CONDOMS AND CONDITIONS ON CONSENT: UPHOLDING INTENTIONS, UNDERSTANDING, AND AGENCY FOR CONSENSUAL SEX

by

Kate Sutherland Hartling

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To my parents, Chip and Eve.

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Abstract

There is still widespread confusion over what exactly is necessary for consent in sexual encounters. This has serious consequences because of the severity of the rights violation that occurs if consent is invalid in this domain, i.e., sexual assault or rape. This project aims to provide clarification on this issue, especially concerning how *conditions* placed on sexual encounters impact consent. I focus on one case in particular that exemplifies this broader issue in order to provide clarification. I argue that sex in this case was nonconsensual on three contemporary accounts of consent. First, the event went beyond the *restricted range of possibilities* that was intended. Second, consent did not meet the standards of shared understanding or non-fraudulent disclosure. Third, the agency of one of the parties was not adequately scaffolded. I then examine each of the accounts under consideration and explore the implications of this analysis for sexual consent generally.

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Chapter 1: Introduction

Despite being one of the most intensively scrutinized moral concepts, people continue to struggle with informed consent, and especially sexual consent. This confusion extends to the highest court in Canada, as a recent sexual assault case has gone all the way to the Supreme Court of Canada (SCC). In 2018, Ross Kirkpatrick was charged with sexual assault for not using a condom after the woman he had sex with, hereafter 'the complainant', specified condom use as a condition for sex. However, Kirkpatrick did not actively deceive the complainant: he did not lie or manipulate, but the complainant *thought* the accused had put on a condom when he had not, despite her insistence on its use.

The complainant met Kirkpatrick online in 2017 and on their second meeting in person, they had sex twice (*R. v. Kirkpatrick*, 2020). The complainant stated that on their first meeting in person they discussed sexual practices and she told Kirkpatrick that she always used condoms.[1] On their second meeting in person, the first time they had sex, the complainant asked if Kirkpatrick had a condom and said that if he did not, she did. He said he did and reached to the side table to retrieve it and put it on, and the two engaged in sexual intercourse. After they were finished, the complainant asked to see the condom to make sure that it had been worn, which it had. Later the same night, Kirkpatrick initiated sex with the complainant a second time, and briefly turned to the side table where he had previously retrieved a condom. The complainant thought Kirkpatrick had

[1] Kirkpatrick's statement to police confirmed these allegations but he denied that the complainant had told him that "she would only engage in intercourse if he wore a condom" (*R. v. Kirkpatrick*, 2020, para 11). Kirkpatrick was also not required to provide a defence for the charge because he succeeded on a *no-evidence motion in the first trial* which means the prosecutor does not have evidence of certain elements of the crime (Di Lella, 2021).

put on a condom when he turned over, and they proceeded to have sex. However, he had not put a condom on, which the complainant only realized after the encounter was over. The complainant stated that she "had not consented to intercourse without a condom, and her evidence is that she would not have done so if asked" (*R. v.* Kirkpatrick, 2020, para 9).

There are several other important details here. First, the accused asked at one point if "it felt better", but the complainant mistook this to mean the position and not sex without a condom (*R. v. Kirkpatrick*, 2020). Additionally, when confronted at the time by the complainant, the accused stated that "he had been 'too excited to wear a condom'" (*R. v. Kirkpatrick*, 2020, para 10). However, it seems that the accused was not attempting to actively deceive the complainant. As the original trial judge stated:

> The accused did nothing to hide or deceive the complainant that he did not put on a condom. Within a minute of the commencement of intercourse, the accused asked her if it felt better this way. She unfortunately mistook the inference that the accused was making and said yes. Also, he asked her to guide his penis into her vagina at one point, which strongly suggests that he was not hiding the fact that he was not wearing a condom. (*R. v. Kirkpatrick*, 2020, para 13).

The original trial judge acquitted Kirkpatrick in 2018, but in 2020 the Court of Appeal for British Columbia unanimously ordered a new trial, and as of 2021, the case has been under deliberation by the SCC.[2]

[2] I wrote this thesis while the case was still under deliberation by the SCC, and just as I was finishing, they reached the following verdict: when condoms are made a condition of sexual intercourse, it becomes part of the sexual activity in question. That is, if one consents *only* to sex with a condom, they do not consent to sex without a condom (*R. v. Kirkpatrick*, 2022). I will briefly discuss the alignment of this verdict with my philosophical analysis in the concluding chapter.

To clarify first, the Crown provided two theories in this case as to why sex was nonconsensual: first, the complainant *did not consent* to the sexual activity (i.e., sex without a condom) or second, she *did consent* to the sexual activity, but her consent was vitiated by fraud. If either of these theories are established as true, then sex was nonconsensual, and the accused would be found guilty of sexual assault (Di Lilla, 2021). The problem that SCC judges will have to solve is whether sex with a condom is a *different sexual act* than sex without a condom, such that consent to one act is not consent to the other.[3] If this is the case, there are important implications for future sexual assault cases.

The problem with proving consent was vitiated by fraud arises out of the following: "[f]raud has two elements and the Crown must establish both. First, there must be dishonesty, and second, deprivation or risk of deprivation flowing from that dishonesty" (*R. v. Kirkpatrick,* 2020, para 105). These elements can be difficult to prove, and according to Women's Legal Education and Action Fund (LEAF) lawyer Kate Feeney, these conditions will fail to capture victim's experiences with sexual assault related to condom use:

> If there's a deception but your partner doesn't have any sexually transmitted infections, or perhaps you're using a different form of birth control so there's not a realistic possibility of pregnancy, the second test — the second aspect of the fraud

[3] In *R. v. Hutchinson*, a woman charged a man with aggravated sexual assault after he poked holes in a condom which resulted in a pregnancy, when she had said she would only have sex with a condom. The SCC upheld the conviction, but only the minority found it was because the sexual activity (sex without a condom) had not been consented to in the first place and the majority finding that consent was vitiated by fraud. Thus, the SCC interpretation of *Hutchinson* is that sex without a condom is *not* a different sexual act than sex with a condom and this interpretation is what the trial judge used in *R. v. Kirkpatrick* (Di Lella, 2021).

> test — isn't met and therefore the criminal law protection doesn't apply. (Feeney in Tunney, 2021).

Furthermore, even if a case passes the second test of fraud, that is, proving there was significant risk, the way this is done in court is often harmful to the victims. LEAF filed a motion to intervene in this case, arguing that proving significant risk of serious bodily harm is invasive and negatively impacts the physical and mental health of complainants, unequally applies criminal protection to complainants who have less stereotypical or animated reactions to an assault, and perpetuates the kinds of harms that sexual assault survivors experience both inside and outside of the court systems (*R. v. Kirkpatrick*, 2021, para 5).

In the first trial of the Kirkpatrick case in 2018 in which the accused was acquitted, the judge found no evidence of the first element of fraud, dishonesty, because the accused did not attempt to hide the fact that he was not wearing a condom. However, on the issue of appeal in 2020, all three judges agreed that there was some evidence that sex was nonconsensual: two found that this was because sex without a condom is a different act than sex with a condom[4], and one found that it was because there was evidence of consent being vitiated by fraud.[5] It will be up to the SCC, then, to decide what, if anything, was wrong with Kirkpatrick's behavior. Their ruling will have significant implications for future sexual assault cases regarding condom use: if the two are separate sexual acts, then there will no longer be a need to rely on proving fraud for cases in which sex occurs without a condom when someone consents *only* to sex with a

[4] The judge reinterpreted the SCC's judgement of *R v Hutchinson* to do this.
[5] They suggest the original trial judge failed to recognize *Mabior,* in which failing to disclose a condom absence could meet the first condition of fraud, dishonesty, even though there may not be an explicit lie or misrepresentation (Di Lella, 2021). I will be making much more of this later in Chapter Three.

condom. The legal determination of the boundaries of a sexual act will clarify cases like these. However, my project here is not to provide a legal analysis of this case nor is it to determine which of the Crown's theories is correct. Rather, it is to focus on the philosophical issues raised by this type of case. The moral issue at the heart of this case and others like it is *consent*, and that *different acts* require *different consent*. As such, we can turn to philosophical accounts of consent to see what they have to say about this case.

Informed consent is typically understood as having five components: (1) competence, (2) disclosure, (3) understanding, (4) voluntariness, and (5) token consent, all of which must be met in order for consent to be valid (Faden & Beauchamp, 1986, p. 274). That is, a person gives informed consent "if (and perhaps only if) he or she is competent to act, receives a thorough disclosure, comprehends the disclosure, acts voluntarily, and consents to the intervention" (Beauchamp & Childress, 2013, p. 124). All these elements are meant to ensure that when a person consents and in turn authorizes some act or intervention, they are making an *autonomous choice* to do so. Thus, a primary goal of informed consent is the protection of autonomy and is intimately connected to the rights we have, including the right to make decisions about others' access to and treatment of our bodies.

The competence requirement ensures that a person is *capable of decision-making* and that they are able to provide recognizable reasons for their choices. The core meaning of competence is "the *ability to perform a task"* (Faden & Beauchamp 1986, p. 288) and while this is invariable across contexts, the *criteria* for competence in different contexts will vary because it will be specific to a given task. Thus, a person may be sufficiently competent to decide what they want to eat for breakfast, but not to make legal decisions

for themselves. Further, a person can be competent for something at one time but not another. For example, someone can be competent enough to consent to sex while sober but not when they are severely inebriated.

The voluntariness requirement ensures that a person is *freely choosing* to consent. That is, a decision is voluntary "if he or she wills the action without being under the control of another person or condition" (Beauchamp & Childress, 2013, p. 138). One form of control that violates voluntariness is *coercion*, generally understood as a threat to harm or make a person worse off. If a person consents to something only because they have been *threatened* if they do otherwise, then that decision is not made voluntarily and will invalidate consent. However, there is also middle ground between a voluntary and a coerced choice: *manipulation* is one way that a person may be influenced to *some* extent such that their decision is not entirely controlled but not entirely voluntary, either.

The understanding and disclosure requirements make up the *informational component* of consent (Beauchamp & Childress, 2013). Both understanding and disclosure concern *information* about the specific act that is being consented to. Though some understanding is necessary for all accounts of consent, there are various interpretations of the *content* of the understanding requirement. Faden and Beauchamp (1986) break up understanding into two parts: understanding *that* one is authorizing and understanding *what* one is authorizing. Disclosure is particularly, though not exclusively, important for consent in the medical practice and research context because of the lack of expertise that patients and research subjects have regarding medical and health matters and because of the invasive and personal nature of the interactions and interventions patients have with providers. In order to make autonomous choices in medical decisions,

physicians and researchers must disclose important information about procedures to the person giving their consent. Disclosure is thus often thought to be a means to obtaining understanding about the information relevant to consent. It is these last requirements of consent, those which make up the informational component, that will be the focus on this paper as this is where the problem lies for consent in the Kirkpatrick case.

In the following chapters, I explore three contemporary accounts of consent to see what they have to say about this case. Given the confusion around consent that remains a widespread problem, this case presents an opportunity to turn to those who spend time analyzing the tough cases in order to provide clarity for the real-world cases. And though I will be looking very closely at one case in particular, my aim in clarifying the confusion around it is to show what this analysis says about *general sexual consent*, and in particular about the impact conditions placed on sexual encounters have on consent. I argue that sex in the Kirkpatrick case was nonconsensual, under all three accounts of consent. I will begin by presenting three contemporary accounts of consent in Chapter Two, from Joseph Millum and Danielle Bromwich (2018a, 2021a), Quill Kukla (2018, 2021), and Tim Dougherty (2013, 2021a), which I apply to the Kirkpatrick case in Chapter Three.

Millum and Bromwich (2018a) take a minimalist approach the understanding requirement, arguing that one need only understand that they are giving consent, how to give or refuse consent, and *what they are consenting to*, which requires that there be shared understanding between both parties about how the normative relationship between them is changed through consent. That is, the parties must understand how the normative boundaries between them are shifted through consent, i.e., what was morally

impermissible before consent is now morally permissible. This account is interesting to look at for this case because of this supposed minimalism regarding understanding, part of the informational component of consent, which is where the controversy lies in this case. As such, if the complainant's understanding does not meet even a *minimal* standard for the requirement, then this account would be useful in strengthening the justification for the invalidity of the complainant's consent. This is accompanied by their account of the disclosure requirement, under which the authors argue that the function of disclosure is to avoid *illegitimate control* over a person's decision-making, which requires that the recipient of consent disclose any information that they know which would be relevant to a person's decision to consent and that a person would reasonably expect to be told (Millum and Bromwich, 2013).

Kukla (2018) argues that the process of consent in sexual encounters must be recognized as collaborative and constituting mutual participation and responsibilities. They argue that talk of consent has skewed our view of the kinds of sexual negotiations that occur that do not neatly fit into the category of the speech act of consent, and often leave out the importance of *positive agency* that can be expressed through ethical sex. This in turn leads them to develop their account of nonideal consent, under which autonomy is *compromised* by both our own internal capacities as well as external conditions such as the power imbalances between us (Kukla, 2021). Because of this, our agency must be interpersonally and socially scaffolded to compensate for compromised autonomy in order for consensual, ethical sex to be possible. Kukla's account provides first, a new way of determining the ethical standards for sexual encounters that need not be based strictly on consent which may present a challenge and second, its focus on

gendered power relations is especially relevant in the context of this case.

Dougherty (2013) develops the Intentions View of consent, under which the rights we waive are the rights we *intend* to waive and as such if we would object to *any feature* of an event, that event has gone beyond what we've intended to allow, and consent will be invalid. Part of the aim of this account is to defend why deceiving someone into sex, even if that deception is concealing something minor such as romantic interests, income, or a person's natural hair color, leads to *nonconsensual sex*, so long as the deception conceals a *dealbreaker*. That is, a feature of an event that would make it such that a person would not consent to sex if they knew of it. This is paired with his Ameliorative View of consent, under which consent obtained through minor coercion has an *ameliorative effect* on sexual misconduct: that is, the presence of some consent makes misconduct *less grave* than had there been no attempt at all to obtain consent. This creates a third category of validity, *partially valid consent* (Dougherty, 2021a). Given that condom (non)use was a dealbreaker for the complainant in the Kirkpatrick case, Dougherty's account is useful here, but his Ameliorative View also provides an interesting complication when trying to determine the validity of consent.

In Chapter Three, I apply each of these accounts to the Kirkpatrick case to determine whether consent was valid in the Kirkpatrick case and argue that on *all* accounts, consent was *invalid*. In Chapter Two, I begin with Millum and Bromwich's account because it explains some of the more basic and fundamental features of consent generally and as such provides a good foundation on which to begin this project. In this chapter, however, I begin with Dougherty first because his account has the most immediate answer to the question of whether the complainant's consent was valid. By

using Dougherty's account, I argue that because condom use was a dealbreaker for the complainant, sex-without-a-condom went beyond the events she intended to allow and thus consent was invalid. Further, I argue that even though there was no deception involved on the part of the accused, he is still culpable for the nonconsensual event because he took *excessive risk of wrongdoing* by not using a condom in the first place. I then explore whether the presence of some consent, i.e., the complainant's participation, had any effect on the misconduct under Dougherty's Ameliorative View and argue that consent will still be fully invalid as opposed to partially valid.

Following this, I apply Millum and Bromwich's accounts of the understanding and disclosure requirements and determine that consent in this case did not meet either requirement. I argue that shared understanding was not met by using their interpretation of H.P. Grice's notion of conversational implicature which requires that both parties implicate the same sub-categories of the concept that must be understood for consent (i.e., sex). I then argue the disclosure requirement was not met because information about the presence (or lack thereof) of a condom was known to the accused, and he had reason to believe both that it was important to the complainant's decision to consent, and that she could reasonably be expected to be told it. Here, I also explore the problem of blameworthiness in this case and show how the disclosure requirement can help clarify why responsibility lies with the accused as opposed to the complainant.

Finally, I apply Kukla's accounts by exploring two questions: (1) Was sex unethical but consensual nonetheless? and (2) Was the complainant's agency enhanced or impaired by the interaction and how did that impact her consent? I argue the answer to the first is no: sex was both unethical and nonconsensual. In order to answer the second

question, I explore the power imbalance that exists between the complainant and the accused stemming from heterosexual sex within patriarchy, and how this raises the standards for what is required for supporting agency and in turn having more consensual sex, and why that this standard was not met.

