

The Communicative Criterion: Establishing a New Standard for Non-Violent Sexual Encounters by Reframing Consent

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You are a petite woman, tired, walking home from a long day at work. You travel this route often and know each bend in the sidewalk. You hear a rustle, and suddenly a large man jumps out from the shadows. He grabs you, pins you down, and tears your clothing. Despite your screams for help and your physical resistance, he forces sex on you.

When we think of rape, we imagine this type of story. We assume that mysterious strangers emerge from the darkness and violate our bodies, our psyches, and our sense of safety. But statistics do not support this tale. In reality the ‘strangers’ in the shadows are likely to be our acquaintances, husbands, and boyfriends. The sidewalks are more often our bedrooms. The woman walking home from work is you and I and all our sisters, daughters, mothers, and friends.

Studies estimate that on college campuses in the United States 20 to 25 percent of women are raped by the time they graduate (Fisher, Cullen, and Turner 10). Because these episodes are often not reported, statistics more than likely underestimate the extent to which young women encounter sexual violence. When one in every four or five of the women in the undergraduate class I teach has been or will be raped, this is an epidemic. Even more startling is the fact that the vast majority (70 to 84 percent) of the women who are raped know their attackers (Bureau of Justice Statistics 29; Koss 15).

When we apply the word ‘rape,’ we know that something has gone wrong; a violation has been committed. But what standards do we use to judge that transgression? How do we arrive at the conclusion that a person has engaged in conduct outside the acceptable bounds for sexual behaviour?

In the United States, consent is the primary framework that citizens, judicial officials, neighbours, and families use to decide whether a particular sexual encounter is immoral or harmful. When these groups consider applying the word ‘rape,’ the most fundamental question they ask is whether both parties agreed to sexual intercourse.

Despite its centrality in judgments about sex, consent is a deeply troubling concept. Through an examination of historical articulations of consent, empirical studies on sexuality, and philosophical objections to the term, I argue that consent is no longer an adequate construct for understanding acquaintance rape. Consent is clearly important and useful in certain situations, especially when justice is sought against violent offenders. Although I do not believe that consent should be abandoned entirely, I do believe it needs to be altered. I argue for a reframing of sexual interactions that does not reject consent outright.

Following Lois Pineau, I propose and examine a communicative model for sexuality. Unlike the consent model, in which one partner agrees to a particular interaction with the

other, a communicative model of sexuality focuses on processes of meaning making in sexual encounters. It provides a new framework for social evaluations and understandings of appropriate sexual liaisons.

Much of the recent feminist work on transnationalism problematizes assumptions about nations and borders. Attention is given to flows, hybridity, colonialism, and power. Cultural formations are understood to emerge from complex interactions among economies, peoples, and polities. My discussion is grounded geographically, culturally, and historically in the United States; court cases and empirical studies are drawn from this country. I take both 'country' and 'discourse' to be inherently relational.

My discussion focuses on interactions between legal adults who have normal levels of mental function and are not under the influence of drugs or alcohol. Other constructs become centrally important when one judges the acceptability of sexual interactions between an adult and child or sex with the mentally impaired or intoxicated. For the purposes of this essay, these scenarios are set aside to focus narrowly on a particular kind of acquaintance rape. Although it is not my primary objective, I believe that the reconfiguration of consent I propose may also shift the way we understand scenarios not directly analyzed in this project.

My intent is to develop a communicative criterion of sexuality that avoids heteronormativity. For this reason, wherever possible, I have chosen to describe the people involved in an encounter as actors, parties, or partners. In so doing, I do not wish to obscure the fact that men commit the vast majority of acquaintance rapes and that women are most often the ones who experience these rapes. The specific examples of acquaintance rape I use to illustrate my points all involve men who violate women. In part, this is because I believe that if we are to reconfigure consent, we must remain grounded in the knowledge that sexual violence affects an extraordinary number of heterosexual women. My hope is that we can build upon the successes of a primarily woman-focused anti-violence movement to advance dialogue, research, and policy that encompass multiple expressions of sexuality.

Although I frequently refer to court cases and legal definitions of consent, this project does not offer new standards for laws. Although I believe a communicative model of sexuality has much to offer the penal system, I only briefly outline how the judiciary might rethink consent. Instead of focusing on rewriting statutes, I take up legal discussions as fragments of the broad cultural discourse that surrounds rape. Court cases are used as evidence of the stories that cohere to help us make sense of acceptable and deviant sexual behaviours. It is the underlying logic of consent that I am after.

I end by suggesting ways that a communicative model of sexuality might be taken up in the law, in academic research, and in education. The steps I identify, among many you and others will add, begin to push us toward an understanding of rape that can more fully address the complexities of power, sexuality, and relationship. A reconfiguration of consent is radical only in retrospect, after many small moves bring us to a new landscape of non-violent, compassionate sexuality.

