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A Liberal Response to Catharine MacKinnon

Never has it been asked whether, under male supremacy, the notion of consent has any real meaning for women.... Consent is not scrutinized to see whether it is a structural fiction to legitimize the real coercion built into the normal social definitions of heterosexual intercourse.... If consent is not normally given but taken, it makes no sense to define rape as different in kind. (MacKinnon 1979, 298 n. 8)

Can liberal feminists accept the social constructionist analysis of gender relations offered by Catharine MacKinnon? Central to MacKinnon's analysis is a claim about the validity of women's consent under patriarchy. She argues that women's consent to participate in oppressive practices is not free in these conditions. First, women are forced or coerced into oppressive activities by conditions in which power and economic goods are unequally distributed between men and women. Second, socialization undermines the validity of women's apparent consent, since women's acceptance of oppressive activities is socially conditioned. I will argue that liberals must reject this analysis. The rejection would not startle MacKinnon: her feminism is rooted in socialism. But I hope to show, further, that her view is unsustainable.¹

1. The Liberal Principle of Freedom of Contract

In liberalism, consent generally acts as a bar to state intervention. The feminist arguments I will examine attack the validity of the consent women give to oppressive arrangements. If such consent is invalid, then in these cases the standard entry conditions into contracts are not met. Procedural, or entry, conditions into contract can be distinguished from outcome conditions. Entry conditions to contract require that parties be competent, that they freely consent in the absence of coercion or deception, and that the contracts do not illegitimately harm third parties. These preconditions to contractual validity are standardly endorsed by liberals (see, e.g., Rawls 1971, 345).

Some liberals also qualify freedom of contract based on the *outcome* of contracts: for instance, if the outcome is unfair or exploitative. Rawls' difference principle might play such a role, by redistributing the benefits of contracts which met the entry requirements. But there is no liberal prohibition of individuals making contracts disadvantageous to themselves. Liberals reject legal paternalism, the view that prevention of harm to oneself is a reason in support of legal prohibitions (see Feinberg 1986, xvii). For instance, in Rawlsian liberalism, state neutrality—which demands that the state not privilege any conception of the good life over another—implies that the state should not control the content of contracts, but simply provide a mechanism for enforcement of the terms chosen by the parties to the contract. because it conflicts with law, although its content is not actually criminal.

If a feminist analysis could show that women's consent is insufficiently free to meet the standard of validity, the analysis could be used to argue for state intervention into consensual arrangements between individuals on the grounds that such arrangements are not truly consensual. In the case of contracts, this would allow the state to interfere,

without violating freedom of contract, because the entry conditions had not been met. I will argue that liberals cannot alter their definition of consent to accommodate such an analysis of consent, and, further, that MacKinnon's analysis in particular is inconsistent with a feminist agenda.

2. Are Women Forced or Coerced into Oppressive Activities?

The first claim, made by MacKinnon and others, is that women are forced to participate in oppressive activities because women and men as classes possess unequal shares of social power. On this basis, Carole Pateman (1988) writes that "women collectively are coerced into marriage" by economic pressures (132). Martha Minow and Mary Lyndon Shanley (1986) suggest that the economic compulsion to marry constitutes force. Raising an objection to the application of freedom of contract to marriage contracts, they write:

The assumptions that bargains will be freely struck masks configurations of social power that provide the backdrop to any contracts.... [O]ne of John Stuart Mill's great insights in *The Subjection of Women* was his observation that the decision to marry for the vast majority of women could scarcely be called "free." Given women's low wages, scarcity of jobs, and lack of opportunity for higher or even secondary education, marriage was for them a "Hobson's choice:" that or none.

But Mill was writing in 1869! The suggestion that women will *now* be forced to marry out of economic necessity seems wrong. Minow and Shanley continue with a discussion of contract pregnancy:

[T]o depict a woman who agrees to bear a child because it is the only way to bring her household income above the poverty line as exercising her 'freedom' ignores the restraints or compulsions of economic necessity. (11)

Yet these 'compulsions' do not amount to force, in the case either of contract pregnancy or of marriage.

This line of argument claims that women are forced or coerced into oppressive activities (such as dominant-submissive relationships, prostitution, pornography, or contract pregnancy) by social and economic pressures. If women are *coerced* into these activities, then restrictions on such contracts are justified, since the procedural criteria for contract are not met. If women are *forced* by economic hardship or social pressures to participate in oppressive activities, this might establish why a neutral state should intervene in certain voluntary oppressive activities. But either claim is incompatible with liberal standards of procedural justice in contract.

In some cases, force or coercion renders consent to a contract defective, and the contract unenforceable. When coercion reduces voluntariness beneath a certain level, consent is invalid: "it lacks legal or moral effect" (Feinberg 1986, 254). In order to argue that women's consent is not sufficiently voluntary to have effect, one must prove the

presence of coercion or force capable of reducing voluntariness below the significant level. But the case is very weak.