In Chapter Four, I provide a critical analysis of the accounts of consent discussed and their application to this case and explore some broader implications that arise out of Chapter Three. I argue that Millum and Bromwich's account, particularly their understanding requirement, can incorporate the benefits of Dougherty and Kukla's accounts while side stepping some challenges they face. I then explore a benefit specific to Millum and Bromwich's account, namely, their ability to incorporate features that are important for consent, that is, communication, trust, and power, and tie them directly to the validity of consent. I conclude by discussing some worries I have with underlying motivations and intuitions in the current discourse on consent and why it is so important to correct them as well as why sexual assaults involving condom (non)use need to be taken seriously. The aim of this project is thus to assess the complainant's consent in the Kirkpatrick case, but also more generally, show why these kinds of consent violations are particularly harmful and why they need to be recognized as such.

Chapter 2: Three Contemporary Accounts of Consent

2.1. Millum and Bromwich: Shared Understanding and Non-Fraudulent Disclosure

Valid informed consent requires that a person provides consent voluntarily, is capable of autonomous decision-making, and *understand* what they are agreeing to (Millum & Bromwich, 2018a). This is because for Millum and Bromwich, in giving someone our consent, we are permitting an act which would otherwise be a rights violation and consent is thus intimately tied to the rights we have over our persons and property, and the duties others have towards us to respect those rights and refrain from interfering with them.[6] The understanding requirement makes up part of the informational component of consent and is required because when we give our consent, we are authorizing *something*, and in order for this to be legitimate and under our control, there are at least *some things* we need to understand about what it is we are agreeing to authorize.

The standard interpretation of this understanding requirement is that it is fairly demanding.[7] However, Millum and Bromwich argue that the understanding requirement of consent is more minimal than standard accounts suggest and that a person consenting need only understand the following to meet the requirement: "(1) that she is giving consent; (2) how to exercise her right to give or refuse consent; and (3) to what she is being asked to consent" (2018, p. 45).[8] As they note, the first two conditions are

[6] This is based in a standard view of the function of consent as autonomous authorization: see Faden and Beauchamp (1986).
[7] For example, in the medical context, Beauchamp and Childress include the following: "[d]iagnoses, prognosis, the nature and purpose of the intervention, alternatives, risks and benefits, and recommendations typically are essential [for understanding]. Patients or subjects also need to share an understanding with professionals about the terms of the authorization before proceeding" (2013, p. 132).
[8] See Sreenivasan (2003) for a similarly minimalist account of the understanding requirement.

relatively straightforward, but important nonetheless. And included in the second condition will be the specification that one must understand consent can also be withdrawn: this is a fundamental feature of consent that should not be taken for granted.[9]

The third condition, that is, understanding what one is being asked to consent to, is a *relational requirement,* unlike the first two which involve only the understanding of the person consenting. For this third condition, Millum and Bromwich argue that it is necessary to have *shared understanding* between the consenter and recipient of consent, that is, "knowing what one is consenting to means that the profferer and recipient of consent must share an understanding of how their normative relationship has been changed by the token of consent" (2018, p. 47). It is thus a specific kind of moral relationship between two people, and how this moral relationship will be different because of what one person is permitted to do with the other, which is at the core of this condition as opposed to understanding certain information about a procedure or act.

However, this is not a permanent or all-encompassing change in the relationship. That is, the way the relationship is changed is both *time sensitive* and *event sensitive:* if I give you permission to do something now, permission is only for that one thing, and it is limited to that specific time as opposed to indefinitely. Further, shared understanding is going to require *communication* between the two parties because it would be unreasonable to expect for two people to achieve a mutual understanding of something without first having some communication between each other. Given that consent is time and event sensitive, communication is also going to be important for establishing the

[9] This is particularly important for sexual consent, which can be withdrawn *at any time*. However, consent in other domains may have limits on when it can be withdrawn when consent has also created certain expectations that the consenter may be limited in violating.

specific conditions and boundaries of what is being agreed to.

Millum and Bromwich argue that communication is successful in producing a mutual understanding if both parties agree on the *intensions of the terms* used. That is, both parties must agree on the properties of a concept or term. For example, the intentions of the term 'needle' would be "thin cylinders with pointed tips" (Millum & Bromwich, 2018a, p. 52) and this could include anything from a hypodermic needle to a sewing needle. However, Millum and Bromwich restrict this by appealing to H.P. Grice's conversational implicature: "[i]t is also a matter of recognizing the context in which the proposal is made and what that includes and excludes… what explains our ability to convey and identify communicative intentions is the presumption that there are rational constraints on our conversational exchanges" (2018, p. 53). So, we have to agree on the intentions of the terms used, but this agreement is also informed by the context in which a conversation takes place as opposed to the purely literal meaning of the words we use.

The understanding requirement is accompanied by the *disclosure requirement* of informed consent, which determines what information must be disclosed by the person asking for consent. Millum and Bromwich (2013) argue that the purpose of disclosure is to avoid controlling another person's decision because this violates the right to autonomy. According to Millum and Bromwich, the disclosure requirement is conceptually distinct from the understanding requirement: the "fact that valid consent requires that the person giving consent needs to understanding *something* and the person receiving consent needs to disclose *something* does not *entail* that the content of the two overlaps at all" (2021a, p. 48).[10] Thus, what must be disclosed need not always be understood. Millum and

[10] Of course, *in practice* the content of these two will often overlap significantly.

Bromwich develop the content of the disclosure requirement by analyzing *fraudulent disclosure*, in which information is withheld or mispresented such that it undermines consent by *illegitimately controlling* a person's decision.

By determining what counts as fraudulent disclosure, conditions are revealed for what is necessary for a legitimate disclosure, i.e., one that *avoids* illegitimately control a person's decision. Millum and Bromwich argue that there are four conditions for fraudulent disclosure, and these conditions in turn help explain what the content of the disclosure requirement must include to obtain valid consent (Millum & Bromwich, 2021a). First, in order to control someone else's decision with information, a person must possess knowledge of that information. Second, the information must be relevant to the person the information is being disclosed to in order for it to impact their decision-making and thus be controlling. Third, the information must be disclosed in a way that is deceptive, which can occur by misrepresentation of the information or from withholding it. Finally, it is the *information* that is relevant rather than the *intentions* of the person disclosing: if relevant information is withheld it will constitute fraudulent disclosure even if the person disclosing did not intend to illegitimately control the consenter's decision, for example, if a physician withholds information from a patient because she does not want to worry them (Millum & Bromwich, 2021a). Thus, if a person disclosing mispresents or withholds information that they are aware of and that is relevant to the person consenting, they have illegitimately controlled the consenter's decision and disclosure is fraudulent, regardless of what their intentions were.

Millum and Bromwich argue that a legitimate disclosure, and thus the content of *disclosure requirement*, is revealed by the preceding conditions and therefore "in order to

avoid illegitimate control, the person requesting consent must disclose a piece of information if and only if: (1) she knows the information; (2) she has reason to think it is relevant to the potential participant's consent decision; and (3) she judges he would reasonably expect to be told it" (2021a, p. 52).[11] All three of these are necessary conditions for a legitimate disclosure and in turn valid consent. In addition, even if all the right information is disclosed, it must be done so in a way that is *understandable* in order to avoid illegitimate control. This adds additional communicative requirements on the discloser to be wary of language barriers or in the medical context, using overly complicated scientific jargon. The implication of these conditions is that there will be a lot of information that must be disclosed.

However, as mentioned, Millum and Bromwich argue that even though this information needs to be understandable, it does not need to be *understood* by the consenter in order for valid consent to be obtained. This is not to say that there is no overlap between the information disclosed and understood, and in fact, quite the opposite. In order to know what we are consenting to, and for *shared understanding* to be achieved, the consenter must understand how the normative relationship has been changed by the token of consent (Millum & Bromwich, 2018a). In order to achieve this understanding then, and the changing boundaries of the relationship we are in with the person we are giving consent to, certain information about what is involved in the act to

[11] Millum and Bromwich note that their use of 'fraudulent' is different from commonplace and legal use, though there may be some problems with their terminology and framing. Dougherty (2021b) claims that referring to failing to meet the disclosure requirement as fraudulent or illegitimately controlling a decision is problematic given that the disclosure requirement may not be met unintentionally or without any *intent* to withhold or misrepresent information, such as a nurse who forgets to disclose some information because she is overworked and makes a mistake. Millum and Bromwich suggest that in a case like this, the problem remains the same: "a failure to disclose certain information invalidates consent when it *predictably causes someone to give consent* [emphasis added] *(*i.e., is controlling) and *breaches a duty* [emphasis added] (i.e., is illegitimate)" (2021b, p. w2).

which we are consenting is necessary for shared understanding. In order to understand, for example, that the boundaries between myself and my physician will be changed by allowing them to insert a needle into my arm, I must also understand that a needle will be inserted, by my physician, into my arm. Thus, while a patient may not need to understand all of the risks or technicalities of a medical intervention in order to give their consent to it, they *do* need to understand that they are consenting to a certain intervention, with a specific person.

Millum and Bromwich's account can be contrasted with the standard view of consent, according to which the content of the understanding requirement of consent is the same as the content of the disclosure requirement (Millum & Bromwich, 2021a). That is, the information that must be disclosed for valid consent must also be understood. However, Millum and Bromwich suggest that the standard account both overestimates and underestimates the importance of certain features of consent against our intuitions. Proponents of the standard view overestimate the importance of disclosed information for our understanding, which is evident from the "muted" reaction from researchers to the considerable data that shows that research participants often fail to understand what is disclosed to them about key features of studies, such as their overall purpose or associated risks (Millum & Bromwich, 2021a). Thus, Millum and Bromwich suggest their account fits better with some of our intuitions regarding consent, that is, it fits better with what we think are permissible or impermissible encounters involving consent, at least in the research context.[12] Proponents of the standard view also underestimate the importance of understanding basic but fundamental features of consent, like the ability to

[12] Whether our intuitions are *right* about consent generally is a separate issue that will be addressed in Chapter Four.

give or refuse consent, which are highlighted by Millum and Bromwich.[13] The standard view has little to say about understanding these aspects of consent, but these are highly important outside of the medical context too, such as in sexual encounters where it is critical to know how to exercise one's rights to give, refuse, or withdraw consent.

2.2. Kukla: Negotiation Model and Nonideal Consent

Sexual encounters can be a bit more complicated than medical encounters, and Kukla (2018) argues that an excessive focus on consent has skewed our understanding of sexual agency; that focusing on sexual communication and the ways it can go *well* can also be ethically useful as it properly addresses the ways that sex and sexual communication can enable agency and fulfillment. They define consent as "a performative speech act, and a rich and complex one at that… To understand consent, we need to understand its felicity conditions, the rituals that surround its performance, its authority conditions, and so forth" (Kukla, p. 74). But understanding these features of consent is not sufficient for understanding the ways that sex can also be good for us.

This is in part because looking at whether someone has given or refused consent focuses on how their *negative freedom* was impacted through an event and leaves out their *positive agency*, which Kukla suggests is just as important for autonomy. There is thus there is a lot more required for good, ethical sex than obtaining consent.[14] Further, Kukla argues that there are other speech acts besides consent that allow for people to

[13] Many accounts of the understanding requirement focus on comprehension of the information being disclosed rather than understanding the function of consent itself. Dougherty (2020) classifies these views as having a *Context Understanding Condition* or a *Description Understanding Condition,* respectively. Millum and Bromwich's view can thus be classified under the *description understanding condition.*

[14] Alex London (2019) also emphasizes the importance of positive freedom for autonomy and suggests we have a right to this and has criticized Millum for not recognizing its impact on consent, particularly regarding coercion.

express their desire to participate in sex, such as accepting an *invitation* or *gift offer.*[15] These methods of sexual initiations can still entail ethical sex that consent is meant to set the standard for, in which "everyone has communicated that they want to engage in it" (Kukla, 2018, p. 92), but they are different speech acts from consent, and rather than 'consenting' to invitations or gift offers they are something we *accept*. Thus, Kukla suggests using a *negotiation model* as opposed to a consent model for determining the ethical standards for sex that is better able to capture positive agency and these other speech acts used to initiate sex.

Kukla draws on Michelle Anderson's negotiation model of legal consent in which she proposes that for rape law reform, "[t]he law should eliminate the requirement of non-consent. In its place, the law should recognize the centrality of negotiation… [which] would require only what conscientious and humane partners already have: a communicative exchange, before [sex] occurs, about whether they want to engage in sexual intercourse" (Anderson in Kukla, 2018, p. 92). Here, Kukla points to the ways that this kind of model would promote collaborative communication and mutual consultation between sexual partners, as well as equal authority as opposed to one person requesting something which another person provides. A negotiation model would require conversation that could still involve requesting and refusing consent, but could also include invitations, gift offers, and other speech acts that may also be used.

Not only does this promote the positive agency that Kukla wishes to highlight because it focuses on more than refusal and negative interference, but it also serves as a

[15] Kukla suggests that invitations are a common way of initiating sex, and a speech act which "leave the invitee neither obligated nor with a neutral free choice" (2021, p. 81). Proposing some sexual act as a gift offer is more common for long time partners and "by nature, cannot be demanded or even requested" (2021, p. 85).

form of protection that is lacking in both the 'No Model', where consensual sex requires that someone doesn't refuse, and the 'Yes Model', where consensual sex requires that someone enthusiastically accepts (Kukla, 2018). Both models rely on an assumption that when engaging in sex, a person is just allowing someone to do something to their body. Thus, even the 'Yes Model' is neither sufficient nor necessary for ethical sex. It is not necessary because there may be various times people will be unenthusiastic about a sexual encounter where it is nonetheless still an ethical one, for example, trying something new they are unsure they will like or doing something only because it appeals to their partner (Kukla, 2018). It is also not sufficient, because "at its core the yes model relies on a man's ability to infer actual willingness from a woman's body language" (Kukla, p. 93), and as Kukla points out, men have consistently failed to infer women's willingness adequately.

Moreover, by working within a negotiation model, the shift in requirements turns to the necessity of mutual participation and responsibilities, and conversation between two parties and so protects from the problems arising out of the Yes/No Models. This is because *ethical* sexual negotiation cannot merely be replaced with having better conversations about consent because it covers more than accepting a request. The negotiation model can be extended further by looking at an account like Thomas Millar's, which proposes a performative model of ethical sex as "a collaborative activity requiring ongoing communication and engagement" (Kukla, 2018, p. 94).[16] This moves beyond Anderson's primary focus on the initiation of sex, covering instead the entirety of a sexual event while still emphasizing the importance of collaboration and mutuality in

[16] See Millar (2008).

sexual negotiations. Further, this gives us other ways to talk about how sex can be unethical or bad without being rape, which both makes communicating about bad sex easier, and ensures that we are not diluting the harm of rape (Kukla, 2018).

This negotiation model of consent is less clear-cut than Millum and Bromwich's, but Kukla finds this to be appropriate given the real-life complications involved around sexual encounters.[17] In taking this approach, Kukla (2021) goes further to develop what they call a *nonideal theory of consent* in which it is recognized that most often we are operating with *compromised autonomy,* but that this does not preclude us from providing valid consent.[18] Kukla takes autonomy as "a shifting continuum and full autonomy to be an unreachable and ultimately unhelpful idea" (p. 270). Our autonomy may be compromised by internal factors such as our own capacities, or external factors such as power asymmetries or social norms. While these compromises are the norm, there will still be cases where autonomy at the lower end of the continuum is compromised too greatly, or where significant coercion is present, such that a person cannot provide valid consent. However, Kukla is less interested here in where to draw that line and instead focuses on instances in which there is sufficient autonomy for the ability to consent.

The implications of having autonomy come in degrees is that consent will, too. Kukla notes that the legal implications of having consent on a continuum is that a line

[17] Whereas Millum and Bromwich's account, and other more traditional accounts of consent, focus on validity and negative rights, Kukla opens up consent or the sexual negotiation process to a wider array of considerations, such as the different kinds of speech acts for initiation, positive agency and rights, and mutual participation. This makes consent under Kukla's account a bit more complicated.

[18] Joan C. Tronto (2009) also takes systems of power and oppression as central to their account of informed consent in medical practice. However, their account widens the responsibilities that physicians have towards their patients by shifting consent from the typical view of *consent-as-autonomy* "(i.e., an internal check about what is best for me)" (p. 189) to *consent-as-authority*, whereby consent is transformed to be "connected to power as 'power to' something…the creation of something new, a relationship of authority. Authority is thus by its very nature relational" (p. 189).

must be drawn to determine at what point a person has consented *enough* for sex to not count as rape but leaves this project open.[19] By their definition, consensual sex is:

> [S]exual activity in which each party is participating with agency, takes themselves to be doing so, communicates successfully that they are doing so, and can use communication to successfully stop the activity or any part of it as soon as continuing would no longer be an expression of their agency. (Kukla, 2021, p. 273)

Kukla distinguishes agency, defined as a person's "ability to express and enact their desires, maintain their integrity and sense of self, and determine their own activities and narratives" (p. 283), from autonomy, by narrowing the meaning of autonomy to a person's "decisional capacity, or the ability to make a voluntary and independent choice in light of one's own values" (p. 273) to reflect the way in which individual decisional capacity is seen as necessary for consent. What has been described in feminist discourse as *relational autonomy,* then, is better described as *relational agency* on Kukla's view, given that Kukla reserves autonomy for independent decisional capacity for the purposes of their nonideal consent.

