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The Issue of Consent in Sex and Sexual Assault

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ABSTRACT

The Issue of Consent in Sex and Sexual Assault

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The issue of consent, insofar as it applies to sex and sexual assault, is a complex issue; the existence of AIDS makes it an urgent one as well.

Consent is significant in four spheres: moral, legal, conceptual, and personal. Failure to distinguish among these spheres can lead to confusion.

There are three constituents of valid consent: capacity (mental and physical), informedness, and voluntariness. Insofar as these constituents are not discrete qualities but rather a matter of degree, consent itself is not a discrete quality, but is a matter of degree. These constituents are necessary and inter-related; however, the sufficient composite of constituents constituting valid consent must be flexible, dependent on context and sphere of significance.

Consideration of the expression of consent must take into account constraints: force, fraud, and fear are three conditions of coercion which negate the constituents, respectively, invalidating consent. Further considerations include the explicit/implicit distinction, the field of consent, the active/passive or commission/omission distinction, the grantive/contractive distinction, and the problem of privacy. Because of the complexities involved with the expression of consent, in the legal sphere, consent is better conceived as a behavioural act than as a mental act.

Consent should continue to be considered significant: allowing one to consent to self-injury is the price of allowing one to maintain autonomy. Nevertheless, especially in the legal sphere, the practicality of this permission continues to be problematic.

CONTENTS

INTRODUCTION

In this thesis, I will explore the issue of consent insofar as it applies to sex and sexual assault. I suggest that AIDS adds an urgency to the task of sorting out this complex issue.

In Chapter I, I examine the spheres in which consent is significant, identifying four: moral, legal, conceptual, and personal. In Chapter II, I examine what I consider to be the necessary constituents of consent: capacity (mental and physical), informedness, and voluntariness. In Chapter III, I examine the complexities of the expression of consent, specifically the constraints against expression, explicitness and implicitness, the field of consent, the active/passive and commission/omission distinctions, the grantive/contractive distinction, and the problem of privacy. In Chapter IV, I re-examine the significance of consent asking this time not in what ways consent is significant but whether or not it should be significant; the issues of injury, autonomy, and practicality are addressed.

Throughout my analysis, I draw on biomedical ethics, philosophy of law, and feminist philosophy (in particular, analyses of gender politics).

I. THE SIGNIFICANCE OF CONSENT

It seems to me that, with respect to sex and sexual assault, consent is significant in at least four distinct spheres: moral, legal, conceptual, and personal.

Significance in each case is intensified by the reality of AIDS: with AIDS now a possibility, one of the people involved in the action may die because of that action.

Moral Significance

Consent is generally considered to be relevant to moral responsibility: to consent to something is to agree to share responsibility for it, and therefore to accept any blame or praise for it; if one does not consent, one cannot be held morally responsible.

I think this view is sound and I can think of only two exceptions. The first involves situations in which the act has no moral attribution to begin with; I discuss these below. The second involves situations in which the agent consents under coercion or deception; but in these cases, as I will discuss in Chapter II, one cannot be said to have truly consented.

In addition to having relevance to moral responsibility, consent can have relevance to moral attribution. The relevance is not to *whether* an act has a moral attribute, for if an act is morally neutral (for example, putting on one's left shoe first rather than one's right shoe), consent (or lack thereof) does not change that neutrality. Rather, consent is relevant to *which* moral attribute is 'assigned' to an act: "Acts which are immoral when coerced . . . become moral when freely engaged in by consenting adults" (Zweng 120). Thus taking someone somewhere with their consent is moral, but doing so without their consent is not; likewise, a

sexual action with someone with their consent is moral whereas such action without their consent is not.

It is not necessary that harm be done: "A subject can be wronged without being harmed" (McCormick 200). To act toward another without their consent is to use that other; it is to treat that other as a means and not an end, as an object and not a subject, and the action is *thus* immoral.[1] Mappes examines the immorality of *sexually* using a person, showing that, as with moral responsibility, moral attribution depends on consent: one person (A) sexually uses another person (B), i.e., acts *im*morally, "if and only if A intentionally acts in a way that violates the requirement that B's sexual interaction with A be based on B's voluntary informed consent" (Mappes 251).

To summarize, (a) when the act has a moral value, consent necessarily entails moral responsibility, and (b) in some cases, consent determines which moral valence an act has--the presence of consent gives the act a positive moral value (the act is moral) whereas its absence gives the act a negative moral value (the act is immoral)

Legal Significance

Just as consent can determine the moral attribute, it can also determine the legal attribute: when consent is present, an act may be legal: when consent is absent, that same act may be illegal. For example, if I consent to your use of my car, it is called 'a loan'; if I do not consent, it is called 'theft'. In the case of sexual action as well, consent is the difference between legality and illegality: if I consent to sexual interaction with you, it is called 'having sex'; if I do not consent, it is called 'sexual assault'. And further, I suggest that if

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[1]This moral principle, that it is wrong to use another person as a means, is put forth by Kant (Kant 36); defense of this principle is beyond the scope of this paper.

you have the HIV virus, and I do not consent, your act would be called 'homicide' (or at least 'attempted homicide').[2]

Katz underlines the legal significance of consent in a medical context: even if a certain surgical procedure is successful, if it was done without consent, one is liable to the charge of battery, for the procedure was therefore 'an intentional touching without consent' (Katz 96). Hegland emphasizes the same point: "The heart of the battery action is the absence of legal consent", and it is irrelevant if the action was given with skill and benefit (Hegland 355).[3] To summarize, consequence is of little concern: consent is what matters.

Some argue, however, that consent is not relevant--let alone definitively relevant--in all cases. "A comparison of behaviour in other violent crimes underlines the exceptional nature of the consent standard for sexual assault cases. Not only are robbery victims encouraged to comply with their assailants, but research indicates that they usually do not offer any resistance" (Gunn and Minch 29). This suggests that unlike cases involving a sexual exchange, those involving a property exchange are not defined as legal or illegal according to the presence or absence of consent. This apparent double standard seems to rest on the premise that one may or may not consent to a sexual exchange (with an acquaintance or even a stranger) whereas one probably will not consent to a property exchange; if the latter occurs then, lack of consent is assumed (and need not, therefore, be proved). It may be that the context of probability that is so helpful in the property exchange cases is not helpful in the sexual exchange cases--but the context is one merely of *probability*.

Suppose I have given permission for an acquaintance to use my car on

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[2]As of 1994, the Canadian *Criminal Code* states, however, that "no person commits culpable homicide...unless the death occurs within one year and one day from the time of the occurrence of the last event by means of which the person caused or contributed to the cause of death" (*Criminal Code* s.227).

[3]Note that 'battery' is an American legal term, referring to the application of physical force; 'battery' is thus reasonably equivalent to (part of) the Canadian crime of 'assault'.

several occasions in the past, but on the occasion in question I did not; would it not be as necessary to prove lack of consent when I called the police to report a robbery, especially if I had left the car unlocked and the keys on a hook in my garage (the parallel, perhaps, in the sexual assault case, to being alone with the acquaintance)? I believe it would be. So in both sexual *and* property exchange cases, the difference between legality and illegality *is* consent.

That is, the difference is consent unless there is injury. Injury seems to take precedence as the factor differentiating between legal and illegal action.[4] One doesn't ask after an assault whether consent was given: when injury is involved, *non*-consent is presumed.

At least, non-consent is presumed unless the assault is sexual. "Consent is not generally identified as an issue if the level of violence is seen as *normal* given the relationship of the parties and other situational factors" (Vandervort 264, my emphasis). In cases of sex, some violence, some injury, is 'allowed'. Only when there is an unusual amount of injury must consent be established to differentiate between assault and non-assault, between illegality and legality. Thus it seems, with respect to sexual action, that in the eyes of the law one can consent to injurious action ('rough sex' is conceivable), but one cannot withhold consent to non-injurious action (sexual assault without injury is not conceivable).

To summarize, it seems that there are three levels of significance for consent in the legal sphere: in assaultive contexts, consent is insignificant--the presence of injury defines the action as illegal; in sexual contexts, consent is significant only if injury is 'abnormal'; and in medical contexts, consent is the only thing that matters--not only may the action be non-injurious, it may be beneficial, and still, *consent* determines legality.

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[4]At this point, I am speaking of *physical* injury.

Conceptual Significance

Is sexual assault a sexual kind of assault or an assaultive kind of sex? Though I can find no study establishing that women do not in fact experience sexual pleasure during rape, that they do so is increasingly considered a myth. Certainly the numerous testimonies of rape victims that I have read indicate that the primary response is one of fear, not pleasure. Perhaps the single most important study of rapists is that done by Menachem Amir in 1971; and as Brownmiller states, "the single most important contribution of Amir's Philadelphia study was to place the rapist squarely within the subculture of violence" (Brownmiller 181)--not the subculture of sex.[5] Thus from the perspectives of both people involved, sexual assault is more a kind of assault than a kind of sex.[6]

Words that are not accompanied by a gesture do not constitute assault (*R.* v. *Byrne*). However, the requisite gesture may be minor if it is done in an angry, revengeful, rude, or insolent manner (*R.* v. *Burden*). Insofar as sexual assault humiliates and degrades (an aspect emphasized by A. Dworkin, M. French, and others), it seems to share the manner requisite of assault. Consistent with this perspective is Lambert J.A.'s definition of sexual assault as an affront to sexual integrity and sexual dignity (*R.* v. *Cook*). Laycraft C.J.A., on the other hand, emphasizes physical force rather than emotional tone, but nevertheless he too defines sexual assault as an assault: it is an act of force in circumstances of sexuality (*R.* v. *Taylor*).[7]

In any case, as long as consent is significant, it would seem that sexual assault is being conceived as a sexual kind of assault rather than

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[5]This does not rule out a relation between the two, especially for the male. As Brownmiller says, "all rape is an exercise in power" (Brownmiller 256) and power may provide sexual pleasure.

[6]I am assuming that fear and violence belong to the realm of assault whereas pleasure belongs to the realm of sex.

[7]There is no definition of sexual assault in the Canadian *Criminal Code*.

as an assaultive kind of sex: consent potentially distinguishes between assault and non-assault; it does not distinguish between sex and non sex.

The fact that most sex and most sexual assault is between males and females is worth considering. In the past, when men could own a woman's body, consent was completely insignificant and the concept of sexual assault therefore (?) did not exist.[8] This ownership was even legally guaranteed in marriage law. This may help us understand (but not excuse) some current attitudes: there are still some men who think they own a, or any, woman's body and thus have full right to its use regardless of consent.

The dominance in our society of heterosexuality gives rise to another interesting point. Male-male sexual assault does not seem plagued by the same ambiguity as male-female sexual assault: it is *assumed* to be assault, not sex. This may be because people generally assume that a man would not consent to sex with another man (whereas a woman may consent to sex with a man), and thus assume assault; it may also be that a man is generally not considered to have any sort of ownership rights over another man (unlike the male-female scenario), and thus too the assumption is assault.[9] However, one could argue just the opposite: one could argue that the male-male interaction is sex, not assault. In that situation, any man, any *real* man, the argument would go, would fight back and so avoid it; that a man does not, indicates that he consented (i.e., he is a homosexual) and it is therefore sex, not assault. This argument, however, ignores the possibility of coercion.

Lastly, keeping the sexual aspect as the adjective ('sexual assault') rather than the noun ('assaultive sex'), as the means rather than the end, enables us to further clarify and discriminate by creating

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[8]To say 'therefore' supports the view that consent is a definitive element of assault; this is not something I'm prepared to do at this point.

[9]When slavery was acceptable however this last point would not hold; perhaps only homophobia kept the incidence of male owners raping their male slaves to a presumably low level.

similar crimes: sexual trespass (perhaps a better conception for prohibited touching of a sexual nature than the current consideration of such touching as a kind of sexual assault), sexual blackmail (sexual interaction under threat of loss of job, for example), sexual murder (death by AIDS as a result of rape by an HIV-infected person).

Personal Significance

Conceptualizing sexual assault as a sexual kind of assault rather than an assaultive kind of sex leaves us with the problem of defining 'sexual'. Is a touch on a breast sexual? Always? Is a touch on a knee sexual? Ever? The lack of certainty about the answers to these questions suggests that an arbitrary mapping out of body parts is inadequate; the characteristic that turns a simple assault into a sexual assault is not solely a matter of anatomy (*R.* v. *Cook*); the so-called primary sexual parts of our bodies are sexual mostly insofar as reproductive sex is concerned, but as the advertising industry has shown, almost any part of the body can be eroticized. Context is therefore what matters, and context includes intent and interpretation. And interpretation is particularly subjective.

For example, Woman A may claim that her core identity does not reside between her legs; she would not feel any more 'violated' by a penis, or a cucumber, thrust up her vagina than by a fist thrust in her face.[10] She may know that the other is trying to degrade her sexually, but she resists his interpretation--her own interpretation defines her experience. Woman B, however, may insist that her self-esteem is violated when such a sexual assault occurs; for her, a sexual assault is significantly different from a non-sexual assault. What, in this case,

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[10]Though I recognize that sex and sexual assault often involves children and 'mentally-challenged' adults, I am restricting the scope of my paper to cases involving 'normal' adults.

makes sexual assault any different from organ assault or limb assault? One explanation may be that socialization encourages a connection between self-esteem and sexuality (for both sexes), and for women in particular, there is a socialized connection between virtue and sexuality; if a woman's celibacy is the indicator of her virtue, it is not difficult to understand that to be raped is to have one's very moral self attacked. This perhaps explains the extreme emotional and psychological damage that sexual assault can have on a woman who has accepted the attitude that her very identity is somehow dependent on her sexuality. But socialization impacts on people in varying degrees.

That the significance of sex and sexual assault varies a great deal from person to person, and from situation to situation, suggests that the significance of consent is equally variable: the more 'important' the act is, the more 'important' it is that consent is given or withheld. If I do not care much about my car, I do not care much if my friend uses it with or without my permission. For a woman or a man for whom sex is purely recreational, like going to a movie or playing a quick game of pingpong, to 'consent' under social/peer/partner pressure--to say 'yes' when you really do not want to, because you want to 'keep the peace' or because you 'owe them one'--is no 'big deal', and hardly merits the 'foofarah' accompanying 'rape!'. However for another person, giving and withholding consent may have serious emotional consequences; it may be woven into their moral system; and it may seriously affect their subsequent behaviour.

II. THE CONSTITUENTS OF CONSENT

I suggest that for consent to be valid (legitimate), it must have the following three constituents:

A. capacity - mental
- physical

B. informedness

C. voluntariness

Force, fraud, and fear are often specified as the conditions of coercion which negate consent. It seems to me that these three constraints can be mapped one-to-one onto the forementioned three constituents: force negates capacity, fraud negates informedness, and fear negates voluntariness.

Capacity

Mental capacity is taken to refer to the capacity to understand and so form a judgement about giving or withholding consent. Though certainly intellectual growth varies from person to person, the objective standard used for legal purposes is 'the age of consent': generally, one is legally considered capable of consenting to sexual interaction at age fourteen.[11]

Mental capacity may arguably include emotional capacity as well. This is perhaps even more difficult to measure; it is also perhaps more variable. In any case, it is not explicitly entrenched in any legal definition.[12]

Kluge's analysis of competence from an ethical perspective (and so, relevant to the moral sphere), provides four parameters: conceptual,

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[11]See the *Criminal Code* s.150.1(2) for exceptions.

