Sexualität in Recht und Gesellschaft 3

Elisa Hoven | Thomas Weigend (Eds.)

Consent and Sexual Offenses

Comparative Perspectives

Nomos

Sexualität in Recht und Gesellschaft

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Introduction

Sexual offenses have moved to the top of the global criminal policy agenda. Long ignored by mainstream criminal law scholarship, violations of sexual autonomy, especially of women, have since the turn of the millenium become the object of vivid debates in criminology, criminal law theory, and legislation. Demands for better protection of vulnerable groups against sexual exploitation and more effective sanctions for sexual assaults beneath the level of forcible rape have led to a flurry of new legislation.

One key point in the debate on sexual offenses is the role of consent. While there clearly is no reason for criminal penalties if two responsible adults agree to have sex with each other, there exist a host of situations in which the presence or the legal validity of consent is doubtful. Consider, for example, two 15-year-olds experimenting with sex – can each of them give valid consent to being touched sexually? If the answer is 'yes', does it make a difference if one or both are drunk? Or if one of them is not 15 but 22 years old? Even among adults, a declaration of consent can be influenced by a variety of factors that may raise doubts about its validity. What if an employee agrees to have sex with her boss because she is afraid of getting fired if she refuses? Or if a woman consents to have intercourse with a man wearing a condom but the man secretly removes the condom?

Even a quick glance at these questions shows the massive practical and theoretical difficulties of defining what "consent" means in sexual relations. Yet, delineating the preconditions and limits of valid consent is of great relevance for the criminal law. The existence of consent is likely to make the difference between a mutually pleasurable experience and the commission of a serious crime. Since the issue of consent is bound to arise, in some form or other, in every legal system, the editors sought to collect perspectives and solutions from various jurisdictions, hoping that useful conclusions for policymaking can be drawn from the experiences of different countries.

As a focal point of these efforts, an international conference on the topic was held in September 2021. The Covid19 pandemic regrettably made it necessary to abandon the original plan of meeting in Leipzig. But the online conference nevertheless ignited spirited debates on selected topics, based on previously circulated national reports from twelve jurisdictions on three continents.

The present volume collects eight topical, comparative essays as well as eleven national reports, followed by a synopsis designed to put together the main findings and remaining issues for debate. The chapters of this book are based on the contributions to the 2021 conference, which have been expanded and brought up to date by the authors. We hope that this volume can be of help to scholars as well as to judges and policymakers faced with potentially criminal situations in which consent to sexual acts is at issue.

The editors are most grateful to the contributors to this volume, who have, in a spirit of friendly debate and cooperation, succeeded in providing up-to-date information on the situation in their countries and in furthering international exchange on the multiple issues raised by the law of sexual offenses.

Elisa Hoven
Thomas Weigend

Comparative Essays

Defining Rape. In Quest of the Optimal Solution

Wojciech Jasiński

At first sight, it may seem that defining criminal offenses, especially those qualified as *mala in se*, should not pose too many problems or raise controversies. For various reasons, however, reality is the opposite. In general, the challenges faced by lawmakers stem from the simple fact – often overlooked, particularly by lay persons – that criminalization is not a simple task of mapping reality. What should be qualified as an offense is deeply dependent on people's (especially policy makers') perceptions, which in turn are shaped by various cultural and political factors. As a result, plenty of value judgments are involved in every decision regarding the scope and method of criminalization, even if it refers to behaviors conceptualized as *mala in se*. Not surprisingly, if the scope of penalized wrongdoing as well as the cultural patterns influencing these decisions are the subject of heated debates, the process of drafting relevant legal provisions becomes even more challenging. Defining criminal offenses cannot simply be reduced to the question of how to name the relevant wrongdoing. In some cases, the wording of definitions of criminal offenses (including sexual offenses) are influenced by other important factors such as the potential impact on the ability to collect evidence and investigate the crime.[1] The fear of overcriminalization also plays a crucial role. In the case of sexual offenses it has to be noted that the decision to engage in sexual relations affects the most intimate sphere of people's privacy where interference, especially by means of the criminal law, should be limited to a necessary minimum. All these issues, coupled with political bargains and other random factors

1 This is particularly true with respect to rape. Westmarland and Gangoli have rightly pointed out that 'problems with rape and the criminal justice system are often dismissed on the grounds of rape "being a difficult crime to investigate"'. See: Nicole Westmarland and Geetanjali Gangoli, 'Introduction: approaches to rape' in: Nicole Westmarland and Geetanjali Gangoli (eds), *International Approaches to Rape*, 2012, 9. See also Vanessa E. Munro, 'From consent to coercion. Evaluating international and domestic frameworks for the criminalisation of rape' in: Claire McGlynn and Vanessa E. Munro (eds), *Rethinking Rape Law. International and Comparative Perspectives*, 2010, 19. Munro emphasizes the 'unease at the prospect of women's false rape allegations' and its influence on rape laws.

influencing policy decisions, make the task of devising an optimal solution difficult.

The topic of redefining rape has become one of the central issues regarding sexual offenses due to the entry into force of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) in 2014, important rulings of international courts and tribunals referring to the criminalization and prosecution of rape,[2] and the pressure exerted by international bodies like the United Nations Committee on the Elimination of Discrimination against Women.[3] Although the definition of rape had been discussed for several decades,[4] the beginning of the 21st century clearly brought important changes. In addition to a growing consciousness about the significance of this issue, its cultural background and its interdependence with women's position in society, the crucial aspect is a progressive trend around the globe toward reshaping rape laws.[5] The direction of this reform has often been presented as a shift from a 'coercion-based' model toward a 'consent-based' model of defining rape. The central idea is to replace definitions of rape based on the use of violence or threats by a definition focusing on lack of consent. Recent debates on how to define rape have shown, however, that lawmakers are facing a complex problem. The challenges multiply when the topic of consent is analyzed carefully. Should a 'yes means yes' or 'no means no' model be adopted? How should consent be externalized? When should it be expressed? Can consent be withdrawn? What external factors make it impossible to give valid consent? These and several other questions indicate that making changes is neither quick nor simple.

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2 See e.g., ECtHR, *Z. v Bulgaria*, App no. 5925717, Judgment of 28 May 2020; *I.C. v. Romania*, App no. 36934/08, Judgment of 24 May 2016; *M.G.C. v. Romania*, App no. 61495/11, Judgment of 15 March 2016; *M.C. v. Bulgaria*, App no. 39272/98, Judgment of 4 December 2003. See also Alison Cole, 'International Criminal Law and Sexual Violence' in: Claire McGlynn and Vanessa E. Munro (eds), *Rethinking Rape Law. International and Comparative Perspectives*, 2010, 47–60.

3 See e.g., Right to be free from rape – overview of legislation and state of play in Europe and international human rights standards, 2018 – https://www.amnesty.org/en/documents/eur01/9452/2018/en/.

4 On the discussion of this topic in the U.S., see Stephen J. Schulhofer, 'Reforming the Law of Rape' 35 *Law & Ineq* 335, 336 (2017).

