

Michael Plaxton, *Implied Consent and Sexual Assault: Intimate Relationships, Autonomy, and Voice*. Montreal and Kingston: McGill-Queen's University Press, 2015.

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In this book, Michael Plaxton advocates for expansion of the legal definition of “sexual consent” to include “implied consent.”¹ Like Don Stuart² and Edward Greenspan,³ he is troubled by the effects of the legal definition of sexual consent, in particular, by its potential to deem what Plaxton characterizes as “innocent” or “morally” non-culpable physical contact between intimates as “criminal”—a result Plaxton describes as “counter-intuitive.” Examples offered of “innocent,” albeit non-consensual (no contemporaneous agreement) and therefore “criminal” conduct, include touching the other party in public (caressing her knee under a restaurant table) or private (the impromptu surprise “embrace” or the kiss while she sleeps). These examples, Plaxton suggests, show that ordinary acts of intimacy between parties in accordance with normative arrangements and practices established by them are not criminal acts and should not to be labelled as “crimes.”⁴

Plaxton therefore proposes that the definition of “sexual consent” as “voluntary agreement to participate in the sexual activity in question,” as codified by Parliament in 1992 and first construed by the Supreme Court of Canada in *R. v Ewanchuk* in 1999, be amended to recognize a role for “implied consent.”⁵ He expressly limits his focus to sexual activity between heterosexual individuals and presumes the male to be the socially dominant party, the female the “consenting” party and the potential complainant. Economic equality is assumed, and issues arising from intersectionality are not addressed. Plaxton claims that recognition of the validity of “implied consent” would advance the equality rights of women by affording them a fuller measure of sexual autonomy free from the state enacted and judicially

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1. Michael Plaxton, *Implied Consent and Sexual Assault: Intimate Relationships, Autonomy, and Voice* (Montreal & Kingston: McGill-Queen's University Press, 2015) at 3.
 2. Don Stuart, “*Ewanchuk*: Asserting ‘No Means No’ at the Expense of Fault and Proportionality Principles” (1999) 22 Criminal Reports (5th) 39.
 3. Constance Backhouse, “Edward Greenspan: A Feminist Reflection on the Eulogies Surrounding His Death” (2015) 27:2 Canadian Journal of Women and the Law 157 at 167.
 4. Arguably, some of these examples are simply expressions of “affection” and are not “sexual” in nature. Cultural conventions often shape interpretation of the significance of casual interpersonal physical contact based on the circumstances and the age and gender of the parties.
 5. *R v Ewanchuk*, [1999] 1 SCR 330.

construed requirement that sexual partners obtain contemporaneous express affirmative consent to sexual activity from each another.⁶ In his opinion, the moral imperative to treat women as ends in themselves requires the adoption of an expanded definition of sexual consent along the lines he proposes.

Plaxton distinguishes “implied consent” from “advance consent” (analyzed in *R. v J.A.*⁷), defining “implied consent” as “a subjective state in which the individual accepts a set of norms, applying to her at the relevant time, by which the sexual touching in question is legitimate,” even if on the occasion when the touching takes place she does not want to be touched (or lacks capacity due to sleep, unconsciousness, or impairment).⁸ Legitimacy is seen to flow from the recognition of the power of a woman, as an agent, to bind herself to a set of “normative commitments,” rather than from a specific agreement made in advance in anticipation of a specific act (as in “advance consent”). Plaxton states that sexual partners may want to cede “control” over when and how they are sexually touched, even if they are asleep or unconscious or otherwise vulnerable, and suggests (correctly) that this requires an approach to “consent” that is precluded by the definition of consent in section 273.1 of the *Criminal Code* as interpreted by the courts.⁹

The book is addressed to a general audience, not a scholarly one, and does not provide a comprehensive analysis of the socio-legal context and the legal and political implications of the proposal. The core of the book is instead organized as a discussion of a series of theoretical issues¹⁰ that Plaxton identifies as relevant to the role of “implied consent” in criminal law. A road map is provided.¹¹ Chapter 1 offers an overview of the issues with an emphasis on the “expressive” function of criminal law and the “principle of fair labelling.” Chapter 2 asserts that the “wrong” of sexual assault as defined by Parliament in 1983 lies in “sexual objectification, in the narrow sense of instrumentalization: one person’s use of another as a mere tool for sexual gratification.”¹² The objectives of the further amendments in

6. Plaxton, *supra* note 1 at 17–18.

7. *R v JA*, 2011 SCC 28, [2011] 2 SCR 440.