[12]However insofar as emotional development is correspondent to intellectual development, it is implicity so entrenched.

emotional, volitional, and valuational. Two of these are of interest at this point. The first, conceptual competence, seems to be what I am calling mental capacity: "[It] concerns only what may be termed the reasoning or intellective faculties" (Kluge 92) Conceptual competence includes a cognitive aspect (the ability to understand data), an inferential aspect (the ability to see connections and draw conclusions), and a mnemonic component (the ability to remember data or decisions) "Clearly, given the varied components of conceptual competence, conceptual competence is not an all-or-nothing affair" (Kluge 92); variations include the presence/absence of the components as well as the degree of presence/absence. It seems to me that if a constituent of consent is a matter of degree, then so is consent itself.[13] This point is made again, more strongly, when the constituent of voluntariness is discussed (in a later part of this chapter).

The second of Kluge's parameters is discussed in the negative. Emotional incompetence is "the inability to reach a reasoned (and reasonable) decision because of emotional pressures, feelings, and so on" (Kluge 94).[14] Consent given in a 'date rape' situation may thus, arguably, be considered invalid because it is given by someone emotionally incompetent. However, I think it is of great importance to distinguish between emotional incompetence and emotional immaturity. The former seems to apply to people incapable of emotional response -psychopaths and autistics. The latter seems to apply perhaps to a great number of adults

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[13]This would be true only if that constituent were a *necessary* constituent

[14]Kluge's third parameter, volitional competence, will be considered in a later part of this chapter.

The fourth parameter, valuational competence--"the appropriateness of the values selected by the individual to determine the direction of his/her conceptual and volitional efforts" (Kluge 96)--distinguishes between those individuals whose values (whether socially acceptable or not) are connected with the nature of reality and those whose values are not. Those individuals who fall into the latter category, who are without valuational competence, fall outside the scope of this paper: I would consider those people to be suffering from some sort of mental illness which manifests itself in hallucinations, delusional thought patterns, etc.).

who must nevertheless be held responsible for their actions. If one is physically mature and has the potential to be emotionally mature, one must take responsibility for so becoming; if one chooses to remain immature, if one chooses not to 'grow up', one must suffer the consequences. Recall that this first constituent is capacity, not ability: it refers to potentiality, not actuality; it refers to the presence of, not nessarily the use of, certain faculties.

Though I am restricting my discussion to cases involving 'normal' adults, the issue of mental capacity is relevant in cases involving otherwise capable adults who are intoxicated or who are in some other chemically-altered mental state. The standard argument is that intoxication incapacitates (mentally and physically) and therefore negates consent. However if a man, intoxicated, drives a car and causes injury, he is nevertheless responsible for his actions. If a man, intoxicated, beats up his wife--or indeed anyone--he is again, nevertheless, responsible for his actions. And yet if a woman, intoxicated, agrees to sex, she is considered *not* responsible. It seems to me that if we release women from accountability for behaviour while intoxicated, then to be consistent, we must do the same for men; not to seems to indicate a sort of paternalism. However, though the driving-while-intoxicated and spouse-assault examples tend to feature male perpetrators, the offenses are *not* sex-specific and women in the same circumstances *would* be held responsible.

So perhaps, instead, the difference can be accounted for by a distinction between active and passive, a distinction between acts of agency and acts of compliance; and consent is categorized as a passive act. I have trouble with the distinction as well as the categorization, but this will be discussed in a later chapter. For now, I suggest a parallel situation: if, intoxicated, I agree to lend my car to a friend for a trip out to Vancouver, is my consent considered invalid and my subsequent charge of theft allowed? The answer is 'no': apparently, in

cases of a property transaction, consent given while intoxicated may be valid--theft is defined as 'taking without colour of right' and if a person reasonably believes that the consent given is, in spite of intoxication, genuine, then such a person *has* colour of right and the taking is not theft. However, in cases of a sexual transaction, consent given while intoxicated is not valid because it is not capable. This seems to me to be inconsistent: consent that is given while intoxicated should be judged by one standard, whether that consent is for a property transaction or a sexual transaction.

Perhaps the issue is a distinction between commission (did A, intoxicated, say 'yes do x to me') and omission (or was A, intoxicated, unable to say 'no, do not do x to me'). This would be a somewhat different distinction, and one perhaps equally suspect, it will also to be discussed later.

Perhaps Nyberg's distinction between consenting attitudes and consenting actions provides a way out of the apparent double standard. Insofar as 'action' is defined as a physical or behavioural phenomenon and 'attitude' is defined as a mental phenomenon, driving a car and assaulting a person are actions whereas consenting is an attitude.[15] And in the legal sphere, one is accountable for one's actions, not one's attitudes. However, though not a defense for actions such as driving and assault, intoxication *is* a defense for actions such as murder. This is because the crime of murder requires a *mens rea* (guilty mind). Thus, an intoxicated person who shoots and kills another person may have the charge reduced from murder to manslaughter if it can be proved that intoxication was sufficient to mentally incapacitate the person such that *mens rea* was impossible (Hardy July 1994). This is consistent with intoxication negating consent in that both *mens rea* and consent are states of mind, attitudes rather than actions (which may or may not be 'acted upon')

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[15]This presumes a somewhat superficial view of the distinction between physical and mental; but, a full discussion of this aspect of 'the mind body problem' is beyond the scope of this paper.

However once the state of mind, consent, is expressed, be it by making a sound ("yes") or a gesture (nod), an action has occurred, and so we are back where we started.

Mental capacity is a major concern in the biomedical context. Indeed, the Presidential Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioural Research requires patients/subjects to have "decisional capacity", and Shuman says "the most troublesome feature about informed consent is the requirement that there be 'competence' or 'capacity' to give such consent" (Shuman 137). It is 'most troublesome' because medical practitioners may have good reason to believe that, in some cases, a patient simply cannot understand all the relevant aspects of his or her condition, alternatives, risks, etc. In those cases, 'true' consent would not be possible as long as such capacity was a condition. In the case of sex and sexual assault however, I believe that everyone over fourteen *can* understand all the relevant aspects. (Whether or not their consent is informed will be discussed in the next part of this chapter.)

Physical capacity is not meant to describe the physical ability to express consent. A completely paralysed person may or may not consent to a sexual action. One wouldn't know unless such a person *could* express it; and unfortunately most of us are not telepaths and so such expression needs to be physical, therefore it would seem that physical capacity to express consent *is* necessary--necessary for the *legal* sphere of significance, yes, but not perhaps for the other spheres.

Rather, what is meant is the physical ability (if applicable) to perform the action consented to. Thus it is meaningless for me to consent to walk through walls. This is closely related to the physical viability of options and alternatives which are, as I shall explain in the third part of this chapter, necessary prerequisites to voluntariness. A choice is not a real choice unless there are alternatives, and an alternative is not a real alternative unless it is physically possible. I cannot choose

to run away from an assaulter if my legs are tied. In this way, force negates consent. Not only can one be *re*strained by force, one can be *con*strained (for example, one's legs can be forced apart) Thus physical capacity affects voluntariness.

Generally speaking, force is indicated by the presence of injury, often a result of resistance (which requires physical capacity). "The notion of consent, in legal terms, refers to resistance. Resistance must be sufficient to prove lack of consent" (Gunn and Minch 28). In addition to being very subjective (how sufficient is sufficient? for this individual? in this situation?), the resistance standard is unreliable as an indicator of consent because consensual sex may involve injury[16] and resistance and so these cannot be the only indicators of force.

And yet, there are instances in which resistance is *not* required to prove lack of consent. Brownmiller points out, while comparing sexual assault to robbery, "it is never inferred that by handing over the money they 'consented' to the act and therefore the act was no crime" (Brownmiller 383). This may be true because in the case of robbery, perhaps the activity itself provides a sort of 'circumstantial evidence' of force. But if one had promised to give money to this acquaintance and then changed one's mind, if one had given money to this particular acquaintance before, or if one was in the habit of giving money to acquaintances, one might very well infer that by handing over the money one *did* consent and there *was* therefore *no* crime.

Informedness

For bioethicists, the main requirement of consent is that it be 'informed'. The statement on informed consent by the Royal College of

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[16]Or at least, for the moment, I'll say it can involve bruising (injury consented to may not properly be called injury; this will be discussed in Chapter IV).

Physicians and Surgeons of Canada is as follows: "Competent . . . patients have the right to make such decisions. The physician is morally obliged to protect this right by providing patients with all reasonable data about diagnostic and therapeutic procedures, and possible alternatives and risks, and by allowing patients to make their decisions without coercion" (Royal College).

Regulations regarding the use of human subjects, established by The Department of Health, Education, and Welfare, stipulate that the following six elements be present for informed consent (Kieffer 244).

1. A fair explanation of the procedures to be followed and their purposes, including identification of any procedures that are experimental.
2. A description of the attendant discomforts and risks reasonably to be expected.
3. A description of the benefits reasonably to be expected.
4. A disclosure of appropriate alternative procedures that might be advantageous for the subject.
5. An offer to answer any inquiries concerning the procedures.
6. An instruction that the person is free to withdraw his/her consent and to discontinue participation in the project or activity at any time without prejudice to the subjects.

American regulations are similar. Judge Robinson defines 'true consent' thus: "True consent to what happens to oneself is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each" (Robinson 90). And the Presidential Commission specifies that the "relevant information regarding one's condition and alternatives includes possible benefits, risks, costs, and other consequences, and significant uncertainties regarding any of this information" (Presidential Commission 104).

How possible is this standard of informedness? Not very, implies Ingelfinger, arguing that there is a "nearly endless list of all possible

contingencies" (Ingelfinger 191); he therefore differentiates between 'informed' consent and 'educated' consent--informed consent refers to that given by a person who has received the relevant information while educated consent refers to that given by a person who actually understands the information. Transferring the standard from the medical context to that of sex and sexual assault, one may ask 'what's there to understand about sex?' And perhaps, generally, we can concede that most people *do* know all there is to know: it is reasonable to expect sexually-experienced adults to already know about procedures and purposes, discomforts, benefits, and alternatives. However, I think an exception must be made for people who have never had sex before: without the knowledge of experience, can they 'consent'? One might say 'yes' because surely we *do* consent to other things *for the first time*. But in our society, sex is a particular taboo subject and perhaps sometimes there is not sufficient pre/non experiential knowledge to allow 'informed' consent. Furthermore, intersecting this analysis with a gender politics perspective[17] enables us to suggest that *women* are *especially* 'not supposed to know' about sex, and are therefore more often than men, and to a greater extent than men, kept ignorant about it. For example, sexually explicit videos and magazines are viewed more by men than women;[18] 'dirty jokes' are not 'supposed to be' told in the presence of women because women are presumed to be and to be kept innocent of such matters. Speaking about 'ought' rather than 'is', I think sexually-inexperienced people should be provided with this knowledge by parents and/or teachers; that is, the provision of this information should not be the responsibility of the consent-seeker.

However, with respect to risks, I do think, since this can vary

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[17]Generally, whenever I refer to the gender politics perspective, I am narrowing my scope to sexual assault in which a man is the assaulter and a woman is the assaultee.

[18]I realize that such viewing hardly informs about 'real' sex but at the very least it suggests that more male virgins have at least seen a picture of a naked woman than vice versa.

greatly from individual to individual (no risk with the disease-free and sterile person to risk of death with the HIV-positive person), that it *should* be the responsibility of the individual consent-seeker.

Further, to consent is to assume risk; legally, consent is a waiver of the right to sue. This not only encourages one to become informed about risks, it also 'allows' a certain amount of risk. Paglia would support this: engaging in sex is always a risk, and if it doesn't turn out the way one wants, one cannot then go back and cry 'assault!'.

Partly as a result of the knowledge differential, the medical profession has developed as well a power differential. The role of power in consent will be discussed to a greater extent later, but for now I wish to describe the 'doctor as authority' view that dominates the medical field. Along with greater power comes greater responsibility, the medical profession is clear about that. Barber says that the duty to obtain consent falls on the physician (Barber 98). To this end, Robinson says the doctor has "an obligation to communicate specific information . . ." (Robinson 91). Further, Robinson applies a standard of "reasonableness of what the physician knows or should know to be the patient's information needs" (Robinson 92): "A risk is thus material when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy" (Robinson 92); in short, "on the basis of his medical training, he can sense the needs of the average reasonable patient" (Robinson 92). Katz points out the historical link--lords made decisions for peasants because their capacity to make their own decisions was doubtful--and admits that "most doctors believe that patients are neither emotionally nor intellectually equipped to be medical decision-makers" (Katz 95). This has been identified as a rather paternalistic stance, one which is in conflict with an individual's self-determination. However, I do not want to debate its merit here; what I want to do is explore the potential for transfer to sex and sexual

assault.

Because of our gender-polarized socialization, men may have a knowledge advantage; do they also have a power advantage? I think that they do. Women and men are encouraged to see men as authorities, to believe that 'father knows best'. Comments from 'it was for her own good' to 'trust me--you'll like it', made by sexual assaulters, indicate that they believe themselves to be in a position of authority, similar to doctors, capable of making decisions for sexual assaultees. And insofar as they are able to carry out these decisions (whether by physical and/or emotional coercion, and/or because of a lack of resistance), they do have a power advantage.

Apart from the knowledge *differential*, there is the question of knowledge *sufficiency*: can anyone know the full consequences of sex with a certain person? One cannot predict the future. Sometimes one's emotional responses 'the morning after' are completely unexpected. However, and this is one of the problems with consent pointed out by Axinn, one *may* give consent without knowing all the consequences (Axinn 20). Consent therefore cannot be fully informed; it can be, at best, educated. But this leaves us with the question 'how much knowledge is sufficient to constitute consent?'

And it could be that the answer to this question depends on the sphere involved. Person A may feel comfortable making a decision based on x amount of information whereas Person B may not feel comfortable unless x + 1 amount of information is known. These subjective differences, in the personal sphere, should be acknowledged and respected.

However an objective standard is necessary for the legal sphere. We could call on the 'reasonable man' standard already in use, however inadequately. But perhaps we should take the cue (given, albeit, with 'tongue-in-cheek') from A.P.Herbert, who points out, with reference to a fictional water traffic accident case, that "legally there is no reasonable woman" (Herbert 5); therefore, he suggests, "the learned judge

should have directed the jury that, while there was evidence on which they might find that the defendant had not come up to the standard required of a reasonable man, her conduct was only what was to be expected of a woman" (Herbert 5). Perhaps given the current sexism in our society, a 'reasonable woman' standard is different and should be so noted.

Such attention to the context of gender politics results in several complexities. For example, on the one hand it *is* reasonable to accept that Woman A believed Man A (when he said 'I love you' or 'You'll like it' or 'I will not hurt you', etc.) because after all, 'Father knows best'...; on the other hand, many women will say, I think, that men routinely lie to 'get sex', and so it is *not* reasonable for Woman A to have believed Man A.[19] The larger cultural context is also important: "the process of informed consent must consist of a structure of supportive values, emotions, and ideologies *as well as* cognitive understanding" (Barber 6-7, my emphasis).

