

Snapshots of practice: Working with complexity in unique and specialist ways

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Title: Defusing the 'C' bomb: prioritising 'choice' over 'consent' in conversations about sexual assault

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Abstract

Among the many outcomes of WW 2 were the United Nations Organisation and the articulation of universal human rights. Among these is the inalienable right of sexual autonomy: the freedom and opportunity to choose about sexual activity. Sexual autonomy, amongst other signifiers of gender equality, is fundamental to the feminist agenda; is foundational in responding to victim/survivors of sexual assault; holds the key to prevention programs and also underpins contemporary Australian sexual offences legislation. Everyone's right to choice is inherent in all these contexts.

On the other hand, the legal test of the violation of the human right of sexual autonomy is to prove a breach of 'consent', or free and voluntary agreement. Somehow our sexual offences statutes confuse choice and agreement. Under legal circumstances the right to choice is skewed and limited to the *right to agree*, when in fact it includes the *right to agree, to abstain, and to change my mind*.

In the sexual assault sector it is our responsibility to continue to demonstrate the centrality of choice across all our practice – counselling and advocacy, training and education, primary prevention and other public advocacy. For example, we know it helps victim/survivors recognise their absolute right to choose about sexual activity and to clarify if their experience is sexual violence if we ask, 'Did you feel like you had a choice?', rather than 'did you agree' or 'did you consent'. This paper will explore the social, political and practice ramifications of the substitution of 'consent' for 'choice' in sexual assault discourse and propose benefits of a feminist revival of 'choice'.

There are a couple of 'c' words that are relevant to my discussion about sex and sexual assault today but the only 'c' bomb I want to defuse is 'consent'. In many conversations about adult experiences of sexual assault, 'consent' remains the most ubiquitous and influential term. I think that rather than promoting clarity and victim's rights, the use of 'consent' undermines so much of the good work we do by perpetuating the assumption that victim/survivors are automatically agreeing, and must prove otherwise. In place of consent I would like to encourage the sexual assault and wider violence against women sector to actively promote the language of choice and sexual autonomy.

So, how significant is the difference? According to the Macquarie Dictionary, 'to choose' is to select from two or more or more options, that which you prefer; while 'to consent' is to agree, comply or yield. The notion of options is important to choice, but consent carries no real alternative.

Sexual autonomy, amongst other signifiers of gender equality, is fundamental to the feminist agenda; is foundational in responding to victim/survivors of sexual assault; holds the key to prevention programs and also underpins contemporary Australian sexual offences legislation. As we know 'consent' – or rather a lack of it - is the legal test of sex crimes and while it is extremely important to emphasise that sexual assault is a crime, it is equally if not more relevant to remind ourselves that it is an indictable crime because first and foremost sexual assault absolutely transgresses fundamental social mores, and betrays and violates individuals' rights to safety and bodily integrity. In addition,

from a feminist perspective the threat and fact of sexual assault, embody transgression, betrayal, humiliation and violation and effectively constrain the equal participation of women in our society.

My introduction to the concept of sexual autonomy came relatively recently ... in hindsight embarrassingly later than my entry into the sexual assault sector 14 years ago and later again to the realisation that I had the best job in the world – facilitating adult learning, working with a team of hardworking and dedicated feminists and learning more every day about the many and varied ways that living in a patriarchy is harmful to most women and children and many men. And always working towards social change.

Among the many outcomes of WW 2 were the United Nations Organisation and the articulation of universal human rights. Among the latter is the inalienable right of sexual autonomy: that is the freedom and opportunity to choose about sexual activity. 'Sexual autonomy' leapt off the page of an ACSSA Issues paper about the law and sexual offences legislation in Australia written by Mary Heath in 2005 when I was researching intimate partner sexual assault for a stakeholder paper for the Australian Family and Domestic Violence Clearinghouse with Deb Western (Duncan and Western, 2011). 'The modern law of rape', Mary Heath says, 'focuses much more strongly on sexual autonomy' than on the historical conceptualisation of 'rape as a violation of male property rights' (p3) (women being the property of men). This modernisation, one would hope, should put choice about sexual activity to the fore, allow for the inclusion of all forms of intimate partner sexual violence and, coincidentally, legitimise the reality of the sexual assault of men. Autonomy, choice and self-determination also resound harmoniously with one of the central themes of feminism – the right of women to decide what happens to our bodies.

