

A CRITIC AT LARGE

HOW CONSENT CAN—AND CANNOT—HELP US HAVE BETTER SEX

The idea is legally vital, but ultimately unsatisfying. Is there another way forward?

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Several new books try to construct a philosophy of sex that goes beyond “yes” and “no.” Illustration by Michelle Mildenberg Lara



Save this story

In 1978, Greta Hibbard was twenty-two and living in rural Oregon. She had a two-year-old daughter, a minimum-wage job, and an unemployed husband. She was, she would later say, “living on peanut butter sandwiches.” She and her husband, John Rideout, often fought; sometimes he hit her or demanded sex. On the afternoon of October 10th, when he did just that, Hibbard fled to a neighbor’s house. Rideout followed her, cornered her in a park, and took her home. Once inside, she said, he punched her several times in the face and pulled down her pants. Their toddler, who was watching, went into her bedroom and wailed as her father penetrated her mother.

That this might be rape, legally speaking, was a brand-new idea. Until the mid-seventies, much of the sex in the United States was regulated not by the theory of consent but by that of property: a husband could no more be arrested for raping his wife than for breaking into his own house. In 1977, Oregon became one of the first states to make spousal rape illegal, and even then some politicians thought the law should apply only to couples living apart or in the process of divorcing. A California state senator summed up the prevailing attitude: “If you can’t rape your wife, who can you rape?”

Hibbard herself had only just learned that she had a right to decline sex with her husband. (At a woman’s crisis center, she had noticed a sign on the wall that read “If she says no, it’s rape.”) The night before the incident, she and Rideout were chatting with a neighbor when she brought up the new law. “I don’t believe it,” Rideout said. When he was arrested a few days later, he still didn’t. What followed was *Oregon v. Rideout*, the first time in the United States that a man stood trial for the rape of a wife with whom he lived, and a formative test of the notion that consent should determine the legality of sex.

Sarah Weinman retells this story in “Without Consent: A Landmark Trial and the Decades-Long Struggle to Make Spousal Rape a Crime” (Ecco). Weinman is known for taking a true-crime approach to intellectual history:

her previous books center on the murderer who befriended William F. Buckley, Jr.—the founder of the *National Review*—and on the kidnapping that is believed to have inspired Vladimir Nabokov to write “Lolita.” Her writing is breezy even when the subject matter is not exactly beachy. Rideout’s trial, for example, teemed with outrages. His defense lawyer smeared Hibbard for her sexual past: two abortions, a supposed lesbian experience, and a previous assault allegation against Rideout’s half brother, which, according to Weinman, Hibbard retracted after threats from the accused. Meanwhile, even the prosecutor thought Rideout seemed like a good guy. “I don’t think he belongs in prison or jail,” he told the press. When Rideout was acquitted, the courtroom burst into applause.

Hibbard, who reconciled with Rideout almost immediately after the trial, would divorce him within months. But Weinman follows Rideout all the way through 2017, when he was once again tried for rape. This time, the victims were Sheila Moxley, an acquaintance who had grudgingly allowed a drunk Rideout to sleep on her sofa after he came over to help her fix some furniture, and Teresa Hern, a long-term, on-and-off girlfriend. Both women had been held down and penetrated by Rideout in the middle of the night. Once again, a defense lawyer attempted to paint the women as lying, scheming seductresses. But this time Rideout was convicted on all counts and eventually sentenced to twenty-five years in prison. “You are a bad man,” Moxley read in a statement. “You are an evil man. You are a monster.”

Weinman’s choice to begin and end with Rideout’s trials allows her to tell a story of comeuppance, in which, during the span of one man’s life, society decided to take rape seriously and punish the monsters who commit it. This is a happy thought. But the real arc of history is not so short, nor does it bend with anything like certainty toward justice. Today, about one in ten American women have been raped by their intimate partners—roughly the same rate reported in the eighties. This year, the Trump Administration removed the Center for Disease Control’s online statistics on intimate-partner and sexual violence; the page was restored by a court order, and now

contains a disclaimer: “This page does not reflect reality.” Donald Trump himself has been accused of sexual misconduct by at least twenty-four women. He has denied these accusations, including one from his first wife, Ivana, who testified under oath that he threw her on the bed, ripped out a handful of her hair, and then forced himself on her. She later clarified that she didn’t mean the word “rape” in the “literal or criminal sense.”

