

Consent and the Criminal Law

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Abstract

The author examines two proposals to expand legal recognition of individual control over physical integrity. Protections for individual autonomy are discussed in relation to the right to die, euthanasia, medical treatment, and consensual and assaultive sexual behaviours. The author argues that at present, the legal doctrine of consent protects only those individual preferences which are seen to be congruent with dominant societal values; social preferences and convenience override all other individual choices. Under these conditions, more freedom to waive rights of physical integrity can only place socially vulnerable persons at great risk of abuse.

CONSENT AND THE CRIMINAL LAW^o

BY LUCINDA VANDERVORT^{*}

The author examines two proposals to expand legal recognition of individual control over physical integrity. Protections for individual autonomy are discussed in relation to the right to die, euthanasia, medical treatment, and consensual and assaultive sexual behaviours. The author argues that at present, the legal doctrine of consent protects only those individual preferences which are seen to be congruent with dominant societal values; social preferences and convenience override all other individual choices. Under these conditions, more freedom to waive rights of physical integrity can only place socially vulnerable persons at great risk of abuse.

If individual and conventional societal perceptions and preferences were the same, there would never be a difference between what the individual considers to be a criminal assault and what society labels as a *crime*. The individual would never consent to a transaction that would be categorized as harmful by society. Society would never question the propriety of individual choice. If, in addition, we also communicated perfectly and we all appreciated the social significance of the act of consent, the behaviour of a potential victim would never appear ambiguous to anyone.¹ Mistakes about consent would never occur. The distinction between assaultive and non-assaultive behaviour would be clear beyond dispute to the assailant, the victim, and all third parties. There would be perfect correspondence between assaultive and non-

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¹ These two problems - differences between individual and social definitions of assault, and ambiguity in communication with respect to consent, respectively - are central to papers by Patrick Fitzgerald and Brenda Baker on consent and the criminal law, which were originally delivered in Ottawa at the 15-16 May 1987, conference of the Canadian Section of the International Association for Philosophy of Law and Social Philosophy and subsequently published in edited conference proceedings. See P. Fitzgerald, "Consent, Crime, and Rationality" and B.M. Baker, "Consent, Assault and Sexual Assault" in A. Bayefsky, ed., *Legal Theory Meets Legal Practice* (Edmonton, Alberta: Academic Publishing, 1988) at 209-21 and 223-38.

consensual interventions with physical integrity. The result would be as depicted in Figure One below.

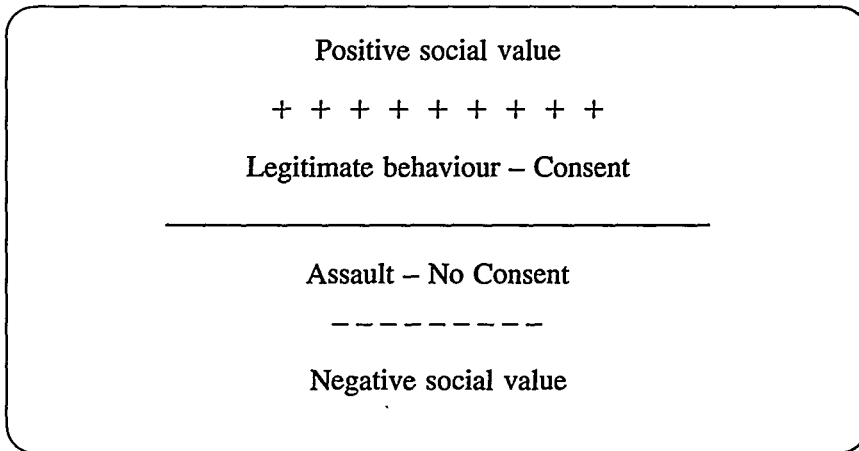


Figure One

But life is not so simple. Neither of these conditions – consensus in perception and evaluation or perfect communication – correspond to conditions in the social world. Human beings, even when they share the same general values, are not always in perfect agreement about what is the case or about the relative value of particular states of affairs in the world. Furthermore, no one has direct knowledge of the thoughts, attitudes, preferences, and feelings of other persons. To ascertain what these are, it is necessary either to ask people or to interpret their behaviour, including any statements or comments they are known to have made.

