

The Opposite of Rape

JOHN GARDNER *

1. Rape in contrast with what?

Nicola Lacey once lamented that a theoretical focus on rape, with its ‘individualised notion of consent’, tends to come ‘at the expense of the development of a positive conception of what kinds of sexual relationships matter to personhood.’¹ Although I might be inclined to replace the words ‘matter to personhood’ with something less lofty, I totally agree with Lacey’s point. It was under Lacey’s influence, indeed, that Stephen Shute and I tried some years ago to locate rape in the moral landscape of human sexuality, hoping to explain *in contrast with what* rape

* All Souls College, Oxford. For thoughtful questions and comments, thanks to participants in the conference ‘Rape: Rethinking the Orthodoxy’ at the University of Nottingham in April 2015. Also to Annalise Acorn, Tim Macklem, and Martha Nussbaum for subsequent detailed discussion. Cornell Law School proved to be an inspiring and illuminating environment in which to rework the paper in September 2015. A later draft was presented at the University of Oslo, where I benefitted from many valuable suggestions, notably from Lars Christie, Franco Trivigno, and Anna Smajdor. The final version benefits from further improvements suggested by Les Green, Cécile Fabre, Hassan Dindjer, and by two *Oxford Journal of Legal Studies* referees; also by articles editor Richard Ekins. Many thanks to all of these kind folks.

¹ Lacey, ‘Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law’, *Canadian Journal of Law and Jurisprudence* 11 (1998), 47 at 62, reprinted in Lacey, *Unspeakable Subjects* (Oxford 1998).

is such an outrage.² Naturally, we did not attempt to develop a general ethics of sex. In exploring the opposition between rape and good sex, our essay made only a limited and faltering start. In fact, we floated just two ideas on the subject.

(a) We suggested that from good sex to rape there are at least two large steps. The first is sexual objectification of another; the second is disregard for his or her lack of consent. These may be psychologically connected but they are conceptually distinct. There are plenty of cases in which the relevant objectification is present, but the disregard is not. They include much that goes on in the commercial sex industry, but also, maybe more insidiously, quite a bit of mainstream marketing and movie-making and the like. We thought that people have the right to engage in at least some of these objectifications, including by consenting to be the objectified party. Sexual freedom, we thought, is like freedom of association and freedom of contract. It includes the freedom to go wrong in various ways, and the freedom to cater in various ways for those who go wrong in those ways. But that should not lead us to gloss over the wrong turns. It is not mere prejudice or prudishness that leads to non-rape-involving pornography-use and prostitute-use being regarded as amiss *in a somewhat rape-like way*, and therefore as calling for pained toleration rather than shoulder-shrugging indifference (let alone breezy affirmation as just another alternative lifestyle shared ‘between consenting adults’).

(b) We suggested that the special significance of rape, as compared with other imaginable objectifying and nonconsensual activities, lies mainly in the way in which it inverts a familiar picture of good sex. The familiar picture, we admitted, might be over-romanticised. It is the picture of

² Gardner and Shute, ‘The Wrongness of Rape’ in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford 2000), reprinted with minor changes in Gardner, *Offences and Defences* (Oxford 2007).

penetrative sex as a perfect and blissful union, a mutual integration of two embodied beings, acting together as one to make *la bête à deux dos*.³ That the picture may be over-romanticised does not mean that it cannot be exploited to lend a certain social meaning to its radically asymmetrical perversion in the shape of rape. It can make rape, in social meaning, the antithesis of a loving and giving and mutually respectful and engaged interaction, a model of contempt and subordination. And that social meaning operates somewhat independently of the particular attitudes of the particular rapist to lend rape its special power as a weapon in the hands of those who *do* have such attitudes and who aim to express them. These people can use rape to say, as no mere words could: ‘to me, you (and your kind)⁴ are disposables, unpersons, nobodies (or *mere* bodies)’. Not only as no mere words could, but also as no mere spitting or starving or forced-pavement-scrubbing could.⁵ Rape is a timeless ritual of humiliation, degradation, dehumanisation.

³ Claude Duneton, *La Puce à l’Oreille: Anthologie des Expressions Populaires avec leur Origine* (Paris 1978): ‘[U]n euphémisme, qui évoque ... non pas tant la bestialité de la chose qu’une idée d’union très intime, et de bonne santé’. I leave the expression in French here because in English translation it has very different overtones. Consider Iago’s inflammatory use of it in *Othello*, I.1.

⁴ The parenthetical addition is especially apt when rape is used as a weapon of war, ‘ethnic cleansing’, etc. However I am sympathetic to those who think that it is also apt more generally: rape, when it is (as it typically is) of women and girls, is very often, perhaps even typically, an expression of hatred for or anger towards womankind at large. For some telling interview research see Diana Scully and Joseph Marolla, “‘Riding the Bull at Gilley’s’’: Convicted Rapists Describe the Rewards of Rape’, *Social Problems* 32 (1985), 251.

⁵ The last is Avishai Margalit’s example of a self-evident humiliation from *The Decent Society* (Cambridge, Mass. 1996), 127.

Our point (a) has attracted a good deal of critical attention.⁶ Our point (b), less so. Since point (b) was sketched much more cursorily in our essay, that is perhaps not very surprising.⁷ It is also true that point (b) has fewer direct implications for the law of rape and its policy framework, those being the matters of greatest concern to many of our readers. Yet in a way point (b) is the more important of the two. Reflecting on it helps us to understand better the troubled contemporary politics of sex and its regulation. It helps us to see how today's debates about the boundaries of sexual consent, and hence about the extent of so-called 'rape culture', have become so intractable and so rancorous. It also helps us to see how genuinely progressive policies can end up, tragically, perpetuating reactionary ideologies. At any rate, so I will argue here. More specifically, I will attempt to develop the neglected point (b) from the original Shute-Gardner essay, or some aspects of it, so as to reveal more about its complex interplay, and in some ways its tension, with point (a). At the very least, I will aim to persuade you that an interest in the law of rape, in the wider regulation of sex, and in the associated policy issues, cannot but draw you into reflecting on what Lacey calls your 'positive conception' of sex.

⁶ Recent examples: John Stanton-Ife, 'Horrible Crime' in RA Duff, L. Farmer, SE Marshall, M. Renzo, and V. Tadros (eds), *The Boundaries of the Criminal Law* (Oxford 2010); Mari Mikkola, 'Dehumanization' in Thom Brooks (ed), *New Waves in Ethics* (Basingstoke 2011); Daniel Statman, 'Gardner on the Wrongness of Rape', *Jerusalem Review of Legal Studies* 4 (2012), 105; Bob Watt, 'The Story of Rape: Wrongdoing and the Emotional Imagination', *Denning Law Journal* 26 (2014), 46; Jesse Wall, 'Sexual Offences and General Reasons Not to Have Sex', *Oxford Journal of Legal Studies* 35 (2015), 777; Michael Plaxton, 'Nussbaum on Sexual Instrumentalization', *Criminal Law and Philosophy* 10 (2016), 1.

⁷ It seems to have been missed altogether by Statman and by Mikkola in their respective (otherwise very exacting) critiques listed in the previous note.

2. A regulative ideal for sex

My first task is to elaborate the ‘familiar picture’ of penetrative sex as *la bête à deux dos*, or at least some aspects of it, in a slightly more literal-minded way. I hope it will seem less over-romanticised when I have finished explaining it. I will not deny, however, that what I am explaining probably remains what philosophers call a ‘regulative ideal’.⁸ Probably the ideal can at best be approximated, never perfectly instantiated. So in the dimension I will be exploring good sex is, perhaps, never quite perfectly good sex. (‘No surprise there’, you might well say.) Moreover, I hasten to add, the dimension of good sex that I will be exploring is not the only dimension that counts in evaluating the quality of sex. I will not be considering, but nor will I be casting doubt on, the evaluative importance of intense physical pleasure, of close affective engagement, of raw sexual chemistry, of playful experimentation, of satisfaction of sexual appetites, and of various other dimensions in which sex may be better or worse *qua* sex. For some people – e.g. those who are really interested in sexual domination and submission, and not just in the theatrical representation of it or tentative experimentation with it – good sex in one or more of these other dimensions may have to come at the expense of sex that is good in the particular dimension that I will be exploring.⁹ For I will be exploring only one particular dimension: the dimension of collaboration, coaction, concertion, communion, or coitus;

⁸ On which see Dorothy Emmet, *The Role of the Unrealizable* (London 1994).

