

RELATIONAL AUTONOMY AND RAPE

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Jack Bauer, James Bond, Jeremy Beedle: these are the male icons of our age. These rugged isolated conquerors struggle against the powers of the anonymous authorities. Bravely putting love of country before love of women, against insurmountable odds, they battle through. Leaving broken hearts wherever they go, they emerge bloodied, but victorious at the end of the day. Such men are seen by some at the epitome of the modern autonomous hero. Fighting free from the strings that bind and the forces that oppress, they emerge free men. Yet this image of “Super-Detached Man” is a fiction (Chen-Wishart, 2006). More than that he is a “thoroughly noxious concept” (Hoagland, 1989, p.144).

This chapter will be in two halves. The first will seek will consider the notion of relational autonomy. It will explain how this approach to autonomy grew out of a perception that many forms of liberal autonomy were overly individualistic and thereby failed to accord sufficient weight to the fact that decisions are taken within the context of relationships. Relational autonomy requires that people’s decisions are understood in the context of the relationships they live in and that the obligations that flow from those relationships are given due weight. The chapter will seek to explore the strengths and weaknesses of the writings about relational autonomy. One particular difficulty with it is that much of it has been at an abstract level, with few attempts being made to apply it in a concrete setting. Hence the second half of this chapter. In it an attempt will be made to apply relational autonomy to the law of rape. Central to the law on rape is the requirement that the victim did not consent to the act. This chapter will critique the use of consent in sexual offences for failing to place the sexual act within the context of the relationship between the parties. It will suggest that consent must be understood in the context of the interactions between the parties prior to the event, the relationship between the parties, and the wider social setting.

DIFFERENT VERSIONS OF AUTONOMY

Relational autonomy is a concept that flows from a rejection of the traditional liberal interpretations of autonomy. It regards them as being atomistic (McClain, 1992) and sees the need to reconceptualise autonomy in a way that appreciates values based on care, responsibility and interdependence. It has been developed by a number of writers, particularly, though not exclusively, by those writing from a communitarian or feminist perspective (Barclay, 2000). Some of those who have been persuaded by the kind of criticisms of individualistic autonomy we shall discuss have rejected the language of rights of autonomy altogether and sought alternative approaches, such as an ethic of care (Kiss, 1997). Others, however, believe that it is possible to reconceive autonomy in a way that can take account of the concerns.

INDIVIDUALISTIC AUTONOMY

There is much debate over whether or not many of the writers on relational autonomy have misunderstood traditional liberal autonomy (Friedmann, 2006). There is much truth in the claim that relational autonomy is based on a rejection of a caricature of liberal autonomy, rather than the real thing. Therefore, in this chapter the term “individualistic autonomy” will be used to describe the vision of autonomy which is rejected by relational autonomists.

Autonomy in much legal and philosophical writing has obtained a “sacred status” (Chen-Wishart, 2006, p.231). At the heart of individualistic autonomy is the argument that each individual should be able to choose how to live out their lives in whatever way they wish, as long as others are not harmed. Linked to the notion of individual autonomy are a whole set of other ideas: self-sufficiency, self-sovereignty, moral independence, self-government, pluralism and liberty (Fineman, 2005). Autonomy is about living a self-authored life: living according to values that are one’s own. This means that the rights attached to individualistic autonomy are all about fighting off unwanted intrusions into an individual’s freedom of choice (Donchin, 2001).

RELATIONAL AUTONOMY

Relational autonomy is not a “single unified conception” (Mackenzie & Stoljar, 2000, p.4) but rather an umbrella term with a range of related perspectives. At their heart is a

shared conviction...that persons are socially embedded and that agents’ identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity. (Mackenzie & Stoljar, 2000, p.4)

As will be suggested later, the fact that it has attracted support from a wide range of different perspectives might be explained by the fact that most of the writing on it has been at an abstract level. When it is applied in concrete settings, differences between its adherents may become clearer.