5 According to an Amnesty International report, 13 legal systems within the EEA base their definition of rape on lack of consent: Right to be free from rape – overview of legislation and state of play in Europe and international human rights standards, 2018 – https://www.amnesty.org/en/documents/eur01/9452/2018/en/.

In general, it can be said that the coercion vs. consent dichotomy correctly describes the main axis of the dispute on how to define rape. It would, however, be an oversimplification to say that the controversies about defining rape can be reduced to a 'coercion vs. consent' dilemma. Moreover, this formulation appears to indicate that we are facing an either/or choice, which is not necessarily true.[6] It is therefore worth taking a closer look at the process of devising an optimal legal definition of rape.

The analysis conducted in this chapter will focus primarily on national reports provided by specialists from Australia, Austria, England and Wales, Germany, Italy, Poland, Spain, Sweden, Switzerland and the USA in the scope of the project managed by Professors Thomas Weigend and Elisa Hoven, supported where necessary by other sources.

At first it should be noted that the call to redefine rape implies two things: first, that the current legal definition of rape is for some reason inadequate; second, that change is necessary to achieve desirable outcomes. The initial question is, however, how the demand for redefinition should be understood. The word 'rape' has a certain linguistic connotation. In Polish, for example, '*zgwałcenie*' or '*gwałt*' is understood as forcing someone to engage in a sexual act.[7] Similar definitions can be found in other languages.[8] In general it can be said that rape is traditionally perceived as 'an act of sexual intercourse accomplished by a man with a woman not his wife, by force and against her will'.[9] From a legal perspective, however, the focus is not on the meaning of the term 'rape' in ordinary language, even if its redefinition in ordinary language may also be on the agenda of some social movements. But what is relevant here is the legal definition. It deserves emphasis that there is no necessary relation between ordinary language and the terminology applied in legal provisions. Lawmakers are not obliged to employ ordinary language in statutes; it is thus not necessary that the criminal offense of rape is formulated in the same way as in ordinary language. The legal definitions of rape adopted in some countries

6 It is worth referring to Blackstone's definition of rape which included both force and lack of will of the victim: '[c]arnal knowledge of a woman forcibly and against her will.'; quoted after Stephen J. Schulhofer, 'Reforming the Law of Rape', 35 *Law & Ineq* 335, 336 (2017).

7 Jarosław Warylewski, 'Przestępstwo zgwałcenia' (art. 197 KK) in: Jarosław Warylewski (ed), *System Prawa Karnego. T. 10. Przestępstwa przeciwko dobrom indywidualnym*, 2010, 600.

8 See, e.g., https://dictionary.cambridge.org/dictionary/english/rape.

9 Lucy Reed Harris, 'Towards a Consent Standard in the Law of Rape' 43 *University of Chicago Law Review* 613 (1976).

confirm that observation. For example, in the Polish Criminal Code of 1997 the offense of rape is understood as the use of force or the threat of its use in order to engage a person in sexual intercourse, or as deceiving a person in order to induce him or her to engage in sexual intercourse. The latter makes the legal understanding of rape broader than in ordinary language, since it includes deceit.[10] Legal doctrine does not, however, regard that use of legal terms as wrong.

It should also be noted that the word 'rape' does not even appear in all criminal codes or other relevant criminal statutes. Instead, expressions like 'sexual assault' (*Crimes Act 1900* (NSW) Division 10), 'sexual penetration' and 'sexual coercion' (*Criminal Code Act 1913* (WA), Chapter XXXI) are used in Australia, 'sexual violence' (*violenza sessuale*) in Italy, or 'sexual assault' (*agresiones sexuales*) and 'sexual abuse' (*abusos sexuales*) in Spain.[11] In such a situation, the obvious question is how a demand for the redefinition of rape should be understood, since there is no such statutory term as 'rape'.

In light of the above, it can be said that calls for change are in fact not about a simple redefinition of rape. That is only a simplification used in public discourse to promote a reform which is in fact far more complex than a simple re-definition of one word. The crucial and much broader question that should be asked is what kind of sexual behavior is blameworthy and how it can effectively be criminalized. The problem of whether rape should be redefined can of course be isolated and even treated as central. Nonetheless, it is necessary to see the bigger picture encompassing all types of offenses involving various kinds of sexual assault and abuse. Only by taking such a perspective, one can see how the relevant legal provisions, including those on rape, are interrelated and how they should be modified. Therefore the calls for reform are in fact about a wider redefinition of the approach toward the criminalization of sexual assault and abuse.

A comparative analysis of coercion-based and consent-based criminal-law provisions confirms that the discussion about rational criminalization

10 Jarosław Warylewski, 'Zgwałcenie – zagadnienia definicyjne', in: Lidia Mazowiecka (ed), *Zgwałcenie. Definicja, reakcja, wsparcie dla ofiar*, 2016, 18.

11 In some legal systems, apart from a word for 'rape' other expressions are used. This is the case in Germany, where the terms sexual assault (*sexueller Übergriff*), sexual coercion (*sexuelle Nötigung*), and rape (*Vergewaltigung*) are applied, the latter being an aggravated form of sexual coercion. Similarly, the Swiss Criminal Code employs the terms sexual coercion (*sexuelle Nötigung*) and rape (*Vergewaltigung*).

of sexual behavior cannot be limited only to the coercion vs. consent dichotomy. This dichotomy is undoubtedly central in situations where persons are able to express valid consent to other people's actions. However, it must be noted that there also exist a wide range of sexual behaviors commonly accepted as deserving criminal punishment where a victim cannot express consent, or where they do so but their consent is not treated as legally valid. In numerous legal systems,[12] adhering to both coercion-based and consent-based models, there exist separate provisions penalizing sexual acts with persons who are unable to express valid consent because of their age, mental deficiencies, relation of dependence, or other relevant external factors. In all these instances, the perpetrator does not need to use violence or threats to commit a criminal offense. This clearly indicates that the lack of violence (or threat of its use) does not necessarily make a sexual encounter legal. The same is true about factual consent given in sexual relations. Neither the lack of coercion nor factual consent can exclusively determine whether a sexual offense has been committed. It is also worth emphasizing that the coercion vs. consent dichotomy refers to law in the books. In Italy, for example, where the coercion-based model is still in force, courts have exceeded the literal meaning of the word 'violence' and have interpreted it very broadly, focusing in fact more on dissent than on the classically understood use of force[13]. This proves that even coercion-oriented models may in practice focus more on consent than one would expect.

Going beyond the coercion vs. consent dichotomy allows us to identify a wider range of factors that need to be taken into account when discussing the optimal scope of criminalization of blameworthy sexual behavior, including rape, and to optimally shape the relevant criminal-law provisions. Three such factors should be mentioned: the specific features of the perpetrator and the victim, the relation between the perpetrator and the victim, and the *modus operandi* of the perpetrator.

