

# Criminalizing ‘Unjust Sex’

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This essay examines the limitations of current rape law and advocates for legal reform to better protect sexual autonomy. Sexual autonomy, defined as the right to freely choose and refuse sexual interactions, is foundational to liberal legal principles. However, the concept of ‘unjust sex’, which involves manipulation, coercion, or exploitation of agency without physical force, reveals gaps in existing legal frameworks. Drawing on Ann J. Cahill’s work, the essay argues that unjust sex undermines agency and autonomy, causing significant harm that warrants criminalization. While rape nullifies sexual autonomy outright, unjust sex limits the individual’s capacity for meaningful self-determination, reinforcing systemic power imbalances. The essay addresses concerns about potential overreach, arguing that criminalizing unjust sex defends autonomy without imposing moralistic control. It concludes that protecting sexual autonomy requires acknowledging and addressing the harm caused by unjust sex.

## INTRODUCTION

Sexual autonomy – the ability to choose and shape the sexual relations one has – is a right as fundamental as any other type of autonomy and is legally protected. The law on sexual offences defines them as ‘violations of the right to sexual self-determination’ (Hörnle 2016, 851). Following a liberal perspective, it has been set out to strengthen sexual autonomy by loosening the grip of the law and decriminalizing certain sexual acts, e.g. homosexuality and adultery. The notion of a liberal criminal law concerning sexual offences has thus been strongly associated with decriminalization, especially in the second half of the 20<sup>th</sup> century. In this essay, however, I will argue for the reform of laws pertaining to sexual offences to better protect sexual autonomy by criminalizing sexual acts lacking valid and robust consent including forms of ‘unjust sex’, as termed by Ann J. Cahill (2016). The argument will follow from the description of unjust sex as undermining the victim’s agency, which is crucial for the establishment of autonomy. I will argue that it can be in the interest of a liberal theory of law to criminalize more, in order to protect the legal asset of sexual autonomy. First, I will introduce the notion of sexual autonomy and its dual dimensions of positive and negative liberty. Next, I will provide a brief historical overview of how the focus of rape law has evolved over time, highlighting the shift from a focus on marital rights to a recognition of autonomy and consent as central concerns. Then, I will discuss the concept of unjust sex and why it undermines sexual agency. I will argue that unjust sex represents a significant harm to sexual autonomy which justifies its criminalization. Finally, I will address concerns about the criminalization of unjust sex and conclude.

## SEXUAL AUTONOMY

Humans have a right to sexual autonomy, as much as they have a right to autonomy in general. The desire to be able to choose and control the way in which one engages in sexual activities is a core characteristic of human sexuality. It allows the individual to express themselves in a certain way while also allowing other people to take part in a most intimate area of the human body and psyche. This right, however, must always be understood in relational terms that involve all sexual partners. Everyone concerned has the right not to have their right to sexual autonomy overridden. Thus, sexual autonomy is restricted by the sexual autonomy of others (Schulhofer 2000, 99).

Sexual autonomy is discussed in terms of two notions of liberty or freedom. Firstly, it includes the positive liberty, i.e. the freedom, to engage in consensual acts according to one’s own desires and needs (Hörnle 2016, 859). This is an important aspect of liberal thought, the idea that it is the individuals themselves who can shape their expression of sexuality how they wish. It is crucial, however, that consent is established. Otherwise, the autonomy of the sexual partners involved is compromised. This is where negative freedom

enters: Negative freedom when it comes to sexual interactions is the right to refuse participation in sexual acts at any time. It is the right not to be exposed to the actions of other people that one does not want to participate in or be subjected to (ibid). It is also the right of defence – if someone coerces you into engaging in a sexual act that you do not want, you are allowed to defend yourself. The negative freedom to sexual autonomy also imposes on others a duty not to interfere; it limits their positive liberties. It is only through consent that the duty not to interfere can be removed, it is consent that makes interferences, i.e. the sexual interactions, permissible and legal (Scheidegger 2021, 771).