In Weinman’s epilogue, she briefly points to the unfinished business of ending rape, spousal or otherwise. But her book assumes that society has at least sorted out the philosophical underpinnings of how to regulate sex. “Younger generations were far clearer about these issues,” Weinman writes, “understanding that consent must be given ‘freely and intelligently’ by those who were capable, and anything shy of full consent was considered rape.” There is, I think, no such clarity. It is not just people like Trump, Jeffrey Epstein, Pete Hegseth, Brock Turner, Bill Cosby, Sean Combs, Dominique Pelicot, and their many, many friends who seem to have a bone to pick with consent. Feminists have their own quibbles. What does “freely and intelligently” mean, they ask, and what entails “full consent”? Who exactly is capable of consenting? And what are we to do with rapists?

For some second-wave feminists, the very idea that a woman living under patriarchy could “consent” to sex with a man was absurd. After all, we don’t think of a serf consenting to work for her feudal overlord: the serf might well enjoy tilling the fields, she might even love her master, but she didn’t choose farm labor so much as she was kept, by rigid and often violent social limits, from pursuing anything else. And even if the choice were free—even if decades of hard-fought feminist struggle had occasioned the sort of emancipation that meant women were no longer analogous to serfs—could such a choice ever be “intelligent”? Some women find knitting pleasurable, comforting, and affirming of their femininity, but how many would recommend it to a friend if it carried a ten-per-cent chance of rape?

These were lively arguments in the seventies and eighties, advanced by

feminists like Catharine MacKinnon and Andrea Dworkin, who had herself been battered by her husband. Today, the basic idea—often glossed as “all heterosexual sex is rape,” though neither MacKinnon nor Dworkin wrote exactly those words—seems almost farcical. Radical feminists no longer blame heterosexual women for “sleeping with the enemy.” It’s widely accepted that a woman really can consent to sex with a husband on whom she is financially dependent. The immediate though rather less accepted corollary is that she can also consent to sex with a paying stranger. To say anything else, many feminists now argue, would be to infantilize her, to subordinate her—to the state, to moralism—rather than acknowledge her mastery of her own body.

But the root of the second-wave critique, that there are power differentials across which professed consent is insufficient, lives on in other debates. Children, a class whom the poet Mary Karr once described as “three feet tall, flat broke, unemployed, and illiterate,” are an obvious example. It is easy to be horrified by situations where children are subjected to sex that is forced or coerced. But what about sex that they claim to want? Can children consent to sex with other children? With adults? Can a nineteen-year-old girl legally have what she believes to be loving, consensual sex with her stepfather? What about with her stepmother? Can students choose to have sex with their professors, or employees with their bosses? How we answer these questions depends on whom we consider to be so gullible, vulnerable, or exploited that they must be protected from their own expressed desires.

Generally, we are more willing to limit people’s autonomy in the short term. Youth is the most temporary of conditions: the kid whom we protect from certain kinds of sex grows up to be an adult from whom children must be protected. But some people, legally speaking, never leave the condition of childhood. In 2018, a former ethics professor at Rutgers named Anna Stubblefield pleaded guilty to aggravated criminal sexual contact with a man with cerebral palsy called D.J., who was nonverbal and under the guardianship of his mother and brother. The case fascinated other ethics

professors because it seemed to literalize the debate over coerced consent. Stubblefield had worked with D.J. on a technique known as facilitated communication, in which an able-bodied person supports the arm of a nonverbal disabled person to allow him to type. Were D.J.'s typed expressions of joy at their sexual relationship—"I feel alive for the first time in my life"—really his own? Can someone like D.J. ever consent to sex? And, if not, are his only options to be forever celibate or to be raped?

For liberals, another difficult question is whether some sexual acts are off limits even to adults who are not part of a skewed power dynamic. The unavoidable case study here is from 2001: two German men met online and agreed to cut off the first guy's penis and eat it together. As the amputee bled out, he was filmed expressing his continual and clear agreement to being killed and dismembered. Perhaps, some philosophers suggest, we should not be able to forfeit *future* consent, either by agreeing to serious bodily injury or death or by entering into a contract that strips us of long-term agency. But, if football players can consent to beat each other up on the field, why can't we beat each other up in bed? If we want to forbid people from subjugating themselves in the pursuit of their fantasies, we'd have to criminalize both extreme forms of B.D.S.M. relationships and marriage vows that contain the word "serve."