Among the specific features of perpetrators and victims of nonconsensual sex, gender primarily comes to mind. The classical approach to criminalizing rape assumed that the perpetrator is a male and the victim is a female. This initial gender-specific perception has been widely abandoned. However, rare exceptions can still be found. The most prominent one exists in English law, which has preserved the definition of rape based on penile penetration (Section 1 of the Sexual Offences Act 2003). That

12 For details see the national reports in this volume.
13 See Gian Marco Caletti, 'Italy', in this volume.

of course does not mean that female rapists cannot be prosecuted. But the legal basis for their criminal liability is different. Depending on the circumstances, the prohibited act can be qualified as causing a person to engage in sexual activity without consent or as an assault by penetration (Sections 2 and 4 of the Sexual Offences Act 2003).

Switzerland also presents an interesting case. The offense of rape regulated in Article 190(1) of the Swiss Penal Code provides that the victim can only be a female.[14] However, as in English law that does not mean that male victims of rape are not protected. In such a case, the perpetrator can be found guilty of a different offense, namely sexual coercion (*sexuelle Nötigung*). Both examples prove that even the adoption of a questionable definition of rape does not necessarily result in an inadequate scope of criminalization. Behaviors lying outside the scope of the statutory definition of rape are simply covered by other provisions penalizing coerced sex.

The obvious question is whether that difference matters. From the perspective of holding a person criminally liable, the answer is probably no; yet different labels may have different legal consequences, such as a different assessment of the gravity of the crime and a different sentence. One should also not ignore the message that such a variation in criminalization sends to society. It has rightly been pointed out that using a gender-neutral approach to defining sexual coercion 'would be an indication that the government recognizes that women can be sexually aggressive and dominant, that men are not always "up for" sex, and that *both* men and women have an interest in their sexual integrity and autonomy not being violated. This would not mean denying that rape has been and continues to be a tool used systematically by men as a way to oppress women, nor would it mean claiming that rape affects men and women in the same way. It could, however, undermine some of the sexual gendered stereotypes that cloud the way that sex between men and women is viewed and which can be particularly harmful to women'.[15] A gender-neutral way of defining rape therefore seems to be a good solution[16] even though the vast majority of perpetrators are male and victims female.

Apart from abandoning gender as an element of the offense of rape (sexual assault), marital status or race are also for obvious reasons no longer regarded as relevant. However, some features of the victim remain

14 See Nora Scheidegger, 'Switzerland', in this volume.

15 Natasha McKeever, 'Can a Woman Rape a Man and Why Does It Matter?', 13 *Criminal Law and Philosophy* 599, 616–617 (2019).

16 For various arguments in favor see Natasha McKeever, 'Can a Woman Rape a Man and Why Does It Matter?', 13 *Criminal Law and Philosophy* 599 (2019).

very important in drafting sexual offense provisions. The age and mental state of the victim are two main bases for distinguishing specific types of offenses involving nonconsensual sex. It is widely accepted that minors and people with various mental deficiencies are incapable of making responsible decisions in the area of their sexuality and should be protected even if they outwardly consent to sex. This is the case regardless of whether the coercion-based or the consent-based model has been adopted.[17]

The relation between a perpetrator and a victim is another widely acknowledged element of statutory definitions of sexual offenses. It is not disputed that the exploitation of various factual or legal situations of dependence between a perpetrator and a victim (abuse of trust or professional relations, exploiting a person in a desperate situation, etc.) should be punished even if the dependent person consented. Similarly to entering into sexual relations with minors or persons with mental deficiencies, this is not a matter of dispute, and coercion-oriented and consent-oriented models adopt a similar approach.[18] Of course, there exist differences in how the law defines situations of dependence. Some legal systems are more specific (e.g., England and Wales), whereas others (e.g., Poland) have generally drafted provisions on that topic. But their laws nevertheless cover a similar range of blameworthy behavior.

The distinction between coercion-based and consent-based definitions of rape (sexual assault) is not very helpful for comparing how a perpetrator's sexual behavior affects the classification and labeling of sexual offenses. Regardless of the model adopted, criminal laws distinguish between types of nonconsensual sexual penetration (vaginal, anal or oral) and other sexual activity and also take into account the degree of any violence or coercion used. Some countries treat all types of sexual penetration equally (e.g., England and Wales, Poland, Sweden); others differentiate among types of penetration (e.g., Switzerland)[19]. Some draw a distinction between acts involving and not involving penetration (e.g., Poland, England and Wales); others do not (e.g., Sweden).[20] The classification of criminal offenses does not, however, necessarily result in different treatment of perpetrators in practice. The Swiss example is illustrative in this respect. The offense of rape in the Swiss Criminal Code covers only coerced vaginal sex. In cases of coerced oral or anal sex, the perpetrator may be held crimi-

17 See national reports in this volume.
18 See national reports in this volume.
19 For details see national reports in this volume.
20 For details see national reports in this volume.

nally liable for indecent assault (Article 189). However, the Swiss Supreme Federal Court has held that although legal qualifications are different, penalties for indecent assault should not be disproportionate to penalties imposed for rape in comparable situations.[21]

A commonly used gradation of sexual offenses is based on the use of violence. This can be seen both in countries that adopted the coercion-based model (e.g., Spain, Poland) and the consent-based model (e.g., Austria, Germany, Sweden).[22] Clearly, the move toward emphasizing the role of consent does not mean that the element of violence as an important factor in grading sexual offenses should be eliminated.

The differences in the structure of sexual offenses performed without valid consent are also visible at a more general level. In Italy, recent reforms resulted in the creation of a single type of offense (Article 609-bis Codice penale) instead of the previous distinction between rape and violent libidinal acts.[23] A similar unification is also being discussed in Spain in the context of a 2021 draft law amending sexual offenses. However, other countries that abandoned the coercion-based model in favor of the consent-based model have not adopted a unified approach (e.g., Sweden). In Germany and Austria, a new offense based on non-consent was simply added to the existing scheme focused on coercion.

All the above observations are important because they indicate that the regulation of sexual offenses in countries adopting coercion-based and consent-based models have much in common. Regardless of the models in place in various jurisdictions, there are parts of the criminalization puzzle which are uncontested. These are the use of violence (or threat of its use) and various situations where the victim cannot give valid consent (because of age, mental deficiencies, relation of dependence, or other relevant external factors). What differs is the approach to the criminalization of sexual abuse in cases where valid consent can be given. This is where the coercion vs. consent dichotomy becomes crucial. However, it is important to note that even in this area there are noticeable differences. Opting for a coercion-based or a consent-based model does not mean adopting the same shape and structure of sexual offenses. Similarly, criminalization of the same offensive sexual behaviors does not mean the application of uniform labeling. The latter is clearly visible even in legal systems which decided to amend the law to emphasize the role of consent. In Germany,

21 See Nora Scheidegger, 'Switzerland', in this volume.
22 For details see national reports in this volume.
23 See Gian Marco Caletti, 'Italy', in this volume.

although the sexual offenses were reformulated, the distinction according to seriousness was preserved (rape – *Vergewaltigung*, sexual assault – *sexueller Übergriff*, sexual coercion – *sexuelle Nötigung*). A similar gradation of sexual offenses can be seen in Austrian law after the reform of 2015. Likewise, Sweden, which opted for a consent-based model, differentiates between rape, gross rape, and sexual assault. In countries preserving a coercion-based model, similar distinctions apply (e.g., Spain, Switzerland).

