



Wall Jesse, *Sex and Self-Ownership* (Oxford: Oxford University Press), p. 218.£ 100

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On what may be called the standard model, sex is, as such, a morally neutral activity. There is no *prima facie* reason against having sex, apart from the fact that it may not have been consented to. Sex is wrong in the absence of consent and permissible when consented to. Consent makes sex permissible, not by providing a reason that balances or outweighs a reason against sex, but by eliminating the wrong of its being non-consensual. In his book *Sex and Self-Ownership*, Jesse Wall argues that we should reject this view. Instead, we should accept the view that sex is *pro tanto* wrong. To say that sex is *pro tanto* wrong is to say that there is a general reason not to have sex, regardless of whether it is consented to. To be permissible, sex therefore requires justification. And it is, on Wall's view, only justified if the consent-receiver has an undefeated reason to believe that consent has been given. This is the main claim Wall argues for. Because I am not a legal scholar, I cannot do justice to the book's legal aspects and will therefore focus on its moral aspects.

Wall starts his book by arguing that sex has a general problem. This is that sex in all its forms instrumentalizes another person. It is a general feature of sex “that all sex is the use of another's body as a means to an end” (21). Wall distinguishes between instrumentalizing and objectifying another person. You instrumentalize another person if you use her for your own ends. You objectify another person if you use her with complete disregard of her subjectivity (8), a central feature of rape. To determine what it takes to avoid objectification, Wall draws on Kant's view on sex and marriage. Objectification of the other person is avoided, Kant argues, when sex takes place within the legal institution of marriage. The marriage contract ensures that both have permission to use each other's bodies. The couple becomes a unity of will, as Kant puts it (see 36). Wall takes the unity of will as a sharing of the ends pursued by the use of the other's body (36). As he puts it, “[i]t is a unity of the *what* and the *why*” (36); that is, the what we consent to and why we consent. The unity of will, on Wall's

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interpretation, is the consent to use the other's body (which is given by the signing of the marriage contract), and in addition, the consent to the reasons for using the other's body. He writes,

"I am not being treated as for someone else's ends when I share in those ends with the other. I do not merely agree to the use of me; I am part of a decision-making process where I control the reasons for the use of me". (37)

One can have sex for different reasons: "sex for pleasure, sex for survival, sex for exercise, sex for money, sex for diversion, sex for release from stress ..." (Robin West 2020, 19, see 37). In order not to be objectified by A, B does not merely have to consent to having sex with A. The reasons for which A has sex with B must also be acceptable to B. The parties are also supposed to have control over the reasons for which their bodies are used (37).

But it is unclear why this should be the case. Kant thought that what is required for the permissible use of another person's body is the permission the contract conveys to use the other's body. Kant is talking of "an agreement between two persons by which they grant each other equal reciprocal rights, each of them undertaking to surrender the whole of their person to the other with a complete right of disposal over it" (Kant, *Lectures on Ethics*, 1963, 167, see 35). Two people grant each other the right to use their bodies without reference to the reasons why they use each other's bodies. Kant might have missed something important here.

However, it remains unclear why anything more than consent to the use of each other's bodies is required. Suppose A consents to having sex with B because A seeks sexual pleasure, while B wants to have sex for bodily exercise. Suppose further that A is unhappy about being used as a means for bodily exercise. Would it be morally problematic for B to have sex with A in these circumstances? A's consent permits B to have sex with A. It seems, then, that A's consent grants B the right to use A's body, even if B's reasons for having sex with A are not acceptable to A.

This seems especially plausible in cases in which the reasons for having sex are not themselves objectionable. If, by contrast, B's reasons for having sex with A were grounded in the intention to damage A's reputation, for instance, to suggest that "A has sex with everyone", then B's having sex with A might indeed be morally problematic. But this would not be because A regards having sex for such reasons as unacceptable. Rather, it would be because those reasons are themselves unacceptable.

For A to permissibly instrumentalize B, A needs B's consent. When B consents, B exercises a normative power to permit A to have sex with her, something A would otherwise have a duty not to do. It seems natural to assume that consent makes the difference between using someone as a means and using someone as a mere means. However, on Wall's view, avoiding the instrumentalization of a person requires more than the other person's consent. We must also have "reasons to believe that the person would agree to the treatment of them" (44). These reasons are needed because sex is *pro tanto* wrong.

In Chap. 5, Wall begins to explain the main claim of the book: the claim that penetrative sex is a moral wrong (91). Consent is needed "as a justificatory defense rather than the absence of consent being an element of the offence" (91). Why is

penetrative sex *pro tanto* wrong? It is not *pro tanto* wrong, as Dempsey and Herring argue, because it poses a non-trivial risk of causing psychological harm (Dempsey/Herring (2007), 478, see 99). According to Wall, it is *pro tanto* wrong because it is an infringement of a person's self-ownership.

What, on Wall's view, is the problem here? "Penetration of the vagina or anus, forceful or otherwise, is use and control by the other, rather than use and control by the self" (110). The forceful use of someone else "to achieve sexual penetration" is "an infringement of a person's self-ownership, and therefore contrary to general reasons" (113). As an infringement of self-ownership, Wall argues, it is a *pro tanto* wrong.