Decisions about application of the criminal law of assault in cases involving intervention against physical integrity are therefore based on interpretation of the behaviour of all the parties concerned. Such interpretation necessarily occurs in the context of the law of assault, and with reliance on social and linguistic conventions, including formal and informal normative conventions about interpersonal transactions. The result is depicted in Figure Two below.

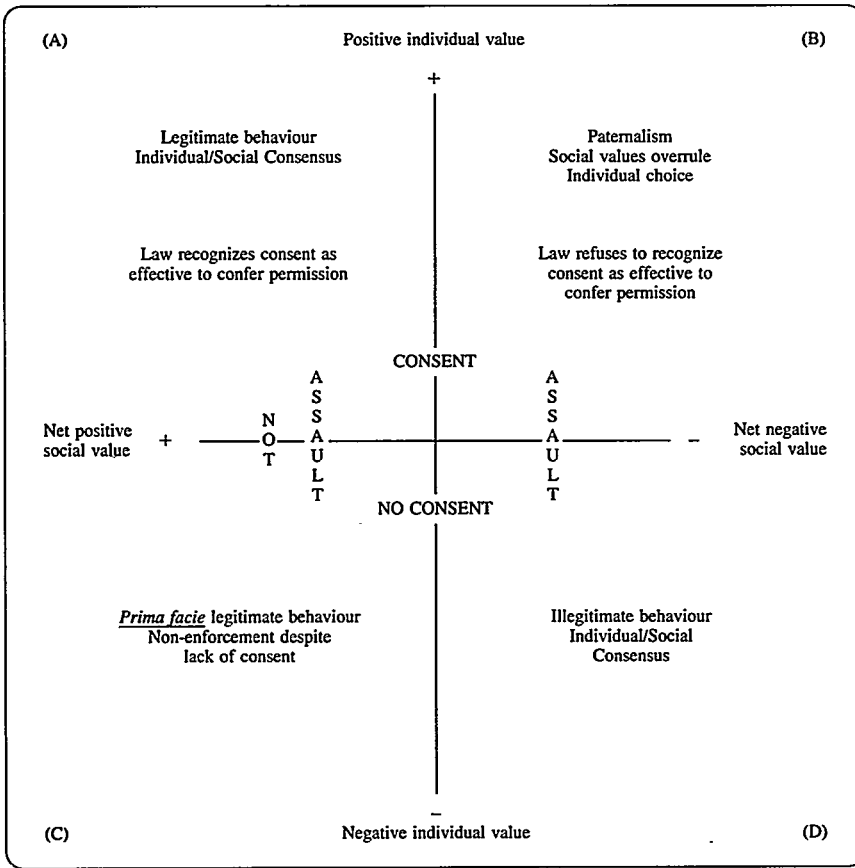


Figure Two

In a substantial number of cases, the formal legal decision disregards the presence or absence of consent by the individual victim. Indeed, in Figure Two, we see that it is always societal preference, not consent by the individual, that determines whether a particular physical intervention with that person is classified in law as an assault. When individual consent and societal preference coincide, we say that the law gives effect to individual choice. When the two conflict and societal preference governs, we say this is an exception to the general rule. Such is the power of rhetoric. It

enables us to say one thing, do the opposite, and yet remain unaware of the dichotomy. Consequently, it is widely believed that the criminal law of assault protects the individual's right to determine what personal physical interventions to permit (right of self-determination).

If we are to move closer towards a law of assault that actually achieves this goal, some changes are required. Fitzgerald and Baker both suggest, with reference to euthanasia and sexual assault respectively, that we simply attach more significance to individual choice to indicate whether any particular physical intervention against the person is an assault and a crime, and less to the *prima facie* social legitimacy of behaviour or its conformance with convention. This proposal is in accord with the general principle of common law that where the interests of the individual are at issue, it is ordinarily that individual who has the right to determine what his or her own interests are and to have that determination respected by other persons.