In his analysis of informed consent in the medical context, Kluge answers the question 'how much information is reasonable' by distinguishing between four standards of disclosure: full, professional, subjective, and objective. Though disclosure suggests a power imbalance that is not present to the same degree in the sex and sexual assault context, his analysis is nevertheless of interest.

(i) Full disclosure requires all *relevant* information.

(ii) Professional disclosure requires all and only that information "a similarly placed colleague" (Kluge 115) would disclose.

(iii) The subjective standard of disclosure requires that the patient be given all the data they wish.

(iv) The objective reasonable person standard of disclosure requires whatever a reasonable person would want to know if they were in the position of the patient.

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[19]Recall that I'm excluding statutory rape, the situation in which the age differential compounds all of this.

Kluge considers the last standard to be the most appropriate, but emphasizes that it refers to the position of that *particular* patient and thus, entailing the subjective standard, maintains autonomy. For the sexual context, which involves people who can always speak for themselves, the subjective standard seems most appropriate.

That consent involves a choice has already been alluded to, and tabled for a full discussion in the third part of this chapter. Just as an alternative is not a *real* alternative unless it is physically possible, an alternative is also not a real alternative unless it is known. Thus Barber specifies that "informed consent includes telling the patient that she is free to refuse" (Barber 108). However Zweng distinguishes between 'knowing consent' and 'informed consent' (Zweng 117-118); it is this explicit information of the right to refuse that separates the two. I think, for the sexual context, knowledge of the right to refuse can be taken for granted.[20]

Just as force can render capacity impossible and hence consent invalid, fraud renders informedness impossible and hence consent invalid This particular kind of coercion is becoming increasingly important: it is, unfortunately, not uncommon for people to withhold information or lie about being HIV-positive. Such fraud renders consent to sexual activity invalid and this can have great consequences in the legal sphere. Insofar as one can consent to one's own death (consider euthanasia, for example), in the case in which A lies to B about being HIV-positive and subsequently receives consent to sexual activity which results in the eventual death of B by AIDS, being able to prove the fraud will prove homicide. At the very least, such a lack of disclosure should result in a very successful lawsuit.

Pincoffs suggests that "it is the consenter's responsibility not to sacrifice his freedom, and also to take precautions not to be tricked or forced into sacrificing his freedom" (Pincoffs 110). How reasonable is

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[20]Though exercising this right may come with consequences to be considered

this? Does this mean that a woman should never allow herself to be alone with a man? Actually, being alone with more than one man would also be potentially 'irresponsible'. Even if there were a woman or two present, there is a chance that a sexual assault will occur. So it appears that simply to *be* a woman in a patriarchal society is to 'sacrifice one's freedom'! Fortunately Pincoffs adds that "something like *a* reasonable man standard must obtain: "[One is] required only to take the precautions against loss of freedom that a reasonable man would take, and similarly for informing [one]self of what, 'exactly', [one] is consenting to" (Pincoffs 110). Pincoffs did not make a separate comment about reasonable women so either he means 'man' in the inclusive sense--in which case he's either ignoring or denying the social context which creates a double standard--or he is thinking and writing about only half of the species. For those of us who recognize the double standard, we may ask 'are we required by reasonableness to 'accept' it?' Even if doing so *is* sacrificing our freedom--or our life?

Swimming in and out of the biomedical ethics view of informed consent is the idea that consent takes *two*. Pincoffs (not speaking strictly of the biomedical ethics view) supports this idea, saying that it is incumbent upon the consenter as well as the seeker of consent that it be free and informed (Pincoffs 110). I am uncomfortable with this and I maintain that I can consent on my own. But, of course, if my consent is to be informed, generally I must interact with at least one other to acquire that information. However what is important is that I need not interact with the person to whom I may or may not give consent. I *may*, and would perhaps be wise to, acquire all the information I need (about sex *and* about that person) from someone other than that person.

Nyberg's analysis of power adds some detail to this view. "Whenever at least two people are related in some way relevant to at least one intended action, power is present as a facet of that relationship. The minimum and necessary conditions of power are two people and one plan for

action. This means that power is partly psychological and partly social" (Nyberg 40). It is psychological in that at least one of the individuals involved has a plan, a goal, an intention, a desire, it is social in that it involves more than one person. Sex and sexual assault satisfy both aspects and are thus sites of power.

Nyberg goes on:

> The relation between the one's intention to act and the other's consent to that intention is close to the heart of power theory This relation suggests another facet of power, namely, that it always exists in connection with a state of relative powerlessness. One consents to the other, and transfers power with that consent. (Nyberg 40-41)

This sounds like the *grantive* consent Kipnis speaks of, as opposed to the *contractive* consent.[21] I think the grantive model fits the consensual sex scenario better than the contractive model, but the power imbalance isn't necessarily applicable. We could consider it thus. if both parties have the same intended action, we end up with two grantive relations simultaneously, and this achieves a power balance. Perhaps again it is our socialization that tends to situate only one person, the male, in the seeker of consent position and the other, the female, in the consenting position.

Nyberg presents consent as a delegation of power and it therefore may be withdrawn; consent is thus control over power; without consent, power is reduced to force and is thus lost (Nyberg 45-46). This last observation--that without consent, the action must become one of force, without power--does seem to fit the sexual assault scenario well.

One further comment: if consent takes two (and if, and therefore, the action takes two), it would surely be reasonable in the legal sphere to examine the past history of the man as well as the woman, not only to determine the likelihood of his using force against a woman's will this time, but also to determine his credibility and general moral character. However "men's behaviour is taken for granted, not judged" (M.French 194).

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[21]See page fifty-one.

And, if we were to so judge it, as we do the behaviour of women, that would be as much an example of 'the psychological error' described by Barber, that consent is the outcome of personalities, uninfluenced by the multiperson, multidimensional social system (Barber 6-7).

Voluntariness

The third constituent of consent, voluntariness, is particularly slippery because it presumes self-determination. A full discussion of the free will and determinism debate is beyond the scope of this paper. However, I will make the following comments.

The debate as stated is mis-named: disproving determinism (every event has a cause) does not prove 'free will'[2]; intention in an indeterminate world (one in which causal connections are random or non-existent) is impossible. That is, disproving *physical* determinism does not prove free will. In fact, to have 'free will'--or better put, to be capable of intention-- there must be some sort of 'psychological determinism', one's desires must be able to affect one's actions.

I will simply state that some sort of self-determination is a necessary premise for this paper.[3] However I'm left with the question

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[2]I place the phrase in single quotation marks because I subscribe to Locke's view that the phrase itself is a bit of a mis-nomer: one is free to the extent that one has the power to act or not act according to one's desires, so what we really want to know when we ask 'do we have free will?' is not whether *the will* is free but whether *we* are free.

[3]Ryle is one philosopher of many who maintains a contrary position: there is no will, there are no volitions. In *The Concept of Mind*, he argues that the concept of will or volition is a useless concept: we don't describe our conduct in terms of willing; volitions cannot be witnessed; mind is postulated to explain causality (one's volitions direct one's actions) and yet it is defined as being beyond causality; volitions must be either voluntary or involuntary acts of the mind, and yet both possibilities are absurd (Ryle, *Concept of Mind* 63-65).

'to what extent does one have control over one's desires?',[24] and this is precisely the question that the discussion about internal and external coercion gets to. External coercion, force, has already been addressed, as negating capacity and hence invalidating consent. Internal coercion, *as* coercion, would also invalidate consent. But what exactly *is* internal coercion? Cohen distinguishes between (i) narrow or tight coercion, where there is a deliberate effort by A to pressure B to do x, which makes consent invalid by making it involuntary, and (ii) general or loose coercion, where one is pressured by the general conditions one finds oneself in or by the desires and needs one has, which does *not* invalidate consent (Turkington 194). The latter, loose coercion, referring to one's desires and needs, seems to be what is intended by the phrase 'internal coercion'.

Johnson notes that in a sense all of our actions are more or less coerced by the reasons for them (Johnson 174), but this is not a useful definition of 'coercion', as it would render *all* consent invalid.

Insofar as we always act for a reason or a set of reasons, to distinguish between consenting to sex in order to satisfy a momentary hormonal want and consenting to sex in order to stay alive (when, for example, one is threatened with grave injury otherwise), and to say that the one is genuine consent and the other is not, is actually to distinguish between reasons and to judge one reason 'better' than the other. I consider the end of 'life' to be higher than the end of 'physical pleasure' (because life is more valuable than physical pleasure, I suppose); and so consenting to otherwise-unwanted sex in order to stay alive seems to me to be much better reason than doing so to satisfy a momentary hormonal want; therefore, the consent given in the first instance should be deemed 'better'--more worthy--than consent given in the

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[24]In asking the question 'does one have control over one's desires?' one presumes that one is distinct from one's desires. However the problem of the self (who/what *is* the self I keep referring to? how is it related to the will? to desires?) is also beyond the scope of this paper.

second instance.

So, what is the difference between 'coerce' and 'cause'? (I want to say our actions are *caused* by our reasons for them.) One possibility has been already suggested: control. But again, do we have control over our mental states, our fears and desires as well as our beliefs and attitudes? Can these even be considered together? Kluge suggests that our beliefs and attitudes are controlled by our culture:

> All of us, through the process of growing up in a particular culture and learning its language, acquire a conceptual framework that limits the range of what is meaningful to us. Each one of us is therefore constrained by the conceptual and valuational limits of the cultural and sub-cultural framework in which we are raised and in which we are embedded. (Kluge 122)

And Freud suggests that our fears and desires are controlled by our past. That seems to leave us with no choice.

When Katz specifies voluntariness as a condition, in the biomedical ethics view of consent, he goes on to say that "any informed consent doctrine, to be realistic, must take into account the biological, psychological, intellectual, and social constraints imposed upon thought and action" (Katz 102).[25] His list very nicely illuminates the problem: one's neurochemicals can affect one's clarity of thought which in turn affects one's beliefs which in turn affect one's attitudes--which are also affected by the society in which one lives. The lines demarcating regions of control of self by self become fuzzy indeed. One can wonder therefore if anyone is ever ". . . so situated as to be able to experience free power of choice " (United States F.D.A.). And though Elster considers it fallacious to think that "everything that comes about [that is caused?] by action can also be brought about [intended?] by action" (Elster vii), surely *some* things can be so brought about. And surely like consent, constraint is a matter of degree. Elster defines an action as "the

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[25] Vandervort suggests that economic coercion also be considered.

outcome of a choice within constraints" (Elster vii),[26] and perhaps that is the best we can do. Further, though generally his view is that one cannot choose one's own character, he does say that "men are sometimes free to choose their own constraints" (Elster vii).

What about women? What about women in a patriarchal society--are they equally free? I think the most important consideration added by the gender politics perspective is the relevance of the social context. Gender politics, with its 'the personal is political' analysis, rectifies Barber's first error regarding consent, 'the individualistic error': "This error consists in defining informed consent as the outcome of a transaction that occurs between two and only two individuals . . . the medical care and research system is a complex multiperson system in which the two individuals are [illegible]" (Barber 6-7).

One of those influences must be the socialization of men into active roles, and women into passive roles. And, as voluntariness suggests an active rather than a passive action/attitude, women so socialized tend not to be very voluntary, tend not to be very consensual.[27] *'Be* consensual' or '*express* consent'? Am I talking about the attitude or the action? Both, but the action, the expression of consent, will be discussed in the next chapter, and the effects of patriarchal socialization on that expression will be addressed then.

Another aspect of gender socialization, one mentioned earlier, is the view of men as authority figures. Though by 'volitional competence' Kluge intends a psychological meaning of volition rather than a philosophical meaning, such that volition is absent because of emotional trauma, he extends the causes to include "the pressure of the context in

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[26]Though it is important that he talks about *action*: Nyberg's distinction between consenting attitudes and consenting actions (see p.13) would 'allow' one to be free in one's attitude and choose x, but because of force, one's action could be coerced toward y and hence not free.

[27]One might think that women, because of their socialization, are *too* consensual; but, this would be thinking of submitting rather than consenting

which [people] find themselves" (Kluge 93); such pressure can make a person "so compliant that they sacrifice their own autonomy . . . [and] . . . merge their will with the will of the persons they take to be in authority" (Kluge 93). This easily applies to the genderized sex and sexual assault scenario.

Also mentioned earlier, not only do men have more authority than women, men generally have more power than women. In fact, Nyberg describes four kinds of power, each of which, I notice, 'favours' men in our society:

(i) force - men have the physical advantage of brute strength and women are not encouraged to acquire any of the compensatory physical skills;

(ii) fiction - women are encouraged to believe men, whatever they say;

(iii) finance - men earn more money and own more property than women;

(iv) fealty (power of faithfulness based on trust and mutuality) - though perhaps the weakest, women <u>are</u> encouraged to trust men (because they know best . . .).

Given both the authority and the power advantage, can any consent by women be 'voluntary'?

Furthermore, men are socialized to *expect* women to obey (or at least to consent, to agree with a little coercion) and the power of expectation is very great. Consent, thus, becomes a bit of a self-fulfilling prophecy.[N]

Fear has already been mentioned as one important factor negating voluntariness and hence invalidating consent. Is fear internal coercion? Consider one of Zweng's examples: "A woman consents to sleep with a man,

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[N]Speaking of expectation, it is interesting to note that Shotland found that "men as well as women [are] perceived to be obligated [to sex] by sexual precedence [previous sex]" (Shotland 756); in fact, "men are perceived to be *more* bound than women . . . [their] refusal is seen as less legitimate" (Shotland 762, my emphasis). At first this may seem to contradict the general picture that has been forming, that gender socialization disadvantages women more than men with respect to consent in sex and sexual assault--men are not allowed to change their minds either, for men to consent to x entails consent to y; however, Shotland's finding may simply reflect the attitude that men's sexual impulse is unstoppable--and this attitude puts women right back at the disadvantaged position.

coerced by the fear of losing his attention" (Zweng 117). This seems to me to be an abuse of the defense of fear and too broad a definition of coercion. It thus illustrates the need for limits on the terms--that is, how afraid is afraid? Fear of injury[29] to oneself or others seems far more legitimate than fear of losing the attention of a man; in fact, to call that fear 'coercive' is perhaps an insult to the woman.[30]

Discussing coercion by threat, which seems to me to entail fear, Gaylin presents an interesting relationship between capacity and voluntariness: it is, for example, the unfired gun pointed at someone's head that forces the action, not the fired gun (that would destroy the ability to act at all). The effect of coercion by threat (which negates voluntariness and hence invalidates consent) thus depends on "[one's] capacity for anticipation and visualization, [one's] ability to learn by experience . . ." (Gaylin 449).

Implicit in intention (which I have presumed) is choice: to intend to do x would seem to entail that one could intend to do other-than-x, and if x and other-than-x exist, one has a choice. It is to this issue of choice that I now turn my attention. Implicit in the notion of choice is the existence of alternatives. That is to say, the statement 'I intend (or consent to) x' (a statement of choice) is meaningless unless at least one other-than-x (an alternative) is possible.[31] Furthermore, as mentioned earlier, the extent of alternatives depends on the extent of physical capacity.