8. Plaxton, *supra* note 1 at 19.

9. Plaxton asserts at the outset that the offence of sexual assault, as amended by Parliament, targets the “wrong” of sexual instrumentalization, the objectification and use of another person’s body for one’s personal sexual gratification but does not explain how the sexual touching of a person who lacks awareness due to sleep, unconsciousness, or impairment is anything other than sexual instrumentalization as he defines it. And see Cressida J Heyes, “Dead to the World: Rape, Unconsciousness, and Social Media” (2016) 41:2 *Sigs* 361. *Criminal Code*, RSC 1985, c C-46.

10. Plaxton’s previous publications dealing with these subjects, including Nussbaum on instrumentalization, the bad man in criminal law, motive and morality, the use of presumptions in criminal law, the *Butler* decision, and so on are available on his author’s page on SSRN.com.

11. Platon, *supra* note 1 at 22–26.

12. *Ibid* at 22.

1992 are not given equal consideration. In Chapter 3, Plaxton sets out his case for a doctrine of “implied consent,” suggesting that in rejecting the doctrine in the sexual sphere in *Ewanchuk*, the Supreme Court of Canada “proceeded on the basis of a flawed grasp of it.”¹³ Plaxton does not explain in what respect he believes the Court’s grasp of what was referred to at trial as “implied consent” was “flawed” rather than simply different from Plaxton’s. In *Ewanchuk*, Justice John Major held that when analyzing consent in the *actus reus* of sexual assault, there are only two options: consent or no consent.¹⁴ There is no third option. Nonetheless, in a move that will definitely confuse many readers, Plaxton chooses to retain the term “implied consent” for use in the analysis of the *actus reus* of sexual assault and proceeds to define it, initially drawing on loose analogies to consent to participate in sports activity where the rules of the game provide a set of social practices by which individual players agree to be bound. Parallels with issues of consent in the contexts of “cultural defences,” advanced health directives, and assisted suicide, where questions of capacity, voluntariness, and autonomy are crucial and public policy has a significant role, are not explored.

In Chapter 4 and following, Plaxton advocates for adoption and use of a version of “implied consent” in which sexual touching is understood to be legitimated by the rules and aims of norms and social practices adopted by the individuals in question.¹⁵ Chapters 5 and 6 discuss the writings of Martha Nussbaum on instrumentalization and “wrongful” objectification, and Clare Chambers on autonomy, influence, and choice.¹⁶ Throughout, Plaxton’s primary focus is on issues of “morality,” not legality. Chapter 7 examines stereotyping and its relationship to objectification, as discussed in the writings of Lawrence Blum, Catherine MacKinnon, Sally Haslanger, and Rae Langton, among others, and distinguishes reliance on stereotype or myth to conclude (erroneously) that a complainant consents (a mistake of law) from reliance on the actual terms of a specific voluntary agreement established by and between specific parties (which, this reviewer notes, may also involve mistakes of law in multiple respects—for example, what constitutes agreement; when an agreement is voluntary, and so on).¹⁷

The risk that such a doctrine of “implied consent” would effectively undo legal abolition of the marital rape exception is examined in Chapter 8. Plaxton reads Christine Boyle as suggesting that there may be a place for future legal recognition of a doctrine of “implied consent” in the context of marriage.¹⁸ Actually she does not. In the article in which the passage quoted by Plaxton appears, Boyle acknowledges that sexual touching does occur in the absence of communicated consent in

13. *Ibid* at 22.

14. *Ewanchuk*, *supra* note 5 at para 31.

15. Plaxton, *supra* note 1 at 84ff.

16. *Ibid* at 104–21, 122–44.

