# SEXUAL CONSENT: SOME THOUGHTS ON PSYCHOANALYSIS AND LAW

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Sexual consent is a complex issue and there are various fields that have seized upon it to decide when it happens, what form it takes, and who is in a position to know. I will be focusing here on how one knows one has consented, but also on some of the ways that psychoanalysis and law may have to work together, despite some persistent tensions between them. Part I of this article reflects on "consent" through the lens of relational psychoanalysis. Since I am not trained as an analyst, my approach would hardly be called "clinical" in any accepted way. However, I do try from the position of a cultural critic to shed light on some of the ways that consent functions both inside and outside of psychoanalysis. This is a difficult task, since if one were to consider consent clinically, one would have to start with the clinic, that is, the fact that someone comes to an analytic session consensually, and that the same someone may well have abiding ambivalence or anxiety about the very fact that they are there. They have consented, but do not like that they have. In other words, since someone may "have issues" with consent that become material within an analytic session, that person has also set up the problem of transference by consenting to walk through the door into the analyst's office. When they do enter the door, they consent to psychoanalysis itself, which is not to say that they know precisely to what they have consented in advance. When the analyst opens the door, there is not only some operation of consent involved as the client moves forward through the doorway for that first meeting, but an issue of consent may well remain at play for years to come, even if one drags oneself there even one no longer precisely knows why one goes. The scene is one in which law and psychoanalysis

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invariably meet, since once the client enters through the doorway, certain legal norms come into play, constraining and guiding the actions of the analyst. Still, how precisely do law and psychoanalysis meet? How do we describe this meeting of the two, and is it not the case that for each of them to work, they sometimes need to part and leave each other alone?

Part II focuses on consent less as a singular act of a subject than as a more or less organized way of entering into relationship. There always seems to be someone else, or some other set of persons to whom one gives consent, or before him consent is offered. Of course, our ordinary language suggests that we consent to entering relationships, and sometimes that is, in fact, the case. But following from a consideration of consent within a broadly "relational" framework, we might ask whether consent needs to be redescribed in such a way that it both presupposes and orchestrates some relation to another. Is there always someone else there for consent to be possible, someone to whom or before whom I consent, and in what sense can we see this "act" as a relational and social form?

Although consent is often conceived as a discrete act that an individual performs and so draws upon the presumption of a stable individual, what happens to this framework if we maintain the view that the "I" who consents does not necessarily stay the same in the course of its consent? In other words, does the "I" give itself over to a certain transformation, not fully knowable in advance, through its act of consent? And if consent is given to another, or before another, it is then a way of organizing a social relation rather than a merely individual act? Moreover, if the "I" enters into a social relationship by virtue of its consent, is it also sometimes transformed precisely by what happens by virtue of its consent? How do we explain the fact that sometimes the "I" who consents undergoes a change in the course of its consenting?

## I. The Silencing Effects of Regulatory Law

One clear way that the law addresses sexual consent is through age of consent laws. Such laws are concerned with determining the age at which a person is considered to be legally capable of sexual consent? Even though such laws are centrally

concerned with when the capability to consent is achieved, they rarely reflect on the development of consensual capacities themselves. Indeed, rarely do debates over age of consent laws think philosophically about the problem of consent, nor do they try to think about what any of us actually do when we claim to consent or what is happening when our actions are regarded as consensual engaged. I propose that we approach this legal framework critically, by which I mean interrogating the presuppositions and effects of this discourse in ways that inform and exceed its legal semantics. To think about the problem of consent outside of the legal frameworks that tend to dominate public discussions is difficult. At least within public debate, the problem of consent in conjunction with sexuality is usually understood to be a legal problem—for instance, in relation to rape laws, including statutory rape, and debates about differential age of consent laws for men and women, for homosexuality and heterosexuality.

Unsurprisingly, age of consent laws are often occasions in which fears over emerging childhood sexuality are negotiated, and various experts are brought in to establish what kinds of protections are required. In some of these cases, though not all, some contribution on the part of developmental psychologists is required, but that contribution is finally subordinated to legal decision and adjudication. At what age is consent to sexual relations permissible? Indeed, the views on this matter are quite diverse, and they differ according to country and gender, according to whether the law seeks to end sexual trafficking, whether the law is acknowledging customs regarding child brides, and whether the kind of sex is permissible or not: So age of consent laws vary according to whether sexual practice is deemed heterosexual or homosexual, or within marriage or before marriage. In most cases, sexuality is presumed by such legal codes to be heterosexual, so the lack of a differential regulation between straight and not straight sex is less a sign of equal treatment, than of the unthinkability of non-heterosexual law within the legal codes regulating sexuality—after all, even prohibiting homosexual sex is a way of acknowledging that it exists.

The British sociologist, Mathew Waites, has written in great detail about the implicit and explicit political aims of

sexual consent laws in his book, *The Age of Consent.*[1] There Waites focuses on the debates in the United Kingdom in the 1990s, showing how the petition to establish 16 as an equal age of consent for heterosexual and homosexual sex rallied a number of other discourses that had very little to do with what children want, and when they are ready to have what they want. Indeed, Waites notes that legal conventions governing equality ended up shaping the discourse of social movements, strengthening the power of several extra-juridical discourses (medicine, child welfare expertise, social policy, and biomedicine, to name a few).