Relational autonomy is based on a reconceptualization or reconfiguration of the concept of individualistic autonomy. Although its supporters are sympathetic to many of the points made by the notion of autonomy, they argue that traditional liberal autonomy is too individualistic. Lorraine Code (1991, p. 78) argues that for supporters of individualized autonomy:

Autonomous man is – and should be – self-sufficient, independent, and self-reliant, a self-realizing individual who directs his efforts towards maximizing his personal gains. His independence is under constant threat from other (equally self-serving) individuals: hence he devises rules to protect himself from intrusion. Talk of right, rational self-interest, expedience, and efficiency permeates his moral, social, and political discourse. In short, there has been a gradual alignment of autonomy with individualism.

Supporters of relational autonomy argue that basing autonomy on a conception of an isolated individual pursuing his own version of life, fails to recognise that in fact most people live their lives in a complex web of relationships and connection.

Individualistic autonomy emphasises the values of independence and self-sufficiency, while it is inter-dependence and connection which are the values at the heart of many people's lives. While an individualistic model of rights presents many legal cases as involving a clash of individual rights and the state's job being to mediate between these conflicting claims, a relational autonomy model argues that such an image misconceives how people understand their lives, especially when in close emotional relationships. We are not constantly clashing rights with those we live with, rather our interests are intertwined. People in close relationships seek a compromise which is good for "us" and do not see it as a matter of weighing up competing interests. Relational autonomy therefore has attraction to communitarians who seek to emphasise the values of community (McIntyre, 1981) and to feminists seeking to emphasise the importance of care and relationships of dependence (Ball, 2005). There can be tensions between those approaching relational autonomy from these two perspectives (Bridgeman, 2007).

Six linked themes which run at the heart of relational autonomy will now be presented.

Relational Life is Inevitable.

We live our lives in relationships with others and those relationships are an important aspect of who we are and how we live. Our characters and understandings of ourselves from the earliest days are charted by our relationships with others (Carle, 2005). The experiences of caring for dependents and the benefits and sacrifices of friendship, are, whether we like it or not, part of our lives (Sevenhuijsen, 2003). We are not free to "live our lives as we choose" in an isolated way. Our decisions are constrained by the responsibilities and realities of our lives and the relationships within which we are embedded (Nedelsky, 1989). Rarely are important decisions we make in fact just about us. They impact our families, friends and those we are in relationships with. And their decisions impact on us. Hence Allan Johnson (1997, p. 30) has called our culture's insistence that we are separate and autonomous as patriarchy's "Great Lie."

In fact the point is broader than this. It is not just that our decisions affect those we are in relationship with, but that our relationships enable us to make autonomous decisions. Linda Barclay (2000, p. 57) notes that "our ongoing success as an autonomous agent is affected by our ability to share our ideas, our aspirations, and our beliefs in conversation with others. It is unlikely that any vision or aspiration is sustained in isolation from others." To be autonomous a person must be able to reflect critically on their life and the values underpinning it. But that is only possible with the help and support of those around them (MacKenzie, 2000).

For many people their self-definition of themselves is based on relationship, be it as a mother, a Muslim or a Millwall Football Club fan (Barvosa-Carter, 2007). Our sense of self is a mixture of interlocking and sometimes conflicting social identities (Donchin, 2000). Therefore the obligations, responsibilities and restrictions of relationship are not antithetical to being autonomous. Quite the reverse; they are essential to it.

Relational life is good

Living in the context of these relationships is good (Groenhout, 2004). Many relationships are to be valued, recognised and indeed treasured by the law. The traditional liberal visions of autonomy, keeping relations hidden and not recognised means relationships end up being devalued and ignored by the law (Herring, 2007). Relationships of care and dependency need to be supported, nurtured and upheld, not hidden and downplayed (Verkerk, 1999).

However, a crucial point must be made here. Supporters of relational autonomy do not have an idealistic view of relationships. Although beneficial relationships are an important part of people's lives and essential to autonomy, relationships and social structures can be oppressive and destructive of autonomy. A central aspect of relational autonomy must be in protecting people from the harms that abusive relationships can cause (Chen-Wishart, 2006).

