approach advocates for the criminalization of the buying of sex and the decriminalization of the selling of sex and the creation of social policies to help prostituted women and girls exit the sex industry.

Pro-legalization advocates often argue that criminalization would “take away” women’s “choice” to be prostituted. In a way, this is a similar focus to traditional criminalization of prostitution, in which states prosecute the prostituted women for selling sex. The focus is solely on what women are doing, and the only relevant political difference is whether women should be allowed to do it. The Nordic approach, on the other hand, focuses on changing *men’s* behavior; that is, criminalizing what men do to women. The focus of the Nordic approach to prostitution is to change how women are treated by men and the legal system. The Nordic approach does not, in fact, change women’s “choices” (since the Nordic approach decriminalizes the selling of sex, women are as free as they were before to prostitute themselves); instead, it changes the context of men’s choices (for whom it becomes illegal to attempt to buy sexual services from women).

Some might argue that restrictions on the actions of the person to whom consent is given does restrict the agency of the person consenting. If we make punching someone impermissible, then it seems that I no longer have the ability to change the moral permissions such that I can be

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<sup>194</sup> Cornell, “Freed Up: Privacy, Sexual Freedom, and Liberty of Conscience.”

punched (of course, I can still be punched and give permission for someone to punch me, but this does not make the interaction permissible). It seems my agency is restricted in the sense that I no longer have the moral authority I did previously.

However, the way in which the prohibition on punching people is a limitation on *my* agency is trivial. I am free to do everything that I was before. In this way any and all constraints on what consent can make permissible—such as the prohibition against chattel slavery—are a “constraint” on the agency of potential slaves. Constraints on what consent can make permissible are more accurately described as restrictions on acceptable treatment of persons. Prohibiting slavery is about not treating *other* human beings as objects and commodities; it seems that treating others as mere things is the wrong, rather than “selling oneself.” The actual target of intervention is not the person consenting, but other people. Similarly in the example above, the purpose of (once again, in a trivial way) not permitting women’s “consent” to make prostitution permissible is to address men’s commodification, objectification, and exploitation of women and girls.

In order to demonstrate that that I am wronged by restrictions on how others can treat me, one would need to demonstrate one of two things. First, they could demonstrate that others are somehow (morally or politically) obligated to assist me in my projects. This is unlikely to get any traction against the feminist point: firstly, because this once again shifts the focus to the obligations of others rather than on my “choice”; and secondly, because the circumstances in which this would be a feasible defense would be limited. The scope of circumstances in which others are obligated to participate in my projects might cover food, shelter, or survival, but could not cover someone’s personal “conception of the good”, particularly (as radical feminists argue)

if there are overriding considerations as to why there should be a prohibition on such participation (mainly, that it constitutes social-sexual subordination of women).<sup>195</sup>

If one wants to claim that a large scope of what consent can make permissible is necessary for some social value—such as sexual relationships—one would once again need to establish that the value of these relationships *override* other ethical and political considerations. But this would necessarily require one to establish that whatever one is attempting to preserve by an expanded scope of what consent can make permissible is more valuable than whatever restriction on the acceptable treatment of persons (or, to make the burden more clear, that the norm on acceptable treatment of persons is unnecessary). To return to the earlier example, the pro-legalization advocates would have to demonstrate that prostitution is somehow (non-contingently, to use Chambers’s phrase, in order to establish that this is not in response to unjust social coercion) necessary to preserve some value. In addition, this value, whatever it may be, overrides all other concerns about the social acceptability of the sex trade (such as the rape, torture, and trafficking of women and girls).

The second way that one could argue this point is that a restriction on someone’s agency, in the way described above, would be inherently unjust. But to claim that the mere fact of “restricting someone’s agency” is unjust would mean that *any* restrictions on what consent could make permissible would constitute a wrong. Someone arguing for this view would be committed to an extreme libertarianism. If someone does not want to be committed to this extreme libertarianism—that consent can and does make anything permissible—they would be especially prone to the arbitrariness problem (described below). Most liberals would not want to be

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<sup>195</sup> Once again, though, there is a serious inconsistency here with some feminist liberals: the idea that part of people’s “conception of the good” extends to enforcing these ideals on one’s children is an example of forcing others (who have not given consent) to participate in one’s conception of the good, even when doing so causes tangible social, emotional, and economic harm.

committed to this extreme libertarianism. However, to argue against the justness of creating restrictions on the acceptable treatment of persons, they would need to engage with the actual *content* of the restriction, and make a substantive argument as to how this conflicted with some other overriding value. To argue that any norms on the acceptable treatment of persons simply conflict with the value of “liberty” or “autonomy” will not do.

### Social and Epistemological Barriers to Conceptualizing Harm

The structure of consent itself leads to a certain theoretical blindness to normatively important elements of the moral situation—in the case of feminism, this leads to erasing the role of men and failing to expose men’s choices and actions to ethical or political critique.

Additionally, there is another problem with claiming that, because of reasonable disagreement about what constitutes a harm, one should defer to consent to determine harm. In this section, I will describe the various mechanisms that would make it difficult for women to recognize harm to themselves. I will argue that using consent to determine harm or wrong itself encourages victim-blaming and serves as a psychological, social, and conceptual barrier for women to recognize to women recognizing that an interaction, practice, or institution is harmful.

Furthermore, divorcing the experience of wrong or injustice from harm results in theoretical blindness to norms, practices, and institutions that are ostensibly consensual but nonetheless harmful.

As will be explicated in detail below, there are structural and systematic as well as psychological barriers to women recognizing that they have been harmed. Although this includes phenomena such as adaptive preferences, it is not merely that women’s desires and preferences will be structured according to their current social status. There are also systematic barriers to women recognizing that they have been harmed. Women are not only socially conditioned to

accept various forms of subordination, but there are also strong social and psychological mechanisms that prevent a woman from recognizing what is happening to her as harmful. This undermines the assertion that by permitting oppressive practices and behaviors liberals are respecting women's "choice."

### **Psychological Mechanisms**

One problem with using consent as a means to frame harm is that women are psychologically motivated to not see harm as harm when they are under conditions of vulnerability, dependency, and subordination. For example, Freyd has engaged in groundbreaking research into suppression of childhood memories of abuse.<sup>196</sup> Through her research, she found that suppression of abuse was a coping mechanism for people within dependent relationships. Based upon psychological research, Freyd asserts that our normal response to betrayal is either withdrawal or confrontation. However, in relationships of dependency (such as child-parent relationships), withdrawal or confrontation could result in either violence or the withdrawal of social and material support.<sup>197</sup> Since withdrawal and confrontation are no longer an option for the abused person, the abused person instead fails to see the abuse as abuse.<sup>198</sup>

This analysis appears to be limited to interpersonal violence rather than extending more broadly to performance of femininity, cultural traditions, or religious traditions. However, feminists have made the case that similar mechanisms are at work with regard to participation in femininity and patriarchal traditions in general. Graham argued that women collectively

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<sup>196</sup> Jennifer J. Freyd, *Betrayal Trauma: The Logic of Forgetting Childhood Abuse* (Cambridge, MA: Harvard University Press, 1996).

<sup>197</sup> *Ibid.*, chap. Why Forget?

<sup>198</sup> *Ibid.*, Blind to Betrayal, Why Forget?

experience Stockholm Syndrome. Stockholm Syndrome is a psychological survival mechanism (first studied in the context of a hostage situation) in which the victim becomes strongly bonded to her abuser; takes the abuser's perspective on herself and her identity; denies her own feelings of anger at the abuser, and instead directs anger at outsiders; and engages in self-blame and victim-blaming in order to maintain the illusion of control over her situation.<sup>199</sup>

Graham explains that these “cognitive distortions” are, in a situation in which someone is subjected to the threat of violence that is inescapable (or perceived to be inescapable), necessary for the psychological and even physical survival of the victim.<sup>200</sup> In this way, self-blame for abuse, adoption of the abuser's perspective (including the idea that the victim deserves the abuse), serves as a crucial coping mechanism to deal with the distress of living in an abuse situation.<sup>201</sup>

Graham argues that women, as a class, are in a similar position to the abuse victim or the hostage. Women are in a situation in which male violence is pervasive, a constant threat, and inescapable. Ironically enough, women often pair with men (the ones who pose the threat of violence to them) in order to protect them from other men.<sup>202</sup> Graham describes this as “Societal Stockholm Syndrome,” and argues that women's attachment to men, adherence to male norms (including norms which systematically devalue female children) and performance of femininity (attempting to make themselves pleasing to men, denying their anger, and being empathic toward men) is a product of Societal Stockholm Syndrome in which, at a fundamental level, seeing themselves through the eyes of their oppressors is a necessary survival tactic.<sup>203</sup>

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<sup>199</sup> Graham, *Loving to Survive*, 1–52.

<sup>200</sup> *Ibid.*, 43.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*, 106–107.

<sup>203</sup> *Ibid.*, 50–165.

If one takes these arguments seriously—arguments which have been made, in different ways—that women’s core identities are structured through the lens of their oppressor, then it seems that many of the same core narratives that are present in abusive situations can be expanded to the way in which women view themselves. For example, a narrative popular in “pop” feminism that makeup is empowering because women “choose” it. It is still a cultural imperative for women to be attractive and appealing to men. Women who fail to perform femininity properly are subject to various degrees of social sanction and disadvantage. Given that this is still a cultural imperative, it may be less distressing for women to claim that they do it “for themselves” rather than admit that the time-consuming, possibly painful and harmful, beauty rituals are the result of socialization into a position of powerlessness vis-à-vis men.

