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Vanessa E. Munro

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Munro, Vanessa E. (2008) "Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy," *Akron Law Review*: Vol. 41 : Iss. 4 , Article 5.

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**CONSTRUCTING CONSENT: LEGISLATING FREEDOM
AND LEGITIMATING CONSTRAINT IN THE EXPRESSION
OF SEXUAL AUTONOMY**

*Vanessa E. Munro**

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I. INTRODUCTION

According to George Fletcher, “no idea testifies more powerfully to individuals as a source of value than the principle of consent.”¹ Bolstered by a social contract ideology that prioritizes conceptions of individual personhood, linear models of progress and regimes for the

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1. GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 109 (1996).

protection of private property, the capacity to give consent has certainly played a key role in the Anglo-American legal context, serving – amongst other things – to accredit the human being with the status of serious and rational agent, and to respect individuals as entities for whom the distinction between self and other, and between mine and thine, has profound significance.² In turn, the consent threshold has often been used in contemporary liberal societies to demarcate the terrain between acceptable and unacceptable intrusions upon property / bodies, generating what Heidi Hurd has called its ‘moral magic’ in its operation as a transformative channel between the harmful and the harmless, and also thereby between the permissible, the condemnable and the criminal.³

At the same time, however, the presumptions that underpin this conventional understanding of consent have come under increasing scrutiny. Influenced by Marxist, feminist, and critical race analyses of entrenched power disparity, as well as by Foucaultian insights into the proliferation of normalizing techniques in modern society, theorists have highlighted the constructed nature of choice, challenging thereby the assumption of unconstrained freedom that animates the conventional account. In addition, these theorists have drawn upon the work of communitarian thinkers in order to deconstruct the myth of the detached and abstract human agent by illustrating the inevitability of mutual interdependence and the profound influence of community and inter-personal relationships in framing each person’s sense of self, and self-determination.

The implications of these debates over the role and legitimacy of conventional accounts of consent have been felt across a number of areas of legal, political, and moral theory. In this article, however, attention will be focused exclusively on their relevance for our understanding of, and responses to, sexual consent. More specifically,

2. John Gardner & Stephen Shute, *The Wrongness of Rape*, in OXFORD ESSAYS IN JURISPRUDENCE: FOURTH SERIES 193, 207 (Jeremy Horder ed., 2000). For further discussion on the role and relevance of consent in the liberal context, see, for example, JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW, VOLUME I: HARM TO OTHERS* (1984), JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW, VOLUME III: HARM TO SELF* (1986), HERBERT LIONEL ADOLPHUS HART, *LAW, LIBERTY AND MORALITY* (1963), and JOHN STUART MILL, *ON LIBERTY* (Gertrude Himmelfarb ed., 1974).

3. Heidi Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121 (1996). This special issue was dedicated to the issue of consent. See also Alan Wertheimer, *Consent and Sexual Relations*, 2 LEGAL THEORY 89 (1996); Heidi M. Malm, *The Ontological Status of Consent and Its Implications for the Law of Rape*, 2 LEGAL THEORY 147 (1996); Joan McGregor, *Why When She Says No She Doesn’t Mean Maybe and Doesn’t Mean Yes: A Critical Reconstruction of Consent, Sex, and The Law*, 2 LEGAL THEORY 175 (1996).

this article will examine recent legislative efforts, in England and Wales, to construct a criminal rape code that reflects a more context-sensitive understanding of the consent threshold, and insists upon the development of a more communicative terrain for socio-sexual interaction. There is little doubt that the resulting Sexual Offences Act 2003 represents a well-intentioned intervention, and it can indeed be seen to offer some significant improvements.⁴ At the same time, however, it will be argued that the legislative framework does (perhaps, can do) little to recognize, let alone problematize, the complex ways in which entrenched power disparities, material inequalities, relational dynamics, and socio-sexual norms operate to construct and constrain not only women's ability to say 'no' to male sexual initiative, and to have that refusal accredited both by society and law, but also – and perhaps even more problematically – to say 'yes,' at least in the kind of free and unfettered way that the liberal model of autonomy often seems to presume.

In order to explore these issues within the confines of this article, discussion will be broken down into three main parts. In the first section, the nature and parameters of the conventional understanding of consent will be examined in more detail and the contemporary challenges that have been lodged against it – particularly from those

4. For an overview of the reform process, see Law Commission, *Consent in Sexual Offences: A Report to the Home Office Sex Offences Review*, <http://www.lawcom.gov.uk/docs/consent.pdf> (2000); United Kingdom Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences*, <http://www.homeoffice.gov.uk/documents/vol1main.pdf?view=Binary> (2000); United Kingdom Home Office, *Protecting the Public – Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences*, <http://www.homeoffice.gov.uk/documents/protecting-the-public.pdf?view=Binary> (2002); United Kingdom Home Office, *Convicting Rapists and Protecting Victims – Justice for Victims of Rape*, <http://www.homeoffice.gov.uk/documents/cons-290306-justice-rape-victims?view=Binary> (Spring 2006) [hereinafter Home Office, *Convicting Rapists*]; United Kingdom Home Office, *Sexual Offences Act 2003: A Stocktake of the Effectiveness of the Act Since its Implementation*, <http://www.crimereduction.homeoffice.gov.uk/sexual/sexual24.pdf> (2006). For general discussion of the implications of the reforms, see Nicola Lacey, *Beset by Boundaries: The Home Office Review of Sexual Offences*, 2001 CRIM. L. REV. 3; Philip Rumney, *The Review of Sexual Offences and Rape Law Reform: Another False Dawn?*, 64 MOD. L. REV. 890 (2001); Jennifer Temkin & Andrew Ashworth, *The Sexual Offences Act 2003: Rape, Sexual Assaults and the Problems of Consent*, 2004 CRIM. L. REV. 328; Andrew Bainham & Belinda Brooks-Gordon, *Reforming the Law on Sexual Offences*, in *SEXUALITY REPOSITIONED* 261 (Belinda Brooks-Gordon et al. eds., 2004); Vanessa Munro, *Dev'l-in Disguise? Harm, Privacy and the Sexual Offences Act 2003*, in *SEXUALITY AND THE LAW: FEMINIST ENGAGEMENTS 1* (Vanessa Munro & Carl Franklin Stychin eds., 2007); Sharon Cowan, *Freedom and Capacity to Make a Choice: A Feminist Analysis of Consent in the Criminal Law of Rape*, in *SEXUALITY AND THE LAW: FEMINIST ENGAGEMENTS 51* (Vanessa Munro & Carl Franklin Stychin eds., 2007); FRANCIS BENNION, *SEXUAL ETHICS AND CRIMINAL LAW: A CRITIQUE OF THE SEXUAL OFFENCES BILL 2003* (2003); and John Spencer, *The Sexual Offences Act 2003: Children and Family Offences*, 2004 CRIM. L. REV. 347.

influenced by structural, post-structural, and communitarian analyses – will be considered. With the terrain of these debates on consent – and related concepts such as autonomy, agency, and self-determination – in place, the second section of this article will focus specifically upon their implications in the context of sexual consent in general, and women’s sexual consent in particular. It will outline the development of the Sexual Offences Act 2003 in England and Wales, and will discuss some of the merits and demerits of the approach adopted towards rape as a criminal offence therein. Having done so, discussion in the final part will examine a number of the more fundamental difficulties posed by this legislation’s instigation of a consent threshold that centers upon such theoretically contested, and malleable, concepts as ‘freedom,’ ‘capacity,’ and ‘reasonableness.’ Juxtaposing the presumptions that often lie behind these concepts in conventional liberal accounts with the messy and multi-faceted realities of women’s daily lives, this section will examine the adequacy of the legal response in terms of its ability to both reflect and respond to the experiential patterns of (hetero)sexual initiative.

II. UNCOVERING THE ‘CON’ IN CONVENTIONAL THEORIES OF CONSENT

If, as social contract theorists have argued, our collective consent (real or hypothesized) provided the mechanism through which the institutional framework from which all modern law emanates was established,⁵ it follows that consent must in some ultimate sense be the master of law. In reality, however, there are a number of difficulties with such an analysis. For one thing, there are significant practical barriers to revocation of consent in a world in which established structures and processes – even flawed ones – are self-perpetuating, and often preferable to a world of chaotic anarchism. In addition, the assertion that consent is the master of law neglects or at least trivializes the complex and powerful ways in which the dictates of law and institutions of the state, once established, operate to construct the very mechanisms of, and parameters for communicating, consent.

Indeed, as a number of critics have argued, this contractarian perspective is premised on a dubious understanding of power as a largely unilateral and one-dimensional force.⁶ Law is presumed to be

5. While united by this contractarian perspective, it is clear that leading theorists in this tradition also engage in some significant disagreements as to the detail of how, and to whom, this allegiance is promised - see, for example, THOMAS HOBBS, *LEVIATHAN* (Crawford B. MacPherson ed., 1968); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., 1963); and JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* (George D.H. Cole ed., 1968).

6. For critique of the social contract tradition, and its treatment of women’s position in

something issued by an identifiable sovereign, through a vehicle of command or prohibition, to a collective who have authorized and accepted their own subservient position. The upshot of this analysis is not only a commitment to the legitimacy and neutrality of the imposition of law's force, but also an insistence that areas of social living that are unregulated by such prohibitive commands are, therefore, areas in which the human agent has a free and unfettered remit for individual self-determination.⁷

While offering a more nuanced analysis of the origins of the state and the basis for legitimate authority, it is often argued that these core commitments continue to animate contemporary legal and political thinking.⁸ The links between this contractarian hypothesis and liberalism are strong, traceable via chains of influence from Rousseau to Kant, through the Enlightenment, and into a modern period in which rationalism and individualism have been reified as prerequisites for, and paradigm manifestations of, effective citizenship.⁹ Subjectivity is expressed here primarily through the exercise of agency, and consent

particular, see, for example, CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988); and Carole Pateman & Teresa Brennan, *Mere Auxiliaries to the Commonwealth – Women and the Origins of Liberalism*, 27 *POLITICAL STUDIES* 183 (1979). This challenge to the one-way projection of authority underpinning the contract model has been re-iterated, moreover, in the context of other approaches, e.g. Austin's command model of law – see, for example, HERBERT LIONEL ADOLPHUS HART, *THE CONCEPT OF LAW* (2d ed. 1994) and (from a quite different perspective) ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* (1994). This failure to recognize the 'force' of law's imposition has also been challenged, for example, in Jacques Derrida, *Force of Law: The 'Mystical Foundations of Authority'*, in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 3 (Drucilla Cornell et al. eds., 1992).