One critique of consent, then, is that it is too permissive—that it ignores how coercion or delusion may result in the illusion of agreement. But another critique is that it's too restrictive and punitive. Decades of reform laws have expanded the number of situations legally considered to be rape: it's no longer a charge that can be brought only against an armed stranger who attacks a struggling victim, ideally a white virgin. On university campuses, the idea that "no means no" has given way—because of the well-documented fact that many people freeze and are unable to speak in moments of fear—to "yes means yes."

Critics of this shift worry about encounters where both parties are blackout

drunk, or where one appears to retroactively withdraw consent. They argue that a lower bar for rape leads to the criminalization—or at least the litigation—of misunderstandings, and so discourages the sort of carefree sexual experimentation that some feminists very much hope to champion. “I can think of no better way to subjugate women than to convince us that assault is around every corner,” the self-identified feminist Laura Kipnis writes in “Unwanted Advances,” a 2017 book about “sexual paranoia on campus.” Kipnis describes her own mother laughingly recalling a college professor chasing her around a desk and trying to kiss her. That young women today are encouraged to think of this kind of “idiocy” as an “incapacitating trauma,” Kipnis argues, codifies sexist ideas about their innocence, purity, and helplessness. Another interpretation is that young women have decided, with a rather masculine sense of their own entitlement, that they need not smile indulgently upon their transgressors. But Kipnis is right in her broader point: the bureaucratization of our erotic lives is no path to liberation.

Kipnis’s book came out six months before reporters at this magazine and the *Times* published more than a dozen allegations against Harvey Weinstein, setting off the mainstream #MeToo movement. The subsequent wave of disclosures made clear just how common sexual violence is, and just how much victims continue to lose by coming forward. In a review of Christine Blasey Ford’s memoir, for example, the writer Moira Donegan suggests that the defining moment of Blasey Ford’s life was not the time when, as she describes it, she was pushed onto a bed and a seventeen-year-old-boy straddled her, tried to rip off her clothing, and covered her screaming mouth while his friend laughed. It was when society—or at least Congress—decided that she was a liar and that the boy who held her down should be a Supreme Court Justice.

The backlash to Title IX and the #MeToo movement can make it seem like the primary effect of such activism on men is to strip them, often temporarily, of their swimming scholarships and book deals and political

clout. (Andrew Cuomo's failed mayoral campaign was premised on the idea that voters could forget that the Department of Justice found he had sexually harassed thirteen women, and had retaliated against some who came forward.) But rape is also a criminal offense, and people, often poor, nonwhite men, can spend decades in jail for it, sometimes wrongly: think of the Central Park Five. The sentencing disparities for certain crimes are shocking; roughly four out of every five people who are convicted of statutory rape are Native American.

On the one hand, it's very hard to argue that crimes like rape are too aggressively investigated, or that victims are too deferentially believed. In Chicago, for example, between 2018 and 2023, police received more than twenty thousand reports of sex crimes, for which only around three hundred people went to jail. On the other hand, anyone horrified by rape should be very worried about putting even a single additional person in prison, where sexual violence, often at the hands of guards, is extremely prevalent. Men and women in state and federal prisons report being coerced or forced into sex at almost the same rates. This is not to say that rape can be separated from the hatred of women, just that, in certain situations, the role of the victim can be violently reassigned. As feminists have long argued, rape may incidentally be about sex. But it is always about power.

If the debates of the past decade have made one thing clear, it is that consent alone cannot save us. We continue to have terrible judgment, flawed communication, a fondness for incapacitating agents, and a violently eroticized contempt for the feminine. And yet where can we turn for regulation? It is very hard to let a moralizing government into the bedroom without giving up treasured and hard-fought freedoms like birth control or gay or kinky sex. University administrators, it is now impossible to ignore, are mostly lawsuit-avoiding machines. Hashtags are fleeting; the worst people continue to see themselves as the real victims, and to rule the country. Prisons have no moral authority when it comes to rape.

Into this impasse come a slew of recent books: Joseph Fischel’s “Screw Consent: A Better Politics of Sexual Justice,” Katherine Angel’s “Tomorrow Sex Will Be Good Again: Women and Desire in the Age of Consent,” Manon Garcia’s “The Joy of Consent: A Philosophy of Good Sex.” These books are not primarily critiques of our legal system: they generally agree that consent is, as Fischel puts it, “the least-bad standard available for sexual assault law.” But they worry that a cultural emphasis on consent—and especially “enthusiastic consent”—has divided “sex into the categories *awesome and rape*” (Fischel), ignored the complexity of female desire (Angel), and reinforced the notion of sex as something that women give to men, rather than something that equal people can enjoy together (Garcia).