First, "coercion ... impl[ies] the presence of an intentional agent or coercer" (Elster 1985, 211). If a woman were held at gun-point until she signed a marriage contract, she would be coerced, but the case at issue here is one in which she acts apparently freely. Can one make a case that social and economic pressures actually coerce her to act? It seems not, since no intentional agency lies behind the various and entrenched social and economic pressures.

Social pressures could more plausibly be seen as a case of force than of coercion, since force "need not imply more than the presence of constraints that leave no room for choice" (ibid., 212). In other words, no agent need intend the effect. However, the economic and social factors which influence women are not effective enough to count as force. In cases of force, the victim is deprived of alternatives, but social pressures influence rather than determine action. Women can clearly choose to act against them. Finally, there is the phenomenological aspect. In cases of coercion or force, the agent is caused to act against her preferred option by a threat or a lack of alternatives. But many women choose involvement in oppressive activities as their preferred alternative. And even if an individual's choice is not fully voluntary, it does not count as a case of coercion or force so long as she has a meaningful alternative (see 214).

Socialism provides examples of cases where such apparent freedom of choice is illusory, but they do not fit this case. Socialists argue that the apparent freedom of workers to leave the proletariat and become shop-keepers is not real freedom:

proletarians, though formally free not to remain workers ... nevertheless are forced to sell their labour power.... Similarly, women are collectively coerced into marriage although any woman is free to remain single.... Coercion to enter the marriage or employment contract casts doubt on the validity of the contract. (Pateman 1988, 131-33; see also Elster 1985, 214-15)

But the cases are disanalogous. Not all workers can leave the proletariat and become shop-keepers because the working class is necessary for the existence of property owners. But all women may act against social pressures. Catharine MacKinnon (1987) would disagree with that. "[T]o those who say, 'Any woman can'," she responds "*all women can't*" (77). A female elite may overcome sexism, but the system which permits pornography and lacks a law of sex equality keeps the mass of women in their places. But women's choices are not like the choice for a laborer between working and starving. Nor is the situation analogous to the dependence of property-owners on a proletariat base. There is no mechanism of this sort to prevent the exodus of all women.

The claim that women's consent to oppressive activities is not free cannot carry political weight as a case of force or coercion. More importantly, we cannot give content to the claim that such pressures render women's choices not free without undermining liberalism and the role of consent as a moral and legal permission. Imagine two possible maneuvers which someone determined to show that women's consent is not valid could make. First, she could claim that the definition of coercion is inadequate and that socio-

economic pressures do in fact constitute coercion. Second, she could claim that liberalism needs to redefine the level of voluntariness needed for consent, so that while socio-economic pressures do not amount to coercion, they are sufficient to invalidate consent.

The first attempt must fail, for an attempt to stretch the definition of coercion wide enough to encompass social pressures will render an implausibly wide range of choices and actions as cases of coercion. If consent is invalidated whenever social pressures provide the main impetus for a choice, there will be few cases left where state intervention is barred by valid consent. The same problem recurs in the second maneuver. This would raise the standard of voluntariness required for consent to an impossibly high level. MacKinnon's social constructionist account, indeed, attempts to do just this, and we will see why such an account must fail.

3. Is Women's Consent Valid?

MacKinnon's central argument is that women choose to participate in oppressive activities without coercion, but that the desires which lead them to make these choices are the result of oppressive social conditioning. Women's consent to subordinate roles is not free because women are socially conditioned to accept subordination.² According to MacKinnon, sexuality, desire, and gender are social constructs and their central dynamic is inequality. In our society, sexuality and desire are structured by the inequality between men and women. Gender itself is defined by inequality, which takes the form of dominance and submission (see *ibid.*, 6, 50). Male dominance does not just consist in social power, but in the construction of maleness.

This inequality permeates all social relations, says MacKinnon: "the molding, direction, and expression of sexuality organize society into two sexes, women and men. This division underlies the totality of social relations; it is as structural and pervasive as class is in marxist theory" (*ibid.*, 49). While people can cross boundaries, so that a successful female may take on the dominant viewpoint, in fact gender inequality is all-pervasive. All sexuality, even homosexuality, is defined by the heterosexual norm, that is, the dynamic of dominance and submission. Given this, sexuality is not truly consensual because it is based on female submission. In these circumstances, what can a woman do but submit? MacKinnon writes "If 'no' can be taken as 'yes', how free can 'yes' be?" (95). She alleges that women cannot give meaningful consent to heterosexual sexual relations, conditioned as they are to submit.