⁹ On some special potential for value in certain serious dom/sub (and in particular S&M) sexual practices, see William Eskridge, ‘The Many Faces of Sexual Consent’ *William & Mary Law Review* 37 (1995), 47 at 64.

the dimension – if you will forgive the rehashed John Lennon joke – of coming together.¹⁰

You might be tempted to think, when you hear this, that I will be investigating a dimension in which good sex is *morally* good sex. But quite apart from its priggish overtones, I doubt whether this characterisation is exactly apt. You might well find me likening good sex, in the relevant dimension, to good ensemble playing by musicians, good ballroom dancing, and good circus acrobatics, all of which may be undertaken immorally (e.g. to distract from a robbery or perpetrate a tax fraud or prop up a dictatorship). Likewise sex that is good in the dimension that interests us here may still be part of some wider nefarious scheme, even a sexually nefarious scheme. Lovers caught up with each other sexually can spread a lot of evil about them. I am not sure that I want to suggest that there is any redeeming moral value in such evil-spreading that comes of the mere fact that the participants are excellent collaborators, whether in bed or otherwise. Would we want to say that much of a highly organised conspiracy to embezzle, an elaborate multi-agent Ponzi scheme, or the like? If not we should be careful about saying it in the case of *folie à deux*. I think it might be less misleading, although perhaps still jarring, to say that we are interested in a respect in which a sexual relationship, *qua* sexual, can be *humanly* good.¹¹ It can exemplify, albeit in most cases only within a microcosmic

¹⁰ ‘Come Together’ was originally conceived for possible use as a political campaign song, but it is hard to miss the *double entendre* and it is hard to resist the conclusion that Lennon’s non-acknowledgement of that was part of the joke. As he did say, ‘you couldn’t have a campaign song like *that*, right?’ Reported in David Sheff, *All We Are Saying* (New York 2000), 201.

¹¹ In Aristotle’s terms, an excellence of *techne* (skill; we might today say ‘social skill’) rather than that of *ethike arete* (moral virtue): *NE* 1140^b1-11, 1140^b21-24. Kudos to Franco Trivigno for spotting the link to Aristotle’s distinction.

community of two, the advanced human capacity for a certain complex kind of action-with-others. Elsewhere I have labeled the relevant kind of action-with-others 'teamwork'.¹² When we engage in teamwork, there is something (not everything, but something) that was done, not by me, not by you, but only by us together. I passed the ball, you scored the goal, the team won the match. I attached the slates, you did the leadwork, together we reroofed the house. I shone the torch, you reached into the sofa, together we rescued the hamster.

To understand the exact capacity I have in mind, think of the events with which Ian McEwan's *Enduring Love* begins.¹³ The novel is in a way a book about sexuality, about sexual obsession and sexual jealousy and so on. But the set-up is a story of high-stakes spontaneous interaction by multiple people in a totally different corner of human life. On a sunny but blustery day a hot air balloon lands in a field where people are picnicking and playing. A man and a small boy are on board. The man gets into a tangle as he alights, and does not succeed in getting the boy out of the basket before the wind, now gustier, catches the balloon, now lighter, and starts to pull it away. The man is dragged along as he tries to restrain the balloon. Picnickers and others start to run to his aid. Before they reach him, he briefly seems to have things under control. The balloon is anchored, the panic is over. Then comes an even fiercer gust of wind. The anchor breaks loose and the balloon starts to lift off the ground and pull away. Electrical pylons are not too distant and the child is in grave danger. The bystanders resume their frantic efforts to reach the rogue balloon and control its ascent. Each seizes an available rope hanging from the basket. Together they have some success. Their combined weight and effort grounds the balloon. But before they manage

¹² Gardner, 'Reasons for Teamwork', *Legal Theory* 8 (2002), 495.

¹³ London 1997. My *précis* is of pages 8-23.

to get the terrified boy out of the basket, a tremendous new gust of wind hits the field. The balloon coasts and lifts, with the would-be rescuers still holding onto their respective ropes, dangling now a foot above the turf, now two feet, now three. Possibly they would have been heavy enough to return the balloon to earth with the abating of the gust, were it not that one of the group loses confidence in the success of the enterprise, or maybe just loses his grip, and abandons his rope. With that loss of freight, the balloon starts to rise a little faster, and other collaborators quickly lose confidence too, letting go one after the other to avoid being lifted up into the sky, to avoid adding their own deaths to the tragedy. In the end, just one poor fellow hangs dutifully on to his rope and is inexorably lifted up with the escaping balloon. The balloon does not hit the power lines. It later returns to earth, and no physical harm befalls the small boy. However the one man who hangs on does not manage to hang on for long, and his grisly death by falling into a neighbouring field brings the enterprise's survivors, or at least some of them, into a macabre bond which provides the setting for the remaining plot of the book.

Because this collaboration was purely instrumental (i.e. it had a goal specifiable independently of the collaborative means used to pursue it) it may not strike you as having anything in common with good sex. In good sex, the sex itself is normally at least part, if not the whole, of the collaborators' common goal. And that is not, of course, the only notable difference. Yet there are also a few similarities. I will emphasise two. One I already mentioned. The collaboration portrayed by McEwan is spontaneous. The participants are swept along by the urgencies of the moment, and not only at the start. There is never any plan. Nevertheless – and here is the second similarity – the participants are highly responsive at every point to each other's initiatives, and then to each other's responses to those initiatives, and so on. It is a case, we might say, of a sustained interpersonal feedback loop. That is how the participants

manage to get as far as they do in controlling the balloon without any plan. Yet the eventual failure of their enterprise warrants, in this respect, the very same analysis as its near success. Each participant's contribution was worthwhile only in combination with the complementary contributions of others, and even one defection, alas, was enough to make the whole thing pointless. The dropping away was a case of interpersonal feedback looping no less than was the original positioning, heaving, straining, etc. (These physical challenges with balloon-restraining point to other possible similarities with some instances of good sex, but these will not be of concern to us here. Possibly they interested McEwan.¹⁴)

McEwan's is an illustration of action with commonality of purpose, which is but one kind of collective action in which people may engage intentionally. He cleverly focuses on its built-in instability – its high vulnerability to defection – mainly in order to contrast it with another kind. Reflecting on the collapse of the enterprise, McEwan's narrator laments: 'There may have been a vague commonality of purpose, but we were never a team.'¹⁵ An interesting question, on which the narrator also reflects,¹⁶ is that of how in practice the group could have become a team, given the numbers involved, the identical marginal role of each, etc. But prior to that is the conceptual question of what exactly a team would *be*. Here is my proposal.

Acting with mere commonality of purpose already requires the intentions of each participant to converge on a common goal while being ready to adjust to the adjusting contributions to that common goal of other participants. But for teamwork we need each participant to have a further intention on top of all that, namely the intention that *the team* be the one to achieve

¹⁴ Ibid, 65: 'Something passed between us up there on the hill.'

¹⁵ Ibid, 10. The book says 'communality of purpose' but this seems to be a typo since 'commonality of purpose' is a stock expression.