"If sexual penetration is a *pro tanto* wrong, then it calls for justification" (129). How could it be justified? Wall argues that it can be justified by consent. The justification, however, does not consist simply in being permitted by consent. One is justified in having sex with another person only if one has reason to believe that the other person has consented. Why? Wall argues that consent has both a subjective and an objective component. The subjective component is the person's internal attitude towards an act, an attitude of willingness, intention, or acceptance. The objective component is the expression of this internal attitude, which provides the other person with evidence of consent. Sex would not be justified if the consent-receiver had no undefeated reason for the belief that consent has been given. It justifies the sex by excusing the *pro tanto* wrong act. Wall writes,

"In order to excuse the wrong act, the defendant needs to have acted on the basis of a justified or reason-based belief in a justifying factor" (136).

You might be justified, but mistaken, in believing that consent has been given. However, if your belief in consent is justified, the wrong of the act is excused. As Wall puts it,

"The defendant needs to have acted on an undefeated reason in favor of the permission. Only the complainant's expressive consent - her words or her conduct ... can qualify as such explanatory reasons" (139).

And he adds:

"Expressive consent, which encapsulates the subjective and objective elements of consent, is necessary to justify the *pro tanto* wrong of sexual penetration" (139).

There is one minor point to mention here. The *pro tanto* wrong of sex seems to be understood as the *pro tanto* wrong of all forms of sexual penetration. It is unclear why this *pro tanto* wrongness would not also apply to all forms of sexual acts, including intimate touching and kissing.

How can a justified belief that consent has been given be acquired? Consent has to be inferred from public behaviour, the words, or overt actions by the person (148). There are cases where no communication is needed to infer the lack of the required

attitude. If someone is asleep or unconscious, the absence of consent is established without any public behaviour. What is the standard to live up to here? One can opt for what the ordinary person would consider reasonable, or for an independent prescriptive standard of what the consent-receiver has a duty to check. Wall ends up endorsing an epistemic standard: to act on an undefeated reason for one's belief after having made a reasonable effort to find that out (166). The main task, according to Wall, is to link overt actions of a person to her attitude of willingness and acceptance (202). This is supposed to be the search for person-specific reasons. "That what can qualify as a justification ... must be grounded in not only words and overt actions but the words and overt actions of the specific person" (192). The answer should not depend on views of whether the ordinary person would consent if she behaved the way she does. It should rather depend on a justified belief that this particular person consents if she talks and behaves the way she does. This tells us what the consent-receiver has to look for. However, it does not answer the question of how much effort must be made for the belief that the other person has consented to count as justified.

Wall claims that if the consent-receiver has a justified belief that the particular person she has sex with has consented, sex is justified. The view raises various questions: how can the reason you have to believe that consent has been given justify sexual penetration? The wrong-making feature of sexual penetration is the control exerted by the other, which is supposed to be an infringement of self-ownership. You may have a reason to believe that consent has been given, but you still apply force. If sex is wrong if and only if it is not consented to, the wrong-making feature of the act can be eliminated by consent. However, consent cannot eliminate any further wrong-making features. If it is the application of force that makes penetration wrong, consent seems to leave the wrong-making feature untouched.

There is the further question of whether sexual penetration, as an application of force, is an infringement of one's self-ownership *rights*. The answer depends on how the rights of self-ownership should be understood. Wall follows Gerald Cohen's proposition that self-ownership grants each person "full and exclusive rights of control and use" (see 106). The rights of self-ownership can be waived. You can waive your self-ownership rights and allow others to use your body. The control you have over your self-ownership rights is normative: you alone determine whether the use of your body is permissible. Consensual use of your body is not a form of exerting normative control over it by another. It might be a form of non-normative control. But, given that it is consensual, it seems to be a form of legitimate control.

Wall disagrees with this diagnosis. The forceful use of someone is an infringement of self-ownership, even if it is consensual. But is applying force to another person an infringement of her self-ownership rights? The force in question is not coercion, but physical force, which is under the normative control of the rights-holder. The right that another person does not use physical force against one can be waived by consent, thereby permitting the other person to use such force. If this is correct, applying physical force does not seem to be an infringement of self-ownership rights. If it were an infringement of self-ownership rights, it would be unclear how sexual penetration could ever be justified by consent. If a form of non-normative control is what infringes these rights, then that infringement will be untouched by consent. That is, it will remain a wrong-making feature of sexual penetration that gives the

consent-receiver a general reason not to engage in it. Consent does not create a reason that balances or outweighs this reason. Consent does not create reasons; rather, it removes a decisive reason against an act. And because consent adds no countervailing reason, sex arguably remains wrong. Of course, it would be wrong to have sex without a justified belief that consent had been given. But the control over another's body would remain an infringement, and one that could not be outweighed by the consent-receiver's reason to believe that sexual penetration had been consented to. Consensual penetrative sex would still wrong the other person.

Wall's book raises important questions and challenges. In particular, it offers a novel justification for the "yes means yes" convention. In sum, it is an immensely rich book and a must-read for anyone interested in issues concerning sex and consent.

Declarations

Ethical Approval Ethical approval was not required for this study because it did not involve human participants, personal data, or animal research.

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