The Debt to Pineau

Pineau advocates for the communicative criterion in order to challenge both the contractual and aggressive seduction models of sexuality, to shift the burden of proof from the person who is assaulted to the person who assaults, and to establish a standard of ‘reasonableness’ less dependent on masculine perspectives. I am sympathetic to each of these aims.

For Pineau, the communicative criterion requires partners to be intuitive, charitable, empathetic, and not overbearing. They exhibit an “ongoing state of alertness” (236) to their partner’s responses, are concerned with the “mutuality of desire” (236), and take on and promote “the ends of [the] partner” (234) as their own. Sexual encounters that exemplify this version of the communicative criterion are similar to good conversations.

Following Pineau, I agree that a focus on communication should be central in sexual encounters, but my ideas differ from Pineau’s argument in several important ways. First, while Pineau offers the communicative criterion as a legal standard, and I support this project, I focus on the communicative criterion’s implications for social understandings of sexual interactions. In so doing, I begin to answer one of Pineau’s critics who argues that “communicative sexuality must be a social as well as a legal norm” (Harris 52). Because social understandings are often informed by legal discourses, the two cannot be entirely separated. Second, this essay extends Pineau’s work by offering insights from the field of human and interpersonal communication. Literature in this discipline strengthens existing critiques of consent by demonstrating, empirically, some of the specific problems with communicating consent within interpersonal contexts. These studies may enrich scholars’ understanding of the communicative criterion, and they may suggest methods for building communicative skills within sexual contexts.

For Pineau, language reflects internal states of being. Communicators who make statements such as “I do not want to have sex” report individual experiences. Instead of understanding communication as a tool that is used to send messages from one independent person to another, I assume a poststructural framework in which meaning making is a process that occurs in the space between sexual actors. Pineau suggests that the communicative criterion requires epistemic responsibility: knowing the desires of one’s partner. In so doing, she assumes the existence of an individual, rational, independent being who makes decisions and judgments. This person is the primary site of knowledge. My iteration of the communicative criterion places the site of significant knowledge on the negotiated landscape between two people, where meaning is made through relational creation and circulation of messages. By departing from Pineau in this way, my use of the communicative criterion echoes Ann J. Cahill’s conception of sexual encounters as intersubjective engagements with significantly indeterminate meanings (183). This is the most important difference between Pineau’s approach and my own.

The Trouble with Consent: A Historical, Empirical, and Philosophical Overview

Definitions of Consent through History

To map society's shifting attitudes about women and sexuality, I examine how legal definitions of consent have changed over time. Although other social-historical evidence could be used to illustrate these changes, laws, unlike films or radio programs, provide records for the last several hundred years. Many of these definitions seem outdated or outrageous, but each informs present attitudes and conversations about the nature of consent. These historical undercurrents are one reason why consent is a problematic construct today.

In the United States at the beginning of the twentieth century, any sexual penetration proved the presence of consent (*Brown v. State*). The law assumed that a woman would always be able to resist a man's advances and could, at the last moment, close her legs. This definition of consent is troubling because it ignores differences in size and strength between many men and women. If we apply this framework to a situation in which a two-hundred-pound, professional quarterback engages in intercourse with a one-hundred-pound, five-foot-tall woman who never works out, we expect the woman to be able to resist the man's advances. If she cannot fight him off, she is consenting. We can so easily find the fault in this logic that the reasoning seems absurd. Yet what is considered reasonable, as many scholars point out, is often determined from a male perspective. Legal and social discussions of consent frequently fail to consider the perspectives of women.

For many years, marriage was equivalent to consent (Cuklanz 27). Wedding vows represented not solely a declaration of love and affection but also a contract governing property rights. Because a husband was entitled to unrestricted access to his wife's body, the matrimonial bond turned a woman into an owned object. Although the idea now seems outdated, California Senator Bob Wilson said not long ago, "But if you can't rape your wife, who can you rape?" (qtd. in Freeman 1). Rape in marriage did not become a crime in all fifty states until 1993, when North Carolina revised its statutes on 5 July (NC Code § 14-27.8). The idea that a husband is entitled to unrestricted sex with his wife regardless of the woman's consent, however, persists.

At one time, the courts also interpreted silence or submission as evidence of consent (McGregor 33). Instead of requiring the man to demonstrate that he sought and acquired agreement for a sexual interaction, this definition of consent burdened the woman with proving that she actively resisted his advances. We still adopt this framework in our everyday understanding of consent. Instead of asking, "Did *he* ask if she was interested?" we ask, "Did *she* say no?" Consent is assumed until non-consent is proven. As Joan McGregor points out, this understanding of consent protects men's access to sex rather than women's right to freedom from harm (35).