Decisions must be understood in a social context

A person's autonomy can only be understood within the personal relationships and social structures that form an agent's desires, beliefs and emotional attitudes (MacKenzie & Stoljar, 2000). Taking these into account may mean that a decision is, in fact, not autonomous, or its meaning may not be the apparent one. The social background may mean that an agent's capacity for self-reflection, self-knowledge or choice can be restricted and inhibited. Inevitably, there is much disagreement between those supporting relational autonomy about when a person's social situation may be so oppressive that they lack autonomy (see Friedman, 2006 and Stoljar & MacKenzie, 2000).

The impact of this is especially important when considering the responsibility the state might be said to have to promote autonomy among its citizens. Ensuring autonomy means that the state must not only ensure that an individual is not subject to improper threats from others, but that the social and community structures are such that a person is free to develop with others a community or set of relationships within which to develop a vision of the good life. In other words maximising autonomy does not require giving people the time and space to sit quietly and reach decisions for themselves free from outside disturbance, but rather developing social and community based structures which will enable human interactions to flourish. Autonomy then is not a psychological state so much as a social one (Oshana, 1998).

Emotions are part of autonomy

A fourth theme in the writings of relational autonomy is that individualized autonomy tends to emphasise our rational side. The ideal decision maker is "judge-like", weighing up the rational arguments and reaching a "balanced decision". Mackenzie and Stoljar (2000, p.21) argue for:

the need to think of autonomy as a characteristic of agents who are emotional, embodied, desiring, creative and feeling, as well as rational, creatures.

This means that we need to recognise that issues of memory, imagination and emotional disposition are important aspects of autonomy (Friedman, 2000).

This argument is based, in part, on a rejection of the dichotomy between reasons and emotions. For example, Martha Nussbaum (2001, p.22) rejects an argument that emotions do not involve judgement saying that “emotions are forms of evaluative judgment that ascribe to certain things and persons outside a person's own control great importance for the person's own flourishing.” Marilyn Friedman (2006) argues that a person's emotions can produce a coherent picture of who a person is. This can therefore be reflective of autonomy. Attitudes and emotional reactions should not therefore be regarded as necessarily lesser when determining what is required to respect a person's autonomy.

The importance of other values.

Supporters of relational autonomy emphasise that although autonomy is very important there are many other values that need to be respected such as trust (O'Neill, 2002), responsibility, care (Franke 2001) and attention to the needs of others. These values are seen as essential to the maintenance of relationships, which are themselves essential to autonomy. Hence, while individualistic visions of autonomy might regard notions of responsibility and trust as antithetical to autonomy, relational autonomy would see them as essential to it.

Autonomy as a fluid concept

Relational autonomy is not treated a state you either have or do not have, but rather a state you acquire (Meyers, 1989). Jennifer Nedelsky (1989, p.10) writes:

I speak of "becoming" autonomous because I think it is not a quality one can simply posit about human beings. We must develop and sustain the capacity for finding our own law, and the task is to understand what social forms, relationships, and personal practices foster that capacity.

For many of us, the goals for our lives depend upon co-operation with each other. This means that our autonomy ebbs and flows with the changing of relationships. Indeed it is in and through relationships that the skills needed to exercise autonomy are learned and developed.

CRITICS OF RELATIONAL AUTONOMY

We have already mentioned one prominent criticism of relational autonomy which is that it has misunderstood traditional liberal idea of autonomy. Much writing in liberal autonomy has emphasised the importance of relationships in individual lives (e.g. Raz, 1986). It may be said that relational autonomy is not truly criticising autonomy as it has been promoted by academic philosophers and lawyers. Rather it is criticising the popular image of “self-sufficient autonomous man”. Notably, for example, Martha Fineman (2004) in her criticism of autonomy starts with its dictionary definition rather than the way it has been developed by academic

commentators. Indeed a supporter of liberal autonomy might respond that relational autonomy is telling us how we should exercise our autonomy. It is not, therefore, a critique of liberal autonomy at all. Supporters of liberal autonomy have always accepted that people can use their self-determination to make bad decisions as well as good ones. People can use their autonomy to live isolated individualistic lives, but that is not necessarily a criticism of liberal autonomy.