7. For critique of this public/private distinction, see, for example, Ruth Gavison, *Feminism and the Public / Private Distinction*, 45 *STAN. L. REV.* 1 (1992) and Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 *CHL.-KENT L. REV.* 847 (2000).

8. For extended discussion of the links between the historical and contemporary uses of the concept of consent, see, for example, Maria Drakopoulou, *Feminism and Consent: A Genealogical Inquiry*, in *CHOICE AND CONSENT: FEMINIST ENGAGEMENTS WITH LAW AND SUBJECTIVITY* (Sharon Cowan & Rosemary Hunter eds., 2008).

9. See Immanuel Kant, *What is Enlightenment?*, in *THE PHILOSOPHY OF KANT – IMMANUEL KANT'S MORAL AND POLITICAL WRITINGS* 132 (Carl Friedrich ed., 1949); IMMANUEL KANT, *PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS* (Ted Humphrey trans., 1983); IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (1964); IMMANUEL KANT, *CRITIQUE OF PURE REASON* (Norman Kemp Smith trans., 1965); IMMANUEL KANT, *THE CRITIQUE OF JUDGMENT* (Werner Pluhar trans., 1987). Indeed, Kant explicitly expressed his indebtedness to Rousseau, especially for his belief in the common man, and for having "first discovered universal human nature beneath the multiplicity of adopted human forms, and the hidden law . . ." CARL FRIEDRICH, *THE PHILOSOPHY OF KANT: IMMANUEL KANT'S MORAL AND POLITICAL WRITINGS* xxiii (1949). See also BARRY HINDESS, *DISCOURSES OF POWER: FROM HOBBS TO FOUCAULT* (2001); Patrick Riley, *On Kant as the Most Adequate Social Contract Theorist*, 1 *POL. THEORY* 450 (1973).

continues to be the presumed (yet rarely interrogated) mode of its communication.¹⁰ Accrediting the articulation or refusal of consent with core significance, this liberal model – like its contractarian predecessor – often presumes a particular conception of the subject and an abstract, rational and self-serving framework for the operation of agency. Granted, as Martha Nussbaum has repeatedly pointed out, “‘liberalism’ is not a single position but a family of positions,”¹¹ and there is a danger in assuming too much unity amongst disparate liberal thinkers. That said, however, critics have identified a tendency in certain strands of liberal theory to analyze social problems by removing actors from their everyday environment, stripping them of the characteristics and relationships that influence their choices, and placing them in a sterile legal world where complex dilemmas are resolved by detached models of distributive justice and invocation of self-interested and conflict-oriented claims.¹² This can be seen, they insist, in the work of John Rawls, who invokes the veil of ignorance to remove from social agents all knowledge of their class, talents, aspirations, relationships, etc. as a necessary precursor to unencumbered (and, by implication, ‘purer’) reasoning about social justice;¹³ or alternatively, in the work of Ronald Dworkin, who imposes a framework premised on equal concern and respect, which operates on a presumption that other-regarding desires or preferences (and the underlying attachments they represent) be

10. For further discussion, and critique of this assumption, see, for example, KATHY FERGUSON, *THE MAN QUESTION: VISIONS OF SUBJECTIVITY IN FEMINIST THEORY* (1993); KAREN GREEN, *THE WOMAN OF REASON: FEMINISM, HUMANISM AND POLITICAL THOUGHT* (1995); GENEVIEVE LLOYD, *THE MAN OF REASON: ‘MALE’ AND ‘FEMALE’ IN WESTERN PHILOSOPHY* (1993); EVA FEDE KITTAY, *WOMEN AND MORAL THEORY* (Diana Tietjens Meyers ed., 1987); and *FEMINIST INTERPRETATIONS OF IMMANUEL KANT* (Robin May Schott ed., 1997).

11. MARTHA NUSSBAUM, *SEX AND SOCIAL JUSTICE* 57 (1999).

12. Linda McClain, *Atomistic Man Revisited: Liberalism, Connection and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1177 (1992).

13. JOHN RAWLS, *A THEORY OF JUSTICE* 516 (1972). See also JOHN RAWLS, *A THEORY OF JUSTICE* 453 (2000). For further discussion of this aspect of Rawls’ work and its implications for women’s lives, see SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS* (1992); SUSAN OKIN, *JUSTICE, GENDER AND THE FAMILY* (1989); Susan Okin, *John Rawls: Justice as Fairness – For Whom?*, in *FEMINIST INTERPRETATIONS AND POLITICAL THEORY* 181 (Mary Shanley and Carole Pateman eds., 1994); Susan Okin, *Justice and Gender: An Unfinished Debate*, 72 *FORDHAM L. REV.* 1537 (2004); Martha Nussbaum, *Rawls and Feminism*, in *THE CAMBRIDGE COMPANION TO RAWLS* (Samuel Richard Freeman ed., 2003); Annette Baier, *The Need for More than Justice*, in *JUSTICE AND CARE: ESSENTIAL READINGS IN FEMINIST ETHICS* 47 (Virginia Held ed., 1995); ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990); Robin West, *Jurisprudence and Gender*, 55 *U. OF CHI. L. REV.* 1 (1988); and ROBIN WEST, *CARING FOR JUSTICE* (1997).

disregarded as distortive and ‘vulgar’ influences on the acceptable face of utilitarianism.¹⁴

Critics have argued that such abstract and individualist approaches are fundamentally counter-intuitive at the level of human experience, and have sought to illustrate the role that the rhetoric of liberalism (in particular, its characteristic claims to neutrality, objectivity, and universality) has played in both disguising the complex realities of consent and obscuring the extent to which human agency is curtailed to comply with this artificial framework. Seeking to contextualize concepts of agency, subjectivity, and autonomy in the concrete realm of social interaction and contemporary power relations, these critics have, in their different ways, called for a re-evaluation of the prevailing notion of consent and a replacement of its image of unfettered self-determinism with a more realistic account of the constructed operation of choice in specific human situations.

A. The Structural Challenge

Those claiming to speak on behalf of marginalized and oppressed social groups have lodged a radical challenge to the dualistic vision of consensually imposed ‘public’ authority and an unregulated ‘private’ sphere of freedom. Whether premised on axes of class, gender, or race, it has been argued that the freedom of some individuals (members of privileged / dominant groups) is secured in contemporary society at the expense of the freedom of others. Mirroring the contractarian vision of power as a commodity held in the hands of some whilst being systematically denied from the ownership of others, these critics emphasize that the basis on which this dynamic is established lacks legitimacy. The social fault lines created by this are, in turn, deeply (albeit often subtly) entrenched - distribution of material wealth, as well as of social opportunity and personal expectation, maps onto these power structures, embedding the marginalized group in a position of weakness and dependency, and satiating its members’ needs just enough

14. Ronald Dworkin, *Do We Have a Right to Pornography?*, in *A MATTER OF PRINCIPLE* 360-61 (1985). For discussion and critique of this position, see, for example, Herbert Lionel Adolphus Hart, *Between Utility and Rights*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 198 (1983). Despite its relevance to the critique of liberalism, there has been relatively little direct feminist engagement with Dworkin on this matter – notable exceptions to this, however, are Nicola Lacey, *Closure and Critique in Feminist Jurisprudence: Transcending the Dichotomy or a Foot in Both Camps?*, in *UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY* 167 (1998); VALERIE KERRISH, *JURISPRUDENCE AS IDEOLOGY* (1991); and DRUCILLA CORNELL, *AT THE HEART OF FREEDOM: FEMINISM, SEX AND EQUALITY* (1998).

to imbue this hierarchy with a gloss of egalitarianism that manages (without redressing) discontent.¹⁵

In a context in which this dynamic of oppressor / oppressed marks the social and legal landscape, theorists from Karl Marx to Catharine MacKinnon and beyond have questioned liberalism's uncritical faith in the ideal of consent and in the rational and autonomous chooser that is presumed to populate its operation. The scope for self-determination afforded to the disempowered is radically reduced, not just by formal prohibitions that deny the availability of certain choices, but also by informal mechanisms that render certain choices too costly – financially, socially, or personally – to be realistic options. Lack of flexible working practices, or of affordable childcare, for example – when coupled with a sex-specific capacity for reproduction and a strong social mandate for women to act as primary child-carers – undermine the pursuit of gender equality in the workplace. In the formal liberal model, however, it is the creation of the opportunity that matters, even when absent the broader social and cultural shifts required to render its selection viable. Consequently, under current conditions, women's lower uptake is construed as indicative of their lack of interest in this choice, rather than as a potential symptom of their disempowerment and their inability to take what they want.¹⁶

Conversely, moreover, this critique emphasizes the artificiality of the conventional model not only in those contexts in which

15. As Catharine MacKinnon puts it, in regard to gender relations, “[t]he liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender – through its legitimating norms [including neutrality], forms, relations to society, and substantive policies.” CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 162 (1989) [hereinafter MACKINNON, TOWARD A FEMINIST THEORY]. See also Catharine MacKinnon, *Feminism, Marxism, Method, & The State: An Agenda for Theory*, 7 SIGNS 3, 515 (1982); Catharine MacKinnon, *Feminism, Marxism, Method, & The State: Toward a Feminist Jurisprudence*, 8 SIGNS 4, 635 (1983); CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED]; and – for more recent discussion – see, CATHARINE MACKINNON, WOMEN'S LIVES, MEN'S LAWS (2005) and CATHARINE MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES (2006).

16. Catharine MacKinnon, *Reflections on Sex Equality Under Law*, in AMERICAN FEMINIST THOUGHT AT CENTURY'S END: A READER 382-83 (Linda Kauffman ed., 1993); CATHARINE MACKINNON, SEX EQUALITY (2001). For further discussion of the limits of this approach, see also, for example, Patricia Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 837 (1990); ZILLAH R. EISENSTEIN, FEMINISM AND SEXUAL EQUALITY: CRISIS IN LIBERAL AMERICA (1984); MARTHA FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991); and SYLVIA WALBY, GENDER TRANSFORMATIONS (1997). For extended analysis of the deployment of 'choice' in contemporary neo-liberal privatization of care-taking responsibilities, see also Gillian Calder, *The Personal is Economic: Unearthing the Rhetoric of Choice in the Canadian Maternity and Parental Leave Benefit Debates*, in CHOICE AND CONSENT, *supra* note 8.

disempowered persons / groups say no to a choice that is open to them only in theory, but also in situations in which they say yes to certain options. In a world in which survival on the best possible terms requires aligning oneself as closely as possible to those who have power, it is argued that we should treat with suspicion those ‘choices’ that comply with the demands of the dominant or that work to maintain the current power relations. Just as workers ‘consent’ to all kinds of exploitative employment practices out of necessity, so too it is argued that women ‘consent’ to heterosexual relationships and procreation in order to benefit from male protection.¹⁷ In both cases, however, the reality is one of ‘submit to survive’ rather than a reflection of genuine autonomy. The alternatives are too unpleasant, too draining, or too dangerous to be meaningful, and compliance with the hegemony emerges as the inevitable conclusion.