Susan Sherwin (1998) is one of the earliest proponents of the relational autonomy view and like Kukla, explicitly distinguishes agency from autonomy. For Sherwin, all that is needed for exercising agency is the ability to make *reasonable choices*. However, just because a choice is reasonable does not make it fully autonomous because we can still make reasonable choices that are informed by our oppression.[20] For autonomy, or

[19] There are also, of course, ethical implications regarding where to draw the line between less consensual sex and nonconsensual sex.
[20] For example, "cosmetic surgery to conform to artificial norms of beauty" (Sherwin, 1998, p. 33).

"self-governance", Sherwin argues that decision making that is influenced by systems of power and oppression are insufficient for autonomy because the "behavior accepts and adapts to oppression" (p. 33) and thus cannot be fully autonomous because we do not have full self-governance over ourselves if our choices are informed by the systems that oppress us. Sherwin suggests widening our conception of autonomy to be based on a *relational* selfhood as opposed to an individualistic one that takes into considerations the relationships we have to other people and systems of power that help shape that selfhood and in turn our autonomy that upholds the self.

Thus, Kukla and Sherwin both agree that selfhood is relational, agency is the ability to express desires and make choices, and autonomy is impacted by the broader social context we are in. Where the two diverge is over how to frame the way that autonomy is impacted by power and people: as opposed to taking autonomy as relational to incorporate these features, Kukla opts to label it as 'compromised', and suggests the way that others can uphold our relational self is through agency. Thus, Kukla's account of consent aims to show how we can support agency, particularly sexual agency, interpersonally and socially to allow for consensual sex under the nonideal conditions of compromised autonomy that are created by our own capacities (or lack thereof) and the power relations and social conditions we exist in.

These latter external factors are particularly interesting because everyone is affected by them, regardless of their internal capacities. For this same reason, it also poses a dilemma: if power differentials compromise autonomy, and sexual relations between people in asymmetric power relations were determined to be wrong because of this effect, then most sex would be impermissible as most people do not have the same

social power. These differences in social power may come from things like "institutional roles (such as advisor and student), a large age or status difference, or a difference in social stability (such as a citizen and a refugee)" (Kukla, 2021, p. 278).[21] Thus, Kukla argues it is essential that we accept the nonideal conditions under which we make our choices:

> [W]e have to make room for the fact that consensual sex can happen even when there are pressures and inequalities that constrain our options, impose unfortunate risks on us, and make our choices less than fully autonomous. This is difficult to think about, but it is essential, given the reality of the dense and inescapable web of power relations we all live within. (p. 278)

One such power relation Kukla focuses on is between heterosexual men and women under patriarchal conditions. As they note, any account of consent must be able to accommodate legitimate sex between these parties, but when recognizing the ways that power compromises autonomy, this can be difficult especially as power cannot be undone by the individual: "[c]hoosing not to avail yourself of power doesn't make that power go away" (Kukla, p. 280). However, by building up agency, especially when understood as *relational agency*, power imbalances can be mitigated in part without having to try to eliminate the "inescapable web of power relations" (Kukla, p. 279) we are in.

In order to understand relational agency, and in turn how to support and scaffold it, Kukla draws on Hilde Lindemann's concept of *holding in personhood,* whose "core idea is that many of the roles, identities, and activities that are most central to our sense of self and our integrity require social and material support and participation; when we

[21] Kukla does note that certain relationships may be too unequal for consensual sex to be possible, one of which they think could be faculty members and their graduate student advisees.

become less able to enact these things for ourselves, other people can take over some of the labor of maintaining us in our identities" (Kukla, 2021, p. 283). Kukla adapts this concept to *holding in agency*, whereby instead of helping someone to express their identities, it involves helping someone "act as themselves, and express themselves in action" (p. 284), though the two are not entirely distinct as holding in agency will contribute in part to holding in personhood.

If agency is socially embedded in this way, then there are ways to enhance it that can in turn enhance our agency in sexual encounters thus achieving *more consensual sex*. Kukla provides a list of ways to scaffold consent, though notes that these methods are neither necessary nor sufficient for ethical sex. They highlight the importance of trust for reducing power asymmetries, the necessity of good communication "including skills and understanding and responding to what each is communicating" (Kukla, 2021, p. 287), and the need for parties to have *epistemic agency* such that they are meaningfully able to report if their consent was violated which requires social connection: "having a support network, a check on reality, and a community that holds people accountable, outside of the couple" (Kukla, p. 288).

So, our autonomy is always going to be compromised because of both internal and external forces that are inescapable. But this does not mean we aren't able to express the individual decisional capacity that is necessary for consent: we first need to recognize the ways that our agency and autonomy are dependent on the people and systems around us (as well as our own selves) and use the methods at our disposal to scaffold others' agency when we can and find people who will do the same for us.

2.3. Dougherty: Intentions View and Ameliorative View

Dougherty develops his account of consent by objecting to what has become a relatively uncontroversial norm around sex and deception which he refers to as the *Lenient Thesis*: "[i]t is only a minor wrong to deceive another person into sex by misleading her or him about certain personal features such as natural hair color, occupation, or romantic intentions" (2013, p. 718). Leniency on the permissibility of this kind of deception is due in part to the fact that it is not thought to invalidate a person's consent. However, Dougherty argues that when even minor deception involves a *dealbreaker*, this invalidates consent and thus constitutes a serious wrong rather than a minor one.[22] By *dealbreaker*, Dougherty means "a feature of the sexual encounter to which the other person's will is opposed…It must be the case that the other person is all things considered unwilling to engage in the sexual encounter, given that it has this feature" (p. 719). It is evident that *major* deception about a central feature of an encounter can invalidate consent because this violates one of the informational requirements of consent: disclosure.

As we saw in Chapter One, disclosure is one of the five key components of informed consent, and it requires that relevant information about the act that is being consented to be provided to the consenter. While the content of the disclosure requirement is debated, it is generally agreed that at least key features of the act must be disclosed.[23] Thus, consent obtained under serious deception, for example, by

[22] One implication of this is that if rape is considered as nonconsensual sex, which is the majority position as noted by Dougherty, then even minor deception that conceals a dealbreaker and in turn invalidates consent may count as rape. This is an issue which I will address in more detail in Chapter Four.
[23] In the medical context, for example, two prominent standards are the *professional practice standard,* where the content of disclosure is determined by the professional communities' standard practices, and the *reasonable person standard*, where the content of disclosure is determined by what a hypothetical

impersonating someone's spouse in order to have sex with them, will be invalid on standard accounts of consent. If someone only consents to sex because they think the person they are giving consent to is their spouse but they have been deceived, this is intuitively wrong: the person thought they were consenting to sex with their spouse, not to someone who was impersonating their spouse.

However, Dougherty wants to go further than this by arguing that any deception will lead to invalid consent so long as it involves a dealbreaker, *regardless of how minor the feature of the dealbreaker seems*. A critical point his argument rests on is that it can be extremely difficult to clearly distinguish between what he calls the *core* and *periphery* elements of a sexual encounter. In the case of an individual impersonating someone's spouse, this feels intuitively wrong because it is clear that a core feature of a sexual encounter will often be *who* someone is having sex with.[24] In contrast, when someone has a dealbreaker that might seem peripheral to the encounter, for example, an individual's occupation or natural hair color, it less obviously impacts that person's consent. However, Dougherty challenges these intuitions and suggests that they, and the Lenient Thesis, unjustly determine which features of a sexual encounter are important to a person: "[o]ne of the key achievements of waves of sexual liberation has been the promotion of a sexual pluralism that allows each individual to pursue his or her own conception of the sexual good… it is up to each individual to determine which features of a sexual

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reasonable person would expect to be told about a procedure in order to consent to it (Beauchamp & Childress, 2013, p. 126).

[24] Dougherty suggests that this may not always be the case: if a person agrees to have group sex with their partner, and at one point thinks they are having sex with their partner but it is another person in the group, it seems that sex is still consensual even though this is otherwise a core feature of the event because the person has "decided that this feature is irrelevant in these specific circumstances" (2013, p. 731). This is further reason why Dougherty is skeptical about setting standards for what the core and periphery features of sex are.

encounter are particularly important to her" (Dougherty, 2013, p. 730).[25]

This leads Dougherty to develop his account of consent based on what he refers to as the *Intentions Thesis*: "The rights we waive are the rights that we intend to waive" (2013, p. 734). Dougherty justifies this by appealing to the way that rights are connected to autonomy and agency: "if our choices are to maximally determine the permissibility of others' actions, then the rights that we waive must be the rights we intend to waive. Only this arrangement leaves us fully sovereign over these realms [of autonomy and agency]" (p. 735). This is true for all areas of our lives but is especially so for sexual autonomy because as Dougherty notes, it is important to people that one's choices determine how their life goes in that domain. Moreover, these intentions are both restrictive and extensive: "our intentions are *restrictive* insofar as we want to permit certain forms of behavior but not others… [they] are *extensive* insofar as there are always multiple courses of action that could realize the permitted behavior*"* (Dougherty, p. 735). And these restrictions may either be implicit or explicit.

Given each of these features, Dougherty proposes the following account of consent:

> In consenting, we intend to allow a restricted range of possibilities, where these restrictions are both implicit and explicit. Any actual interaction with our persons or property is consensual only if this interaction falls within this restricted range of permitted possibilities. On this account of consent, if we object to events in virtue of any feature of them, then they lie outside the restricted range of

[25] This will be true for any dealbreaker, even if it may be an unjust or discriminatory one. As Dougherty notes, "[w]hen it comes to consent, we must respect other people's wills as the actually are, not as they ought to be" (2013, p. 736). We can criticize prejudiced or discriminatory reasons on other grounds but must respect their role in consent.

possibilities to which we are consenting. (p. 736).

This account of consent provides further support for why it is wrong to deceive someone into sex, even if the object of deception seems trivial or benign, so long as it is a dealbreaker for the consenter. This is because we can object to *any feature* of the event, a broad and open category, which can include anything from the kind of activity occurring in the event to specific personal characteristics of the person who is part of that event.[26] For example, suppose an environmental activist would not have sex with someone who didn't believe in climate change. This would be a dealbreaker for her and as such, climate-denying attitudes would constitute a feature of the event (i.e., sex) that she objects to, because one feature of any event is *who* is participating in it. If the environmental activist only intends to have sex with people who share her beliefs about climate change, then sex with a climate-denier would lie outside the restricted range of possibilities she intends to allow.[27]

In addition to the Intentions View of consent, Dougherty (2021a) also proposes what he calls the Ameliorative View of consent. He suggests that consent obtained through *minor coercion*[28] can have an *ameliorative* effect on a wrongdoing in sexual misconduct. That is, obtaining consent, even if it is through coercive means, can make a wronging *less wrong* in comparison to cases where no consent is sought out at all. Dougherty's motivation for developing this account is a desire to fill in what he claims is an empty philosophical landscape when it comes to normative frameworks "for capturing

[26] Millum and Bromwich (2018b) also agree that the Lenient Thesis is false but argue that Dougherty's account of consent has implausible implications. These will be addressed in Chapter Four.
[27] This is true regardless of what the characteristic of a person is that we object to: occupation, romantic intentions, natural hair color, etc.
[28] What constitutes 'minor' coercion is not explicitly described by Dougherty. See cases of *Anger* and *Nonsconsent* below as examples.

a spectrum of sexual misconduct that varies in its wrongfulness" (p. 320), i.e., those that provide the ability to distinguish between forms of sexual misconduct that are not rape.[29]

Dougherty endorses what he refers to as the *Mistreatment Principle:* "If X mistreats Y in virtue of giving a disincentive for failing to consent to X performing action A, and Y consents because of this disincentive, then X cannot justify performing A on the basis of Y's consent" (2021a, p. 324). In other words, by accepting the *Mistreatment Principle*, we accept that a person is wronged if they are coerced into providing their consent and said consent will be invalid. And because the principle is "not restricted to egregious forms of mistreatment like violent threats or threats that are rationally irresistible" (Dougherty, p. 326), it leads to an expansive view of sexual misconduct. However, Dougherty argues that because the *Mistreatment Principle* has an expansive view of sexual misconduct where consent will be invalid under various degrees of coercion, it runs into a problem when faced with explaining the moral effect consent can have when it is obtained through minor coercion compared to when there is no attempt to obtain it at all.[30] Dougherty calls this the *Problem of Minor Duress*. He argues that the solution to the Problem of Minor Duress is to view the presence of consent as having an *ameliorative* effect on the wrongdoing. Consent has an ameliorative effect when obtained through minor coercion because while a person who obtains consent through coercive means still *wrongs* another as they are "being guided by a choice that the individual

[29] Kukla (2018) and Dougherty align here on this shared motivation for their accounts of consent. For others who share these concerns, see Sarah Conly (2004) and Kimberly Kessler Ferzan (2018).
[30] Consider the following two cases Dougherty gives: "*Anger:* Cameron attempts to initiate sex [], implicitly threatening to become angry if Morgan refuses. To avoid an angry outburst from Cameron, Morgan agrees, and they have sex" and "*Nonconsent:* Cameron attempts to initiate sex once more, and again Morgan declines. Frustrated, Cameron concludes by this point that they are entitled to sex and Morgan would enjoy sex once begun. Cameron uses physical force to have sex with Morgan" (p. 327). Here, Dougherty suggests that the intuition that *Nonconsent* is worse than *Anger* is because of the presence of consent in *Anger*.

makes and expresses because they are not in sufficiently favorable circumstances" (Dougherty, p. 337), the wrongdoing is *less grave* than had they disregarded that individual's choice altogether.[31]

However, coercion can shift from being minor to significantly constraining an individual's freedom. For example, if a person threatens violence to obtain consent, then the threatened individual's freedom and thereby their 'choice' to consent is disregarded such that the wrongdoing is comparable to a case in which their choice and freedom gets disregarded entirely (Dougherty, 2021a). Thus, if a person 'consents' because of a threat of violence, the presence of that consent would not have an ameliorative effect on the wrongdoing because the conditions under which the person has 'chosen' to consent are so unfavorable that the situation is comparable to having one's choices disregarded entirely. For Dougherty, however, the picture will not always be this clear. In order to be in sufficiently favorable circumstances where an individual's choice is their own, "informedness", competence, and freedom all play a role, but each of these capacities come in degrees. And because these capacities come in degrees, a person can be in more or less favorable circumstances when it comes to making choices. Accordingly, a person can harm an individual in varying degrees depending on the state of the individual's capacities and circumstance.

Dougherty (2021a) suggests that the best way to frame consent based on the idea

[31] Dougherty (2021a) argues that the degree of wrongfulness *must* depend on the presence of consent as opposed to the degree of harm felt by the victim or the use of force or violence, because when we try to appeal to harm or use of force, these are not going to track across all cases. That is, the same degree of force could be used in both a case where consent was present and where it is not (p. 330). Harm is also dependent on a victim's state and is thus unreliable as a marker for wrongness: if a victim is drugged and assaulted, and never find out about the assault, they have still been wronged even though they haven't been aware of harm (p. 329).

that wrongdoing in sexual misconduct can vary in these ways is by moving outside of the binary of valid and invalid consent. That is, Dougherty proposes the *Ameliorative View* of consent, whereby we maintain the categories of valid and invalid consent but develop a third category of *partially valid consent.* While valid consent has the normative effective of eliminating a wrongdoing, and invalid consent has no normative effect (i.e. it does not eliminate a wrongdoing), *partially invalid consent* has an ameliorative effect on a wrongdoing: it is a "spectral category in the respect that consent can be more or less partially valid: the degree to which the consent is partially valid consists in the size of the ameliorative effect" (Dougherty, p. 341), where the size of the ameliorative effect depends on the degree of coerciveness used to obtain said consent. For Dougherty, this framework provides a way to distinguish between the degrees of wrongfulness that can occur in different forms of sexual misconduct while still maintaining the Mistreatment Principle, namely, that an individual is wronged *anytime they are coerced into sex*, even if the coercion is 'minor' or does not meet the threshold for violent or rationally irresistible threats.