There is some force in these objections. Certainly it is not always clear in the writing on relational autonomy what is being attacked: whether it is the academic notion of liberal autonomy or the cultural image of the autonomous man. While this is true, it would be wrong to categorise relational autonomy as simply advice on a good life, rather than a challenge to traditional liberal autonomy. First, traditional liberal autonomy values choice and disapproves of restrictions on choice. Yet, by entering relationships our choices are to some extent inevitably limited. That, however, should not be regarded as undesirable. Second, while liberal autonomy does not *per se* promote the image of the isolated individual, it needs to be seen as part of the larger picture. Mary Becker (1999, p. 22) writes “patriarchy values power, control, autonomy, independence, toughness, invulnerability, strength, aggressiveness, rationality, detachment (being non-emotional), and other traditionally masculine attributes that have proven effective in the battle against other men.” Once put in the context of other values that society and law values autonomy can be said to play its part in promoting individualism.

Another significant objection is that relational autonomy, in emphasising the importance of interdependent relationships in an individual’s life, has overlooked the importance of the “self” and the importance we attach to self-determination. In other words if traditional liberal versions of autonomy have been too ready to view individuals as isolated, relational autonomy has over-emphasised the importance of community and relationship and has ignored the importance of the private life of the self. Although relationships do play an important part in people’s lives, most people have an inner life and sense of self which is not dependant upon their relationships with others. Indeed, it might be argued a self-vision which is entirely constructed upon relationships with others is unhealthy (de Botton, 2004). We have dignity and worth in ourselves as people, and not just in our relationships with other. The isolated loner is of no less value or worth than the person with over a 1000 friends on Facebook. John Christman (2004, p. 157) argues:

Just as conceiving of persons as denuded of social relations denies the importance of such relations to the self-understandings of many of us at various times in our lives, to define persons as necessarily related in particular ways similarly denies the reality of change over time, variability in self-conception, and multiplicities of identity characteristic of modern populations.

While accepting there is a danger that relational autonomy can lead to insufficient weight being placed on the self, it need not. As Elizabeth Frazer and Nicola Lacey (1993, p. 178) argue:

The notion of the relational self, in contrast to both atomistic and inter-subjective selves, nicely captures our empirical and logical interdependence and the centrality to our identity of our relations with others and with practices and institutions, whilst retaining an idea of human uniqueness and discreteness as central to our sense of ourselves. It entails the collapse of any self/other or

individual/community dichotomy without abandoning the idea of genuine agency and subjectivity

A rather different complaint is that by emphasising the importance of family and community there is a danger that relational autonomy too readily allows an individual's rights to be overridden in the name of the family or community (Binder, 1994). There is certainly a concern with the way that relational autonomy is sometimes presented. Friedman (2000, p.47) makes an interesting point with this in mind. She argues:

Although women still have occasion to fear men's autonomy, it seems that many women have good cause to welcome our own.

Her point is that although women can legitimately be concerned by the way the men's autonomy might be used to justify an adjuration of responsibility for children or other family dependants, women must treasure their own freedom to, for example, leave an oppressive relationship. Feminists should be wary of any suggestions that in the name of relational autonomy an individual's autonomy should be sacrificed for the "greater good". History suggests that the "greater good" tends to require the sacrifice of the rights of women, rather than men. Further glorifying values of caring and dependency might reinforcing the traditional roles of women (McClain, 1992). The roles of carer, nurse, mother become idealised, thereby reinforcing the model of behaviour of which feminists have been attempting to break free from for decades.

