

Sexual Activity, Consent, Mistaken Belief, and *Mens Rea*

Peg Tittle

ptittle7@gmail.com

www.pegtitle.com

Abstract

The gendered subcultures of our society may have different value systems; sexual activity which involves members of these subcultures may be, therefore, problematic, especially concerning the encoding and decoding of consent; this has serious consequences for labelling the activity (as sex or sexual assault). Conceiving consent not as a mental act but as a behavioural act (i.e., using a performative standard) would eliminate these problems.

However, if we remove the mental element from one aspect, then to be consistent, we must remove it from all: the 'mistaken belief' defence would then be eliminated and *mens rea* would become insignificant (if what the woman *means* is irrelevant, then what the man *believes* or *intends* should also be irrelevant).

This suggests major changes to our current conceptions of legal justice which, if undesirable, prompt reconsideration of the initial proposal to use a performative standard for consent.

Sexual Activity, Consent, Mistaken Belief, and *Mens Rea*

I - Consent

While consent is significant in at least four spheres--moral,ⁱ personal,ⁱⁱ conceptual,ⁱⁱⁱ and legal--I am concerned in this paper with only the latter: the legal sphere. Simply put, consent can determine legality: when consent is present, an act may be legal; when consent is absent, that same act may be illegal. For example, if I consent to your use of my car, it can be called 'a loan'; if I do not consent, it is called 'theft.' In the case of sexual action, consent is the difference between legality and illegality: if I consent to sexual interaction, it can be called 'having sex'; if I do not consent, it is called 'sexual assault.'

Most definitions of consent include the following as requisite constituents: capacity (the ability to understand and so form a judgement about giving or withholding consent), informedness (knowledge of the procedure, its risks, its benefits, its alternatives), and voluntariness (self-determination, autonomy).

These constituents are not discrete qualities: one is more or less capable, more or less informed, and more or less voluntary. Consent, therefore, is also a matter of 'more or less'. In the legal sphere, however, we need to establish clear-cut lines, and that is one problem: *how* capable, informed, and voluntary is capable, informed, and voluntary *enough*? Most answers resort to some standard of reasonableness, but this standard is difficult to define clearly: values get in the way, and in our still sexist society, these values are often gendered--'the reasonable man' may not be the same as 'the reasonable woman'^{iv}.

Further, each of these constituents, capability, informedness, and voluntariness, is a mental state. Conceiving consent as mental (a mental act, if you wish) presents many problems. Since we are not telepathic, consent must be expressed--and herein lies the problem. On the one hand, the values of our patriarchal culture interfere with the 'sending'; on the other hand, they interfere with the 'receiving.'

One of the errors that Barber describes, speaking of consent in medical therapy and research, is 'the communicative error,' which assumes that good communication is sufficient. I think the platitudes 'just say no' and 'no means no' are instances of this error. As Barber says, consent is not simply a matter of 'good communication'; he asserts that we need to use certain values and norms to *define* what constitutes proper and sufficient communication, and we need better social control mechanisms to see that barriers to effective communication are removed (6-7).

Which values and norms is a problem. As Kluge points out, "We tend to assume that because we speak the same language and because we function in the same national setting, we therefore share the same general framework of concepts and values" (123). There are subcultures, however; and to some extent, there are subcultures according to sex, each with a different framework of concepts and values. Insofar as the sexual situation is one in which men and women, members of different subcultures, meet, it is a situation bound to be fraught with mistaken assumptions.

Men are socialized to be active and women are socialized to be passive; men tend to be the consent-seekers and women tend to be the consent-givers.^v Since it is up to the woman, then, to give or withhold consent, the woman is the 'gate-keeper.'

Part of this socialization is the belief that virtuous women cannot get raped (Brownmiller 386): a woman is, after all, the gate-keeper, and if she's virtuous she'll say no. This myth, amazingly enough, denies male force. It also ignores the possibility that to say 'yes' is an indicator

not of vice, but of a "healthy interest in sex, . . . a chronic history of victimization . . . a spirit of adventure, a spirit of rebellion, a spirit of curiosity . . ." (Brownmiller 386).

Extended, the gender-socialized attributes of active and passive become aggression and submission. Brownmiller explains:

The real reason for the law's everlasting confusion as to what constitutes an act of rape and what constitutes an act of mutual intercourse is the underlying cultural assumption that it is the natural masculine role to proceed aggressively toward the stated goal, while the natural feminine role is to 'resist' or 'submit'. And so to protect male interests, the law seeks to gauge the victim's behaviour during the offending act in the belief that force or threat of force is not conclusive *in and of itself*. (385)

However, according to this perspective, resistance and submission are as equally natural as force, and thus *also* not conclusive. Such a perspective clearly provides a 'barrier to effective communication'!