### **Ideology of Autonomy**

Another reason women are motivated to claim that they consented or wanted what occurred is in order to retain a sense of self in the face of powerlessness and victimhood. Women saying that they consented or wanted what occurred allows them to retain a sense of self and reclaim the agency that has been taken from them, thus permitting them to ignore the reality of their lives and psychologically survive the situation.<sup>204</sup>

The impulse for women to claim that they consented or wanted what occurred in order to retain a sense of self is especially the case where autonomy is valued as definitive of humanity. It should not be news to any feminist that patriarchal culture is an intensely victim-blaming one, in which women are made responsible for what men do (something to which the narrative and structure of consent actually contributes, see above). Women are told that they dressed too provocatively, or that they made him angry, or that they should have known better or, in the

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<sup>204</sup> Mackinnon, “Sexuality, Pornography, and Method.”

worst of cases, that they knew what they were getting into and that they have no basis for complaint if they ever said “yes.” Certainly due to these factors, women internalize the victim-blaming attitude with which they are surrounded.

However, women are also motivated to engage in self-blame for another reason. Engaging in victim-blaming behaviors allows them to avoid acknowledgement of the fact that they have been violated and that they are powerless to stop their violation. It creates an illusion of control in a situation in which they have very little; it is perhaps psychologically comforting to think that if they had done something differently they could have avoided their victimization, rather than the realization that there was nothing that they could do or that it does not matter what they do, men will subject them to violence with complete impunity.<sup>205</sup>

Even feminist liberals sometimes adopt the victim-blaming narrative that acknowledging that women are victims of men’s violence is saying something negative about *women* rather than a condemnation of what men do to women. For example, Jaggar provides a well-known criticism of radical feminism that “portray[s] women as helpless victims.”<sup>206</sup> Cudd takes it even further, claiming that “what is wrong with seeing oneself as a victim is that one sees oneself as personally inadequate—it is self-degrading.”<sup>207</sup> Oddly, Cudd does not conclude that perhaps it is wrong to view victimhood as degrading to the victim, but instead claims that “seeing oneself as part of a *group* that has been subjected to long-standing social injustice takes away the self-degrading aspect of being a victim.”<sup>208</sup> While extremely pernicious, it is unfortunately uncommon to claim that being a victim is evidence of the victim’s personal flaws rather than

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<sup>205</sup> Susan J. Brison, *Aftermath: Violence and the Remaking of a Self* (Princeton: Princeton University Press, 2011).

<sup>206</sup> Jaggar, *Feminist Politics and Human Nature*, 115.

<sup>207</sup> Here she is not talking about women being responsible for the harms that they inflict upon other women, which would not be victim-blaming because the woman herself is not the victim. Cudd, *Analyzing Oppression*, 216.

<sup>208</sup> *Ibid.*

merely a statement of fact about what *others* have done to her. This is precisely the type of rhetoric which makes women want to eschew the label of “victim” and therefore the admission that *men* have wronged them.

This rather striking admission is understandable if one takes into account the way in which liberals frequently focus on women’s choices. Cudd, for example, claims that women are partially responsible for oppression through their choices.<sup>209</sup> This is itself not necessary news; oppression always works with the cooperation of the oppressed, even when this cooperation is obviously coerced and generated in social circumstances in which it is rational to comply.<sup>210</sup> Cudd, however, claims that women have an obligation to resist their oppression; for example, she claims that a woman with children has an obligation to work outside the home to combat “traditional stereotypes”<sup>211</sup> and that women have an obligation to resist even though it is unfair.<sup>212</sup> Interestingly enough, while speaking about women’s obligation to work outside the home she says nothing about her husband’s responsibility to do his share of the childcare and housework. Indeed, she does not seem to entertain the possibility that resisting stereotypes might require that a woman not marry or have children, which would have the benefit of improving the woman’s welfare in addition to combating stereotypes. And while Cudd goes so far as to admit that she is engaging in victim-blaming by requiring that women resist oppression, she spends precious little time engaging the obligations of the “privileged non-oppressors” (in this case, men).<sup>213</sup>

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<sup>209</sup> Ibid., 146–154.

<sup>210</sup> Ibid., 148–149.

<sup>211</sup> Ibid., 219–220.

<sup>212</sup> Ibid., 199.

<sup>213</sup> Cudd only spends two pages discussing men’s obligations to combat oppression, (Ibid., 196-197) while she discusses the obligations of women to end oppression more extensively (Ibid., 197-201, 219-220).

The emphasis on resistance and the denigration of victimhood creates another, related barrier to recognizing victimhood. It has become something of a faux pas among feminists to describe women as “victims” as opposed to “survivors.” While the intentions of this language shift were no doubt attempting to be empowering, they have the effect of potentially minimizing and denying the harm and trauma that actual victims experience, and providing further motivation for women to deny or bury the harm and trauma that women experience themselves.

Cudd states that

[.] it is victim-blaming to claim the victim either made some contribution to the harm or responded in some untoward way that made the outcome worse than it otherwise would have been. If the claim is false, then these kinds of victim-blaming are mere rationalizations of the victimization. But if the claim is true, then the victim may, depending upon the relative contributions of the actions to the harm, shoulder some of the blame for the harm that came about.”<sup>214</sup>

The “good survivor” is one who does not “contribute to the harm” by not acting in an “untoward way.” The socially unacceptable reality, made socially unacceptable by the ideology of autonomy, is that there are women and girls who do not “survive,” for whom rape and abuse is a life-destroying event.

### **Using Consent to Determine Harm**

Another problem in recognizing harm comes from the claim that consent can capture all normatively relevant harm itself. Thanks in no small part to the attempts to mainstream BDSM by “sex-positivists,” women who have been subject to physical abuse now must be able to prove that the abuse is not “consensual” in order to be taken seriously.

The idea that all normatively relevant harm is “nonconsensual” has already been implemented in rape and abuse law, with disastrous effects. There are, however, numerous

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<sup>214</sup> Cudd, *Analyzing Oppression*, 200–201.

instances in which the harm or violence that occurs is consensual. Domestic violence, and many form of sexual violence, are examples of violent, harmful situations which nonetheless occur “with consent.” Women frequently believe that they deserve the physical, sexual, and emotional abuse that they endure, even to the point of perceiving the cessation of violence as an indication of the kindness of their abuser.<sup>215</sup> While it may be that feminist liberals want to exclude domestic violence from what consent can legitimate, using consent to determine harm does not provide them any resources to do so.

#### Arbitrariness of Harm

We live in a patriarchal culture which enforces male entitlement to women’s emotional and domestic labor; male entitlement to women’s sexuality and reproductive capacities; and the constant devaluing of women’s humanity. Examined critically, none of these behaviors can be clearly or cleanly divorced from psychological, physical, and emotional abuse. But attempting to make a clear distinction is ultimately untenable, and leads to a problem of merely arbitrarily allowing certain types of abuse and certain types of violence. I will argue in this section that attempting to use consent in order to capture normatively relevant harm results in there being no principled way one can exclude any form of violence. Instead, the only principled position that they can take is to exclude the normative relevance of harm altogether.

First, there is no way to distinguish violations of consent as a difference in kind, only a matter of degree. If one divorces wrong or injustice from the experience of harm, there is nothing normatively unique about violating someone’s body as opposed to violating her consent in other ways, such as stealing her pencil.

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<sup>215</sup> Graham, *Loving to Survive*, 35.

This is a particular concern for feminist liberals because the most pressing and urgent concerns for women's liberation are issues that deal with women's embodied existence: reproduction and access to proper medical care or abortions; sexuality and sexual violence; and domestic violence and abuse. Let us take two very different examples of violations of consent (in this case, actual consent). In the first case, someone steals my pencil. In the second case, I am physically assaulted. In both cases, I have not consented to either someone taking my pencil or someone touching my body. If we were to attempt to locate the wrong or injustice that is done to me in terms of the nonconsensual nature of the act, it appears that stealing my pencil and assaulting me are both equally wrong since there was an equal lack of consent on my part in both cases. By itself, consent does not distinguish any normative difference in the wrongness of both cases (the banal example of having a pencil stolen, versus being assaulted). But there are qualitative differences between these two experiences; the violation of my consent in the assault case is a more serious wrong than someone stealing my pencil, and treating these two cases as similar seems insensitive at best.

Second, if one uses an individual's consent to determine harm there are no principled ways of excluding any form of violence (or putting any restrictions on the scope of what consent can make permissible). Let us presuppose that the only, or the primary, value is autonomy and that autonomy trumps other potential values. Furthermore, one can assume that, when harm is acknowledged, harms can be made permissible by consent. Is there any *principled* (as opposed to merely arbitrary) way that one could ensure that certain types of violence are impermissible? It appears the only genuine principled way at which one could draw this line would be at (consensual) murder, since murder precludes the possibility of future consent. What about permanent injury or mutilation? I doubt that one could have a principled reason to draw the line

here, because even someone who has been deprived of nearly all physical capabilities is still able to consent. Stephen Hawking is completely paralyzed, and yet no one would claim that he is unable to make competent decisions for himself. The only possible line that could be drawn would be at the place that makes it impossible for someone to consent because of her psychological condition, and that line of questioning would lead us to the problem of internalized oppression and the way in which traumatic experiences (e.g., physical abuse) may impact someone's ability to make decisions (for example, by causing anxiety, depression, or PTSD). Generally, however, even victims of torture—even though it causes lasting psychological harm—are not therefore considered non-autonomous in any politically or ethically important sense. The mere fact of someone suffering (even permanent, certainly temporary) physical or psychological harm in itself cannot be reason to dismiss his autonomy.