As seen above, there is no uniform legal construction that has been adopted in the analyzed jurisdictions. The difference lies in how the violence factor operates. In Sweden rape defined as the performance of sexual penetration, or some other sexual act that in view of the seriousness of the violation is comparable to sexual penetration, with a person who is not participating voluntarily becomes a qualified type of rape when accompanied by violence, namely gross rape (Chapter 6, Section 1 Swedish Criminal Code[24]). In Austria, acts of nonconsensual sexual penetration with and without violence constitute separate types of offenses (Article 201 and 205a respectively). The legislature supplemented the existing scheme of violent sexual offenses by a separate provision criminalizing sex without consent, placed at the end of this group of sexual offenses. A similar structure was adopted in England and Wales (Sexual Offences Act 2003, part 1, Sections 1–4). In Sweden and Germany, the statutory regulation is different. It starts with the offense of nonconsensual sex, and factors like violence are added as aggravating circumstances. In general it can be said that lawmakers can choose between having one type of offense criminalizing sexual acts without consent (rape or a differently labeled equivalent) with various aggravating (or mitigating) factors, and having more than one type. The latter option does not exclude adding aggravating or mitigating factors where necessary. A separate distinction in gravity between nonconsensual sexual penetration and other sexual activities is commonly applied, regardless of whether a legal system adheres to the coercion-based or the consent-based model.

The crucial question is whether the structure of sexual offenses matters, especially in practice. The answer is: it definitely does, as a matter of fair labelling. The distinctions mentioned above are a consequence of the belief that sexual transgressions differ and that this difference has to be acknowledged when drafting relevant criminal provisions. It has been observed correctly that fair labelling refers not only to naming wrongdoing but also

24 https://www.government.se/government-policy/judicial-system/the-swedish-criminal-code/.

to 'the way in which the range of behavior that is deemed to be "criminal" is divided into individual offenses'.[25] However, the effort to determine adequate labels for various kinds of wrongdoing is not just a quest for a perfectly structured and coherent theoretical construct. More importantly, fair labelling is about sending a message to the perpetrator, the victim, and society as well as to the criminal justice system and authorities or agencies outside the criminal justice system.[26] The information that a person has been convicted of a crime is undoubtedly relevant for his or her everyday interactions in society. For various reasons (e.g., privacy issues, passage of time), this information clearly cannot be provided in detail to everyone who has a legitimate claim to it. There is therefore a need for short, informative and, above all, adequate labels. This need is particularly pressing in the case of sexual offenses, which imply serious social stigma. Putting all types of sexual abuse and assault in the same pot therefore is not a good solution. The result might be either that the wrong of the perpetrator's act will be underestimated or that the person will be stigmatized and face social consequences disproportionate to the offense committed. The latter especially needs to be avoided, since there are numerous examples of how unfair labelling may cause unnecessary damage to people's lives. Correct labelling for sexual offenses is particularly important, because the person will be labelled as a sex offender and might be placed in an official register, sometimes accessible to the wider public.[27]

The introduction of one or several types of sexual offenses is also inherently related to establishing statutory ranges of penalties and shaping the discretionary power of judges in sentencing. Although this issue may seem technical, it is nonetheless very important because it structures the way of thinking about the imposition of penalties. Not only sexual coercion offenses are relevant here. There is also an important interdependence between provisions regarding situations where the victim cannot express valid consent because of age, mental deficiencies, external factors, etc. and

25 James Chalmers and Fiona Leverick, 'Fair labelling in criminal law', 71 Modern Law Review 217, 222 (2008).

26 For details see James Chalmers and Fiona Leverick, 'Fair labelling in criminal law', 71 Modern Law Review 217 (2008).

27 An illustrative example of flawed attribution of sex offender stigma can be given in the context of the Polish law of 2016 on the Sex Offenders Register. It provides that personal data of a minor who committed an offense of grooming can be placed in the Register even if the victim is of similar age. The same refers to sending a person of similar age pornographic content. Paradoxically, however, a conviction for sexual intercourse by a minor with another minor (which is a criminal offense in Poland) is not placed in the Register.

provisions referring to victims who can express consent. The whole picture has to be taken into account. The crucial question is what the basic point of reference is for determining statutory penalties and how they are imposed in practice. Depending on the adopted model and structure of sexual offenses, rape can be perceived as a point of reference. On the other hand, focusing on consent may result in sex without consent being treated as the point of departure. This can very well make a difference in practice. Adopting a coercion-based model may mean that sexual offenses committed without the use of force or threats are perceived as minor and by consequence are punished leniently. The Polish regulation of sexual offenses can be given as an example. While rape is punished with imprisonment between two and twelve years, forced sexual intercourse resulting from the abuse of a relationship of dependency or abuse of a critical position of another person is punishable by imprisonment for only up to three years. If the perpetrator takes advantage of the vulnerability of another person or her inability to recognize the meaning of the act or to control her conduct, resulting from her mental deficiency or mental illness, the penalty is imprisonment between six months and eight years. Moreover, it is symptomatic that while the statutory penalty for rape regulated in Art. 197 §§ 1–2 Polish Criminal Code was raised significantly in 2005, penalties for offenses where the perpetrator abuses his dominant position over the victim remained the same.

Even in countries that adopted the consent-based model, noticeable differences remain between statutory penalties for rape and for sex without consent but not accompanied by violence. In Austria the statutory penalty for rape is between two and ten years imprisonment, for sexual coercion between six months and five years imprisonment, while for nonconsensual sex the maximum penalty is two years imprisonment. The disparities in statutory penalties are less pronounced in Germany. Nonconsensual sex is punished by imprisonment between six months and five years, rape by imprisonment between two and fifteen years. In Sweden, the penalty for rape ranges from two to six years and for gross rape from five to ten years imprisonment. In Swedish and German law, the difference in statutory penalties between rape on the one hand and forced sex where the victim is dependent on the perpetrator (but without the use of violence) on the other hand is considerably smaller than in the Polish Criminal Code.

Several general conclusions can be drawn from the comparative analysis of rape laws and their evolution. First, the distinction between coercion-based and consent-based models of defining rape definitely is useful, because it focuses on what is a crucial point of reference in thinking about sexual behavior that needs to be criminalized. The promoters of the reform

of rape laws correctly point out that the legislature's focus on how the perpetrator acts (use of violence, threats, deceit, etc.) and how the victim reacts potentially neglects situations where the victim is unable for various reasons (e.g., because of fear) to express her lack of consent and oppose the perpetrator. Legal systems that use coercion-based definitions of rape thus do not offer effective protection in all cases where sex takes place without valid consent. The example of Italian law demonstrates that an extensive interpretation of the term 'violence' can be a cure of this problem, but case law does not guarantee as effective criminalization of sex without valid consent as clear statutory provisions. Statutory provisions criminalizing blameworthy sexual behavior should therefore be consent-oriented rather than based on modalities of a perpetrator's actions.