Chapter 3: Applying the Accounts

I now want to return to the Kirkpatrick case that was introduced in Chapter One. In what follows, I apply three accounts of consent from Dougherty, Millum and Bromwich, and Kukla, to see what each of these contemporary accounts of consent have to say about this case.

Before proceeding, however, it will be useful to briefly review some key features of the case. Recall that the complainant and the accused had sex twice, but the first encounter was deemed *consensual* by the complainant: they used a condom after she asked, and she checked that it had been worn after the encounter was over, which it had. It was the second encounter that the complainant said was nonconsensual because no condom had been used despite her insistence on it. However, the accused did not intentionally deceive the complainant about the presence of the condom. When he briefly turned over to his side table, the complainant thought he had put on a condom when he had not, and when asked at one point by the accused "if it felt better", she took this to mean the position as opposed to sex *without* a condom.

Thus, it seems that the complainant was sufficiently competent, and her consent was voluntary (i.e., free from coercion). It is therefore within the *informational component* of informed consent, that is, understanding and disclosure, where the controversy about consent lies.

3.1 The Dealmaker: Dougherty

For Dougherty, consent is like making a deal: not only do we get to choose *all* the terms of that deal, but if *any* dealbreaker for us becomes apparent, the deal is off. Of the three

accounts of informed consent under consideration, Dougherty's account provides the most immediately apparent answer: the complainant in the Kirkpatrick case did *not* give her consent to the sexual encounter because it went beyond the *restricted range of possibilities* that she intended to allow (Dougherty, 2013).[32] Recall that for Dougherty, the rights that we waive are the rights we *intend* to waive, and the intentions we have are both extensive and restrictive. That is, there are always different ways for a permitted action to be carried out, and we want to permit certain actions but not others. Thus, if the activity for which we are meant to be providing our consent goes beyond or is different from what we intended to agree to, then consent will be invalid. This will be the case for the Intentions View for *any* feature of an event: as long as that feature is outside a person's restricted range of possibilities, or is a 'dealbreaker', it counts as invalidating consent.

In the case in question, the complainant did not intend to have sex *without a condom*. This was a dealbreaker for her, one which she expressed on the first meeting in person, emphasized again before the first sexual encounter, and confirmed once more after the first sexual encounter was over by checking the condom. When the complainant and the accused had sex a second time the same night, and the complainant mistakenly thought the accused had put on a condom when he had not, the event went beyond the restricted range of possibilities that the complainant intended to allow. She agreed to have sex with a condom, but not without, and thus she did not give her valid consent and so the second time they had sex it was nonconsensual.

[32] Dougherty also has accounts for both the disclosure requirement and understanding requirements of consent, but they will not be addressed here. See Dougherty, "Informed Consent, Disclosure, and Understanding" (2020).

This case is challenging in the respect that the complainant was not *intentionally* deceived into sex without the condom. However, for Dougherty, it is not deception itself that is the serious moral harm but the *nonconsensual sex* that occurs *because* of the deception. That is, a minor deception or white lie can be harmless in certain circumstances or even desirable, for example, when a person fakes interest in a date's stories for the sake of kindness or good conversation (Dougherty, 2013). But when even this kind of minor deception vitiates someone's consent (i.e., by concealing a dealbreaker), it is a serious wrong. And there will be nonconsensual sex anytime consent is invalid, regardless of *how* consent is invalidated. Deception is one way this can occur, if the deception is concealing a deal breaking feature which lies outside the consenter's restricted range of the possibilities. In these cases, the person deceiving is also *culpable* for their wrongdoing. However, deception is not the only way that consent can be invalidated and in some alternative contexts, it is possible to have given invalid consent that does not *prima facie* entail that the requester of consent is morally blameworthy. Thus, we can ask, was the accused in this case *culpable* for his actions leading to nonconsensual sex?

To demonstrate why a person may not be culpable in a case where their actions have led to a nonconsensual act, consider a case provided by Dougherty:

> Suppose Candace asks to store antique skis in Courtney's basement, and Courtney agrees. Unbeknownst to both parties, the skis were once owned by Josef Stalin. If Courtney had known about their former owner, then she would not have let Candace store them. (2013, p. 737)

In this case, despite Candace's blameless behavior, Courtney's consent is invalid because

she would not have given her consent had she known about the skis' previous owner. This is because Courtney's consent is *independent* of Candace's epistemic state: whether Candance knew and lied, or did not know, it was still something that Courtney would not have agreed to and which lay outside her restricted range of possibilities (Dougherty, 2013).[33] Dougherty suggests instead that intuitions of Candace's blamelessness are due to her *justifiable ignorance*: it is not her fault that she did not know who the former owner of the skis were.

Thus, when it comes to invalid consent, there is a further issue of *culpability*: if consent is invalid there has been a serious wrongdoing, but it is another question whether a person is *culpable* in said wrongdoing.[34] Dougherty accepts the following view of culpability, which he claims is standard: "deliberately doing wrong, being aware that one does wrong, and taking an excessive risk of doing wrong" (2013, p. 740).[35] It does not seem that Kirkpatrick was culpable in the first two sense Dougherty describes, either by deliberately doing wrong or being aware that one does wrong.[36] Regarding the first sense, he was not deliberately trying to deceive the complainant into sex, and regarding the second sense, it seems possible that he was unaware of the wrongdoing given the

[33] Dougherty is not too concerned with the specifics of these kinds of counterfactuals or the metaphysics regarding features of events. He suggests that "[f]or the most part, we can rely simply on our intuitive judgements about what features an event has and ask whether someone would have been happy to go along with the event, given that it has each of these features" (2013, p. 735).

[34] All cases of invalid consent will constitute a wrong, but how serious that wrong is will vary depending on what act is being consented too. For example, though Courtney has not given valid consent to store Stalin's skis, this a much less serious wrong than had she not given her valid consent for sex. Elsewhere, Dougherty (2015) distinguishes between low-stakes and high-stakes situations and their implications for consent, where high-stakes involves one person being accountable to another in a *particularly important way*, as is the case with sexual encounters and the medical context.

[35] This might be a restrictive view of culpability, given that some non-intentional harms might be excluded. However, for the purpose of this analysis, it will be useful to determine whether Kirkpatrick's actions qualify as culpable under a stricter standard.

[36] His decision to not put on a condom when he knew it was important to the complainant could constitute culpability in these two senses, though that is more difficult to determine as it depends on his mental state.

miscommunication between himself and the complainant, a point which I will return to in more detail shortly.

It is this last condition, taking an excessive risk of wrongdoing, which is most relevant here. Dougherty (2013) notes that when it comes to minor deception and sex, there is always going to be a risk of wrongdoing because even minor deception could conceal a dealbreaker, and a dealbreaker will invalidate consent. However, he recognizes this issue is complicated by the fact that people are *epistemically limited*: a person may not know that what they think is minor is of critical importance to their sexual partner. However, the accused in this case was not epistemically limited in this regard. The complainant explicitly told the accused what her dealbreaker was, brought it up again directly before their first sexual encounter, and confirmed it again by checking the condom after their first encounter. The accused therefore had full knowledge that sex without a condom was a dealbreaker for the complainant and he was culpable for the non-consensual sex in the second encounter by taking an excessive risk of doing wrong by ignoring the complainant's conditions for sex. Thus, even though the accused may not have intentionally deceived the complainant into sex without a condom, he is nonetheless culpable for the nonconsensual sex because he was *not* justifiably ignorant of the complainant's dealbreaker.

Here, I want to return to the point about the accused potentially being unaware that he was doing wrong. One concern with this case, and one objection to the application of this account, might be that the miscommunication between the parties excused the accused from wrongdoing. Recall that the complainant engages in the second encounter because she thought the accused had put on a condom, and when asked if "it felt better",

she replied “yes”, thinking that the accused was referencing a position rather than sex without a condom. From the perspective of the accused, then, the woman has not objected to his not using a condom when he initiated and has seemingly confirmed to him that it feels better without a condom. It could be fair to say that he *thought* she had given her consent to have sex without a condom. Does this change his culpability or the validity of consent?

No, it doesn’t. And here’s why: first, even if he isn’t culpable in the sense of being aware of wrongdoing, he is still culpable for taking an excessive risk of wrongdoing and second, what matters for the validity of consent is that the event does not go beyond the restricted range of possibilities for the person who is *giving* their consent. Regarding the first point, Dougherty’s conditions for culpability show that while the accused could have very well thought that the complainant was not objecting to sex without a condom, he was still responsible for the wrong because he took excessive risk by ignoring the conditions the complainant had established for their sexual encounter. It seems two things are simultaneously true: the accused *thought* that the complainant was okay with having sex without a condom once it was initiated, and he *should never have initiated sex without a condom in the first place,* given the knowledge he had of her dealbreakers. That is, it is possible to recognize both that the accused misunderstood the situation and that he still acted wrongly.[37]

The second point, regarding the (in)validity of consent, arises out of the fact that for Dougherty, there are essentially no constraints on what kinds of features of events we

[37] Also consider the way that misinterpreting consent is a relatively common defense in rape cases: “I thought she wanted it”; “But look at what she was wearing”; “She didn’t say no”. The complainant’s engagement in this case does make it more complicated, but nonetheless, the same point holds: just because someone *thinks* they had consent does not excuse them from wrongdoing if they did not actually have it.

can object to, and consent is not temporally constrained. By temporally constrained, I mean that one could *think* they have provided valid consent, but if they find out later that consent concealed a dealbreaker, then the consent they gave was *invalid* based on this alone. So, anytime that we object to *some* feature of the event, whether it is part of the activity itself or an attribute of a sexual partner, consent is invalid even if we come to learn about this dealbreaker after the event occurred.[38] By accepting Dougherty's account of consent, one accepts that anytime someone objects to any feature of an event, that consent is invalid: if "[events that lie outside a person's restricted range of possibilities] nevertheless occur, then 'what happened is not that for which consent was given'" (2013, p. 736)

There are certain features of the dealbreaker in this case which make consent more obviously invalid on this account. First, the complainant *specifically* and *repeatedly* expressed in clear language that safe sex was important to her and that she would not have sex without a condom. That is, she made her dealbreaker clear and so the accused was not epistemically limited in that regard. Second, the dealbreaker in question is morally significant *beyond* the fact that it is a dealbreaker for the complainant: condom use is a method of safe sex, providing protection from STIs and unwanted pregnancies. For Dougherty, a dealbreaker need not have these additional features in order to be taken seriously. If a person's genuine dealbreaker is their sexual partner's occupation, this is equally justified as being outside the restricted range of possibilities a person intends to allow. However, because condom use has these potentially harmful consequences, its

[38] Millum and Bromwich (2018b) take issue with this feature of Dougherty's account and argue that he has mistakenly conflated the understanding and disclosure requirements. This problem will be addressed in Chapter Four.

importance can be justified separately on these grounds in *addition* to its being someone's dealbreaker.

There is one complication that arises when looking to Dougherty's (2021a) subsequent account of consent, the Ameliorative View of consent. Recall Dougherty's goal of providing a framework to talk about sexual misconduct that is not rape and his proposal that there should be a third category for the validity of consent: partially valid consent. Consent will be deemed partially valid when a person acts based on someone's choice that they are making when they are not in sufficiently favorable conditions, e.g. if they are being minorly coerced, and thus the presence of some consent has an ameliorative effect on the wrongdoing. The coercion must be minor for consent to be partially valid instead of invalid because if the coercion or threat is too forceful, it will be equivalent or almost equivalent to disregarding someone's choice altogether, which is what occurs in rape cases. This is how Dougherty separates rape from other forms of sexual misconduct.

Whereas Dougherty's Intentions View is primarily dealing with the informational components of consent, the Ameliorative View is dealing with coercion, which is thought to violate the *voluntariness* component of informed consent. This may not seem directly applicable given that coercion was not the problem in the Kirkpatrick case. However, Dougherty does note that "informedness" and competence are similar to freedom (or voluntariness) in the respect that "for each, there is a target degree that corresponds to being in a sufficiently favorable position for making a choice. Below this target, the individual can fall short to varying degrees, according to how uninformed, incompetent, or coerced they are" (2021a, p. 338). So, coercion, or minor coercion, is one way we can

be put into less favorable circumstances. But we might also be in less favorable circumstances for making a choice if we are not informed enough, or not competent enough. Applying this to the Kirkpatrick case, it seems that the accused acted on the complainant's choice, when the complainant's circumstances were negatively impacted as a result of the state of her informedness about the act (i.e., she did not have the right information about the presence of a condom). It seems possible, then, that her consent could have been *partially* valid as opposed to invalid: although her circumstances might have been made more unfavorable due to the lack of information she possessed, maybe it was only unfavorable enough for *partially* valid consent as opposed to invalid consent.

There are two responses I want to address here. First, I think this objection points to some problematic implications of the Ameliorative View that I will be addressing in Chapter Four. And second, the complainant's consent is still going to be invalid as opposed to being partially valid. If there had been some other feature of the event relevant to the complainant's informedness that was impaired or missing for the complainant, then perhaps this would have fallen under partially valid consent. But the complainant's informedness was made unfavorable because of the unknown presence of a *dealbreaker*. Thus, even though Dougherty permits *some* ways of being in less favorable circumstances, if a person is made to be in a less favorable circumstance in their informedness because of a *dealbreaker*, then consent is going to be fully invalid. Dougherty's position on dealbreakers is too strong to be mitigated by the presence of *some* consent, where some consent is obtained by acting based on a person's choice as opposed to disregarding their choice completely, even if that choice is made because of unfavorable circumstances. The complainant's informedness was not just minorly

impaired in this case, but severely, because if she *knew* that there was no condom then she would not have consented at all. While the accused was not forceful or coercive, he disregarded the complaint's choice by not disclosing that he had not worn a condom after she had expressed that her decision to consent was reliant on condom use.

3.2. The Minimalists: Millum and Bromwich

As we saw above, the informational component of informed consent is the problem for the complainant's consent in this case. According to Millum and Bromwich, there are two informational requirements for valid consent: the understanding and disclosure requirements. In order for consent to be valid, there are some things which must be *understood* and some things which must be *disclosed*. Given that Millum and Bromwich suggest the understanding requirement is minimal, it seems possible that their account will deem that consent was valid in the Kirkpatrick case because what lead to the problem for consent in the encounter was in part the complainant's understanding. There was no intentional deception on the part of the accused, rather, the complainant thought she was consenting to sex *with* a condom and not sex without. Thus, the complainant's understanding played a central role in why she felt her consent was invalid, and if the understanding requirement is minimal, then perhaps her consent was in fact valid. Before proceeding, it should be clarified that Millum and Bromwich would likely find this wrong or harmful on other grounds, even if the consent was valid. However, to say that something is wrong or harmful is different from saying it has the power of invalidating consent.[39]

[39] For example, a person can be exploited while still giving their valid consent. Consider Millum and Garnett's (2019) account of *coercion as subjection*: unlike traditional coercion, coercion as subjection does

To see why consent in this case might be valid according to this minimalist understanding account of consent, recall that for Millum and Bromwich (2018a), by definition, valid informed consent is consent that *waives a right*. This is why consent plays a critical role in our lives: we all have rights to non-interference that correlate with others' having duties not to interfere with us in certain ways. Thus, anytime a person gives their consent for something they are allowing something which would otherwise be a rights violation. In this case, then, the question is whether sex without a condom was a rights violation, given that the complainant engaged in sexual intercourse with the complainant under the impression that it was sex with a condom.

We can consent to things without understanding everything about them, as is clear from a case Millum and Bromwich raise:

> *First Sex:* Ezra is a virgin but is eager to have sex. His partner, Daria, happy to be his first, starts kissing him one afternoon and one thing leads to another. "Are you sure this is what you want?" she asks. "Definitely," he replies. Afterwards, Ezra wonders what all the fuss is about—that definitely wasn't the magical experience that the movies had led him to expect. (2018a, p. 46)

If we had to understand *everything* about what we were consenting to, then we would not be able to consent to any event in which we were epistemically limited, in situations like Ezra in *First Sex.* Thus, we can misunderstand at least *some* things about an event or

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not undermine the voluntariness of consent. Instead, it is an instance in which a person proposes "to make another worse off if he does not comply with her demand, with 'worse off' understood as 'worse off relative to his preexisting moral entitlements" (Millum & Garnett, 2019, p. 22). An example they use to illustrate this form of coercion is looking at payment for research for someone in extreme poverty. Although there is a sense in which a person in extreme poverty is not *fully* freely choosing to participate in research if it is their only means of income, they are still able to give valid consent, thus facing coercion as subjection rather than consent-undermining coercion. This may still be wrong in terms of exploitation, but it is not wrong in terms of voluntariness as they are still able to freely choose to give their valid consent.

experience whilst still giving valid consent.