If, on the other hand, one were to attempt to draw the line at permanent injury because of a concern about bodily integrity or physical harm, that would not prevent them from escaping the charge of arbitrariness. If bodily integrity becomes a concern when causing someone permanent injury or mutilation, then why does bodily integrity become a value at the point of permanent injury or mutilation, rather than at all times? Why is bodily integrity not always normatively important, rather than just when it involves permanent injury? Once again, one cannot appeal to a notion of autonomy in order to provide the rationale; Stephen Hawking is fully autonomous in the important ethical and political sense of autonomous. Having a conception of autonomy that relied upon physical ability seems highly suspect; after all, someone who loses a limb is not any less autonomous in any important ethical or political sense than someone who has all his limbs. Thus, **if** one is going to consistently claim that bodily integrity is a normatively relevant value, they do not have the luxury of invoking bodily integrity as a value when they want to make

impose some sort of constraints on what consent can make permissible (presuming they want to have any constraints at all).

Note that I do not need to presume that there are no constraints in place. One may believe that we should have certain constraints on what one can do to another person (even when that person is “consenting”). However, my point is that there is no *principled* way that they can delineate this line; instead, it will be merely arbitrary. One might make determinations about how much violence is permissible, but these will be merely arbitrary determinations. Problematically for women (and for anyone else in society), this means that there are merely arbitrary determinations on the acceptable treatment of persons (because, as I have argued above, constraints on consent are better conceptualized as norms around the acceptable treatment of persons). As argued previously, attempting to use consent as the determination of wrong—in the absence of any other value (e.g., bodily integrity)—cannot distinguish the wrong of assault and the wrong of stealing a pencil. It would also, therefore, provide no means of ethically accounting for the wrong of domestic violence or sexual assault.

Perhaps one could claim that as long as one does not suffer permanent harm (overt psychological trauma, or permanent injury) that could serve as the means by which we delineate acceptable violence from non-acceptable violence. This, however, takes a consequentialist view. The consequentialist view is that as long as one can mitigate or bury the effects of the harm, it makes the actual infliction of the harm irrelevant. This is counter-intuitive; we would assume that the harm to someone who does not experience permanent psychological trauma still counts as harm. In addition, as described above, it is often the case that women may suffer abuse and yet not resist the abuse, believe that they deserved the abuse, or even simply not show any outward signs of distress because the abuse is so normalized.

One might argue in response that harm could still be part of the moral evaluation even if all morally relevant categories were already determined by consent.<sup>216</sup> Under this view, one might consider harm to be an aggravating factor, even though the wrong itself is determined by the lack of consent (the violation of the individual's autonomy). Thus, for example, one might consider that non-consensually punching someone is wrong even when no physical harm occurs but one might think that non-consensually punching someone is worse because it involves the infliction of harm. In both cases, what determines that a wrong has occurred is the lack of consent; however, what makes the second case worse is that there has been harm involved.

Problematically, however, this response does not solve the arbitrariness problem—that is, that using consent to determine wrong permits a completely arbitrary amount of violence to be permissible and there is no principled way using consent as a value to determine when the violence becomes unacceptable. It is not completely illegitimate to think that there might be certain mitigating factors in determining wrong; for example, non-defensive killing might be wrong, but we may consider the fact that a person suffers severe mental illness to be a mitigating factor in determining the perpetrator's guilt and the amount or severity of punishment that the perpetrator deserves. However, in this case, the moral relevance of harm only appears after an action has been deemed “nonconsensual.” There is no principled reason why harm should be morally relevant or why bodily harm is more morally relevant than say, financial loss. The invocation of harm in this case either is itself arbitrary, or else it appeals to a value other than consent. If the latter is the case, then it is unclear why this value would not be salient consistently throughout rather than at the moment at which consent is no longer in play.

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<sup>216</sup> I would like to thank to A.K. Flowerree for pointing out this objection.

One might argue that the medical case is a clear case where this consent must be able to render someone harming another permissible; the doctor must cause the patient harm (or risk of harm) for nearly all procedures. However, the medical case is not an actual counterexample, because there is a hidden assumption behind the medical case (recall the earlier dentist case); the presupposition is that the doctor is only engaging in a procedure that could potentially harm the patient because she can empirically demonstrate that there is an objective physical benefit to the patient. I would also argue that a doctor has an obligation to minimize any discomfort or risk that might be inflicted upon the patient (although this is far from the practice, it seems as a principle what would be necessary to justify the doctor's actions). Therefore, the medical case is not a counterexample to the argument that consent is insufficient to justify harm because there are clear norms that are operating in the medical case (that is, that the potential harm must be outweighed by an actual benefit). Indeed, it is no accident that one of the informal principles of the medical profession is "do no harm."

How does this arbitrariness problem work in practice with women's issues? The arbitrariness works on two levels. The first level is a problem with how much violence is permissible in society; at what (arbitrary) point does women's consent no longer legitimate violence against them? For example, should torture be permissible provided a woman ostensibly (by what standard?) consents? The second level is the arbitrariness of harm when it comes to social norms. Feminist liberals such as Anderson, for example, agree that socializing girls into gender norms, predicated upon male dominance and female inferiority, is harmful but that the state cannot interfere in the private sphere to prevent or address this harm (Anderson recommends addressing these harms through the "civil sphere").<sup>217</sup> Indubitably, Anderson thinks

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<sup>217</sup> Anderson, "Toward a Non-Ideal, Relational Methodology for Political Philosophy," 141–142.

that some degree of harm warrants interference. But this results in another arbitrariness problem; how much harm should be tolerated in the private sphere before it warrants intervention? If, as it would be plausible to argue, gender socialization (including, but not limited to, forcing girls to serve the male members of the household; indoctrinating girls into rape or abuse-supporting ideologies, and so on) is a form of psychological abuse, why would this not be recognized as a form of abuse that should warrant intervention?

If one wants to simply exclude gender socialization as non-abusive, one would need also to exclude emotional abuse (and perhaps also some aspects of neglect) from the ethical and political definition of abuse altogether. If it should be considered (ethically and politically) child abuse to tell her that she is inferior and deserves to be abused, then one cannot exclude as abuse telling a child she is inferior and deserves to be abused *because she is a girl*. That is, it appears once the emotional abuse and neglect becomes embedded in our social norms and institutions, it becomes “too big to fail.” But one could not hold these views without clearly being discriminatory against girls, and thus reinforcing the institutional subordination of girls by failing to give them the same protections.<sup>218</sup>

One might argue that arbitrariness is an inherent part of the political process. For example, the government makes arbitrary distinctions regarding traffic laws (such as whether one drives on the left side or right side of the street).<sup>219</sup> This arbitrariness does not appear to be vicious or problematic in any way. However, the arbitrariness that I am attempting to reveal is not arbitrariness of this sort. A better analogy would be traffic laws stating that it is acceptable

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<sup>218</sup> Okin makes this argument against multiculturalism; using multiculturalism to justify harmful and discriminatory practices is to effectively refuse girls who are subject to them the same protections as other children. Susan Moller Okin, *Is Multiculturalism Bad for Women?*, ed. Joshua Cohen, Matthew Howard, and Martha C. Nussbaum (Princeton: Princeton University Press, 1999).

<sup>219</sup> I am indebted to Kyla Ebels-Duggan for bringing up this objection.

for drivers to run over pedestrians, and injure and maim them, as long as the pedestrian does not die. This is a very different type of arbitrariness, because what is at stake is how much harm can be inflicted before it becomes a political or an ethical problem. On the other hand, arbitrariness about which side of the street when one drives upon does not have any implications for harm towards persons one way or the other.

The arbitrariness I am discussing is not simple arbitrariness; it is an arbitrariness about how much violence against women and girls is permitted before it becomes an ethical and political problem. This is analogous to the problem of how much coercion is acceptable before consent is no longer legitimate. Violence against women is regulated and legitimated through consent, not eliminated. The arbitrariness of violence with regard to consent ensures that the basic conditions of the subordination of women—men being able to subject women to harm (as embodied through our social-sexual norms) with impunity—remains steadfastly in place.

Let us say that in order to deal with this problem, liberals instead attempt to strengthen the concept of autonomy. Would this solve the problem? If one were to make the concept of autonomy substantive enough, one would have to acknowledge the various ways in which one can be coerced (interpersonally as well as structurally), and thus certain conditions (which are currently justified by “consent”) would be unacceptable. But importantly, if one accepts the argument that we do not arrive with a pre-given sense of entitlement to respectful treatment, but must be treated and socialized as such, then it appears thickening autonomy (in the absence of other constraints or acknowledgment of other values) would require liberals to insert a certain amount of content; that is, a certain education into what constitutes acceptable treatment. It is precisely the *content* of what constitutes respectful and acceptable treatment that is at issue with consent.

## Conclusion

In this chapter, I have argued against the idea that consent can be used to determine ethically or politically relevant harm. These problems only emerge when one divorces the experience of harm or violence from the determination of wrong or injustice, or when one attempts to use consent in order to make permissible what would otherwise be impermissible (e.g., assault). If one takes harm to always be normatively relevant, and normatively relevant independently of consent (that is, consent does not capture harm), then the arbitrariness problem is not present. Thus far in this dissertation, I have argued against specific claims about consent. In the next chapter, I will instead be arguing against what I take to be a presupposition that one must make about the individual consenting in order for these claims to make sense. I will argue that, contra to what some liberals might presume, there is in fact substantive content implied by the value of autonomy which supposedly justifies using consent as a means of determining rightness or wrongness.

## Chapter 5: Consent, Autonomy, and the Self

### Introduction

In this chapter, I will be discussing what I call the “problematic presupposition:” that an individual’s consent, in order to be legitimate, must presuppose certain substantive claims about the individual consenting. I will argue that this entails certain substantive content (including certain material and social conditions). These social and material conditions, however, do not exist for women or members of other oppressed groups. I will argue that the best way to resolve this paradox is by de-prioritizing consent as a normative concept and instead focusing on the substantive content of our norms, institutions, and practices.