Indeed, because the equality argument rested on notions of the fixed nature of homosexuality and heterosexuality, psychologists were largely absent from the debate. Maybe that is a good thing, given how dominant perspectives in developmental psychology too often serve the purposes of pathologizing homosexuality and normalizing heterosexuality. The recent effort to cast intersex as a failure of sexual development is a case in point, since the argument assumes that without discrete and exclusive male or female anatomy, sexual life cannot assume its normal and healthy course.[2] There are all kinds of reasons to resist that new form of pathologization recently installed in the Diagnostic and Statistical Manual *of Mental Disorders* (DSM). But to return to age of consent laws, and the grounds of arguing for equality, it is interesting to see that homosexuality had to become a fixed attribute rather than a developmental achievement, and that only as an immutable characteristic could the equality argument be made. I believe it was Tony Blair who made the following foray into ontological

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[1] MATTHEW WAITES, THE AGE OF CONSENT: YOUNG PEOPLE, SEXUALITY AND CITIZENSHIP (2005).

[2] *See DSM-5 Development: Sexual and Gender Identity Disorder*, AM. PSYCHIATRIC ASSOC., http://www.dsm5.org/ProposedRevisions/Pages/SexualandGenderIdentityDisorders.aspx (last visited June 22, 2011). KENNETH J. ZUCKER, AM. PSYCHIATRIC ASSOC., REPORTS FROM THE DSM-V WORK GROUP ON SEXUAL AND GENDER IDENTITY DISORDERS (2009), *available at* http://www.psych.org/MainMenu/Research/DSMIV/DSMV/DSMRevisionActivities/DSM-V-Work-Group-Reports/Sexual-and-Gender-Identity-Disorders-Work-Group-Report.aspx. *But see* Press Release, Org. Intersex Int'l, OII's Objections to the APA DSM-V Committee's Proposals on Intersex (Mar. 20, 2010), *available at* http://www.intersexualite.org/DSM5.html.

analysis: "It is not against the nature of gay people to be gay; it is in fact their nature. It is what they are."[3] So any sense that sexual acts may not immediately confirm a sexual identity was put out of play; so too were all those complex histories of children, adolescents, and adults whose sexual proclivities fail to achieve fixed and final form as straight or gay. The equality movement was this anti-queer in its assumption and its effects, even though, yes, one wants to be *for* equality. The question is only whether the means through which a legal norm is justified also and paradoxically introduce unjustifiable social and cultural norms and even augment their power. At least in the United Kingdom, arguments concerning the psychological maturity of youth played a very small role in the general public debate. The progressive use of the fixed nature argument actually required the sidelining of psychology in favor of biomedical perspectives to explain sexual orientation. The enhancement of biomedical power for the purposes of defining the basic terms thus seemed to work in tandem with formal conceptions of equality, and what this meant is that the actual conditions of sexual youth or the modes of their sexual emergence were rarely actually thought about, and activists and social workers were not canvassed for anything they may have to say about the patterns and dilemmas of youth cultures.

The main public debates divided into protectionists, who mainly used moral arguments against homosexuality, and libertarians, who while basing their claims on fixed nature arguments, made a case for the supervening value of sexual freedom for individuals. In any case, someone we might tentatively call "the child" was everywhere figured in such debates, but either as an innocent who might be "seduced" or "intervened upon" by a homosexual predator and magically transformed either into a homosexual as a result of that presumptively unwanted intervention, or a budding example of a libertarian, one whose capacity to choose what he or she wants is unproblematic and unquestioned. Similarly, the critics of the debate fell into two different camps. On the one hand, there are those, and I would include Mathew Waites among them, who

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[3] Matthew Waites, *Equality at Last? Homosexuality, Heterosexuality and the Age of Consent in the United Kingdom*, 37 SOC. 637, 646 (2003) (quoting Blair).

think of consent as *a discourse* that is put into play on the political occasion of these laws. The question of what some child wants or does is always figured in terms of frameworks that have very little to do with that kid, and very much to do with the status of biomedical explanations, the moral opposition to homosexuality, and the libertarian defense of individualism and sexual freedom. Shall we then accept that sexual consent is always an expression of a pure and spontaneous freedom, or shall we worry that consent is nothing other than a discourse that works it ways with all of us, confirming our unfreedom? To make the latter point, one might well seek recourse to Gramsci's very useful and important formulation that under conditions of hegemony, consent if "manufactured" or organized by powers to which no one has ever really consented.[4] Indeed, power precedes consent and orchestrates the terms in which we encounter moral or practical dilemmas of consent. We think we are exercising freedom, but actually we are being disposed in certain ways by powers that not only act upon us prior to our willing, but actually frame and form our will. Legal language that seeks to focus on whether an individual consented or not to a given contract or relation tends not to invoke Gramsci, of course, we can imagine that he would not be so very useful if we were really trying to argue that someone's consent was or was not given, or that some action was patently non-consensual or clearly consensual.

After all, it could prove quite disconcerting to think one has consented and to find that one's consent has been manufactured instead. One thought one was acting freely, but it turns out a discourse has been acting in your place, or constraining your self-understanding in ways that were not clear at the time. It is a much stronger version of that claim to argue that consent is always instrumentalized in the name of coercion, and that consent is therefore actually subjugation, and freedom, if it exists, is something wholly different from the discourse of consent.