Johnson argues that it is not sufficient that there *be* alternatives;

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[29]Though of course then we must define 'injury'--to be discussed.

[30]However by saying that the one fear is more 'legitimate' than the other, I am saying that physical injury is somehow more serious (?) than emotional injury; this is clearly a subjective evaluation and one that belongs to the personal sphere. In the legal sphere, however, an invariable definition of fear and injury *is* needed.

[31]However because I exist on one space-time continuum and can therefore perform only one action x per time y, I will never know if not-x is possible, if I really have an alternative.

the alternatives must be *attractive*--only then is consent free. This may be what Branson is suggesting when he says that "to be sufficiently free it is not enough that one is free from *feeling* he is coerced" (Barber 163, my emphasis); to be sufficiently free, 'genuine alternatives' must be available. Johnson goes on to say that circumstances of imprisonment provide only relatively unattractive alternatives (Johnson 170) and this 'prison model' suggests interesting insights for women in a patriarchal society. Degree of attractiveness, however, must be considered: if someone says 'do this or I'll kill you', the presence of choice and hence consent, is questionable; if someone says 'do this or I'll take your wallet', the presence of choice and consent is less questionable. As Gaylin states, "for behaviour to be considered coercive, there must be some correlation between the severity of the threats and the severity of the imposed action" (Gaylin 449). Perhaps the greater the attractiveness of the alternatives, the greater the choice and hence the more valid the consent.

Consistent with this matter of degree, Johnson suggests there is a continuum between coerced and free consent, based on freedom of choice: at one end there are no alternatives and at the other end there is an unlimited number of attractive alternatives.

Cohen, as already discussed (see p.25), also suggests a continuum: at one end there is narrow coercion (for example, a situation in which A pressures B to have sex promising a promotion for consent) which negates consent; at the other end there is general coercion (for example, a situation in which B simply feels that having sex with A would be a good strategy toward promotion), which does not negate consent.

Nyberg also suggests a continuum, on a scale of increasing degrees of willingness: "consent is an idea that takes many forms along a passive/active continuum, no single form of which can stand as the sole definition of consent . . ." (Nyberg 47). He then describes five points along that continuum:

1. acquiescence under threat of sanction;
2. compliance based on partial or slanted information;
3. indifference due to habit and apathy;
4. conformity to custom;
5. commitment thorough informed judgement (given by an autonomous individual capable of participating in rational deliberation).

In a patriarchal society, men tend to have the means and the habit to threaten or sanction, thus situating women at Nyberg's first point. As already mentioned, women tend to be socialized to compliance, which situates them at the second point. Women are also socialized to be followers rather than leaders; an example Nyberg gives of someone at the third point is someone 'who is used to being a follower'. I think that men, more than women, are expected to be rebels; women, more than men, therefore, tend to be conformists--this situates them at Nyberg's fourth point. Sexual activity is hardly presented in our society as a subject for rational deliberation, especially for women: a woman is 'supposed to' be 'swept away' by the passion of the moment (or by the man); to 'premeditate' is to be a 'slut'. Therefore it is unlikely that women will consent (to anything) as at Nyberg's fifth point, with 'commitment through informed judgement and rational deliberation'.

Axinn's analysis of the ambivalent individual ("what are the varieties of consent in the case of an individual who is ambivalent about the question"--Axinn 19) parallels, to some extent, Nyberg's third point, that of the indifferent individual. I realize that indifference is *essentially* not the same as ambivalence, but insofar as both mental states result in a sort of behavioural neutrality (neither this nor that -in the first case because one doesn't care, but in the second case because one cannot decide), indifference is *functionally* the same as ambivalence. Given the mixed socialization women undergo ('good girls do not', but 'motherhood is sacred'; you have to have a boyfriend, and boyfriends insist; etc.), it may not be unlikely that many women are indeed

ambivalent about sex.

Prior to presenting a rational model of an ambivalent individual,[12] Axinn solves the logical problem of an individual with two goals that are inconsistent by introducing a time differential. That is, the logical problem of my wanting to eat chocolate and my wanting to not gain weight (two desires which are inconsistent) is solved by recognizing that "while contradictory statements can not be true at the same time, they may hold at different times" (Axinn 24): at the moment I eat the chocolate, I want to eat the chocolate; the desire not to gain weight may occur the moment before and/or the moment after. This 'escape route' is not at all necessary for the issue at hand: for a socialized woman to want sex and to not want sex at the same time is not at all a contradiction because the situation could be, rather, that the woman wants physical pleasure but does not want to become pregnant.[13]

In contrast with the ambivalent person, Axinn describes the fanatic: he has one consistent goal and he eliminates any interference (Axinn 24). Just as the ambivalent model seems to fit the socialized female in a sexual situation, the fanatic model seems to fit the socialized male.

Though one usually assumes that choice entails alternatives, this may not necessarily be so: I may choose to read and whether or not I have (or even believe I have) an alternative does not affect my desire. Locke says that an act is voluntary if it is done in accordance with one's desires; thus in Locke's view, my consent to read would be voluntary and free[14] but also coerced. In what way is it *coerced?* By the absence of alternatives.

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[12]Using an Aristotelian square of opposition with twenty-eight lines of opposition between contradictories, contraries, subcontraries, subalterns, and equivalences, Axinn comes up with fifty-six varieties of consent (Axinn 23).

[13]The chocolate example could be similarly re-stated in non-contradictory terms.

[14]Recall that Locke defines a free action as one that is in accordance with, not caused by, one's desires.

My parenthetical comment in the preceding paragraph suggests that whether or not one's information is correct (i.e., whether or not one knows or believes[35]), is irrelevant. In the preceding section, I said that 'an alternative is not a real alternative unless it is known'; it seems now that that should be amended to 'an alternative is not a real alternative unless it is believed'. That is to say that alternatives need *not* be real. "If a pistol is held to the head of a man and he is warned that the trigger will be pulled unless he performs an act, the legitimacy of the coercion exists whether that pistol is loaded (a real danger) or unloaded (no danger at all), for it is not the actuality of the danger but the *perception* of danger which is the crucial issue" (Gaylin 450, my emphasis); "...danger will be defined by each individual in terms of his knowledge, life experience, and perceptual distortions" (Gaylin 450). And certainly, in our society, women's life experiences differ from men's: I think of Margaret Atwood's telling conversations with a male friend and then with some female students: the man said that men are afraid women will laugh at them; the women said that women are afraid men will kill them (Atwood 412).

But surely some perceptions are unreasonable. Gaylin himself distinguishes between 'normal anxiety', which is proportionate to the threatening situation, and 'neurotic anxiety', which is not, thus suggesting a standard which would, by his very reasoning, be as applicable to the perceived threat as to the actual threat. This is undoubtedly true for the personal sphere; but can, should, the *law* protect everyone's neuroses, and the woman who consents to life-threatening behaviour (sex)[36] out of fear of losing the man's attention? I think not. Just as we are responsible for our own mental and emotional maturity and must suffer the consequences of immature decisions, so we are responsible for our own

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[35]I use 'believe' in opposition to 'know', to suggest that beliefs have no established correspondence to reality.

[36]Should the man have the HIV virus.

mental and emotional health and must suffer the consequences of unhealthy decisions. A later discussion of 'mistaken belief' (a defence often used in sexual assault cases: 'I *believed* that she was consenting') underlines that a reasonable standard must apply, at least in the legal sphere.

And yet, "All of us are over-responsive to certain stimuli that have been endowed with special significances in our life times" (Gaylin 450). As is indicated by the low social status still accorded to unmarried women, *men* have been endowed with 'special significance' for women in our society, and our saying 'yes' when we feel 'no' may be an example of our 'over-responsiveness'. Shouldn't this reality be taken into consideration, legally as well as personally? Gaylin suggests that resistance to consideration of such emotional coercion (loose/internal) as equally binding as physical coercion (tight/external) is because "one likes to think of himself as a logical individual under the control of intellect rather than emotion" (Gaylin 458). If such a view of ourselves is mistaken, surely our law should reflect that and accommodate the truths about behaviour rather than the myths. I suggest that such a view is *sometimes* and/or *partially* mistaken and call again on the concept of a continuum: there are *degrees* of consent and *that* should be reflected in our law.

Before leaving this section, this discussion of the three conditions of consent, I wish now to present Turkington's suggestion that the aspects constituting consent are not separable. He argues that, because of the nature of our mental and psychological processes, they are not, and offers the following example: "It may be that as a result of the coercive environment, a prisoner . . . imagines the offer to participate in an experiment . . . to be an implied threat to revoke the prisoner's privilege if he does not participate . . ." (Turkington 196). That is, the 'loose coercion' causes him to imagine that 'tight coercion' is present.

Given the patriarchal character of our society, some women may

believe themselves to be in a similar position (recall Zweng's example of the woman who consents to sex for fear of losing the man's attention); another woman may believe that this is not the case. The extent of their knowledge/informedness, of real or imagined constraints, will affect the extent of the voluntariness of their consent.

I have suggested, throughout, several relationships between the constituents, but perhaps the most important one is the almost complete dependency of voluntariness on both capacity and informedness:[37] if one is not aware (informed) of an alternative and if one is not able to actualize (capable) an alternative, how can any decision be voluntary? One might argue, and be saying, essentially, the same thing, that the more informed one is about alternatives (informedness) and the more able one is of achieving those alternatives (capacity), the greater is one's freedom of choice.

So, voluntariness depends on capability and informedness. But what control do I have over my capability and informedness? To the extent those aspects are involuntary, voluntariness depends on involuntariness, and is thus involuntary itself. But to the extent those aspects are voluntary--to the extent I can control my capacity and informedness voluntariness is also 'controllable'. Regarding the woman's position in this patriarchal society (because it so influences the sex and sexual assault situation), such capacity and informedness and hence voluntariness--and hence consent--are possible; but perhaps a woman must work harder than a man to achieve that 'true' or valid consent

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[37]Going back one step further, capacity is, to some extent, dependent on informedness: one could believe that one is physically constrained when one is not; belief/informedness thus 'determines' capacity.

III. THE EXPRESSION OF CONSENT

Muehlenhard makes an interesting point when she says that consent is a mental act, not a behavioral act, and is therefore knowable only by the subject (Muehlenhard 25). Axinn does not even go that far: "It is by no means obvious that individuals do have easy and clear access to knowledge of their own goals and risk preferences" (Axinn 22). If consent is not behavioral and therefore not knowable by the other, and if it is, on occasion, not even knowable by the subject, how can it possibly be significant in sex and sexual assault?

The parallel to consent as a mental act is the defence of mistaken belief.[38] The problems with this defence underline the problems of considering consent *as* a mental act rather than as a performative act.

The accused in the sex and sexual assault situation is said to have made a 'mistake of *law*' when he believes (correctly) that she was not consenting, but does not believe (incorrectly) that his action is therefore illegal; a 'mistake of *fact*' is made when he believes that the other was consenting, when in fact she was not. Mistake of law--i.e., ignorance of the law--is not a defence to a *mens rea* crime (a crime in which a 'guilty mind' or intent is requisite) in Canada; mistake of fact--i.e., the defence of mistaken belief--is.

According to Vandervort, in cases of sexual assault, the defence of mistaken belief is often made and is often successful.[39] It seems to me that this defence, which allows the finding to rest solely on the attitude of the accused, should be, *at least*, replaced with reasonable belief. She

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[38]Belief, like consent, is a mental event.

[39]"If an offence is a *mens rea* offence, the principles of criminal culpability do not permit conviction unless the subjective awareness required by the offence as defined has been proven beyond a reasonable doubt. Sexual assault is a *mens rea* offence. As a consequence, lack of awareness of non-consent and failure to advert to the possibility of non-consent are complete defences to a charge of sexual assault under Canadian law as it is presently being interpreted by appellate judges" (Vandervort 281).

presents a hypothetical sexual assault trial in which the defendant maintains that all of the woman's neutral as well as non-cooperative behaviour *really* indicates consent.[40] The hypothetical defendant may indeed have been *honestly* mistaken in his belief that the woman consented. But given the woman's behaviour (she said 'no', she did not say 'yes', she did not co-operate), surely he was being *unreasonable*[41] to believe as he did.

And in fact, a standard of reasonableness *is* used: Section 244(4) of the *Criminal Code* states that

> When an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, *to consider the presence or absence of reasonable grounds for that belief.* (*Criminal Code* s.244(4), my emphasis)

Vandervort says that "a case of this type [her hypothetical trial] would probably be screened out as 'unfounded' by the police or rejected for prosecution by the Crown on the grounds that the mistaken belief in consent was not *sufficiently* unreasonable" (Vandervort 236)--i.e., his belief was not only honest, it was reasonable enough. This underlines patriarchy as 'the root of all evil' of which the complexity of the issue of consent in sex and sexual assault is but one flower. *Without* patriarchy, the man's belief in consent, despite what the woman said ("I have to leave", "Stop") and did (she struggled, pushed him away), as well as what she didn't say ("I want to", "Yes") and didn't do (undress), would be considered not only obviously unreasonable, it would be considered delusional. Or, at the very least, 'wilfully blind'.[42]

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[40]See page sixty-four for excerpts of a hypothetical trial, written by Vandervort, as an illustration of the mistaken belief defence.

[41]Not to mention arrogant, selfish, and immature--or just incredibly stupid.

[42]If one's mistaken belief is determined to be wilfully blind, it is *not* accepted as a defence.
Further, Vandervort states that "in sexual assault cases the reasonable

Because sexual assault *is* a *mens rea* crime, attention to a *particular* mental state is unavoidable. For crimes of negligence however, attention to a *general* mental state, that of 'the average person', is relevant. According to Vandervort, creation of an offense of 'negligent sexual assault' has been widely discussed. She believes it would not be a solution, however, because "the actual problem does not lie in deviation of an individual assailant's perceptions from those of society in general" (Vandervort 282). Recalling Herbert, I would ask whether 'society in general' is male or female.

> What is 'normal' according to male social norms and 'reasonable' according to male communication patterns and expectations does not accord with what women believe to be reasonable. . . . A woman may believe she has communicated her unwillingness to have sex--and other women would agree, thus making it a 'reasonable' female expression. Her male partner might still believe she is willing--and other men would agree with his interpretation, thus making it a 'reasonable' male interpretation. . . . The use of a reasonable person standard thus has a basic flaw. Courts do not clarify the perspective from which the 'reasonableness' standard should be applied. (Wiener 148-149)

A better solution, Vandervort argues, is to abandon the state of mind altogether (be it of the particular person or the average person) and instead consider what the accused did or failed to do (Vandervort 286)--i.e., to use a performative standard.

The performative model presented by Brett[43] maintains that consent is a behavioural act and not a mental act: consent, as a change in the prevailing pattern of rights and obligations, can take place only when there is communication between the parties (Brett 1). What is crucial therefore is not the attitude (because such a change in rights cannot depend on a private and personal attitude) but the action--i.e., what is

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person standard . . . focuses on the type and degree of violence used by the assailant and compares it with that used in normal sexual encounters of a similar nature" (Vandervort 282) and that "normal sex appears to include some quite extra-ordinary forms of interaction, some of which are quite violent" (Vandervort 282)--that is, rape is 'normal'. See also note 60.