There are, therefore, some genuine concerns over the misuse of relational autonomy. However, that is true of many, if not all, concepts at this level of abstraction. With a proper awareness of its dangers relational autonomy can be developed to be a powerful alternative to the traditional understanding of autonomy.

CONSENT AND RAPE

It has been suggested that the concept of relational autonomy is "hopelessly vague" (Verkerk, 1999, p.363). There is, it must be admitted, some fairness in these remarks. Proponents of relational autonomy have been eloquent on the description of the concept at a theoretical level, but surprisingly reluctant to move to more concrete implementation of the theory. What follows is an attempt to use insights from relational autonomy to examine the law of rape. For reasons of space and clarity this half of the chapter will focus on rape where the victim is a woman. Many (but not all) of the points made could apply equally if the victim were a man.

The offence of rape requires proof that there was penile penetration of the victim without her consent and that the defendant knew or ought to know that the victim did not consent. Consent is therefore a key element of rape. As Richard Posner (1994) starkly puts it, "all that distinguishes [rape] from ordinary sexual intercourse is lack of consent". Consent is seen as essential because it is at the heart of a liberal approach based on autonomy (Roberts, 2001): I should be allowed to permit another to touch me in any way I like. Some people may not like the way others touch me, but if I am competent and have consented to the touching then my decision must be respected. Hence where there is consent there should be no crime. David Archard (2007, p.210) writes:

The giving and withholding of consent fixes what is permissible and impermissible in our relations to others, and has this power as an expression of our fundamental moral status as independent, self-governing agents entitled to determine what may and what may not be done to us.

Hence sexual penetration with consent is permissible and sexual penetration without consent is rape.

Defining consent

Despite the popularity of placing great weight on the notion of consent the concept is in fact extremely difficult to define. The fact that several books have been written on the meaning of consent in the arena of sexual relations indicates how problematic this has been (e.g. McGregor, 2005; Archard, 1998; Westen, 2004; Wertheimer, 2003). These writings demonstrate that there is little agreement over questions such as whether consent to sex is to be determined subjectively or objectively; when the use or threat of force negates consent; or when deceptions negate consent.

Overriding all the arguments over consent is whether we should take a strong or weak understanding of consent. We could take a perfectionist view and declare that only the consent of a person with a full range of choices, in possession of all relevant information, and with no outside pressures should count as proper consent. But one might conclude that in the sexual context it would be extremely rare that such consent could arise. This would mean that only exceptionally would you be deemed in a position to exercise autonomy. However, relying on a weaker understanding of consent means that a decision is treated as an exercise of autonomy, even where it may not truly be an genuine expression of another's will. Venessa Munro (2005, p. 345) summarises the tensions between the positive and negative consent well:

While respecting [positive autonomy] entails a wide freedom to seek out, and engage in, intimate relations, respecting [negative autonomy] entails a right to refuse such relations, and to have this refusal taken seriously. Since setting high standards for what qualifies as consent will thus protect negative at the expense of positive autonomy, and vice versa, we must have a clear sense of what is at stake before we can hope to elucidate an appropriate sexual offences framework.

A Relational Approach To Consent In Rape

Using an approach based on relational autonomy it is clear that there are a number of aspects of the current law which are unsatisfactory. Before outlining these, it is striking that even among supporters of a traditional consent approach there is clearly some unease and that most of them argue that consent has some special meaning in this context. So, for example, Peter Westen (2004) argues that "legal consent" is not the same as "factual consent". It is hard not to agree with Robin West (1993, p.1446)'s analysis that consent is an "extraordinarily malleable notion". The suspicion is created that important issues are being hidden behind the label consent.

A relational autonomy approach could raise the following concerns about the current law's approach to consent:

The social setting for consent

In a rape trial the jury must consider whether or not there is consent. The focus is often on whether the complainant voiced her opposition or consent at the time of the penetration. This can lead to the jury failing to take into account the history of the parties' relationship (Lees, 2002). Notably violence or threats of violence immediately before the act can create a rebuttable presumption that there was no consent (Sexual Offences Act 2003, s. 78). But that presumption only arises where the violence is immediately before the penetration.