B. The Post-Structural Challenge

The work of Michel Foucault has been central to the development of the post-structural challenge.¹⁸ In positing modern power as a pervasive force that infiltrates all aspects of social living through the invocation of normative expectations and discursive discipline, Foucault’s work not only highlights the artificiality of the notion of unregulated social space, but challenges the attendant contention that individuals have a free and unfettered remit for self-determination within these confines. Emphasizing the extent to which power is a normalizing, rather than primarily repressive, force, Foucault insists that control of the individual in modern society is ensured, not through direct state repression but through strategies of discipline that ensure self-regulation towards prioritized norms.¹⁹ As a result, while Foucault continues to

17. See, for example, SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 267-68 (1975); Susan Rae Peterson, *Coercion and Rape: The State as a Male Protection Racket*, in *FEMINISM AND PHILOSOPHY* 368-69 (Mary Vetterling-Braggin et al. eds., 1977); and Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *SIGNS* 631, 636-67 (1980).

18. See, in particular, MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (Alan Sheridan trans., 1972); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH – THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1979); MICHEL FOUCAULT, *POWER / KNOWLEDGE – SELECTED INTERVIEWS AND OTHER WRITINGS 1972-77* (Colin Gordon trans., 1980) [hereinafter *FOUCAULT, POWER / KNOWLEDGE*]; MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY VOLUME I: AN INTRODUCTION* (Robert Hurley trans., 1980) [hereinafter *FOUCAULT, VOLUME I*]; MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY VOLUME II: THE USE OF PLEASURE* (Robert Hurley trans., 1985); and MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY VOLUME III: THE CARE OF THE SELF* (Robert Hurley trans., 1986).

19. *FOUCAULT, POWER / KNOWLEDGE*, *supra* note 18, at 73-74.

take the individual as his point of theoretical departure, he rejects any metaphysical assumption that the world is populated by autonomous, self-legislating moral subjects. On the contrary, he argues that the human subject is produced by, and reflective of, the norms and power dynamics of social life: subjected rather than transcendent, and a constructed identity rather than organic entity.²⁰

One of the distinguishing features of the modern, disciplinary society, according to Foucault, is the extent to which power “circulate[s] through progressively finer channels.”²¹ It operates at the ‘capillaries’ of existence, “seep[ing] into the very grain of individuals, reach[ing] right into their bodies, permeat[ing] their gestures, their postures, what they say, how they learn to live and work with other people.”²² This makes the disciplinary dictates of such power relations not only pervasive but also extremely effective, bolstering the illusion of freedom whilst restricting the remit for choice. While this is not to dismiss the possibility of resistance - indeed, according to Foucault, wherever there is a power relation, there is also, by definition, scope for resistance - it is to challenge the ideal of transcendent freedom and the notion of unfettered self-determination that critics argue form a central pillar of the liberal account. The individual may exercise creativity in the way in which her existence is fashioned, but the practices through which this is achieved are always, if not determined by, then at least framed in relation to, the socio-cultural context. These ‘practices of the self’ are “not something that the individual invents . . . [but] patterns that he finds in his culture and which are proposed, suggested and imposed upon him by his culture, his society and his social group.”²³

20. *Id.* In Foucault’s own words, “the individual is not a pre-given entity which is seized on by the exercise of power. The individual, with his identity and characteristics, is the product of a relation of power exercised over bodies, multiplicities, movements, desires, forces.” *Id.*

21. Sandra Bartky, *Foucault, Femininity, and the Modernization of Patriarchal Power*, in *FEMINISM AND FOUCAULT: REFLECTIONS ON RESISTANCE* 79 (Irene Diamond & Lee Quinby eds., 1988).

22. MICHEL FOUCAULT, *THE WILL TO TRUTH* 216 (Alan Sheridan trans., 1980).

23. Michel Foucault, *The Ethics of Care for the Self as a Practice of Freedom*, in *THE FINAL FOUCAULT* 11 (James Bernauer & David Rasmussen eds., 1988). The implications of much of this analysis of power, resistance and subversion are developed further in the context of gender relations by Judith Butler - see, in particular, JUDITH BUTLER, *GENDER TROUBLE - FEMINISM AND THE SUBVERSION OF IDENTITY* (1990); JUDITH BUTLER, *BODIES THAT MATTER - ON THE DISCURSIVE LIMITS OF ‘SEX’* (1993); and JUDITH BUTLER, *UNDOING GENDER* (2004). However, this direction of feminist analysis has also attracted considerable criticism - see, for example, *FEMINISM AND FOUCAULT*, *supra* note 21; NANCY FRASER, *UNRULY PRACTICES - POWER, DISCOURSE AND GENDER IN CONTEMPORARY SOCIAL THEORY* (1989); *FEMINIST INTERPRETATIONS OF MICHEL FOUCAULT* (Susan Hekman ed., 1996); LOIS McNAY, *FOUCAULT AND FEMINISM: POWER, GENDER*

As with the structural challenge, then, this post-structural analysis emphasizes the extent to which the scope for, and expression of, consent is both constructed and curtailed by broader social imperatives. But where the structural critic has focused upon macro-level forces and systematic power disparities (mapping variously onto class, gender, or race divisions), the post-structural critic has argued for a more fluid conception of power, leading in turn to a concern with the self-regulatory influence of disciplinary norms.²⁴ By constructing the subject who ‘chooses’ conformity within the confines of the socially prescribed, it is argued that such discipline undermines the very legitimacy of that choice.

C. *The Communitarian Challenge*

To the extent that one’s community and relational context provide vital components of the infrastructure through which disciplinary discourses circulate, as well as offering localized vectors for the expression of broader axes of group-based oppression, the communitarian challenge to liberalism in general, and to its conceptions of subjectivity and agency in particular, can be seen as allied in important ways to both the structural and the post-structural critique. At the same time, however, the origins of communitarianism remain distinctive and the contours of its utopian vision are markedly different – in both form and content – from those that animate structural claims to revolution or post-structural calls for resistance. As such, it merits independent treatment.

At the heart of the communitarian challenge is an insistence that the starting point for analysis – in legal, political, and moral theory – should be the social rather than the individual. From the outset, this approach turns the tables on certain key strands of liberal thinking by showing that “the autonomous individual agent is itself a product of social construction,” which is embedded in a particular context.²⁵ In so doing, it maintains that “if liberalism is true as a social theory, this is only

AND THE SELF (1992); and CAROLINE RAMAZANOGLU, UP AGAINST FOUCAULT: EXPLORATIONS OF SOME TENSIONS BETWEEN FOUCAULT AND FEMINISM (1993).

24. See Michel Foucault, *What is Enlightenment?*, in THE FOUCAULT READER 32 (Paul Rabinow ed., 1984). For further discussion of the similarities and tensions between these approaches, see, for example, Vanessa Munro, *On Power and Domination: Feminism and the Final Foucault*, 2 EUR. J. POL. THEORY 79 (2003); Alan Hunt, *Getting Marx and Foucault Into Bed Together!*, 31 J. L. & SOC’Y 592 (2004); and AMY ALLEN, THE POWER OF FEMINIST THEORY: DOMINATION, RESISTANCE, SOLIDARITY (1999).

25. ELIZABETH FRAZER & NICOLA LACEY, THE POLITICS OF COMMUNITY: A FEMINIST CRITIQUE OF THE LIBERAL-COMMUNITARIAN DEBATE 57 (1983).

because it is, in a wider sense, false.”²⁶ It is argued that this conventional preoccupation with the individual is not only misguided but also impoverished. By excluding from consideration issues of personal affection and phenomenological experience, communitarian theorists argue that the liberal tradition has perpetuated a highly abstract conception of agency and a largely hollow account of what it is to be a self-aware and socially immersed being. Humans are inherently interdependent, necessarily situated in, and at least partially constituted by, the communities in which they live, the traditions in which they are raised, and the associations they form with others.²⁷ What’s more, these are not conditions that can – or should – be transcended in the pursuit of abstract individualism, since to do so would distort the realities of human existence and deny the value and meaning attributable to its relational dimensions.²⁸

Communitarian critics insist, then, that liberalism maintains its rhetoric of unconstrained self-determination (reflected in and represented by prevailing consent thresholds) only by abstracting the individual from the social dynamics and relational commitments that inform the very exercise of human agency. In so doing, however, they point out that it not only offers a vision of social interaction that is fundamentally unrealistic, unachievable, and undesirable, but disguises the extent to which such communitarian imperatives pose their own dangers (of undue conservatism or subservience to the demands of others, for example), which must be both acknowledged and opened up to critical scrutiny.²⁹

D. Towards a Critical Consensus on Consent?

Despite the considerable differences in priority and emphasis within these accounts, then, there is consensus that consent as a moral and legal

26. *Id.*

27. See ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1999); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988); and ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY* (1990).

28. See MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 152-53 (1982); CHARLES TAYLOR, *SOURCES OF THE SELF – THE MAKING OF MODERN IDENTITY* (1989); and, generally, *THE COMMUNITARIAN CHALLENGE TO LIBERALISM* (Ellen Frankel Paul, Fred D. Miller & Jeffrey Paul eds., 1996).

29. For discussion of these concerns, with particular reference to their implications for women, see, amongst others - Nicola Lacey, *Community in Legal Theory: Idea, Ideal or Ideology?*, in *UNSPEAKABLE SUBJECTS*, *supra* note 14, at 125; Marilyn Friedman, *Feminism and Modern Friendship – Dislocating the Community*, 99 *ETHICS* 275 (1989); SUSAN J. HEKMAN, *MORAL VOICES, MORAL SELVES* (1995); and FRAZER & LACEY, *supra* note 25.

notion may only support the normative significance attributed to it in much liberal theory on the basis of a suspect understanding of the relationship between the individual and society. Such a theory, it is argued, presents its subject as highly atomistic, depicting society as a voluntary and equal association of self-sufficient individuals, each capable of making free decisions about how best to live their lives.³⁰

Although – at the level of theory and intuition – there may be a number of difficulties with this account, in the legal arena, where a reminiscent pull towards the abstract has often been identified, it has nonetheless proven to be particularly resilient. In contexts ranging from contract to medical law, standards for the issuing of consent have been created in which – for the most part – there is an emphasis on principles of *caveat emptor* and informed decision-making, even in situations in which there are profound disparities of power between the parties or a dearth of alternatives for consideration. In the regulation of sexuality, moreover, where a delicate balance is called for between permitting expression and prohibiting violation, the standard legal form has been similarly formulaic and disconnected from the terrain of contemporary socio-sexual interaction. In the next section, the criticisms lodged at this approach will be considered and recent legislative efforts in England and Wales – which were designed, in part, to provide an affirmative and context-sensitive standard for consent – will be examined.