Consent's protection of men's access to sex becomes particularly pernicious when combined with one of the common rape myths. Men are assumed to have an uncontrollable libido, and women are often accused of provoking it. Because men are presumably unable to restrain their own sexual desire, the burden for negotiating sexual encounters is placed on women. Not only must women refuse male advances, they must also not invite those

advances. Consent guarantees male access to women's bodies and excuses men from assuming responsibility for their actions or attending to their partners.

Perhaps the most troubling historical understanding of consent emerged from psychoanalytic theories. Because desires are buried deep in the subconscious, these theories posit, women may be ambivalent about or completely unaware of their true wishes. Men are therefore justified in forcing women to have intercourse because women actually want sex. Psychoanalytic theories are also used to suggest that women may not be aware of whether they have given consent (Cuklanz 25). These theoretical approaches to sexuality render consent irrelevant by suggesting that in cases in which consent *appears* to be absent, women have not yet faced the reality that they have a profound wish for male penetration.

Our current social understanding of consent is informed by this historical trajectory. When we ask each other questions about whether a sexual encounter was acceptable, our answers often subtly or directly rely on the themes discussed here. Conversations in the law, in the media, and among friends frequently suggest that it did not matter what the woman wanted because it's a man's right or that she really wanted it. These ideas are entrenched within the logic of consent and are a part of what makes consent such a troubling and inadequate construct for addressing acquaintance rape.

The Difficulty of Communicating Consent

Studies of interactions in heterosexual relationships provide further evidence that consent is a problematic framework. In this section I examine three of the primary issues. First, actors most often communicate consent non-verbally (Hall para. 58; Hickman and Muehlenhard 271). This finding suggests that definitions of consent that require explicit verbal agreement, such as the highly publicized 1993 Antioch College policy, are out of sync with how partners really negotiate sexual encounters. Although it might have been unrealistic, the Antioch policy attempted to respond to a difficulty inherent in consent: given that non-verbal cues are extremely ambiguous, how do actors ensure that they accurately understand each other's signals? Other research identifies reasons why actors may misinterpret each other's cues. Terry Humphreys found that as relationships lengthened and levels of sexual activity increased, partners required less explicit consent (313). Humphreys also found that women more so than men consistently believed that consent should be expressed more explicitly (313). This research reinforces the fact that answering the question, Did A agree to have sex with B? is neither easy nor straightforward.

Second, actors assume that desire is equivalent to consent. In reality, people often consent to sex they do not want or refuse sex they do want. Humphreys makes a distinction between inward consent (a voluntary willingness to engage in a sexual activity) and the outward manifestation of that willingness (communicating consent to another) (307). Lucia F. O'Sullivan and Elizabeth Rice Allgeier found that 38 percent of their study participants had consented to unwanted sex (248). Additionally, a cross-cultural comparison found that more women in the United States than in Russia or Japan had consented to unwanted sex (Sprecher

et al. 130). These studies reveal yet another layer of complexity in the issue of consent and provide evidence that assenting to a sexual encounter involves much more than desire alone.

Finally, cultural scripts inform how, when, and if a person communicates consent. Phillips found that women sometimes use the appearance of coercion to preserve their image as good girls (120). Similarly, Charlene L. Muehlenhard and Maria McCoy found that women occasionally use scripted refusals, called token refusals in other literature, to negotiate a sexual double standard in which women who like and agree to sex are considered promiscuous (457). These studies suggest that cultural expectations have a significant effect on the way women use communication in sexual encounters.

Each of these issues in the communication of consent demonstrates that determining whether consent occurred is extraordinarily difficult. The criterion of consent masks these difficulties by implying that one can simply either agree or disagree to an advance and that one's partner will easily understand the message.

Philosophical and Other Objections to Consent

Feminist philosophers and theorists voice several concerns with the criterion of consent. Some, such as Catharine MacKinnon, suggest that consent in heterosexual relationships is not possible (175). Because society is fundamentally patriarchal, men and women have different amounts of power. The law incorrectly assumes that males and females are equal. In reality, opposite-sex partners cannot give consent because they arrive at a sexual encounter already on uneven ground. MacKinnon's argument couples consent and coercion and calls into question whether women can ever freely agree to sexual activity.

Susan Brownmiller, like MacKinnon, criticizes the social structures within which consent is negotiated. She argues that monogamy and matrimony emerged in response to fear of rape (16–17). If the primary systems in which we engage in consensual relationships are a reaction to and defence against non-consensual relationships, consent has been defined in terms of what it is not. Consent is merely the absence of rape rather than the presence of some positively negotiated sexuality.

Ann Cahill finds the concept of consent troublesome because it frames sexuality in terms of a contractual event that involves property. This model of sexuality fails to account for the embodied nature of subjectivity because it assumes that sexual actors are rational, autonomous agents (182). Sexual expression is an area for control peripheral to one's being rather than a central aspect of personhood.