In 1977–78, Michel Foucault made clear his view that all age of consent laws serve the purposes of regulating norms of

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[4] ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 244, 266 (Quintin Hoare & Geoffrey Nowell Smith trans., 1971).

decency and criminalizing certain forms of sexuality. He actively took part in public conversations in France in 1977 and signed a petition, along with Jean Danet and Guy Hocquenghem, to abolish all age of consent laws.[5] He maintained, that "[a]ll the legislation on sexuality introduced since the 19th century in France, is a set of laws on decency [la pudeur],"[6] but now, "[w]hat is emerging is a new penal system, a new legislative system whose function is not so much to punish offenses against these general laws concerning decency, as to protect populations and parts of populations regarded as particularly vulnerable."[7] Later he explains that according to the campaign in favor of these laws:

> [T]here is childhood, which by its very nature is in danger and must be protected against every possible danger, and therefore any possible act or attack. Then, on the other hand, there are dangerous individuals, who are generally adults of course, so that sexuality, in the new system that is being set up, will take on quite a different appearance from the one it used to have. In the past, laws prohibited a number of acts, indeed acts so numerous one was never quite sure what they were, but, nevertheless, it was acts that the law concerned itself with. Certain forms of behavior were condemned. Now what we are defining and, therefore, what will be found by the intervention of the law, the judge, and the doctor, are dangerous individuals. We're going

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[5] Michel Foucault et al., *Lettre ouverte sur le revision de la loi sur les délits sexuels concernant les mineurs* [*Open Letter on the Revision of the Law on Sexual Offenses Involving Minors*], LE MONDE, Jan. 27, 1977, *translated in sub nom* Michel Foucault, *Sexual Morality and the Law*, *in* Lawrence D. Kritzman. POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977–1984 281 (Alan Sheridan et al. trans., Lawrence D. Kritzman ed., 1988) [hereinafter THE LETTER]. For an account of the subsequent discussion with Jean Danet *see* 3 Michel Foucault, *La Loi de la Pudeur*, *in* DITS ET ECRITS: 1954–1988 [*The Law of Modesty*, SAID AND WRITTEN] (1994).

[6] *See* THE LETTER, *supra* note 5, at 281.

[7] *Id.*

> to have a society of dangers, with, on the one side, those who are in danger, and on the other, those who are dangerous.[8]

So, we can see that here that Foucault considers age of consent laws to be exclusively in the service of protectionism. He did not foresee the importance of the libertarian argument in the 1990s, but perhaps some of his views actually came to inform that very movement. His colleague Danet elaborates the view that such protectionist forces, especially from the psychiatric establishment, actually act coercively on children. He claimed "what takes place with the intervention of psychiatrists in court is a manipulation of the children's consent, a manipulation of their words."[9]

Foucault clearly thought that age of consent laws could only be used to produce a spectre of fear, a kind of sex panic that produces greater power for the police and criminalizes sexual freedom." Continuing his reflections on a society of dangers, he wrote:

> And sexuality will no longer be a kind of behavior hedged in by precise prohibitions, but a kind of roaming danger, a sort of omnipresent phantom, a phantom that will be played out between men and women, children and adults, and possibly between adults themselves, etc. Sexuality will become a threat in all social relations, in all relations between members of different age groups, in all relations between individuals. It is on this shadow, this phantom, this fear that the authorities would try to get a grip through an apparently generous and, at least general, legislation and through a series of particular interventions that would probably be made by

[8] *Id.* at 280–81.

[9] *Id.* at 274.

> the legal institutions, with the support of the medical institutions.[10]

Although Foucault is writing about France in the late 1970s, and Waites is writing about the United Kingdom in the 1990s, we can see the change in condensed form how in each context the so-called medical institutions were working in coordination with legal systems. For Foucault, it was psychiatry, which clearly included psychoanalysis prominently, and in the United Kingdom, it was no longer psychiatry, but biomedicine, a social form that Foucault surely anticipated with his conception of biopower, but whose implications for sexual politics of this kind he could not have known.

Both Foucault and Hocquenghem thought that contracts had no place in sexual life, and that consent invariably belonged to the legal discourse of contract. Hocquenghem remarks, "this notion of consent is a trap, in any case. What is sure is that the legal form of an intersexual consent is nonsense [*intersexuel:* pertaining to sexual exchange]. No one signs a contract before making love."[11] Well, at Antioch College in 1993 they surely did, when the protocols adopted concerning sexual life on campus required clear contractual agreement to every sort of act and entry.[12] But clearly, in 1977, it was possible to say, even apparently urgent to say, as Hocquenghem did, that the real question is whether children consent to these forms of psychiatric investigation that subject them to exposure, judgment, and manipulation. "When we say that children are 'consenting' in these cases, all we intend to say is this: in any case, there was no violence, or organized manipulation in order to wrench out of [*leur arracher*] them affective or erotic relations."[13] Foucault worried that protectionist forces seek to

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[10] *Id.* at 281.

[11] *Id.* at 285.

[12] ANTIOCH COLLEGE, THE ANTIOCH COLLEGE SEXUAL OFFENSE PREVENTION POLICY, *available at* http://antiochmedia.org/mirror/antiwarp/www.antioch-college.edu/Campus/sopp/SOPP2006%20.pdf (last visited June 26, 2011).

[13] *See* THE LETTER, *supra* note 5, at 285.

compel children to turn against their desire and to forfeit any mode of sexuality deemed dangerous. He defends the rights of children to say what they want, and calls "abuse" the unwillingness to accept what the child says as true: "To assume that a child is incapable of explaining what happened and was incapable of giving his consent are two abuses that are intolerable, quite unacceptable. The child may be trusted to say whether or not he was subjected to violence."[14]

What is less often remarked upon in this controversial discussion is Foucault's insistence that adults should listen to a child and that this is something that a child should be able to expect. I am not sure he would call it a "right" of the child to be heard, but it certainly seems like a reasonable, if not necessary, ethical expectation that children may have. Indeed, his objection to the legal regulations under consideration is that they assume that the child cannot speak and, in that sense, cannot be heard. Indeed, the legal regulations are part of the very construction of the child as one who is unable to speak about what has happened or how she or he feels. A child's self-description is not believed only when the child is assumed to be unable to speak in a meaningful way about his or her own experience. Significantly, it is the moral right of the child to speak that concerns Foucault most, and it is this speaking which he considers to be effectively silenced by the proposed legal regulation of age of consent laws. Can the law say when consent has happened, or can the child say? Is it the case that the law presumes that the child cannot say, so that the law must say?