[43]Nathan Brett, Department of Philosophy at Dalhousie University, in a paper titled "Sexual Assault and the Concept of Consent" presented at the Canadian Philosophy Association conference in Calgary, 1994.

said or done that can be construed as communicating permission to change, to do the acts in question (Brett 1).[44]

Though I agree that, in the legal sphere, the performative model of consent should be used, Nyberg's view that consent can be *both* a mental act (consenting attitude) and a behavioural act (consenting action) is useful because of the importance of separating *desire for* (a consenting attitude) from *consent to* (a consenting action): one can desire sex with another but choose not to so engage (i.e., withhold consent). Clearly, in the legal sphere, the choice is more important than the desire, otherwise I would be 'guilty' of murder when I wanted to kill but refrained from doing so: one's actions are relevant in the legal sphere, one's attitudes are not. That is, unless it is a *mens rea* crime--and sexual assault *is* such a crime. The solution seems to be to eliminate the *mens rea* requirement from the crime of sexual assault and use a purely performative standard. So even though one did not want to have sex with another, if one does (capably, informedly, and voluntarily[45]), one has consented and cannot charge assault.

Is the separation to be complete? That is, is a consenting attitude (a pro-attitude, as Brett calls it) neither sufficient *nor* necessary for consent (the action)? This reduces to the arbitrariness of description: insofar as any action is described by definition as that which we most strongly desire, a consenting attitude *is* necessary for a consenting action (in fact, it is synonymous); however, insofar as 'we' are described as 'free' to act according to our 'will', which is distinct from

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[44]Ryle would, I think, subscribe to Brett's performative model, as his position is that all mental phenomena can be accounted for in terms of performances or "capacities, skills, habits, liabilities, and bents" (Ryle, *Concept of Mind* 45).

[45]It may seem odd to suggest that one does voluntarily what one does not want to do. Perhaps this is most easily understood with the 'action as the strongest desire' analysis of human behaviour. The premise of the theory is that we always act according to our strongest desire. So though I may say that I would rather read Douglas Adams' new novel than work on this thesis, as long as I *do* work on this thesis, *that is* what I would rather do.

our 'desire', a consenting attitude is *not* necessary to a consenting action.

Constraints

The question here is 'what are the constraints on the expression of consent?' One of the errors that Barber describes is 'the communicative error', which assumes that good communication is sufficient; I think the platitudes 'just say no' and 'no means no' are instances of this error. As Barber says, consent is not simply a matter of 'good communication'. It is simply not that simple. Barber asserts that we need to use certain values and norms to *define* what constitutes proper and sufficient communication and we need better social control mechanisms to see that barriers to effective communication are removed (Barber 6-7). *Which* values and norms is a problem: "We tend to assume that because we speak the same language and because we function in the same national setting, we therefore share the same general framework of concepts and values" (Kluge 123); there are subcultures, however, and to some extent there are subcultures according to sex, each with a different framework of concepts and values. Insofar as the sexual situation is one in which men and women, members of different subcultures, meet, it is a situation bound to be fraught with mistaken assumptions.

Removing the barriers created by gender socialization is another problem. Perhaps because men are socialized to be active and women are socialized to be passive, men tend to be the consent-seekers and women tend to be the consent-givers.[46] Since it is up to the woman then, to give or withhold consent, the woman is the 'gate-keeper'. When adultery was first criminalized, it was so for women only. Whether this evolved

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[46]This presumes that giving consent is 'passive'. This will be discussed in the fourth part of this chapter.

out of the myth of male inability to control sexual desire or out of the biological division of reproductive labour is irrelevant; women are perceived by themselves and by men to have the sole responsibility for sexual activity. This is odd when considered together with the attitude that women, like childrer, the mentally ill, and slaves, are incapable of making decisions, and men must be, are, responsible for them. Gender socialization is, however, full of contradictions. (Another is the notion that, even when men unilaterally make the decision to have sex, women are responsible for any consequent conceptions--unilaterally.) Of course, changing the gender socialization (eliminating it?) would be a solution. Indeed, as women become more active, more the initiators, they will become more the consent-seekers; and as men become more the consent-givers, they will *also* become gate-keepers.[47]

Another part of the socialization is the belief that virtuous women cannot get raped (Brownmiller 386): a woman is, after all, the gate-keeper, and if she's virtuous she'll say no. (This myth amazingly enough denies male force.) (It also ignores the possibility that to say 'yes' is an indicator not of vice, but of a "healthy interest in sex, . . . a chronic history of victimization . . . a spirit of adventure, a spirit of rebellion, a spirit of curiosity . . ." [Brownmiller 386].) The underlying assumption is, of course, that sexual chastity is the indicator of a woman's virtue, and unfortunately, of not just *sexual* virtue. This in part explains the examination of a woman's past sexual history in court: it is not in order to determine whether or not she was liable to have consented this time, but in order to determine her credibility.[48] A

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[47]Brett suggests that "consent does not have a useful application whenever persons are interacting" (Brett 13). It thus applies only to sexual situations in which one is active and the other is passive. However I fail to understand why a situation characterized by mutual permission (sexual interaction) would not be characterized then by mutual consent.

[48]Sexual assault cases are twice as likely as robbery cases, and seven times as likely as aggravated assault cases, to be dropped because of questions concerning the witness's personal credibility (Holmstrom and Burgess 153).

virgin is honest; a sexually active woman tells lies. (You figure the logic.)

Extended, the attributes of active and passive become aggression and submission: "the real reason for the law's everlasting confusion as to what constitutes an act of rape and what constitutes an act of mutual intercourse is the underlying cultural assumption that it is the natural masculine role to proceed aggressively toward the stated goal, while the natural feminine role is to 'resist' or 'submit'. And so to protect male interests, the law seeks to gauge the victim's behaviour during the offending act in the belief that force or threat of force is not conclusive *in and of itself*" (Brownmiller 385). However, according to this perspective, resistance and submission are as equally natural as force, and thus *also* not conclusive. Such a perspective clearly provides a 'barrier to effective communication'!

Considering together the aspects of socialization mentioned so far--women are passive, women are gate-keepers, virtuous women say 'no'--it is easy to understand that 'no' can sometimes mean 'yes', because 'yes' cannot be said; 'yes' is, after all, active, irresponsible, and unvirtuous.

And in addition to such genuine misunderstandings about whether 'no' really means 'no', there are also real differences in the definition of acceptability: some men "do not consider sexual coercion *rape*, they call it 'working a yes out'--talking a girl into sex or getting her high...afterward they say 'she was asking for it'" (M.French 192).[40] And yet those who--twenty to sixty per cent, according to various college studies--say they might use force to get sex "*if they could get away with it*" (Russell 8, my emphasis) surely understand that the common consensus is that using force makes it criminal/*unacceptable*--otherwise why the 'if

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[40]That last bit has an interesting double meaning: 'asking for it' as in requesting/consenting, and 'asking for it' as in 'deserved it', like a just punishment.

I could get away with it'? (Russell 8-9).[50]

Perhaps there is no 'communicative error' after all. Perhaps both sexes do understand the values and norms that inform proper and sufficient communication. And perhaps it is just that the values and norms are different for men than for women, and the difference for men *includes* a permission to violate the values and norms of women.

The Explicit/Implicit Distinction

In addition to defining the constituents of consent, it is important to define the constituents of the expression of consent. Most important, I think, is the question 'can consent be implied?' As Scarry says, "the phenomenon of consent is, as a verbal act, extremely protean: it continually slides in and out of varying conceptual locations such as contract, signature, partnership, promise, waiver, voting level, warning, and warranty" (Scarry 868). As a *non*-verbal act, it gets even more slippery.

Given that fact, and given that we are neither accustomed nor socialized to giving (or requesting) explicit consent for sex, it is essential to be clear about the 'signals of implied consent' (Cohen 1524). That common opinion is that there *are* such signals is shown by a study done by Holmstrom and Burgess: in twenty-eight out of twenty-eight hearings and twelve out of twelve trials, questions were asked to establish implied consent. These questions, establishing possible signals, concerned the female's struggle, her sexual reputation, her general character, her emotional state, her prior relationship to the accused, and the promptness of her report (Holmstrom and Burgess 172).

Consider the following 'common' example of implicit consent: a woman

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[50]It is interesting that sex is acceptable without consent, but a urine test is not--a study has shown that a sizable majority feel that informed consent is necessary for any urine test (Barber 6).

walking alone in a park at night. For a woman to walk alone in a park at night is to put herself at risk for sexual assault more than for purse-snatching, even though walking in a park at night is a solitary activity and not an inter-sexual interaction (like going to a party with a man)--that is to say, even though walking alone in a park at night is not logically connected with having sex. This kind of illogical reasoning makes implied consent, consent implied by behaviour, extremely unreasonable. This implied consent is an example of the questionable double standard of acceptable behaviour (a man walking alone in the park at night is not understood to be consenting to sex).[51]

Another example of a gender socialized standard of behaviour that is unreasonably understood as implied consent is maintaining 'an attractive appearance'. That it is often the basis of 'the provocation defense' underlines another contradiction inherent in gender socialization: "the victim . . . can be discredited for behaviour that our society expects: looking attractive" (Holmstrom and Burgess 178).[52]

Distinguishing between express and tacit consent, Locke argues that

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[51]Actually, if the park is a popular gay spot, perhaps he *would* be so understood. However, the context must remain the same for the standard to be identified as double, and I do not think that a woman assumes that a man walking alone in the park is sexually available to her.

[52]However, the more important issue here is to what degree is a provoker responsible for the consequences of his/her provocative behaviour? To provoke x is not necessarily to consent to x.

And is there a significant difference between verbal provocation and physical provocation? For example, if I hit you and you hit me back, is your hitting me my fault? In a way, yes. But legally, you are still liable to an assault charge. So surely a verbal insult that provoked you would no more exempt you. And, if such active provocation, verbal and physical, is insufficient justification, surely passive provocation, such as the proverbial short skirt, is also insufficient justification.

As Harris points out, "although a flagrant display of cash in public may very predictably precipitate a robbery, the law does not hold an alleged robbery victim responsible for his own foolishness in making such a display (Harris 639). And surely "to hold a woman legally responsible for the effect that her everyday activity has on men around her is both unrealistic and unfair" (Harris 625).

Therefore I was amazed to read that a murder can be reduced to manslaughter if the act is provoked by an "insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control" (*Criminal Code* s. 1.5.(2))--I wonder if that 'ordinary person' in mind at the time was male or female.

someone who may "be barely traveling freely on the highway" (Locke 452), gives, merely by being on that highway which is within the domain of a particular government, tacit consent to that government. The relation between a citizen and the state, however, is not the same as the relation between a woman and a man. In the political contexts Locke is writing about, it might be reasonable to say that by using a state's resources, one is consenting (or should be consenting) to abide by that state's laws But what can one say about the sexual contexts I am writing about? That by accepting financial support from a husband, a wife agrees to that husband's laws, which may include 'sex on demand'? That by attending a fraternity party, a woman consents to the customary 'frat gang bang'? To say either of these is to stretch the 'field of consent' perhaps beyond reason. This issue will be discussed further in the next section of this chapter. For now, I suggest that though mere presence, with perhaps even silence ("has made no expressions of it at all" [Locke 451-452]), has had a long history as a token of consent, I think this kind of tacit consent is as inadmissible as the example discussed above (walking in a park at night), for the same reason: there is no logical relation between the action taken as implied consent and the action understood as consented to.

And participation, another suggested signal of implied consent, is equally suspect: the element of coercion, as already discussed, must be considered; the question of which particular acts are involved (to participate in x is not to consent to y) must also be considered

Vandervort presents a continuum that suggests that the expression of consent--specifically its explicitness--like consent itself, is a matter of degree.

(a) Explicit consent: voluntary agreement is expressly communicated.

(b) Implied consent: voluntary agreement can be unequivocally inferred from the behaviour of the complainant.

(c) Vitiated consent: the circumstances in which actual or apparent, explicit or implied, consent was given imply that agreement was incomplete

or not fully voluntary.

(d) Implied non-consent: (1) resistance and other behaviours inconsistent with 'voluntary agreement' such that refusal can be unequivocally inferred from the behaviour of the complainant; or (2) the complainant, though conscious, takes a passive role and offers neither assistance nor resistance.

(e) Explicit refusal: refusal is expressly communicated.

(f) Use of force causes submission or lack of resistance: no consent as a matter of law.

(g) Unconscious victim: capacity to consent or refuse is suspended.

Certainly, for the personal and moral spheres, this continuum is helpful. But for the conceptual and legal spheres, a line must be drawn: how explicit must consent be before it is considered 'true consent'? If such a line is drawn between (b) and (c), thereby accepting implied consent (as defined by Vandervort), then we need to ask 'who decides whether the inference is 'unequivocal'?'. And on what basis is this decided? I am tempted to say that the difficulty answering these questions should lead us back to a performative model entailing only explicit consent. But this would not eliminate ambiguities: a spoken 'yes' is as much a behaviour or performative act as undressing, both of which are examples, I assume, of the 'express communication' specified in (a)--and yet, that 'yes' may be misunderstood.

The Field of Consent

Thomas J. O'Donnell (McCormick 199) describes three modalities of informed consent which are accepted in the therapeutic context: (1) presumed consent--for example, consent to life-saving procedures by an unconscious person; (2) implied consent--for example, consent to tests performed during a general check-up by someone who has come for/consented

to such a check-up; and (3) vicarious consent or proxy consent--for example, consent made on behalf of children by their parents. His second type is of greatest interest to me with regard to the sex and sexual assault context: by consenting to sex, does one consent to any and all specific sexual actions?

Bayles says that consent is always to particular acts (Bayles 161). Axinn says this too: consent is expressed at a certain time, and for a certain period, and it may or may not require renewal (Axinn 21) Thus consent to Acquaintance A should in no way imply consent to Acquaintance B.[53] And consent to sexual act x does not necessarily imply consent to sexual act y. And, consent to Acquaintance A regarding sexual act x last night or last month does not imply consent to Acquaintance A regarding sexual act x tonight or next month. This should not be difficult to accept. It is not unreasonable to lend my car to John but not Joe; to lend it to John for a trip to Laval, but not Vancouver; to lend it when I do not want to use it but not when I do. Nevertheless, 'past consent' remains legally important: "The importance of past consent to the defense of consent is that, in the absence of some indicator that a person no longer consents, past consent is often good evidence that the person presently consents" (Parker 78). To return to my analogy, if I have loaned my car to John on a regular basis every weekend, and even if I said to him 'feel free to use it anytime', does he still need to ask for my consent this weekend? Perhaps yes, perhaps no. I suppose it depends on his manners and on the closeness of our relationship. Nevertheless, the car is still mine, and if I intercept his 'taking it for granted' one weekend, and say 'no', then it is not his to borrow. And he especially has no right to use force to do so. So perhaps past consent can justify *initiating* sexual interaction, but as consent can be withdrawn at any

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[53]And in fact, this assumption that sexually active women are more apt to consent is weak for another reason: "If, in fact, all women refuse more propositions than they accept, the proposition that an unchaste female is likely to consent will be wrong more often that it is right" (Bessmer 262).

time, it cannot justify in and of itself *continuing* with sexual interaction.