¹⁶ Ibid, 11 and 14.

the common goal. This means, less cryptically, the intention that the common goal be achieved by each having the like intention that the common goal be achieved by each having the like intention that the common goal be achieved by each having the like intention ... and so on. In the mere commonality of purpose case, the efforts and contributions of others can be seen as propitious or unpropitious circumstances, like the wind dropping or picking up, to which one's own efforts and contributions must be adapted. In the teamwork case, by contrast, the efforts and contributions of team members are necessarily regarded by each team member as efforts and contributions, just like her own. Indeed, thanks to the infinite reflexivity of the extra intention I described, each team-member cannot but regard the efforts of other team members together with her own efforts as constitutive of another effort distinct from the efforts of each, namely a *team* effort. And for there to be a team effort there must be a team intention, not merely an intention that all have in common, but an intention that all have jointly, an intention concerning what the team is to do, with its multiple participants acting together intentionally as one.¹⁷

Since good sex is not readily classified as a kind of work – even when it is physically demanding – it may seem strange to describe it as a kind of teamwork. Still, I propose that we think of good sex as a kind of team activity (for which ‘teamwork’ serves here as a mere shorthand). Not only do the sexual partners have common intentions regarding the pleasure and satisfaction that each is to bring to the other¹⁸ and the general menu of ways in which that pleasure and satisfaction is to be

¹⁷ I am drawing here on Gardner, ‘Reasons for Teamwork’, above note 12, at 499-500, where the points are explained in more detail.

¹⁸ For simplicity of expression I will assume here and from now on that there are just two partners at a time. I am certainly not advocating that as part of the ideal, although (as McEwan notes: *Enduring Love*, above note 13, at 10) teamwork gets a lot harder as the numbers grow.

achieved and such like. Each also has a version of the infinitely reflexive intention that I just described. Each intends that they do it together, that it be a joint pursuit and not just a pursuit in common, that the pleasure and satisfaction be achieved by each having the like intention that the pleasure and satisfaction be achieved by each having the like intention that the pleasure and satisfaction be achieved by each having the like intention ... and so on.

You may think that this special kind of mutuality is a tall order for those who are (as we hope they may be) also consumed with sexual desire for each other. But in a way it was already prefigured by something I said before, which probably didn't seem like such a tall order, and which comports with sexual desire. In good sex, I pointed out, the sex itself is normally at least part of the goal of the parties. This already entails that the intention of the parties to a sexual encounter normally extends not only to what each has to gain separately from the encounter with the other, but also on the way in which it will be gained, viz. by encountering the other as a sexual partner. Plainly this does not yet entail that the encounter will have the particular kind of mutuality that I have been describing under the heading of teamwork, or indeed any mutuality. It leaves plenty of room for confusion about what a 'sexual partner' is, misreadings of the other's intention, and similar mistakes. One need only think of the sorry delusions of the narcissist who thinks himself sexually irresistible.¹⁹ My point is merely that *if* both parties correctly diagnose in each other the intention to have sex with each other on condition that the other has a like intention, we are not an unrealistically long way from

¹⁹ Simplified, he sometimes figures in the literature on the law of rape under the name 'Adonis'. Adonis finds it impossible to believe that, where sexual activity with him is concerned, 'no' could ever mean no. See R.H.S. Tur, 'Subjectivism and Objectivism: Towards Synthesis' in S. Shute, J. Gardner and J. Horder (eds) *Action and Value in Criminal Law* (Oxford 1993).

concluding that they have the joint intention necessary for it to qualify as good sex in the dimension that I am interested in here. That intention is not such a tall order as it looks. (You should not read me to be suggesting here, however, that good sex in this dimension is more common than bad. Whether that is so calls for empirical investigation.)

It is natural to read into these remarks the idea that good sex, in the dimension that I am interested in, is *symmetrical* sex. But that characterisation needs to be approached cautiously. In the McEwan story, as we noted, every participant has the same role. There are no significant divisions of labour. The same can be true in teamwork. Think of the convicts working together, of grim necessity, on the chain gang. But it is not true in all teamwork. In the orchestra, the violinists have very different tasks from the flautists, and both very different again from the timpanists, and so on. There are elaborate divisions of labour. In the orchestra they are planned for. But in jazz improvisation, perhaps a better analogy for the sexual context, they need not be. Even though different people play different instruments and to different effects, they may still respond to each other's contributions spontaneously and with a high degree of mutual responsiveness that is organised into the sustained feedback loop that I described. And they may also have the extra, infinitely reflexive intention that the music be played by the band acting together as one. Similarly, I suggest, in good sex. The partners each have their different parts in the improvisation, with, if you don't mind my prolonging the analogy, different instruments to play on (i.e. different parts of each other's bodies to explore with different parts of their own) and different tunes to play (i.e. different ways of stimulating those body parts and achieving pleasurable and satisfying effects for themselves and each other). In the context of

heterosexual penetrative sex, for example,²⁰ it is the male and the female genitalia that are the principal instruments – one within the other – and the musical repertoire, if you like, is the indefinite range of ways in which these instruments can be moved in relation to each other, gently or more energetically, with languor or with urgency, more or less percussively, at different angles and in different rhythms and with different paths or cycles of movement, with the two partners varying between themselves in who is taking the lead, in who is setting the beat, in who has the next solo break, and so forth. When things go well the sexual partners share their intention to do all this together, acting as one in spontaneous mutual responsiveness. Yet it does not follow – in fact it is physiologically impossible in the ‘straight-sex’ example I am developing – that at any given moment each is engaged in making exactly the same contributions to the joint activity.

All the same, there is a kind of symmetry in a different, and I think more important, way. With good sex, sex that is good in the dimension that interests us here, there is no *agent-patient* asymmetry. In the case of good penetrative sex, still remaining for simplicity with the same heterosexual case, the activity as a whole is not something that is done by one partner to the other, not even strictly speaking by each to the other, but rather by both together. It is not merely that the penetrating could just as aptly be described, from the point of view of the other’s agency, as an enveloping; it is that neither word foregrounds the point of view of the team, in which the question is not ‘what is *he* up to?’ or ‘what is *she* up to?’ but ‘what are *we* up to?’

Those who allow only the former questions paint a sad and lonely picture of sex – I mean of what sex can and should be.

²⁰ Again I am not presenting the heterosexuality or the penetration as part of the ideal. Thanks to an *Oxford Journal of Legal Studies* referee for encouraging me to make this clear, as well as suggesting various presentational changes.

Theirs is the desolate sex of a porn movie shot from the point of view of the one who acts upon the other, and who triggers (or tests) in that other what might best be described as *sexual reflexes*, instances of the body 'behav[ing] on its own'.²¹ That the male physician's office is a staple setting for such porn is no coincidence. A reversal of the male/female roles in the scene might make it less of a wearisome phallic cliché, to be sure, and might even make for pointed satire. But it surely wouldn't reduce the desolation. It would only help to emphasise it. One doesn't reduce the desolation of the scene by turning the tables, making the patient into the agent and *vice versa*. To reduce the desolation one needs to make the sex more symmetrically agential. And not in the sense of each doing stimulating things to the other. Even in the porn world, they know to pay lip service (forgive another bad joke) to *that* idea. No, I mean in the sense of doing mutually stimulating things together, as a team. There have to be three agents in the room at least: the me, the you, and the we. The actions of the me and the you have to contribute constitutively to the actions of the we. In this situation nothing is being done *to* anybody. What is done,

²¹ The phrase is Colin Blakemore's from *The Mind Machine* (London 1988), 261. This theme of the porn genre I am describing is amplified in a more extreme variant in which women are portrayed as aroused by things done to them while immobilised by physical restraints. Here the arousal is not just *without the woman's active participation* but also (the plot contrivance goes) *whether she likes it or not* and even *in spite of herself*. For all I know the portrayed activity itself is popular in the sub/dom world and can validly be consented to under the right conditions (which may extend to porn performances). But its porn representation nevertheless feeds a self-justificatory fantasy of the rapist, who deludes himself that he is helping his victim by foisting some sexual arousal upon her, this being what she 'really' wants and needs in spite of, or even in *view* of, her ritual protestations. See Neil Malamuth and James Check, 'The Effects of Aggressive Pornography on Beliefs in Rape Myths: Individual Differences', *Journal of Research in Personality* 19 (1985), 299.

including what is done constitutively by me or you, is now being done *with* somebody.