For Millum and Bromwich's (2018a) account, in order to fulfill the understanding requirement, one must understand what it is one is consenting to. While this need not include everything about the encounter, it does require that there be shared understanding between the person consenting and the person receiving consent about how their normative relationship is changed by the token of consent, i.e., that what was a rights violation before is now permissible. The authors suggest that the best way to achieve shared understanding is through communication, and that *successful* communication is best determined by Jennifer Saul's interpretation of H.P. Grice's conversational implicature. For Grice, successful communication means that both parties agree on the intensions of the terms used, but there are also *rational constraints* on conversations that are dependent on the context in which they are being made. That is, certain things are *conversationally implicated* due to the contexts we are in rather than what is explicitly stated: when the doctor at a hospital asks if they can insert a needle into your arm, it is implicated that they mean *medical needle* as opposed to *sewing needle* (Millum & Bromwich, 2018a).

However, Millum and Bromwich suggest that these conversational implicatures are more complex, and they adopt Saul's concepts of *utterance-implicature* and *audience-implicature:* the former describes "claims that the speaker attempts to conversationally implicate" (2018a, p. 53) and the latter describes "claims that the audience takes the speaker to be implicating" (p. 54). And while both parties need not be imagining the exact same thing in order to have successfully communicated such that they have achieved shared understanding, they do need to implicate the *same sub-*

category of the concept being referred to, or the recipient of consent must be implicating a sub-category within a more general category that the profferer of consent is implicating.

For clarification on what constitutes a concept and its sub-categories, consider the example of *needle*:

> The same concept—*needle*, meaning a thin cylinder with a pointed tip—may include as sub-categories gramophone needles, craft needles, pine needles, medical needles, and so forth. These sub-categories may themselves be divided up into more fine-grained sub-categories. So craft needles include knitting needles and sewing needles. Medical needles include hypodermic needles, gun needles, and surgical needles… The label 'needle' can be accurately applied to all of them. (Millum & Bromwich, 2018a, p. 54)

If a doctor asks, "May I insert this needle" and they are utterance-implicating *gun needle*, but the patient is audience-implicating *medical needle,* consent is valid despite the fact that the patient is not thinking of a gun needle, because a gun needle is a type of medical needle, which the patient is consenting to by implicating it (Millum & Bromwich, p. 56). However, if the doctor was utterance-implicating *gun needle*, and the patient was audience-implicating *hypodermic needle*, then the patient has *not consented* to have any needle inserted because a hypodermic needle is *not* a kind of gun needle, and they have only consented to having a hypodermic needle inserted. Generally, then, when the person who is giving consent is using the broader category, and the person who is receiving consent is operating *within* this broader category, consent is going to be *valid*. Conversely, when the person giving consent is using the more specific category and the person receiving consent is using the broader category, consent is going to be *invalid*. Or,

if both parties are using *different* sub-categories, then consent will also be *invalid*.

So, although we do not need to understand everything about an event, what was not understood in the Kirkpatrick case was a key feature of the event for the complainant, that is, it had an impact on which rights she *thought* she was waiving. When we apply Saul's interpretation of Grice's conversational implicature to the case we can see why shared understanding was not successful and thus why the understanding requirement was not met, rendering consent to sex without a condom invalid. The complainant and the accused must have both implicated the same *sub-category* of the concept being referred to, or the complainant must have been implicating the broader category.[40] Here, we can say that the broader concept is sex, which of course is going to contain *many* sub-categories, which themselves will have their own sub-categories. Given the complexity of sex, it might be better to begin with a concept that is slightly more specific, for example, penetrative sex. This still can be divided up into sub-categories: penetration with a toy, oral, penile-vaginal, each of which have further categories e.g., penetration with a toy might mean certain toys and not others. One sub-category of penile-vaginal penetration would be with a condom, and another without a condom.

But this needs some explanation because what the courts are trying to figure out is *if*, in fact, sex with a condom is a different act from sex without a condom. The first sub-categories of sex described are likely to be uncontroversial categorizations of different acts but because condom use is a more finely tuned category of another category, its categorization is less clear. However, one way that sub-categories of a concept can be

[40] If the person giving their consent is up for anything regarding sex, then shared understanding will be much easier to achieve because the recipient of consent can be implicating *anything* within the category of sex.

determined is by looking at social context, as this can determine what is implicated. For example, the word 'needle' spoken in the context of a hospital both *excludes* certain sub-categories of the concept needle (i.e., craft needles) and implies others (i.e., types of medical needles). However, social context includes more than physical locations and also brings in the social norms of a given time and place. Thus, *Canada in 2022* has certain features relevant here: casual sex is a relatively common and accepted practice, it is recognized that there are many kinds of sex (though heteronormative assumptions are still prevalent, there has been some success to start moving beyond this), and safe sex practices are common in discussion and in education.

For example, in their study of the sexual behaviors of adolescents and young adults in Canada, Rotermann and McKay (2020) found that over 60% of individuals from the ages of 15 to 24 reported using a condom the last time they had sex, and for those who reported not using a condom, the reason why for 47.6% was due to being in a monogamous relationship, and 47.2% were using other methods of contraception. Further, condoms have been vital for public health approaches to contraception because of their accessibility: "[m]any sexuality educations programs tout condom use as a law-cost, hormone-free, and accessible option for pregnancy and STI-transmission prevention" (Fetner et al., 2020). Canada also has a "Sexual and Reproductive Health Awareness Week", a campaign designed to "raise awareness on sexual and reproductive health and promote resources to improve community health in Canada" (Public Health Agency of Canada, para 1, n.d.). Given the commonplace use and discussion of safe sex practices, and condom use in particular, in the current context this case has taken place in, sex with a condom is a justifiable and *meaningful* sub-category, or perhaps protected sex

could itself be a category.

Here then, we can see why the communication in this case failed and thus why the complainant did *not* give her valid consent. First, it should be addressed that there was a significant lack of communication in the second sexual encounter between the complainant and the accused. However, conversational implicature can be brought in when the accused asked, "Does this feel better?", referring to sex without a condom, and the complainant saying, "Yes", referring to what she thought was sex with a condom. Here, the accused is the *utterance-implicater* and the requester of consent, and the complainant is the *audience-implicater* and the proferrer of consent. The complainant and the accused were both implicating different sub-categories within the concept of sex: sex with a condom and sex without a condom, respectively.[41] To clarify in this case, we can think of sex as analogous to *medical needle*, sex with a condom as equivalent to *hypodermic needle*, and sex *without* a condom as equivalent to *gun needle*. Therefore, like the patient in the previous example, the complainant did not give her valid consent for the encounter because she and the accused were both implicating different sub-categories of the concept of sex. The complainant consented to sex with a condom, but not sex without a condom. As such, on Millum and Bromwich's account, shared understanding was not met because different sub-categories were implicated and thus the complainant did not give her consent to the second sexual encounter she had with the accused. Thus, although we don't have to understand everything about an encounter or have the exact same thing in mind between the utterer and the audience, if there is some

[41] As stated above, the concept in reality is more specific than sex (i.e., penile-vaginal penetration) but I simplify here for the sake of clarity: 'sex with a condom' for these purposes, is equivalent to 'penile-vaginal penetration with a condom'.

part of the act that is so important to a sexual experience that we would *not otherwise consent*, then it seems justified to think that that person has in mind a sub-category that reflects this specific preference, so long as there is context for its being a sub-category.

Shared understanding is necessary because in order for consent to be valid, the parties involved must understand how the normative relationship between them has changed, and this is achieved through successful communication in which both parties are implicating the same sub-category of a concept, or the person receiving consent is implicating a sub-category within a general category the person giving consent is implicating (Millum & Bromwich, 2018a). But we can also think about this in simpler terms: having sex *without* a condom brings in other kinds of rights violations: certain bodily fluids or contact, potential pregnancy, and potential STIs. Thus, beyond being a condition upon which one can give or restrict their consent and thereby constitute at least some violation if not respected, it can also have direct physical consequences and thus further violations of one's bodily integrity which all impact the normative boundaries of the relationship between two people. However, this is also true of other conditions placed on a sexual act. Consent reflects our autonomy to make decisions for ourselves and our bodies, and if a person consents to being touched in one place but not another, or in one way and not another, then violating these requests entails that the normative relationship between parties has *not been changed* in a way that would permit such actions.

I now want to turn to the *disclosure requirement*, the second part of the informational component of informed consent. Having already established that the complainant did not meet the understanding requirement of consent, consent will be invalid regardless of whether disclosure is met because all components of consent must

be met for validity. If one is not, then consent is invalid. However, it is useful to explore the disclosure requirement, to be thorough. To see whether this requirement was met in the Kirkpatrick case, recall the following from Millum and Bromwich's account: "the person requesting consent must disclose a piece of information if and only if: (1) she knows the information; (2) she has reason to think it is relevant to the potential participant's consent decision; and (3) she judges he would reasonably expect to be told it" (2021a, p. 52). These are the conditions which ensure that the person requesting consent does not undermine that consent through *fraudulent disclosure* which illegitimately controls a person's decision. And though Millum and Bromwich use the term 'fraudulent', a person need not *intend* to control a person's behavior through deception: withheld or misrepresented information still qualifies as such even if a person had benevolent intentions (Millum and Bromwich, 2021a).

The accused in this case was the person who initiated sex and is thus the requester of consent and is therefore obligated to meet the disclosure requirement. In this case, the information in question is the presence of a condom, and this information meets the above conditions for information that must be disclosed. First, it is information that was known by the accused. Second, he had reason to think it was relevant to the potential participant's consent decision. The complainant asked the accused if he had a condom and said if not that she had one before having sex the first time, and after they had sex, she checked to make sure he had worn one.[42] Thus, he had even *very* good reason to think it was relevant. Third and finally, he should have judged she would reasonably

[42] The complainant also stated that she said she would only ever have sex with a condom, but the accused denied this. This would be definite reason for the accused to disclose. However, even if she had not said this, it would still be reasonable to assume it was important to her given the other facts.

expect to be told it. This is due to in part to the previous facts: knowing that she had been adamant about using a condom the first time, it is reasonable to assume that this was important to her decision to consent. But because condom use is also commonplace, and morally significant in other ways (i.e., for safe sex) there could also be justification for disclosing whether one is using one regardless of a person's stated preferences. Therefore, the disclosure requirement was also not met, and consent was also invalid by failing to meet this condition.

There are a few issues that need to be addressed before concluding this section. One problem that arises here, as it did under Dougherty's account, is the misunderstanding and its effect on the accused's action: because the complainant *thought* that the accused was wearing a condom, she proceeded to engage in the sexual activity. However, this also does not excuse the accused on Millum and Bromwich's account, that is, it does not change the fact that both the understanding and disclosure requirements were *still not met* and thus consent was invalid. Because the complainant was implicating *sex with a condom* and the accused was implicating *sex without condom*, shared understanding was not met and thus consent is invalid, regardless of the accused's intentions or misunderstanding.

Further, even if the accused *thought* that the complainant had consented, he still failed the duty he had to disclose that he was *not wearing a condom.* It could be said that the complainant should have also confirmed herself that the accused was wearing a condom before agreeing to have sex. This may be true: she could have double checked, and maybe it would have been prudent to do so. But nonetheless, the accused *should also have checked*, and because he is the recipient of consent, he is obliged to meet the

disclosure requirement which places an even stronger sense of responsibility on him to check (by disclosing that he was not wearing a condom) than it does on the complainant.

The last point I'd like to touch on concerns the sub-categories of sex. As I have argued, social context can play a part in determining what counts as a sub-category, as the Canadian context has with condom use and other safe sex practices. However, there is an issue of how far this extends: given how complicated sex is, there is a *vast* number of different ways it can go, and thus in theory the possibility of nearly endless sub-categories if each different feature of sex constitutes a different sub-category of sex. Further, I have suggested that part of the problem with this case was the fact that the complainant had a specific condition in mind that her consent depended on, namely, that a condom was used, which is why shared understanding wasn't met. However, not *all* conditions would have this effect for Millum and Bromwich's account, for example, conditions extended to include characteristics or attributes of a sexual partner.[43] Though I do not wish to settle the issue here of where this line gets drawn, it seems that there must at least be some social context or commonplace use of a form of sex in order for it to count as a sub-category, as there is with condom-use.

3.3. The Anti-Transactionalist: Kukla

Millum and Bromwich and Dougherty ground their accounts of consent in a standard view of consent whereby consent's importance is based closely to *negative rights* and is *transactional*: I give you my consent, and through this transaction, what was once a rights violation is no longer one. However, Kukla's (2018, 2021) approach takes consent as

[43] As Dougherty's (2013) account would suggest.

more complicated than this, in part because they bring in positive freedom in addition to negative freedom, and because for them consent is not something that is merely requested and then given. Consent for Kukla is something that is achieved between two people through something like negotiation, and it is something that comes in degrees. Regarding the former point, viewing the consent process like negotiation allows for us to recognize other speech acts that are used to initiate sex and to describe the ways that sex can go poorly without it being nonconsensual; a binary which Kukla is wary of (Kukla, 2018). Regarding the latter point, Kukla suggests that an event can be more or less consensual depending on how a person's agency is either scaffolded or impaired by others' actions and attitudes towards them, and this applies to all sexual encounters on the view of *nonideal consent (*Kukla, 2021).

Regarding the Kirkpatrick case, Kukla would surely find this problematic, especially given their feminist position and general concerns about heterosexual sex. However, Kukla's account is complex in that it is meant to allow for compromised autonomy, and to talk about bad sex that isn't necessarily nonconsensual. Thus, an implication of their account could be that sex in the Kirkpatrick case was in fact consensual. There are two questions, then, which can frame the application of Kukla's account. First, given that there are many ways that sex can go poorly without being nonconsensual sex, was the case in question an instance of bad sex that was nonetheless consensual enough? Second, and relatedly, in what ways was the complainant's agency enhanced or impaired by the event and how did that impact the degree of her "consensuality" (Kukla, 2021, p. 272)?

Part of the problem Kukla has with the current philosophical discussions of sexual

encounters is that it has been primarily focused on two things: *harmful encounters* of sex and the *initiation* of sex. The former means that positive sexual agency is often overlooked, and the latter entails that discussions about sex revolve around responses to initiation, i.e. consent or refusal, which leads to a problem:

> If we focus our discussions of sexual negotiation on consent and refusal, then the only sexual harm or ethical misfire we have the tools to discuss is rape, where rape is understood as sex without consent. But if we think that rape is the only way that sex can go wrong, then this both dilutes the serious harm of actual rape and sets a dangerously high bar for what we are willing to call out as ethically problematic sex. (Kukla, 2018, p. 94)[44]

However, in cases like the one under consideration here, we have to determine whether sex was consensual.[45] Kukla does not go into detail about how exactly to determine whether sex was unethical or nonconsensual. Instead, they focus on the ways that sex can go well and aim to alter the way we view consent to allow for ethical analysis of sex that can help guide discussions to reflect these complexities. For Kukla, some consensual sex won't count as *ethical* sex if we adopt a negotiation model because the standards for meeting ethical negotiation that incorporates positive agency can be more difficult to meet. As Kukla notes, everyone must communicate they want to participate in sex in order for it to be ethical, but: "[w]e can fully autonomously agree to all sorts of harmful

[44] Kukla's concern here about diluting the harm of rape is that if the only standard we have for ethical sex is consent, then sex falls into two categories: nonconsensual, unethical sex, or consensual, ethical sex. Thus, if people experience some sexual misconduct, there are only two options: sex was fine (bad, maybe, but consensual) or it was rape (nonconsensual). Kukla does not go into much detail on what we should classify as rape but implies that just because sex was bad or perhaps unethical in certain ways, this does not mean it counts as rape.

[45] Here I will be using language of consent and validity while still trying to reflect Kukla's ideas that are outside of this model.

and unethical things, for terrible reasons. For instance, I might agree to do something that I find degrading or unpleasantly painful because I would rather have bad sex than no sex at all, or because my partner isn't interested in finding out what would give me pleasure" (2018, p. 76). However, recognizing that sex can be unethical in these ways does not make it rape: "[w]e do this in other areas, where we recognize actions of deceit, hurtfulness, and damage which are not the worst of transgressions and yet which are not morally neutral" (Conly in Kukla, p. 94).

So, it is clear that the sexual negotiation in the Kirkpatrick case at least went badly. Communication between both parties was not good, and while there may have been some mutual uptake and collaborative engagement in the activity, it was based on a misconception about the encounter that greatly impacted the complainant's agency. If sex is ethical when we are able to express sexual agency, then our preferences (and conditions on sex) and whether our partner respects them are necessary are necessary for ethical sex in which sexual agency can be expressed.