In addition to its complicity with fundamentally patriarchal systems, the concept of consent privileges problematic hetero-normative scripts. It assumes one person (almost always the man) initiates a sexual encounter and another (almost always the woman) responds. This formula does not allow for mutually negotiated consent. It also does not allow the role of responder and initiator to change during the course of a sexual encounter, and it solidifies a pursuer-pursued model of sexuality. By adopting rigid and binary formulations of masculinity and femininity, the concept of consent not only places boundaries on how we understand

heterosexual interactions, it also limits our ability to seriously address sexual violence in queer relationships.

The concept of consent is also troubling because, as currently understood, it focuses attention primarily on intercourse. Deciding whether an encounter is acceptable and appropriate rarely involves questions about forms of sexual expression that do not involve penetration. Using consent as the primary criterion for making judgments about the acceptability of particular sexual acts may prevent us from developing a more robust, diverse, empowering, and compassionate theory of sexuality.

Toward a New Standard for Acceptable Encounters: The Communicative Criterion

The Communicative Criterion Outlined

The consent standard operates in a similar fashion to the Shannon-Weaver model of communication. Developed in conjunction with technology projects at what is now AT&T, this model assumes that a message is formulated, transmitted, and then received (Shannon and Weaver 5). Similarly, the consent framework assumes that a sexual actor decides to consent, expresses that consent, and the actor's partner receives that expressed consent. Although it has an important place in the history of communication research, the Shannon-Weaver model is criticized because it does not account for interference, messages that are sent and received simultaneously, or mutually negotiated meanings among communicators (Rakow and Wackwitz 4–8; Wood 35–36). Recent scholarship has developed transactional models of communication. A reconfiguration of consent that moves toward a communicative criterion for acceptable sexuality should be formed in the image of these newer models.

Like Pineau, I argue that the communicative criterion poses a new set of questions. Instead of asking, Did A agree to sex with B? we must ask, Did both actors actively work to mediate the ambiguous, intersubjective process of communicating during sexual encounters? Are the two mutually interested in the activities? The communicative criterion shifts our attention. No longer are we concerned with whether the parties consented to sexual relations; instead, we seek to understand how the partners attended to each other, sought information from each other about likes and dislikes, and negotiated boundaries.

As outlined by Pineau, a communicative model of sexuality “combines the appropriate knowledge of the other with respect for the dialectics of desire” (234–35). Drawing on common guidelines for effective communication, we can expand the communicative criterion to require a concern for, recognition of, and confirmation of the other. Actors who exemplify the communicative criterion for acceptable sexual encounters ground their interactions in empathy, listen to both verbal and non-verbal cues, and check their perceptions.

The communicative criterion assumes that engaging in no sexual activity is the default. Without this assumption, one could argue that attending to one's partner's desires, as the communicative criterion requires, would mean that if one partner wants to move forward, the other is obligated to meet that desire. The communicative criterion emphasizes that no sexual

activity is the default in order to require that both parties want to engage in sexual activity. It protects negative, not positive, autonomy.

The Benefits of the Communicative Criterion

Adopting the communicative criterion resolves a number of the problems associated with the criterion of consent. First, it addresses several of the difficulties with consent that are most apparent in legal cases. To prove the absence of consent, the law burdens the plaintiff with demonstrating resistance. By contrast, the communicative criterion shifts the burden to the defendant, who must demonstrate an ongoing, active commitment to acquiring knowledge about his or her partner's wishes and desires. The communicative criterion also avoids the law's troublesome coupling of force and consent. In practice, the absence of consent is often ignored if force is not present. Under the communicative criterion, the independent presence of force or absence of consent is enough to prove that the actor has not met the standards for appropriate conduct. Finally, the criterion of consent requires those involved in a trial to determine whether coercion negated consent. The communicative criterion resolves some of the problems inherent in those discussions. Any attempts to coerce, or instances that could be considered coercive, do not fall within the conduct that the communicative criterion deems appropriate. Instead of asking, Was this behaviour coercive, and did it therefore negate consent? Judges could advise, "If this behaviour was potentially coercive it is evidence that the person in question was not acting in accordance with the communicative criterion."

Although I intend to intervene primarily in popular discourse, I draw attention to these possible improvements to the law because public attitudes and the law are often interconnected. Because the communicative criterion has much to offer both legal and everyday discourse, it can potentially reframe our understanding of sexual encounters.

When considered in the context of popular thought, the communicative criterion addresses three issues that the consent criterion does not. First, the communicative criterion allows either partner's interest in continuing sexual interaction to shift at any point during a sexual encounter. Whereas the consent framework raises questions about how long consent applies once granted, the communicative model's requirement for ongoing attentiveness to one's partner acknowledges the reality that actors in a sexual encounter experience changing desires. Second, under the proposed model, using the 'she really wanted sex but didn't know it' argument to rationalize coercion, force, or violence is deemed inappropriate. Engaging in a sexual act without seeking evidence that it is congruent with the conscious, present experience of one's partner is a violation of the communicative criterion. Finally, one of the greatest strengths of the communicative criterion is its ability to reframe consent's problematic hetero-normative scripts. The communicative criterion does not assume that one partner initiates and the other responds; instead, both actors mutually negotiate an encounter and may, at different moments, assume the lead. Whereas consent privileges intercourse as the primary sexual act, the communicative model allows for an understanding of sexual encounters that includes many forms of sexual expression. Acts may be more or less

acceptable and appropriate regardless of whether heterosexual penetration is involved.