Furthermore, Axinn suggests that one can consent to a procedure but not to all of the products of that procedure (Axinn 22): one may consent to travelling by plane, but not to the hijacking that occurred while so travelling. Is that to say that one can consent to sex, but not to the child produced by sex, or to the AIDS developed because of it? Surely those consequences, unlike the hijacking perhaps, are within the reasonable range of informedness, barring fraud, of course. But that does not mean they are also within the range of consent: one can consent to x, knowing that y might also occur, but consent to y is not necessarily entailed--consent only *to the risk of y is* so entailed.

Nyberg is helpful on this point, describing what he calls the 'field of consent': "A person may be asked for consent to any of three parts in a power relationship: the plan or system of ideas which is to be implemented, the person(s) in delegating positions, and the particular assignment given" (Nyberg 50). Perhaps it is confusion among these which causes consent to be unclear. Is the woman consenting to her acquaintance or to the sexual activity with the acquaintance? A prostitute may make the field of consent very clear (she explicitly consents to a specific sexual act for a specific sum of money) whereas a person on a date may not make it clear at all (she may have simply said 'yes' to going on a date with a specific person). This simply underlines the need for clarification at certain moments.

The Active/Passive and Commission/Omission Distinctions

Legal language has changed from 'against her will', which implies she said 'no', to 'without her consent', which implies she did not say

'yes'. At first, this seemed to me to be a move from commission to omission, from active to passive; but in fact, both give significance to the saying of something, a verbal action/commission: the first gives significance to saying 'no', the second to saying 'yes'. More importantly, the first implies an assumption of 'yes' unless 'no' is said, whereas the second implies an assumption of 'no' unless 'yes' is said. To that extent, the legal language has improved, no longer embedding the patriarchal view that males have a right to females' bodies, or the patriarchal assumption that women *will* generally consent to men.

In the personal and moral spheres, whether one says 'yes', or does not say 'no' is irrelevant. Whether one consents (as a mental act) or not is what matters, and that is independent of one's expression or lack thereof. For conceptual and legal significance, however, the difference may be relevant. In fact, the difference between saying 'yes' and not saying 'no' (or, saying 'no' and not saying 'yes') is the difference between explicit and implicit consent. To not say is, well, to not say. it is to acquiesce; it is not to consent.

I suggested in the first part of this chapter that the giving/withholding of consent was passive, whereas the seeking of consent was active. Is this the case? Insofar as the former requires an expressive act (gestural or verbal) that is preceded by a mental act (a decision), I would say no, consent-giving is *not* passive. In fact, consent-giving seems not only to be active, it seems to be *more* active than consent-seeking, which does *not* requires such a decisive mental act. An answer is more active, more committed, than a question.

Examining the difference between active (commission) and passive (omission) with respect to euthanasia, Rachels focuses on the intention involved; and since it is the same in both cases (proponents of active euthanasia and passive euthanasia both seek to relieve suffering), he says there is no real difference. The issue is perhaps mis-argued because of an assumption that commission is accompanied by intent whereas omission is

not; however this is a mistaken assumption. One can unintentionally *do* something as easily as one can intentionally *not* do something. Like Rachels, however, I think the distinguishing issue is the presence or absence of intent, not the presence or absence of action. However this view brings with it the problems of valuing a mental rather than a performative[51] act: especially for the legal sphere, the problem is one of proof--how can we know one's intent?

Rachels emphasizes that there is no *moral* difference between active and passive euthanasia; and at the very least, I could suggest the same: the difference between saying 'no' and not saying 'yes' may be relevant in the conceptual and legal spheres (because definition is crucial), but not in the moral sphere (because intention, which can be independent of definition, is crucial). However, I think more can be said. According to Abelson, in discussions of euthanasia, Glover focuses on agent certainty of consequence and Tooley focuses on effort, risk, and sacrifice; and Abelson himself focuses on granting of foreseen harm, wickedness of motive, subjective certainty of harmful result, effort, risk, and/or sacrifice, premeditation, and special responsibility of agent toward victim. It seems to me that all of these authors miss the point. To suppose that there is any difference between active/commission (saying 'no') and passive/omission (not saying 'yes'), when action is possible, is to presume some sort of neutrality, some norm of non-being, against which action is, well, action. But being is the *default* state we are always in: we are *always* doing something, we are always acting. That is to say, when we are *not* shaking someone's hand, we are holding our hand by our side. The difference between active and passive, or commission and omission, is thus merely a matter of description: 'shaking a hand' (active) and 'not shaking a hand' (passive), or 'shaking a hand' (active) and 'holding a

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[51]The terms I use do not make clear the intended distinction between a private mental phenomenon and an observable physical phenomenon--a mental act can be performed; but I wish to retain the terms that recall both the court's *mens rea* and Brett's performative model of consent.

hand still' (active).[55]

The Grantive/Contractive Distinction

Another analysis of consent is presented by Kipnis who distinguishes between 'grantive' consent,[56] which is giving permission to the other to act in a manner not otherwise permitted (I may lend my car to someone), and 'contractive' consent, which contracts an obligation we do not otherwise have (I may agree to look after your dog for a day). In a way, the distinction reduces to a passive active difference: grantive consent is passive in that it is *the other* who may do something, contractive consent is active in that it is the *I* who must do something. In any case, Kipnis' analysis is relevant to the expression of consent because it suggests another possibility for misunderstanding: perhaps confusion about the terms of agreement makes consent in the sex and sexual assault scenario unclear. It seems to me that consent to sex by the woman is grantive: the woman permits the man to do something.[57] And sexual assault may be the result of a mistaken contractive consent: the man may understand that the woman agrees to do something (possibly in return) and when she does not (thus failing to 'live up to her end of the contract'), he retaliates with violence.

However, as Parker points out with reference to research

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[55]Pyle would differ with me on this: though he would call withholding consent a 'negative act'--a negative *act*--it would not qualify as an action proper because it lacks a "full complement of *inter alia* chronological, behavioral, technical, circumstantial details" (Pyle, *On Thinking* 108); also, negative acts tend to endure for far too long a time (actually, until the complementary positive act is performed, which is not unusually a life-time) to be granted action-status.

[56]See page twenty-three for previous mention.

[57]I am not assuming women are passive in sexual activity; but for acts done by the woman, her *consent* would not be required (her *initiation* would be required). I would have said 'the one permits the other to do something' but the main focus of my paper is 'male doing to female'.

experiments, consenting is *not* promising, and one can change one's mind even at the last moment (Parker 78). I think it is only the myth of male sexuality ('once started, the train is unstoppable') that inhibits or prohibits the same freedom in sexual situations. Yes, a man may have a right to be disappointed, frustrated, unsatisfied, and angry, if the woman changes her mind--as would the researcher who had perhaps invested a lot of time, energy, and hope into the experiment; but neither is justified in using force to achieve the desired end.

The Problem of Privacy

Even if the expression of consent is clearly given and clearly understood, there remains a problem for the legal sphere: proof. As Edwards points out, the burden of proof lies with the complainant in cases of larceny, rape, and assault (Edwards 59). In principle, this seems fair: one is innocent until proven guilty; so if I say you assaulted me, I must prove your guilt more than you need to prove your innocence. In practice, however, because sexual assault, unlike non-sexual assault, almost always takes place in private with no witnesses, it results in a contest of credibility. And because in our patriarchal society a man's word is generally considered to be more credible than a woman's, one party, the woman, is at a disadvantage. (And yet--and here is another inconsistency of our sexual politics--given our gendered socialization, the man is likely to coerce and the woman likely to comply; so, instead, the woman should be at an advantage.)

IV. THE SIGNIFICANCE OF CONSENT

In the first chapter, I discussed *how* consent *is* significant; in this section, I discuss *whether* consent *should be* significant.

The Issue of Injury

In American law, "consent is not a defence ... to crimes of violence against the person such as murder or battery" (Moffat 150). This exposes a problematic circularity: battery is defined, in law, by the *absence* of consent (regardless of consequence--i.e., the injury caused) and yet, implied by the inability to use consent as a defence, one cannot *possibly* consent to battery anyway (because battery entails violence against the person--i.e., it causes injury). Therefore if injury is part of an alleged sexual assault, one would think consent would be irrelevant in that crime as well. That this is not consistently the case points to the supposed special nature of sexual assault: since consensual sex may also involve injury, the argument goes, the presence of injury cannot be what separates consensual from non-consensual sex. Therefore consent is relevant because it is what separates the two; but then this is an exception to the rule 'one cannot consent to injury'.

Perhaps a clear definition of injury would solve the problem. For example, are the incisions made for surgical purposes (of a consented-to procedure) and the bruising resulting from such procedures called 'injuries'? Intention aside, establishing a dividing line on the continuum of physical touch between injurious and non-injurious may not be easy. For example, pain cannot be the definitive factor because one can consent to pain, usually for greater pleasure/benefit, and such touch would not therefore be considered injurious. Furthermore, one could argue that 'injury' need not refer only to '*physical* injury': as suggested

earlier,[58] a sort of '*moral* injury' occurs when one acts upon another without the other's consent (McCormick 200), and, as also suggested earlier,[59] emotional injury may also be significant. Surely, in many cases, whether or not an act can be said to cause injury is a subjective judgement. In view of these inadequacies of an 'injury standard', a 'consent standard' remains significant.

The important question becomes then 'should one be allowed to consent to acts that injure oneself?' If the answer is yes, the difference between consensual sex and sexual assault remains cloudy and complex because both can involve injury. If the answer is no, then any sexual interaction involving injury is by definition sexual assault, for by definition it cannot be consented to.

Indeed some short-term or small injuries may have long-term or greater benefits; and we allow consent to self-injury in many of those cases. Axinn suggests that the limits of consent can be set to injury that is '*without* greater benefit' (Axinn 21, my emphasis). This may be a solution; but then, what constitutes 'greater benefit' and who decides?

In Canada, however, consent *may be* a defense to assault--one *can* consent to injury. For example, a punch given during a fight to which both parties have consented will not constitute an assault (*R.* v. *Setrum*). At least in the legal sphere, this dissolves the borderline problems of surgical 'injuries'; it also dissolves the problem of non-assaultive sex that injures [60]

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[58]See page three.

[59]See page nine.

[60]However this view, that there *is* non-assaultive sex that injures, may itself be the result of a male-dominated society: according to Clark and Lewis, most men (against whom rape complaints were laid with the Metropolitan Toronto Police Department in 1970) consider violent behaviour as normal for a sexual encounter (Clark and Lewis 100-108). I wonder how many women would agree. (Though perhaps 'preferred' should be substituted for 'normal': it could be that a similar finding--i.e., most women consider violent behaviour normal for a sexual encounter--merely reflects the reality of sex because it usually involves a man.)

It does *not* dissolve, however, the problem of sexual interaction with an HIV-positive person. I have suggested[61] that such an action amounts to murder, and in Canada, consent is *not* a defense to murder. There are thus legal limits to what one can give consent.[62] Therefore, (1) consensual sexual interaction[63] with someone with the HIV virus is legally impossible (because by law one cannot consent to one's own murder),[64] and (2) in sexual assault cases in which the perpetrator has the HIV virus, because such cases thus become (attempted) homicide cases, consent is legally irrelevant.

This prohibition (that one cannot consent to one's own death) seems to me to have a religious basis[65] and is thus out of place in the legal sphere of a society such as ours that proclaims separation of church and state. And it is, in fact, undergoing challenge: Sue Rodriguez, pleading for euthanasia, represents the position that one should be able to consent to one's own death.[66] Perhaps the decriminalization of suicide suggests that the law is already moving in that direction.[67]

The Issue of Autonomy

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[61]See page four.

[62]One could establish a continuum of limits, each point indicating a greater degree of some defined variable, but death of a person seems *qualitatively* different from injury to a person; that is to say, committing suicide is not injuring oneself, it is terminating oneself. (Indeed, insofar as injury is defined as 'something that feels painful', suicide is exactly *not* injury because it obliterates altogether the capacity to feel pain.)

[63]Involving the exchange of bodily fluids.

[64]Though whether such interaction is consenting to one's murder or attempting suicide is an interesting question.

[65]The premise is 'since God gave us life, only God can take it away'.

[66]Presumably it would not be called 'murder' then.

[67]Should suicide become again illegal, it would seem that people consenting (in the full sense explicated in Chapter II) to sexual interaction with an HIV positive person would have to be charged with some sort of crime (attempted suicide? accessory to homicide?).

Another consideration is that prohibiting consent to self-injury or self-termination infringes upon one's autonomy. "Our honour of the defense of consent reflects our respect for the individual autonomy of the consenter, our willingness to respect his choices however unfortunate we may think them to be" (Parker 77). I think the word 'choices' is important: as long as capacity, informedness, and voluntariness are present, the presence of which entails attractive alternatives, the individual can be said to have chosen and must be allowed the autonomous right to do so no matter what the consequences to self.[68] However, in cases of euthanasia then, because the alternative may be a life of pain, that is, something unattractive, consent (to euthanasia) is invalid. To agree rules out the permissibility of most euthanasia cases (I am presuming such a decision is made *because* the alternative is so unattractive). But to disagree eliminates the necessity of attractive alternatives and this calls into question voluntariness as I have earlier defined it.[69]

Consider this however: the presence of attractive alternatives is meant to eliminate the possibility of coercion, thus ensuring voluntariness and consequent moral responsibility. A says to B 'have sex with me or I'll kill you' and B therefore consents; because A offers no attractive alternative, B is coerced, and therefore her consent is not

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[68]Regarding consequences to *others*, typically we think we may interfere. In fact Leiser argues that "what consenting adults do in private can be seriously damaging to others and...those others therefore have an interest in preventing such acts from occurring" (Leiser 140). This however does not seem to apply easily to sex and sexual assault. Unless what A does in private with B's consent breaches some contract A has with C, I do not see how C can be detrimentally affected except perhaps emotionally (I am considering some extra-marital scenario). I would hesitate to criminalize that emotional harm. And if A sexually assaults B, C may be also harmed; but again, surely this harm would be minimal compared to the harm suffered by B, and likewise should not be criminalized.

[69]See page thirty.

voluntary, and therefore she is not responsible.[70] What does the necessity of attractive alternatives change? It does not change anything because coercion is still present: coercion is defined, not by the presentation of unattractive alternatives, but by the use of force; coercion describes A's behaviour, nothing else. In the euthanasia situation, coercion (presumably) is not present: alternatives may be similarly unattractive, but *not through the agency of another*. Choice *is* therefore voluntary, and consent to death is valid.[71]

Another argument in favour of such validity is this: it is reasonable to assume that rights and responsibilities go together; if I am responsible for myself, for my body, then I also have a right to decide what is done to it, be it beneficial or injurious.

For some activities (e.g., pornography, obscenity), criminality depends on some 'reasonable person' or 'community' standard. Speaking from the biomedical ethics context, Katz says that substituting 'reasonable person in the patient's position' (i.e., a community standard) for 'the patient herself' "cuts the heart out of the court's purported respect for individual self-determination" (Katz 99). A similar move would have a similar consequence for sexual assault. As I described in my first chapter,[72] the significance of consent is a very personal and subjective matter; maintaining consent at the locus of the *individual* is therefore very important.

