Discussion Questions

1. Does marriage entail an implicit promise of sexual fidelity to one’s spouse? What about “open marriages” where both spouses agree to permit extramarital affairs? Support your answers.

2. Is a commitment to sexual exclusivity a necessary condition for the existence of a marriage? If so, are agreements on the part of spouses to be open to letting the other have extramarital affairs morally invalid? Support your answers.

3. Is there an implicit promise of sexual fidelity in steady dating and cohabitation? Relate your answer to the case of Brooke and Adam at the beginning of this chapter. Discuss how Wasserstrom might answer this question.

4. Discuss whether or not it is morally permissible for a person to have an extramarital affair if they are certain they will not be caught and if they are not emotionally involved with their extramarital partner.

5. Is Internet “sex” adultery? Is it immoral? Why or why not? Discuss how Wasserstrom would most likely answer these questions.

6. Is adultery ever morally permissible in cases where one of the partners is a permanent invalid and unable to have a sexual relationship? Support your answer.

7. Some feminists, such as Catherine MacKinnon and Cheshire Calhoun, argue that marriage is not a desirable social institution because it is oppressive to women and “a primary site of women’s subordination to and dependence on men.” Do you agree? If so, what are some alternatives that might overcome some of the problems of conventional marriage?

LOIS PINEAU

Date Rape: A Feminist Analysis

Lois Pineau is a professor of philosophy at Kansas State University. Pineau defines date rape as nonconsensual sex that does not involve physical injury. The requirement by courts of evidence of physical injury, she argues, stems from myths that women are sexually provocative and asking for it, and that men's sexual desires are uncontrollable. Pineau rejects these myths as well as the contractual model of sex, arguing instead for a communicative model. According to Pineau, good sex requires communication. When sexuality is not communicative, the man cannot assume consent. To engage in sex without consent is rape.

Critical Reading Questions

1. How does Pineau define date rape?
2. Why is physical injury generally required to show that a sexual encounter was rape?
3. Why do courts, according to Pineau, usually shift the burden of proof onto the woman in cases of alleged rape?
4. What is the difference between actus reus and mens rea? What constitutes mens rea in order for a man to be guilty of rape? Why does Pineau find this account of rape unsatisfactory?
5. What are some of the myths underlying the criterion that an alleged rape victim must prove that she vigorously rejected the man's advances?
6. How does Pineau describe a possible date-rape scenario? Why, according to Pineau, do so many women experience paradoxical feelings in cases like these?
7. What are some of the myths about rape and sex in our culture?
8. What assumptions about male and female sexuality enforce the myth that women want to be raped? According to Pineau, why is this a myth?
9. According to Pineau, why is the contract, which supposedly exists when a woman acts provocatively, not binding?
10. Why doesn't a woman's consent given at the beginning of a sexual encounter necessarily establish the legitimacy of the whole encounter?
11. According to Pineau, what is the only way to establish the legitimacy of a sexual encounter?
12. What does Pineau mean by "communicative sexuality"? How does this model differ from the "contract" model? What is the role of consent in both of these models? Why does Pineau reject the contractual model in favor of the communicative model?
13. How would the communicative model change the way the judicial system currently approaches sexuality and the question of date rape?

... Date rape is nonaggravated sexual assault, nonconsensual sex that does not involve physical injury, or the explicit threat of physical injury. But because it does not involve physical injury, and because physical injury is often the only criterion that is accepted as evidence that the actus reus is nonconsensual, what is really sexual assault is often mistaken for seduction. The replacement of the old rape laws with the new laws on sexual assault have done nothing to resolve this problem....

THE PROBLEM OF THE CRITERION

The reasoning that underlies the present criterion of consent is entangled in a number of mutually supportive mythologies which see sexual assault as masterful seduction, and silent submission as sexual enjoyment. Because the prevailing ideology has so much informed our conceptualization of sexual interaction, it is extraordinarily difficult for us to distinguish between assault and seduction, submission and enjoyment, or so we imagine. ... I therefore want to begin my argument by providing an example which shows both why it is so difficult to make this distinction, and that it exists. Later, I will identify and attempt to unravel the lines of reasoning that reinforce this difficulty.