Critics of Pineau's original formulation of the communicative criterion voice the following objections: (1) the communicative criterion universalizes a female standard for reasonableness and simply inverts one of the problems Pineau notes (Harris 53); (2) men, who communicate differently because of socialization, may be unfairly punished by this standard (Adams 37); (3) the reformulated universal leaves out women who do not share this ideal of sexuality (Wells 42); and (4) a communicative model requires a checklist-like process of interaction that reduces the spontaneity and erotic value of an encounter (Adams 36).

The communicative criterion, as I outline it, is subject to none of these objections. Although Pineau argues that a communicative criterion adopts women's visions of rewarding sexual encounters, I do not share her view. Pineau and her critics may assume that 'communication' means the direct, explicit, and verbal discussion of sexual activities, including frequent reflection on emotional experiences. If this is the case, then Pineau's critics may be right on each account. In his critique, Adams draws on scholarship on masculine and feminine speech communities, developed most famously by Deborah Tannen in her 2001 book, *You Just Don't Understand: Women and Men in Conversation*. Like Tannen, many scholars who study speech communities argue that women develop styles of communication that differ in significant ways from those of men. Pineau's critics are concerned that the communicative criterion privileges women's styles and ignores men's.

My formulation of the communicative criterion avoids this problem in two ways. First, although some research equates styles of communication with biological sex, as Pineau may have, I draw on a body of literature in which communication reflects qualities of gender, not sex (Cameron 947; Crawford 3; Dindia and Canary x). Thus, a male individual may exhibit characteristics of both masculine and feminine communication. Although every individual may favour a particular mode, a person's style varies across social contexts and over time. Second, the communicative criterion I have in mind does not assume that one mode of communicating should be the standard. I assume that communication is always happening, that it involves both direct and indirect messages, verbal and non-verbal cues, instrumental and emotive expressions. Because I do not advocate a communicative criterion that narrowly defines 'communication' in the way that Pineau and her critics might have conceived it, the criterion does not universalize a female standard, unfairly punish men, or exclude women who do not care for the emotive, direct communication for which it appears Pineau is an advocate.

I use the communicative criterion to draw attention to the ways in which communication occurs – to the process of attributing meaning to others' behaviour, forming perceptions, and making sense of experiences. These activities are inherently fraught with ambiguity, and no two actors negotiate them in exactly the same way. Although active and effective communication occurs in multiple forms and includes varied behavioural elements, it always requires communicators to assume that negotiating these processes can only occur through communication and interaction. To meet the communicative criterion, actors must continually

acknowledge that meaning making occurs not in a single individual, but between people.

Some may object to the communicative criterion by asking these questions: Do the problems identified with communicating consent not also apply to general communication in a sexual encounter? Is it not still difficult to accurately interpret the signals of the partner? Could it not turn into a he-said-she-said situation? The answer to each of these questions is yes. The communicative criterion makes these difficulties central to considerations of appropriate sexual conduct. Whereas consent assumes an unproblematic negotiation of sexual encounters (one either agrees or disagrees to an activity), the communicative criterion requires actors to acknowledge the ambiguity of meaning from the outset. Partners must make active, concerted efforts to negotiate shifting desires and account for varying perspectives. Appropriate sexual encounters begin with the knowledge that two people will not have the same experiences; therefore, actors must directly and continually address these differences.

The Communicative Criterion Applied

To more fully illustrate the value of the communicative criterion, I apply it to several scenarios. In each I demonstrate that, where the consent standard fails, the communicative criterion strengthens our understanding of what has gone wrong between the partners. In the first situation, a case that occurred in North Carolina in the mid-1980s, consent appeared to be absent. A pregnant woman's ex-husband had abused her many times (*State v. Alston*). In the encounter in question, the woman verbally refused her ex-husband's advances, but she did not resist physically for fear that the man would become violent and harm the child she was carrying. The jury in this case acquitted the defendant because the woman did not fight back hard enough. Although explicit consent was absent, the jury's decision reflected a troubling social understanding of consent: refusal is only valid if it is accompanied by a vigorous fight. Because force was absent, the jury – as many people might – assumed that consent was present. If the court applied the communicative criterion, the husband would have a difficult time proving that he tried to understand and respond to his ex-wife's wishes. If she verbally refused, how could he reasonably believe that moving forward with the encounter was appropriate?