Such an approach at least theoretically offers better protection for sexual autonomy, which is perceived as an important value that should be guaranteed by criminal provisions. If the emphasis is on sexual autonomy, it seems obvious that consent is crucial. Exercising the right to self-determination in the sexual sphere is precisely about consenting or not consenting to a person's sexual conduct. One should be aware, however, of the limits of a consent-based approach. Persons may agree to sex not because this is what they want, but because they are in an unfavorable situation in relation to other persons.[28] This does not mean, however, that consent should be eliminated as a key concept. But its definition should be sensitive to cases where consent may be given due to an unequal or abusive relationship.

Second, provisions referring to sexual offenses should not only deal with coercion and consent. It also matters how other important elements of crime are defined. The common approach today is to criminalize coerced sex in a gender-neutral way (referring both to the perpetrator and the victim). This definitely is the optimal solution, even if legal systems not following this pattern do not leave male victims or female perpetrators outside of the reach of criminal law. Obviously, factors such as the marital status or the race of the persons involved are irrelevant for sexual coercion offenses. However, the age and mental capacity of the victim are factors that are very important for the proper criminalization of sexual behavior. They commonly serve as a basis for separate provisions dealing with situations where valid consent cannot be given. This also applies to relations of dependence between the perpetrator and the victim.

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28 See, e.g., Catharine A. MacKinnon, 'Rape Redefined', 10 *Harvard Law & Policy Review* 431 (2016).

Third, accepting the central role of consent does not mean that the violence component is to be abandoned. Some rational distinctions between various types of sexual assault and abuse should be retained in order to preserve the principle of fair labeling. There is a remarkable difference between sex without consent and the same act accompanied by cruelty or debasement. Therefore, the use of force or threats should be included in the structure of sexual offenses. The open question is how this can be done. Taking into account the differences between domestic legal orders, there are several options, e.g., creating separate offense types or naming the use of force or threats as an aggravating factor. Neither of these possible solutions seems to be *in abstracto* optimal. Much depends on how sexual offenses are regulated in their totality, how the national provisions have evolved, and how they are applied in practice. Only a careful analysis of the specific legal system may indicate what is the best option. However, changing existing laws based on the coercion model cannot consist in simply adding an additional provision covering sex without consent. This may result in creating the perception that "mere" sex without consent is a minor crime, especially when there is a significant disparity between statutory penalties. Instead, a comprehensive reevaluation of existing provisions should be undertaken in order to properly shape the law and its perception by law enforcement agencies and society at large. In this context, the right approach is to define rape in its traditional definition as a particularly grave violation of a person's sexual autonomy rather than as an 'anchor' for determining the gravity of other types of sexual assault and abuse (especially those without violence).

Fourth, one must keep in mind that defining sexual offenses is inherently related to the choice of sanctions. Although there can be no doubt that all sexual offenses should be penalized proportionally, this may prove difficult especially if traditional (violent) rape is used as the main point of reference in setting statutory penalties. This may lead to the result that various forms of sexual abuse committed without violence will not be punished adequately.

Summing up, the emphasis on consent in sexual offenses signifies a shift from a perpetrator-based (focused on his behavior, especially involving violence) to a victim-oriented (focused on her attitude toward the sexual behavior of another person) way of perceiving reality. This change implies a major reexamination of the meaning of various elements of sexual crimes. However, as mentioned earlier, reform should not make consent the only relevant point of reference nor should it abandon violence as an important factor in distinguishing among sexual offenses. Reformer should rather strive to re-evaluate the meaning of these concepts. Consent

should be perceived as a main point of reference in addressing sexual offenses. It would be inapposite to treat "traditional" rape as the base type of sexual offense and as a consequence to regard other types of offenses involving nonconsensual sex as much less blameworthy. The perspective should rather be the reverse, where the use of violence is either an aggravating factor or a factor constituting an aggravated type of offense. Placing consent at the center of sexual offenses necessarily raises difficult questions as to its definition. This topic will be developed in other contributions to this volume. There can be no doubt, however, that the move toward consent-based models is inevitable if the declarations about the need to effectively protect sexual autonomy are to be treated seriously. Therefore, challenges involved in defining consent, even if serious, cannot provide an excuse for abandoning this direction of criminal law reform.

Coercion by Violence and its Changing Meaning. The Experience of Italy

Gian Marco Caletti

A. Introduction

For a long time, the regulation of rape has been based on the concept of coercion, and specifically on coercion by force.[1] Italy is no exception and is, moreover, one of the few Western jurisdictions where the definition of rape still requires the use of violence.[2]

With the exception of some subsequent adjustments, the current legal framework of sexual offences was established in 1996. The reform was hailed as a victory for women and a cultural turnaround in its symbolic recognition and protection of sexual autonomy.[3] The main feature of the reform is that the law now classifies sexual offences as "offences against personal freedom". Previously, under the 1930 fascist penal code (the so-called "Rocco Code"), sexual autonomy had not been protected as an interest in itself but as a part of the public interest in "public morality and decency".[4]

Beyond this ideological message to society, the reform brought few innovations with regard to the structural elements of the offence of "sexual violence" ("*violenza sessuale*"). The crime continues to be based on coercion and predicated upon the traditional components of violence and threats. Several commentators have emphasised that retaining the old structure

1 Stephen J. Schulhofer, 'Unwanted Sex. The Culture of Intimidation and the Failure of Law' (1998), 114.

2 See the chapter on Italian law in this volume.

3 Giuliano Balbi, 'Violenza sessuale', in: Enciclopedia Giuridica (1998) 1, 3.

4 Marta Bertolino, 'La riforma dei reati di violenza sessuale', (1996) Studium Iuris 401; Rachel A. Fenton, 'Rape in Italian law: towards the recognition of sexual autonomy', in: Clare McGlynn and Vanessa E. Munro (eds), 'Rethinking Rape Law' (2010), 183.

of the offence is not entirely consistent with the reform's aim to provide stronger protection for sexual autonomy.[5]

If the law in the books remains linked to the concept of coercion, the law in action is extremely different. Although the word "violence" is associated with the use of physical force, in case law – especially of the Supreme Court – the requirement of violence has been completely dematerialised.[6] The particularity of the Italian law on sexual offences, therefore, is that – despite the official focus on coercion – the Supreme Court has consistently interpreted it in terms of consent of the victim. In order to convict the defendant, a forcible *actus reus* is no longer required.

This chapter thus will explore how the concept of coercion has been transformed over the years in Italian case law to the point of being identified with the absence of consent. This process has been influenced not only by compelling changes in social attitudes but also by external inputs from comparative analysis of other legal systems and from supranational jurisprudence. The chapter will try to demonstrate these connections, but also setbacks that occurred along the way, such as when in 1999 an Italian judge made international headlines by announcing a rule that a man could not possibly rape a woman wearing tight blue jeans (see *infra*, § 5). This case of showing a revival of the concept of coercion by force will also demonstrate that a paradigm based on violence is no longer acceptable. That model, indeed, is closely linked to false myths and stereotypes of the past and is based on a concept of sexuality rooted in bygone myths.