### Presuppositions of Autonomy

Scholars such as MacKinnon and Pateman have argued that the liberal notion of consent presupposes an individual that is white, heterosexual, and male. While consent presupposes that people within liberal society are “free and equal persons,” Pateman argues that if we examine the history of liberalism we will see that consent—far from creating relations of freedom and equality—instead is used to justify and to reify relationships of domination and subordination.<sup>220</sup> Although Pateman approaches her main critiques of liberalism through her examination of contract theory, her arguments are applicable more generally to the claims about consent that are discussed in this dissertation.

Pateman argues that there is an unwritten contract, as it were, embedded within historical (and contemporary) social contract theory of the “sexual contract” which creates and embodies what she terms the “male sex-right”—the availability of women’s bodies to men “in the flesh

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<sup>220</sup> Pateman, *The Sexual Contract*.

and in representation.”<sup>221</sup> Pateman argues that the “revolutionary idea” of liberalism positing that all individuals were free and equal necessitates contract, for all other justifications for legitimating authority were eliminated by fiat.<sup>222</sup> Thus, the only way that one can subordinate free and equal individuals to authority is by virtue of their own agreement.<sup>223</sup> In this way, Pateman argues, the social contract creates a situation of “civil subordination.”<sup>224</sup>

Pateman argues that rather than exemplifying freedom, our “social contracts” embed forms of social domination: economic domination, racial domination, and, centrally to Pateman’s work, sexual domination. As Pateman discusses in her book, the original contract theorists presupposed the domination of women by men: as she describes it, contract theory created a “fraternal order” which overthrew the “rule of the father” but preserved the male sex-right over women.<sup>225</sup> While the authority of fathers over sons might have been eliminated through the fraternal order, the authority of husband over wife and male over female nonetheless remained in the social contract.<sup>226</sup> Pateman argues that the social contract historically rationalizes and makes invisible social subordination. A more recent example is Rawls’ positing the individuals behind the veil as “heads of households,” and the assertion that the principles of justice do not apply to the private sphere—the sphere where women are likely to be abused and exploited.<sup>227</sup>

Pateman argues that the interrelationship between the social contract and the subordination contract casts doubt on contract theory itself, and Pateman herself is skeptical that contract theory can be purged of its subordinating elements. She argues that the contrast between subordination—the exemplar of which is chattel slavery—and contract is not as clear as it may

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<sup>221</sup> Ibid., 14.

<sup>222</sup> Ibid., 39.

<sup>223</sup> Pateman, “Women and Consent,” 150–151.

<sup>224</sup> Pateman, *The Sexual Contract*, 39–76.

<sup>225</sup> Ibid., 77–153.

<sup>226</sup> Ibid., 116–153.

<sup>227</sup> Okin, *Justice, Gender, and the Family*.

seem. In spite of its seeming contradiction, the fact that liberals and contract theorists (Robert Nozick is perhaps the most glaring example) would entertain the idea that one could have a contract of civil slavery is not merely an aberration.<sup>228</sup> Pateman argues that the fundamental presupposition of contract theory is that the individual, by definition, has property in his person.<sup>229</sup> However, this is not an ordinary exchange of goods. What is being “exchanged” or rather, established, through “contracting in” is the creation of a relationship by which the individual subordinates himself to another (or, in the case of the employment contract, rents out the use of his body and labor).<sup>230</sup> Thus, Pateman argues that it is not merely the conditions by which people enter into contracts that is problematic (although that certainly is the case), but that the contracts themselves create relations of subordination.<sup>231</sup>

Pateman argues that the concept of having property in one’s person posits the individual as fundamentally a masculine subject. However, to posit a male subject is not merely an unjust exclusion of the female subject; instead, to posit the male subject is to posit the sexual contract (that is, the subordination of women) because the male is defined in relation to his domination of the female through the “male sex-right.”<sup>232</sup> Pateman argues that according to social contract theory, the individual is an individual by virtue of being a property-owner, not merely of external objects in the world, but of himself.<sup>233</sup> Thus, Pateman argues that there is a fundamental problem with the construction of the notion of the political subject that embodies patriarchal norms, and specifically a masculine subject.<sup>234</sup> The individual and the human is constructed through social contract theory as a male, and Pateman argues that efforts at gender-neutralizing the liberal

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<sup>228</sup> Pateman, *The Sexual Contract*, 39–76.

<sup>229</sup> *Ibid.*, 56–57.

<sup>230</sup> *Ibid.*, 116–153.

<sup>231</sup> *Ibid.*, *Contract, the Individual and Slavery*.

<sup>232</sup> *Ibid.*, 105–106.

<sup>233</sup> *Ibid.*, 55–59.

<sup>234</sup> *Ibid.*, chap. *Patriarchal Confusions*.

individual present serious problems for feminism insofar as it presupposes the patriarchal construction of the individual as male.

Relatedly, Pateman claims that the understanding of the civil society is ambiguous within contract theory. On the one hand, civil society is taken in opposition to nature, and thus civil society is what results from the social contract.<sup>235</sup> On the other hand, civil society is a separate sphere from the political even when it contains economic and social spheres which are part of “public” life.<sup>236</sup> The family, and more fundamentally patriarchal domination of women through male sex-right, is taken to be natural and thus precedes the social contract.<sup>237</sup> The private sphere, as a necessary precondition or a natural element of human society, thus is rendered invisible and depoliticized.<sup>238</sup> By virtue of their relegation to the sphere of the private, women are excluded from full citizenship.<sup>239</sup> It is thus not accidental that the primary or even the fundamental harms that women experience occur within what is designated as the private sphere, even as the boundaries of the private sphere itself are vague and ambiguous.

### **Problematic Presupposition**

The problematic presupposition is that, in order for consent to do its normative work, one must make certain assumptions, explicitly or not, about the individual consenting and her social conditions.

(1) The person consenting is in a situation in which the background conditions would not vitiate the person’s consent.

(2) The person’s consent represents her desires or preferences.

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<sup>235</sup> Ibid., 10–13.

<sup>236</sup> Ibid.

<sup>237</sup> Ibid., 19–38, 77–115.

<sup>238</sup> Ibid., 112–114.

<sup>239</sup> Pateman, “Women and Consent,” 151–152.

(3) The person consenting feels entitled to respectful treatment from others.

The problem with the assumption in (2) has already been discussed. Even if one does not presume that consent represents preference-satisfaction, or should represent preference-satisfaction, there are still problems with presuming that consent represents a fully autonomous individual choice. The basic idea behind (1) is that the background conditions of consent must hold in order for the person's consent to be legitimate; the person would need to not be subject to coercion or exploitation that would undermine her ability to consent. A central feature of oppression is that the oppressed group is subject to systematic and structural coercion; to be oppressed is to be coerced not only systematically but in a way that is inescapable.

In addition, one must presuppose that the person consenting feels entitled to treatment from others that supports, or at least does not count against, her status as a human being. Consent must presuppose, at the very least, that “individuals are rational, that they have, or are able to develop, the moral and intellectual capacities necessary to enable free commitment to be given.”<sup>240</sup> There are various ways that one could formulate (3); someone has requisite “self-respect” or has access to the social bases of self-respect (to use a Rawlsian formulation) or that the person consenting can see herself as a free and equal citizen. In all cases, the person consenting must have a certain set of *entitlements* to respectful treatment from others. As explicated in previous arguments in this dissertation, the *content* of women's choices is already given by patriarchy, and in a way that benefits men.

This is where the unspoken, but presumed, substantive content of consent comes into play. The consent of men and women cannot be considered equivalently, because men are socialized into believing that they are owed certain types of consideration. Under patriarchy, of

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<sup>240</sup> Pateman, *The Sexual Contract*, 152.

course, this is pernicious; they are socialized to believe that they are entitled to sex from women, that they are owed various forms of deference from women, and that they are entitled to women's emotional and domestic labor. It would be dishonest of us to act as though there is no content to how we are socialized in terms of our set of entitlements. Consent implicitly relies upon the idea that the person consenting is socialized to expect respect from others, but what constitutes "respectful treatment" implies substantive content.

An example will help to illustrate how there is hidden or implicit substantive content behind the idea of "respectful treatment." Consider medical treatment. The norms are such that white males can expect doctors to consider their complaints are serious and non-psychological in nature, to consider physical causes before psychological causes for their ailments, and to provide them with adequate pain alleviation if they are in pain or if they require a procedure that would cause them pain. Contrast this with the norms around medical treatment for women or minorities. They can expect that doctors and medical staff will not provide them with adequate pain alleviation, that doctors will not consider their ailments to be serious or to take them seriously, and to attribute their physical ailments to either exaggeration or hysteria.

Even if we were to abstract away from the lack of informed consent and access around medical procedures for women (itself a significant problem, particularly for pregnant and disadvantaged women) and we were to suppose that men's and women's consent to medical procedures were equally informed and autonomous, this would not change the problems with how men and women are treated. Men and women might equally consent to medical procedures, but to what women would be consenting in terms of their medical treatment would look very different from to what men consent. Consent itself would not change the content of how men and women are treated, and yet consent would make these two situations look similar. Even more

damaging, telling women that they can “consent” without giving any content to the norms of how they should be treated means that women will, at worst, not consider themselves as deserving of better treatment and at best, be left with the unpleasant options of either enduring a potentially degrading, painful, or traumatic experience at the hands of medical professionals or simply forgoing medical care altogether.