Also, as Vandervort says, "consent, when given, is given by an individual" (Vandervort 271). And insofar as "each individual is a person

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[70]Though I would like to argue that she could be held responsible for it and this would be acceptable too. As I mentioned earlier, to choose unwanted sex over death is, to my mind, a good choice, and one *I* would like to be responsible for. It could easily be one I would make with capacity, informedness, and voluntariness *given the options*--this brings us back to Elster's 'choice within constraints' view of all of life.

[71]One may also consider that the less unattractive alternative *is*, by virtue of comparison, an attractive alternative.

[72]See page eight.

with a collection of social, cultural, and psychological experiences, needs, fears, values, and priorities . . . any particular individual may be more effectively pressured and manipulated by some reinforcers (threats and rewards) than by others" (Vandervort 271). However, "the right to self-determinate and autonomy protected by the *Criminal Code* is the actual *individual's* right, not the right of some hypothetical 'typical' individual" (Vandervort 271). But this brings us back to the privacy of mental state, a problem in the legal sphere: how did this particular woman perceive the situation, and this particular man? Vandervort has faith in 'expert evidence': "Voluntariness is a subjective issue, but objective tests, appropriately formulated to encompass the factors relevant to a particular complainant, can be of considerable assistance to the trier of fact who must decide whether consent was voluntary" (Vandervort 273). Such tests may well be of assistance, but surely they cannot establish certainty.[73]

An argument for removing consent from the locus of the individual is given by S. French who argues that, if A has power over B (for example, as a teacher, employer, or physician), even if B consents to sexual interaction, indeed requests or otherwise initiates sexual interaction, A is morally bound to refuse. This rendering of B's consent as invalid[74] and insignificant denies autonomy to B. And insofar as men in general have power over women in general (discussed earlier[75]), such a stance would deny autonomy to women, *as a whole*. Furthermore, A having power over B does not necessarily mean that A will *use* that power--and only in the case of its use would B's consent be coerced and hence invalid.

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[73]This leads us into the 'other minds' problem (can we know the existence, let alone the content, of another's mind?), which is beyond the scope of this paper.

[74]Though it must be said that A's lack of consent does not really *invalidate* B's consent, it just makes it ineffectual--which happens *whenever* consent is not reciprocal.

[75]See especially page twenty-eight.

Lastly, I agree that "where the power lies so lies the responsibility..." (Peters 21) but only if the objects are the same: power to x entails responsibility for x but power to x does not entail responsibility for y--power to grade entails responsibility for those grades but it does not entail responsibility for sex. For these reasons, I argue strongly that the individual's consent--as long as it is capable, informed, and voluntary--be maintained as significant.

The Issue of Practicality

Perhaps the strongest argument against considering consent as significant, at least in the legal sphere, is the practical one. And perhaps the strongest practical argument is the issue of privacy described earlier: given the usual privacy of the action (sex and sexual assault), and the complexity of the contest for credibility, consent (as a mental or behavioural act) simply cannot be established with the certainty required by the charge--especially if the charge is homicide.

Another argument against requisite consent for sex is that "only in the case of sexual transactions do we refuse to acknowledge that the relevant issue is the offender's behaviour rather than the victim's[76] state of mind" (Gunn and Minch 29). I think this is *partially* true: in the case of the habitual car loan to a friend that becomes one weekend unpermitted and hence theft, the relevant issue there too would be the victim's[76] state of mind, but the offender's behaviour is *also* relevant. In any case, I think it may be justifiable to consider the victim's state of mind as relevant and not the offender's behaviour *because*, given the dissolution of the injury standard[77] in the case of sexual transaction,

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[76]I use the term 'victim' without any patronizing connotation.

[77]On both sides--a sexual assault may *not* be physically injurious whereas non-assaultive sex *may* be.

consent *may be* the only difference between criminality and legality--and given the ambiguity of a behavioural act, state of mind may provide significant corroboration.

Nevertheless, perhaps consent itself should be just one of *several* corroborative items. And the several should include not just those related to the *victim's* condition (injuries, medical evidence, promptness of complaint to police, emotional condition, lack of motive to falsify charge, etc.) but *also* items related to the *perpetrator's* condition (past history of coercion, past sexual history, motive for abusing the victim, medical evidence, emotional condition, etc.). If it is a crime, then as in other crimes, the essential evidence is the behaviour of the alleged criminal; but if it is not a crime, i.e., if it is consensual sex, then as an *interaction* between two people, evidence regarding *both* people is relevant. So, the more the man wants to establish his innocence, i.e., that it *was* consensual sex, the more *he* would want his behaviour and background to be put forward (as a partner); and the more the woman wants to establish his guilt, i.e., that it was sexual assault, the more *she* would want *his* behaviour and background to be put forward (as a perpetrator); either way, logic has it that the situation should be exactly reversed from what it is (now it is the *woman's* behaviour and background that is focused on, in either case).

However, it must be said that sexual assualt is "by no means unique in presenting problems of proof" (Bessmer 110). Bessmer presents the following situations to illustrate:

> A and B are alone together and begin to fight. B is killed during the brawl. Did A intend to kill B when the fight began (first degree murder), intend to kill B only at the point when the killing blow was struck (second degree murder), intend only to hurt B who was accidentally killed while falling from the blow (voluntary manslaughter), or was A merely defending himself from an onslaught by B (no criminal liability)? . . . If B had not been killed, there would be the problem, in an assualt case, of who was the attacker and who the defender. Or, where someone is stopped on the street by an armed assailant who demands money, proof of the robbery could hinge on the testimony of the robbed alone. If the problems of proof in murder, assault and robbery do not call forth a corroboration requirement, why do similar

potential problems create such a need in rape cases? (Bessmer 110-111)

There is however another argument against making consent significant: four to six months after an 'informed consent interview' and subsequent surgery, twenty of twenty patients failed to recall major parts of the interview; errors included failure to recall, positive denial of truth, fabrication or assertion of falsehood, and error of attribution (Barber 82). This suggests that parties to a sexual interaction, assaultive or otherwise, may similarly fail to recall, fabricate, or deny whether consent was sought and/or given; so, if reports by the involved parties are the only sources of information, perhaps such an unreliably reported element, consent, should not be given significance--or at least not sole significance.

CONCLUSION

In Chapter I, I identified four separate spheres of significance for consent with regard to sex and sexual assault: moral, legal, conceptual, and personal. In Chapter II, I identified three requirements for consent to be valid: it must be capable, informed, and voluntary.

Three important insights result from these analyses. The first, mentioned throughout, is that insofar as at least two of the necessary constituents--informedness and voluntariness--are not discrete qualities but rather are present in degree, then consent itself should be considered not as a discrete quality, but as one of degree.

The second, also mentioned throughout, is that the *necessary* constituents of consent are inter-related.

The third, which I would like to mention now, is that the *sufficient composite* of these constituents must be flexible, dependent on

(i) context--individual and societal

(ii) sphere of significance[78]

That is to say that consent for one sphere must be a different composite of constituents than consent for another sphere.

With respect to the personal sphere, the degree of informedness necessary for valid consent varies from individual to individual; so does the degree of voluntariness--a sexually-experienced individual who is ambivalent about sex may be content with less emphasis on voluntariness than a sexually-inexperienced person with romantic ideals intact.

With respect to the moral sphere, voluntariness, as an expression of the subject's desire or intent, may figure prominently if the moral system concerned involves intent (that is, if the assignation of right and wrong depends on what the subject intends to do); however if the system is consequence-based (if the assignation of right and wrong depends on what

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[78]In some respects (i) and (ii) overlap: the sphere of personal significance *is* the individual context and the sphere of legal significance is closely connected to societal context.

actually happens), voluntariness may be next to meaningless.

With respect to the conceptual sphere, I think all three requirements are equally important.

The legal sphere is perhaps most troublesome because it intersects the personal sphere and, some maintain, the moral sphere. The sociopolitical factors, whether in individual or societal contexts, that have been mentioned throughout this thesis, become important in the legal sphere: "Only when coercion of a type recognized under Section 244(3) [threats, force, fear, or the exercise of authority] is found to have been the effective cause of the complainant's behaviour are *legal* guidelines supplied to exclude consent as a matter of law. Common sense and folk wisdom, myth and custom have provided the guidelines for determination of the issue of consent in all other cases" (Vandervort 266) This explains, Vandervort suggests, the "scrutiny of the verbal and non-verbal behaviour of the complainant, and of the social situation in which that behaviour occurred" (Vandervort 266). However, the definition, let alone the significance, of consent must be objective and perhaps somewhat invariable if the courts are to be consistent with justice. Must it be? Objective, yes--but invariable? The calculation of damages owing in a lawsuit for (say) an accident include a consideration of 'pain and suffering', which can include emotional trauma. Could not something similar be the case for sexual assaults? That is, if the plaintiff can prove serious emotional harm (via a psychological assessment, for example), then the sentence, at least, could reflect that. This optional utilization of civil law in addition to criminal law would enable the justice system to be fair to the woman whose self-esteem *is* shattered by a sexual assault while not patronizing the woman who feels it equal to a mugging.

In addition to the legal concern, there is another reason for making the constitution of consent standard, one that takes us into the topic of Chapter III, the expression of consent: there is a social reason for standardizing the constitution of consent. One must know the convention

(the community standard?) before one can know if one departs from it or is idiosyncratic. And insofar as it is reasonable to behave according to the convention, unless otherwise directed, then one will need to know if one is idiosyncratic in order to articulate that, providing such direction. Otherwise, one will be misunderstood, judged according to a standard (the convention) that does not apply. For example, if I am not aware that, in the social context in which I find myself, shaking one's head from left to right indicates assent, I am liable to be terribly misunderstood unless I accompany such a gesture with the words "I mean 'no'--for me this gesture signals 'no'!"

Brett's definition of consent ("giving consent means making changes in a prevailing pattern of rights and obligations" [Brett 1]) and its means of expression ("consent is given by means of acts which have some conventional significance" [Brett 8]) lead to the same insight: one must therefore *know* the prevailing pattern of rights and obligations and one must be fluent with those acts of convention. This is true especially because

> "the acts through which consent is given appear to vary (more) widely from one context to another and to be governed by conventions which are themselves less stable. This problem is particularly acute in relation to sexual consent where the parties may be working from quite different assumptions about the significance of specific actions. Some males are prone to assume that the acceptance of a ride or a beer or an invitation to one's room is itself an expression of sexual consent." (Brett 9-10)

So are some females. The question is whether, given that instability, that 'some'-ness, and multiple meanings (accepting a beer may *also* mean simply accepting a beer), the prevailing pattern *can* be known.

A hypothetical trial written by Vandervort illustrates many of these prevailing cultural assumptions of our gendered society that make the expression of consent so problematic. I quote from that trial and offer the following comments.

(i) "Girls never mean it when they say *no*. They just say that because they're supposed to." "She would just say *no*; but then she'd never do

anything about it." As I have mentioned earlier, a verbal 'yes' has been socially unacceptable (one is a 'slut' or a 'nympho' if one wants sex) so a verbal 'no' has meant 'yes'. But a gestural 'no' has also been socially unacceptable (women do not fight) so a verbal 'no' has also had to mean 'no'.

(ii) "You do not need to pay much attention to what women say . . ." Dale Spender's research has proven that men typically *do not* pay much attention to what women say.

(iii) "If she hadn't, she would have never come home with me from the bar. Any girl would have known that was an invite." Asexual behaviour is often interpreted as implicit consent to sexual behaviour; recall my example of the woman walking alone at night.

(iv) "I could tell she wanted me to go ahead. I mean she was obviously ready for it ["she got so wet"] . . . ." A body responding with readiness doesn't necessarily mean the person desires sex; furthermore, a person who desires sex may not necessarily therefore consent to sex. I have mentioned before the crucial difference between a consenting attitude and a consenting action and the fact that one does not necessarily lead to the other (This however applies to both sexes and is not an example of our sexist context.)

(v) "I didn't hurt her." This presumes, inadequately as I have shown, injury as the difference between consensual sex and sexual assault: no wrong is done if he acts without her consent; wrong is done only if he physically injures her.

In addition to the forementioned three insights arising from Chapters I and II (that the necessary constituents of consent are interrelated, that consent is a matter of degree, and that the sufficient composite of these constituents depends on the sphere involved), there is a fourth, underlined by Vandervort's hypothetical trial, which arises from the analysis of Chapter III: for the legal sphere, consent is better conceived as a behavioural act (the performative standard) than as a

mental act. The attitudinal interpretation, dominant in the legal community, according to Brett (who then argues against it), seems to be an example of confusion of spheres: "If a woman is legally capable of granting consent, her subjective attitude toward the sexual act determines whether or not it is rape" (Editors 55). Yes, the woman's attitude defines the action, but only in the *personal* sphere; the *legal* sphere is concerned with events that are social, that is, interactive; therefore communication, that is, expression, behaviour, is relevant. If a woman clearly (i.e., is so understood) looks like, sounds like, and acts like one who is consenting--and no reasonable person would deem coercion to be present (i.e., she seems this way voluntarily)--it seems to me ridiculous to say that the interaction is sexual *assault*.[79]

Conceiving consent in the legal sphere as a behavioural act rather than a mental act requires qualification of two important strands of my thesis. One, insofar as behavioural actions are subject to discrete measurement, consent, in the legal sphere, is *not* a matter of degree.

Two, insofar as capacity, informedness, and voluntariness are mental aspects, they are *not* then necessary constituents of consent in the legal sphere. If a consenting action is performed, consent must be said to be have been given--regardless of whether that action was capable, informed, or voluntary. *However*, and *therefore*, in the legal sphere, the presence of coercion[80] is of utmost importance, for it then invalidates the action. And as long as coercion is established in order to establish criminal culpability rather than to prove injury, the difficult issues concerning injury (consent to self-injury, 'injury' in consensual sex), which were discussed in Chapter IV, are avoided. As for consenting actions that are

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[79]I am assuming that the woman is capable and informed.

[80]It is not necessary that such coercion be physical: proof of 'sexual blackmail' would also be proof that consent was not voluntary.

incapable and uninformed,[81] they must simply be considered to be performed 'at the agent's risk': an adult who pulls a trigger not understanding that a bullet will fire or not knowing that the gun is loaded, must accept nevertheless, the legal consequences of the action.

If we take the mental element (state of mind) out of the one side, then we should also take it out of the other: that is, if what the woman wants (capably, informedly, voluntarily) is irrelevant (and what she does is all that matters), then what the man believes (honestly, reasonably) and intends (*mens rea*) should *also* be irrelevant (and what he does should be all that matters). I have mentioned this possibility of eliminating the *mens rea* element of sexual assault earlier[82] and I would like to come back to it now, particularly as it has some bearing on the current controversy concerning the intoxication defence.

There are three kinds of *mens rea*: intent, knowledge, and recklessness. There are two kinds of intent: general and specific.

> In a general intent offence the acts are done to achieve an immediate consequence or result. For example, assault is committed when A throws a punch at B in order to hit him and he does hit him without B's consent. In a specific intent offence, the acts are done with some additional or further intention in mind. For example, A's further intention in hitting B might be to steal B's money.[83] (Clarke 27)

Sexual assault can involve either general or specific intent, depending on the facts of the case. Therefore, as I understand it, if a man has sex with a woman in order to have sex with her, then a general intent is involved; if however a man has sex with a woman in order to rape

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[81]Consideration of coercion has dealt wtih consenting actions that are involuntary.