Supporters of relational autonomy would emphasise that a person's consent must be understood in its broader social context. In particular that a woman's consent to sex must be seen in the context of patriarchy. Catherine MacKinnon (2003) argues:

The problem with consent-only approaches to criminal law reform is that sex, under conditions of inequality, can look consensual when it is not wanted, at the time because women know that sex that women want is the sex men want from women. Men in positions of power over women can thus secure sex that looks, even is, consensual without that sex ever being freely chosen, far less desired.

The claim here is certainly not that women cannot make a rational decision about sex. Rather the decision must be seen in the surrounding social, economic and relational background. If we are to ascertain whether a person is exercising their autonomy and agreeing to sexual penetration we cannot rely simply on the words used by the parties at the time. There must be consideration of the wider social environment and the influences that will be affecting the parties (contrast Reece, this volume). This will include the paramountcy given to sexual penetration in the heterosexual masculine identity. To many men sexual penetration is a confirmation of masculinity. Related to this are the sexual expectations of women. Many cultural images reinforce the idea that vulnerability is regarded as "sexy" in women; where as strength (manliness) is regarded as sexy for men. These create intense pressures on the parties when decisions are made about sex. In a recent survey for the children's charity, the NSPCC (BBC News Online 2005), it was found that 44% of teenage girls felt guilty saying no to a request for sex from their boyfriends. Of those who had experienced unwanted sex, 55% thought the event was partly their fault.

Further, there are the economic and social disadvantages that women as a group suffer which can be readily exploited to access sex. The narrow approach taken in the law to consent favours those who have the strongest tools to acquire it. Robin Morgan (1980) writes:

(T)he pressure is there, and it need not be a knife blade against the throat, it's in his body language, his threat of sulking, his clenched or trembling hand, his self-deprecating humour or angry put-down or silent self pity at being rejected. How many millions of times have women had sex "willingly" with men they did not want to have sex with?

Also crucial is the fact that the giving of consent has to be seen with the context of "rape culture" (Madden Dempsey and Herring, p.480). A culture in which widely available pornography portrays coerced sex as enjoyed by women, and where

prosecution and conviction rates for rape are appallingly low. If consent is not provided the woman can expect little protection from the law and society if the man never the less continues with sex. In this light “consent” (sic) may be a sensible choice if the man is determined to penetrate whatever happens.

There is much more that could be said about the cultural background against which sexual encounters take place. What I hope to show is that simply asking the question “did the victim consent?” closes off the context within which the encounter takes place. An approach which fails to appreciate the pressures on the parties and the relationship between them, the fears of what might or might not happen, the awareness of the lack of effective criminal sanction in cases of rape; is one that cannot claim to be truly seeking to protect sexual autonomy.

Tokens of consent

In considering whether or not there was consent juries inevitably use general social understandings of consent. Widespread attitudes towards women and sexual penetration are built on “rape myths” (Chapleau, Oswald & Russell, 2007). The myth that women “like it rough” and that “unless they say no they mean yes” and “any woman who is drunk wants to have sex” are myth barely behind the surface of many commonly expressed attitudes to sex. These myths can, of course, play an important part in jury deliberations. It can be extremely difficult for a woman to show that she did not consent, especially where she has been seen to behave “foolishly” (e.g. by inviting a man to her flat after a date). And that is something known by men. And women. Only “good victims” can hope to receive protection from the criminal law (West 1996). Even where there are physical injuries these may be insufficient. In a Home Office Study one victim reported being told by the police that “your bruises ain’t good enough; you’ve got no case” (Harris & Grace, 1999, p.21). It is not possible to know what factors juries in fact take into account in jury trials because research into jury deliberations in actual cases is prohibited. However research projects involving mock juries suggest the “rape myths” of the kind mentioned in this paragraph do play a central role in their deliberations (Finch and Munro, 2006).