Foucault is also maintaining that the adult has an obligation in this discursive scene, and that is precisely to listen. Listening stands as an alternative to a regulatory approach. Foucault draws briefly on psychoanalysis when he asserts the necessity of accepting the sexuality of the child: "They are thought to be incapable of sexuality and they are not thought to be capable of speaking about it."[15] On the basis of this description of the sociological presumption that underwrites sexual regulation, Foucault makes an alternate recommendation: "[L]istening to a

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[14] *Id.* at 284.

[15] *Id.*

child, hearing him speak, hearing him explain what his relations actually are with someone, adult or not, provided one listens with enough sympathy, must allow one to establish more or less what degree of violence if any was used and what degree of consent was given."[16]

Foucault makes clear that whatever affective relations exist between a child, who is given no age, and an adult, who remains unsituated in the narrative, cannot be explained adequately through the language of legal consent. To impose the legal language of consent on the situation is, in his words, "an absurdity": "*if one listens to what a child says and if he says 'I didn't mind', that doesn't have the legal value of a consent'*."[17]

So the relevant question would not be, "did the child consent?" but "was the child forced to enter into the legal discourse that refused to countenance what the child says?" If we agree that the translators who intervene to decide whether the child's utterances comply with legal norms governing consent do something unjustifiable to the child's own language for desire and willingness, wouldn't we need to say that something like consent was abrogated when psychiatrists interrogated in the way they did, or when legal language "wrenched" the words out of the child's mouth. In other words, although consent is largely considered to be an instrument of other discourses (and that is true for both Waites and Foucault), the normative valuation of that very situation, that is, the grounds for objecting to that instrumentalization, presupposes the possibility of a prior and violable freedom.

Is this, at least for Foucault and his allies opposed to all age of consent laws, a libertarian opposition to consent? Is this a situation in which one formulation of freedom wars against another? If there is sexual freedom, according to this view, it does not take the form of consent, since consent is already colonized by law and its psychiatric or medical supports. So what language is left for freedom? Are there other languages for thinking about the sense of freedom that one might hope is

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[16] *Id.*

[17] *Id.* at 285.

captured by the language of consent? Hocquenghem opens up an important question when he asks whether the child has been forced into a legal framework. It seems to me, however, that he answers that question too quickly through recourse to a kind of libertarian presumption that the child has a reserve of sexual freedom available at all times. Such a view refuses to countenance the vexed consequences for children of the social formation of desire, the psychic repercussions of ambivalence, shame, and unknowingness, and the particular tensions that can and do emerge when one wants what one does not choose, or one chooses what one comes not to want very much, or when sexuality is itself animated without knowing precisely what or how one wants. Only within a strictly libertarian point of view is every act of desire an implicit act of choice, which means that both psychic process and social formation are set aside as factors that might complicate the direct link between sexual and consensual acts. Indeed, some of the strongest advocates from the libertarian camp in the United Kingdom are also active proponents of sexual tourism, and have been militating for legislative efforts to curb the expression of religious freedoms for Muslims.[18] Although that kind of politics does not follow necessarily from libertarian presumptions, we have certainly seen recently in Europe the rise of a strong gay libertarian movement that often targets Islam, especially in the United Kingdom and the Netherlands.

So perhaps for all kinds of reasons it is time to rethink and displace the exclusive opposition between moral protectionists and libertarians. Perhaps that framework is no longer sufficient for us. And is the language of consent so corrupt and abused that it is no longer of use? I think in fact it circulates surreptitiously even in the arguments against consent, as I have tried to suggest.

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[18] *See e.g.*, Peter Tatchell, *Age of Consent*, PETERTATCHELL.NET (Jan. 30, 2011) (offering various articles on the age of consent, gay libertarianism, and anti-Muslim politics). *But see* Jasbir Puar, *To be Gay and Racist is No Anomaly: It's no Surprise the English Defence League Has Gay and Lesbian Members—Liberal Inclusion Has Always Been Exclusive*, GUARDIAN, June 2, 2010, *available at* http://www.guardian.co.uk/commentisfree/2010/jun/02/gay-lesbian-islamophobia (offering criticism of Jasbir Puar's views). *See generally On the Censorship of 'Gay Imperialism' and Out of Place*, X:TALK (Oct. 17, 2009), http://www.xtalkproject.net/?p=415 (offering an overview of the controversy).

So the question emerges: what can we think about sexual consent outside the libertarian frame?