What one is owed as a person is a substantive notion. Men are socialized to believe that doctors should alleviate their pain. Men expect to be treated with respect in this way because of the content of their socialization, and the enforcement of this socialization through their interpersonal and institutional interactions. What one is owed is a substantive notion with substantive content, and is something that does not simply arise out of pure autonomy. Instead, it is something that people are told—in various ways and in various forms—through their interpersonal and institutional interactions. Women will not know that they are owed better treatment unless they are informed to *what* they are entitled to in terms of treatment from others, and this entitlement is reinforced through their interpersonal and institutional interactions.

### **Property in the Person**

Liberalism has the problem of answering the question as to why people would voluntarily submit to domination by another in order to justify the right of the state to have a “monopoly on the legitimate use of force.”<sup>241</sup> In order to solve this problem they have had to resort to =hypothetical consent, but in doing so have they have excluded “certain individuals and social relationships from the scope of consent.”<sup>242</sup> Pateman claims that women have been excluded from the “scope of consent” because of “social reluctance to recognize women as ‘free and

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<sup>241</sup> Pateman, “Women and Consent,” 150–151.

<sup>242</sup> *Ibid.*, 151.

equal individuals' [which] denies in practice what the law proclaims in principle."<sup>243</sup> That is, consent presupposes theoretically what, in practice, it is used to deny; that women are treated as free and equal individuals.

There is an inherent tension in using consent to justify the conditions of substantive and meaningful equality for women:

Consent is central to liberal democracy, because it is essential to maintain individual freedom and equality; but it is a problem for liberal democracy, because individual freedom and equality is also a precondition for the practice of consent. The identification of enforced submission with consent in rape is a stark example of the wider failure in liberal democratic theory and practice to distinguish free commitment and agreement by equals from domination, subordination, and inequality. Writers on consent link "consent," "freedom," and "equality," but the realities of power and domination in our sexual and political lives are ignored. Contemporary consent theory presents our institutions as if they were actually as consent demands, as if they were actually constituted through the free agreement of equal persons. The reduction of "consent" to a mere "constituent" of liberal democratic ideology leaves consent theorists unable to ask many vital questions.<sup>244</sup>

Feminist liberals are going to have a particular problem with this reconciliation, because their feminist commitments mean that they do not have the "luxury" of ignoring or abstracting away from the realities of sexual subordination.

The intellectual inheritance of contract theory might make sense of different stances in the prostitution debate. If one conceptualizes individual rights as "property in the person," it makes sense that prostitution looks like a "job like any other job"; a woman temporarily "rents out" the property in her person, just as the employee does. Similarly, in questions of rightful sexual consent, the problem of sexual violence is not the trauma, violation, or violence that women actually experience but whether or not she "consented" to temporarily lend use of her person to another. This is why questions about sexual consent begin to sound like questions of

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<sup>243</sup> Ibid., 156.

<sup>244</sup> Ibid., 163.

*contract*, and, similarly, why it is difficult to use consent to express the wrong of sexual relations in which women agreed but were nonetheless harmed and treated as mere objects of use.

One can also see how this conceptual framework emerges in the discourse of abortion; the political stance in favor of legalized abortion is discussed as a matter of “choice” and the rhetoric often claims “my body, my choice.” To claim “my body” is to presuppose that a woman’s body is an object, a piece of property, and that the abortion debate is genuinely a debate over who has control over it. For the pro-life side, the argument is that the fetus, or perhaps men, should have control over women’s bodies. For the pro-choice side, the argument is that the woman should be able to dispose of her “property” as she desires. Both sides tend to fundamentally ignore the realities of pregnancy as an embodied experience.<sup>245</sup>

The presupposition of conceptualizing women’s bodies as fundamentally a form of property makes sense of some of the deep disagreements between feminist liberals and radical feminists. Women do not have the luxury of abstracting away from our embodied existence, since women’s bodies are the locus of women’s subordination. But importantly, to the extent that feminist liberals are committed to feminism, they do not have this luxury either.

### **Kantian Liberalism and Property in the Person**

One might argue that Pateman’s argument about property in the person only applies to liberalism based upon Locke’s philosophy which endorses the idea of property in the person. On the other hand, Kantian-influenced accounts, such as that of John Rawls, are not prone to the same problems. Anderson, for example, agrees that “Pateman is right to condemn the model of the possessive individual as one which legitimates unjust and patriarchal forms of

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<sup>245</sup> MacKinnon, *Toward a Feminist Theory of the State*, chap. Abortion: On Public and Private.

domination.”<sup>246</sup> Anderson, however, argues that Pateman is wrong in ascribing the idea of a “possessive individual” to all of contract theory or to all of liberal theory.<sup>247</sup> Anderson claims, instead, that one can have the idea of contract—even contracts regarding (women’s) sexuality—without necessarily presupposing the “possessive individual” (in the specific case, of not presupposing that women’s bodies are commodities and objects for men’s use).<sup>248</sup> For example, two adults could agree to have exclusive sexual relations with each other while nonetheless rejecting the idea that it entails entitlement to sexual access. Okin, too, attempts to argue for the idea of the liberal individual by claiming that certain feminist arguments (the case she brings up is that of abortion) cannot be argued without appealing to the “liberal individual.”<sup>249</sup>

There are thus two questions to be asked: the first is whether the liberal individual presupposes property in the person; the second is whether a liberal account which rejects the idea of property in the person can escape my arguments about what is presupposed in the account of the liberal individual. It is important to note that the success of arguments about the liberal individual does not require that the liberal theorist explicitly endorse the idea of property in the person. Instead, the argument made by myself and critics such as Pateman is that the liberal individual is implicitly presupposed to be white, male, and heterosexual.

First, the success of my arguments in this chapter does not necessarily hinge on the idea that a theorist must be committed to the idea of property in the person. Instead, as described above, my argument is that using consent as a justificatory concept presupposes certain things about the individual consenting which entails certain social and material conditions that do not hold for women or other oppressed people. To make the argument that all liberal theory does in

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<sup>246</sup> Elizabeth S. Anderson, “The Sexual Contract,” *Michigan Law Review* 88, no. 6 (1990): 1804.

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*, 1805–1806.

<sup>249</sup> Okin, “The Sexual Contract,” 668–669.

fact presuppose property in the person would require extensive examination of all forms of liberal theory, which is outside the scope of this dissertation. I would argue, however, that one can only make sense of certain claims that some liberals make about certain issues if one presupposes that (women's) bodies are objects. The debate on prostitution seems to exemplify this claim; the idea that prostitution is "work like any other work" and that the main problem is that women cannot sell their bodies rather than the problem being that men can buy women and girls.

The second question more directly pertains to this dissertation; what would a Kantian account still be vulnerable to the charge that they are presupposing a male individual? My answer to this question is yes. Recall from the earlier section that there are certain presuppositions that must be made in order for consent to function as a justificatory concept:

- (1) The person consenting is in a situation in which the background conditions would not vitiate the person's consent.
- (2) The person's consent represents her desires or preferences.
- (3) The person consenting feels entitled to respectful treatment from others.

At the very least, it appears that all liberal theorists must accept claim (1). This, while a justified presupposition, is problematic to the extent that it is not empirically the case that the background conditions which enable someone's consent to represent a genuine free choice do not exist. As argued in this dissertation, the sort of background conditions that are necessary for one's choice to be free are incompatible with subordination. Thus, regardless of whether a theorist explicitly rejects the idea of property in the person, the fundamental presupposition that the liberal individual is free and equal does not apply to women, who by nature of being subordinated are neither free nor equal.

## Consent and Self-Respect

One could still argue against my claims by arguing that this presupposes that self-respect is the basis for the legitimacy of consent. But self-respect, justifiably, is something which seems very subjective. Someone might have a poor self-concept because of their personality, or mental illness, or any number of reasons which cannot (and should not) be controlled by the liberal state. Attempting to instantiate a specific self-conception for every citizen is not only a possibly futile and impossible exercise, but also would require such interventions that would violate individuals' basic rights to autonomy.

There are several things that can be said in response. The first is that this is only a problem for those who are attempting to use consent as a justification for political or ethical relations (as described in the Introduction). If one rejects these claims, we do not need to worry about the individual's self-conception because most of the normative work is done by the content of our institutions, norms, and practices. We do not need to worry, for example, about whether women "consent" to things just because they have been taught that they do not deserve better if we do not permit poor treatment of women in the first place.

Second, it seems that for someone's consent to be legitimate they must, at the very least, be educated about their minimal set of entitlements and, importantly, be socially and materially able to exercise their right to those entitlements (that is part of the rationale for the "substantive" part of substantive equality). This is the rationale behind "informed consent" more broadly, and we can also see this in more specific contexts such as educating patients on their rights. Standard practices for medical professionals require that they have their patients sign a waiver that informs them of their rights regarding the disclosure of their medical information. However, one cannot

talk about education into entitlements unless one also talks about the *content* of those entitlements.

Jaggar explains the problem with the substantive content—or lack thereof—to women’s self-conceptions and the conflict with the liberal interpretation of individual choice more eloquently:

To provide criteria for genuine choice that are sufficiently sensitive to the ways in which people’s beliefs and feelings are determined by their social context, liberalism would have to abandon one of its central doctrines, namely, its pretensions to moral neutrality, and make precisely the kinds of value judgments about human fulfillment that it is committed to avoiding. In this way, the liberal feminist pursuit of equal opportunity raises deep problems for the very theory of human nature that it took as its starting point.<sup>250</sup>

I have argued that consent presupposes a certain type of individual in order for consent to make sense as a political or ethical justification. The individual that is presupposed, implicitly or explicitly, by consent is an individual that is in a certain material and social condition such that he is not subject to coercion or exploitation and who has been socialized in a certain way. The conditions for this presupposed individual are substantive social and material conditions. The “moral neutrality” of liberalism is not actually neutral; the implicit content of the neutrality of liberalism is the experience (and interests) of white, heterosexual males. To include women requires addressing the substantive content of our norms, practices, and institutions.