B. The historical origin of forcible rape and the duty to resist

Historically, the concept of rape by force arose in a context in which sexual intercourse with a married woman or a girl under the custody of her father was inherently wrongful.[7]

At the time of the ancient Greeks, forcible rape and adultery were considered to be equally serious and were treated by the law as the same

5 See e.g., Tullio Padovani, 'Pre-Art. 609-bis c.p. Commento ad Art. 2 l. 15 febbraio 1996, n. 66', in: Alberto Cadoppi (ed), 'Commentario delle norme contro la violenza sessuale e contro la pedofilia' (4th edn. 2006) 431, 434; Bertolino (note 4), 403.

6 Among several scholars, recently Matteo L. Mattheudakis, 'L'imputazione colpevole differenziata. Interferenze tra dolo e colpa alla luce dei principi fondamentali in materia penale' (2020), 418–422.

7 Tullio Padovani, 'Violenza carnale e tutela della libertà', (1989) Riv It Dir Proc Pen, 1301, 1306.

crime ("*moicheia*").[8] However, from the perspective of the man who owned his wife or his daughter, the conduct of another male who seduces the woman secretly was more dangerous than that of the rapist who, driven by an overwhelming sexual desire, occasionally forces her to have sexual intercourse.[9] As Lysias states in *On the murder of Eratosthenes*, "seducers corrupt minds, to the point that the wives of others belong to them more than to their husbands; they become masters of the house and one no longer knows who is the father of the children".[10]

During the Roman Empire, force was the element that made it possible to draw a line between adultery and rape. The *lex Iulia de adulteriis* punished very harshly (with exile, loss of property, in later times even death) both the man and the woman who were complicit in adultery.[11] Proof that sexual intercourse had been brought about by force allowed the woman to avoid criminal liability and exempted her husband from the duty of repudiating her.[12]

The history of rape developed along these lines until the age of Enlightenment. In the criminal law of the *ancien régime*, sexual activity did not constitute a right of the person or an expression of autonomy; it was an instrument for procreation within the legal family.[13] For this reason, any sexual intercourse not directed toward legitimate procreation was criminalised, leaving aside any concern about consent.[14]

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8 Eva Cantarella, 'I reati sessuali nel diritto ateniese. Alcune considerazioni su "moicheia" e violenza sessuale', in: Alberto Maffi and Luca Gagliardi (eds), 'Eva Cantarella. Diritto e società in Grecia e a Roma. Scritti scelti' (2011), 373, 385.

9 Isabella Merzagora, 'Relativismo culturale e percezione sociale in materia di comportamenti sessuali deviati', in: Alberto Cadoppi (ed), 'Commentario delle norme contro la violenza sessuale e contro la pedofilia' (1996), 343, 345; Keith Burgess-Jackson, 'A History of Rape Law', in: Keith Burgess-Jackson (ed), 'A Most Detestable Crime. New Philosphical Essays on Rape' (1999), 15.

10 Lysias, 'On the murder of Eratosthenes', 32–33.

11 Giunio Rizzelli, 'Lex Iulia de adulteriis. Studi sulla disciplina di adulterium, lenocinium, stuprum' (1997), 171.

12 Fabio Botta, 'Per vim inferre. Studi su stuprum violento e raptus nel diritto romano e bizantino' (2004), 57.

13 Padovani (note 7), 1303.

14 To be accurate, during the period of so-called 'intermediate' law, there was a kind of presumption of rape, even where there was the woman's consent, in all cases where sexual interaction was illegitimate because it took place outside of a regular marriage. The woman's consent was assumed to be invalid. The qualification of such sexual interactions as rape served to force the man to marry the woman in a so-called 'reparative' marriage, restoring the family order and the legitimacy

While the crime of adultery survived until late in the 20th century, for the crime of rape a distinction was introduced between "simple" (when the sexual encounter takes place with an unmarried woman), "qualified" (when the woman is persuaded by a non-fulfilled promise of marriage) and "violent" (when there is forcible coercion) rape.[15] Consistently, even violent rape of prostitutes was not criminalised, since they were neither the property of a husband nor in the custody of a father waiting for marriage and maternity.[16]

The Enlightenment approach of separating law from morality – of not punishing mere sins – led 19th century lawyers to challenge the figure of "simple rape". The legal justification for decriminalising this form of rape was based on the woman's consent.[17] As one scholar has argued, however, the emphasis on women's free consent did not reflect the transposition of new values and principles into the law, because in that period society was not ready to recognise women's sexual autonomy.[18] The change can be explained in political terms: The upper classes wished to abolish mandatory marriage as a consequence of any "simple rape" to prevent lower class men from gaining access to wealthy families by seducing young women.[19] Consent was therefore a rhetorical device to justify the loss of ancient protections for women, such as marriage after "simple rape". It was not seen as an act of women's freedom, but as a sign of their guilt.

On this basis, it became important for the lawyers of the time not to grant protection to seductive women who did not deserve it, i.e., those who failed to demonstrate that they were not complicit in the sexual intercourse and that they had resisted with all their strength. It is in this historical period that numerous stereotypes of seduction were established.

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of the union. See Giovanni Cazzetta, 'Praesumitur seducta. Onestà e consenso femminile nella cultura giuridica moderna' (1999).

15 Padovani (note 7), 1304.

16 For a debate on the rape of prostitutes, see Isabella Rosoni, 'Violenza (diritto intermedio)', in: 'Enciclopedia del diritto' (1993), 843, 854.

17 This was, for example, the opinion of the most renowned Italian criminal lawyer of the 19th century, Francesco Carrara. See Giovanni Fiandaca, 'I reati sessuali nel pensiero di Francesco Carrara: un onorevole compromesso tra audacia illuministica e rispetto per la tradizione', (1988) Riv It Dir Proc Pen, 903.

18 Giovanni Cazzetta, 'Colpevole col consentire. Dallo stupro alla violenza sessuale nella penalistica dell'Ottocento', (1997) Riv It Dir Proc Pen, 424.

19 Ibid.

C. *"Vis grata puellae": from "vis atrox" to force of "any intensity"*

Nineteenth-century lawyers rediscovered the "wisdom" of the ancient poets and, among others, that of Ovid, who contended that a little force is appreciated by maidens in order to overcome their modesty and reluctance ("*vis grata puellis*").[20] The woman in Ovid's poetry "*pugnando vinci se tamen illa volet*" ("although fighting, wants to be defeated").[21]

In view of that, not all degrees of force were considered sufficient for a rape conviction. Physical force against the victim's body was required with such intensity that nothing could be done to overcome it in any way (so-called "*vis atrox*").[22] A lesser amount of force was held inadequate, because it was assumed that the woman could have eluded the assault with some resistance, if she were truly committed. The presence of particularly intense force was also required to make sure that the complainant was not lying about the rape.