The right to sexual self-determination, especially for women, must also be understood in a historical context. Originally, the criminal law on sexual offences was established to safeguard the authority of fathers and husbands over women's bodies. Women were their property, and in cases of rape, it was possible that the woman would get accused of adultery and thus harm the honour of her husband (Lameyre 2000, 92–93). Rape within a marriage was largely inconceivable as the husband had full sexual rights over his wife. To free herself from this accusation and to free her father or husband from dishonour, the woman had to prove an element of coercion, which demonstrated that she had shown sufficient resistance to the aggressor. Even though this notion is highly outdated now, the requirement of coercion as a central element of rape law is now being removed in many jurisdictions, albeit only after a prolonged struggle and resistance from a patriarchal society (Scheidegger 2021, 770). But there is no denying that there has been a significant change in the attitudes towards rape law almost on a global scale in the last twenty or thirty years. Indeed, the focus of rape law has shifted from coercion as the main characteristic of rape to a consent-based model, that defines rape as sex against one's will.<sup>1</sup> This already includes the idea of sexual autonomy; the right to choose the sex you want. Thus, as Tatjana Hörnle puts it, disregarding the right to sexual autonomy is punishable as such (Hörnle 2016, 862). What is punishable is the offence against sexual autonomy. Rape law has thus moved away from a moralizing perspective that dictated with who and how sex was permissible or not, to a focus on sexual autonomy, emphasizing the individual's right to shape their own sexual interactions.

Following the notion of positive freedom in relation to sexual offences, there has been a clear tendency to decriminalize certain sexual acts. For example, the abolition of criminal offences of adultery, sodomy, homosexuality and incest (Scheidegger 2021, 770). One main idea is that the state has no right to determine or have control over the way the individual wants to have sex. This has also led to a demoralization and destigmatisation of certain sexual relations. Thus, positive freedom has the effect - at least in tendency - that we criminalize less. Being able to act according to your own wishes and needs primarily means that the state should not interfere in this intimate area and should be tolerant and non-paternalistic. Autonomy in the sense of positive freedom is the epitome of a modern law on sexual offences: de-moralization of sexual criminal law, getting away from religious commandments and hence decriminalization. This is also reflected in how the law is named: What in some legal orders was termed "offences against morality" became "offences against sexual autonomy" (Hörnle 2016, 851). Since today, it is sex against the will or sex without consent that is punishable, which, at its core, embodies the idea that sexual autonomy is worthy of protection and should be able to shape sexual interactions in a meaningful way, it seems as if everything is settled. However, there are still cases of impairment of sexual autonomy that are not clearly covered by the reformed law. One complex set of these cases can be collected under the heading of 'unjust sex'.

## UNJUST SEX

Ann J. Cahill discusses the differences between 'unjust sex' (as termed by Nicola Gavey, 2005) and rape and introduces the idea that the victim's agency is crucial in determining whether an act is rape or not.<sup>2</sup> There are some heterosexual interactions that occupy a 'gray area', where sex occurs under pressure (albeit non-violently) or with passive acquiescence, making them ethically problematic but distinct from rape. Examples include "situations in which a man applied pressure that fell short of actual or threatened physical force, but which the woman felt unable to resist" (Gavey 2005, 136). The elements of "letting sex happen", or

<sup>1</sup>This is the case in most European countries (see, e.g., 'Europe: Spain to Become Tenth Country in Europe to Define Rape as Sex without Consent' 2020)

<sup>2</sup>Cahill limits her discussion on hegemonic heterosex, and the following descriptions are of a very gendered nature that stereotypically portray heterosexual cis-women as the victims and heterosexual cis-men as the offenders (Cahill 2016, 747).

“going along with sex” shape the interactions of unjust sex that fall into this ‘gray area’ (ibid). These sexual interactions, though not overtly violent, are nonetheless not desired and thus possibly non-consensual. What permeates the descriptions is the notion of giving in and conceding to the actions. The sexual interactions are accompanied by a sense of moral wrongness which cannot simply be equated with rape. While there are common elements between sexual assault and certain forms of unjust sex, such as coerced and pressured sex, they differ significantly in terms of the role and efficacy of the victim’s sexual agency. In instances of unjust sex, the victim’s sexual agency is acknowledged but constrained or exploited, serving as a superficial validation of the interaction. Feeling like there is no way of refusing sex and ‘having to go along with it’ demonstrates a constraint on the ability to act freely. In sexual assault, agency is overridden or nullified (Cahill 2016, 758). The victim’s right to not engage in the sexual interaction or the right not to be interfered with is revoked and constitutes a harm to sexual autonomy. It is important to acknowledge that women have sexual agency and that denying them this agency constitutes serious harm.