III. SEXUAL CONSENT AND THE SEXUAL OFFENCES ACT 2003

Feminist engagement on consent, and on women's sexual consent in particular, is clearly mirrored in and influenced by the criticisms of the conventional conception of agency discussed above. Susan Estrich's distinction between 'ideal' and 'real' rape,³¹ for example, has been repeatedly deployed to challenge the ways in which social imperatives (or disciplinary techniques) construct norms of gendered sexual behavior against which women are judged, both by society and by law.³² The

30. For further critique, see, for example, Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13 (1999); MARILYN FRIEDMAN, AUTONOMY, GENDER, POLITICS (2003); Sabina Lovibond, *Meaning What We Say – Feminist Ethics and The Critique of Humanism*, 215-20 NEW LEFT REVIEW 98 (1996); and RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY AND THE SOCIAL SELF (Catriona MacKenzie & Natalie Stoljar eds., 2000).

31. SUSAN ESTRICH, REAL RAPE 10 (1987).

32. See, for example, in the UK context, ZSUZANNA ADLER, RAPE ON TRIAL (1987); SEX CRIMES ON TRIAL: THE USE OF SEXUAL EVIDENCE IN SCOTTISH COURTS (Beverley Brown, Michele Burman & Lynn Jamieson eds., 1993); JENNIFER TEMKIN, RAPE AND THE LEGAL PROCESS (2d ed. 2002); and SUE LEES, CARNAL KNOWLEDGE – RAPE ON TRIAL (1996).

female body, it is argued, has been analyzed, “qualified and disqualified—as being thoroughly saturated with sexuality,”³³ with medical and psychological discourses justifying the prohibition of various social and sexual activities from women on the basis of claims to an inherently dangerous female sexuality, which is seen to be in perpetual need of (beneficent) control. Women who exhibit non-conforming behavior in this context – by drinking alcohol, dressing provocatively, or initiating intimacy – are deemed to have sent out signals of sexual interest which cannot be easily revoked when subsequently relied upon by an observer. At the same time, male sexuality is depicted as uncontrollably natural, consisting of overwhelming urges and desires, which leaves the male sexual imperative and its utilization of coercive strategies of sexual persuasion (a.k.a. courtship) unchecked.³⁴

Concerned by the (in)ability of the consent threshold to secure justice in a context in which sexual stereotyping is prevalent and powerful, this critique highlights the contributory role of a courtroom culture in which adversarial methods and dichotomous outcomes prevail, with the result that the defendant’s acquittal is equated with his innocence and with sexual complicity and deceit on the complainant’s part. Although non-consent is a required element in many crimes, these critics point out that in rape trials this threshold is operationalized in a context of profound suspicion of female sexuality. As Nagire Naffine puts it:

[R]ape is a crime whose setting is a society where women are expected to repress their desires, where they are expected to want what a man wants, where women’s sexual wishes are actively (though never completely) suppressed or rendered mysterious or incredible whenever they cease to fit the possessive form.³⁵

One of the upshots of this is an insistence that women who are treated as passive and powerless in other matters are nonetheless

33. FOUCAULT, VOLUME I, *supra* note 18, at 104. See also ROSALYN DIPROSE, *THE BODIES OF WOMEN: ETHICS, EMBODIMENT AND SEXUAL DIFFERENCE* (1994); KATHY DAVIS, *EMBODIED PRACTICES: FEMINIST PERSPECTIVES ON THE BODY 3* (1997).

34. Evidence of these attitudes can be found in a range of studies – for example, see Amnesty International, *Sexual Assault Research Summary Report*, Nov. 21, 2005, http://www.amnesty.org.uk/news_details.asp?NewsID=16618; and for general discussion of psychological research on attitudes to rape, see, for example, COLLEEN A. WARD, *ATTITUDES TOWARDS RAPE: FEMINIST AND SOCIAL PSYCHOLOGICAL PERSPECTIVES* (1995); and NICOLA GAVEY, *JUST SEX?: THE CULTURAL SCAFFOLDING OF RAPE* (2005).

35. Nagire Naffine, *Possession: Erotic Love in the Law of Rape*, 57 *MOD. L. REV.* 10, 34-35 (1994).

required to be strong, aggressive, and powerful in rejecting intimacy.³⁶ Standards used in rape laws typically direct attention to the complainant's, rather than (or at least as much as) the defendant's, behavior, and normative expectations regarding the proper feminine role influence decision-making at all stages of the legal system: women, who are conditioned to attribute sexual violation to the (im)propriety of their own conduct, do not recognize the offense or are reluctant to report it;³⁷ police and prosecutors evaluate the strength of cases on the basis of women's conformance to socio-sexual norms, with attrition rates demonstrating the extent to which cases involving drunken or provocatively dressed complainants, complainants who have made previous allegations, who do not exhibit signs of physical injury, or who have an active sexual history, are not taken forward;³⁸ and in turn courts (and, in particular, juries) re-affirm these stereotypes - witnessing only a tiny proportion of the most conformant cases but nonetheless rigorously policing the boundaries of the acceptable, and rarely convicting in a case where the complainant's conduct falls foul of these standards.³⁹

36. In many jurisdictions, this has been reflected in a legal requirement that the complainant's will be overborne in the course of the rape, manifesting itself in physical injury as the woman 'resists to the utmost' against her attacker. While, this force requirement has long been formally abandoned under English law, it remained a core feature of Scots law until the recent decision of the Court of Session in *Lord Advocate's Reference (No 1 of 2001)*, 2002 S.L.T. 466 (H.C.J.).

37. See, e.g., Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. OF CONSULTING AND CLINICAL PSYCHOL. 162, 169 (1987); Mary P. Koss, *Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education*, in RAPE AND SEXUAL ASSAULT II 4-5 (Ann Wolbert Burgess ed., 1988); Mary P. Koss, *The Underdetection of Rape: Methodological Choices Influence Incidence Estimates*, 48 J. OF SOC. ISSUES 61, 65-66 (1992); Mary P. Koss, *Detecting the Scope of Rape: A Review of Prevalence Research Methods*, 8 J. INTERPERSONAL VIOLENCE 198, 205 (1993). But cf. KATIE ROPHIE, *THE MORNING AFTER: SEX, FEAR AND FEMINISM* (1993). See also Neil Gilbert, *The Phantom Epidemic of Sexual Assault*, 103 PUB. INT. 54 (1991).

38. See LIZ KELLY ET AL., UNITED KINGDOM HOME OFFICE, A GAP OR A CHASM? ATTRITION IN REPORTED RAPE CASES 46 (2005), <http://www.homeoffice.gov.uk/rds/pdfs05/hors293.pdf>. Further review of attrition in rape cases has been conducted via the recent Joint Inspection Report of Her Majesty's Inspectorate of Constabulary. See HER MAJESTY'S CROWN PROSECUTION SERVICE INSPECTORATE, WITHOUT CONSENT: A REPORT ON THE JOINT REVIEW OF INVESTIGATION AND PROSECUTION OF RAPE OFFENCES (2007), http://www.hmcpso.gov.uk/reports/Without_Consent_Thematic.pdf.

39. There is considerable social psychology literature which evidences these attitudes amongst jurors – for a thorough overview, see Douglas D. Koski, *Jury Decisionmaking in Rape Trials: A Review & Empirical Assessment*, 38 CRIM. L. BULL. 21–159 (2002) or GARY D. LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* (1989). For more recent evidence of these attitudes in the UK context, see Emily Finch & Vanessa Munro, *The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants*, 16 SOC. & LEGAL STUD. 591 (2007) [hereinafter Finch & Munro, *Demon Drink*]; Emily Finch & Vanessa Munro, *Juror Stereotypes and Blame Attribution in*

In this context, it has been argued that the deference afforded to the conventional conception of consent in rape laws disguises the extent to which men and women do not operate in, choose from, or communicate on the basis of an equal and mutually respectful terrain. On the contrary, social stereotypes and anachronistic assumptions about appropriate gendered behavior inform our subjectivities (as gendered *and* sexual beings), activities, choices, and assessments of scope for refusal. Men are pressured into the role of sexual hunter and women are encouraged to perform the role of sexual prey, which hardly represents the climate of mutual equality, dignity, or freedom presumed by the liberal model. Building on her critique of the social contract tradition, Carole Pateman has emphasized the “failure in liberal-democratic theory and practice to distinguish free commitment and agreement by equals from domination, subordination, and inequality.”⁴⁰ And in the specific context of sexual relations, Catharine MacKinnon has lodged a similar challenge, insisting that the idea of consent, while fundamental to contemporary understandings of, and responses to rape, is inadequate, primarily because it ignores the reality that men and women do not engage in sexual negotiations on an equal footing.⁴¹

In a patriarchal world in which, according to MacKinnon, women exist as oppressed victims of male power, tokens of heterosexual interest, acquiescence, or even initiative, may be as much a mechanism for survival as an expression of legitimate choice.⁴² With characteristic boldness, she suggests that “rape law takes women’s usual response to coercion – acquiescence, the despairing response to hopelessness to unequal odds – and calls that consent”⁴³ and insists that, in a context in which the law licenses men to act as sexual predators, using whatever level of force or seduction the patriarchal society deems acceptable, rape becomes hard to distinguish from ‘normal’ heterosexual intercourse.⁴⁴

Rape Cases Involving Intoxicants, 45 BRIT. J. CRIMINOLOGY 25 (2005) [hereinafter Finch & Munro, *Juror Stereotypes*]. There is, however, some literature which indicates that non-conforming women may be able to elicit juror sympathy where they demonstrate resistant strategies in the courtroom – see Wendy Larcombe, *The ‘Ideal’ Victim v Successful Rape Complainants: Not What You Might Expect*, 10 FEMINIST LEGAL STUD. 131 (2002).