For many years I had been rather glibly talking about sexual assault in CASA House training programs and other contexts as a violation of human rights. Reading Mary Heath's paper jolted me to realise that actually I had been parroting 'human rights' mantra-like, maybe even hoping that no-one would ask me for clarification. Now at last, and rather thanks to chance, I knew what that right was and have been empowered by the concept in all my work since. I assume that those of you who support victim/survivors, in counselling and advocacy, through the legal system and other avenues will have been working consciously and actively with sexual autonomy as the bench mark, and sexual assault as the violation of the right to choose, - that is to participate in sex, to abstain and to change one's mind at any time. The CASA Forum definition is very clear that sexual assault is sexual behaviour that is unwelcome, unwanted and uninvited – unchosen if you like.

It is interesting to consider that both these starting places – the human right of sexual autonomy espoused by the law, and the feminist fundamental of the right of the individual to choose what happens to her body, are politically fairly conservative positions; consistent with most cultural values and the ethics of respectful relationships. Yet both are rather radical ideas when placed up against the assumption of agreement that is inherent in the term 'consent'. 'Consent' seems still to be the starting point for police investigations and public discourse around sexual assault and it is used in much of the sexual assault sector's public proactive and reactive conversation and written material about sexual assault. The suggestion of implicit agreement is also present in misguided questions like, 'Did you consent?' and, 'Did she agree?' when agreeing is but one of the choices available. I think another problem inherent in the language of consent is its connection to formal commercial contractual settings reflecting a permanence of commitment that is not present in the day to day,

moment to moment, dance of intimate relations. 'No means no', on the other hand has been a very powerful slogan because it signifies that everyone has the right to choose about sexual activity. Unfortunately it also reinforces the misconception that we have a responsibility to say 'no' clearly and categorically about sexual activity: never a requirement in any other form of social exchange.

I will go back to Mary Heath and her discussion of the modernisation of the law as an example of what I mean about the power of 'consent' to overshadow the right to choose; that is, 'consent' as the legal test of the violation of sexual autonomy helping us to lose sight of sexual choice as the crux of the matter. Heath says (p22) that 'in attempts to improve the protection of adult sexual autonomy ... almost every [Australian] jurisdiction has reformed the law dealing with consent.' Notice the sliding together of choice and consent as though these words are interchangeable in our lexicon? It seems that what persists despite a focus on sexual autonomy is the primacy of 'consent' reframed as 'agreement' – albeit 'free' agreement when testing for sexual assault. How different would it be if the accused was called on to show how he respected, ascertained, maintained and respected her right to choose?

Heath says, the new 'consent standards make it clear that a person who does not positively communicate free agreement to sex through their words or actions is not consenting' (Heath, p.22). It just gets harder and harder, not only has the victim/survivor's right to choice and her bodily integrity been obliterated by the perpetrator and also by the court but she has to convince 12 people that she didn't agree to being violated. I appreciate that the law's job here is to enact a law while our work is to support victim/survivors, but it seems to me that while one side starts with agreement and the other choice, the system will remain as hopelessly and ludicrously inefficient as it is.

Choice and self-determination are not synonymous with an assumption of agreement. 'I have the right to choose' is not the same as 'I have the right to agree'. The latter in fact invalidates or at least circumscribes my options. It seems to me that this elision or blurring of consent as agreement with choice suggests that agreeing to sex is the 'natural' position, so to speak; that the 'reasonable person' of the law wants to have sex with anyone, anywhere, anytime, anyhow, unless proven otherwise. The feminist in me suspects that this proposition of 'congenital consent', as I have heard it described, is evidence of enduring patriarchal hegemony embedded in our law – what Lynne Henderson (1991) calls 'Law's Patriarchy.' It makes me question whether the 'reasonable person' of the law is really gender neutral? Or does the right of choice about sexual activity continue to cleave to men and that of perpetual agreement lingeringly pertain to women.