3. *The passivity of the consentor*

From this it follows, although this may seem at first like a leap, that there is something out of place in our invoking what Lacey aptly calls the ‘individualised notion of consent’ in connection with the kind of good sex that I am discussing. It may seem like a leap because the power to consent is widely and rightly thought to be a power to exercise more or less autonomous control over aspects of one’s relationships with others, and hence is widely and rightly associated with the upholding or expressing of the agency of the consentor.²² ‘Consent is active, not passive’, today’s college codes rightly say.²³ Yet this characterisation is misleading because of an important feature of consent that it leaves out.

Think again of medics – this time real ones, not porn ones. Emergencies and incapacities apart, the consent of the patient is required for legitimate medical interventions. Armed with your consent, so long as various other conditions hold, your doctor can legitimately manipulate and intrude into your body, ply you with substances, extract and replace parts of you, and even subdue you with anaesthetics in order to do such things. Your doctor does such things *to* you. That is the sense in which you are her *patient*. By consenting here, it is true, you exercise your autonomy, and *a fortiori* your agency. But you do so in such a way as to confine or qualify or even surrender your own agency in respect of what your doctor and her team will then proceed to

²² For a particularly rousing statement of the association, see George Fletcher, *Basic Concepts of Legal Thought* (Oxford 1996), 109.

²³ The widely-used wording is borrowed from the booklet by Caren Adams and Jennifer Faye, *Nobody Told Me It Was Rape* (Santa Cruz CA 1984).

do. The doctor will not be conducting the surgical procedure with you but *on* you. Her phlebotomist will not be taking blood with you but *from* you. Her anaesthetist will not be administering the isoflurane with you but *to* you. Indeed part of the point of the anaesthetic is that, when it comes to the surgery, you will not be participating at all. You will not be exercising any autonomy or joining in with anything or playing any active role, because for the time being you will not be an agent. For the duration of the procedure you will be exclusively a patient (thank goodness for that, says your doctor, relieved to have one less stressed-out person to deal with at what will be a busy time).²⁴

That example is a stark one, but its lesson can be generalised. The power to consent is a power to affect what other people can do to or on or in place of the consenter.²⁵ A's consent given to B is way of waiving certain duties that B might otherwise owe to A, or authorising certain breaches of those duties by B without waiving them, or conferring powers upon B to alter A's normative position (or to alter C's normative position in a way that would otherwise fall to A). It is all about what B gets to do, not about what A gets to do. Suppose that I consent to my teenage son's staying out until midnight tonight. I thereby waive the duty that he would otherwise owe me, under our usual rule, to be home by eleven.

²⁴ As my parenthetical remark may reveal, I am not sure that the dominant role of consent in contemporary medicine rests on very solid foundations. For a good survey of doubts, including a near neighbour of the one I will be exploring here, see Kathleen Liddell, 'Beyond a Rebarbative Commitment to Consent' in Oonagh Corrigan (ed), *The Limits of Consent* (Oxford 2009). Thanks to Anna Smajdor for encouraging me to spell this out.

²⁵ Here I build on the conceptualisation offered by A John Simmons in his *Moral Principles and Political Obligation* (Princeton 1979), 76. I have adapted it so as to accommodate (insofar as I think they should be accommodated) the counterexamples suggested by Joseph Raz in his 'Authority and Consent', *Virginia Law Review* 67 (1981), 103 at 120-1.

His being home by midnight is not, however, something that he gets to consent to. Possibly he *undertakes* (or even *promises*) to be home by midnight, but that is a different matter. When his undertaking or promise comes together with my consent in a certain *quid-pro-quo* way,²⁶ we *agree* that he is to be home by midnight. But all that he strictly *consents* to thereby, if he consents to anything, is my authority to determine (or to agree, if we do agree) his curfew. His consent, if any, bears on what I get to do to him (boss him around), not on what he gets to do to me. What he gets to do to me (stay out after eleven) is determined instead by *my* consent. One person's consent, to generalise, extends another person's latitude or competence in agency, and relative to that agency, the consenter thereby makes herself more or less a patient; he or she is the one who suffers it to be done rather than the one who does it.

That someone can validly give his or her consent to certain kinds of sexual treatment by another, even to use of his or her body as a kind of sex toy, strikes me as clear. That, recall, was the main point that Shute and I made, the one that I summarised above as our point (a). One may validly consent to being subjected to some quite extreme kinds of sexual objectification. I do not mean to suggest that giving consent to sexual treatment is always licensing some kind of *mistreatment*. It may be but need not be. There is space for dominant-submissive sexual activity of a pretty intense kind which is licensed by consent, and which does not qualify as mistreatment any more once it is so licensed (instead it becomes, to those who don't share the taste for it, vaguely comic). But notice that even if one is not licensing another to do some *mistreating* of one, by consenting one is always licensing another to do some *treating* of one. By consenting one is placing oneself in the position of patient, and

²⁶ For exacting and impressive treatment of the '*quid pro quo*' or 'exchange' aspect of agreements, see Oliver Black, 'Agreements, Undertakings, and Practical Reason', *Legal Theory* 10 (2004), 77.

the other in the position of agent, so far as what is consented to is concerned. From there one can quickly see that the question ‘was there consent?’ presupposes an asymmetry of exactly the kind that I suggested is not to be found in good (teamwork) sex. It presupposes that the sexual activity was not fully agent-agent symmetrical. Perhaps one was not exactly a patient etherised upon a table²⁷ at the time – although I am fairly sure one can in principle validly consent even to being that kind of inert sexual plaything for perhaps an hour or two – but nor was one an active participant. One was being put to sexual use by another. But by no measure did one have sex *with* that other.

Consent, it seems to me, has been expected to do far too much work in the sexual mores of our age. That some sexual encounter was ‘between consenting adults’ is widely taken to be the only judgment we need, and indeed are entitled, to make. Everything else is sexual taste, and (so they say) there’s no accounting for taste.²⁸ Taking consent to be the only legitimate currency for the evaluation of sex puts the concept under a lot of pressure to do a lot of work. Consequently, many have been tempted to reintroduce other currencies of evaluation indirectly by packing them into a ‘refurbished’ idea of consent.²⁹ Consent, once thus refurbished, is not an act by which one exercises a normative power, whether in favour of another or otherwise. It is a state of mind, an attitude towards what one is doing at the time when one does it, a welcoming or identifying or

²⁷ The phrase is, of course, T. S. Eliot’s from ‘The Love Song of J. Alfred Prufrock’, in his *Prufrock and Other Observations* (London 1917). The poem is usually read as a meditation on passivity and disconnection.

²⁸ I am not conceding that there’s no accounting for taste. My own view is that taste, including sexual taste, is fully open to rational evaluation. The best place to begin is with gustatory taste, or taste in the strict sense, on which I commend Carolyn Korsmeyer, *Making Sense of Taste* (Ithaca NY 1999).