This approach was followed for decades by the Italian courts,[23] surviving even in the period after the Second World War and only being abandoned gradually from the 1960s. Even in 1986, the Court of Cassation felt obliged to make the following clarification with regard to resistance: *"It is not necessary for the victim to resist vividly, constantly and to the point of exhaustion of her physical strength, which inevitably leads to physical signs*".[24] In fact, the false myths of resistance and the impossibility of raping a woman if she really does not want it continued to surface in some local courts' judgments.[25]

The "*vis atrox*" model has evolved into a less strict one, but still based on the use of some amount of force. The violence required to commit rape became that force which coerces the victim's will, even without completely overwhelming it. In this perspective, coercion, i.e., the absence of free consent, is the effect caused by violence. Italian scholarship describes violence

20 Ovidio, 'Ars amatoria', Liber I, 613–614.
21 Ibid. 666.
22 Matteo Vizzardi, 'Violenza sessuale (art. 609-bis)', in: Carlo Piergallini, Francesco Viganò, Matteo Vizzardi, Alessandra Verri (eds), 'I delitti contro la persona. Libertà personale, sessuale e morale. Domicilio e segreti' (2015), 47, 84.
23 Cass. pen., 7.2.1934, GP, 1934, II, 1334; Cass. pen., 10.5.1948, RP, 1949, II, 34; Cass. pen., 18.5.1954, GP, II, 706.
24 Cass. pen., 20.1.1986, CP, 1987, 753.
25 Trib. Bolzano, 30.6.1982. Luigi Domenico Cerqua, 'Considerazioni in tema di violenza carnale', (1984) Giur Mer, 135.

as an "instrument" by which the perpetrator turns the victim to his own will.[26]

This second paradigm requires a minimum of physical force as did the previous one. On this basis, the Supreme Courts acquitted a man who ejaculated on a woman's leg, taking advantage of the overcrowding of a public transport vehicle.[27]

D. The paradigm of "improper violence" and the dematerialisation of the concept of violence in the wake of German scholarship and case law

In Italy, as elsewhere (see, for instance, the theory of "inherent force" in United States law[28]), the courts have tried to expand the concept of violence in order to offer greater protection to sexual autonomy. While this broader conception of force has never really been implemented in U.S. case law,[29] in Italy this occurred with the adoption of the so-called "improper violence" interpretation,[30] according to which "coercion" need not be the effect of the use of physical force.

In 1986, the Court of Cassation stated: "*For the purposes of the penal code, violence should also be the actus reus which, depending on the circumstances, puts the victim in a position where she is unable to provide all the resistance she would have wished to, and coercion may occur even if the victim has not called for help, raised alarm, suffered lacerations to clothing and injuries to the body…*". The Court thus relieved the victim of the burden of resisting and regarded as "violent" any coercion brought about by the circumstances and not by physical violence.[31]

The Italian courts also created a type of violence where the perpetrator employs an element of surprise.[32]. In such situations, it is the suddenness and rapidity of the act which overcomes the victim's opposition and constitutes "violence", e.g., when a doctor suddenly penetrates the patient's

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26 Ferrando Mantovani, 'Diritto penale. Parte Speciale. I delitti contro la persona' (7th edn. 2019), 444.

27 Cass. pen., 19.11.1965, GP, 1966, II, 464.

28 Sanford H. Kadish, Stephen J. Schulhofer, Carol S. Steiker, Rachel E. Barkow, 'Criminal Law and its Processes. Cases and materials' (9th edn. 2012), 363.

29 See the criticism by Susan Estrich, who believes that American appellate courts have always applied masculine standards to the concepts of force and resistance; Susan Estrich, 'Real Rape' (1987), 63.

30 Mantovani (note 26), 405.

31 See supra note 24.

32 See the chapter on Italian law in this volume.

vagina with his fingers during a gynaecological examination without any medical purpose.[33]

This theory is also called the "theory of coercion" since violence is dematerialised to such an extent that it does not require any force. Violence, which was originally meant to constitute the causal antecedent of coercion, now merges with coercion itself. In order to justify their approach, courts often refer to the sexual self-determination of the victim as the true objective of protection of sex crimes.[34]

It should be noted that sexual offences are not the only field in which the concept of violence has been dematerialised. Sex crimes have indeed been the last area of criminal law to develop this concept of violence independent of physical force[35], perhaps because of the resistance of myths and stereotypes linked to sexuality as a predatory activity. In all the other numerous crimes in the penal code that require violence as a constitutive element, the process of abandoning force took place many years earlier.

According to three prominent commentators, this trend of dematerialisation was strongly influenced by the German criminal literature and case law.[36] In Germany, there has been a process of "spiritualization" (*Vergeistigung*) or "dissolution" ("*Auflösung*") of the "*Gewaltbegriff*" (concept of violence), in which the latter has come to coincide fundamentally with coercion.[37]

The German Constitutional Court, however, in 1995 declared this broad interpretation of the concept of violence to be unconstitutional because it violated the principle of predictability of the law.[38] In response to the adoption of a restrictive interpretation of the concept of violence by the courts, the German legislature in 1997 introduced the so-called "*Ausnutzungsvariante*", i.e., a new variant of rape based on taking advantage of a situation in which the victim is helpless and at the mercy of the

33 Cass. pen., Sez. III, 16.4.1999, RP, 967. See Alberto Cadoppi, 'Art. 609-bis c.p.', in Alberto Cadoppi (ed), 'Commentario delle norme contro la violenza sessuale e contro la pedofilia' (4th edn. 2006), 439, 501.

34 David Brunelli, 'Bene giuridico e politica criminale nella riforma dei reati a sfondo sessuale', in Franco Coppi (ed), 'I reati sessuali. I reati di sfruttamento dei minori e di riduzione in schiavitù per fini sessuali' (2nd edn. 2007), 37, 68–69.

35 Marta Bertolino, 'Libertà sessuale e tutela penale' (1993), 115–130.

36 Giulio De Simone, 'Violenza (diritto penale)', in: 'Enciclopedia del diritto' (1993), 881; Marco Mantovani, 'Violenza privata', in: 'Enciclopedia del diritto' (1993), 930; Francesco Viganò, 'La tutela penale della libertà individuale. L'offesa mediante violenza' (2002).

37 De Simone (note 36), 892–901.

38 Viganò (note 36), 96.

perpetrator. Surprise sexual acts still did not fall under the German definition of violence but were explicitly criminalised in the 2016 reform of sex offences.[39] In Italian jurisprudence, by contrast, these situations continue to be encompassed in the definition of violence, although there have been several setbacks.

E. Reviving resistance: The "blue-jeans" decision"

As indicated above, in 1996, when the reform of sexual crimes did not remove the element of coercion by violence from the definition of the offence, violence had already been dematerialised in case law and no longer implied the use of force. Myths, however, are firmly rooted in social culture and sometimes re-emerge from hidden chasms. Very surprisingly, the Court of Cassation in 1999 returned to a traditional interpretation of violence, re-creating a burden of resistance on a young girl raped by her driving instructor.[40] The judgment is so awkward that it made international headlines[41], in particular for the ridiculous statement that it is impossible to rape a woman wearing blue-jeans.

An 18-year-old girl was picked up from her home by her driving instructor, as had happened on other occasions. The man, who was married, took her from the town centre to an isolated road in the fields on the pretext of picking up another girl for a lesson. He threw her to the ground and, after removing her jeans from one leg, penetrated her. He then drove back to the village, letting the girl drive only for the last part of the way to avoid arousing suspicion.