40. Carole Pateman, *Women and Consent*, in THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY 83 (1989).

41. MACKINNON, FEMINISM UNMODIFIED, *supra* note 15, at 100.

42. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 15, at 168

43. *Id.*

44. As MacKinnon expresses it - “[p]erhaps the wrong of rape has proven so difficult to articulate because the unquestionable starting point has been that rape is definable as distinct from intercourse, when for women it is difficult to distinguish them under conditions of male

There is no doubt that these arguments present a rhetorically and politically powerful critique, but commentators have expressed increasing concern about the relationship between these assertions and a contemporary feminist project that seeks to transcend essentialist claims or deterministic prophecies of male/female relations.⁴⁵ While instances of rape and ‘normal’ heterosexual intercourse may exist, under patriarchy at least, on a continuum, such commentators point out that it is difficult to see how equating them can do anything other than belittle the experiences both of the rape victim (by making her violation ‘ordinary’) and of the woman who conceives herself as a voluntary sexual agent (by making her intimate connection a violation). Indeed, as Stephen Schulhofer puts it, “[w]e cannot simply dismiss as ‘false consciousness’ the perceptions of women themselves. And for many women, sweeping attacks on the possibility of uncoerced sex . . . are greatly overdrawn.”⁴⁶ Thus, while MacKinnon’s claims are perhaps to be commended for drawing attention to the constraints and cultural pressures that operate upon women’s ability to make sexual choices, her failure to discriminate between the different kinds of pressure and her refusal to engage with the role that (some) women play in perpetuating – or, indeed, resisting – these pressures is theoretically limiting and strategically damaging.

What’s more, it might be argued that it generates premature and / or only superficially compelling calls for the abandonment of the consent threshold itself. A number of commentators have argued for a reformulation of rape, proposing either to relegate non-consent from being a constitutive element of the offence (limiting its presence to defensive relevance) or to establish a differentiated ‘familial’ system in which a substantive definitional content describes the harm in its absence (e.g. rape by coercion, drug assisted rape, rape by force, etc.).⁴⁷

dominance.” Catharine MacKinnon, *Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 635, 647 (1983).

45. See, e.g., Lucinda M. Finley, *The Nature of Domination and The Nature of Women: Reflections on Feminism Unmodified*, 82 NW. U. L. REV. 352 (1988); Drucilla Cornell, *The Doubly Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644 (1990); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Kathryn Abrams, *Ideology and Women’s Choices*, 24 GA. L. REV. 761 (1990); Drucilla Cornell, *Sexual Difference, The Feminine and Equivalency: A Critique of MacKinnon’s Toward a Feminist Theory of the State*, 100 YALE L.J. 2247 (1991); Emily Jackson, *Catharine MacKinnon and Feminist Jurisprudence: A Critical Appraisal*, 19 J. L. & SOC’Y 195 (1992); Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181 (1994); CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989).

46. STEPHEN SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 56 (1998) (citations omitted).

47. Victor Tadros, *Rape Without Consent*, 26 OXFORD J. LEGAL STUD. 515, 518 (2006).

Such approaches may, however, be problematic. For one thing, as John Gardner and Stephen Shute have argued, in the context of rape, some concept of consent is needed to allow people to act, and be respected, as moral agents who police the boundaries of their personal intimacy by inviting as well as denying sexual access.⁴⁸ Of course, one might respond to this claim – as Victor Tadros has done – by insisting that “[e]ven if the concept of consent is central to the most appropriate theoretical investigation into the scope of the law of rape,” its excessive and inherent ambiguity means that it is simply not useful in the delineation of the law itself.⁴⁹ But this response begs crucial questions about the wisdom of concerning oneself “only with practical law reform”⁵⁰ in a context in which the reforms in question generate conceptual frameworks that are consciously detached from – and arguably at odds with – the wrong, and wrongdoing, that occasions their instigation and development. In addition, it is far from clear that these proposed reforms would, in practice, do a great deal to avoid the reinsertion of the consent threshold in the courtroom. Regina Graycar and Jenny Morgan have argued that reforms rendering consent a defense have not prevented disputes about its presence from arising, and have done little to prevent dubious claims about appropriate female socio-sexual behavior from continuing to inform both judicial and jury reasoning.⁵¹ Likewise, Jennifer Temkin, having conducted a review of the impact of rape reforms in New South Wales, Michigan, and Canada, has concluded that “the problem of consent is unlikely to vanish whatever means are adopted to deal with it.”⁵²

It is profoundly disappointing to find that the concept of consent has been distorted out of recognition, and too often out of utility, in the context of rape law: a context in which one would hope – given the importance of what is at stake – that it would be at its most stringent. But for all the legitimate concerns expressed in regard to its operation here, its potential for more productive deployment in a world beyond patriarchy should not be ignored. Indeed, as Sharon Cowan has emphasized, “[c]onsent is a concept which we can fill with either narrow liberal values, based on the idea of the subject as an individual atomistic rational choice maker, or with feminist values encompassing attention to

48. Gardner & Shute, *supra* note 2, at 193, 207-08.

49. Tadros, *supra* note 47, at 518.

50. *Id.* at 519.

51. REGINA GRAYCAR & JENNY MORGAN, THE HIDDEN GENDER OF LAW 365-66 (Federation Press 2d ed. 2002). Discussed in Cowan, *supra* note 4, at 68.

52. TEMKIN, *supra* note 32, at 176.

mutuality, embodiment, relational choice, and communication.”⁵³ The solution, then, is not to abandon consent as the transformative channel between the permissible and the condemnable, but to reformulate it in a way that enables it to take greater account of the peculiarities of context, constraint, and construction, and to operate with renewed vigor in the pursuit of social justice.⁵⁴ Amongst other things, this approach boasts the strategic advantage of preserving a dialogue with liberalism and law – on terms that are familiar to it – without denying the complexity of the relationship between a woman, the ‘choices’ that she makes, and the motivations that drive those choices. In so doing, it enables moral and legal theory to recognize that consent does have meaning for (some) women, many of whom experience their heterosexual relationships as an expression of agency, without thereby endorsing or entailing the claim that “women are immune from various pressures to constrain and regulate these relationships, or that such constraints operate to the prejudice of women and to the benefit of men, or that the existence of such constraints cannot be explained in terms of a disparity of power between men and women.”⁵⁵

To the extent that the Sexual Offences Act 2003 in England and Wales seeks to preserve the role of non-consent as the triggering condition for criminality in rape cases, while simultaneously providing a more developed understanding of what consent requires in this context, it might be argued that this legislation represents a significant step forward. The following section outlines the legislative framework in more detail and evaluates its potential to better respect women’s sexual autonomy and to protect rape complainants.

A. *Re-Setting the Boundaries?: The Sexual Offences Act 2003*

The Sexual Offences Act 2003 is a wide-ranging piece of legislation, intended to consolidate and modernize the law in England

53. Cowan, *supra* note 4, at 53.

54. Reconstruction, along similar lines, of other (often complementary) concepts in liberal legal / political theory have recently been defended in feminist / critical scholarship – see, for example, CORNELL, *supra* note 14; ROBIN WEST, *RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW* (2003); DAVINA COOPER, *CHALLENGING DIVERSITY: RETHINKING EQUALITY AND THE VALUE OF DIFFERENCE* (2004); SIOBHAN MULLALLY, *GENDER, CULTURE AND HUMAN RIGHTS: RECLAIMING UNIVERSALISM* (2006); *REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY* (Nancy J. Hirschmann & Christine Di Stefano eds., 1996); and VANESSA MUNRO, *LAW AND POLITICS AT THE PERIMETER: RE-EVALUATING KEY DEBATES IN FEMINIST THEORY* (2007).

55. DAVID ARCHARD, *SEXUAL CONSENT* 97 (1998).

and Wales on various aspects of socio-sexual life. Section 1(1) defines rape as the non-consensual penile penetration (vaginal, anal, or oral) of another person in circumstances in which the defendant does not reasonably believe in consent.⁵⁶ Section 1(2) goes on to state that the reasonableness of this belief will be determined in light of all the surrounding circumstances, including the steps that the defendant took to ascertain whether the complainant was consenting.⁵⁷ Thus, while the legislation preserves the traditional focus on consent and belief in consent as the threshold for criminality, this offense definition – in particular its extension to oral penetration and its shift from the defendant's honest⁵⁸ to reasonable belief – marks a significant change. In addition, where the concept of consent was previously undefined, with the jury left to determine its presence by “applying their combined good sense, experience and knowledge of human nature and modern behaviour” to the facts of each case,⁵⁹ clear efforts have now been made to move beyond this non-prescriptive stance.

More specifically, the Act imposes a structure for guiding decision-making on the presence or absence of sexual consent. It does so in a number of ways. First, it provides a definition of consent under section 74: “a person consents if he agrees by choice, and has the freedom and capacity to make that choice.”⁶⁰ Secondly, it provides, under section 75, an exhaustive list of circumstances (including, for example, where force or the threat of force has been used or where the “complainant [i]s asleep or otherwise unconscious,”⁶¹ and the defendant knows this to be the case) in which consent and reasonable belief in consent will be presumed to be absent. The Act makes it clear, however, that such presumptions can be rebutted by the defendant's successfully adducing evidence that justifies raising the complainant's consent or his reasonable belief therein as an issue for consideration.⁶² Alongside this list, therefore, the Act also sets out, under section 76, two circumstances in which the presumption will be conclusive – namely where the defendant has intentionally deceived the complainant as to the nature or

56. Sexual Offences Act, 2003, § 1(1) (U.K.).

57. Sexual Offences Act, 2003, § 1(2) (U.K.).

58. *D.P.P. v. Morgan*, [1976] A.C. 182 at 188.

59. *R. v. Olugboja*, [1982] Q.B. 320, 332.

60. Sexual Offences Act, 2003, § 74 (U.K.).

61. Sexual Offences Act, 2003, § 75 (U.K.). Arguably this represents a reduction in the level of protection afforded to the complainant, since under the previous position, the fact of unconsciousness meant that, as a matter of law, the complainant could not consent – *see Larter and Castleton*, [1995] Crim. L.R. 75 and *Malone*, [1998] Crim. L.R. 834.