However, the complainant was not able to express sexual agency. Or rather, the opportunity to express her agency was taken away when the accused ignored what was important for her to have in order to have good sex, or any sex at all. And although Kukla allows for sexual negotiation to go poorly without it necessarily constituting rape or assault because negotiation captures a broader range of the features of sexual encounters and the communication around it, disregarding not only someone's preferences, but their *precondition* for sex, is going to go beyond just bad sex. Further, Kukla's recognition of the ways that sex can go well or poorly is reflective of a broader point: there are *many* ways that sex can go at all. That is, the complexities and variations of sexual acts are vast,

as are people's preferences. And moving beyond heteronormative assumptions about sex opens up a much wider range of acts that we can consent to in the first place. This is going to make it more difficult to defend why the conditions people place on a sexual encounter given their preferences, for example using a condom, wouldn't have an impact on their consent to an encounter.

Another way to determine whether a sexual negotiation goes well is to look at whether a person's agency was enhanced or impaired through the encounter. Here, we can turn to the second question I've posed and look at the ways the complainant's agency was impacted and how this in turn impacted the degree of her consent. Recall that for Kukla (2021), an account of consent must reflect the nonideal conditions we are situated in that impair our autonomy; conditions which are both internal (i.e. capacities) and external (i.e. social norms and power relations). These impairments entail that people's autonomy comes in degrees, and because this varying autonomy is required for valid consent, an event can be more or less consensual depending on how much autonomy is compromised.[46] Because of this compromised autonomy, agency and in turn consent must be socially and interpersonally scaffolded to compensate for this in order to achieve more consensual sex. When it comes to sex, holding others' agency means being responsive to what is being communicated through verbal and physical cues, but further, it requires "respecting and understanding who they are, what they value, and so forth" (Kukla, 2021, p. 285). And while this may be more difficult for new sexual partners,

[46] This is not to say that consensual sex prohibits our autonomy from being *intentionally* compromised if we so choose: consider certain BDSM practices that might involve humiliation, pain, or submission, all of which would compromise agency/autonomy under circumstances in which they weren't welcome. However, Kukla (2018) points to BDSM communities as an exemplar of good-quality sexual negotiations and argues that the common use of safe words would be beneficial in many other kinds of sexual practices.

especially these latter conditions about personhood, it is still achievable with some extra effort.[47]

In this case, the complainant's agency was not scaffolded adequately.[48] When the accused ignored what was important to the complainant, namely, condom use and safe sex practices, they undermined her agency as opposed to holding her in it. While it could potentially be said the accused responded to the complainant's physical and verbal cues in the second encounter by taking her participation as a cue for consent to sex without a condom, as well as her response "Yes" when asked if it felt better, these are more surface features of the event that do not seem to reflect the deeper features of agency that Kukla aims to highlight. What differentiates the concept of holding in agency from something like basic communication (i.e., responding to physical and verbal cues) is that it includes a person's values and identity. Failure on behalf of the accused to recognize what he knew of the complaint's values and identity by not respecting her wishes and trying to initiate sex in the first place without a condom already undermines her agency. By not doing more to ensure that this was okay with her, he undermined it further. Thus, we can at least say that this was *less consensual sex*.

Further, Kukla (2021) argues this scaffolding is necessary for everyone, given the consistent differences found in people's capacities and social positions. However, there

[47] Kukla notes that one-night stands and hookups can be perfectly ethical, as can sex between people who have been drinking. The former is not inherently more problematic for Kukla, it just may require more effort on behalf of the parties to ensure sex is more consensual than less. The latter does raise challenges and risks, but Kukla states it "is unrealistic to count all such sex as nonconsensual, and hence in effect rape" (2021, p. 275)

[48] Kukla does not specify how much scaffolding is necessary for consent, only that sex will be more consensual when agency is scaffolded to some degree, and less consensual when it isn't. The degree to which our autonomy is compromised will also determine how much scaffolding is adequate: if my internal capacities are not impaired very much, and I have a relatively high social power, then supporting my agency will require less than it would for someone who has a lower social status or is impaired in their internal capacities.

are certain relationships in which this is especially true, such as those having heterosexual sex because of the power imbalance that exists in a patriarchy and the impacts this can have on women's sexual agency:

> Growing up under patriarchy involves developing attitudes and habits that are tangled deep within a pervasive set of social norms that train us to be passive about sex and to be quiet about our own sexual desires. It generally discourages us from being assertive and from thwarting men's social demands. And indeed, when we resist men's attempts to interact with us, we lay ourselves open to violence and verbal abuse. (Kukla, p. 279)

This means that there is a particular challenge, that is, it will take more scaffolding, for women having heterosexual sex because not only is there a pervasive power imbalance in place between them and their partners, but this power imbalance has specific implications for their sexual agency. For instance, historically women have been objectified and not seen to have their own sexual agency, or have been taught that men's sexual agency is more important: "[p]atriarchy is fundamentally structured by norms that demand that women serve men's needs, and sexuality is the paradigmatic arena where such servitude is demanded" (Kukla, 2021, p. 279). When the accused's response to being confronted about not wearing a condom was that he had been "too excited" (*R. v. Kirkpatrick*, 2020, para 10), what he was expressing in part was that his pleasure and agency was what mattered most, at the expense of the complainant's. Thus, as the complainant and accused were engaged in a heterosexual relationship, the standards for *more consensual sex* are going to be higher than for some other relationships. However, as I have suggested, the encounter between the complainant and the accused can already be deemed less

consensual based on the basic features of holding in agency. Because the standards for their consensual sex were even higher because it was heterosexual sex, this impairs the quality of consent further under Kukla's nonideal account.

3.4. The Verdict from the Philosophers

The answer we get from each of these philosophical accounts of consent, then, is that *sex in the Kirkpatrick case was nonconsensual*. Despite Millum and Bromwich's minimalism about understanding, or Kukla's acceptance of compromised autonomy for consensual sex, or Dougherty's view about the ameliorative effect of the presence of *some* consent, each account shows that sex in this case was nonconsensual and that the accused was morally responsible for it. Both Dougherty and Kukla's accounts were able to do this without ever having to determine whether sex with a condom is a different sexual act than sex without. And though Millum and Bromwich require some distinction between sexual acts in order to justify what counts as a sub-category of sex for the purpose of determining whether shared understanding was met, this is not necessary for their disclosure requirement of consent.

I raise this point here because what each of these accounts do is show us *why* this sexual encounter was problematic regardless of whether *sex-with-a-condom* is a different act than *sex-without-a-condom.* Each bring in broader considerations about why consent is important and why it was problematic in this case, for example: we have autonomy over ourselves and our bodies and we get to choose in very specific ways how we intend to allow others to interact with us, our agency and sexual freedom is important for our health and well-being and others should help us achieve this rather than hinder us, and

because of the seriousness of the rights violations that occurs when we are interfered with without our consent, others have strict duties towards us when it comes to disclosing information about any potential rights violation.

Chapter 4: Lessons Learned

4.1. Which Account Gets It Right?

All three accounts of consent deemed sex nonconsensual in the Kirkpatrick case. However, each did so in importantly different ways. In the following section, I first discuss some benefits and pitfalls of each of the accounts and then argue that Millum and Bromwich's account is able to incorporate the good features of Dougherty and Kukla's accounts while avoiding some of the problems they face.

4.1.1. Analysis of Dougherty

An important benefit of Dougherty's account of consent is its recognition of the complexity of sex and differences in what people find most important about their sexual encounters. This is not to say that we can't define sex, or features of sexual practices, but that as we've seen from the previous discussion, even something like "penetrative sex" can itself be broken up in sub-categories with further subcategories within those. For Dougherty's Intention's View, what is important for sex, or what is a *core* feature of it for a person, is determined by that person and thus the account is inclusive of all kinds of sexual practices and takes people's preferences as central.

However, issues arise when *anything* can count as a core feature of sex, even things that are outside of the physical aspects of the event, which is an implication of Dougherty's account because he has such an open interpretation of what counts as a feature of the event. His interpretation includes not only physical features of the event but also any feature of the *person* who is part of that event (Dougherty, 2013). Thus, the

account goes beyond being inclusive of the variances of sexual practice and also includes as part of these events the many features a person might have, whether it be physical attributes, their attitudes, or some other characteristic. This is not to say that these things cannot be of great importance for people and their sexual encounters, but the problem is that there is a difference between invalid consent that arises out of a dealbreaker that changes the act and the one that doesn't. Consider an example that Dougherty raises:

> Victoria makes it clear that she wants to have sex only with someone who shares her love of nature and peace. Chloe falsely claims to have spent time in a war zone as a humanitarian… When Victoria asks whether she likes animals, Chloe omits the truth – 'only to eat or to hunt'– and pretends to love petting them in the wild. As a result of this deception, the two spend a night together. (2013, p. 728)

For Dougherty, this means that Victoria's consent was invalid. When we compare this example to the Kirkpatrick case, we can see the similarity between the two: Victoria did not consent to have sex with someone who did *not* share her love of nature and peace, and the complainant did not consent to have sex *without* a condom. However, recall the case of Candace asking Courtney to store what are unknowingly Stalin's skis. Consent is still invalid here even though neither party knew about the skis' owner and there was no deception involved. Similarly, if Victoria were to assume that Chloe was an animal and peace lover when she was not, and had sex with her due to this misconception without any deception from Chloe, then Victoria's consent is still going to be invalid. This seems to place the complainant's invalid consent in the same category as Candace's and the altered case of Victoria's in which there is no deception.

However, this takes away something from the violation that the complainant in the Kirkpatrick case experienced: the feature of the event to which she objected to (no condom) was something which transformed sex into a different act entirely (sex without a condom). The same cannot be said for the violation that Victoria experienced when she mistakenly thought she was having sex with a fellow animal lover. This is not to say that Victoria is not wronged if this really is a dealbreaker for her and if she was *deceived* about it, then her consent may still be invalid. For example, Millum and Bromwich (2018b) argue that Dougherty has conflated the understanding and disclosure requirements of consent. They agree consent will be invalid if a person is deceived about a feature of the event that is a dealbreaker for them, but this is because the consent receiver is obliged to meet the disclosure requirement, under which they must disclose information that would be dispositive to a person's decision *if they have reason to believe it is dispositive*. Thus, if Chloe had good reason to believe that her animal-non-loving self was a dealbreaker for Victoria and lied about it, Victoria's consent would be invalid because Chloe would have illegitimately controlled her decision to have sex.

The problem under the Intentions View is that anytime there is a dealbreaker, even if its presence is unknown to both parties, consent will be invalid.[49] And this is further complicated by the fact that *anything counts*, that is, not only will dealbreakers pertaining to the sexual act count, but also dealbreakers pertaining to all attributes and characteristics of sexual partners. There are thus two things working against the plausibility of Dougherty's categorization of cases of invalid consent: the fact that dealbreakers do not have to be known at the time when giving consent, and the fact that

[49] Dougherty recognizes this implication of his account, stating: "it is not always transparent to people whether they are giving their morally valid consent to particular events in the world" (2013, p. 736).

these dealbreakers can be anything. This is going to vastly increase the number of cases of invalid consent and include those in which people are blameless.

The reason this takes away something from the violation the complainant in the Kirkpatrick case faced is because consent in all these examples is violated in the same way. Dougherty's account concerns the informational component of consent, and when someone's dealbreaker is concealed (regardless of how it is concealed or if someone is responsible for this) then their consent is invalid because they are missing information that is relevant to their consent decision. And while people have a right to decide for themselves what is important for their sexual encounters, some misunderstandings about information of the event is more serious than others.[50] The complainant in the Kirkpatrick case misunderstood information that resulted in having someone *do something to her* that she did not agree to in the first place. And placing the wrong in the same place as Victoria's misunderstanding, in the altered version where she falsely *assumes* that Chloe is an animal lover and later discovers she is not, fails in giving an adequate justification for why consent in the complainant's case is more problematic.[51]

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[50] For example, Tilton and Ichikawa (2021) reject Dougherty's proposal that deception over *any* dealbreaker leads to invalid consent and develop an account of consent that distinguishes between the effects of dealbreakers on consent by focusing on their *metasemantic content*. On their account, "if you deceive someone into sex by lying about something essential to what someone agrees to, you involve them in a sex act they have not consented to, and so their sexual rights are violated... Lies about peripheral features, on the other hand, do not change what is agreed to in the same way, and so the subsequent sex act is still the same one to which they consented" (Tilton & Ichikawa, 2021, p. 146). This is because of the role of convention in the content of *what someone agrees to:* it is thus not that some dealbreakers are less morally justified than others, but that they don't invalidate consent if consenting language isn't explicit about their details.

[51] Millum and Bromwich (2018b) argue that Dougherty's account also leads to three problems: (1) it has a unreasonably high standards for the recipients of consent to check for dealbreakers; (2) it collapses the distinction between nonconsensual acts and acts that a person comes to regret because if they *later come to object* to a feature of the event, then consent is invalid; and (3) later changing one's dealbreakers means that what was an invalid encounter before is now *valid*.

4.1.2. Analysis of Millum and Bromwich

Millum and Bromwich's supposedly minimalist understanding requirement turns out to be quite robust, particularly for sexual encounters.[52] There are two main reasons for this. First, given the complexities of sex and the various sub-categories within the concept of sex, shared understanding will often require significant communication in order for the proferrer and recipient of consent to implicate the same sub-category, or for the proferrer of consent to implicate a more general category which the recipient of consent is implicating within. This is going to be especially so when people have *conditions* (or dealbreakers) on their sexual encounters that can result in the activity being placed in a different sub-category of sex. As stated previously, it is unclear where exactly the line gets drawn between mere preference and a condition that has sufficient context to create a sub-category within the concept of sex. But as I have argued, if there is sufficient context, as there is with unprotected sex and protected sex, then a condition justifiably creates a sub-category. Of course, many will not enter into a sexual encounter with explicit conditions for the encounter.[53] Take Millum and Bromwich's example of *First Sex* raised in the previous chapter: Ezra is eager to have sex for the first time, the assumption here seems to be penile-vaginal penetration, and in the case as stated, neither party has any

[52] Whether it is more robust than they may think in the medical context as well is a separate issue. However, I think perhaps the lack of expertise of patients or research subjects in the medical context could impact how often people implicate more specific sub-categories than their physician or the researcher and thus make shared understanding easier to achieve in these contexts. In sexual encounters, the concepts that must be grasped are going to be more accessible than, say, knowing all different types of needles that are included under the category *medical needle*. The sub-categories within sex are more commonly known, and people will often come into a sexual encounter with preferences already (or conditions, e.g., oral sex but not penetrative sex, or of course, sex with a condom but not without). In cases where people come into the encounter with specific conditions or preferences, meeting shared understanding is going to require more communication and effort.

[53] Or they may adjust as the encounter goes on; not everything has to be decided beforehand. Initiation, as noted by Kukla, is just one part of sex and consent will be ongoing throughout any encounter.

explicit condition placed on the encounter. However, when people *do* have conditions for their sexual encounters such as condom use, and this changes the category of the activity, communication between people will require more effort and the recipient of consent must be aware of and responsive to the conditions a person has.

The second reason Millum and Bromwich's account is more robust than one may initially think is because the person giving their consent, or the person *audience-implicating*, has more control in determining whether shared understanding is met. If the consenter is implicating a *more specific* sub-category of a concept than the recipient of consent, then shared understanding will not be met and consent will be invalid. This puts pressure on the recipient of consent to ensure that they are implicating the same sub-category as the consenter or within a broader category that the consenter is implicating. What this entails in practice is that in encounters like the one in the Kirkpatrick case, where the person giving their consent has misunderstood what the sexual encounter was supposed to be or who had some condition on their participation in the encounter that was violated, their consent is going to be invalid. Millum and Bromwich's account is thus able to explain why victims of sexual assault are wronged through something like a misunderstanding or lack of communication or consideration for the conditions they place on sex.[54] Oftentimes, the most visible cases of sexual assault are ones that have to do with voluntariness and competence: the use of force or coercion (which violates voluntariness) or taking advantage of someone in some incapacitated state (which violates competence). But as this case shows, those are not the only things which can go seriously wrong such that someone's rights are violated, and Millum and Bromwich's

[54] As will some other accounts of the understanding requirement, but Millum and Bromwich's implicature component specifically targets understanding sub-categories and thus certain conditions for sex.

account captures why in cases like these misunderstanding can be the source of harm and why the recipient of consent must work to ensure there is sufficient understanding.