In the next two situations under consideration, the issue of whether consent had been given was ambiguous. In the first case, tried in Texas, a man wielding a knife broke into a woman's house (Milloy 30). The woman locked herself in the bathroom. The man eventually broke into the bathroom and demanded that the woman have sex with him. The woman feared for her life and decided that it was safer not to resist his advances. She asked him to wear a condom to protect her from life-threatening sexually transmitted infections. When the case first went to trial, jurors acquitted the defendant because they believed that the woman's request for a condom indicated her consent. If we instead apply the communicative criterion to evaluate this episode, we find no evidence that the man made any attempt to discover, respond to, or act in accordance with the plaintiff's wish to not engage in sexual activity. The presence of the knife likely indicated that the man knowingly acted against the desires of the woman, and

this is clearly a violation of the communicative criterion. Although not an instance of acquaintance rape, this situation illustrates that judgments based on the consent criterion can go awry in a way that judgments based on the communicative criterion do not.

Consider a second ambiguous scenario in which Jill goes on a date with a man she recently met:

We were talking, it was just like a date, you know, when he pulled a gun out of the bag on the back of his motorcycle and started playing with it. I don't like guns. My parents don't have guns. I said, "Oh, gee, that's not loaded, is it?" and he said, "Oh, yeah." I was very scared.

Jill's date laid the gun down on the blanket they were sharing. He then put his arm around her and started kissing her, but just briefly. He almost immediately proceeded to have intercourse with her.

I remember at the time I thought, "Just go along, it doesn't matter." I didn't want to take any chances. I just wanted to get home and get out of that situation. (Warshaw and Koss 28, italics in original)

Jill indicates that she decided to just go along, and we could easily consider this consent. In the communicative model, however, we would look for and find no indication that Jill's date tried to understand Jill's interest in intercourse. He would therefore fail to meet the standards for acceptable sexual interactions.

In the preceding examples, consent was either absent or questionably present. To fully understand the benefits of the communicative criterion, consider a situation in which consent was clearly present. A woman verbally, and without reservation or hesitation, agreed to engage in intercourse with her male date. They began to have sex, and during the episode the man began to use foul and abusive language. He violently pummelled the woman's breasts to the point that she was bruised and bleeding. The woman felt violated and humiliated. Our basic instincts tell us that something is wrong in this scenario, but it has nothing to do with consent. Clearly, the woman agreed to have sex. The communicative criterion identifies the unacceptable element of the encounter: the man did not continuously attempt to recognize or respond to the experiences and desires of his date. Care, empathy, and attentiveness were absent. While some statutes in the United States recognize that consent can be withdrawn at any point during a sexual encounter, the law does not always match social reality. Sexual actors often mistakenly assume that, once given, consent continues throughout a sexual encounter. The communicative criterion, as a basis for interpersonal interaction in sexual encounters, provides groundwork for correcting this assumption.

The communicative criterion not only allows us to understand when encounters are harmful but also prompts important discussions about the social constraints that are at work when partners negotiate their sexualities. To illustrate the criterion's potential to generate an important dialogue in our culture, consider one additional example from Pineau:

The woman [...] agrees to see someone because she feels an initial attraction to him and believes that he feels that same way about her [...] We do not know how much interest she has in him by the end of their time together, but whatever her feelings she comes under pressure to have sex with him, and she does not want to have the kind of sex he wants [...] And while she feels she doesn't owe him anything, and that it is her prerogative to refuse him, this feeling is partly a defensive reaction against a deeply held belief that if he is in need, she should provide. If she buys into the myth of insistent male sexuality she may feel he is suffering and that she is largely to blame [...] He uses the myth of "so hard to control" male desire as a rhetorical tactic, telling her how frustrated she will leave him [...] She resists, voicing her disinclination [...] It is late at night, she is tired [...] She does not adopt a strident angry stance, partly because she thinks he is acting normally and does not deserve it, partly because she feels she is partly to blame, and partly because there is always the danger that her anger will make him angry, possibly violent. It seems that the only thing to do [...] is to go along with him and get it over with [...] She finds the whole encounter a thoroughly disagreeable experience, but he does not take any notice [...] Later she feels that she has been raped, but paradoxically tells herself that she let herself be raped. (222–23)

Does the man meet the standards of the communicative criterion? Clearly, he does not because he pays no attention to the woman's experience. In this case, the communicative criterion does more than simply condemn the man's actions. It highlights some of the complexities involved in any encounter: gendered socialization encourages women to be supportive and accommodating, and cultural scripts suggest that male sexual aggression is the norm. Because the woman knows that consent is the central framework for understanding acceptable sexual encounters, she feels guilt and self-blame. In order for the situation to be considered rape, the woman believes that she should have resisted and objected more strongly. Popular culture and the law would most likely agree. She simultaneously feels pressure to enact 'woman,' a role in which assertiveness can negate her femininity, negate the man's masculinity, and raise his ire. The woman is caught in the trap feminist philosophers such as Brownmiller and MacKinnon identify in their scholarship: the basic systems in which we operate were fundamentally patriarchal long before we attempt to negotiate our places and actions within them.