To implement the Fitzgerald and Baker proposal in a manner that actually enhances self-determination, and thus achieves the purported goal, poses a greater challenge than is at first apparent. It appears disarmingly simple to do what they propose. It is therefore understandable that neither Fitzgerald nor Baker confront the problems of implementation in a fully satisfying manner. Indeed, it is only when the problems that are discussed by each – dissension and ambiguity respectively – are used as foils for one another, and the interaction between the two types of problems is considered, that we gain an overview of the impediments to implementation that must be dealt with if individual choices are to be significant for criminal assault law. The effects of both lack of consensus in perception and evaluation and of imperfect communication, caused in part by the "performative"² ambiguity of many acts of consent,

² Performatives are utterances that do things. Examples include: "I promise," and "I agree." An equivalent effect on reciprocal obligations and expectations may often be achieved, or be assumed to have been achieved, by another combination of words, especially in the context of an ongoing conversation or relationship. Therein lies a major problem. Consent, when it is effective, changes interpersonal obligations and expectations. These obligations and expectations determine the normative significance of post-consensual behaviour. Therefore, any ambiguity in consent necessarily results in ambiguity in the normative significance of subsequent behaviour. For an introduction to analysis of *performative utterances*, see J.L.

must be recognized and dealt with in legal analysis. Every assault or putative assault must be scrutinized from both of these perspectives simultaneously.

I submit that examination of our experience with the law of consent and its practical role in the criminal law demonstrates that individual choices that are not congruent with dominant social perceptions and preferences are routinely denied recognition by the criminal justice system. When collective preference or interest,³ and individual preference or choice are in conflict, the criminal law doctrines of the Anglo-American legal systems are used to deny recognition and enforcement to individual preference. It is therefore doubtful that law reform which purports to expand the choices permitted to individuals will necessarily have the practical effect of empowering individuals, even if it is undertaken in the name of liberty and respect for persons.⁴

To understand how doctrine is used to deny efficacy to individual choice, compare Figures One and Two above. Figure One depicts a mythical total consensus between *individual preferences* and *social perceptions of legitimacy*. In actuality (depicted in Figure Two), individual/societal consensus is not total. Only in quadrants A and D of Figure Two is there consensus. In quadrants B and C of Figure Two, individual and societal preference conflict, and the individual's choice is overruled by the societal assessment of the net value or normative significance of the behaviour.

Austin, *How to do Things with Words*, 2d ed. by J.O. Urmson (Oxford: Clarendon Press, 1965). For an analysis of consent as a performative, see N. Brett, "Consent and Sexual Assault" (Department of Philosophy, Dalhousie University, 1982) [unpublished]. In her paper, Baker, *supra*, note 1 refers to Brett's analysis of consent as a performative.

³ That is, the socially dominant interest which invariably claims to speak for the collective interest.

⁴ Readers who wish to examine the basis for these assertions about the role of the doctrine of consent in Anglo-American legal systems in greater detail may wish to see the following articles in which I have analyzed these, and related questions, at length and in a variety of contexts: L. Vandervort, "Legal Aspects of the Medical Treatment of Penitentiary Inmates" (1977) 3 *Queen's L.J.* 368; L. Vandervort, "The Lawyer-Client Relationship in Ontario: Use and Abuse of Authority to Act" (1984) 16 *Ottawa L. Rev.* 526; L. Vandervort, "Social Justice in the Modern Regulatory State: Duress, Necessity and the Consensual Model in Law" (1987) 6 *Law & Phil.* 205; and L. Vandervort, "Mistake of Law and Sexual Assault: Consent and *Mens Rea*" (1987-88) 2(2) *Can. J. Women & L.* 233.

Under paternalism (Figure Two, quadrant B), the behaviour, whether it entails mere touching or hurting or the more serious consequence of harming or killing, is labeled *assault*. Consent by the individual victim is not permitted to have a legal effect in such cases. To use the language of performatives, even where the consent is clear, and is exercised on a voluntary and informed basis by a competent person with full legal capacity, social paternalism prohibits such a waiver of the right against intervention from having the normative "neutralizing" effect of an effectively executed performative.⁵ Under Canadian criminal law, euthanasia falls in this quadrant. Other examples include sexual acts with minors, excessive violence in sports and in the control or discipline of dependents or subordinates, and sodomy on a consenting adult. All of these examples, including euthanasia, can also be analyzed as possible instances of invalid or ineffective consent. But use of that analytic approach arguably only reflects and confirms, rather than determines, the negative social assessment of such behaviours. It is precisely because the behaviour is *prima facie* illegitimate, because it is assessed negatively, that we scrutinize with suspicion any purported consent to submit to the behaviour.