### Consent, Equality, and Freedom

The paradox of liberalism, as explicated by theorists such as Pateman, can be summarized thus: consent is used to undermine the conditions of its own exercise.<sup>251</sup> Consent must presuppose that the person consenting is “free and equal.” Feminist liberals are committed

<sup>250</sup> Jaggar, *Feminist Politics and Human Nature*, 195.

<sup>251</sup> O’Neill, Shanley, and Young, *Illusion of Consent*, 23.

to the idea that “free and equal” is at least partially a substantive notion; that is, it must translate into the actual lived experience of the individual in society (otherwise, they would be committed to an extreme libertarianism, and few liberals—let alone feminist liberals—would be committed to that). However, at the same time, substantive equality is unattainable because of concerns about protecting individual choice.<sup>252</sup>

How can feminist liberals avoid this paradox? There are three potential options, which I will first describe and then explain the problems with each. The first potential option is to make a distinction between the private and public sphere. While certain inequalities must be tolerated within the private sphere, women must have equality (including substantive equality) within the public sphere. The second potential response is to, in some way, “bite the bullet” and acknowledge that there may be injustices or problems within the private sphere, but that these are nonetheless unavoidable because it would be problematic to attempt to address them except through private or civil action. The last potential way is not a response from liberals per se, but instead a diagnosis; that the “freedom” that is being preserved is actually men’s freedom and not women’s.

### **Private Inequality, Public Freedom**

The first response is to claim that, while there might be inequalities or hierarchal gender roles within the private sphere, we can nonetheless justify and achieve substantive equality within the public sphere. If we can achieve equality within the public sphere, we can achieve the type of equality to which liberalism aspires and which liberalism promises. Hartley and Watson argue that liberalism has the resources to provide substantive equality to women. They argue that the “criterion of reciprocity limits reasonable political conceptions of justice to those that

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<sup>252</sup> Mansbridge, “Carole Pateman: Radical Liberal?,” 23.

eliminate social conditions of domination and subordination relevant to reasonable democratic deliberation among equal citizens.”<sup>253</sup> While non-domination might require “radical revision” of gender hierarchies, it would not necessarily entail their elimination since, after all, liberalism cannot eliminate all hierarchal identities but only those that interfere with “equal citizenship.”<sup>254</sup>

Hartley and Watson are aware of and concerned about the way in which the content of our social norms can create conditions of unequal citizenship for women; they mention beauty standards, as well as the potential for viewing pornography and prostitution as hindrances to the criteria of reciprocity they utilize in their argument.<sup>255</sup> They acknowledge that the content of our norms and practices entails male social-sexual domination of women, even though they want to shy away from a “comprehensive” liberalism.<sup>256</sup> There are reasons why one might plausibly believe that women can be considered subordinate within the home (the sacred “private sphere”) and yet still be considered equal as citizens. One can think of certain hierarchal social identities that nonetheless do not impinge upon one’s political identity or participation in the political process; for example, the difference in social identity between cleric and layperson (which is perhaps what Hartley and Watson have in mind, given that they specifically mention church hierarchies).<sup>257</sup> In fact, if we are going to take an expansive view of “social identity,” one could name numerous unproblematic examples of hierarchal identities: student and teacher, coach and athlete, employer and employee.

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<sup>253</sup> Hartley and Watson, “Is a Feminist Political Liberalism Possible?”

<sup>254</sup> *Ibid.*, 12.

<sup>255</sup> *Ibid.*, 9–10, 18.

<sup>256</sup> *Ibid.*, 19–21.

<sup>257</sup> Of course in *practice* these hierarchies often lead to abuses of power; for example, teachers, coaches and clerics are often implemented in abuse and bullying of children. Sometimes, as was the case with the Catholic Church abuse scandals, the respect for the “social identity” of clerics led to cover-ups of the abuse.

Gender, however, is not analogous to these types of social identities. These social identities are narrow, constrained, and associated with one's profession or fluid social roles. Gender, on the other hand, is a social construct that is associated with one's status as a person. Gender is violently imposed upon girls because of their sex, and unlike other types of hierarchal identities, it is inextricable from social subordination. It would be a far stretch to claim that students are "subordinated" to their teachers in the sense of social oppression, as opposed to merely being subject to their authority in a relatively narrow context (the same can be said of coaches and athletes). Unlike gender, it is not *inherent* to teaching that students are trained by various forms of physical and psychological violence to be submissive, physically constrained, and sexually and emotionally exploited. The way in which women are subject to the "authority" of men is quite different; with gender, this means that women are subject to varying degrees of physical, psychological, and sexual abuse and exploitation. This means, for example, that girls are taught to be quiet, to not pursue intellectual interests, and that their purpose is to serve men in various capacities. At even "subtle" levels, girls are told that they are supposed to like pink, denigrated for being assertive or loud, and discouraged or incapacitated in various ways so that they cannot develop their physical strength.

The gender hierarchy inherently posits that women are inferior as *persons*, not simply subject to the authority of someone else in a specific context (which can be, although not always easily, left behind). Gender posits that all women, as a class, are inferior to all men as a class. When a comprehensive doctrine has a hierarchal view of gender, they do not claim that only "their" women are inferior to "their" men (which would be problematic and unjust in itself), but that all women are inferior and should be subordinate to all men. Hartley and Watson do not have the luxury of claiming that gender does not extend to the various ways in which women are

sexually, psychologically, and physically exploited or socialized into submission: first, because the nature of gender is such that it invariably involves all of these; second, because gender is not equivalent to a social position; and third, because they explicitly mention the reasonability of men's domination over women *within the home*.<sup>258</sup> This means that the gender hierarchy does not merely apply to church hierarchies, but to women's subordination within the "private sphere" of family life and interpersonal relationships.

There are several problems with this solution. The first problem is that this takes a consequentialist view of exploitation, injustice, and abuse against women; it is only problematic insofar as it might interfere with women's ability to participate in the public sphere or to be "equal citizens," not as a problem in itself. The second problem is that, even if one could successfully ensure that women are able to fully participate in the public sphere, this would require that women maintain a "fractured consciousness."

The first problem is that the subordination of women and girls, and thus the abuse, exploitation, and injustice that they suffer within the private sphere and interpersonal relationships, is not seen as a problem in itself but only a problem insofar as it interferes with their ability to participate in the public sphere. It is logically possible, and in fact frequently the case, that women experience massive abuses, violence, degradation, and exploitation in the "private sphere" of family, interpersonal relationships, and sexuality, and yet are able (in spite of all this) to participate in the public sphere as "citizens."

This, of course, would also depend on how one defends what it means to be an "equal citizen," and it is difficult to do this without collapsing into either formal legal guarantees (such as the right to vote) or into a substantive view of equality which makes substantive social

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<sup>258</sup> Hartley and Watson, "Is a Feminist Political Liberalism Possible?," 20.

inequalities within the “private sphere” even more difficult to justify. With feminist liberals who cannot be committed to a particular outcome (for example, equal representation of women in all professional fields), discovering at what point the social-subordination of women problematically interferes with their citizenship will be difficult to determine.

If we take a substantive view of what it means to be a “free and equal” citizen, then the problem of patriarchal leakage becomes even more difficult to ignore. For example, sexual objectification also leads women to decrease their social presence.<sup>259</sup> More generally, the pervasive social norm that women should not “take up space” (physically or socially), the denigration and social punishment of women and girls who assert themselves in social situations, and the pervasive social norm that women should not be believed means that women’s contributions are not taken seriously. Even more perniciously, these same norms which are protected under “privacy” also means that feminist liberals are going to have an uphill battle to ensure even minimal protections for women and girls against violence where it is considered not only socially acceptable but “empowering” for men and boys to coerce, injure, abuse, hurt, and degrade women and girls as constitutive of “sex.”<sup>260</sup> Because of the pervasiveness of sexualized violence against women and girls, this means that no degree of violence is considered to “really” constitute assault against women and girls either socially or legally.

But let us presume, somehow, that they are able to stop “leakage” and maintain a completely compartmentalized private sphere while nonetheless having a “free and equal” public sphere. The second major problem with this attempted solution is that it would result in what one

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<sup>259</sup> T. Saguy et al., “Interacting Like a Body: Objectification Can Lead Women to Narrow Their Presence in Social Interactions,” *Psychological Science* 21, no. 2 (February 1, 2010): 178–82.

<sup>260</sup> Most pornography includes acts of physical violence or psychological abuse against women. Bridges, Ana J, Wosnitzer, Robert, Scharrer, Erica, Sun, Chyng, Liberman, Rachael, “Aggression and Sexual Behavior in Best-Selling Pornography,” *Violence Against Women* 16, no. 10 (2010): 1065–85.

might call “fractured consciousness.” On the one hand, women are supposed to be able to regard themselves as free and equal citizens. On the other hand, however, it is permissible to socialize them into gender norms in which they are taught to believe that they are socially unequal and dominated by men in the private sphere. Thus, women are in some ways required to see themselves as free and equal in one sphere of life, but still unequal and subordinate *as persons* in another sphere of life.

This “fractured consciousness,” I claim, is both harmful and unjust to women. For women, this means that the social inequalities that affect them most intimately will never be addressed unless they are visible from the standpoint of the public sphere of political participation. It means that women will know, regardless of how successful they are or how much they are able to accomplish in the “public sphere”, that there is always a sphere in which they are seen as men’s inferiors and can be treated as a subordinate. Additionally, it means that men can remain entitled and secure in their sense of superiority and domination over women—including the ways in which they may abuse or exploit women—because there is always a sphere where their privilege and power remains unchallenged. Analogously to how women need to frame harm in terms of “consent” because in order for men’s violence to be considered problematic, women would need to frame any injustice or harm in terms of political participation in order for it to be considered, heard, and addressed.