What Cahill highlights is the fact that what makes rape problematic is the nullification of the victim’s sexual agency. Since sexual autonomy and agency are intrinsically connected, a harm to agency is also a harm to autonomy (Cahill 2016, 757; 2016, 760). Autonomy relies on the ability to make meaningful choices, and when agency is constrained, the capacity for autonomous decision-making is diminished or abolished. The nullification of the victim’s sexual agency can be seen as giving enough grounds for criminalization as it amounts to reprehensible sex against the will, to sex that prevents the individual from acting autonomously, i.e. to non-consensual acts. As undermining sexual agency is harmful in at least this very important sense, unjust sex should be criminalized as it is contrary to sexual autonomy.

Cahill also points out, that sexual agency is to be understood in relation to others (Cahill 2016, 757). This means that agency is not exercised in isolation but is shaped by and interacts with the agency of others. The agency is limited by the duty of non-interference imposed by the positive right of others to sexual autonomy. This is similar to how autonomy is described, and that the relational aspect of sexual interactions is limited by the autonomy of others.

### **False affirmations of autonomy**

There are cases where autonomy can be weaponized: in unjust sex, the appearance of autonomy – where a woman’s consent or acquiescence is sought – can paradoxically undermine her autonomy. This occurs when her ‘choice’ is used to validate an interaction that does not genuinely respect or expand her sexual agency. In such instances, consent becomes a tool for masking manipulation or coercion rather than an expression of free will. It is fictitious and non-valid consent, but one that is difficult to detect because it hides behind the façade of proper consent. There can be instances of manipulation or non-violent coercion that lead to this kind of ostensible consent. It can also be the case that preexisting power dynamics influence the ‘choice making’ but in a way that does not further the victim’s sexual agency. When a person’s consent is shaped by factors like economic dependence, social pressure or emotional vulnerability, the resulting action may appear consensual but fail to respect or affirm their autonomy. Rae Langton describes how affirming someone’s autonomy when it is actually constrained can mask the underlying coercion and power imbalance (2009, 14). This recognition of false or apparent autonomy reinforces systemic injustices.

Indeed, traditional gender roles and expectations often normalize behaviours that subtly undermine sexual agency framing them as acceptable aspects of romantic love. Consider the idea of the male pursuer, having to woo the woman and interpret her refusal or denial as teasing him, not understanding that she is setting boundaries and asserting sexual autonomy. Or the expectation that women have to prioritize male pleasure and give in to pleas in order to avoid conflict; these norms all lead to a normalization of violation of sexual agency. Without recognizing and addressing the limitations on sexual agency in everyday sexual interactions, we cannot adequately confront the culture that allows the undermining of sexual agency and autonomy to perpetuate.

## SYNTHESIS

Combining the notions of both sexual autonomy and unjust sex, this is what results: the legal asset which criminal law on sexual offences aims to protect is sexual autonomy. Sexual autonomy is the right to engage in consensual sexual interactions that one desires without interfering with the negative freedom of the sexual partners not to be coerced into acts that they do not want to participate in. In instances of rape, sexual autonomy is nullified, taking away the right to sexual autonomy of the victim. The violation is complete and leaves no room for the exercise of autonomy. By contrast, in cases of unjust sex, agency is acknowledged but deliberately exploited, limiting the victim in their ability to assert their sexual autonomy. Although this may not nullify autonomy in the same way as rape, it imposes significant restrictions on the victim's capacity for self-determination, thereby causing harm to their sexual autonomy. The harm caused by unjust sex is not merely moral but involves a legal and social dimension that requires recognition and intervention. Since sexual autonomy is what the law aims to protect, I conclude that there are compelling reasons to criminalize unjust sex.

## CONCERNS

This line of argument raises several significant concerns, which I will address in this section.

Firstly, the tension between the liberal idea of decriminalization and the lived reality of many women still experiencing cases of 'unjust sex' that are not captured by existing rape law can lead to confusion. Stricter penalties for offences can provoke defensive reflexes in liberal-minded people. The fear is that increased criminalization might lead to overreach or moral paternalism. The deeply intimate nature of sexuality often leads to an intuitive resistance against state interference, as it is seen as an area where the state should not interfere, and the suspicion of moralization is high. Excessive state control over private lives raises issues about how much state interference is allowed and can be tolerable when it comes to regulating intimate relationships.