²⁹ Martha Chamallas, ‘Consent, Equality, and the Legal Control of Sexual Conduct’, *Southern California Law Review* (1988), 777 at 784.

enjoying.³⁰ Or, if it is an act of exercising a normative power, the power is one that cannot validly be exercised instrumentally,³¹ nonreciprocally,³² maybe even unreasonably.³³ One wonders how those who place such demanding restrictions on (valid) consent can possibly interact with their doctors, lawyers, electricians, taxi-drivers, decorators, auto mechanics, hairstylists, dentists, bank tellers, dry-cleaners, and the many others whose everyday interactions with them call for their consent. Do they welcome and enjoy the drilling and filling of their teeth? Do they appoint and instruct counsel only for the sake of that very appointing and instructing? Do they entrust their car to a cheap repair shop on the footing that the repair is authorised only if the entrusting is wise, or reciprocal? Obviously, those to whom I am addressing these openly facetious questions would answer by saying that sex is different in ways that make it inapt (and inept) to treat it as if it were, say, a haircut or a vaccination or a ride into town. And that is also my point. Sex is different from all of these things (and they are also different from each other) in ways that make it profoundly misleading to evaluate any of them, including sex, only on the single axis of consent. Consensual dentistry or dry-cleaning can be mediocre, dreadful, even wrongful, and so can consensual sex.³⁴ What we need to understand with each of

³⁰ Eva Feder Kittay, 'Ah! My Foolish Heart: A Reply to Alan Soble's "Antioch's 'Sexual Offense Policy': A Philosophical Exploration'", *Journal of Social Philosophy* 28 (1997), 153 at 157-8; Lois Pineau, 'Date Rape: A Feminist Analysis', *Law and Philosophy* 8 (1989), 217 at 242.

³¹ Chamallas, 'Consent, Equality, and the Legal Control of Sexual Conduct', above note 29, at 783.

³² Eva Feder Kittay, 'Ah! My Foolish Heart', above note 30, at 157-8 (an alternative reading of the same passage cited in note 30 above).

³³ Lois Pineau, 'Date Rape', above note 30, 239 (a different passage).

³⁴ Recall that a valid consent need not waive a duty but may instead permit a breach of it. That explains how it can be consistent to hold that an action was still wrongful even though it was covered by a valid consent. This

these activities is what can go amiss with that particular activity even when it is consented to, indeed irrespective of whether it is consented to, and that requires us first to understand, *for each activity*, what the applicable criteria of success are, what it would take for the same thing to go well, to go better than well, indeed to be at its best.³⁵ Then we will see in what way sex is different. Consent alone is clearly not it.

Shute and I already developed the thought that consent is insufficient to vindicate sex, to guarantee its good quality or even its moral acceptability. Here I am advancing the more explosive proposition that, when the sexual going is good, consent is also unnecessary. Before you explode, bear in mind that my case proceeds, not from the thought that consent is too high an expectation for our sex lives, but rather from the thought that it is too low an expectation. Ideally, I suggest, the question of consent does not arise between sexual partners. For the question of consent belongs to sex individualistically, even solipsistically, conceived, to sex conceived as something that one person does to another (even if, in the course of their sexual encounter, the individuals concerned take scrupulously equitable turns in being the doer and the done to). The proper antidote to this somewhat melancholy conception of sex, or of what sex can be, is not to replace what Lacey calls the ‘individualised notion of consent’ with some refurbished (and perhaps less individualised) notion of consent, but rather to replace the emphasis on consent, which cannot but be

assumes a position in deontic logic according to which one may have a duty to $\neg\phi$ at the same time as a permission to ϕ . On permissions as not inter-definable with obligations, and hence as imaginably capable of conflicting with them, see G.H. von Wright, ‘Norms, Truth, and Logic’ in his *Practical Reason: Philosophical Papers Volume 1* (Oxford 1983).

³⁵ For remarks on the application of this point to political philosophy, see my review of Amartya Sen’s *The Idea of Justice* in *Journal of Law, Philosophy and Culture* 6 (2011), 241.

individualised,³⁶ with an emphasis on some less individualised notions. Teamwork is one such notion.

4. *Sex by agreement*

Is agreement another such notion? My main worry about the place of consent in contemporary thinking about sex would admittedly not arise if the demand for consent were replaced with a demand for agreement between sexual partners.³⁷ In the case of the midnight curfew, recall, my agreement with my son comprised his consenting to my authority and my consenting, in exercise of that authority, to his proposal to stay out an extra hour. An agreement like this is clearly not what we need to get beyond our difficulties with consent.³⁸ This agreement remains agent-patient asymmetrical, albeit each of us has a turn at being the agent. But take an agreement of a different kind. Suppose my friend and I agree to meet at noon, under the clock at Paddington Station. In this case there is no exchange of consents. Each of us undertakes to be there, and the agreement consists exclusively in the exchange of undertakings – possibly they are even promises – not in the exchange of consents.³⁹ We

³⁶ In the relevant way. I do not mean to deny that a team can itself consent to be treated in some way by another team. So perhaps, on reflection, ‘autonomised’ would be a better word than ‘individualised’. For more on the autonomous agency of teams, see my ‘How Law Claims, What Law Claims’ in Gardner, *Law as a Leap of Faith* (Oxford 2012).

³⁷ I say ‘agreement between’ rather than ‘agreement of’ to make clear that our topic here is bilateral or multilateral agreement, not unilateral agreement. ‘I agreed to it’, the unilateral case, is roughly equivalent to ‘I consented to it’: Raz, ‘Authority and Consent’, above note 25, 119.

³⁸ Thus it is not clear what is added by saying, as the Sexual Offences Act 2003 s74 says, that ‘a person consents [only] if he agrees’. (I am omitting other necessary conditions listed in s74 that definitely do make a difference.)

³⁹ Some people think that whenever one undertakes to ϕ and thereby acquires a duty to ϕ one also consents to be rebuked or punished by the

are both going to be agents in the performance of this agreement. Only if one of us fails to show up does the other have something done to him by the first (namely, being stood up), and only then will the question arise of whether the person who was stood up consented to the standing up (namely, by waiving the other's duty to be under the Paddington Station clock at noon as agreed, or by authorising the breach of that duty). Notice, however, that the consent here lies outside the original agreement, unlike in the midnight curfew case where it is integral to it.

The original agreement here, in the Paddington Station case, is agent-agent symmetrical in just the way we need it to be for it to be compatible with teamwork. Indeed it is tempting to go beyond 'compatible'. It is not entirely misleading to say, as David Velleman invites us to say, that such an agreement constitutes an example of 'how to share an intention' – in this case, an intention to meet under the Paddington Station clock at noon.⁴⁰ Thinking of it in that way, one might wonder whether a sound analysis of teamwork and a sound analysis of agreement are perhaps going to converge in many of their features, and maybe even interdepend. And one might be reinforced in that expectation by the narrator's explanation, in *Enduring Love*, of why the people who tried to restrain the hot-air balloon failed to advance from commonality of purpose to teamwork. One

person to whom one owes the duty if, without justification or excuse, one fails to ϕ . I do not deny that one may consent to such consequences, but one need not do so and usually it is redundant to do so, for the rebuke and punishment would be permissible anyway just in virtue of the fact that one was in culpable breach of a duty owed to the rebuker/punisher. One's consent, if one gave it, would only help to license otherwise *unjustified* (e.g. disproportionate) rebuke or punishment. See Larry Alexander, 'Consent, Punishment, and Proportionality', *Philosophy and Public Affairs* 15 (1986), 178.

⁴⁰ Velleman, 'How to Share an Intention', *Philosophy and Phenomenological Research* 57 (1997), 29.

reason, he says, is that there was ‘no agreement to be broken.’⁴¹ So perhaps, with a tweak, we could rescue ourselves from the alarming implications of the thought that, ideally, the question of sexual consent does not arise. Maybe it is true that, ideally, the question of sexual consent does not arise, but maybe, ideally, the question of sexual agreement still does arise. And maybe, when sexual consent is not necessary, that is only because we are lucky enough to have sexual agreement instead.