The woman I have in mind agrees to see someone because she feels an initial attraction to him and believes that he feels that same way about her. She goes out with him in the hope that there will be mutual enjoyment and in the course of the day or evening an increase of mutual interest. Unfortunately, these hopes...
of mutual and reciprocal interest are not realized. We do not know how much interest she has in him by the end of their time together, but whatever her feelings she comes under pressure to have sex with him, and she does not want to have the kind of sex he wants. She may desire to hold hands and kiss, to engage in more intense caresses or in some form of foreplay, or she may not want to be touched. She may have reasons unrelated to desire for not wanting to engage in the kind of sex he is demanding. She may have religious reservations, concerns about pregnancy or disease, a disinclination to be just another conquest. She may be engaged in a seduction program of her own which sees abstaining from sexual activity as a means of building an important emotional bond. She feels she is desirable to him, and she knows, and he knows that he will have sex with her if he can. And while she feels she doesn’t owe him anything, and that it is her prerogative to refuse him, this feeling is partly a defensive reaction against a deeply held belief that if he is in need, she should provide. If she buys into the myth of insistent male sexuality she may feel he is suffering from sexual frustration and that she is largely to blame.

We do not know how much he desires her, but we do know that his desire for erotic satisfaction can hardly be separated from his desire for conquest. He feels no dating obligation, but has a strong commitment to scoring. He uses the myth of “so hard to control” male desire as a rhetorical tactic, telling her how frustrated she will leave him. He becomes overbearing. She resists, voicing her disinclination. He alternates between telling her how desirable she is and taking a hostile stance, charging her with misleading him, accusing her of wanting him, and being coy, in short of being deceitful, all the time engaging in rather aggressive body contact. It is late at night, she is tired and a bit queasy from too many drinks, and he is reaffirming her suspicion that perhaps she has misled him. She is having trouble disengaging his body from hers, and wishes he would just go away. She does not adopt a strident angry stance, partly because she thinks he is acting normally and does not deserve it, partly because she feels she is partly to blame, and partly because there is always the danger that her anger will make him angry, possibly violent. It seems that the only thing to do, given his aggression, and her queasy fatigue, is to go along with him and get it over with, but this decision is so entangled with the events in process it is hard to know if it is not simply a recognition of what is actually happening. She finds the whole encounter a thoroughly disagreeable experience, but he does not take any notice, and wouldn’t have changed course if he had. He congratulates himself on his sexual prowess and is confirmed in his opinion that aggressive tactics pay off. Later she feels that she has been raped, but paradoxically tells herself that she let herself be raped.

The paradoxical feelings of the woman in our example indicate her awareness that what she feels about the incident stands in contradiction to the prevailing cultural assessment of it. She knows that she did not want to have sex with her date. She is not so sure, however, about how much her own desires count, and she is uncertain that she has made her desires clear. Her uncertainty is reinforced by the cultural reading of this incident as an ordinary seduction.

As for us, we assume that the woman did not want to have sex, but just like her, we are unsure whether her mere reluctance, in the presence of high-pressure tactics, constitutes nonconsent. We suspect that submission to an overbearing and insensitive lout is no way to go about attaining sexual enjoyment, and we further suspect that he felt no compunction about providing it, so that on the face of it, from the outside looking in, it looks like a pretty unreasonable proposition for her.

Let us look at this reasoning more closely. Assume that she was not attracted to the kind of sex offered by the sort of person offering it. Then it would be prima facie unreasonable for her to agree to have sex, unreasonable, that is, unless she were offered some pay-off for her stoic endurance, money perhaps, or tickets to the opera. The reason
is that in sexual matters, agreement is closely connected to attraction. Thus, where the presumption is that she was not attracted, we should at the same time presume that she did not consent. Hence, the burden of proof should be on her alleged assailant to show that she had good reasons for consenting to an unattractive proposition.

This is not, however, the way such situations are interpreted. In the unlikely event that the example I have described should come before the courts, there is little doubt that the law would interpret the woman's eventual acquiescence or "going along with" the sexual encounter as consent. But along with this interpretation would go the implicit understanding that she had consented because when all was said and done, when the "token" resistances to the "masterful advances" had been made she had wanted to after all. Once the courts have constructed this interpretation, they are then forced to conjure up some horror story of feminine revenge in order to explain why she should bring charges against her "seducer."

In the even more unlikely event that the courts agreed that the woman had not consented to the above encounter, there is little chance that her assailant would be convicted of sexual assault. The belief that the man's aggressive tactics are a normal part of seduction means that mens rea cannot be established. Her eventual "going along" with his advances constitutes reasonable grounds for his believing in her consent.