62. Sexual Offences Act, 2003, § 75 (U.K.).

purpose of the act or has intentionally induced the complainant to consent by impersonating someone she knows.⁶³

A number of commentators have welcomed this framework's efforts to provide greater guidance on the issue of sexual consent, and thereby to improve the consistency and predictability of court decisions in rape cases. Its elevation of at least some situations of intercourse under questionable circumstances to a position in which non-consent is presumed has been welcomed for sending out important social signals about the boundaries of acceptable sexual behavior. It has been submitted that this will encourage more rape complainants to report their experiences to the police and secure an increased number of convictions; these being core goals driving the reform process. Despite this, however, these provisions have also come under considerable criticism. Commentators have, for example, questioned the wisdom of setting up a hierarchy of rape, of the sort implied in this three-pronged approach. In addition, concerns have been expressed about the categorization of circumstances as between sections 75 and 76,⁶⁴ and a number of critics have challenged the decision to make the list of section 75 circumstances exhaustive, lamenting the omission of other situations of dubious consent, such as where the complainant is subjected to non-violent threats or is self-intoxicated.⁶⁵

Of course, where these presumptions do not to apply, this simply reverts the evidential balance between prosecution and defense back to that which it would have hitherto been. In these situations, the definition of consent under section 74 resumes its central role, as do the provisions under section 1(2) in regard to the evaluation of the reasonableness of belief. While the legislation's attempt here to bring about a more communicative understanding of sexuality, grounded in agreement about intercourse *between* the parties, rather than on a presumption of male proposition, has been applauded, it has been argued that these provisions also present substantial difficulties. In requiring that a person must have

63. Sexual Offences Act, 2003, § 76 (U.K.).

64. Jennifer Temkin & Andrew Ashworth, *supra* note 4, at 336-37; Jenny McEwan, *Proving Consent in Sexual Cases: Legislative Change and Cultural Evolution*, 9 INT'L J. EVID. & PROOF 1, 20-21 (2005).

65. See generally Emily Finch & Vanessa Munro, *The Sexual Offences Act 2003: Intoxicated Consent and Drug Assisted Rape Revisited*, 2004 CRIM. L. REV. 789. For further discussion on issues surrounding intoxicated sexual consent, see Emily Finch & Vanessa Munro, *Intoxicated Consent and the Boundaries of Drug-Assisted Rape*, 2003 CRIM. L. REV. 773; Karen M. Kramer, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115 (1994); Alan Wertheimer, *Intoxicated Consent to Sexual Relations*, 20 LAW & PHIL. 373 (2001); and Nicholas Dixon, *Alcohol and Rape*, 15 PUB. AFF. Q. 341 (2001).

the freedom and capacity to make the relevant choice, the definition of consent under section 74 of the Sexual Offences Act 2003 directs attention more clearly than in the past to the context in which agreement to intercourse is given or refused. In turn, this offers the potential for a less one-dimensional understanding of agency, which acknowledges the reality that the outcome of the consent binary cannot be radically divorced from the circumstances under which the choice is made. This suggests a protection of the value of sexual autonomy which, if interpreted broadly, *could* permit a more complex analysis of the power dynamics and cultural pressures that operate to constrain a person's freedom and capacity to make sexual choices. In reality, however, the extent to which section 74 is capable of producing this result remains uncertain.

Terms such as freedom, choice and capacity can be interpreted in radically divergent and often minimalist ways. In the specific context of the Sexual Offences Act 2003, it is clear that these terms are not intended to imply absolute freedom or choice. As a result, however, "all the questions about how much liberty of action satisfies the 'definition' remain at large."⁶⁶ Responsibility for this interpretation is left first in the hands of the judiciary and then with jurors who will apply judicial guidance to the circumstances of each case.⁶⁷ In recent case law, however, the judiciary has been reluctant to propose any substantive development of these tests in the directions that are given to the jury,⁶⁸ and recent research with mock jurors – conducted by the author – indicates significant variability in the way in which these ideas of freedom and capacity will be applied.⁶⁹ Indeed, without greater guidance, it seems that the new legislation – though intended to promote

66. Temkin & Ashworth, *supra* note 64, at 336.

67. *Id.*

68. See, e.g., R. v. Bree, [2007] EWCA (Crim) 256. For an excellent discussion of this judgment and the issues arising therefrom, see Philip Rumney & Rachel Fenton, *Intoxicated Consent in Rape: Bree and Juror Decision-Making*, MOD. L. REV. (forthcoming 2008) (on file with author).

69. Emily Finch & Vanessa Munro, *Breaking Boundaries: Sexual Consent in the Jury Room*, 26 LEGAL STUD. 303, 315-16 (2006) [hereinafter Finch & Munro, *Breaking Boundaries*]. While some jurors read the legislation as requiring something "active rather than passive" - as "saying that consent isn't just being there and not saying no" - many others adopted a different position, commenting: "I think maybe that's why she consented, because she didn't say anything" or "in order to not consent you have to . . . she has to actually make it clear that she has not consented." *Id.* at 316. Even in the case of a heavily intoxicated complainant, moreover, a number of the jurors illustrated the tenacity of the force requirement insisting that they would expect to find evidence of struggle / injury to establish non-consent. *Id.* For further discussion of the mock jurors' discussions around the issue of intoxication in particular, see Finch & Munro, *Demon Drink*, *supra* note 39.

a more proactive and communicative understanding of sexuality – may do little to prevent jurors from continuing to presume consent in the absence of positive dissent.⁷⁰

Similar problems emerge, moreover, in regard to the provisions under the Act relating to the defendant's belief in consent. The Sexual Offences Act 2003 shifts the position from one in which an honest, albeit unreasonable, belief in consent sufficed to absolve the defendant of liability, to one in which any such belief must be reasonable. While this represents a (not uncontroversial) departure from ordinary standards of criminal responsibility, it was accepted that there were peculiar and legitimate grounds for holding defendants to a higher level of accountability in the rape context. In particular, it was deemed to be relevant that the parties would be in close proximity, such that the defendant's responsibility to ensure consent could be easily discharged, and that intercourse in its absence would constitute both a violation of the victim's bodily integrity and a disregard for her sexual autonomy. But even if imposing a reasonable belief threshold can be justified on these grounds (and I believe that it can), it is less than clear that it will operate in practice to hold defendants to a higher level of accountability.

There is, after all, considerable evidence of tenacious and popular, but fundamentally questionable, views about 'appropriate' sexual behavior in our society. Of course, the fact that many people believe that women who say no do not always mean it, or that men are entitled to use proactive strategies to secure intercourse,⁷¹ does not speak to the reasonableness of those beliefs as such, but it does suggest that these views are more likely to be deemed reasonable when assessed by a jury of peers in the rape trial. Certainly, in the mock study mentioned above, it was clear that jurors often deduced sexual consent (or at least the defendant's reasonable belief therein) from other, unrelated, events that

70. *Id.* See also Emily Finch & Vanessa Munro, *Of Bodies, Boundaries and Borders: Intoxicated Sexual Consent Under the Law of Scotland and England*, JURIDICAL REV. 53 (2005); Finch & Munro, *Juror Stereotypes*, *supra* note 39.

71. E. Sandra Byers & Paula Wilson, *Accuracy of Women's Expectations Regarding Men's Responses to Refusals of Sexual Advances in Dating Situations*, 8 INT'L J. OF WOMEN'S STUD. 376, 385 (1985). In the Byers and Wilson study, fewer than 40% of male and female respondents interpreted a woman's direct, unqualified refusal to mean that she wanted a man to immediately stop his advances. *Id.* at 384. This skepticism may be attributed to belief in 'scripted refusals' by women who wish to engage in sex, but who wish to avoid the appearance of sexual promiscuity. Charlene L. Muehlenhard & Marcia L. McCoy, *Double Standard / Double Bind: The Sexual Double Standard and Women's Communication About Sex*, 15 PSYCHOL. WOMEN Q. 447, 448-49 (1991); Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women's Token Resistance to Sex*, 54 J. PERSONALITY & SOC. PSYCHOL. 872, 874 (1988).

lacked temporal correspondence with the intercourse. The introduction of these wider circumstantial factors allowed jurors to rely on a range of (ill-founded) views about ‘appropriate’ socio-sexual interaction. Thus, for example, several jurors argued that it would be reasonable for the defendant to believe that the complainant was consenting to intercourse if she “had been drinking all night and flirting with him.”⁷² The likelihood that such patterns will emerge in ‘real’ jury deliberations is strengthened, moreover, by section 1(2) of the Sexual Offences Act 2003, which, rather than relying on a ‘reasonable person’ standard, adopts a general test of what is reasonable in all the circumstances.⁷³ Critics have argued that, if interpreted broadly, this test not only permits, but *invites*, jurors “to scrutinise the complainant’s behaviour to determine whether there was anything about it which could have induced a reasonable belief in consent.”⁷⁴

At the same time, moreover, this phrasing of the *mens rea* test also permits scope for the personal characteristics of the defendant to play a role in assessing reasonableness. Introduced to permit flexibility in the case of defendants who exhibit individual characteristics (youth, low IQ, etc.) that make an unmodified objective standard unduly harsh, section 1(2) refuses to specify which circumstances and characteristics are relevant, and in Parliamentary debates preceding the legislation, it was suggested that the judge and jury would determine this in every case.⁷⁵ But, as Catharine MacKinnon has insisted, “[t]o attempt to solve [the problem of rape] by adopting reasonable belief as a standard without asking, on a substantive social basis, to whom the belief is reasonable and why – meaning, what conditions make it reasonable – is one-sided: male-sided.”⁷⁶ In the context of the Sexual Offences Act 2003, Sharon Cowan has developed this position, cautioning that this legislative flexibility in favor of the defendant may be secured at the cost of rendering it reasonable for an accused who has “led an especially sheltered life, in a rural place, within a sexist family, has not been schooled in the shifting gender power relations of the twenty-first century” to believe, for example, that a woman is consenting to intercourse despite her verbal protestations.⁷⁷

In the final analysis, then, it seems that while the Sexual Offences

72. Finch & Munro, *Breaking Boundaries*, *supra* note 69

73. Sexual Offences Act, 2003, § 1(2) (U.K.).

74. Temkin & Ashworth, *supra* note 64, at 341-42.

75. Lord Falconer, 648 PARL. DEB., H.L. (5th ser.) (2003) 1074-75.

76. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 15, at 183.

77. Cowan, *supra* note 4, at 62.

Act 2003 *could* be interpreted and applied by the courts in a truly progressive way that would redress many of the substantial concerns that have been raised above in regard to consent in general, and sexual consent in particular, it is far from clear that it will operate in this way in practice. To some extent, of course, this conclusion raises inevitable questions about the relationship between legal reform and social change, and more specifically about whether the promotion of a genuinely context-sensitive and deconstructed understanding of sexual consent can – or indeed should – be something that we look to the criminal law to achieve. These questions will be reflected upon further in the following section, which also develops an argument in favor of a ‘consent-plus’ model that acknowledges the influence of external pressures on personal self-determination and – without necessarily seeking their elimination – subjects these forces to critical scrutiny, in the hope of moving beyond false consciousness or ‘submit to survive’ acquiescence and towards a self-reflective and experientially correspondent sense of (sexual) autonomy.