By contrast (in quadrant C of Figure Two), the *prima facie* social legitimacy of the behaviour renders it "not-wrongful" in the criminal sense even though the victim has not waived the right not to be subjected to any physical intervention. Many cases in which sexual assault is alleged but not prosecuted, or prosecuted but without success, fall in this quadrant. The *prima facie* legitimacy of sexual behaviours, in general, serves as a shield against scrutiny of consent and, when consent is examined, facilitates a finding of implied consent or the conclusion that the accused may have had a *bona fide* belief that the victim consented.

The crucial role of *prima facie* social legitimacy is also seen in current legal analysis of consent to medical treatment. Medical treatments which are reasonable by professional standards are only categorized as wrongful if the patient positively refused treatment. Otherwise, even if informed consent was not obtained (the patient, though conscious and competent, made no affirmative choice

⁵ Baker, *supra*, note 1 at 224.

whatsoever with respect to treatment) provision of reasonable medical treatment is seen as not-wrongful.

The dominant view, in Anglo-American legal systems, is that medical treatment, provided in such circumstances, is neither a criminal or civil assault, but, at worst, a negligent breach of the civil duty of disclosure. Classification of the problem as one of negligence, rather than assault, changes the grounds for the action and ensures that professional criteria and standards of disclosure are applied to dispose of the case. It is clear that this approach curtails effective individual autonomy.⁶ Individual concerns and preferences, with respect to treatment options that are not encompassed by professional standards, are not protected. This approach reflects the view that health care providers must be protected from civil liability, as well as criminalization, as long as the medical interventions and criteria used are within the bounds of established medical practice.

Medical treatment is *prima facie* a legitimate activity. Therefore, a practitioner, who provides a recognized form of treatment to a patient for whom such treatment is not medically inappropriate, is not said to act wrongfully, in a criminal sense, as long as the patient did not refuse treatment. As long as the treatment itself is not grossly negligent, the legal result is the same, even when the net effect of treatment is to cause harm to the patient. What we see here is deference by legal doctrine and the legal system to professional interests. It is believed to be in the public interest not to prohibit health care workers from infringing the individual's right to be free from physical interventions not expressly consented to. Only interventions performed contrary to the patient's express refusal are prohibited.

Medical treatment in accordance with professional standards, and sexual transactions not causing death or serious physical injury, are both examples of social interactions in which the *prima facie* social legitimacy of the behaviour generally governs disposition of the case at criminal law. These examples suggest that agents who engage in socially legitimate activities have only a qualified duty to

⁶ This analysis of the implications of the dominant legal approach to consent in the context of medical treatment is also adopted by S. McLean, "The Right to Consent to Medical Treatment" in T. Campbell, D. Goldberg, S. McLean *et al.* eds, *Human Rights: From Rhetoric to Reality* (Oxford: Basil Blackwell, 1986) at 148-72.

respect the autonomy rights of persons directly affected by those activities. In such cases, the label *assault* is not ordinarily applied, even though no express consent is given to the interventions the activities cause. The individual, whose right of physical integrity is violated, has, at most, a civil remedy for negligence. Failure to invoke the criminal law, in such cases, affirms that society views the right to physical integrity to be defeasible at the discretion of agents engaged in legitimate social activities. The sole exception arises when the bearer of the right expressly and unequivocally refuses to waive the right (and is able to prove this to have been the case after the fact). In those circumstances, it is the agent's flagrant disregard for the individual's right to physical integrity that causes otherwise socially legitimate behaviour to be characterized as illegitimate.

Prosecution of health care providers for criminal assault is almost unknown in cases where the treatment provided conforms with accepted medical practice, and the patient was not forcibly confined contrary to law. Even in cases of sexual assault where the accused admits that the victim did not expressly consent, it is common for the case to be classified as unfounded and not selected for prosecution or, if prosecuted, not to result in conviction. In such cases, implied consent⁷ (behaviour that is interpreted as being consistent with consent) is often taken to constitute an effective waiver. As a result, there is, in law, no *actus reus* (criminal act). Should consent not be found to have been implied, the accused may still assert that he or she *believed* the complainant consented. At present, all mistakes of this type are classified as mistakes of fact and, if credible, are tolerated and serve to excuse. It is therefore often difficult to establish that the accused was aware that consent was absent, even when the accused admits to having been aware that the victim had said "No."⁸

⁷ Discussed by Baker, *supra*, note 1 at 229.