The latest and most vigorous addition to this genre is “Sex Beyond ‘Yes’: Pleasure and Agency for Everyone” (Norton), by Quill Kukla, a professor of philosophy and disability studies at Georgetown University. Part manual, part manifesto, “Sex Beyond ‘Yes’ ” has plenty of can-do ideas about how we might turn consensual sex into “good sex”—how we might learn not only to accept and reject but also to invite, warn, ask, and order. Kukla, who is nonbinary, and who has both an academic and a personal interest in kink, sometimes writes with a certain condescension toward vanilla heterosexual couples, who having “never been forced to think reflectively about their sexual practices and desires may not have had the chance to develop these skills.” But their book touches on topics that will interest a wide audience: how to ethically have sex with a partner with dementia, for example, or the liberatory possibility of teaching children how to define physical boundaries using safe words.

Kukla complains that we talk too little about how to have good sex, and too much about how to avoid bad sex. They are sharp on the counterproductiveness of initiatives like *Take Back the Night*, which, by suggesting that women are at high risk from strangers on the street, can heighten their dependence on partners and acquaintances, who commit more than ninety per cent of rapes. They argue that the mainstream (and

sometimes feminist) idea that male bodies are gross and threatening is actually a form of rape culture, because it upholds the idea of sex as something men must extract from women. One could close Kukla's book with the sense that rapists are simply people who have not yet had the chance to develop the "complicated skills" of good sex. This is not as Pollyannaish as it sounds—a D.O.J. report from 2000 found that the most common age of sexual-assault offenders was fourteen. And anyone who wants to advocate for better sex must take as a first principle that boys and men are capable of change.

As sex education goes, "Sex Beyond 'Yes'" is lucid and straightforward; in a better world, it would be taught in high schools. But sex education, as Kukla admits, is not everything: "The best communicators in the world cannot have strong sexual agency in a country with maximally restrictive and punitive sexual norms or laws, or when trapped in a brightly lit room in an institution, such as a prison or hospital, that offers no privacy." Sexual "agency," Kukla's preferred term, differs from sexual consent in much the same way that a walkable neighborhood differs from a gated community. If consent is our right to briefly release other people from their obligation not to touch us, agency is our right to live under conditions where we can freely pursue our desires. Kukla calls such conditions the "scaffolding" of good sex.

A sorority sister, for example, has better scaffolding if she has a place to dance and get drunk and kiss strangers that is not a house operated entirely by men who have sworn loyalty oaths to each other, and who themselves are no strangers to sexual hazing. A foster child has better scaffolding if he has a bedroom of his own, with a door that locks. Birth control and PREP can be scaffolds for better sex, as can financial independence. Kukla mentions "twenty-four-hour public transportation," which allows people to "be confident that they can leave safely and easily whenever they choose to." When I read this, I thought of John Rideout's assault on Sheila Moxley, after he had drunk too much to bike himself home. Had there been a bus stop outside, could Moxley have more confidently turned out Rideout, locked the

doors, and slept peacefully through the night?

There is something unsatisfying—almost victim-blaming—about my question. Rideout, after all, did not rape Moxley because he didn't want to pay for a cab; he raped her because he didn't see her as a full human being. Kukla, who is surely aware of such cases, nevertheless avoids a gendered analysis of sex in order to focus on the material realities that abet bad sex. Scaffolding, ultimately, is less like reparations and more like universal basic income.

In any case, money's money, and we can wonder how Greta Hibbard's life might have gone differently had she been cut a slightly larger sexual-agency check. Pregnant at nineteen, she at first turned down Rideout's marriage proposal because she thought he was "irresponsible." After several months of trying to raise the baby alone on welfare, she reconsidered, and accepted Rideout, who had since joined the Army. Even after Hibbard told her parents that Rideout had begun to kick and punch her, her father told her that she had a duty to stay in the marriage, and her mother refused to help pay for a divorce. Hibbard may or may not have been surrounded by monsters. But she was certainly living inside a monstrous architecture. ♦

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