Surveys of public attitudes also appear to back up the prevalence of these rape myths. A survey by Amnesty International (2005) found that 30% of people believed that if a woman had behaved flirtatiously she was partly or completely responsible for a rape; and 26% thought the same if she wore revealing clothing or had been drunk. Astonishingly 6% thought a woman wearing revealing clothing was totally responsible if she was raped and 8% that a woman who was known to have had several sexual partners was again totally responsible. As this indicates there is still within our society credence given to the “rape myths” that women can generally be taken to agree to sex at any time with any man, unless she dresses in very baggy clothing, staying indoors, is rude and unfriendly, and fights any man who attempts to have sex with her.

Narrowness of approach

The notion of consent is too narrow in its time frame. In answer to the question “did the defendant consent?” the law only permits the answer “yes” or “no”. This provides no ready room for the telling of a woman’s story of what happened before the incident

of sex, or the context within which the sex took place. As Wendy Brown (2001, p.36) argues, consent is “a response to power: it adds or withdraws legitimacy but it is not a mode of enacting or sharing in power”.

The story is structured by the “consent question” as construed by the law: the man wanted to engage in penile penetration and the question for the jury is did the complainant agree or not? Such a picture reflects images of an active masculinity and passive femininity, but it also closes out the story of what happened before and what was intended to happen after; of how the act was to be understood. Nicola Lacey (1998) has written:

The victim’s consent responds to power by conferring legitimacy, rather than shaping power in its own terms: consent is currently understood not in terms of mutuality but rather in relation to a set of arrangements initiated, by implication, by the defendant, in an asymmetric structure which reflects the stereotypes of active masculinity and passive femininity

This echoes Matthew Weait (2005)’s argument that the law tends to isolate criminal offences into a “discrete and meaningless moment or event”. Consent is focusing on the question: “was it a ‘yes’ or a ‘no’?” This decontextualises the event and objectifies the woman in paying no attention to her understanding or experience of the event. It also restricts the woman’s role to a legitimising one, rather than providing her as an equal partner in negotiating how their intimate relationship will develop.

Developing an argument of this kind Ngaire Naffine (1994, p.20) argues:

The sexual paradigm of law, the naturalised sex of law, invariably cast the man (never the woman) in the role of initiator (never the negotiator) of a sexual act (a singular, never a plural, thing which never took the form of an engagement) which always entailed the thrusting of the penis into the vagina (never the lips of a woman on the lips of another, to think of just one of the many other forms that ‘the act’ might have taken).

Through the consent model the woman is the respondent to the man’s proposal. “Sex still entails the (unidirectional) proposal of one party to take the body of the other party: the act is lawful when the other party agrees to be taken; it is rape when the other party does not.” (p.26) The significance of this “unidirectional” approach is extensive. Thus, women are in the “consent model” the “passive receptacles of male agency” (Anderson 2005).

Overlooking of other values.

As mentioned earlier, relational autonomy supporters emphasise the importance of taking into account other values apart from autonomy. By contrast it is a common view among liberal writers on sex that consensual sex cannot be wrong (see also Jenkins, this volume). But this overlooks the ways in which, even in consensual sex, a person can be used.

There is widespread acceptance that in sexual conduct it is particularly easy for one person to use another as a means to an end. Soble (2002, p. 226) writes that sexual conduct is all about “uncontrollable arousal, involuntary jerkings, and its yearning to master and consume the other’s body.” That may be philosophers for you,

but it is often said that sex is connected to loss of self control and self awareness and this readily leads to a loss of regard for the humanity of the other. Germaine Greer (1970, 250) amply demonstrates the kind of “sheer use” that can occur too easily in sex when commenting that in many cases the man regards the woman “as a receptacle into which he has emptied his sperm, a kind of human spittoon, and turns from her in disgust.” Consent supporters claim that where there is consent there cannot be this objectification or use of another person (Wertheimer 2003, p.128). But Martha Nussbaum (1995) in her seminal article has set out the ways that objectification can occur despite consent. These include instrumentality (where the objectifier treats the other as a tool for his or her purposes); violability (where the objectifier treats the other person as something that lacks boundary integrity and that it is “permissible to break up, smash, break into” (Nussbaum, 1995, p. 357)) and denial of subjectivity (where the objectifier treats the other as something whose experiences and feelings do not need to be taken into account). The fact that the victim may have consented should not lead to a conclusion that therefore she has not been wronged.