There are two ways to get out of this dilemma, neither of which would probably be very palatable to feminist liberals. The first way would be to bite the bullet and address all forms of social domination as a means of ensuring substantive equality for women. This is probably not going to be acceptable to most feminist liberals, because it would involve at least some disregard for the private sphere and the central role it is awarded within liberal philosophy. It would also

probably severely limit the scope of acceptable pluralism. The second would be to acknowledge that there might be some sufficiency standard at work; while social domination might not be eliminable, liberalism can perhaps give women a “good enough” level of substantive equality in order to have a political identity. This second approach, while perhaps tempting in order to preserve their liberal commitments, seems to be prone to a concern about arbitrariness; at what point does the subordination of women become acceptable? How much can women be treated as inferior and subjected to various forms of abuse and exploitation before it becomes “too much”?

### **Unreasonable Pluralism**

Another way to deal with this paradox is to bite the bullet another way and admit that the paradox is a genuine one that cannot be solved by the liberal state. Anderson has such a view; rather than attempting to claim that patriarchal comprehensive doctrines are “reasonable,” which inherently leads to certain contradictions and tensions, Anderson claims that liberalism will necessarily generate a certain number of “unreasonable” doctrines. Anderson admits that given expansive parental rights over their children<sup>261</sup> and the persistence of misogynist conceptions of the good, the socialization of children into gender roles will undoubtedly harm girl children.<sup>262</sup> While Anderson focuses on how this negatively impacts women who resist these gender roles and the potential for impacting equal opportunity, radical feminists would understand this gender socialization as inherently harmful (after all, it would still constitute subordination even if women were so well brainwashed that no woman ever contested gender roles). Anderson claims

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<sup>261</sup> Note of course, that this is merely presupposed and never justified, and once again feminist liberals cannot justify expansive parental rights on the basis of “consent.” Indeed, it seems counter to their justification for why people should have expansive ability to pursue their “conceptions of the good”; the anti-paternalistic argument that people should not have conceptions of the good imposed upon them. It is also dubious that they can merely appeal to the “private sphere”, unless the public/private distinctions can be made in a *principled* way.

<sup>262</sup> Anderson, “Toward a Non-Ideal, Relational Methodology for Political Philosophy,” 141.

that the legitimate exercise of individual liberties will lead to the emergence of “unreasonable pluralism”; doctrines that “can’t survive rational scrutiny or the reasonable consideration of others.”<sup>263</sup> Nonetheless, Anderson believes that the reason for tolerating gender injustice is not because the doctrines or norms underlying them are “reasonable,” but because the cost of enforcing gender justice is too high.<sup>264</sup>

The claim must be, then, that it is illegitimate and not simply ineffective to attempt to create substantive equality for women through any form of intervention in the private sphere. There are several problems with this view. The first is that this seems to be prone to the same problems as described above: this solution will preclude genuine substantive equality in the public sphere; this solution presupposes the legitimacy of the private sphere, which is itself under dispute; and it is prone to the “patriarchal leakage” problem. It thus seems that this view would need to renounce the idea of substantive equality for women, even in the public sphere.

### **Hidden Perspectives**

The last potential way to resolve the paradox of feminist liberalism is to claim that the “consent” or freedom in question is actually men’s freedom and not women’s. Although this is not necessarily explicit, it would be a way in which the paradox could—though certainly not without problems—be resolved. If it is men’s freedom that is the reason why women’s substantive equality cannot be instantiated, then liberals can avoid the charge that women’s consent is undermining the condition of its exercise. Of course, this is problematic for an even more serious reason, and that is that men’s “freedom” to subordinate women takes precedence over women’s right to be free and equal. That cannot be construed as a legitimate exchange

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<sup>263</sup> Ibid., 142.

<sup>264</sup> Ibid., 143.

without simply, and rather explicitly, justifying and supporting the idea that women are not free and equal citizens.

This seems like a rather obvious mistake. But, as I have argued in an earlier chapter, consent makes it appear as though creating limitations, or making substantive statements, about how men should treat women is really a limitation of women's agency rather than a limitation of men's agency. The example used previously was the difference in approaches to prostitution, where some feminist liberals interpret criminalizing male behavior (buying women and girls for sexual use) as an unjust limitation of women's "sexual agency." Thus, it appears that what is really men's freedom—the ability for men to use women and girls as sexual objects, and to subject them to violence—is in fact women's freedom to "do what they want" with their bodies.

The conflict is instead a conflict between men's freedom to do what they want to women and women's right to be free and equal. Radical feminist theorists have long claimed that rights are in fact, gendered male; that is, the rights are constructed in such a way to ensure de facto (and often de jure, as it is the case with sexual assault) male power over women.<sup>265</sup> A seemingly "gender neutral" example is the legal and social approach to sexual violence. When sexual violence and sexual harassment are discussed, oftentimes people will argue against procedures that would make it easier (or even just possible) to hold perpetrators accountable by claiming it violates "due process" (this is the ostensible reason why it is considered justifiable that rape and abuse, in nearly all cases, are physically impossible for women to prove under the current legal system). If we examine this discourse, however, it is clear that "due process" is coded language for the rights of men (that is, the perpetrators of sexual and physical violence against women). "Due process" rights are interpreted as the right not to be held accountable for one's actions, or,

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<sup>265</sup> MacKinnon, *Toward a Feminist Theory of the State*, chap. The Liberal State, Sex Equality: On Difference and Dominance.

at the very least, to make it extremely difficult for perpetrators to be prosecuted, convicted, and punished. In addition, “due process” is also considered the right of men not to suffer any negative social consequences for violence against women, even when they are currently a danger to women and girls; thus, for example, there is wide social acceptance of the social practice that men who abuse women do not lose their jobs or access to schools unless they have been convicted of a crime (frequently, their careers, opportunities, and social status are not affected even when they have been convicted). In practice this means that women and girls are the ones who suffer all negative social and material consequences for male violence, since not only in the initial trauma, but in any subsequent attempt to get away from their rapist or abuser they must leave schools, jobs, and flee their homes, and this is even apart from the fact that they will be subjected to extreme psychological abuse if they dare to testify against their abuser within a court of law.

All these practices which protect perpetrators from any negative consequences and inflict great harm on victims are completely consistent with the liberal view of what constitutes “justice;” that the only rights that are relevant are the rights of the perpetrator to not be punished, and that it is better, as the colloquialism goes, for ten guilty men to go free rather than for one innocent man (and in this case, it is very clear that it is a man) to spend a night in jail. From this understanding of “due process,” our current system where men can commit rape (as well as abuse, torture, enslavement, and sometimes murder) with complete impunity is a well-functioning system. But this is the male perspective: the perspective of the perpetrator. If one interprets “due process” from the perspective of women, it is clearly a completely broken, unjust, and ineffectual system. From the perspective of current and potential victims, due process rights might look very different: the right not to suffer negative consequences (loss of a home, job, and

so on) for suffering or reporting a crime; the right to be physically protected from any further social contact with their abuser; the right to be treated with respect and compassion by law enforcement, medical professionals, and protected from social harassment for reporting abuse; the right to have all forms of abuse be legally prosecutable within the justice system; the right to have a reasonable expectation that their abuser will be prosecuted, convicted, and adequately punished. To have these rights would require, for example, that legal standards be changed to actually cover all forms of violence; that the standards are changed such that the evidentiary burden can be met in all or nearly all cases; enabling victims to have effective protection from their abuser before trials and without requiring conviction; and changing the way in which victims are treated by the justice system.

This is one example in which the male perspective is implicitly presumed, and thus it can make it appear as though institutions, norms, and practices which undermine women's freedom, equality, and basic physical safety are in fact really questions of women's "choices." But it is illegitimate to claim that men's freedom should be able to undermine women's equality, at least if one aspires to have any feminist commitments.

### **Liberal Responses**

Can these problems be avoided? There are two approaches that I will consider below. The first is what I will call a "deliberative" or "procedural" approach; the idea that we can avoid talking about the substantive content of our norms and practices by simply changing the conditions upon which we decide our norms and practices. The second approach is to avoid the problems with actual and hypothetical consent by arguing for a substantive view of autonomy.

*The deliberative approach*<sup>266</sup>

The first approach is the procedural or deliberative approach. Under this approach, rather than directly attacking the content of our norms and practices, we must change the conditions under which we decide upon our norms and practices such that women are able to participate on equal terms with men. Rawls' idea of "public reason" might be considered to be one formulation of this view; the criterion of reasonableness is not *what* one says but *how* one says it.<sup>267</sup>

However, this approach will not avoid the problem of dealing with the actual substantive content of our norms, practices, and institutions. Without addressing the substantive content of our norms, practices, and institutions, women are likely to simply choose the same set of norms and practices as before. One cannot presume, particularly in light of the way in which women are socialized into their subordination, that women will have the ability to understand themselves as deserving anything else. Women are socialized to believe that they are inferior to men by the way in which their parents favor male children over girl children; the way in which girls within the home are forced to endure abuse (including, oftentimes, physical and sexual abuse) from brothers, fathers, and male relatives; the way in which women are more often told to forgive their abusers or that they "asked for it" or invalidated; the way in which they are told that romantic and sexual relations with men consist of suffering and self-sacrifice. In a perverse act of betrayal, women are likely to receive the most hateful messages from those who are supposed to love and care for her.