When we use the consent criterion to understand acquaintance rape, we fail to understand the tensions under which actors operate. We can argue that women, who most often experience acquaintance rape, can learn to be more assertive. This would clarify the presence or absence of

consent and strengthen the work the consent criterion can do. Although urging women to be more assertive is useful and important, this method of addressing problems with acquaintance rape fails to acknowledge the consent criterion's fundamental flaw: it does not account for the extraordinary and very real pressures that constrain actors' behaviours within sexual encounters.

The communicative criterion shifts our focus and has the potential to prompt a nuanced dialogue about the nature of sexuality. It issues an injunction to men and women – intersexed and trans, straight and queer – to rethink acceptable sexual encounters. Instead of resting on one party's acceptance or refusal of an advance, appropriate sexual encounters are defined in the space between the two partners, in their attempts or failure to negotiate a shared meaning. The criterion is based on the assumption that we each experience the world differently and that creating any significant bond requires active, engaged efforts to understand and appreciate the perspectives of another.

Implementing a Communicative Model of Sexuality

Enacting the communicative criterion requires a dramatic shift in our approach to sexuality, a change that cannot happen overnight. A radical reconfiguration begins with small steps, and advances can be made now in the law, scholarly research, and education.

The Communicative Criterion and the Law

I do not suggest that the communicative criterion *replace* the consent criterion in law. Although problematic, the concept of consent is a central component of laws that do important work. The last several decades have been ones in which a woman's ability to seek justice for violent sexual victimization has increased, and the difficulty of securing those gains cannot be overlooked. An outright rejection of consent would be unwise given its role in laws and cases that punish heinous crimes and reframe public attitudes about acceptable sexuality. However, the law would be enhanced if it allowed the communicative criterion to operate alongside consent. If a case failed to meet the consent criterion, it would also fail to meet the communicative criterion. Moving toward a communicative criterion therefore does not require the law to abandon consent. Consent can be preserved as a shift to communication is implemented gradually.

A gradual shift is desirable because replacing the consent criterion with the communicative criterion may introduce a new problem: the widespread criminalization of sexual activity. Statistics indicate that date rape is extraordinarily prevalent, and I believe that if the communicative criterion were adopted, a majority of these episodes would be condemned. Although I do not wish to condone date rape, criminalizing a large percentage of sexual encounters is problematic because the judicial system is designed to dole out punishment, not to offer rehabilitation or preventative efforts. For this reason, methods used to address acquaintance rape must not be only legal. Although laws may shape attitudes and thus deter

some offenders, we also need proactive interventions. Additionally, a law-only approach to reducing acquaintance rape would be unwise because the vast majority of acquaintance rapes are never reported.

Developing the Communicative Criterion through Scholarly Research

Whereas the judicial system provides a negative definition of acceptable sexuality by identifying acts worthy of punishment, scholarly research can focus on developing a positive definition of appropriate sexual encounters. Communication studies – with its focus on meanings negotiated between people, attention to power, and understanding of how race, class, gender, and sexuality both enable and constrain lives – is uniquely situated to advance this line of inquiry. Scholars can work to operationalize the communicative criterion by asking the following: What communicative strategies lead to effective negotiation of physical boundaries? How do partners successfully resolve conflicts about their sexual activities? How can partners build trust in, knowledge of, and sensitivity to each other? Instead of focusing on the presence or absence of consent, research motivated by the communicative criterion would seek empirical data to demonstrate how partners bring care and attentiveness to each other.

The majority of recent studies on communication in sexual relationships explore health concerns and risky behaviours. Many seek to explain the effects of parent-child communication on adolescent sexual activity. Others document intimate partners' discussions about sexually transmitted infections and safer-sex practices. Both lines of inquiry focus on reducing unwanted pregnancy and disease. Given this current emphasis on health, scholars who want to gain visibility for work on the communicative criterion could frame their research in terms of health concerns. Although the effects of acquaintance rape may not always include unwanted pregnancy or a sexually transmitted infection, the emotional and psychological costs are high. These consequences alone, given the staggering number of acquaintance rapes each year, should be enough to merit widespread public concern.

Education in the Service of the Communicative Criterion

I suspect that the average American acquires sexual education through the popular media. Movie scenes in which actors look each other in the eyes while the orchestra swells in the background are the norm. Moments later, the couple magically arrives at simultaneous orgasm. These romanticized depictions of sexuality often involve violence. When people learn about sexual practices from Hollywood, they are not exposed to lots of important information. Even when formal sexual education programs are available, if they do not include media literacy, many people may not critically interrogate the representations of sexuality they encounter in advertising, on television, and on the big screen.