SUMMARISING AN ALTERNATIVE APPROACH TO CONSENT

An approach based on relational autonomy would seek to improve on the law’s current approach. Respecting another’s autonomy requires not just asking whether or not there was “consent” (whatever that means) but looks to enabling people to have autonomy and a careful analysis of the circumstances in which a choice was made. This requires therefore a far greater awareness of the social context in which a decision is made; the relationship between the parties; and the transactions between them prior to any consent being given. Respecting autonomy is not the same as respecting choice. It means respecting the other person’s right to make decisions for themselves as to how they wish to develop their version of their good life. It means appreciating that individuals exist in their social context and in the network of relationships. In this context it means a recognition of the patriarchal forces within which women “consent” to sexual intercourse. No one adopting such an approach would give any credence, for example, to the rape myths mentioned above.

Second, a relational autonomy approach would emphasise not simply the point in time at which the sexual penetration took place. It should not be seen as a act which the “man proposes and woman disposes.” The law should expect there to be a mutual agreement between the parties. Where movement towards sexual penetration is all one way (i.e. the man is “making all the moves”) there should be a suspicion as to whether the sexual penetration was the result of a mutual agreement. The law should be looking at the actions, behaviours and attitudes of both parties leading up to the penetration.

Third, that sexual partners owe each other responsibilities. In particular responsibility to respect the other party’s sexual autonomy. Respect for your partner’s humanity requires more than obtaining “consent”. Onora O’Neill (1985, p. 253) writes:

I shall argue that an adequate understanding of what it is to treat others as persons must view them not abstractly as possibly consenting adults, but as particular men and women with limited and determinate capacities to understand or to consent to proposals for action. Unless we take one another’s

limitations seriously we risk acting in ways which would be enough to treat “ideal” rational beings as persons, but are not enough for treating finitely rational, human beings as persons.

This argument does not regard obtaining consent as some kind of a game where the man wins if he gets the woman to say “yes”; but rather it involves a respect for each other with limited capacities and with finite rationality. Developing this theme, the current law fails to properly acknowledge the responsibilities that people have when they engage in sexual penetration. The responsibility is to respect the other’s autonomy. Lying to a partner, pressurising them, threatening them; these things cannot be part of respecting another person’s autonomy. Listening to them; removing any pressures; giving time, care and support: these are the things that involve respecting another’s autonomy.

CONCLUSION

This chapter has examined the concept of relational autonomy. Writers adopting this approach have found the traditional individualised approach to autonomy thin, inaccurate and dangerous. The ideal the law should be built around is not a world of individuals pursuing self-interest, with their right to do so being protected from the needs or obligations of others unless absolutely necessary. But rather it should be based on an acknowledgement that individuals are embedded in relationship with others.

Using this concept this chapter has criticised aspects of the law’s approach to consent in rape. The law has failed to show sufficient appreciation of the social and cultural context in which sexual penetrations take place. It reduces consent largely to an isolated event, rather than a fuller consideration of the relational context in which the event takes place. It fails to appreciate the responsibilities that are undertaken between parties who engage in sex.

Relational autonomy provides a richer a more nuanced way of understanding our lives, our decision-making and our choices. To be autonomous is to not to be isolated and free of responsibility, but to be in a network of relationship, with their dependant responsibilities. As Marilyn Friedman (2006) suggests it enables us to see that true picture of an autonomous man is not our Jack Bauer figure riding off into the sunset in a blaze of smoke; but the man at home changing a nappy.

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