I want to turn to those questions in a moment, but first let me affirm that there are several regulatory powers converging to determine age of consent for all kinds of reasons and that sometimes make use of "the best interest of the child" for the purposes of augmenting those very powers. This is made all the more clear when we consider the policy goals that are achieved through age of consent laws, many of which have very little to do with a consideration of how a child desires and consents. Consider the notorious inconsistency of these regulations.[19] In Angola a boy is legal when he is 12, but a girl, only when she reaches 15. In the Philippines, the age of consent for a girl is 12, but that excludes sex for money and human trafficking. So she can be given away in marriage at a young age, but must be protected from trafficking. In Argentina a boy is legal at 13, and a girl at 16. In Gibraltar, a boy can be 16 if he is having sex with a female, but has to be 18 to have sex with another male. Girls can have sex together only at age 18. Some countries offer not an age, but a range, like Japan, which says that anytime between 13 and 18 is legal, and in Mexico, it is 12–18, no matter what gender you are or the anatomical composition of the one with whom you have sex. These are sometimes different from the age limits that govern marriagability. And in many countries, the age of consent is simply the same as the legal age for marriage, since only sex within marriage is legally permissible: Qatar, Saudi Arabia, Sudan, and Yemen. The number of countries that do not have an age of consent for homosexual relations is also quite large, although some permit male relations more readily than females. Although some seem not to have conceptualized the possibility of lesbian relations, so their legal codes neither permit nor criminalize those sexual relations. And some specify the kind of sex you can have. Interestingly enough, in Queensland, anal intercourse only becomes legal at 18, although vaginal intercourse is possible at 16. The Austrians are apparently fine with sex at the age of 14, but they issued a proviso that is replicated in similar form in several legal codes:

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[19] For a full range of age of consent laws *see Worldwide Ages of Consent*, AVERTING HIV AIDS, http://www.avert.org/age-of-consent.htm (last visited June 26, 2011).

Fourteen is the minimal threshold but sex can be deemed criminal if it can be shown that an older person has exploited the sexual immaturity of a 14 or 15 year old. For your information, the average age of sexual consent globally is 16, which is also the average in the United States where each state decides its own law.

In some of these contexts, psychologists and psychiatrists are needed to determine whether there was sufficient maturity on the part of a teenager, whether the age difference constitutes abuse, and whether, again in the legal language, someone took advantage of another's inexperience or, as it says in the sexual codes of German criminal law, whether someone "exploits the victim's lack of capacity for sexual self-determination."

In this way, the law admits that some considerations enter into the picture that lawyers cannot determine on their own. Indeed, the topic challenges law's self-sufficiency, since questions of maturity, inexperience, and sexual self-determination require some mix of psychological and moral judgment. Surely, the very existence of these provisos suggests that something is not quite right or not quite adequate in age of consent laws, since age alone is not a sufficient grounds upon which to determine whether someone can consent to sexual relations or not. The law has to rely on accounts that are non-legal in character in order to make its own legal determination. So, yes in these cases: consent is a place where juridical and psychological discourses still meet, and the psychological is usually reduced to "input" into a legal process. But what happens when a certain reversal takes place and legal ways of thinking about consent come to govern or permeate psychological discourses on what it means to consent, how we know whether someone has, and what kind of action this consenting actually is?

As I mentioned above, age of consent laws serve all kinds of social purposes: the protection of children, the ownership of children, the regulation of marriage and of sexuality, the restriction of sexual trafficking, or the promotion of sexual trafficking, and the protection of parental, medical, and disciplinary prerogatives. At the same time that consent is a category that seems to be completely instrumentalized, the term

draws upon certain embedded structures of political liberalism, which is why Gramsci's formulation sometimes makes sense. The very terms that found our individual freedom are those whose instrumentalization confirms our unfreedom. Within the terms of classical political liberalism, individuals are cast as deliberate and volitional beings who, importantly, have the capacity to enter into contracts of both an economic and political nature–and to honor them. This presumption in law of a discrete individual with perspicacious and deliberate autonomy was crucial to all forms of economic contract, and to the possibility of devising and implementing laws that held individuals accountable for contracted goods and services, or indeed for criminal deeds. The legal apparatus that supported the economic functioning of the market and a regime of criminal law required an operative idea of the fully volitional subject at the same time that it made provisions for those who were less than competent to understand or honor a civil contract.

## II. Towards a Relational View of Consent

Although psychiatry is clearly one of those forces that Foucault presumes to be part of the regulatory means by which a child is rendered speechless and unbelievable, it seems that Foucault relies on a psychoanalytic assumption, namely, that the child is a desirous being, when he counters the regulatory powers of psychiatry. It matters that Foucault was joined by the psychoanalyst Françoise Dolto in signing the petition that opposed age of consent laws. We may well ask: why? Although it is Foucault who claims that the adult must "listen[] with enough sympathy" to what the child says, it could very well have been Dolto who expressed this view. Indeed, she not only developed a psychoanalytic account of what it means to listen to a child, but insisted as well that children have their own

"lucidity."[20] At this juncture, we see an unwitting convergence of Foucault and psychoanalysis, a brief but significant solidarity between the analyst, Dolto, who knows that only under certain conditions can the desire of the child be heard, and Foucault who insists upon the practice of listening to counter the regulatory law that presumes and enforces the silence of the child.

Such a position does not assume that the child is, as it were, a tiny liberal, epistemologically equipped with a translucent window that opens upon the domain of true desire and choice at a very young age. It only presumes that the speaking of the child is one way of trying to make sense of desire and choice on the condition that someone else is actually listening. The speech is given over to someone else, and that someone else must receive it. Only within the context of this scene of listening does something begin to be fathomed and articulated. That process, I would suggest, is very different from the one that either assumes in libertarian fashion that the subject has a fully lucid and transparent relation to desire and choice or that the subject is unable to speak, and that the law must speak in his or her place. Is there a way to resist both heightened libertarian presumptions and regulatory paternalism? What would be that other way?