In being so quickly reassured, we are forgetting that one of the things that drew us to McEwan’s story, as a suitable one for illuminating the character of (some) good sex, was the spontaneity of the collaboration. The participants in the rescue attempt, recall, are swept along by the urgencies of the moment. They don’t have a plan. An agreement of the kind that we are thinking about here is a kind of plan for acting together, possibly (although not necessarily) by teamwork. An agreed plan is what the musicians in an orchestra or a string quartet typically have. It is what, by contrast, our imagined jazz improvisors lack. Or at any rate we can imagine that they lack it. Possibly they do agree to play together and to show up at a certain place to do so, and then they agree how they will get the music started, only from that point proceeding improvisationally, i.e. without further agreement. Or possibly they agree to play together and show up at a certain place to do so, but don’t agree how to get started and just see what happens when they are messing around with their various beats and riffs. Or possibly – the possibility that interests us here – they don’t even agree to play together and they are just there in the same space by happy coincidence, for other purposes. Like the kids from *Fame* or *Glee*, they just start messing around with their beats and riffs, gradually taking various cues from each other, and things get into full swing from there. Being ensemble jazz

⁴¹ *Enduring Love*, above note 13, at 14.

musicians, they are skilled at working as a team, getting the music going, without agreeing anything at all. I am sure McEwan's narrator should not be understood to be denying that possibility. He is reflecting on ways in which the motley bunch of unskilled strangers in the field could have improved their chances of success in their rescue mission. He mentions having an agreement, having a plan, and having a leader as three closely interrelated ways in which they could have made it more likely that they would start to work together as a team, and thereby reduce the chance of defection and disintegration.⁴² But he does not suggest that any of these three is a necessary *ingredient* of teamwork. Just as well, because none of them is.

One can clearly agree to engage in teamwork. One can also engage in teamwork, conversely, to reach an agreement. But one can equally engage in teamwork without any agreement to do so, and reach an agreement without any teamwork. To reach an agreement, commonality of purpose is usually as much shared intention as one needs. Even then, reaching an agreement is only one possible manifestation of the commonality of purpose. It is, to be exact, a preliminary or anticipatory manifestation: it foretells of further manifestations to come. That is because making an agreement, like consenting, is exercising a normative power. It is a way in which people exchange (and thereby also attempt to cement) their commitment to actions, sometimes teamwork actions, but always actions that, at the moment of agreement, still lie ahead. The actions in question may only lie a moment or two ahead but the idea of agreeing is still that one thereby commits to their performance when the time comes. The shared commitment of the agreement can help to avoid defections from the agreed-to activity. The teamwork intention, if it is also present, can also

⁴² *Enduring Love*, above note 13. Plans are mentioned on pages 10 and 14; leaders on page 10 and 12; agreements on page 14.

help to avoid defections from the same activity. The two devices can help to reinforce one other. But they are still two complementary devices, not one.

It is tempting to insist that our totally spontaneous jazz musicians *have* agreed to play together, and that their agreement to play together can be implied from the very fact that they are playing together. The proper response to this suggestion is not to say that an agreement is not the kind of thing that can be implied. Certainly it can.⁴³ If these five musicians show up at the same bar and play together at the same time every Friday, and they have done so for a while, and each knows that the others are counting on it every week, and they all talk as if the pattern were agreed (e.g. by apologising or making excuses to each other for absence), an agreement between them can be implied. No, the proper response to the suggestion that an agreement can be implied from the mere fact that they play together is to say that the suggestion neutralises the importance of agreement. The suggestion, on closer inspection, is not really that an agreement between the musicians can be implied. The suggestion is that an agreement must be *deemed to exist*, which means that the musicians are to be treated *as if* they agreed.⁴⁴ But if everyone who ϕ s together is to be treated as if they have agreed to ϕ together, what would be the point of ever agreeing to ϕ together? What normative change would an agreement to ϕ together effect? Suppose, for example, that there were some defection from the ensemble.

⁴³ On implied agreement, as on various other matters, I have benefited hugely from reading Timothy Macklem's 'Absence of Consent', forthcoming.

⁴⁴ For reflection on similar instances of 'implication' in the law, see Patrick Atiyah, 'Judicial Techniques and the Law of Contract', in Atiyah, *Essays on Contract* (Oxford 1986), 244 at 272: 'in a large number of cases the court is simply ... making law for the parties ... and ... it is a pure fiction to treat this as a matter of "giving effect to the intention of the parties"'

Suppose that the bassist stopped playing mid-set, and the performance fell apart. There might then arise a question of whether she had agreed to play and was now breaking the agreement. When action-with-others collapses, as the rescue attempt in *Enduring Love* does, we may want to know whether someone breached a duty to persist, and whether that helped to bring about the collapse. At that point the possibility of an agreement to participate may need to be considered as a possible source of such a duty. But if an agreement to participate is always deemed to exist just in virtue of the fact that people are participating then there is no point in even looking for an agreement to participate, express or implied. An agreement could not make any difference.

One thing that makes it easier to get away with the suggestion that the musicians must have some sort of agreement is that the word ‘agree’ and its cognates are ambiguous. Quite apart from the normative power that one exercises by *making an* agreement with somebody (‘performative agreement’) there is the condition of *being in* agreement with somebody (‘cognitive agreement’). The difference is not that there are no cognitive, or otherwise psychological, conditions on which the validity of a performative agreement depends.⁴⁵ Sure there are. One must know that some of the elements of an agreement are in place, one must understand at least some of the content of the agreement, one must be aware of at least some of the circumstances and consequences of it, and so on.⁴⁶ No, the

⁴⁵ Compare Heidi Hurd, ‘The Moral Magic of Consent’, *Legal Theory* 2 (1996), 121 at 136, who thinks that ‘performative’ means roughly ‘ostensible’.

⁴⁶ Clearly there are also lots of nonpsychological conditions of validity. Consents and agreements are invalid, for example, if obtained by coercion, manipulation, exploitation, or deception. Some of these nonpsychological conditions have subsidiary cognitive, or otherwise psychological,

difference is that the cognitive conditions for the validity of a performative agreement are conditions obtaining at the time when the agreement is made, not at the time when it is carried out. Whereas cognitive agreement has whatever significance it has as a basis for the acceptability of anything only by enduring, by accompanying the thing to which it relates. It 'has to be continuous'.⁴⁷ Clearly those who engage in teamwork, and indeed those who act with commonality of purpose, must be in cognitive agreement with each other about some things while their collaboration is going on. *Ex hypothesi* they share certain goals and intentions, and that means that they share beliefs about what is to be done, and (up to a point) how, and when, and where, and by whom. Their mutual responsiveness depends on a great deal of shared cognition. So we can think of teamwork as entailing a kind of agreement, so long as we shift our attention from agreement conceived as committing to something in advance (performative) to agreement conceived as a continuing meeting of minds, one that prevails throughout the activity (cognitive). Similarly, we could think of teamwork as necessarily consensual if we shift our attention from consent (performative) to something more like *consensus* (cognitive). If we allow these shifts then we can restore our faith in the idea that all acceptable sexual activity needs to be either consensual or agreed in some sense: if it is not licensed by consent or agreement (performative), you might say, it must instead be

subconditions. To be deceived one needs to acquire a mistaken belief, to be coerced one must believe that a threat has been made and is likely to be carried out if one does not conform to the threatener's proposal, etc. For discomfiting discussion of deception as it invalidates sexual consent, see Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy', *Yale Law Journal* 122 (2012), 1372.

⁴⁷ Joseph Raz, 'Disagreement in Politics', *American Journal of Jurisprudence* 43 (1998), 25 at 33.

characterised by an ongoing consensus or agreement (cognitive).