Further, their account of the disclosure requirement helps clear up some concerns about where responsibility lies in cases like these. As I mentioned in the previous chapter, a common response to this case and others like it may be to question who is blameworthy for the misunderstanding. For example, "if condom use was so important to the complainant, then why didn't she check to make sure one was being worn?" Or similarly, "he *thought* she knew and that he had her consent". This shift in blame in cases of sexual assault is far from uncommon and can be the result of what Kate Manne calls *himpathy:*

> The excessive sympathy sometimes shown towards male perpetrators of sexual violence. It is frequently extended in contemporary America to men who are white, nondisabled, and otherwise privileged 'golden boys'… There is subsequent reluctance to believe the women who testify against these men, or even to punish the golden boys whose guilt has been firmly established. (2017, p. 197)

To clarify, Manne introduces the concept when discussing Brock Turner, who raped an unconscious woman, which is a very different case from the one under consideration. However, that is not to say that himpathy could not still be at play in the responses to the kind of sexual assault that is present in the Kirkpatrick case.

Millum and Bromwich's account of disclosure helps to confront these responses and places responsibility appropriately: the person requesting consent is obliged to disclose features of the act that they are aware of, that are relevant to the consenter, and that the consenter would reasonably expect to be told (Millum and Bromwich, 2021a). While both parties need to communicate with each other, the moral obligation of the

receiver of consent is much higher because of this requirement. Disclosure is often discussed in the medical context rather than in sexual encounters, but this case is a useful reminder of its importance across contexts and its role in the moral transformation of our relationships that occurs between consenting parties through consent.

4.1.3. Analysis of Kukla

Although Kukla's project is not focused on determining where exactly the line between less consensual or unethical and *nonconsensual sex* is, they have valuable insights on *why* consent in this case was problematic that are revealed from looking at the broader social contexts within which consent is being given. When looking at something like consent, which is historically based in protection of autonomy and freedom from bodily interference and is a process that occurs primarily between two people, it can be easy to have a narrow focus and forget to look at what's going on *outside* of the transaction between two parties. Kukla brings these peripheral features into focus and shows their direct impacts on consent. For them, power relations and social norms are not just background considerations, rather, these external factors compromise autonomy and this in turn compromises the degree of "consensuality" of an event. Some of these power relations and social norms are quite broad, such as patriarchal systems. However, there is room to look at more specific social norms and practices within and related to broader systems like patriarchy.

One practice is particularly relevant in this case are social norms and specific forms of sexual violence around condom use (or non-use), such as *stealthing*: "the practice of a man nonconsensually and covertly removing a condom, after his partner

explicitly expressed that intercourse is subject only to use of a condom" (Ebrahim, 2019, p.1). Stealthing is a relatively new term for a practice that has likely been going on for much longer. It is recognized as a practice done by primarily by men, to women: "stealthing as located at the nexus of sexual autonomy, sexual consent, and sexual violence produces a unique form of gender-based sexual violence that is distinct from rape and other forms of sexual assault" (Ebrahim, 2019, p. 1). Sexual autonomy is of particular concern because when stealthing occurs, not only is something happening against a person's will, but it has happened under the *pretense* of autonomously choosing to have sex with a condom (Ebarahim, 2019).

To clarify, Kirkpatrick was not accused of stealthing as he did not actively try to deceive the complainant into sex without a condom. However, on Kukla's nonideal account of consent, this practice and other social norms and forms of gender-based violence are relevant because they are a specific method through which a power relation (i.e., patriarchal) is abused rather than fought against. Given that stealthing is a means used primarily by men to exert power over women and to specifically take away from their ability to express their sexual agency, women's preference regarding condom use are going to be very important for men's sexual encounters with women and represent a specific way that consent can be made more or less consensual. Kukla's account helps capture a reason as to why consent in the Kirkpatrick case was worrying, and how the complainant was wronged in a specific way.

But Kukla's nonideal consent can also capture the importance of respecting conditions on sex that are not tied to a specific social norm or form of oppressive means. *Any* requirement or condition for sex is going to be important because it is a way to

express one's sexual agency and as such it should be respected and upheld by a person's sexual partner. And because Kukla draws in focus on positive bodily agency in addition to the negative freedoms attached to bodily integrity, all conditions and preferences relating to sex are going to be important. This is especially so for those whose autonomy is more compromised, whether by external factors or internal capacities, because those with more compromised autonomy need more social and interpersonal scaffolding i.e., through holding in agency. Respecting people's conditions and preferences is an easy way for this scaffolding to be done.

Additionally, although women are always going to be more compromised than men in certain ways under patriarchy, especially women who are multiply marginalized, there are various other external factors and power relations that are not gender-based.[55] For example, Poon (2000) draws attention to the issue of gay Asian men's vulnerability to same-sex violence, particularly with White partners, because of the socio-economic differences between them. Poon suggests this is due to several factors, some of which are that: "[s]ervices for them are neither available nor culturally appropriate. Because of racism and homophobia, their experiences are not frequently heard. The strong emotional and psychological pain is usually covered due to the internalization of cultural shame" (2000, p. 40). Thus, in a white-heteronormative society, gay Asian men's autonomy may be compromised because of the impact that homophobia can have on their ability to seek out help if they experience sexual violence and this is exemplified by the racism they may face, a problem which White gay men will not have.

When we look at sexual encounters for those with certain disabilities, physical or

[55] I have been referring to women under patriarchy, but this will apply to many non-binary folks too.

intellectual, there are also power relations at play.[56] One way this plays out is through the desexualisation of people with disabilities:

> When disabled people are regarded as asexual by nondisabled society, this imposed asexuality often relies on impressions of disabled people as undesirable; disqualified for marriage or any sexual partnership and reproduction; denied access to sexual assistance, contraception, and sex education; and disallowed any private space in and out of institutions. (Wilkerson in Kim, 2011, p. 482)[57]

There are thus false assumptions about some disabled people's sexuality that have real consequences not just for whether they can have sex, but also their access or lack thereof to necessary resources and services. This in turn compromises their autonomy, and specifically their sexual autonomy, at a disadvantaged position relative to non-disabled people. Under Kukla's account of nonideal consent, then, we can see how power relations can impact consent in non-heteronormative sexual encounters, too.

4.1.4. The One That Gets It Right

Millum and Bromwich's account is able to accommodate the best features of each of the other accounts in addition to having its own benefits. As I have argued, Millum and Bromwich's shared understanding requirement of informed consent ends up being quite robust rather than minimal. It seems that Dougherty's Intentions View can accomplish similar aims in terms of protecting the person consenting by having limitless conditions

[56] There are also of course what Kukla would classify as internal factors compromising autonomy, as other non-disabled people will have too, but I will leave these aside here.
[57] However, Kim distinguishes asexuality *as embodied identity* from asexuality *as imposed stigma* and cautions about erasing the identities of the former: "the right to be asexual coexists with sexual rights and sexual diversity" (2011, p. 489)

we can place on the features of the events we consent too. However, Dougherty does so at the expense of categorizing too much under invalid consent in a problematic way: any time a feature of an event, or characteristic of a person participating an event is a dealbreaker, it will invalidate consent even if neither party is aware of the presence of the dealbreaker. Millum and Bromwich are able to sidestep these problems while still maintaining that deceiving a person, even over trivial things, can still invalidate consent because they place the wrong under disclosure rather than understanding, which they argue is where Dougherty went wrong in the first place. If deception illegitimately controls someone's decision to consent, then consent obtained will be invalid (Millum & Bromwich, 2013). This also helps explain why we don't have to disclose *everything*, regardless of how personal, to the person we are asking consent for. That is an implication of Dougherty's account: anything can be a dealbreaker, and so concealing or withholding any fact about oneself can invalidate consent. However, when dealbreakers are dealt with through disclosure, it explains why, for example, a patient does not have a right to know the sexual orientation of their physician (even if their physician's sexual orientation was a dealbreaker for them). Millum and Bromwich's disclosure requirement can thus explain why it's wrong to *deceive* someone into sex by concealing a dealbreaker without the implausibilities of Dougherty's account.

I argued that one benefit of Dougherty's account is his acceptance of sexual diversity and accommodating this diversity into his account by not predetermining for all people what counts as a core feature of their sexual experiences, and this itself is reason to reconsider favoring Dougherty's account. But by accepting Millum and Bromwich's account we do not have to give up this feature, at least in part. As we observed earlier,

deception concealing a dealbreaker will still invalidate consent if it illegitimately controls the consenter's decision, regardless of how trivial the dealbreaker may seem (Millum & Bromwich, 2018b). Thus, under Millum and Bromwich's account, we still have rights not to be lied to about something that is important for us. People can decide for themselves what is core and peripheral to their sexual encounters but recall that they must also give the consent receiver *reason to expect* that this feature is relevant to their decision to consent in order to alert the consent receiver of its importance to the consenter and in turn for the consent receiver to be obliged to disclose it.

However, dealbreakers may be concealed *without* deception, as it was in the Kirkpatrick case through misunderstanding and miscommunication. And while Millum and Bromwich won't classify all dealbreakers as critical to understanding, as Dougherty does, they are still able to capture *some* conditions or dealbreakers for sex that people may have. As I have argued, if there is sufficient context for a condition on sex, it will create a sub-category of the concept 'sex' such that if the proferrer of consent is implicating a sub-category reflecting a condition they have, the receiver of consent will have to as well in order for consent to be valid. This means that there at least some dealbreakers pertaining to sex on Millum and Bromwich's account where deception does not have to be involved in concealing a dealbreaker for consent to be invalid, so long as the dealbreaker meets the conditions above.

Millum and Bromwich's project is different from Kukla's: Millum and Bromwich focus more narrowly on validity and negative rights whereas Kukla incorporates broader considerations like power relations and positive agency. At first glance, these two approaches might seem incompatible. However, Kukla's account can complement

Millum and Bromwich's well. I specify that Kukla's should *complement* as opposed to be preferred because of Millum and Bromwich's focus on validity and because of their differences in approach. While Millum and Bromwich have developed accounts of understanding and disclosure which deal specifically with the informational component of informed consent, Kukla's accounts of consent can be more generally applied. Thus, Millum and Bromwich's account is useful here as their focus on validity and the specific requirements that are necessary when it comes to the informational component of consent provide a very clear answer on whether consent was valid. When looking at the Kirkpatrick case, which is complicated by certain misunderstandings and miscommunications (due to such things as recklessness and lack of consideration), Millum and Bromwich's account is able to deal with these complications and provide a clear answer, drawing a clear line between consensual and nonconsensual sex. This is something we need to be better at, a point that I will return to in more detail in the final section of this chapter. But Kukla is not in contention with this, as their account of consent is not targeted at one component of consent in particular, and because of this they can fill in some other considerations for consent generally that get left out by Millum and Bromwich.

However, there is one feature of Kukla's accounts that Millum and Bromwich have incorporated into their understanding requirement, which is what I have referred to in previous chapters as a *relational aspect* of their account of consent. To clarify, the nature of consent and rights in general are relational too, but Millum and Bromwich, like Kukla, take this a step further. Even though Millum and Bromwich's account fits the standard approach of focusing on the protection of autonomy and negative rights,

whereby consent is a transaction that protects these rights from being violated, the shared understanding component of their account ties the two parties together in a way that does not occur in standard views. On my reading of Millum and Bromwich, consent is relational not only in the sense that it involves two people who each have obligations towards each other that are changed by consent, but also relational in the way that it ties the relationship between them *directly* to the validity of consent. It is not just the respective rights and duties we have towards each other that are present, but the normative relationship between *two specific people* who have to communicate together to get to a shared understanding of their relationship and its boundaries. This is similar to Kukla, for whom consent is not just something that is passed from one person to another but rather is achieved *together* through a collaborative negotiation process.

4.2. Accommodating Trust, Communication, and Power

I now want to turn to an interesting implication of adopting Millum and Bromwich's account, namely, that certain things that we know impact consent become directly incorporated into the validity of consent. Rather than being considerations that are placed outside of consent itself to be cautious or aware of, the relational component of shared understanding provides a way for these considerations to be integrated into the validity of consent itself. Consider communication, for example. On most accounts of consent, at least *some* form of communication is going to be important for achieving valid consent.[58] However, because shared understanding is a *relational* requirement, communication

[58] There are exceptions, for example, what Dougherty (2015) refers to as *attitudinal views* of consent which propose that for valid consent a person need only adopt a certain mental attitude (i.e., intending) that does not have to be communicated.

between two people is not only important but most times necessary for shared understanding and thus for the validity of consent. However, communication, or significant communication, is not *always* necessary for achieving shared understanding.

Communication may not be necessary, or may be less important, between two people who have established *trust*. Take for instance, a couple in a long-term relationship. The consent process for them may be very different than for two people having a one-night stand. While hook-ups or one-night stands can be perfectly ethical, they will require more effort and communication because they involve two people who don't know each other or each other's boundaries and thus sex can be morally riskier. A long-term couple have already (hopefully) established trust and significant experience with each other. They know what the other likes, what they don't like, and they may have certain routines or practices set up already when it comes to sex that make explicit communication less needed. However, we need to be careful when explaining *why* consent between people with established trust with each other may seem less strict or important. Trust or experience with a person in no way precludes someone from being able to assault or violate their partner's consent. In fact, the contrary is true: perpetrators of sexual violence are most often an acquaintance or former partner (RAINN, n.d.). But trust between the consenter and the recipient of consent can decrease the need for strict consent practices. Shared understanding provides a clear answer as to why this is the case.

Millum and Bromwich argue that in order to achieve shared understanding, we need communication. However, communication is not itself a requirement of consent, but a *means* to achieving a requirement, i.e., shared understanding. So, while communication is what's going to get us to shared understanding in most cases, it may not always be

required. Consider again the long-term couple and their experience together, their knowledge of each other's preferences, and established routines and practices that may require little or even no communication. In relationships like this, it's not the case that the consent process is not happening or isn't important: they are just able to achieve shared understanding more easily because of their shared experience together. Additionally, recall that for Millum and Bromwich, shared understanding is how parties involved in consent come to understand the way that their normative relationship is changed. When consent is thought of in this way, that is, as a means of changing a normative relationship in specific ways, for partners who have changed the boundaries of their normative relationship in the same ways many times, understanding what those shifting boundaries look like is easier to do.

There are three important takeaways here. First, shared understanding tells us exactly why communication is so important for consent and ties this importance directly to the validity of consent. Second, shared understanding can accommodate why trust and experience with a partner can decrease the need for strict consent procedures and significant communication in certain cases. Third, while it can accommodate for these features of trust and experience, it does *not* do so at the expense of recognizing the importance of consent, even when it's between two people who trust and care for each other.

In the same way that trust and experience can make shared understanding and thus consent easier to achieve, there are also factors which can hinder shared understanding making consent more difficult to achieve, such as some social norms and power relations. Recall that the Gricean model of conversational implicature allows for

different meanings to be conveyed by the same word, restricted by context and conversational maxims (Millum & Bromwich, 2018a). So, when a doctor at the hospital asks if they can insert a needle into your arm, 'needle' could mean anything from medical needle, gun needle, or hypodermic needle. It would not, however, mean 'craft needle' or 'sewing needle' because the *context* precludes this from being an appropriate implicature given that the context 'needle' is being said in is in a hospital, by a doctor. And broader context is relevant, too, as we saw with how the sub-categories of sex with and without a condom are justified. Consider also the word 'pants': in Canada, this refers to some form of trousers, but in the U.K., it refers to underpants. So, if I were to ask someone, "What colour pants are you wearing?", my question would have different implications in Canada than it would in the U.K. Whereas this is a seemingly harmless question in Canada, because by 'pants' I just mean trousers, someone could take this offensively in the U.K., or as having some sexual connotation, as it would be seen as inquiring about what underwear they have on.

But context is social, not just location dependent. In a white, patriarchal social context, for example, certain groups' testimonies are often not taken as legitimate.[59] Consider an example of how this can impact communication and shared understanding: a woman says 'no' to a man trying to engage in intercourse with her, and the man does not take this 'no' seriously, meaning he takes it as 'yes'. Like the way that the word 'needle' can refer to several different objects, the word 'no' can (though should not) imply two different things to different people: no, for the woman, and yes, for the man. The

[59] Or they are not recognized as a knower at all. This is what Kristie Dotson (2011) refers to as *testimonial quieting*, a form of epistemic violence that Black women often face. See also, Miranda Fricker (2007) for other forms of epistemic injustice.

patriarchal context in which an exchange like this could occur has certain features that impact how a woman is heard because of the way women have been seen as objects without sexual agency to be used for men's sexual pleasure.[60] This is complicated by the fact that there will also be nonverbal behavior that others will falsely take as 'signals', for example, wearing a short skirt or being alone at a bar. Thus, something like the word 'no' can have different conversational implicatures because of the broader social context (patriarchy) in which it is being said.