IV. DECONSTRUCTING CHOICE: FREEDOM, CAPACITY & REASONABLENESS IN THE SEXUAL CONTEXT

The Sexual Offences Act 2003 provides a useful illustration of the extent to which legal standards that at first sight appear to be exacting will often fail to translate into demanding thresholds when removed from the lofty isolation of abstract theorizing and transposed into the messy realities of everyday socio-sexual life. As discussed above, the notion that women meaningfully consent to sex only where they exercise a choice to do so, in conditions in which they enjoy both freedom and capacity, indicates a rigorous threshold that has the potential to render non-consensual many mundane instances in which women engage in intercourse with male partners / spouses purely out of a sense of relational obligation, to strengthen their relative bargaining position, or in pursuit of improved social status. In practice, however, the legislation is likely to be interpreted in a significantly more reductive way, with the existence of freedom and capacity being evidenced by the absence of obvious counter-veiling coercion, deception, or stupefaction.

No doubt, there are many who would defend precisely such an approach – insisting that anything other than this ‘consensual minimalism’ would be both unjust and unjustifiable, expanding the reach of the state into our private and sexual lives in hitherto unprecedented ways and imposing upon male suitors an arduous burden to discharge

their potential criminal responsibility for non-consensual intercourse by undertaking an investigation, not only of the averred articulations of their partners, but also of their inner desires, motivations, and psyche, as well as of their levels of social and economic power.⁷⁸ While (at least some of) these concerns may be legitimate, it will be argued in this section that this kind of totalizing ‘all-or-nothing’ perspective is disappointing. There is a real danger that, without some more proactive development, this new piece of legislation will simply re-trace the steps of its predecessor. Focusing attention only on the most obvious impediments to agency, it risks undermining the more progressive intentions of (some of) its drafters by failing to offer any more sophisticated analysis of the boundaries of permissibility in the myriad sexual scenarios in which, despite the absence of such impediments, it is clear that full and free choice is nonetheless lacking.

Theorists who, in the past, have sought to challenge this kind of minimalist approach have often done so by adopting a ‘consent-plus’ model, according to which something more than a mere token of acquiescence (or even affirmation), in the absence of coercion or deception, is required in order to render sexual contact (legally / morally) permissible. Theorists like Eva Kittay,⁷⁹ Lois Pineau,⁸⁰ Elizabeth Anderson,⁸¹ and Martha Chamallas⁸² have, in their different ways, all insisted that reciprocal sexual desire, experiences of sexual pleasure, or mutual sexual attraction and affirmation of an emotionally intimate relationship must also accompany a token of sexual consent in order to render it an expression of genuine agency; and have disputed the validity of ‘consensual’ sex embarked upon for any other (instrumental) reason. These theorists are to be commended for their efforts both to

78. The threshold of ‘consensual minimalism’ has recently been defended by Alan Wertheimer. ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 130 (2003). He defines it as entailing that “a sexual relationship is permissible if it is consensual in some reasonably straightforward sense. . . .” *Id.* Thus, while any circumstances of force, coercion or deception stand to be evaluated in terms of their effect on the validity of consent, in the absence of these conditions, a *prima facie* token of consent will be sufficient in itself to render sexual contact permissible. *Id.* at 140. For an examination of the merits and demerits of Wertheimer’s analysis of sexual consent, see Vanessa Munro, *Concerning Consent: Standards of Permissibility in Sexual Relations*, 25 OXFORD J. LEGAL STUD. 335 (2005).

79. Eva Fede Kittay, *Ah! My Foolish Heart: A Reply to Alan Soble’s “Antioch’s ‘Sexual Offence Policy’: A Philosophical Exploration”*, 28 J. SOC. PHIL. 153 (1997).

80. Lois Pineau, *Date Rape: A Feminist Analysis*, in DATE RAPE: FEMINISM, PHILOSOPHY, AND THE LAW 1 (Leslie Francis ed., 1996).

81. ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993).

82. Martha Chamallas, *Consent, Equality and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988).

interrogate behind the veil of affirmative tokening in the (hetero)sexual context and to render the transformative power of consent contingent upon a higher standard of subjective engagement and wantedness. Their insistence upon the importance of mutuality in sexual contact is valuable, especially in a context in which there is considerable evidence that women do engage in 'consensual but unwanted' sexual relations with men.⁸³ At the same time, however, these approaches have been criticized for arbitrarily privileging some reasons for engaging in intercourse over equally viable alternatives, with little clear justification. While this presents a powerful model, it risks excessive protectionism, as well as a problematic refusal to engage with the narratives of many women who consciously participate in sexual intercourse in exchange for other benefits, without any resultant sense of self-alienation, exploitation, or violation.

In light of this critique, a more promising way of moving beyond 'consensual minimalism' may be found in the claim that genuine agency is expressed, not simply when individuals are in a position to articulate and implement their desires, but when they have hitherto 'taken charge' of those desires in a particular way.⁸⁴ At the heart of this approach is a privileging of people's 'programmatic' choices about how they really want to live their lives over their more impulsive and intuitive 'episodic' preferences.⁸⁵ Under this approach, before she can exercise a meaningful and transformative choice, the female agent must have adopted a seriously self-engaged and evaluative approach to the sexual act in question. This does not mean that she can only become involved in serious sexual relationships, but it does mean that the decision to engage in more frivolous exchanges must be the outcome of serious reflection and endorsement. Without jettisoning the importance of mutuality or underestimating the impact of disciplinary norms and disparities of power / resources, this approach shifts, then, from the substantive consent-plus model of Kittay et al. towards a more

83. A survey conducted in the United States, for example, revealed that while 91% of female respondents indicated that their first experience of intercourse was consensual, one quarter of them nonetheless rated its level of wantedness as low (4 out of 10 or below). See JODY RAPHAEL, *SAVING BERNICE: BATTERED WOMEN, WELFARE AND POVERTY* 49 (2000). For further discussion of this survey, see Joyce Abma, Anne Driscoll & Kristin Moore, *Young Women's Degree of Control over their First Intercourse: An Exploratory Analysis*, 30 *FAM. PLAN. PERSP.* 14 (1998).

84. John Stuart Mill, *On Liberty*, in *UTILITARIANISM, ON LIBERTY ESSAY ON BENTHAM* 189 (Mary Warnock ed., 1962). For further discussion on this, see ONORA O'NEILL, *AUTONOMY AND TRUST IN BIOETHICS* 31 (2004).

85. For further discussion of this distinction between episodic and programmatic choice, and its implications on the operation of autonomy, see DIANA T. MEYERS, *SELF, SOCIETY, AND PERSONAL CHOICE* (1989); *FEMINISTS RETHINK THE SELF* (Diana T. Meyers ed., 1997).

procedural insistence on critical reflection about the reasons that underpin, constrain, construct, and motivate our choices. According to Stephen Schulhofer, this model demands that agents engage in “conscious reflection about preferences and a deliberate choice of one’s goals.”⁸⁶ It is not enough to ensure that a person’s preferences are not “deformed by false beliefs, artificially constraining cultural pressures, or the need to minimize psychic stress.”⁸⁷ Indeed, active steps must also be taken – if necessary by the state – to ensure what Joseph Raz has called ‘autonomy’ competence.⁸⁸ Thus, this approach goes beyond the minimalist baseline, not only insisting that there be an absence of immediate obstacles to valid consent (e.g. coercion or deception), but also that adequate education be provided to enable people to manage their long-term self-determination, that a range of genuine and realistic alternatives be made available for people to choose from, and that a culture be promoted which actively encourages introspection about one’s personal desires.⁸⁹

As Alan Wertheimer has argued, it may be reasonable to assume, *prima facie*, that a person who tokens consent to sexual relations always does so expecting some kind of reciprocal benefit.⁹⁰ What the consent-plus model emphasizes, however, is that it is not enough to simply take this expectation, or the motivations that underpin it, at face value. While there is flexibility here as to its substantive content, the extent to which the consenting party genuinely endorses and values this benefit (in the overall context of her unique life narrative, personal relationships, and subjective desires) remains central. And this is important since, as discussed above, the construction and constraint imposed on women’s (sexual) agency – by a complex network of socio-economic inequality, cultural expectations and relational obligations that encourage submissive femininity and controlled (but available) sexual access – make it likely that there will be many situations in which a woman will engage in sexual exchanges in pursuit of a benefit that, on closer inspection, she does not endorse.⁹¹ Imagine, for example, a woman who

86. SCHULHOFER, *supra* note 46, at 106

87. *Id.*

88. JOSEPH RAZ, THE MORALITY OF FREEDOM 203-06 (1986).

89. SCHULHOFER, *supra* note 46, at 106.

90. WERTHEIMER, *supra* note 78, at 140.

91. Abrams, *supra* note 45, at 764-65. Debate over the legitimacy, and possibility, of consent emerges in a range of contexts involving women’s sexuality – these are particularly prominent, for example, in debates around prostitution policy and sex trafficking, but also feature in discussions about pornography, marriage, compulsory heterosexuality, and compulsory motherhood, etc. For

has sex with her male partner, not so much because she wants to, but because she knows that he wants her to. In the absence of overt coercion or deception, this would be condoned and normalized as an unproblematic instance of consensual sex under a minimalist approach. But under this more ambitious consent-plus model, that conclusion would have to be postponed pending an investigation of the context of, and motivations underpinning, the intercourse. If the woman complied because she loves her partner, values their relationship and knows that responding to his sexual advances is important to its health, this may be a legitimate expression of agency, reflecting her endorsement of the benefits that accrue to her as a result of the exchange. By contrast, if she complied because she fears she cannot survive financially without him or is afraid of his (as yet unthreatened) retribution in the event of rebuttal, her involvement emerges as self-alienating, undertaken in pursuit of an unendorsed benefit, and thus problematic. This approach continues, therefore, to track the expectation of reciprocal benefit but, unlike more minimalist analyses of sexual agency, it interrogates the context of decision-making to ensure actual rather than assumed subjective value. Amongst other things, this has the benefit of paying close attention to the diverse ways in which both institutionalized structures of power / knowledge and localized familial / communal imperatives influence an individual's desires. In so doing, it also confronts the willful blindness of the dominant rhetoric around agency, self-determination, and consent, and – crucially – serves to reconnect an abstract sexual choice with the concrete context in which that choice is framed, selected, and then acted upon.⁹²

Perhaps most significantly, this model creates a forum in which agency can be encouraged, fostered, and exercised without resort to a utopian vision of self-determination in which constraint and construction are transcended, avoided, or eliminated. Centering on the endorsement of some anticipated reciprocal benefit as the necessary companion to any apparently valid token of consent, this approach does not demand that people be elevated from the practical and theoretical limitations that impinge upon their decision-making. Instead, it is enough that the parties, exercising choice within the social constraints incumbent upon them, have critically evaluated, and then integrated the values reflected

further development of the ways in which exchanges operate in sexual relations, see LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* (1998).