At least some of the various attempts to ‘refurbish’ the idea of consent mentioned in section 3 above could be interpreted as attempts to sideline consent altogether in favour of the very different (cognitive) consensuality just mentioned. On this view what is needed is an ongoing consensus between sexual partners, such that they are both of one mind about what is going on and what is to happen next. Other purported ‘refurbishments’ could be read as attempts at a combination of both kinds of consensuality, such that all acceptable sexual activity must meet consent conditions beforehand *and* ongoing consensus conditions. These two conditions are not, however, easy to combine. If acceptable sex requires an ongoing consensus, then each partner has the ongoing ability to bring its acceptability to an immediate end simply by ending the consensus. That is not an outrageous proposition. Most people, me included, think that when a sexual partner says ‘enough’, that’s enough. Yet this idea is tricky to combine with the idea that one can license sexual activity by consenting to it. If I consent at time t_1 to someone’s ϕ ing at time t_2 (say a few minutes later) can I consistently reserve for time t_2 *all* of my ongoing discretion over the acceptability of that someone’s ϕ ing at time t_2 ? If so what was the point of consenting? What effect did my consent have, if not to make a temporally extended difference *of some kind* to the other person’s latitude for acceptable action?⁴⁸ The point is even more obvious with agreement. What does making an agreement to ϕ achieve if it

⁴⁸ The point comes across badly in Alan Soble, ‘Antioch’s “Sexual Offense Policy”: A Philosophical Exploration’, *Journal of Social Philosophy* 28 (1997), 22 at 31. Soble makes it sound like ‘of some kind’ entails ‘of an extensive kind’. He thinks that valid consent must be capable of extending into ‘an indefinite, open future’ if that is what is purported. My suggestion that ‘temporally extended’ in my sense.

cannot commit either party to ϕ ing? If each retains total latitude not to be interested in ϕ ing and not to ϕ when the time comes, what was the point of agreeing to ϕ ?

One possibility is that the temporal extension in question remains subject to unilateral modification. In connection with sexual activity, consent and agreement work until the licensed action is over *or* until revoked, whichever comes first. I tend to think that this is a slight distortion of the true situation. The true situation is that, in sexual activity, medical treatment, and various other contexts of personal intrusion, there is a further and distinct normative power to *dissent*. It is the power of one to forbid what would otherwise fall within another's latitude for acceptable action over the other. It is a further and distinct power because it applies even when the basis for the latitude is not consent or agreement. It applies equally in the teamwork cases that I discussed, in which (if I am right) questions of consent and agreement are not germane. On this view an exercise of dissent is not a revocation of consent. Nor is it a modification of what was agreed. The consent or agreement stands - but the sex is over. So there are two different ways in which 'no means no': sometimes it is a refusal of consent or agreement; sometimes, by contrast, it is an exercise of dissent that takes effect irrespective of, and notwithstanding, the presence of consent or agreement.

The contemporary proposal that we should seek active consent or agreement from our prospective and actual sexual partners may be intended to imply that, in addition to seeking consent, we should always be attentive to the possibility of subsequent dissent. But I suspect it is at least sometimes meant to convey something quite different. What is meant is that we should seek regular updates on our sexual partners' thoughts to make sure that the two of us remain, if nothing else, cognitively *ad idem* throughout, from the initial kiss or caress or tickle to the exhausted final collapse. On this view, there is no question of anyone's licensing anything or committing to anything. Over

one's sex life, the thinking goes, one cannot validly exercise any kind of normative power, even by the most active kind of consent or agreement. Sex is to be conducted only in the moment, its trajectory determined by ongoing like-mindedness and mutual responsiveness – augmented a little self-consciously by frequent reassurances and affirmations on both sides.

5. Leaving space for bleak sex

I have now said often enough that I regard this view about the invalidity of consent or (performative) agreement in sexual matters as an excessive restriction on sexual freedom. This theme was also prominent in the essay I wrote with Shute. When the normal conditions of valid agreement are satisfied, one can bind oneself to carry through with the filming of a porn scene, even a seriously objectifying one, by agreeing to do it. Like other performers, one gets to abandon the deal only when one or more of the other parties breach it, e.g. by going beyond the agreed sexual activities, or refusing to pay the agreed up-front sum, or refusing to meet the STD-test preconditions, or threatening or portending such things, or otherwise moving the goalposts once the deal is done. Having sex for money may be a sad line of business to end up in, but that doesn't mean that nobody gets to make it their line of business. In particular it doesn't mean that people's normative powers to agree and consent (and equally to refuse to do so) count for nothing in selecting their customers and collaborators and employers, and in settling their terms of work.⁴⁹ It does not follow, of course,

⁴⁹ Just to reinforce my point in note 48 above: It doesn't follow, as Eva Kittay suggests in her reply to Alan Soble ('Ah! My Foolish Heart', above note 30, 157) that we have to accept the possibility of women validly consenting once-and-for-all to an indefinite sexual availability, e.g. upon marriage. The invalidity of such consent is nothing special to sex. Consent

that going through with the agreement can legitimately be coerced. When people are bound to do things, whether they can also properly be made to do them is always a separate question. I assume that nobody can ever be legitimately coerced to have sex, even when they agreed to it. Specific performance, as the lawyers would put it, is not available. But it does not follow that their agreements to have sex were not binding on them. A sex worker who does not show up for work, or declines to go through with it when she does show up, still owes an explanation, an apology, an offer of amends, like any other person who reneges on his or her agreements.

Nevertheless, hers *is* a sad a line of business, and we should take care not to idealise it, even when we are trying to sound positive in support of its workers (who enjoy much less legal protection and social recognition than they should). It is hard to combine being a consenting commercial sex worker with the kind of good sex we have been discussing, for such good sex is indeed characterised by an ongoing like-mindedness and mutual responsiveness, of which teamwork is the ideal.

You may have read a note of scepticism into my remark about the ‘self-consciousness’ of ‘continual reassurances or affirmations’ in the midst of good sex. But I am far from sceptical about the basic idea. It is hard to have good sex in silence, and it is hard to imagine what would mostly break the silence if not reassurances or affirmations (verbal or otherwise), plus perhaps a bit of kidding around. But possible counterexamples, I suppose, might include deliberately staying completely silent as a game or as a precaution, e.g. if trying to get away with having sex when parents or kids are asleep

to open-ended submission to another’s wide discretion is generally invalid even when freely given and even when there is provision for eventual emancipation. For the application of the same point to the ‘consent’ rationale for political authority, see J. Raz, ‘Authority and Consent’, above note 25, at 127ff.

nearby. And this, I suppose, is a case where performative agreement comes to the rescue – where one plans the teamwork a little. So let me clarify that all I was being sceptical about, all I was associating with self-consciousness, was an importunate *interrogation* of the other's ongoing state of mind. You have to wonder how well things are really going in a sexual encounter if the information is not already forthcoming in some way. If you have to keep on asking, maybe the news isn't good.

Look again at those contemporary laws and college codes that insist on (and sometimes elaborate) the message that 'consent is active, not passive'. Nothing in what I have said is at odds with such schemes when they are interpreted to allow, alongside those bleak utility-hook-ups that the parties consent or agree to, sex that is active, engaged, spontaneous and un-self-consciously communicative. For that kind of sex, involves if anything a *more* active kind of consensuality, a continuing self-possession as opposed to the temporary alienation of one's sexual self to another. To allow that kind of active sex is clearly how the rules should be interpreted. The simple answer to those who complain that such rules are passion-killing or style-cramping may be that they have unfortunate passions or unprepossessing style.

Even if there is something in these complaints, however, even if such rules do introduce new inhibitions and anxieties and nuisances that sometimes get in the way of really terrific sexual sharing, we should remember that laws and similar institutional rules are not there to capture and embody the full evaluative riches of their subject-matters. They are crude tools that exist primarily to deal with the least happy instances of whatever they regulate. Family law, for example, regulates various close personal relationships. Yet even in the best of all family-law worlds, one would not be able to discern in the law the regulative ideals of any of those personal relationships. The law would neither require one nor help one (except in occasional accidental ways) to be a wonderful parent, a first-

rate spouse, a terrific son or daughter, etc. And sometimes, even in the best of all family-law worlds, the law would sometimes get in the way of the realisation of those ideals, e.g. by causing distracting anxiety about how to avoid falling foul of the law, or by sharpening up a borderline in a way that incidentally catches out a few people who would not otherwise even have been close to it.