Considering together the aspects of socialization mentioned so far, namely, that women are passive, women are gate-keepers, virtuous women say 'no,' it is easy to understand that 'no' can sometimes mean 'yes,' because 'yes' cannot be said--'yes' is, after all, active, irresponsible, and unvirtuous. Because women do not fight, a gestural 'no' has also been socially unacceptable, and, consequently, a verbal 'no' has also had to mean 'no'.

In addition to such genuine misunderstandings about whether 'no' really means 'no,' there are also real differences in the definition of acceptability. French explains that some men "do not consider sexual coercion *rape*, they call it 'working a yes out'--talking a girl into sex or getting her high . . . afterward they say 'she was asking for it'" (192).^{vi} And yet twenty to sixty per cent of men, according to various college studies, say they might use force to get sex "*if they could get away with it*" (Russell 8, my emphasis). Surely these men understand that the common consensus is that using force makes the action criminal and *unacceptable*; otherwise why do they say, 'if I could get away with it'? (Russell 8-9).^{vii}

Consequently, there is likely no 'communicative error' after all. Both sexes do in fact understand the values and norms of proper and sufficient communication. The problem is that the values and norms are different for men than for women, and the difference for men may *include* a permission to violate the values and norms of women.

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

Consider the following 'common' example of implicit consent: a woman walking alone in a park at night. For a woman to walk alone in a park at night is to put herself at risk for sexual assault more than for purse-snatching, even though walking in a park at night is a solitary activity and not an inter-sexual interaction (like going to a party with a man). In other words, even though walking alone in a park at night is not connected in any way with having sex, the action is taken to be implicit consent. This kind of reasoning makes implied consent, consent implied by behaviour,

extremely unreasonable. It also makes such consent an example of the double standard of acceptable behaviour: a man walking alone in the park at night would not be understood to be implying consent to sex.

Another gender socialized standard of behaviour that is unreasonably understood as implied consent is maintaining 'an attractive appearance.' This is often the basis of 'the provocation defense.'

Related to implicit consent, and as problematic, is 'the field of consent.' Nyberg explains: "A person may be asked for consent to any of three parts in a power relationship: the plan or system of ideas which is to be implemented, the person(s) in delegating positions, and the particular assignment given" (50). Confusion among these three may cause consent to be unclear: is the woman consenting to her acquaintance or to the sexual activity with the acquaintance? A prostitute may make the field of consent very clear: she explicitly consents to a specific sexual act for a specific sum of money. In contrast, a person on a date may not make it clear at all: she may have simply said 'yes' to going on a date with a specific person, and this may or may not have included consent to sexual acts.

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

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

However, "the 'no means yes' philosophy . . . affords sexual enjoyment to those women who desire it but will not say so--*at the cost of violating the integrity of all those women who say 'no' and mean it*" (Estrich 372, my emphasis).

One last and not insignificant problem is that, in the legal sphere, one is generally held accountable for what one does (behavioural acts), not what one thinks (mental acts). Person A may *want* to kill Person B; A may *think about* killing B; but until A *actually takes action* to kill B, no crime has been committed.

Rejecting consent as a mental act, and conceiving it as a strictly behavioural act,^{viii} that is, using a performative standard,^{ix} eliminates these problems. Actions, including utterances of the word 'yes,' *are* discrete, and so the line can be clear. The question becomes 'did she *say* 'yes'?' and not 'did she *mean* 'yes'?'^x The action is important *not* as an expression of a mental state, to be encoded by the sender and decoded by the receiver, but as an action in and of itself.

Thus, the problems of meaning would be solved if we held people accountable for their actions regardless of contrary socialization, which is what we do in cases other than those involving sex. A man is socialized to be aggressive, but if he punches someone, he can be charged with assault. Similarly, even though a woman is socialized to be coy (to say 'no' instead of 'yes') or unassertive (to say 'yes' instead of 'no'), she too must accept the consequences of her action: 'yes' means 'yes' and 'no' means 'no.'

II - Mistaken Belief

The parallel to consent as a mental act is the defence of mistaken belief: belief, like consent, is a mental event. The problems with this defence underline the problems of considering consent as a mental act rather than as a performative act.

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

According to Vandervort, in cases of sexual assault, the defence of mistaken belief is often made and is often successful.^{xii} Vandervort presents a hypothetical sexual assault trial in which the defendant maintains that the woman's behaviour indicated consent. One might argue that the hypothetical defendant may have been *honestly* mistaken in his belief that the woman consented. But given that the woman said 'no,' she did not say 'yes,' and she did not co-operate, then surely he was being *unreasonable* to believe as he did. Nevertheless, Vandervort observes that "a case of this type would probably be screened out as 'unfounded' by the police or rejected for prosecution by the Crown on the grounds that the mistaken belief in consent was not *sufficiently* unreasonable" (236). This further illustrates the close relation between mistake of fact and consent: both depend on attitudes, beliefs, norms, and values, which are in our society often gendered, as I argued in Part I.

If a performative standard would eliminate the problems with consent, would it also eliminate the problems of mistaken belief? I think it would. Extending the performative standard in this way would have the merit of consistency: if what the woman *means* is irrelevant, then what the man *believes* should also be irrelevant.