The position of the courts is supported by the widespread belief that male aggression and female reluctance are normal parts of seduction. Given their acceptance of this model, the logic of their response must be respected.

RAPE MYTHS

The belief that the natural aggression of men and the natural reluctance of women somehow makes rape understandable underlies a number of prevalent myths about rape and human sexuality.

The claim that the victim provoked a sexual incident, that "she asked for it," is by far the most common defense given by men who are accused of sexual assault. Feminists, rightly incensed by this response, often treat it as beneath contempt, singling out the defense as an argument against it. . . .

The least sophisticated of the "she asked for it" rationales, and in a sense, the easiest to deal with, appeals to an injunction against sexually provocative behavior on the part of women. If women should not be sexually provocative, then, from this standpoint, a woman who is sexually provocative deserves to suffer the consequences. Now it will not do to respond that women get raped even when they are not sexually provocative, or that it is men who get to interpret (unfairly) what counts as sexually provocative. The question should be: Why shouldn't a woman be sexually provocative? Why should this behavior warrant any kind of aggressive response whatsoever?

Attempts to explain that women have a right to behave in sexually provocative ways without suffering dire consequences still meet with surprisingly tough resistance. Even people who find nothing wrong or sinful with sex itself, in any of its forms, tend to suppose that women must not behave sexually unless they are prepared to carry through on some fuller course of sexual interaction. The logic of this response seems to be that at some point a woman's behavior commits her to following through on the full course of a sexual encounter as it is defined by her assailant. At some point she has made an agreement, or formed a contract, and once that is done, her contractor is entitled to demand that she satisfy the terms of that contract.

The rationale, I believe, comes in the form of a belief in the especially insistent nature of male sexuality, an insistence which lies at the root of natural male aggression, and which is extremely difficult, perhaps impossible to contain. At a certain point in the arousal process, it is thought, a man's rational will gives away to the prerogatives of nature. His sexual need can and does reach a point where it is uncontrollable, and his natural masculine aggression kicks in to assure that this need is met. Women, however, are naturally more contained, and so it is their responsibility not to provoke the irrational in the male. If they do go so far as that, they have both failed in their responsibilities, and subjected themselves to the inevitable. One does not go into the lion's cage and expect not to be eaten.
feminine reluctance, it is thought, is no protection against a sexually aroused male.

This belief about the normal aggressiveness of male sexuality is complemented by common knowledge about female gender development. Once, women were taught to deny their sexuality and to aspire to ideals of chastity. Things have not changed so much. . . . The assumption that women both want to indulge sexually, and are inclined to sacrifice this desire for higher ends, gives rise to the myth that they want to be raped. After all, doesn’t rape give them the sexual enjoyment that they really want, at the same time that it relieves them of the responsibility for admitting to and acting upon what they want? And how then can we blame men, who have been socialized to be aggressively seductive precisely for the purpose of overriding female reserve? If we find fault at all, we are inclined to cast our suspicions on the motives of the woman. . . .

But if women really want sexual pleasure, what inclines us to think that they will get it through rape? This conclusion logically requires a theory about the dynamics of sexual pleasure that sees that pleasure as an emergent property of overwhelming male insistence. For the assumption that a raped female experiences sexual pleasure implies that the person who rapes her knows how to cause that pleasure independently of any information she might convey on that point. Since her ongoing protest is inconsistent with requests to be touched in particular ways in particular places, to have more of this and less of that, then we must believe that the person who touches her knows these particular ways and places instinctively, without any directives from her.

Thus we find, underlingly and reinforcing this belief in incommunicative male prowess, a conception of sexual pleasure that springs from wordless interchanges, and of sexual success that occurs in a place of meaningful silence. The language of seduction is accepted as a tacit language: eye contact, smiles, blushes, and faintly discernible gestures. It is, accordingly, imprecise and ambiguous. It would be easy for a man to make mistakes about the message conveyed, understandable that he should mistakenly think that a sexual invitation has been made, and a bargain struck. But honest mistakes, we think, must be excused.

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In sum, the belief that women should not be sexually provocative is logically linked to several other beliefs, some normative, some empirical. The normative beliefs are that (1) people should keep the agreements they make, (2) that sexually provocative behavior, taken beyond a certain point, generates agreements, (3) that the peculiar nature of male and female sexuality places such agreements in a special category, one in which the possibility of retracting an agreement is ruled out, or at least made highly unlikely, [and] (4) that women are not to be trusted, in sexual matters at least. The empirical belief, which turns out to be false, is that male sexuality is not subject to rational and moral control.