Educational programs in primary and secondary schools are the subject of an intense debate over whether young people should receive comprehensive sex education or

information on abstinence only. Many educators and administrators fail to acknowledge that adolescents are sexual beings regardless of whether they choose to have intercourse. Given the present political climate, advancing sexual education curricula in public schools is difficult. However, grounding young people's sexual education in communication may be one way for advocates of comprehensive sexual education to navigate difficult terrain. Being able to negotiate physical boundaries, listen carefully, and empathize are important skills no matter one's political orientation. By framing sexual education as a communicative endeavour, curricula can directly address sexual violence and violation, unwanted pregnancy, and safe-sex practices.

Sexual education, if present in compulsory schooling, is even more limited after students leave public schools to work or pursue higher education. We seem to assume that positive relational sexuality is an inherent capability. Just as everyday interpersonal communication involves a set of skills that can be actively acquired and improved, effective communication within sexual relationships can be cultivated. At the college level, universities could offer workshops and programs designed to build skills for acceptable sexual interactions. Communication textbooks could include a section that focuses exclusively on communicating within sexual relationships. These types of actions are necessary to shift the conversation about acquaintance rape and move toward a society that frames encounters through the communicative criterion.

Humanizing Sexuality through Communication

Although the communicative criterion makes a number of positive contributions to social understandings of appropriate sexual interactions, it is not a panacea. Critics of Pineau's original criterion argue that communication always already occurs within a social context of gendered inequalities, and using it to adjudicate rights and wrongs ignores the conditions that produce it (Adams 33). This criticism should be taken seriously.

Consider the following three pieces of scholarship, each of which suggests that communication cannot be the sole site for intervening in and preventing sexual violence. Using literature on conversation analysis, Celia Kitzinger and Hannah Frith show that refusal is a complex process that involves delays, palliatives, prefaces, silences, compliments, and weak acceptances (310). This culturally normative model of refusal is at odds with the notion that women, when faced with aggressive sexual partners, should or do simply say no. They also argue that both men and women understand a variety of interactional refusals, many of which do not include the word 'no.' Kitzinger and Frith conclude that because sexual actors understand a wide variety of refusals, both direct and indirect, communication is not the primary problem in sexual violence. With this in mind, a focus on communication must include attention not only to individual, interpersonal messages but also to the broader social narratives that inform sexual actors' behaviours and beliefs. Similarly, Barrie Bondurant and Patricia Donat challenge the assumption that acquaintance rape is the result of

miscommunication and suggest that it is instead caused by practices of perception and information processing (691). The communicative criterion assumes that perception and information processes are central aspects of communicating. A focus on communication does not exclude culturally conditioned attitudes but rather considers them to be an important part of the processes sexual actors use to make meaning.

The previous two studies suggest that communication cannot be disconnected from the cultural framework in which it occurs. Intervening in and preventing sexual violence requires a critical interrogation of not only communicative practices – practices that include individual processes of sense making and perception – but also of the cultural scripts that underwrite these processes.

Virginia Braun, Nicola Gavey, and Kathryn McPhillips argue that reciprocity – a discourse that focuses on mutual receipt of sexual pleasure – circulates in relation to discourses of equality and respect. As described, the reciprocity discourse resonates with the communicative criterion. While a discourse of reciprocity seems to enable interactions in which partners are more likely to consider each other's wants and needs, Braun and colleagues suggest that it is “not necessarily as liberatory” as it may seem (253). They argue that although discourses of reciprocity may indeed offer some challenges to troublesome aspects of heterosexual relationships, the discourse may simultaneously “reinscribe aspects of heterosex that we would want to continue to critique” (255). Thus, reciprocity is experienced as both “oppressive and/or genuinely reciprocal” (255). Their work suggests that moves toward a model of sexuality similar to the one the communicative criterion advocates (one based on mutuality and reciprocity) do not totally disrupt or break from the modes of interaction they were designed to critique.

As these scholars point out, miscommunication does not *cause* rape. However, accepting this fact does not mean one must deny that an attention to communication offers a way to intervene in sexual violence and rethink sexual encounters. A focus on the communicative criterion must be coupled with careful and critical discussion of the ways in which the gendered dynamics of the social world influence how sexual actors communicate.

Without uncoupling consent from scripts that normalize violence and reify patriarchal, sexist systems, we cannot move toward a humanizing expression of pleasure in our bodies. As Nicola Gavey argues, we need a new cultural terrain on which “traditional stereotypical representations (and constructions) of men and women” can be challenged (217). Embracing a non-violent, non-harmful, and compassionate sexuality requires that we develop an understanding of human interaction based on our innate yet undeveloped and unrecognized capacity to negotiate the space between ourselves and the world. Here, in this space between, is a future landscape for sexuality in which meanings are generated in community, through communication.

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