However, the regulatory discourses make use of a psychological perspective, and rarely a psychoanalytic one, when it becomes important to know who is exempt from this set of expectations, and how professionals might treat or rehabilitate a subject so that he or she can conform to that model of a fully knowing and choosing self. Age of consent laws are not always concerned with the well-being of the child or, indeed, with questions of sufficient autonomy or readiness. They can be

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[20] Although Dolto's writings on child psychology are vast, some of her important works on listening to children appeared in the late 1980s. *See e.g.*, 1–2 Françoise Dolto, Louis Caldagués & Jean-François de Sauverzac, SÉMINAIRE DE PSYCHANALYSE D'ENFANTS [SEMINAR ON CHILD PSYCHOANALYSIS 1] (1985); Françoise Dolto Jean François de Sauverzac, *Points Actuels*, *in* ENFANCES [*Current Points*, *in* CHILDHOOD] (1986); Françoise Dolto & Juan David Nasio, *Rivages*, *in* L'ENFANT DU MIROIR [*Shores*, *in* CHILD MIRROR] (1987); Françoise Dolto & Robert Laffont, 1–2 SÉMINAIRE DE PSYCHANALYSE D'ENFANTS [THE CASE OF ADOLESCENTS] (1988); Françoise Dolto, Catherine Dolto & Colette Percheminier, PAROLES POUR ADOLESCENTS: OU LE COMPLEXE DU HOMARD [LYRICS FOR ADOLESCENTS: OR LOBSTER COMPLEX] (1989).

instrumentalized for the purposes of maintaining certain social institutions, like marriage, or they can be used to rationalize the working of certain kinds of economic and legal systems. In the second case, we see that an idea of selfhood is invoked that psychoanalysis has had to struggle with and against since its inception. There are continuing debates within the psychoanalytic field about whether becoming that kind of deliberate and volitional individual is an appropriate and desired norm that is the aim of adaptational processes, or whether that very norm serves to cover over or, indeed, repress domains of phantasy and the unconscious that can never fully adapt to such ideals of individual autonomy (or can adapt only by producing fully defensive subjects). Indeed, we might well ask whether that norm covers over or represses modes of relationality that precede, facilitate, and form any self who comes to know and choose as she or he does.

The juridical model of the volitional individual implicitly operates within certain norms governing individual autonomy, and in what follows I propose that we need to allow "consent" to be rethought in relation to another set of terms that cannot be fully constrained within this kind of legal language and its presumptive individualism.

This task becomes all the more acute if in thinking about sexual consent we acknowledge that subjects are formed in dependency and that this has clear consequences for thinking about what is opaque and not fully knowable in the realm of sexual desire. This opacity is not fully overcome at any particular age, disappearing with so-called maturity. And though yes, we can and must speak about more and less mature when it comes to sexual decision making, we doubtless also have to remember that in the time of psyche, childhood does not precisely end at a certain age; it continues to act, time and again, throughout the course of adult life. At stake is what we usually call "choosing" and what we usually call "knowing," and I am not sure we understand either term or, indeed, when they are understood, whether they are ever fully understood. One sign that adults never fully overcome infancy and childhood is that they continue throughout life to fathom the partially obscure domain of sexuality and choice. They ask themselves: how could I have chosen this? Is this what I wanted? Did I actually choose

this at all? What was I thinking? There seems to be no age in which these questions finally cease altogether.

Indeed, it may be that one thing adults do when we consent to a sexual encounter or relation is to try and understand what it means to consent or, rather, to explore some regions of "yes saying"—agreeing, affirming, willingness to try, the fear of trying, probing, wishing, and dreaming. It might also mean precisely and paradoxically to agree to let go, but to agree to let go under conditions in which the implicit or explicit agreement between two people is not let go. Although consent is supposed to be active and clear-headed, sexual consent can involve much less active terms: being moved, being curious, finding oneself open to what is unknown, impressionable, vulnerable, surprised, intrigued, or even moved along and drifting, wondering what will arrive, relinquishing, ceding. We have to distinguish between consenting to sex that one has and consenting to sex that another has. Both of them can implicate the subject in a complicated situation. Here is one example: After a 27 year delay a woman recently publicly declared that the one-night stand between her and a man was actually a rape and that she did not fully consent to what happened those many years ago. They are both about 63 years old at this time, living in a relatively small town, and she gradually decided that it was non-consensual sex after some reflection and indeed some conversations with her close friends, and a greater familiarity with literature on the subject. I tell you this not in order to adjudicate the legitimacy of her claim or indeed to decide the legal issue. Anything might be true, including the contents of her allegation. Can we pose some questions that do not immediately bear upon the legal standing of the claim? The first has to do with how a sexual scene is reconstructed after so many years, or in the course of so many years. A second perhaps has to do with what it means to have sex and to discover afterwards that it did not feel right, it was not what one wanted, it did not involve consent in the way that one imagines consent, it repulsed or injured, or overrode one's sense of dignity or integrity in a significant way. To understand whether someone consented or not we may have to look at what ideas of consent are at play in any given description. It is important to distinguish between sex that did not turn out the way one imagined it would (i.e. that failed to fulfill a certain image or fantasy of sex, or even *a*

*fantasy of consent*) and sex that was unilaterally imposed and clearly against one's will (here again, it is useful to distinguish between agreeing to relinquish one's will, and relinquishing the agreement itself). I infer from the time lag and her own self-description that she went through with this sex and for many years she regarded it as something that simply happened, not great, not fun, not even good, and so bad sex, but not something immediately criminal in nature. She wished she had not done that or had that done.