⁸ Elsewhere (see Vandervort, "Mistake of Law and Sexual Assault," *supra*, note 4), I have argued that some mistakes about consent are mistakes of law, not fact, and therefore do not excuse. There are strong similarities between some aspects of my approach and the Brett-Baker approach in that all three analyze consent as communication of permission. There are some crucial points of difference, however. I maintain, for example, that to be effective as a waiver for the purposes of the criminal law, consent must be express or explicit. That is,

The medical and sexual assault cases demonstrate that individual rights of autonomy and self-determination are protected by the criminal law only when to do so serves the public interest as defined by societal values – values as perceived by public employees and officials including members of the judiciary. If our social world were one of consensus in perception and evaluation, and effective communication (Figure One), this result would not be problematic. In our world of dissension and ambiguity (Figure Two), it is a matter of grave concern. Examples such as those above demonstrate the ease with which the principles of autonomy, self-determination, and respect for persons can be given lip-service, while effective enforcement of these rights on behalf of individuals is avoided. On those rare occasions when the issue is overtly addressed, such decisions are defended as necessary to protect the public interest.

Yet surely modern criminal law is either committed to the protection of individual rights of autonomy and freedom from non-consensual interference, or it is not.⁹ These examples suggest that in present practice it is not. The commitment is instead primarily to the preservation of collective societal values as interpreted by the legal system of the day. Individual rights are protected only insofar

there must be communication of unequivocal agreement; nothing less can be permitted to suffice to waive the duty of non-interference. Otherwise, individual rights will continue to be protected only when others (police, judge, jury, etc.) believe it would have been appropriate to assert them. Furthermore, although I would agree with Baker that to proceed in the face of mere acquiescence is reckless, especially in circumstances where the behaviour of the victim may be influenced by fear, I do not believe that an analytic approach which focuses on recklessness will be effective for the purpose of protecting individual rights for reasons explained at length in the article cited above. Findings of recklessness reflect collective social perceptions and values, not individual ones. Likewise, I would not refer to consent as a matter of objective fact as Baker does. Behaviour is in the realm of empirical fact; consent is in the social realm. Failure to appreciate the role of consent as a performative, a social act with normative effect, is, I submit, more appropriately described as a mistake of law than as a mistake of fact. A mistake about the behaviour of another person (as, for example, that "She said, 'Oh yes!'" when in fact what she said was "You jerk!") would be a mistake of fact.

⁹ It is submitted that the goals of the criminal law in a society change in response to fundamental changes in the political arrangements. Thus, what was originally a vehicle to protect, directly and indirectly, the king's property and security interests, is now a vehicle to protect the interests of individuals, singularly and collectively. At issue is whether and how individual sovereignty over the person is to be given full effect by the criminal law, a public vehicle whose substance and institutions originated under, and remain to some extent shaped by, political arrangements that gave less recognition and protection to individual rights than national constitutional arrangements and international public law now provides.

as this is seen to converge with that primary goal. Enforcement of the criminal law is avoided when positive action to protect individual rights would interfere with the maintenance of traditional social power relationships – themselves believed to contribute to maximizing the achievement of collective social goals. Individual choices that do not coincide with the dominant interpretation of social values (and may also conflict with the interests of one of the more powerful social groups) can be ignored or disregarded almost with impunity.¹⁰ At present, the right to physical integrity is actually protected by criminal law only against behaviour that is *prima facie* illegitimate. Furthermore, when the criminal law is activated against illegitimate behaviour, a victim's waiver of the right not to be assaulted may also be disregarded.

Using the analytic framework here developed to examine the pro-choice proposals by Fitzgerald and Baker, we see that each of these proposals would reduce non-congruence (Figure Two) between the individual victim's choice and societal use of the labels *assault*, *wrongful intervention*, and *crime*. Paternalism and social convenience would pre-empt individual preference in fewer cases. The effects of the changes they propose are depicted in Figure Three (next page).