DISPELLING THE MYTHS

The “she asked for it” justification of sexual assault incorporates a conception of a contract that would be difficult to defend in any other context, and the presumptions about human sexuality which function to reinforce sympathies rooted in the contractual notion of just deserts are not supported by empirical research.

The belief that a woman generates some sort of contractual obligation whenever her behavior is interpreted as seductive is the most indefensible part of the mythology of rape. In law, contracts are not legitimate just because a promise has been made. In particular, the use of pressure tactics to extract agreement is frowned upon. Normally, an agreement is upheld only if the contractors were clear on what they were getting into, and had sufficient time to reflect on the wisdom of their doing so. . . . But whatever the terms of a contract, there is no private right to enforce it. So that if I make a contract with you on which I renge, the only permissible recourse for you is through due legal process. . . .

Thus, even if we assume that a woman has initially agreed to an encounter, her agreement does not automatically make all subsequent sexual activity to which she submits legitimate. If during coitus a woman should experience pain, be suddenly overcome with guilt or fear of pregnancy, or simply
COMMUNICATIVE SEXUALITY: REINTERPRETING THE KANTIAN IMPERATIVE...

In thinking about sex we must keep in mind its sexual ends, and the facts show that aggressive high-pressure sex contradicts those ends. Consensual sex in dating situations is presumed to aim at mutual enjoyment. It may not always do this, and when it does, it might not always succeed. There is no logical incompatibility between wanting to continue a sexual encounter, and failing to derive sexual pleasure from it.

But it seems to me that there is a presumption in favor of the connection between sex and sexual enjoyment, and that if a man wants to be sure that he is not forcing himself on a woman, he has an obligation either to ensure that the encounter really is mutually enjoyable, or to know the reasons why she would want to continue the encounter in spite of her lack of enjoyment. A closer investigation of the nature of this obligation will enable us to construct a more rational and a more plausible norm of sexual conduct.

The obligation to promote the sexual ends of one's partner implies the obligation to know what those ends are, and also the obligation to know how those ends are attained. Thus, the problem comes down to a problem of epistemic responsibility, the responsibility to know. The solution, in my view, lies in the practice of a communicative sexuality, one which combines the appropriate knowledge of the other with respect for the dialectics of desire.

So let us, for a moment, conceive of sexual interaction on a communicative rather than a contractual model.

The communicative interaction involved in conversation is concerned with a good deal more than didactic content and argument. Good conversationalists are intuitive, sympathetic, and charitable. Intuition and charity aid the conversationalist in her effort to interpret the words of the other correctly and sympathy enables her to enter into the other's point of view. Her sensitivity alerts her to the tone of the exchange. Has her point been taken good-humoredly or resentfully? Aggressively delivered responses are taken as a sign that ad hominems are...
work, and that the respondent's self-worth has been called into question. Good conversationalists will know how to suspend further discussion until this sense of self-worth has been reestablished. . . .

Just as communicative conversationalists are concerned with more than didactic content, persons engaged in communicative sexuality will be concerned with more than achieving coitus. They will be sensitive to the responses of their partners. . . . Communicative sexual partners will not overwhelm each other with the barrage of their own desires. They will treat negative, bored, or angry responses, as a sign that the erotic ground needs to be either cleared or abandoned. Their concern with fostering the desire of the other must involve an ongoing state of alertness in interpreting her responses.

Just as a conversationalist's prime concern is for the mutuality of the discussion, a person engaged in communicative sexuality will be most concerned with the mutuality of desire. As such, both will put into practice a regard for their respondent that is guaranteed no place in the contractual language of rights, duties, and consent. . . .

CULTURAL PRESUMPTIONS

The special moral duties we have in certain intimate situations is supported by a conceptual relation between certain kinds of personal relationships and the expectation that it should be a communicative relation. Friendship is a case in point. It is a relation that is greatly underdetermined by what we usually include in our sets of rights and obligations. For the most part, rights and obligations disappear as terms by which friendship is guided. They are still there, to be called upon, in case the relationship breaks down, but insofar as the friendship is a friendship, it is concerned with fostering the quality of the interaction and not with standing on rights. . . .

But is there a similar conceptual relation between the kind of activity that a date is, and the sort of moral practice that it requires? My claim is that there is, and that this connection is easily established once we recognize the cultural presumption that dating is a gesture of friendship and regard. Traditionally, the decision to date indicates that two people have an initial attraction to each other, that they are disposed to like each other, and look forward to enjoying each other's company. . . .