But perhaps she had an inchoate sense that something that happened there was criminal, that she was violated at some level, but did not know how to distinguish violation from other forms of unexpected or unwanted sexual experiences that she had perhaps at first welcomed. We do not know. But the fact that we can ask the question presumes that we do not always know what kind of sex we will get when we allow sex to take place. And even if we have a fantasy of making bad sex against the law, it cannot really be done. A person can make herself available to a sexual encounter she comes to reject, or even find him- or herself in the midst of a sexual relation that turns out to be surprisingly good or surprisingly bad, without being able to say in the latter case that one wants this immediately to stop.

If making oneself available to the unknown is part of sexual probing, sexual exploration, then none of us start as fully self-conscious, deliberate, and autonomous individuals when we consent. How do we understand this not knowing as not only part of any sexual formation, but as a continuing risk of sexual encounter, even as part of its allure? There can be a not quite choosing and not quite *not* choosing which characterizes any number of sexual exchanges. At what point does this intermediary position become crystallized in the notion of "crime" or "violation"? And can we hold out for the fact that some of these relations can be damaging, confusing, and wounding, without immediately resolving the issue of whether or not they are criminal? It may be, to be sure, and I do not mean to weaken the strength of legal punishment for rape by what I argue here. On the contrary. I only mean to ask whether we have an adequate vocabulary for understanding what happened or, indeed, for addressing the injury or the pain of the situation, if law governs psychological inquiry on the matter of consent.

Of course, consenting to other people having sex is yet another matter. My final anecdote involves a person in a long-term relationship who is asked by her partner to consider now enacting a framework of non-monogamy for their relationship. The person agrees, and we might say that, juridically speaking, offers her explicit "yes." There is even reported joy and excitement in offering the "yes." They confer conditions under which sex with others is possible, make some explicit guidelines that attempt to exclude forms of romantic love from the extra-marital encounter, feel good about their understanding, and embark upon their new experiment with some sense of renewal and even hope for revitalizing organization of their relationship. The partner begins a new sexual relationship, but finds that there is greater intimacy and attachment than she had planned. Once the love dimension of the new relationship becomes known, the first partner who agreed to the scene finds herself suddenly wracked with pain, enraged, and resolves that the contract has indeed been broken. The lover who found herself feeling more than she expected finds herself exceeding the terms of the contract, faltering with language, and finds that the good will upon which she depended when the contract was established is suddenly gone. In different senses, both feel betrayed or let down that the contract did not hold as they intended. Now, it may be that the contract was broken, but it may also be that sexuality has a way of breaking contracts, rendering them tenuous, or exceeding their terms, and that we make a mistake by confusing the juridical model of consent with the kind of "yes"-saying and "no"-saying that happens in the midst of sexual encounters and dilemmas.

I am reminded of a story Juliet Mitchells has told of how socialist feminists in the United Kingdom in the 1970s went from various communal households and non-monogamous arrangements to fleeing into separate apartments in the 1980s and spending all their savings on psychoanalytic treatment in the ensuing years. The contracts turned out not to be binding on the unconscious or other psychic processes, and the kinds of suffering that ensued were for the most part *unanticipated* by those who thought they were consciously and willingly entering the contract. Now, I offer these examples not to make a case for monogamy or socially conservative arrangements. On the contrary, I don't think easy prescriptions are possible in this

domain. But here I want to suggest that liberal notions of contract have limited efficacy in controlling, containing, or interpreting primary experiences of loss, rejection, fear of abandonment or replacement, and persecutory ideations. They also cannot predict when and where certain kinds of idealizations and fantasy emerge in relation to objects of sexual desire. Can anyone promise to hold the distinction between desire and love? One can certainly try, but the choosing and perspicacious "I" is finally not at the seat of its own psychic processes, even though it can and must struggle with that situation of humility.

Such considerations raise the question whether consent carries with it a dimension of fantasy, by which I do not mean that it is an error or a falsehood. On the contrary, I am wondering first whether the legal language of consent encodes a fantasy of the liberal subject, the perspicacious and choosing "I." I presume you do not think that I dispute the possibility of clarity or of choosing, even if sometimes, if not often, choosing in a clear-minded way. But even if we do sometimes, or even often, choose in a clear-minded way, that does not mean that we are fundamentally fully choosing and self-knowing subjects. This last knows no humility, or seeks to defeat all psychic processes that are not pure consciousness, that do not ratify that sense of self as ever-lucid. Secondly, fantasy enters into consent in non-legal settings: Someone can agree to something precisely because they want to be the kind of person who *can* agree to that arrangement. And so one can agree to sex or agree to one's partner having sex elsewhere, but sometimes those agreements articulate a fantasy of being one *who can* agree to such things, of being more open or capacious than one is, of overcoming a felt sense of limit, or indeed, of no longer feeling the limits by which one is nevertheless bound. In this sense, one can pursue a fantasy of oneself as more capacious than one is only to find that one's psychic history, including primary fears of abandonment, replacement, or loss, overwhelm the scene and make something of a mockery of one's consent. Sometimes in saying "yes," we make ourselves available to an experience that is unknown, wagering on its fantasmatic promise, and sometimes in saying "yes" we seek to overcome a sense of limit in ourselves that we simply wish were not there. Or sometimes we want to be something for the other that we cannot be, and so agree to sex,

or agree to non-monogamy, as an act of love that overreaches who we are and what we can sustain, only then to concede a greater humility about what we can do, and what is psychically manageable for us. Sometimes the "yes" is a bid for love, an effort to override oneself for the other, even a means through which one breaks oneself for the other, or makes oneself available to be broken – as an act of love. At such moments, we need to think of the "yes" less as an act of consent on a legal model than as a bid, a probe, an essay, a way of lending oneself out for an experience about which one cannot say in advance if it will be good or bad. This region of "yes"-saying is not quite the same as "consent" in a legal sense, although perhaps we will not be able to make sense of consent until we understand how a self is formed who can say "yes," and how sometimes saying "yes" can lead to self-defeat or injury at the hands of another, or some complicated and terrible combination of the two.