Thus, shared understanding and communication, the means through which it is achieved, can also capture how the social context we are in can impact our consent. Who we are (e.g., what groups we belong to), and how we are heard, depends on our social and epistemic standing. And because shared understanding is most often achieved through successful communication, our epistemic and social standing comes into play in how our testimonies are heard in that communication and how we are seen. So, shared understanding can also explain the barriers to achieving valid consent that arise out of certain power relations that exist in the social context we are in from within its own account.

4.3. Broader Concerns and Why This Case Matters

As seen with Dougherty's Ameliorative View and Kukla's Sexual Negotiation Model and Nonideal Consent, there is a push in current discourse towards finding other ways to talk about sex that goes wrong that is not necessarily rape. For Dougherty (2021a), this

[60] Kate Manne argues that this, and misogyny generally, is produced because women are seen as *human givers*: "her humanity is something he, as a privileged being, may hence feel entitled to use, exploit, or even destroy with impunity" (2017, p. 132).

motivation resulted in an account that views the presence of consent, when obtained through minor coercion, as having an ameliorative effect on a sexual wrongdoing. This in turn adds a third category, partially valid consent, to the previous binary of valid consent. This is meant to help distinguish certain sexual harms from others, i.e., violent or forceful rape from coerced sex. Kukla (2018) similarly worries that if the only classification of bad or harmful sex is nonconsensual sex or rape, then we are both limiting our ability to express the ways that sex may go poorly for us if it doesn't quite fit into that category and at risk of diluting the harm of rape. Though well-intentioned, I think these worries are misplaced.

First, Kukla and Dougherty are putting forward worthy projects, and they're right that sex and sexual harms are more nuanced than being consensual or nonconsensual and there will be some tough cases that are on the margins of the two. However, the problem with pursuing these kinds of projects currently is that we still aren't classifying the *easy cases* correctly.[61] That is, there is a reluctance to label clear cases of rape or nonconsensual sex as such, even by those who experience it.[62] As Kukla (2018) notes, despite the prevalence of rape culture, rape itself is taken to be one of the most egregious crimes and thus there is reluctance in categorizing something as rape because of the stigma and seriousness of it. However, this is not beneficial: "the extreme vilification of rapists is actually part of rape culture, rather than a pushback against it" (Kukla, 2018, p. 94). That is, we often hold rape to such a high standard, and villainize those who commit

[61] Because of Kukla's attentiveness to social conditions and their focus on positive agency and how to determine what good, ethical, sex is as opposed to focusing on the negative cases, Kukla is less susceptible to these worries despite motivations similar at times to those of Dougherty.

[62] Peterson and Muehlenhard (2004) studied the phenomenon of *unacknowledged rape* where it's been found that many victims of rape do not label their experiences as such. They attribute this in part to the acceptance of certain rape myths. That is, if women accepted certain rape myths to which their experience corresponded, they were less likely to label their experience as rape.

rape, so much so that we don't feel comfortable putting anyone in that category. So instead of taking seriously all rape and nonconsensual sex, we are really only taking seriously a small portion of these cases where we feel comfortable labeling someone as a rapist.

My concern with focusing on distinguishing violent rape from other cases of questionable-consent or sexual misconduct, against the backdrop of not classifying rape as such, can be illustrated by looking at two cases that Dougherty compares: "*Anger*: Cameron attempts to initiate sex again, implicitly threatening to become angry again if Morgan refuses. To avoid an angry outburst from Cameron, Morgan agrees, and they have sex" (2021a, p. 327) and "*Nonconsent*: Cameron attempts to initiate sex once more, and again Morgan declines. Frustrated, Cameron concludes that by this point they are entitled to sex and Morgan would enjoy sex once begun. Cameron uses physical force to have sex with Morgan" (2021a, p. 327). For Dougherty, Cameron wrongs Morgan in *Anger* because he acts (i.e., accepts Morgan's consent and has sex) based on a choice she makes under unfavorable circumstances (i.e., from minor coercion by trying to avoid Cameron's anger). Dougherty says that Morgan is more gravely wronged in *Nonconsent* because her choice is disregarded altogether.

However, in *Anger*, Morgan only consents out of fear of her partner's potential behavior. Although her partner does not explicitly threaten or force her into sex, the voluntariness of her consent is questionable, as Dougherty notes himself, which is why he

places this into the category of partially valid consent.[63] But I think the focus needs to be shifted here. It is clear to all that forceful or violent rape is particularly harmful and thus to use it as the standard of comparison for other sexual harms is the wrong approach. If a person, like Morgan, is having sex out of fear for what their partner will do if they don't agree to sex, something has already gone *very* wrong.[64] Saying this is not as bad as violent rape may well be true but is an unnecessary comparison that misses the point about the kind of harm that is happening, namely, agreeing to have sex out of fear for what will happen if you don't.[65] And what the Kirkpatrick case reminds us is that sex need not be particularly violent or forceful for it to be nonconsensual, violating and harmful.

There may be some reluctance to recognize that there is more nonconsensual sex happening than people are comfortable admitting. But given our history of failing to see wrongs in this domain, it may be better to be more inclusive rather than exclusive with these kinds of harms, especially if our intuitions are still off as they have been in the past.[66] Further, acknowledging that there is more nonconsensual sex happening does not inherently entail that all nonconsensual sex is the same. Violent and forceful rape is a particularly devastating harm, but just because sex is nonconsensual does not mean it is violent rape. However, it is *still* nonconsensual and may be deeply and egregiously harmful. Take statutory rape, for example. This is one kind of rape that is recognized to

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[63] I leave open whether sex in *Anger* is nonconsensual as it concerns the voluntariness component of consent, and I am primarily focused on the informational component because of its relevance in the Kirkpatrick case. The various methods of pressure, manipulation and coercion and the ways they can all undermine the voluntariness of choice are complex and interesting issues that lie outside the scope of this paper.

[64] Further, partially valid consent is by definition not *fully valid* consent, and if we need fully valid consent for consensual sex then in cases where there is only partially valid consent, sex may just be nonconsensual.

[65] Whether it *is* more harmful is a separate, empirical question.

[66] For example, consider initial reluctance to recognize the possibility of marital rape.

be a distinct kind and is labeled as such, and it constitutes a form of nonconsensual sex that need not be violent or forceful to be considered nonconsensual and oftentimes very harmful. We can have different *types* of nonconsensual sex or rape as opposed to not classifying sex as nonconsensual because it doesn't meet the higher threshold of violent or forceful rape.

When looking at the Kirkpatrick case, and other sexual assault cases involving condom (non)use and stealthing, it's important to ensure that there isn't reluctance to recognize the serious wrong that is happening. Violating consent, whichever component of it, is a particular moral wrong that is tied closely to our autonomy as persons. Those who make condom use a condition of their consent for sex and have this condition violated have their autonomy disregarded: they have been touched in ways they did not permit and further, there are meaningful consequences for this kind of act regarding sexual health and potential pregnancy.

It becomes even more evident why this particular condition matters when we look at the broader social context in which the Kirkpatrick case occurred. That is, there are certain background conditions that are present here that will not be in other cases like it. The complainant in the case had access to lawyers, her testimony has been heard and respected (to a certain degree), she had access to free health care, which she needed because she did HIV testing after the encounter (*R. v. Kirkpatrick*, 2020), as well as access to abortion. But these conditions will not be present for many people depending on who they are and where they are. In the United States, for example, many women will not have access to health care and with the overturning of *Roe V. Wade,* were they to become pregnant unwillingly, they may now no longer have access to abortion depending on their

state. And even in Canada, with access to health care, many women will still not have adequate support. This is especially so if an assault results in a pregnancy that is carried through. This brings in even more considerations: financial burdens, whether they have maternity leave or other support systems in place, not to mention emotional toll. Thus, it is critical that this form of nonconsensual sex be recognised as such and taken seriously.

Chapter 5: Conclusion

5.1. Concluding Remarks

Through the application of three contemporary accounts of consent, I have argued that consent in the Kirkpatrick case was invalid and thus sex was nonconsensual. These arguments will apply to other cases of sexual assault in which there may not be outright fraud or deception, but lack of consideration leading to misunderstanding.

As we saw in Chapter Two, consent is intimately tied to our autonomy and the rights we have. When we give someone our consent, we are permitting something that would otherwise be a rights violation and thus consent changes the boundaries of the normative relationship between two people (Millum and Bromwich, 2018). And if we are to be sovereign over the realms of autonomy and agency, then choosing how others interact with us and our persons means we should have control over which rights we waive (Dougherty, 2013). And while this is true for consent in any realm, it is especially so in the context of sexual encounters.

This is due in part to the severity of the kind of rights violation that occurs in these contexts: if Jill borrows Tom's car without his consent, she has still committed a rights violation, but one that is vastly different than had she touched him sexually without his consent. This is partly because of our rights to bodily integrity, which is infringed upon anytime our bodies are interfered with by others, without permission, in any way: whether it is a surgery in which valid consent was not obtained, getting hit by someone, or being sexually assaulted. But nonconsensual sex is a particularly harmful rights violation because of our sexual autonomy. That is, it is important to people that *their*

sexual choices determine how their life goes in that domain (Dougherty, 2013). Further, sexual autonomy is not exclusive to negative freedom from the interference of bodily integrity, but also *positive bodily agency* that can be expressed through good, healthy sex which can in turn enhance our flourishing (Kukla, 2018). This is why any conditions we may place on a sexual encounter are important, but especially true for that condition which is the use of a condom.

In Chapter Three, I argued that consent was invalid in the Kirkpatrick case on all three accounts of consent under consideration. Under Dougherty's Intentions View, the rights we waive are the rights we *intend* to waive and as such if we would object to any feature then the event lies outside the restricted range of possibilities we intend to allow leading to invalid consent. Because sex-without-a-condom was a dealbreaker for the complainant, and thus lay outside the restricted range of possibilities she intended to allow, her consent was invalid. This is true even though there was no deception on the part of the accused, and I argued that he is still culpable for his actions because he was not justifiably ignorant as he took excessive risk of wrongdoing by recklessly ignoring the complainant's explicitly expressed dealbreaker. Further, although there was presence of *some* consent that the accused was acting on, the complainant was in sufficiently unfavorable conditions when choosing to consent due to the impaired state of her informedness, that the presence of consent had no ameliorative effect on the wrongdoing under Dougherty's Ameliorative View.

Additionally, consent in this case failed to meet both the understanding requirement and the disclosure requirement under Millum and Bromwich's account. Consent failed to meet the understanding requirement because in order to achieve shared

understanding, both the profferer of consent and the recipient of consent must be implicating the same sub-category of a concept, or the recipient of consent must be operating within a broader category that the profferer of consent is implicating. But this was not the case: the complainant was implicating one sub-category of sex, *sex with a condom*, and the accused was implicating another sub-category of sex, *sex without a condom* and thus communication failed. I argued that condom use justifiably creates sub-categories of sex because there is sufficient social context to recognize it as such. This is because Gricean implicature is meant to accommodate not only the direct meaning of words but the implications they have in the *context* in which they are being said. Consent also failed to meet the disclosure requirement because the accused illegitimately controlled the complaint's decision to consent by withholding information that he possessed, that he had reason to believe was important to her decision to consent, and which she could reasonably expect to be told.

Finally, sex was also nonconsensual under Kukla's account. Kukla's model for sexual negotiation raises the standards for ethical sex because it incorporates features beyond giving and refusing consent. And while they leave room for the possibility of unethical or bad sex that may not be nonconsensual, sex in this case was still nonconsensual. This was also evident from their account of Nonideal Consent under which autonomy is recognized as being compromised, requiring that our agency be scaffolded to compensate for this and allow for the possibility of consensual, or *more* consensual sex. Not only was the complainant's agency not supported in this case, but it was actively impaired when her conditions for sex were ignored. Further, because of the gendered-power imbalance between the complainant and the accused, and the direct

implications this has specifically on the complainant's sexual agency as a woman under patriarchy, agency required even more scaffolding and thus the way it was impaired was even more detrimental to consent.

Though sex was nonconsensual on all three of these accounts, as we saw from Chapter Four, each had their own benefits and challenges. I argued that Millum and Bromwich's seemingly minimal understanding requirement turns out to be quite robust. It is able to incorporate at least some of Dougherty's ability to recognize the plurality of sex and sexual preferences and incorporate this into the validity of consent, without the implausibilities that result from the Intentions View. Further, Millum and Bromwich's *relational* requirement of shared understanding can incorporate some of Kukla's insights on the collaborative process of sexual negotiation. And while I've argued that Millum and Bromwich's account got it right, this is in part due to the fact that their account is meant to specifically account for the informational component of consent which is at issue in this case. Thus, Millum and Bromwich's account should be preferred here but Kukla's account can be seen as *complementing* it as opposed to being in contention with it.

I also briefly explored how communication, trust, and power are incorporated into the validity of consent under Millum and Bromwich's shared understanding. I argued that they are able to nicely capture the importance of communication for consent while still accommodating the ways that trust and experience can decrease the need for communication, all while maintaining the importance of consent in long-term trusting relationships. Further, it can also explain certain challenges to consent resulting from power relations and epistemic standing. I argued that because conversational implicatures

will depend not only on local context, but social context, the way certain groups' testimonies are heard can make shared understanding more difficult to achieve.

I concluded by discussing some worries with current discourse on consent, specifically about the push from some to distinguish violent rape from other forms of nonconsensual sex. The worry here was that we need to make sure we're classifying *all nonconsensual sex as such first.* The fact that the Kirkpatrick case went all the way to the Supreme Court of Canada is evidence that there may still be confusion about what exactly is necessary for consent and that there may still be some reluctance to recognize that sexual assault need not be particularly violent in order for it to be nonetheless nonconsensual sex.

5.2. Postscript

On July 29th, 2022, the SCC ruled that condom use forms part of the "sexual activity" if it is made a condition and ordered a new trial for Kirkpatrick (*R. v. Kirkpatrick*, 2022). It was a split decision, with four judges reasoning that there was evidence for the complainant's consent being vitiated by fraud, and the majority reasoning that the complainant *did not give her consent to sex without a condom.* Thus, in Canada it is now legally recognized that sex without a condom is a different act than sex with a condom.

There are several points in the decision that deserve to be highlighted. First is the justification for placing conditions on sexual encounters based on rights to autonomy: "[e]ach person's ability to set the boundaries and conditions under which they are prepared to be touched is grounded in concepts of physical inviolability, sexual autonomy

and agency, human dignity and equality" (*R. v. Kirkpatrick*, 2022, para 51). But further, the specific distinction made between sex with a condom and sex without: "condom use may form part of the sexual activity in question because sexual intercourse without a condom is a fundamentally and qualitatively different physical act than sexual intercourse with a condom" (*R. v. Kirkpatrick*, 2022, para 43). Additionally, the recognition that sexual assault is a highly gendered crime and how this decision impacts women and gender diverse people: "a narrow interpretation of the sexual activity in question will have a disproportionate impact on vulnerable groups, contribute to sexual inequality and deny Canadians equality under the law" (*R. v. Kirkpatrick*, 2022, para 62).

But perhaps most importantly is the consensus from the majority that the wrongdoing in this case must be tracked by *consent*, not fraud: "conditioning agreement to sexual touching on condom use goes to the heart of the specific physical activity in question and the existence or non-existence of subjective consent, and there is no need to resort to the doctrine of fraud and its stringent legal requirements in this circumstance" (*R. v. Kirkpatrick*, 2022, para 83). That is, when condoms are made a *condition of consent*, vitiation of fraud does not apply because condom use becomes part of the sexual activity in question. As such, the heart of the wrongdoing in the Kirkpatrick case was not that the complainant's consent was vitiated by some fraudulent behavior on the part of the accused, but that she *never consented in the first place*.

According to the analysis of consent I have provided, the SCC has *properly identified* this wrongdoing. The philosophers and their accounts of consent that have been examined here have all supported the same conclusion reached by the SCC, namely, that valid consent was not given in the Kirkpatrick case. As I have argued throughout this

paper, the heart of the problem with this case and others like it is consent, and when people set conditions on their sexual encounters this has to be incorporated into their consent. The value of the analysis here is thus not only providing some clarification on sexual consent and the impact conditions on sexual encounters have on consent, but also, I hope, providing further justification for the SCC's decision in the Kirkpatrick case: the purpose of consent is to allow someone to interact with us in a way that would otherwise be unacceptable and as such, we have a right to set the limits and boundaries of this interaction and thus the conditions of our consent.

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