As long as we are operating under the auspices of a dating relationship, it requires that we behave in the mode of friendship and trust. But if a date is more like a friendship than a business contract, then clearly respect for the dialectics of desire is incompatible with the sort of sexual pressure that is inclined to end in date rape. And clearly, also, a conquest mentality which exploits a situation of trust and respect for purely selfish ends is morally pernicious. . . . The proper end of friendship relations is mutual satisfaction. But the requirement of mutuality means that we must take a communicative approach to discovering the ends of the other, and this entails that we respect the dialectics of desire.

But now that we know what communicative sexuality is, and that it is morally required, and that it is the only feasible means to mutual sexual enjoyment, why not take this model as the norm of what is reasonable in sexual interaction. The evidence of sexologists strongly indicates that women whose partners are aggressively uncommunicative have little chance of experiencing sexual pleasure. . . .

Thus, where communicative sexuality does not occur, we lack the main ground for believing that the sex involved was consensual. . . . All that is needed then, in order to provide women with legal protection from "date rape" is to make both reckless indifference and willful ignorance a sufficient condition of mens rea and to make communicative sexuality the accepted norm of sex to which a reasonable woman would agree. Thus, the appeal to communicative sexuality as a norm for sexual encounters accomplishes two things. It brings the aggressive sex involved in "date rape" well within the realm of sexual assault, and it locates the guilt of date rapists in the failure to approach sexual relations on a communicative basis. . . .

CONCLUSION

In sum, using communicative sexuality as a model of normal sex has several advantages over the "aggressive-acquiescence" model of seduction. The
new model ties the presumption that consensual sex takes place in the expectation of mutual desire much more closely to the facts about how that desire actually functions. Where communicative sex does not occur, this establishes a presumption that there was no consent. The importance of this presumption is that we are able, in criminal proceedings, to shift the burden of proof from the plaintiff, who on the contractual model must show that she resisted or was threatened, to the defendant who must then give some reason why she should consent after all. The communicative model of sexuality also enables us to give a different conceptual content to the concept of consent. It sees consent as something more like an ongoing cooperation than the one-shot agreement which we are inclined to see it as on the contractual model. Moreover, it does not matter, on the communicative model, whether a woman was sexually provocative, what her reputation is, what went on before the sex began. All that matters is the quality of communication with regard to the sex itself.

But most importantly, the communicative model of normal sexuality gives us a handle on a solution to the problem of date rape. If noncommunicative sexuality establishes a presumption of nonconsent, then where there are no overriding reasons for thinking that consent occurred, we have a criterion for a category of sexual assault that does not require evidence of physical violence or threat. If we are serious about date rape, then the next step is to take this criterion as objective grounds for establishing that a date rape has occurred. The proper legislation is the shortest route to establishing this criterion.

Discussion Questions

1. Is Pineau’s communicative model of sexuality the only desirable one? Are there times when it is reasonable for a man to believe that a woman has given her consent to sex even though she has not verbally communicated it? Support your answers using examples.
2. Are there times when women might really want to be sexually dominated by men? What about women who prefer not to discuss sex, or who prefer the man to take the initiative—much like patients who prefer to let their doctors make the decisions about their health care? Can there be “good sex” without communicative consensus? Support your answers. Discuss how Pineau might respond to these questions.
3. Catharine MacKinnon maintains that in a society where women are oppressed, communication alone is not sufficient to establish consent to sex. Do you agree? Are there times when a woman might consent out of a feeling of powerlessness, rather than a genuine desire for sexual intimacy? Support your answers using examples. Discuss how Pineau might respond to MacKinnon.
4. Discuss the implications of Pineau’s definition of date rape on how such cases should be handled by the courts. Should policies on date rape be instituted on all campuses? Support your answer.
5. In her book *The Morning After: Sex, Fear, and Feminism on Campus* (1993), Katie Roiphe critiques Pineau’s approach. Roiphe argues that the fuss over date rape, rather than empowering and liberating women, perpetuates the stereotype of them as vulnerable, naive, and in need of protection. The emphasis on communicative consensus, rather than sexually liberating women, has thrown a damper on relationships and created an atmosphere of suspicion between men and women. Has the current focus on date rape empowered women, or made them more fearful? How has it affected the men on your campus and the heterosexual dating scene? Use examples to illustrate your answer.