17. *Ibid* at 145–66.

18. *Ibid* at 167–69.

the context of intimate relationships, but, importantly, she observes that the risk of non-consent lies with the person who does the touching and asserts that this is consistent with a policy of respect for sexual integrity.¹⁹ Boyle's comments both affirm that sexual assault law addresses the very issues that concern Plaxton, and, at the same time, that current law is grounded on social policy. Whether the complainant wanted the sexual touching in question to occur is a question of fact—*mens rea* turns on whether the accused acted with knowledge of her wishes. Thus, in the absence of contemporaneous express voluntary agreement by the person touched, the person who does the touching does indeed run the risk: (1) that the other party does not subjectively consent to the touching; (2) that a court will find as a matter of fact that the complainant did not consent and (3) that the court will find no basis for reasonable doubt but that the accused was quite aware the complainant had not communicated consent. Boyle's remarks do not suggest she views these consequences or the underlying social policy to be inappropriate or undesirable. It is Plaxton, by contrast, who is obviously troubled by the possibility of a charge and conviction in such cases.

Chapter 9 examines limits Plaxton would impose on "implied consent" to preclude abuse of the defence, asserting, *inter alia*, that the possible use of the defence by some undeserving accuseds to obtain acquittal ought not to be seen as grounds to retain a definition of sexual consent that could result in the criminalization of "innocents."²⁰ Plaxton discusses selected excerpts from Catherine MacKinnon, Jeremy Waldron, Alan Brudner, Joseph Raz, Cheryl Hanna, Elaine Craig, John Gardner, Stephen Shute, and Samuel Buell touching on autonomy and overbreadth. Here, the style replicates that seen in Chapters 4, 5, and 6. The reader is presented with the author's commentary on excerpts selected from the topical writings of a variety of theorists and invited to form her own opinion on the issues.

In a brief final chapter, Chapter 10, Plaxton proposes an amendment to the *Criminal Code* to create a reverse onus defence of "implied consent."²¹ Whenever the Crown proved absence of consent in the *actus reus* (as defined under present law per section 273.1 and construed in *Ewanchuk* and subsequent cases), the absence of "implied consent" would be legally presumed, unless the accused showed the contrary on a balance of probability (persuasive burden). Plaxton suggests that in this context, a reverse onus provision would be upheld as constitutional. His brief analysis focuses on the infringement of the presumption of innocence. The effects recognition of the doctrine of "implied sexual consent" would have for complainants are not considered. This is a significant oversight; a *Criminal Code* amendment creating a statutory defence of "implied sexual consent," as proposed, presupposes that legal recognition of "implied sexual

19. Christine Boyle, "Sexual Assault as Foreplay: Does *Ewanchuk* Apply to Spouses?" (2004) 20 *Criminal Reports* (6th) 359.

20. Plaxton, *supra* note 1 at 190–205.

21. *Ibid* at 206–17.

consent” would not result in the infringement of complainants’ rights protected under section 7 of the *Canadian Charter of Rights and Freedoms*.²² Perhaps Plaxton believed that issue to have been resolved in Chapters 2–9. Not so. Nowhere does he fully clarify key terms or provide thorough analyses of the theoretical, legal, and socio-empirical assumptions on which the proposal is based, how it might function in practice, and what its socio-legal effects are likely to be in representative sexual assault cases.²³ Instead, Plaxton simply states that “[t]he defence gives women the power to agree to arrangements in which they play passive sexual roles”²⁴ and concludes by inviting critics to explain why his proposal is unacceptable.²⁵

The invitation is premature. At present, his proposal is only a sketch. If Plaxton revisits these matters, I anticipate that he will ultimately realize that his proposal is inconsistent with the fundamental principles that underlie current law.²⁶ Autonomy is not valued in and of itself but, rather, only as a condition for the meaningful exercise of agency. Once this is grasped, the suggestion that abdication of sexual agency must be permitted in order to enhance sexual autonomy is readily understood to be simply incoherent.