However, when it comes to social change the law is only one avenue and currently our last resort and demonstrably failing everyone – victim/survivors and society at large; because it prioritises consent over choice, and also because the presumption of innocence of the accused perversely and absurdly automatically discredits victim/survivors as witnesses to their own experience.

Catharine McKinnon (1989, p4) says 'to know what is wrong about rape, know what is right about sex'. She has also argued, contrary to the feminist mantra, that sexual assault is about sex; as well as power and control. This makes sense because of the intimacy of the violation, abuse of social expectations of interpersonal behaviour, betrayal of trust, as well as the undoubted sexual gratification of perpetrators.

Our starting place then needs to be in conversations comparing sexual assault with good enough, right enough sexual relating – an idea first introduced to me by one of my counsellor/advocate colleagues. Sexual activity is an intimate pastime guided, like all other social, interactional behaviour by ethics, values, principles and morals. And like all worthwhile human dealings, of course, it can be fraught with dilemmas, challenges, frustrations and confusions. Unfortunately this intercourse – the doing and talking about it, is shrouded in privacy, misinformation and embarrassment which hamper progress towards a sexual violence free world.

In its work towards the elimination of violence against women the sexual assault sector here and elsewhere addresses change on a number of fronts. For young people starting out on their journey into sexual experience understanding pressure and coercion is crucial in knowing what is wrong about sexual assault. And in a complementary fashion exploring the connection between the right to choose and the many ways we can enable choice with our partner provides young people with a sound framework for measuring their own experience and building respectful relationships.

We also know that it helps victim/survivors recognise their absolute right to choose about sexual activity, and to clarify if their experience is sexual violence, if we ask, 'Did you feel like you had a choice?', rather than 'did you agree' or 'did you consent'. And no more so than for women, regardless of their age, who have experienced intimate partner sexual violence when the perpetrator is known, trusted and often still loved. 'Did you feel like you had a choice?' invites a victim/survivor to enumerate the constraints placed on her autonomy – fear for her own safety, fear of harm to others or things she values, fear of loss of her home, relationship, total disruption to life as she knows it.

CASA House training encourages participants to firstly consider the social and cultural norms and expectations of fair play in all interpersonal behaviour - from people who have just met to those of longer acquaintance and or intimacy - as we consider that the majority of sexual assault is perpetrated by a known and trusted person (around 80% for adults and 90% for children). We also ask people to set aside the idea of 'consent' and replace it with 'choice' for the reasons argued above. We have had very thoughtful and enthusiastic responses from community workers in response to this reconsideration of victim/survivors' experience. Many report that this shift in perspective has increased their confidence in initiating conversations about sexual assault with their clients.

In conclusion some years ago at a feminist forum in Townsville I heard the phrase 'the siren call of the law' (first coined by Carol Smart in 1989) used to describe the almost universal tendency to look to law and law reform as a means to reduce sexual violence and create a more equal world for women. I think the 'siren call' nicely reflects our deep desperation for change – we want the law to work well for victim/survivors; perpetrators caught, punished and rehabilitated; investigation to be more thorough and comprehensive; victim/survivors to feel confident and safe in reporting; conviction rates to reflect prevalence and so on. We were looking to Sexual Assault Reform Strategy here in Victoria with this hope even though we know that the law follows society rather than leads social change.

Rather than holding that illusion of the law as the route to change I think we need to reconsider the ideas that set the sexual assault and family violence projects in motion. The right to decide what happens to our bodies, choice about sexual activity and equitable social participation and contribution. In the sexual assault sector it is on our shoulders and in our hands to enlighten all

conversations about sexual assault and violence against women with the spotlight of choice across all our practice – counselling and advocacy, training and education, primary prevention and other public advocacy. I hope I have convinced you of the benefits of a feminist revival of ‘choice’.

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