92. For recent re-engagements with female agency, see, for example, LOIS MCNAY, *GENDER AND AGENCY: RECONFIGURING THE SUBJECT IN FEMINIST AND SOCIAL THEORY* (2000); and DIANA T. MEYERS, *GENDER IN THE MIRROR: CULTURAL IMAGERY AND WOMEN'S AGENCY* (2002).

in the choices that they make. Thus, while other approaches might dictate that the prostitute who tokens consent to sex in exchange for money can *never* be exercising genuine agency, this approach asserts that – in the absence of the control of pimps or the compulsion of drug-addiction, etc. – this *may* constitute a meaningful choice, so long as she has previously both reflected upon and reconciled (as at least some sex workers appear to do) her selling of sex as a coherent and endorsed aspect of her life narrative. Of course, this in no way entails that we should divert attention away from interrogating the broader socio-economic constraints that impact upon this woman in her reflective process, challenging them where necessary in pursuit of a more just distribution of resources and expectations. But it does ensure that the focus is on those instances in which the parties experience the pain of self-alienation and a lack of ‘wantedness’ through their sexual participation. As a result, it allows critical engagement with the discursive and relational circumstances that define the confines of a person’s sexual decision-making, without submerging that person’s ability to speak within the structural dictates of these circumstances – and it makes it clear that, as Brenda Baker has argued, “[i]t is not reasonable to expect consent to do all the work needed for sexual equality. . . .”⁹³

A. *Legislating for Critical Reciprocity - Promoting Justice or Just Convictions?*

Nicola Lacey has suggested that “[w]hile the idea of autonomy as independence seems directly relevant to the wrong of rape, it dominates at the expense of the development of a positive conception of what kinds of sexual relationships matter to personhood.”⁹⁴ Building on that insight, discussion in this section has sought to develop an approach that would better attend to this deeper understanding of personhood. Where the conventional model of agency has tended to ignore background factors of social constructionism, and more radical critique has paternalistically overruled their effects, this approach respects the agent’s felt convictions whilst insisting that the benefits perceived to accrue in any sexual exchange are always subjected to critical analysis. As a result, it demands a serious engagement with the question of whether the intercourse in question was not only not resisted and not

93. Brenda Baker, *Understanding Consent in Sexual Assault, in A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE* 49, 64 (Keith Burgess-Jackson ed., 1999).

94. UNSPEAKABLE SUBJECTS, *supra* note 14, at 117.

undertaken as a result of coercion / deception, but was also welcome, wanted and non-alienating when judged from the experiential point of view of the parties.

While this model provides a standard of sexual intimacy that, it is submitted, we should aspire to privilege in the myriad social sites in which disciplinary discourses are constituted and circulated, there can be little doubt that transposing it into a fair and efficient legal framework is no easy task. For one thing, the process of tracing the integration of values within a person's life-plan may be too complicated for an instrument as notoriously blunt as the law to accommodate well. Not only are there concerns about how we would go about locating the evidence with which to make assessments on the legitimacy of a person's preferences, but there are also problems with the state's ability to make determinations on such issues from its necessarily detached perspective. In addition, there are public policy reasons to avoid allowing the law to over-reach into areas of personal living, and it would be a substantial departure from practice in other areas if we were required to interrogate *prima facie* valid tokens of sexual consent in order to assess their integration within a person's overall life-plan. Of course, the fact that state intervention is generally treated with suspicion does not entail that it is always unjustifiable, and it may be that in this context there are compelling reasons – grounded in the value of autonomy and the need to prevent other-imposed harm – that permit this kind of investigation wherever the less coercive mechanisms engaged at other disciplinary sites have failed to impact adequately upon sexual negotiation practices.⁹⁵

Perhaps more significantly, though, the adoption of this approach in law would also give rise to some very difficult questions from the defendant's point of view. Even assuming that the law is capable of engaging with contextual and psychic nuances sufficiently to recognize and accredit those situations in which a woman's token of consent to intercourse is not in fact supported by a critical endorsement of the benefits associated with the exchange, it may be unduly demanding to hold a defendant criminally liable for rape as a result of his failure to do the same. Indeed, in a context in which the defendant may have already taken reasonable steps to secure the woman's token of consent, to insist that he must also ensure that this token is not tainted with self-alienation

95. For further discussion on the nature of these negotiation strategies – and a defense of their legitimacy – see, in particular, Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401 (2005).

(generated, perhaps, by subtle social or psychic dynamics out with his control) may seem excessively burdensome – and some would add, highly unromantic. This may be particularly so in the case of a defendant who has had no (or a limited) prior relationship with the complainant, and who, as a result, would be wholly ill-placed to assess whether her tokened affirmation (or even initiation) of sexual intercourse *really* means yes.⁹⁶

Bearing in mind these difficulties, the upshot of transposing this model into law may be one in which feminist victories won at the *actus reus* stage in rape trials will be un-done by assessments of *mens rea* that refuse to see the defendant's belief in consent as unreasonable. For those who pursue rape law reform purely in order to secure greater convictions, this may emerge, in the final analysis, as somewhat disappointing. But at the same time, as was acknowledged in the drafting of the Sexual Offences Act 2003, the role of law in society extends beyond the confines of the criminal courtroom. Indeed, this re-engagement with the consent threshold affords an opportunity for the law to lead by example, holding out a model of sexual relations that takes both mutuality and reciprocity seriously, and thereby generating attitudinal changes that may, in time, permit holding defendants to a higher level of accountability in regard to their sexual communication strategies. In addition, the extent to which this approach puts the experiential perspective of the complainant centre stage, at least in its evaluation of the *actus reus* component of the offence, is itself symbolically important, since this perspective has too often been neglected, distorted or rejected in the rape context by both legal and feminist analyses.

Notably, as discussed above, the Sexual Offences Act 2003 is already drafted in terms that would permit it to move in this kind of critical reciprocity consent-plus direction. It is true, in fact, that a fully expansive interpretation, in which the concepts of freedom and capacity would retain the hue of transcendence and self-willed action associated with their Enlightenment origins, would actually pose the threat of being *over-inclusive*. Perhaps it is the specter of this that lies behind the judicial reluctance, evidenced in case decisions to date, to flesh out the contours of the new legislative tests on consent in a way that would require jurors to abandon their typically minimalist interpretive baseline.

96. I am grateful to Sharon Cowan for pointing out that there is, of course, a counter to this, which would insist that these are precisely the situations in which men should be held to a higher standard, since they have no background context of a relationship against which to judge the quality of the token of consent.

Whatever the reason, it is submitted that – to fulfill its progressive potential – the legislation, and any subsequent law reform that builds upon it, must embrace rather than abandon the (messy) middle ground between minimalism and utopianism staked out here. Whether this requires more legislative intervention, expanded judicial instructions, targeted (myth-dispelling) education for jurors, or a combination of all three, remains to be seen, but it is telling – and appropriate – that policy-makers in England and Wales should be considering these strategies so soon after the passing of the Act.⁹⁷

V. CONCLUSION

Women (and many men) are enmeshed in institutionalized structures of power-knowledge that often thwart “their efforts to achieve [] cognitive and moral autonomy,” such that they “too often live as self-fulfilling prophecies” conforming to normative roles that have been scripted for them rather than developing extensive and expansive avenues for effective agency.⁹⁸ In a context in which the terrain of social, political, and economic power is far from gender equal and a woman’s sexuality can be deployed to secure greater benefits, it is perhaps unsurprising that many women engage in sex that is not genuinely experienced by them as ‘wanted.’ There are certainly strong reasons to continue to criticize and challenge these differential distributions of social benefit, but – as noted in regard to Catharine MacKinnon’s work – there is little to be gained by blanket refusal to accredit any tokens of (sexual) consent issued by women under current conditions. In any social context, a person’s preferences are never entirely self-generated, and to attribute an individual woman’s experiences of autonomy to false consciousness or patriarchal complicity may be to misrepresent her own position as well as to overstate the parameters of agency that are achievable for women (or men) in a post-patriarchal world.

Of course, it is important not to conflate a token of consent with an expression of wantedness, but problematising the gulf between these two triggers for intimacy does not require the rejection of the consent

97. Proposals to provide clearer definition on the meaning of capacity for the purposes of section 74 and to introduce general expert evidence to educate jurors about the realities of rape were put forward for public consultation in 2006. The Government’s response to this consultation exercise has yet to be finalized, but it is notable that the proposals have been rejected by the judiciary and others as being unnecessary. Home Office, *Convicting Rapists*, *supra* note 4.

98. Lorraine Code, *The Unicorn in the Garden*, in *WOMEN AND REASON* 263, 265 (Elizabeth D. Harvey & Kathleen Okruhlik eds., 1992).

threshold so much as the rejection of any minimalist interpretation thereof. Adopting the more demanding consent-plus model offered here cannot, and does not, purport to resolve all the dilemmas that will arise when we examine the legitimacy of tokens of consent uttered in everyday socio-sexual life. It does, however, ensure that we begin to ask the right questions – questions that pay attention to the narratives presented by those who claim agency without taking their affirmations at face value, and that avoid the double-bind between ignoring and resigning ourselves to constraints on free choice. What is required is not only a token of affirmation but also a sensation – not so much of control over the social structures that shape our lives (which may be illusory) – but of critical endorsement of the way in which the dictates of those structures are integrated and incorporated into personal narratives.⁹⁹ While the Sexual Offences Act 2003 in England and Wales offers the potential for this kind of approach, it is unlikely to produce it, particularly in a context in which the judiciary are stubbornly resistant to claims that concepts of ‘freedom’ or ‘capacity’ require explanation, in which liberal ideals of abstract subjectivity and unfettered autonomy fail to capture reality, and in which jurors (immersed, by contrast, in that reality) cling to minimalist interpretations.

99. JANA SAWICKI, DISCIPLINING FOUCAULT – FEMINISM, POWER, AND THE BODY 37 (1991) (quoting Karen Rian, *Sadomasochism and the Social Construction of Desire*, in ROBIN RUTH LINDEN ET AL., *AGAINST SADOMASOCHISM: A RADICAL FEMINIST ANALYSIS* 49 (1982)).