Some consensual interventions, previously prohibited on the ground that they contravened social values, are now reinterpreted and recognized as legitimate (quadrant B). Legitimacy is contingent, however, on individual choice. In quadrant C, individual choice is now recognized to be determinative of the quality of some acts that are *prima facie* legitimate. Two areas of non-congruence remain. Individual choices that are still interpreted as unacceptably destructive of collective social values continue to be without legal effect (the residual *paternalism* in quadrant B). As well, in many instances individual refusal to consent to interventions that occur in the ordinary course of social life and are *prima facie* legitimate still will not result in the intervention being labeled as an *assault* (*social convenience* in quadrant C). If the social interpretation of the negative impact on the victim can be shown to outweigh both the positive social value attached to the activity during which the

¹⁰ Legal doctrine, as such, does not say this directly of course, but it is submitted that this is the net effect of the administration of criminal justice.

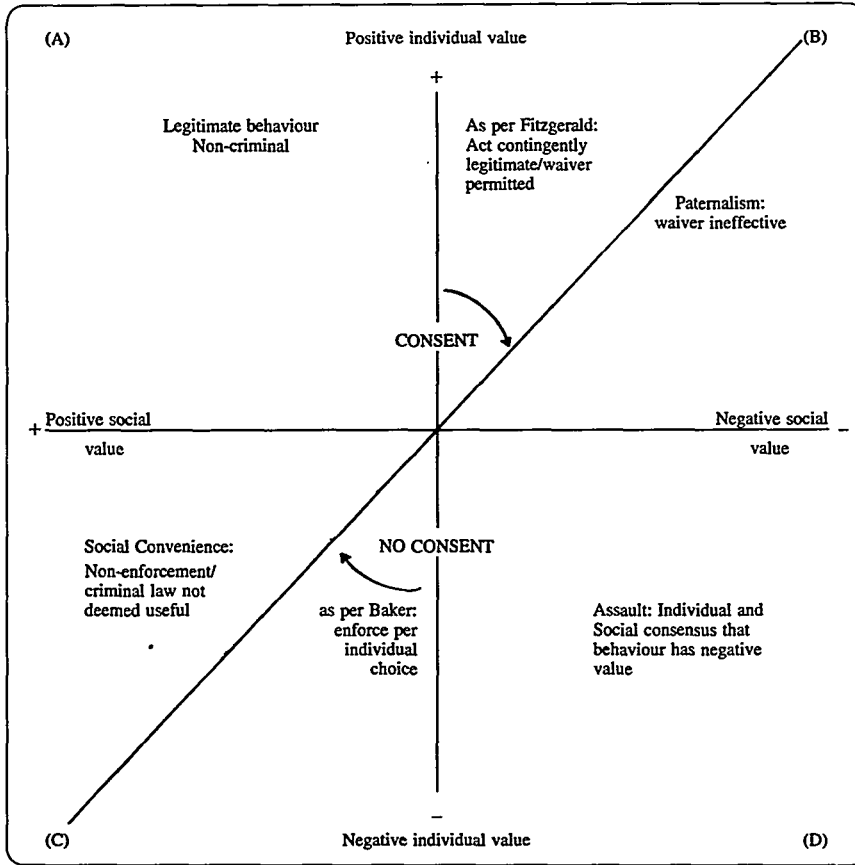


Figure Three

intervention occurred, and the cost and inconvenience of enforcing the criminal law, only then will individual refusal to consent be officially recognized, and the intervention deemed assaultive. Thus, a frivolous or purely private and idiosyncratic use of the criminal law, to penalize behaviour which is prima facie legitimate, remains barred.¹¹

¹¹ It is clear that both residual categories *paternalism* and *abandonment* remain inherently problematic from a theoretical point of view. (Of course, Fitzgerald referred repeatedly to this problem insofar as it arises in the context of paternalism.) Given that, in theory, personal autonomy is the interest protected, how does society justify disregarding any choices by the

When an activity is *prima facie* legitimate (quadrant C), any ambiguity about the quality of the impact of the activity on the individual impedes effective enforcement of the criminal law. Baker observes that many judges have difficulty determining whether a sexual transaction was assaultive when the level of violence used was not so excessive as to make the question moot (such a case would fall in quadrant D and be seen as illegitimate behaviour). Baker then uses this example to highlight the unique role that voluntary and informed consent has in transforming the normative significance of a sexual transaction. Her discussion of the prerequisites of effective consent (effective to confer permission) clarifies why judges who work without an understanding of consent as a performative (a speech act that changes interpersonal obligations) find the degree of force used to be the only index of the legal quality of an allegedly assaultive sexual transaction. Indeed, precisely because it has been difficult to enforce sexual assault laws based on proof of non-consent, recent law reform in some jurisdictions has shifted the entire focus to the use of force and violence in sexual transactions.¹² Baker, however, argues that the absence of consent should be retained as an essential element of the offence. She states:

This serves to emphasize that what is wrong about these sexual offences is that they violate certain rights possessed by individuals to the exclusive disposition of their persons in relation to sexual matters according to their choice, this right being reflected in the requirement of consent.¹³

Precisely. And because consent (rather than violence) is the element critical for definition of the offence, it is essential that the law find a new and better way to interpret and apply the law of consent. The same must be said for all other areas of the law where, in theory, legal legitimacy is contingent on individual choice.

individual most affected? An answer may lie in the concept of a continuum. At one end, that which is seen as trivial in its impact on personal integrity and capacity to function autonomously; at the other, that which is destructive of that same capacity. With regard to the trivial, individuals are left to fend for themselves, yet they are also prohibited from making choices that are seen to be destructive of integrity and capacity. Only autonomous choices in the middle of the continuum, between the two extremes, are seen to be expressions of the protected interest, and are therefore given positive support by the community.

¹² Baker, *supra*, note 1 at 226-31.

¹³ *Ibid.* at 231.

Fitzgerald uses the examples of euthanasia, the administration of life-shortening pain-killers, and organ donations to illustrate his point that our collective intuitions about what is wrongful do change. He argues that euthanasia, like the other two examples, may not be wrongful as long as the person undergoing the intervention consents and the intervention is "for accepted social purposes."¹⁴ Waivers of the right against interventions that result in death, permanent harm, or pain would be permitted within his scheme, but only when this would serve the ends of the individual either directly or indirectly. He emphasizes that the individual is not to be used as a means. Individual rights are not to be simply sacrificed in the collective interest. To protect individual rights in euthanasia cases, and yet expand the options available to individuals who believe they would choose to die under certain circumstances, Fitzgerald proposes that a "living will" and a medical panel's certificate be required.¹⁵ We must ask what the actual effects of such arrangements would be.

I submit that our experience with the law of consent has clearly shown, as was briefly sketched above, that if the ultimate locus of control in decision-making about interventions against physical integrity does not remain with the individual, individual rights often will be sacrificed in the collective interest. The locus of control over decisions affecting individuals is of critical importance because each of us interprets and evaluates the significance of possible outcomes within a unique societal-cultural context. Our interpretation of what constitutes abuse of an individual and of the extent to which individual interests may best be served by their subordination to collective ends is never impersonal, atemporal, ahistorical, or acultural. How we identify with collective societal interests and those of the individual (and the nature and extent of our understanding of those interests and our opinions as to how they may best be served) inevitably influences the outcome of our reasoning as we attempt to resolve conflict between individual and collective interests. It is undeniable that there will often be conflict, sometimes real and sometimes apparent. Conflicts invite abuse. Some interests will be favoured at the expense of others despite

¹⁴ Fitzgerald, *supra*, note 1 at 218.

¹⁵ *Ibid.* at 220.

attempts made in good faith to comply with the requirement that any outcome must be fully justified with reference to what are believed to be the best interests of the individual affected.

Many times in the twentieth century, socially convenient legal rationalizations for ordering or permitting the abuse of socially vulnerable individuals and groups of individuals have proven injurious or deadly for millions of people. Consider Native peoples, Jews, Blacks, religious and political dissidents, prisoners, the handicapped, and women. Therefore, when Fitzgerald states that sometimes acts of euthanasia are arguably "worthy acts deserving the victim's gratitude,"¹⁶ we should feel uneasy. The fact that he means well is not enough. Where social convenience coincides with killing (as it would in some such cases), harming, hurting, or merely touching, the possibility of abuse cannot be simply noted and dismissed as a simple problem of implementation. To do so is to invite movement towards congruence between social and individual preference, not by means of recognition of genuine individual preference (quadrant B, Figure Three), but by means of disregard of individual preference (quadrant C, Figure Three) in deference to dominant social perceptions and convenience.