This concern is understandable, particularly given the historical trajectory of law on sexual offences. Liberal thought has long emphasized decriminalization as a means of protecting individual freedoms, ensuring that the state does not impose moral judgments on private sexual behaviour. However, the expansion of the law to include unjust sex is not a step towards moralizing sexual interactions but a necessary measure to uphold sexual autonomy. The criminalization of unjust sex does not aim to regulate private morality but to safeguard individuals' ability to make autonomous choices in sexual interactions. The crucial distinction lies in the law's objective: it is not concerned with evaluating the moral worth of particular sexual acts but with preventing coercive and exploitative behaviour that undermines sexual authority. Unlike past laws that sought to impose moral norms – such as those criminalizing homosexuality or adultery – the proposed reform is rooted in the principle that individuals should be able to make free choices about their sexual interactions. Furthermore, the argument for criminalizing unjust sex does not contradict the liberal commitment to limiting state interference in private life. On the contrary, it aligns with it. Liberalism is fundamentally concerned with ensuring that individuals can exercise autonomy without coercion or undue influence. The same rationale that justifies criminalizing rape – protecting individuals from violations of their autonomy – also supports addressing unjust sex, as both involve the imposition of unwanted sexual interactions. By criminalizing unjust sex, the law does not overreach but instead ensures that sexual autonomy is meaningfully protected, reinforcing the very principle of individual's self-determination that liberalism upholds. A progressive, liberal law on sexual offences does not necessarily rely on decriminalization.

A further concern is the potential blurring of boundaries between unjust sex and rape. Nora Scheidegger highlights the importance to reserve the term "rape" for the most egregious violations of sexual autonomy (Scheidegger 2021, 783). Conflating the two could dilute the power and significance of the term 'rape'. Rape is considered one of the most reprehensible violations of sexual autonomy and widening the scope of its definition might weaken its impact. This is similar to the way psychiatric terms like 'depression' are sometimes used casually even when they don't apply, which diminishes their power and seriousness. The concern is that labelling too many behaviours as rape might trivialize its profound harm and undermine public and legal recognition of its severity.

In response to this objection, one could reply that the argument was not aimed at putting unjust sex into the same category as rape. I have argued that unjust sex as such should be criminalized, and not that because unjust sex equals rape, it should be criminalized. As a distinct category of sexual offences, unjust sex harms sexual autonomy and should be criminalized on the grounds of exactly this. Thus, it is more effective to create distinct legal categories to address non-violent abuses effectively.

Tied to the idea of creating new legal categories is the obvious concern of how the case of unjust sex can be proved in a legal setting. Unjust sex occurs in a more ambiguous space where coercion is subtle, and consent may appear to be given, even if it is influenced by pressure or manipulation. This raises significant questions on how to go about evidence and proof, which are already challenging in sexual offence cases due to their reliance on conflicting testimonies – often leading to legal deadlock in 'he said, she said' scenarios. How can the law reliably distinguish between an individual who truly consents and one who 'goes along with' sex?

A potential response would be to carefully define unjust sex in legal terms, ensuring that it is distinguished both from consensual sex and legally recognized forms of sexual assault. This would involve distinguishing criteria for recognizing coercion beyond physical force, such as establishing a threshold for undue pressure, manipulation or abuse of power. A clear formulation of how the criminalization of unjust sex should be approached, however, is an undertaking that pushes the limits of this essay.

## CONCLUSION

In conclusion, I have argued that unjust sex – instances of sexual interactions that are characterized by exploitation of sexual agency – should be criminalized on the grounds that they harm sexual autonomy. Sexual autonomy, as a legal and moral principle, underpins the ability to make meaningful and voluntary choices when it comes to sexual interactions. It is characterized by the positive freedom to choose which sexual interactions to engage in and the negative freedom to refuse to participate in sexual interactions. Unjust sex, by manipulating or undermining agency, violates this principle, reducing the individual's capacity for self-determination. Cases that allegedly fall into the 'gray area' have to be painted in colour and acknowledged as acts that undermine sexual agency in a way that threatens and harms sexual autonomy. Not only do these instances reinforce behaviour that perpetuates systemic power imbalances, but they also contribute to a culture that normalizes the undermining of sexual agency. The criminalization of unjust sex is not an overreach but rather a necessary measure to make sure that sexual autonomy is protected. The effort is aimed at defending autonomy and not at imposing moralistic control. An obvious question arises from this analysis: how do we go about criminalization? This, however, is a topic best reserved for a separate discussion.

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