[82]See page thirty-eight.

[83]American law is somewhat different: "An honest mistake, no matter how unreasonable, excuses a defendant who would otherwise be guilty of a crime requiring specific intent, while general intent crimes require both honesty and reasonableness as to mistake" (Dettmar 482).

Furthermore, "the defense need not even prove that the defendant *actually* held a mistaken belief in consent. . . . The defense must only raise a reasonable doubt as to whether a reasonable mistake as to consent *might have* been made by the accused (Bienen 232, my emphasis).

her, a specific intent is involved. In the former example, it would seem necessary to have knowledge of consent (mistaken or not); but in the latter example, it would seem necessary to have knowledge of *lack* of consent (i.e., the man *knows* it is rape).[84]

Intoxication has always been a defence to specific intent; the recent decision in *R.* v. *Daviault* allowed intoxication as a defence to general intent.[85] However, it seems to me that if indeed a man is too intoxicated to know that the woman is *not* consenting (specific intent), he *is* also too intoxicated to know that she *is* consenting (general intent); thus, even given the current 'rules of the game', the intoxication defence seems to be a legitimate defence to sexual assault whether the act in question requires a specific *or* a general intent.[86] However, changing the rules and eliminating the *mens rea* element altogether would effectively render null and void *any* intoxication defence--to specific *or* general intent.

When a person achieves one action as a result of performing another such that A hits B *thereby* killing B (and A had not intended to kill, but only to hit), I can understand the relevance of *mens rea*, of intent. However, it is hard to imagine sexual intercourse happening as an

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[84]To have neither, to not bother to ascertain *whether or not* consent is present (that is, whether or not one is about to commit a crime) is also reprehensible--not only morally, but also perhaps legally (I have in mind 'negligent sexual assault', because of the 'recklessness' involved).

[85]Actually, according to lawyer Greg Ellies, *R.* v. *Daviault* simply reaffirmed the decisions made in 1988 in *R.* v. *Bernard* and before that, in 1960, in *R.* v. *George* (Ellies October 1994).

[86]However, if a man is that intoxicated, an erection is unlikely and a substitute for penetration would have to be used; and in that case, if he is lucid enough to figure that out, and imagine, find, and then use the substitute, my guess is that he is not that intoxicated after all.

Furthermore, if a man is so intoxicated that he is incapable of forming any intent, how can he later *know* and thus testify that he was indeed that intoxicated? Surely the best he can do, without lying, is say 'I don't remember'--such a testimony would be weak indeed.

Further still, given the typical absence of witnesses and ambiguity of physical evidence, sexual assault cases are often a contest of credibility--is it reasonable, to place more value on the word of an then-intoxicated man than that of a sober woman?

unintended by-product of another intended action:[87] 'I intended only to lie on top of her but accidentally my penis entered her vagina' is not very plausible. In any case, A is still legally responsible for killing B (albeit in a somewhat reduced manner because intent was not present--manslaughter instead of murder) and the accidental rapist should be as responsible for his actions.

Furthermore, generally speaking, we are not coerced to consume alcohol, to become intoxicated; it is a capable, informed, and voluntary act and thus one we are responsible for. Therefore, we should also be responsible for the consequences of that act. This would mean then not only that the intoxicated rapist be held accountable for the rape, but that an intoxicated woman be held accountable for any consent given: a man who has sex with an intoxicated consenting woman may be committing an immoral act, for he may be taking unfair advantage of another person, but he would not be committing a criminal act.

It may be thought that I have given dominance to the legal sphere, as it seems to entail, to some extent, the personal, moral, and conceptual spheres. However, as Vandervort's analysis of legal decisions regarding mistake of law and mistake of fact and the associated grey areas of their intersection indicate, "changing legal rules appears to be often far less crucial than changing the way we think about the rules and apply them" (Vandervort 263). This is because "the distinction between mistakes of law and fact in effect determines which cases are to be decided on the basis of community standards and which are to be decided as a matter of law" (Vandervort 265) and "in those cases in which a mistake of fact defence is not barred as a consequence of classification of the mistake as a mistake of law, the determination of criminal responsibility *will* reflect social definitions of sexual assault" (Vandervort 264).

Since the convention regarding consent in sex and sexual assault is especially unclear, and the consequence of being misunderstood is

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[87]Though perhaps other degrees of sexual assault may be so imaginable

especially high, one might therefore suggest a simple and explicit statement,[88] 'no' means 'no', that would eliminate mistakes of fact defences.[89] One might think that, if people could get into the habit of having to say and hear 'yes/no', then the problem of differentiating between consensual sex and sexual assault would be solved. And one might think that "the requirement that sexual transactions be preceded by communication between the parties with respect to consent is not particularly onerous" (Vandervort 305). But I think that getting people to talk about consent before sexual interaction will be as difficult as it has been to get them to talk about condoms; perhaps this is because of (1) the gender-polarized socialization described earlier,[90] and (2) the socialization to be non-explicit, in almost all respects, regarding sex. In other words, can we reasonably expect people to conform to such an explicit and objective standard, especially in this situation, which is either a (possibly) intimate occasion (consensual sex) or a crisis situation (sexual assault)? Well, if one does not in the first case then one takes the risk of having the situation defined according to the second case. If you do not insist a friend sign a contract when you lend her money, you run the same risk should something 'go wrong' with the interaction. And if any time is right for requiring explicitness regarding sexual interaction, surely, because of AIDS, now is that time.

But even if we did get into that habit, we would be left with the problem of meaning (a) as intended by the one, and (b) as understood by

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[88]As a result of reading Brett, I am tempted to clarify that the message must be explicit but need not be verbal. To be explicit is to be clear, to be unembedded in vague symbology. So a gesture could well mean 'yes' or 'no' and only 'yes' or 'no' and thus be explicit. In fact Brett argues that a single activity can be both an initiating move and an act that confers permission. I tend to agree for contexts involving people who know each other quite well; but for other contexts, the probability of misunderstanding remains high and so an explicit *verbal* expression remains the first choice.

[89]Such defences are 'based on attitudes, beliefs, and norms that are inconsistent with the right of the individual to self-determination in sexual relationships' (Vandervort 263).

[90]See page nineteen.

the other. That is, given the factors described in the gender socialization sections, *does* she really indicate consent by saying 'yes'? *Is* she capable, informed, voluntary? And, given the same factors, *does* he understand her 'yes' to *be* consent so defined?

A central problem is that men and women define consent differently. First of all, there are the 'signals of implied consent' already discussed--men may interpret presence, attire, a look, a gesture to mean consent. Even on the few occasions when consent may be given or withheld explicitly, men may understand 'no' to mean 'yes'. And indeed, given the socialization discussed earlier, what Barber calls social control mechanisms, a woman *may* mean 'yes' when she says 'no'.[91] As Radin puts it,

> 'Just say no' as the standard for determining whether rape has occurred is both under- and over-inclusive. It is under-inclusive because women who haven't found their voices mean 'no' and are unable to say it; and it is over-inclusive because, like it or not, the way sexuality has been constituted in a culture of male dominance, the male understanding that 'no' means 'yes' was often, and may still sometimes be, correct. (Radin 225)

However, "the 'no means yes' philosophy . . . affords sexual enjoyment to those women who desire it but will not say so--at the cost of violating the integrity of all those women who say 'no' and mean it" (Estrich 1321).

It would be good to get to a point where a 'yes' was *required*, and indeed a Wisconsin statute includes both force and lack of consent as elements of the crime of rape, such that implied consent is precluded and the presumption seems to be 'no' unless otherwise indicated but we'd be left with the problem of proof.

One source indicated that since "male sexuality . . . is dependent on penile reactions . . . it may be difficult for a man to comprehend rape as anything but a . . . sexual experience for anyone engaged in it . . . . The claim that rape was physically only painful and without any pleasurable sensation . . . may be unintelligible to a man . . ." (Wells

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[91]Though I am beginning to wonder if the prevalence of the 'no means yes' response is grossly exaggerated, if not completely fabricated, by men (for men)

and Borges 104). Given this, perhaps part of the solution would be for women to speak in language men will understand. I suppose that would be anger and physical violence[92] (maybe *that is* why the courts require such proof of resistance), but that goes against women's socialization: "The irony is that females who are not supposed to know how to fight suddenly are expected to struggle, fight, and resist to a high degree..." (Holmstrom and Burgess 175).[93]

All of this leads us to the possibility that what matters most is not what happens but what people think happens. Holmstrom and Burgess' work supports this: "It became clear that the key issue is not whether a rape occurred, but whether people believe a rape occurred" (Holmstrom and Burgess 165). And perhaps that is why we use so much 'peripheral' information--information not only about injury, force, and consent, but also about the relationship, the situation, the history. "The definition is fluid, dependent on the definer's context" (Bourque 168).

And yet, even people's beliefs are unclear. Study after study shows that when people are shown vignettes and asked 'is this rape?', not only are their definitions of rape unclear, whether or not what they see *fits* their definition is *also* unclear. Audience response to the recent performances of the play "Oleanna" indicates this as well. The key scene, which takes place between a male professor and a female student, in his

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[92]Actually laughter might also do the trick.

[93]This expectation is unrealistic not only because it is contrary to socialization. If violence is used in order to restrain, then resistance, in order to escape, would make sense. However,

> all studies done on rape have indicated that multiple-assailant rapes are more likely to involve substantial violence and injury to the victim than are single rapes. . . . [suggesting] that the violence and injury are not the product of the need to subdue the victim, which should be easier where the assailant has assistance [but rather] the product of a desire to impress the other assailants. (Bessmer 22)

Therefore, any resistance would probably just increase the angry display of machismo.

Whereas before, women perhaps resisted too little, perhaps now, with AIDS making rape potentially attempted murder, women will perhaps resist too much; however, even killing the rapist would not be too much, insofar as 'force equal to the threat' is allowed for self-defence.

office, is a depiction of what the student later claims is sexual assault. At the performance I attended, one person[94] walked out yelling something like 'kill the bitch!', insinuating that sexual assault had *not* taken place, while other people cheered when the student announced that she was laying charges, insinuating that it *had; everyone in that particular audience saw the same scene.* Perhaps it is like that ambiguous face[95]--we just cannot tell whether it is expressing agony or ecstasy. And perhaps the reason it is so difficult to tell is because it does not depend on any single variable, such as consent.

The problems of meaning would be solved if we used a performative standard--if we held people accountable for their actions regardless of socialization. And we do in other cases. A man is socialized to be aggressive, but if he punches someone, he can be charged with assault. So even though a woman is socialized to be passive (or coy or modest or whatever it is that makes her say 'no' instead of 'yes') or dependent (or weak or whatever it is that makes her say 'yes' instead of 'no'), she too must accept the consequences of her action.

This would leave us, however, with the problem mentioned earlier, the problem of proof. One solution would be to incorporate the use of a witness (live or videotaped) to verify that a consenting action was performed. Am I proposing a resurrection of chaperons? I suppose, but such chaperons would be as legal witnesses, not moral guardians; and they would witness not the sexual activity, but the consent of both parties to the activity. An alternative might be to require both parties to sign a document prior to the sexual activity specifying the terms of the intended interaction. But of course one could consent, witnessed, to one thing, and behind closed doors be coerced to do another. So would the solution be to videotape each episode (*of* the sexual activity), to be viewed only

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[94]A woman, by the way.

[95]See, for example, Bernini's "The Ecstasy of St. Theresa".

if a charge is laid?

This would certainly bring sex out of the closet, removing the taboo on what surely by now most people consider to be a healthy activity. But it may also destroy the romance and intimacy. Nevertheless creative responses remain possible.

This solution is especially suggested by an unflattering view of general male behaviour with regard to sexual interaction: (1) that they habitually lie ('I love you'), manipulate ('just a little kiss, that's all'), and coerce ('spread your legs and shut the fuck up') in order to get sex; (2) that they habitually fail to take emotional or financial responsibility for the consequences of their sexual behaviour, be it abortion or childcare. Why should this behaviour stop because the stakes are higher--that is, because now sex can be fatal? In fact, one could argue that the increased element of risk will just worsen male behaviour.

And though perhaps the woman would be more apt to suggest a witness (since she will need it to support her charge), a witness actually protects the interests of the man (since he is the one liable to be charged). Perhaps the presence of a witness will discourage men from using force; though gang rapes prove otherwise. Certainly the suggestion of a witness--live or mechanical--would be received with the same indignation as pre-nuptial agreements: 'what--don't you trust me?' And, well, the answer must be 'no'. Perhaps no rational person *would* trust an acquaintance with her/his life and, thanks to AIDS, that is what we are talking about now when we talk about sex. Condoms break and people lie. Both breaches of trust can be fatal now. Perhaps such indignation would be a good indication that consent *would* be significant, and should *not* be given.

But what if the coercion were applied prior to the activity and was, therefore, unwitnessed? Though this would not apply to situations involving first-time acquaintances, it could apply to all other cases. Precedent has been established, with the battered wife syndrome, for an

examination of history to provide sufficient circumstantial evidence to corroborate an allegation of threat or other force to coerce 'consent'. Inadequate as this might be, it seems the only option, short of hidden microphones during the time prior.

In the last chapter, I re-examined the significance of consent, asking whether consent should indeed be considered significant. The issue of injury, often used as an argument *against* the significance of consent, seemed to be a red herring: both because non-assaultive sex can cause injury and because one regularly consents to injury in other instances (surgical procedures, for example), the presence or absence of injury is irrelevant, and especially not a distinguishing element. Furthermore, injury is a consequence, and insofar as the moral, legal, *and* personal spheres typically value intent as much as, if not more than, consequence,[96] injury becomes even less significant.

The strongest argument in favour of maintaining the significance of consent is, in my opinion, the argument of autonomy; however, the argument against maintaining the significance of consent, equally strong, is the argument of practicality. A solution lies, again, in considering the spheres separately. Morally, personally, and perhaps even conceptually, there is no practical problem: consent as a private mental act is sufficient and can thus be significant. Legally, however, the issue of practicality is relevant because public, objective standards must pertain and consent must be a behavioural act. Though I have suggested a few solutions to this problem, the sexism in our socialization and the fact that the personal *is* political (perhaps the spheres are not so separate after all), the solutions are unlikely to be successful until patriarchy dies. And when that happens, sexual assault will become less common,[97]

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[96]What one *intends* to do, as much as, if not more than, what actually *happens*, influences assignations of right/wrong and legal/illegal.

[97]It is perhaps not insignificant that boys/men are taught from an early age that while it is not necessarily 'okay' to fight, it is especially '*not* okay' to hit a girl/woman. It seems to me that as long as 'ordinary' physical assault is

and the issue of consent, therefore, less significant as well as less complex.

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so prohibited, *sexual* physical assault remains the only mode of physical violence against women 'available' to men; I have often wondered whether, if the prime directive to boys/men (a directive supported by sexism) of 'never hit a girl/lady' were eliminated, sexual assault would also be eliminated, replaced by the same kind of violence men do to other men, that of 'ordinary' physical assault. In a sort of twisted way, I think that would be a good thing.

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