Through reflection and re-education our views of life and death may well change. Our attitude towards the death of those who are terminally ill or whose quality of life is irreversibly low may come to be generally more positive. This change in attitude may, in turn, affect both social policy with respect to allocation of health care resources, and the preferences and choices of individuals with respect to when and how they die. If the criminal law is changed to permit individuals a right to die under certain circumstances, the result could be a shift towards greater congruence between individual and social avoidance of the use of the terms *wrongful* and *assault* in reference to acts causing death under special conditions. Such a shift would not suppress individual preference and deny individual choice as long as the recognition that the net normative significance of the individual's death by choice actually is congruent with societal values is based on the significance we, as a society, attach to individual self-determination and autonomy. But I remain

¹⁶ *Ibid.* at 215.

sceptical. The odds are that social recognition of the legitimacy of such acts of killing will instead be based on the social convenience of being relieved of dependent, non-productive, or otherwise useless individuals.

Fitzgerald's problem could perhaps be regarded as a question of legal classification. He asks whether killing with the consent of the victim should be regarded as legitimate social behaviour in circumstances where dying is interpreted by society as in the interests of the victim. To answer in the affirmative, as Fitzgerald does, appears to expand the effective sphere of individual autonomy. But I submit that it is unlikely to have that effect as long as the doctrine of consent continues to be interpreted as it is at present. Under present doctrine, once the prohibition against consensual euthanasia is removed, a valid and express consent to be killed would not actually be required. Startling though it may be, that conclusion is based on analysis of the doctrine of consent as it is currently interpreted. It is difficult for a dead person to argue that his or her consent was not implied. Social convenience, and other societal assessments of the propriety or acceptability of the killing, will therefore easily defeat a vulnerable victim's right not to be killed. In the case of euthanasia, only by allowing express affirmative individual choice to determine the legitimacy or illegitimacy of the subsequent physical intervention, can we hope to preclude the possibility that social convenience and preference will continue to determine the ultimate legal characterization of the intervention.¹⁷ This applies as well to all other types of interventions against physical integrity.

¹⁷ A further problem lies in the fact that individual choice is exercised within a broad societal context, as well as an immediate social situation, and is inevitably influenced by that context. Societal influence (I would call this *so-dur-ness*), if unconscionable, may invalidate the performative-normative effect of individual choice, just as an immediate physical threat would in many cases. The definition of unconscionability is a problem for public policy. Applied to the present example, the question would be whether the societal influences on a person who purports to choose to die are ones which are consistent with the contextual prerequisites of valid and effective choice. For example, can ill persons who are unemployed and homeless in a society with significant unemployment and inadequate welfare and medical care programs validly waive their right not to be killed when their medical condition, as assessed by a medical panel, warrants killing? And *who* would have standing to initiate the assessment process?

In short, I argue that to increase latitude in law for individual choice without increasing effective protection for individual control over outcomes chosen, is to place the individual's rights of self-determination and autonomy at greater risk of abuse than exists at present. Greater latitude for individual choice can be achieved by re-examining and removing legal prohibitions, as Fitzgerald proposes. More effective legal protection for individual control over outcomes chosen can be achieved by interpreting the law of consent so as to restrict legal legitimacy to those interventions with the person that the individual expressly and affirmatively permits. This takes us in the direction Baker proposed but further.¹⁸ In theory, both of these directions for re-examination of criminal assault law should be pursued if the law is to be a vehicle to affirm and protect individual rights of self-determination and autonomy.

In practice, by contrast, the two types of reform cannot be given equal priority. Development in the law of consent to recognize and protect individual preference, even when that preference conflicts with societal convenience, would enhance the autonomy, dignity, and quality of life of many people, especially members of disempowered social groups whose choices most need legal protection. Without such protection for individual choice, removal of the specific prohibition against euthanasia would place the very existence of these same people at risk. Under present social conditions, removal of other prohibitions against interventions that compromise the physical well-being of the individual are not likely to be of equal practical benefit to all persons either. Until the conscious choices we make daily about our physical integrity cease to be so easily defeasible, we simply cannot afford the false luxury of concern for the purported loss of dignity involved in lingering as a helpless or unconscious dependent. For the present, the notion that the two directions for legal development are of even roughly equal significance for enhancement of individual self-determination and autonomy should be laughable. But perhaps here again, this time in setting the public agenda for reform of the criminal law, individual and societal preferences conflict.

¹⁸ See *supra*, note 8.