III - *Mens Rea*

Mistake of fact refers to the mental act of *belief*; *mens rea* refers to the mental act of *intent*.

There are actually three degrees of *mens rea*: intent, knowledge, and recklessness. Sexual assault requires intent with respect to the application of force but only recklessness with respect to consent. What is relevant to my argument is that both are states of mind: intent refers to "state of mind regarding the consequences or results of [a person's conduct]" (Clarke 28) and recklessness requires "awareness or foresight" of the danger involved (Clarke 29). Knowledge, while not relevant to sexual assault, is also a state of mind: it refers to the "awareness of certain circumstances" (Clarke 28).

And again, to be consistent, if mental state is irrelevant in one case (consent), then it should be irrelevant in all cases. Therefore, because it is a state of mind, *mens rea* itself becomes irrelevant.

Conclusion

I began by arguing (see Part I) that the mental element (state of mind) regarding consent should be taken out and a performative standard used. If the woman's mental state, namely, what she means (capably, informedly, voluntarily), is irrelevant and what she does is all that matters, then the man's mental state, namely, what he believes (honestly, reasonably) or intends, should *also* be irrelevant and what he does should be all that matters. This revision would eliminate the mistaken belief defence (see Part II) and the importance of *mens rea* (see Part III). These are very significant consequences. The second, the elimination of the importance of *mens rea*, suggests major changes to our concept of legal justice.

It may be possible to distinguish between those acts that can be done *unintentionally* and those that cannot. If this distinction is possible, then the significance of *mens rea* will be preserved. For example, killing someone by accident is less reprehensible than killing someone on purpose. But this response to my argument is clearly unacceptable for sexual actions. It is hard to imagine, for instance, sexual intercourse happening unintentionally. For someone to claim, "I intended only to lie on top of her but accidentally my penis entered her vagina," is not very plausible. The problem remains, therefore, at least with regard to sexual action: using a performative standard for consent leads, if we are to be consistent, to the irrelevance of belief and intent.

NOTES

- i. Consent is generally considered to be relevant to moral responsibility: to consent to something is to agree to share responsibility for it, and therefore to accept any blame or praise for it; if one does not consent, one cannot be held morally responsible. In addition to having relevance to moral responsibility, consent can have relevance to moral attribution: an act may be moral when consented to but immoral when coerced.
- ii. That the significance, for example, of sex and sexual assault varies a great deal from person to person (for some it is equal to an evening of entertainment and a mugging, respectively; for others, it is the pinnacle of emotional bonding and the worst possible violation, respectively) suggests that the significance of consent is equally variable. Likewise for other interactions: if I do not care much about my car, I will not care much if you use it without my consent. Consent is thus variably significant in the personal sphere.
- iii. To look at one question of conceptualization, as long as consent is significant, it would seem that sexual assault is being conceptualized as a sexual kind of assault rather than as an assaultive kind of sex because consent potentially distinguishes between assault and non-assault rather than between sex and non-sex.
- iv. "What is 'normal' according to male social norms and 'reasonable' according to male communication patterns and expectations does not accord with what women believe to be reasonable. . . . A woman may believe she has communicated her unwillingness to have sex--and other women would agree, thus making it a 'reasonable' female expression. Her male partner might still believe she is willing--and other men would agree with his interpretation, thus making it a 'reasonable' male interpretation. . . . The use of a reasonable person standard thus has a basic flaw. Courts do not clarify the perspective from which the 'reasonableness' standard should be applied." (Wiener 148-149)
- v. This presumes, however, that giving consent is 'passive'. An argument can be made that not only is consent-giving active, it is *more* active than consent-seeking: consent-giving requires an expressive act (gestural or verbal) that is preceded by a mental act (a decision) whereas consent-seeking requires no such decision; an answer is more active, more committed, than a question.
- vi. That last bit has an interesting double meaning: 'asking for it' as in requesting/consenting, and 'asking for it' as in 'deserved it', like a just punishment.
- vii. It is interesting that sex is acceptable without consent, but a urine test is not--a study has shown that a sizable majority feel that informed consent is necessary for any urine test (Barber 6). 9
- viii. However, Nyberg's view that consent can be *both* a mental act (consenting attitude) and a behavioural act (consenting action) is useful because of the importance of separating *desire for* (a

consenting attitude) from *consent to* (a consenting action): one can desire sex with another but choose not to so engage (i.e., withhold consent).

ix. See, for example, Nathan Brett, Department of Philosophy at Dalhousie University, in a paper titled "Sexual Assault and the Concept of Consent" presented at the Canadian Philosophy Association conference in Calgary, 1994.

x. Of course she could have said 'yes' under coercion. I'm not denying the significance of coercion--it continues to negate consent even when that consent *is* a behavioural and not a mental act.

xi. I am restricting my paper to heterosexual situations, and in the case of assault, to situations in which a male assaults a female.

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

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