The argument does not attack all social conditioning as invalidating consent, only that which is part of a system of oppression. The invalidation of consent by such conditioning has been a popular theme of contemporary feminist theory. Pateman claims that femininity and masculinity are "developed within, and intricately bound up with, relations of domination," so that women accept domination as natural (qtd. in Walker 1995, 460). Adrienne Rich claims that the "erasure of lesbian existence" conditions women's preference for heterosexuality (qtd. *ibid.*). Again, the point was made by Mill long ago.³ The contemporary claims are grounded in feminist sociological criticism, a

major theme of which is how women's political oppression is reinforced through heterosexual relationships: one author defines "heterosexual desire ... as sexual desire that eroticises power difference," (Jeffreys 1990, 2) and another writes that "the idea of power and submission is built into the language and imagery of heterosexual encounter" (Segal 1987, 99). Women's consent to occupy subordinate positions in intimate relationships is based on their internalization of roles which are integral to a comprehensive system of oppression.⁴

To those who find the universality of her claims unconvincing, MacKinnon (1987) asks,

[W]ould you agree, as people say about heterosexuality, that a worker chooses to work? ... If working conditions improve, would you call that worker not oppressed? ... Those who think that one chooses heterosexuality under conditions that make it compulsory should either explain why it is not compulsory or explain why the word can be meaningful here. (60)

In what follows, I wish to take the former option. Heterosexuality (the dynamic of inequality) is not compulsory because any definition of compulsion which allows that it is implausible and creates incoherence for liberalism and for MacKinnon's theory.

Under the standard liberal definition of free consent, the exercise of "adaptive preferences," those which have arisen due to oppressive social conditioning, counts as valid consent (Walker 1995, 459). The choice is properly connected to the agent because it represents her preferences, even though "they, and she, have been shaped by oppressive circumstances" (464). These preferences are not a momentary departure from selfhood, the result of intensive brainwashing or drug abuse, or a mental aberration unconnected to her personality structure. Instead, they are central to her personality and understanding of the world. Her exercise of preferences which have their causal origin in oppressive social practices is free in the relevant sense, even though she would be better off not having them. The central principle of Rawlsian liberalism is that the state should treat agents equally in allowing them to pursue their own conceptions of the good.

Certainly some forms of manipulation of beliefs and desires negate consent. A *Brave New World* scenario in which the state deliberately manipulates individuals through drugs and social conditioning is clearly objectionable to a liberal since it preempts individuals' ability to choose their own conception of the good. Likewise, someone who was brainwashed or drugged into consenting would not have truly consented. But to suppose that decisions made by women on the basis of social conditioning do not meet the procedural requirements of contract, failing the requirement of voluntariness, would result in undesirable practical implications and theoretical incoherence.

The practical implication is that most contracts cannot meet procedural criteria, since social pressures will be present in most if not all cases. It is incoherent to try to solve the problem by restricting the claim to adaptive preferences: if we can act independently of social conditioning, then we can also act independently of social conditioning which arises in oppressive conditions. That the conditioning occurs in a system of oppression

is a difference in content, not in kind. One could try to limit the cases in which consent will be invalid by appealing to a notion of individual good, so that the state intervenes only when the individual acts on desires which are formed through social conditioning and against her good. But liberal reservations about the state acting coercively in the name of the good of the individual, but against the preferences she actually holds, are well known (see Berlin 1984, 22–25).

Theoretical problems arise if we accept the claim that social conditioning is a factor capable of rendering consent invalid. This would set the standard of consent too high. Excluding the exercise of preferences based on social conditioning from freedom of contract would end with the result that freedom of contract never applies. If the presence of social conditioning renders contractual agreement not free, then no contract can ever meet the conditions necessary for it to be valid. And in the absence of free consent, the rationale for restriction of state intervention in individual affairs falters. The consent necessary to bar state intervention can no longer be given or received. Undermining the possibility of valid consent undermines liberalism.

These difficulties mean that liberals must reject this account, but they are also impediments for proponents of the account. If conditioning is capable of rendering consent unfree, it must do so in all cases. But if so, feminist reform could never make women's consent valid. It makes no sense to seek greater freedom for women—though we can still seek greater equality—since freedom is illusory. MacKinnon's project no longer makes sense. The claim that women's consent is not free is no longer a critique of patriarchy: it is just a statement of fact about human nature. Men's consent is not free either, since they too are subject to social conditioning. But MacKinnon clearly thinks that it is important that women's consent is not free.

Consent is generally thought to have a morally transformative power. Some actions towards others are impermissible if consent is not given. If consent based on conditioning is considered invalid, crucial distinctions are lost. To repeat MacKinnon's question, "If 'no' can be taken as 'yes', how free can 'yes' be?" Surely in this case we want to say that 'yes' carries a permission which 'no' does not. MacKinnon wants to reveal the coercion masked by sexuality and gender. But if consent is never valid, the absence of consent which makes coercion illegitimate is a feature common to all interactions. We can no longer explain what is wrong with coercion.

Notes

1. Some feminists who are committed to liberalism have appealed to MacKinnon's views, and I am concerned to show the ineffectiveness of this strategy. I am hopeful that an egalitarian liberalism could accommodate feminist goals. But I want to be clear about how it could do so by showing how it could not.
2. It could also be said that such women are not competent to consent. See Walker 1995, 464–66.
3. In *On Liberty*, Mill (1982) writes of polygamy: "this relation is as much voluntary on the part of the women concerned in it ... as is the case with any other form of the marriage institution; ... [when women are taught] to think marriage the one thing needful" (160–61).
4. For criticism of these claims, see Archard 1998, chapter 6.

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