The first concern of the law is not to enable people to achieve the ideal of anything, but to protect people at the other end of the spectrum from the worst abuses and derelictions, while *so far as possible* avoiding collateral damage to more desirable activities that might be going on in the same conceptual vicinity. So we should join Lois Pineau in saying:

If as a matter of statistical fact, legislating communication [between potential and actual sexual partners] as a central component of consensual sex is a good way to protect women from being sexually assaulted, then the interest a relatively few people may have in hazarding noncommunicative sex may just have to be sacrificed.⁵⁰

We should join her in saying that, but we should not join her in saying that this would constitute a ‘reformulation of the criterion of consent.’⁵¹ It is not a reformulation, or a

⁵⁰ Pineau, ‘A Response to my Critics’, in Leslie Francis (ed), *Date Rape: Feminism, Philosophy and the Law* (University Park PA, 1996), 84. Pineau’s final word ‘sacrificed’, it seems to me, might be too strong. ‘Left unaccommodated in the law’ seems better. People are not generally morally bound to follow the law as such. If they do something morally unobjectionable that is contrary to law, that should not leave any blemish on their conscience. Occasionally the law may catch them and we have to hope that prosecutorial discretion, or civil disobedience by the jury, will save them from sacrifice. For some remarks on a special class of cases in which people may, exceptionally, be morally bound to adapt their behaviour to innovations in sexual offences law, see my ‘The Many Faces of the Reasonable Person’, *Law Quarterly Review* 131 (2015), 563 at 573-4.

⁵¹ Pineau, ‘Date Rape’, above note 30, 221.

refurbishment, or anything like that. It is not consent at all. It is a different idea. It is not exactly a *rival* idea. It is a contrasting idea. It belongs to a different part of the spectrum of sexual encounters that we have been exploring here. It belongs to the good part, the part that lies towards the teamwork end of our spectrum. Consent, by contrast, belongs mainly to the bad part, the asymmetrical part. But if a right to sexual freedom means anything it means that, armed with one's power to consent, one gets to dabble in the bad part of the sexual spectrum too; one gets to experiment with the dreary, the bleak and the desolate and not only with the loving, the fulfilling, and the uplifting. (And just to remind you: there is more than one sexual spectrum, and my comments here have been restricted to just one of them.)

6. Good sex is a feminist issue

As Pineau's sensible remark foregrounds, and my discussion has not attempted to conceal, the people who face the worst and most widespread abuses and derelictions where sex is concerned are women and girls. In framing law and policy in the area, we need to work primarily with the threats to women and girls in mind. But we also need to be aware of the ideological implications of our proposals. My reflections here point to one way in which modern attempts to improve the regulatory and policy regime for women – with their overwhelming emphasis on consent – might have helped to reinforce the very ideology that the attempts were supposed to be challenging.⁵² When we talk about consent, we can easily express ourselves as if it might as well be a man consenting to

⁵² Robin West's work on sexual consent repeatedly emphasises this point. See e.g. her recent 'Consensual Sexual Dysphoria: A Challenge for Campus Life', *Journal of Legal Education* 66 (2017), 804.

the sexual attentions of a woman. But what we all commonly have in mind, unsurprising given some widely known ‘statistical facts’,⁵³ is the converse case. Our cultural preoccupation with sexual consent is a preoccupation with women as those whose consent is called for, and men as those to whom the consent is to be given. As thus imagined, sex is something in respect of which men are active and women are passive. It is true that the consent itself can be active. Yet consenting is still what women are taken to be doing when they have acceptable sexual encounters, and that means women giving men latitude to act upon them. Men are the ones who do things, and women are the ones to whom those things are done.⁵⁴

In much bad sex, that’s indeed how it is. But in good sex, I mean sex that is good in the dimension I have explored in this paper, all parties are active. They act together, ideally as a team. Isn’t this how we would like things to be for women, all else being equal? Don’t we want women’s sexual agency to be affirmed, or at any rate to be in principle affirmable, in sexual relations between men and women? In which case how have we become wedded to the idea that women suffer ‘sex acts’ to be performed upon them, while men are the performers?

The answer is not hard to find, because we already supplied it. The idea that in sexual matters men are the ones who do and women are the ones who are done to is not just a thoughtless assumption. It is not *merely* a stereotype. It is borne out by

⁵³ Which facts? I mean facts about the incidence of sexual violence and sexual exploitation suffered by women, as compared with that suffered by men. For recent survey data, see David Cantor et al, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Rockville MD 2015).

⁵⁴ On this view and its place in legal history see Ngaire Naffine, ‘Possession: Erotic Love in the Law of Rape’, *Modern Law Review* 57 (2011), 10.

‘statistical fact’. Yet it is a stereotype. It is one thing to recognise the extent to which women are sufferers rather than doers in the dominant heterosexual culture, and another thing to present such passivity as an essential feature of female sexuality.⁵⁵ It is one thing to say that all women must be *able* to control sexual access to their bodies by giving or withholding consent, and another to say that such acts of giving and withholding are the best we can ever envisage for women’s sex lives with men, as if women could only be *letting men at them*, *granting men favours*, or *making themselves available to men*. As these frankly disparaging phrases reveal, our fixation with sexual consent tends to affirm that women are sexual commodities, sex objects, available on certain terms for men to act upon. It is small consolation that women officially, if not always in practice, now get to set the terms of the acting-upon-them. The point remains. The ideology associated with sexual consent confirms and perpetuates a stereotype of female sexual passivity from which women might reasonably hope to have been liberated by now, and the continuing ascendancy of which is likely to work, it seems to me, mainly to the long-term advantage, or reinforcement, of predatory and porn-addled men. For it legitimises their attitudes. It legitimises their antediluvian view of sex as something which men, when they get lucky, get to do to women, and access to which women are (unfortunately) allowed to ration – but which women are rationing using a system that can (fortunately) be ‘gamed’, such that canny men with enough ‘charm’ can in effect get access on demand. And by legitimating that view of sex the ideology quite possibly adds to the bitterness of these already embittered ‘charmners’ and compounds their misogyny. Why are women

⁵⁵ Many years ago I explored the same contrast in the context of anti-discrimination law, in a paper called ‘Private Activities and Personal Autonomy: At the Margins of Anti-Discrimination Law’, in Bob Hepple and Erika Szyszczak (eds), *Discrimination: The Limits of Law* (London 1992).

still denying them their rightful access when they, so to speak, did everything they were meant to? Why don't women surrender to their charms? This is the same men-on-top ideology that we were supposed to be putting behind us. *Plus ça change*.

In these last few sentences I am exceeding my professional brief by fretting about current social trends. My only excuse is that the social trends are, sadly, all too conspicuous. The problem we face is not only a backlash against the achievements of the women's movement. The problem is also a *backfire* in the architecture of those achievements. We have thought too much about policy and not enough about ideology. We have focused too exclusively on the way in which women can be given more effective control over the terms of their sexual engagement with men, without thinking enough about how that very emphasis contributes to maintaining a traditional, patriarchal view of women's sexuality as a commodity to be traded. The main achievement is to have given women more power to make the relevant trades. It is an impressive achievement in itself. But it is an achievement with a depressingly reactionary undercurrent. It empowers women in the *ius ad fututionem* while perpetuating their historic subjection in the *ius in fututioni*. Paradoxically, it renders them, in the actual sex, more object than subject.⁵⁶

⁵⁶ My critique of the ideology of consent in the final section has much in common with Jeffrey Gauthier's critique of the 'commodity exchange model of sexuality' in his 'Consent, Coercion, and Sexual Autonomy' in Frank Burgess-Jackson (ed), *A Most Detestable Crime: New Philosophical Essays on Rape* (Oxford 1999). One difference is that, if sound, Gauthier's critique would extend equally to a (performative) agreement model, and not only to the dominant consent model. I am sympathetic to his wider critique but do not have the space to pursue the matter here. My point here is about the commodification of women *qua* sexual, whereas his concerns the commodification of sex, to the systematic disadvantage of women.