Indeed, in those moments in which we agree to something that turns out to be traumatic, we find ourselves in the present suddenly confronted with some more archaic material, or we find that our trust overidealized the person whose sadism or aggression we did not want to see. Perhaps there was some traumatic scene we are reliving without knowing, or one to which we want to return in order to rework in another way, or one to which we find ourselves returning because we cannot believe that the prior trauma really happened. These kinds of profound and consequential errors happen all the time, which leads me to wonder what role error plays in the practice of sexual consent.

We are used to hearing that there are consenting adults and then there are those who are incompetent to consent. But perhaps incompetence is part of the very process of "yes"-saying. We are not competent to know all the future consequences of the sexual relations to which we say "yes," or to which we willingly or ambivalently acquiesce. We are never fully active, knowing, and competently predictive at such moments. We open, sometimes in spite of ourselves, to a future we cannot fully control, even though we can steer and direct and try to give it shape in one way or another to the best or our abilities. Perhaps the opposite of the subject of consent is not the subject who is too young or too inexperienced or suffering

incompetence. Although there are cases where that is legally right, to be sure, we have to remember that something of childhood persists in adult sexuality, making us more vulnerable or less knowing than we might like, that a certain incompetence pervades our efforts to predict in advance how things will go, and that even a certain inexperience is there at the outset of sexual encounter and in its midst. The juridical subject of consent rules out the humility of unknowingness without which we cannot really understand sexuality. We can, as the former Antioch College rules of sexual conduct tried to do, make every sexual act discussable between two people in advance and a settled matter of consent before embarking on any touch. At such moments, the law has pervaded sexual encounter; the law has drenched our discourse. We expect knowingness precisely at those moments when unknowingness is inseparable from sexuality itself. The law then functions as a defense against the unknown, and tell me: who would have sex if it were really known in advance exactly what it would be like?

## CONCLUSION

Although psychoanalysis is implicated in law because it is a contractual scene, governed by both professional and legal norms, it treats material that often marks the limits of legal understanding. If patients regularly voice profound confusions about what constitutes consent, how one has chosen or what one desires, or report on enduring pain from broken sexual contracts, then in some ways they call into question the idea of the fully choosing subject whose sexual choices express a full understanding and full sense of freedom. The contractual conditions of analysis can absorb the ambivalence about consent and contract, but the responsibility of the analyst, even the legal responsibility, is to hold the contract even when the contract is under assault. So, even if we wish to move away from the language of contract and consent to develop a richer vocabulary for the psychic dimensions of relational life, we are still bound to contract, or rather, someone is responsible for binding us to the contract, if the analytic scene is to continue. That means that a certain legal context provides the condition under which the legal presuppositions of consent and contract are called into question.

Although what I have described above is a critique of certain notions of classical liberal individualism, it also applied to humanism in a different way. If I make apparently universal claims about interdependency and relationality, they are meant to contest certain bounded notions of individuality that have constituted the mainstay of classical humanism.

The "life" of human life means that it is already connected with what is non-human, and that its connection with non-human life is essential to the life that it is. Let us then hold together this term, "human life," even though its component parts, "human" and "life," will never fully coincide with one another. In other words, we will have to hold onto this term even though, as a term, it will on occasion seek to yoke two terms that repel one another, or which work in opposite directions. The human can never fully occupy life, and life can never fully explicate the human—so whatever we might want to call existence as a human will inevitably consist of a negotiation with this tension. As important as it is to ask whose life qualifies as a human life, we have to also ask the inverse question: what of human life is invariably non-human?

Finally, let us remember that this business of relationality is hardly utopian. There are forms of proximity, of living with, of adjacency and co-habitation that are radically unchosen. And these constitute a basic form of sociality that no one enters contractually, that constitute the social conditions of life to which we never consented, and which are finally indifferent to our consent. These are conditions we are nevertheless obligated to protect and defend, even though we never agreed to them, and they do not emerge from our will—they may even be characterized as both sexual and aggressive. We may well nurse rancor against such a situation; after all, our very volition is offended by the fact that we live in populations we never chose, that we are, indeed, born to parents we never chose. But if the world were to be a reflection of our free will, we would be compelled to destroy those parts of the world that we never chose. Perhaps indeed guilt lets us know that we cannot survive without those relations we never chose, that our modes of interdependency always exceed those relations to which we have consented, those relations into which we entered by contract. Those lives which exceed me and are not a matter of my

choosing are a condition of who I am, and so there is no life that is exclusively my own, even though my own life is not every other life, and cannot be. If guilt is a way of checking destruction so that those upon which we depend can continue to sustain us, so that indeed we may continue to survive, then we are finally creatures of life, including creatures of passion, who need what we cannot fully understand or choose, and whose sexual and emotional lives are marked from the start from this being bound up with one another with unknowing and necessity. Although law tries to negotiate this kind of proximity, it cannot provide the language we need in order to describe it. Indeed, those kinds of relations that are fraught with unknowing and ambivalence lead to the need for contract—and its limits.