Under current law, an agreement to participate in sexual activity that is not voluntary²⁷ or does not exist at the time the accused sexually touches another person is not sexual consent. Similarly, wistful reliance on an agreement a court finds to have been coerced or not communicated is reckless or wilfully blind, not a basis for a valid defence. Here Boyle’s remarks, referenced above, apply in full. An accused who relies on an agreement that is assumed to exist, but, as a matter of fact, has never been expressly communicated, is communicated under circumstances in

22. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

23. For a thoroughly researched and well-documented analysis of relevant related issues, see Karen Busby, “Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions” (2012) 24:2 *Canadian Journal of Women and the Law* 328.

24. Plaxton, *supra* note 1 at 212.

25. *Ibid* at 217.

26. Moreover, if it were construed to comply with the *Charter*, it would be indistinguishable from “consent,” bringing us back to Major J’s observation that with respect to sexual assault, “the complainant either consented or not . . . [t]here is no defence of implied consent to sexual assault in Canadian law.” See *Ewanchuk*, *supra* note 5 at para 31.

27. Lucinda Vandervort, “Sexual Consent as Voluntary Agreement: Tales of ‘Seduction’ or Questions of Law?” (2013) 16:1 *New Criminal Law Review* 143, examines voluntariness, influence, and coercion in the context of experience in the everyday life-world and uses the resulting observations to guide the design of an approach to legal analysis in sexual assault cases that promises to curtail the impact of prejudgments, assumptions, and biases in legal reasoning about voluntariness and affirmative agreement.

which voluntariness is questionable, or was communicated by a person who is now unconscious, asleep, or impaired, definitely runs a risk of conviction for sexual assault. Yet cultural scripts are routinely invoked, overtly or covertly, to “imply” or “infer” complainant consent where as a matter of law there was none or to supply the accused with an exculpatory “excuse” for non-consensual sexual activity based on a mistaken belief in consent, even when the defence is unavailable in law.²⁸ The accused, in such cases, often describes himself or herself as “innocent.” Many are never even charged.

Plaxton’s focus on questions of “morality,” as opposed to “legality,” insinuates that the rule of law, including the definition of sexual consent, should often be suspended. Similarly, Plaxton’s insistence that sexual activity that does not entail instrumentalization and objectification of the other party is not “wrongful” and should not be labelled as criminal, is reminiscent of the excuse offered in one form or another by countless accused in sexual assault cases: “I did what I believed the complainant wanted me to do; I acted innocently, with the best of motives; I am entitled to be acquitted on that basis.” Evaluating the appropriateness of sexual conduct by reference to the “motive” of an accused ignores the legal rights of the complainant and takes us back to the mentality of a previous era, not forward. Vulnerable people need legal protection against non-consensual sexual interference, even by assailants whose “motives” are “good.” “Good” motives neither legitimize nor excuse the commission of general intent offences. Sexual assault, like assault, is a general intent offence. The definition of sexual consent in section 273.1 places control to grant or refuse consent to sexual activity in the hands of the individual as long as he or she is conscious, capable, and acts voluntarily. At its root, the fundamental principles that underlie sexual consent are those of political and legal equality, not morality or moralism. The current definition of sexual consent protects the equal right of conscious and capable individuals to exercise sexual self-determination with respect to a broad range of sexual activity. Individuals who are unconscious, lack capacity, or do not act voluntarily, cannot exercise effective legal agency; by law, they are deemed not to consent. This is not an infringement of their autonomy, as Plaxton intimates, but, rather, a legal suspension of their agency, which is necessary to secure and protect them while their mind and will are inoperative. State imposed and judicially construed limits on sexual self-determination remain necessary to protect individuals against abuse. The legal definition of sexual consent will be gradually further refined by the judiciary, but this can and should be done in a manner that builds on the existing jurisprudence and avoids unnecessary complexities that would only tend to confuse Canadians and undermine the efficacy of the legal protections for sexual self-determination.

28. For a recent example, see the analysis of the trial judge’s reasoning by the Honourable Madam Justice JE Topolniski in her reasons for judgment in *R v JR*, 2016 ABQB 414 (21 July 2016), granting the Crown’s appeal from the acquittal at trial and entering a conviction.