Even if, by a miracle, a woman finds some relationships which are not actively abusive or reinforce the message that she is a thing to be used and hurt by men, it is dubious that these interactions will be sufficient to counter the broader social messages (and certainly it does not

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<sup>266</sup> I would like to thank Tyler Zimmer for proposing this solution.

<sup>267</sup> Laden, "Radical Liberals, Reasonable Feminists."

protect her from abuse outside of these relationships). Indeed, even women who might resist their socialization will not necessarily have a clear or concrete understanding of what they *should* be entitled to, as opposed to simply what they do not want to have to suffer. The problematic assumption that this approach must rely upon when justifying oppressive relations is the idea that women who do not know they are oppressed are not “really” oppressed; that is, a norm or practice or identity is not problematic unless and until a woman actually contests her treatment at the hands of men.<sup>268</sup>

One might think that in the political liberal view, the fact of contestation is basically an epistemological concern; one will not know that one is oppressed until the oppressive social categories have been contested. However, problematically, there is no consistent way in which liberalism can say *what* should be contested, and *why*.<sup>269</sup> The only way in which liberalism seems able to discuss this issue is *that* a woman might contest her gender role as being problematic, and the fact of the contestation is what is problematic—not the content. In order for women’s subordination to become part of the political deliberative process (presuming still that feminism is just one of many comprehensive doctrines), at least some women must contest the gender roles that are imposed upon them. Problematically, though, there is no reason why this should be the case in a patriarchal society; one of the many reasons why patriarchy is so pernicious is because it is so pervasive, and structures our relations, identities, and values at such a deep level, that it is nearly impossible to see it as the oppressive structure it is.<sup>270</sup>

Political deliberation and political justification provides women with no resources whatsoever to even form the ability to contest the imposition of social roles; it is logically

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<sup>268</sup> I am indebted to C.J. Pereira di Salvo for alerting me to this interpretation of the problem.

<sup>269</sup> Schwartzman, *Challenging Liberalism*; Schwartzman, “Non-Ideal Theorizing, Social Groups, and Knowledge of Oppression.”

<sup>270</sup> MacKinnon, “‘The Case’ Responds.”

possible (and even accurate) to say that the overwhelming majority of women will form practical identities and values that support a patriarchal society rather than one in which women are not oppressed. However, since political liberalism is attempting to refrain from imposing any substantive content on our norms and practices, other than the purely procedural norms of political justification, there is no way within political liberalism itself that women will come to understand themselves as oppressed and deserving of better treatment than they receive within a patriarchal society.<sup>271</sup>

*Substantive autonomy*

The second approach is to generate a substantive view of agency in order to avoid these problems. The substantive view of agency—that is, the idea that agency requires certain material and social conditions—is another way in which feminist liberals can reclaim consent without coming up against the problems with either hypothetical consent or actual consent. The idea of substantive autonomy is that the conditions for women’s freedom and equality involve substantive social and material conditions; this is the type of approach that Hartley and Watson seem to take.

If we think that there needs to be substantive social and material conditions for consent, then it seems that what is doing the justificatory work are those substantive social and material conditions. It thus become even more important—not less—to talk about the content of our social and material conditions (including the content of our norms and practices). But if this is the case, it makes it even more difficult to use consent to justify the lack of conditions of substantive equality. If the substantive material and social conditions are actually what are doing the normative work (for example, as I claimed was the case in the dentist example described in

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<sup>271</sup> Schwartzman, “Non-Ideal Theorizing, Social Groups, and Knowledge of Oppression.”

the Introduction), then consent has a very limited role. Instead, the normative work is being done by the content of our norms, institutions and practices, and that is what we should examine, interrogate, and, ultimately, change.

### Conclusion

In this chapter, I have argued that using consent as liberals do requires that one presupposes certain things about the consenting individual. Problematically, however, the presuppositions made about the consenting individual implies the existence of certain social and material conditions in which the individual lives. However, these are precisely the types of conditions that are denied women and girls under patriarchy. Because our self-concept is formulated through our institutional and interpersonal interactions, women and girls lack the requisite self-respect and respect for their humanity that are afforded to men. This creates a problem for liberals who want to avoid imputing substantive content to our norms, practices, and institutions. I have argued that there is in fact a standard of content to the idea of the liberal individual that cannot be denied. If this is the case, then liberals cannot avoid addressing the substantive content of our norms, practices, and institutions.

## Chapter 6: Conclusion

The motivation behind this dissertation was an examination of the disagreements between radical feminists and feminist liberals. After examining the radical feminist analysis of certain issues (pornography, prostitution, and sexual violence) in comparison to the feminist liberal analysis of the same, I hypothesized that the disagreements about these issues were ultimately disagreements about the ethical and political role of consent. It appears that, much to the frustration of radical feminists, “choice” is frequently used to either dismiss or ignore the real and tangible harm that women experience under patriarchy. Part of the motivation of this dissertation was to understand how and why choice could be used in this way. More often than not, consent is used to legitimate relationships, interactions, and practices which are harmful or even oppressive. Consent has been and continues to be used ideologically in the pejorative sense of maintaining systems of domination, exploitation, and violence. The use of consent as a means of enforcing oppression is particularly relevant if one examines the ways in which consent is used to justify norms, practices, and institutions which continue to harm and oppress women.

In the Introduction of the dissertation, I argued that there were certain claims made about consent and its ethical and political role:

- (1) The presence or absence of an individual’s consent determines whether an injustice, wrong, or harm has been committed.
- (2) The presence or absence of an individual’s consent determines the sphere of individual liberty where it would be wrong for the government to coercively interfere (e.g., the “private sphere”).
- (3) An individual’s consent is legitimate to the extent that it occurs without coercion, deception, or manipulation (the “background conditions” of consent).

(4) An individual's consent is legitimate to the extent that it operates within certain constraints (that is, the scope of what consent can make permissible may be limited).

(5) An individual's consent is legitimate to the extent that the individual consenting is free and equal.

In addition, I have argued that there are several potential ways of understanding the relation between consent and the normative relevance of harm:

(1) Harm is normatively irrelevant. Violations of autonomy determine wrong or injustice.

(2) Harm is normatively relevant, but there can be reasonable disagreement about what constitutes harm. Thus, we should defer to autonomy.

(3) Harm is normatively relevant, and all normatively relevant harm can be captured by consent.

(4) Harm is normatively relevant, but the preservation of autonomy is more important than the prevention or addressing of harm.

Within this dissertation, I have explicated what I understand to be serious problems with the above claims about the ethical and political role of consent, as well as the relation of consent to the normative relevance of harm. My criticisms could be characterized, in a general way, as claiming that the conditions that are necessary for the exercise of consent do not hold in our current social context (e.g., the chapter on coercion) as arguing that making certain claims about consent leads to contradictions or otherwise problematic implications (e.g., the chapter on harm). Importantly, and most germane to the issue of feminism, I have argued that one cannot use consent to justify conditions of substantive inequality.

I have argued that making certain claims about consent and its ability to justify norms, practices, and institutions is insufficient to create just ethical or political relations. I have not argued against liberalism per se, as there is insufficient discussion in this dissertation to establish

that liberalism itself is problematic. Liberalism takes many diverse forms, and there is a wide array of disagreement by liberal theorists on certain substantive issues. There are some feminist liberals who are more sympathetic to radical feminist claims, and some who might even adopt a very similar analysis to radical feminists on certain issues.<sup>272</sup> Some liberals might adopt some claims but not others, or might have a more nuanced view of the claims which I have explicated. My purpose was to explicate the claims in a way that generally captures the ethical and political role of consent (particularly within liberal theory), although without an extensive review of liberal theories it would be impossible to establish these claims as a certainty. I therefore am making more modest claims: that at least some liberals seem to adopt these claims, and that insofar as one adopts these claims one will face the problems which I have explicated. Whether liberals can abandon these claims and still retain the core of their liberalism is a question for liberal theorists to decide.

In the final chapter of this dissertation I made my most perhaps direct attack on liberalism and liberal theory, namely the argument that the liberal individual contains substantive content, and that this content is white, male, and heterosexual. This is an argument that numerous feminists have made before, and additionally I argue that we must therefore address the substantive content of our norms, practices, and institutions. One might object to my argument by claiming that this argument is vague and provides no alternative to the use of consent as a means of justifying ethical and political relations. One can argue, plausibly, that my project is purely destructive and provides no positive contribution other than to reiterate the sorts of criticisms that feminists have leveled against liberalism for several decades.

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<sup>272</sup> Anderson, for example, takes the position that certain services should not be “for sale.” Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge, MA: Harvard University Press, 1993).

My response to the charge that I am merely parroting radical feminists is to admit that my critique is certainly based on the work of many excellent feminist scholars, to whom I am indebted. If I can claim to have made a contribution, it has been through a self-conscious attempt at focusing my efforts on the concept of consent, the claims that are made about the ethical and political role of consent, and how these connect to feminist theorizing. My response to the charge that I made no positive contribution is also to admit that my project has been mostly “destructive.” I do not have a full and comprehensive alternative theory of justice that I can currently present; that would require another dissertation.

However, once again I will defer to other feminist scholars. I have made some gestures as to what I think a positive conception of justice would look like. I have presented several examples, scattered throughout this dissertation, of what sort of positive norms, institutions, and practices we would need for a fully liberated society: for example, we would need to reconceptualize the purpose and scope of the private sphere; we would need to reconceptualize the purpose of our civil liberties, and the sort of protections that would actually be necessary to preserve them. I do not, however, despair that this task is too much for political philosophy; as described in the rather banal example of dentistry, having “substantive content” to our norms, practices, and institutions is frequently presupposed in many cases where liberals have presumed consent to be playing a pivotal role. It is merely a matter of ensuring that women are treated consistently as free and equal human beings.

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