In the opinion of the judge who wrote the judgment the victim's account was not credible because

a) "as rule of thumb, it is almost impossible to remove even part of a woman's jeans without her active cooperation, since it is an operation that is already very difficult even for the people wearing them";

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39 Tatjana Hörnle, 'The new German Law on Sexual Assault and Sexual Harassment', (2017) Germ LJ, 1309.

40 Cass. pen., Sez. III, 6.11.1998 (dep. 1999), Foro It, 1999, II 163. See Giovanni Fiandaca, 'Violenza su donna "in jeans" e pregiudizi nell'accertamento giudiziario', (1999) Foro It 1999, 165.

41 Alessandra Stanley, 'Ruling on Tight Jeans and Rape Sets Off Anger in Italy', N.Y. TIMES, Feb. 16, 1999.

b) "the girl could have falsely accused someone to justify to her parents the sexual intercourse, which she preferred to keep hidden because she was worried about the possible consequences";

c) "it is instinctive, especially for a young girl, to oppose with all her energy anyone who wants to rape her and it is illogical to affirm that a girl can be submissively subjected to rape, a serious violence to the person, for fear of suffering other hypothetical and certainly not more serious offences to her physical safety";

d) "it is very peculiar that a girl, after becoming the victim of a rape, is in a state of mind which permits her to drive a car with her rapist sitting beside her".[42]

The judgment appears as a collection of rape myths: a set of banalities that have been debunked over the years by criminology. Regarding certain circumstances, such as driving home after the sexual assault, the judge's preconceptions led him to the point of manipulating the facts that emerged during the trial.[43]

The "blue-jeans" decision raised a lot of criticism and debate, showing that certain stereotypes were no longer part of social attitudes. It remained an exception in the process of shifting violent coercion away from concepts of force and resistance.

Recently the courts went even further in this direction.

F. From coercion to dissent and coercive circumstances: European influences from Strasbourg and Istanbul

In confronting new case situations, in particular the so called "rape by omission",[44] or "post-penetration rape",[45] the "improper violence" model eventually led to a consent-based definition of the offence. The Court

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42 See supra note 40.

43 Francesco M. Iacoviello, 'Toghe e jeans. Per una difesa (improbabile) di una sentenza indifendibile', (1999) Cass pen, 2194. The same applies to the consideration that the girl might have lied out of fear of a possible pregnancy (*sub* b), since the defendant had reported in his testimony that he had used a condom.

44 Maria Chiara Parmiggiani, 'Rape by omission, ovvero lo "stupro omissivo": note a margine di un recente caso californiano', (2005) Ind Pen, 311.

45 This terminology was first utilised by Amy McLellan, 'Post-penetration rape — Increasing the penalty', (1991) Santa Clara Law Review 31, 779. For an updated overview of the issue in Anglo-American scholarship, see Theodore Bennett, 'Consent interruptus: rape law and cases of initial consent', (2017) Flinders Law Journal 19, 145.

of Cassation stated that "in interactions between adults, the originally given consent to sexual acts must continue throughout the act without interruption, with the result that the offence extends to the continuation of intercourse if a manifestation of dissent, even if it is not explicit, intervenes 'in itinere' through conclusive facts which clearly indicate the partner's contrary will"[46].

If the sexual interaction was initially consensual, a manifestation of dissent then occurred, and the defendant did not consider it but continued with his conduct, he will be charged with "*violenza sessuale*" according to art. 609-*bis* of the Penal Code. Earlier judgments' more superficial references to consent have now become more explicit: The criminal liability of a person who continues with sexual intercourse when it has become unwanted is justified on the basis of a mere (even non-verbal) expression of dissent. This obviously reminds of the "no means no" paradigm. In this case, as in many others, the Court of Cassation refers to consent without trying to cloak the decision in overstretched definitions of "violence".

In other judgments, the Court of Cassation highlights the coercive circumstances, especially in cases where the victim decides to consent to the defendant's sexual desires because of the situation (e.g., previous episodes of violence, the isolated location in which the events take place, the time of night)[47]. In the past, these situations were qualified as "improper violence". In recent case law, there is no longer any mention of violence, and such coercive circumstances are considered sufficient to establish criminal liability. In some judgments, the conviction is justified not by reference to violence but rather by the invalidity of the consent given under such "environmental" circumstances.[48]

It does not seem arguable that the attention of Italian courts to coercive circumstances is linked to the famous Akayesu judgment of the International Criminal Tribunal for Rwanda (ICTR)[49] – a judgment which part some, especially feminist, scholars have proposed as a model[50].

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46 Cass. Pen., Sez. III, 11.12.2018, n. 15010. Previously in the form of *obiter dictum* already Cass. Pen., Sez. III, 24.2.2004, n. 25727. On the concept of "sexual act" under the Italian law, see Alberto Cadoppi and Michael Vitiello, 'A Kiss is Just a Kiss, or is It? A Comparative Look at Italian and American Sex Crimes' (2010) Seton Hall Law Review, 191.

47 Cass. pen., Sez. III, 12.1.2010, n. 6643.

48 Cass. pen., 22.11.1988, RP, 1990, 565; Cass. pen., 8.2.1991, GP, 1991, II, 366.

49 ICTR-96–4-T, Judgement of 2 Sept.1998.

50 See Vanessa Munro, 'From consent to coercion. Evaluating international and domestic frameworks for the criminalization of rape', in: Clare McGlynn, Vanessa E. Munro, 'Rethinking Rape Law' (2010), 17, with further references.

The shift from coercion to lack of consent seems to be influenced, however, (also) by the jurisprudence of the European Court of Human Rights on rape and by the definition of rape by the Istanbul Convention, even if this is hardly mentioned in the judgments. Starting with the well-known case of M.C. v. Bulgaria[51], the European Court of Human Rights has held that a regulation of rape is in line with the principles established by Articles 3 and 8 of the European Convention on Human Rights only if it makes punishable any sexual act with a non-consenting person, without any limitation regarding the modalities of the actus reus[52]. Adherence to the Istanbul Convention, moreover, would imply that Italy adopts a consent-based definition of rape (Art. 36).

Due to its case law on consent, Italy can contend to be compliant with both Conventions, at least in the law in action[53].

G. *Towards an affirmative consent model?*

In the last three years, the Supreme Court seems to be moving towards an affirmative consent model ("only yes means yes").[54] The following judgment presents several clues in this direction, especially with the exclusion of any defence of mistake on consent, arguing that it is a mistake of law rather than of fact: "The objective element of the offence of sexual violence is not only conduct invading the sphere of the sexual freedom and integrity of others carried out in the presence of a manifestation of dissent by the victim, but also conduct carried out in the absence of the consent, not even tacit, of the victim. It follows that the consent must be validly given and must remain throughout the period during which the sexual acts are performed. The defence of putative consent of the victim is

51 M.C. v. Bulgaria, Case no. 39272/98, Judgment of 4 Dec.2003.

52 Patricia Londono, 'Defining rape under the European Convention on Human Rights: torture, consent and equality', in: Clare McGlynn and Vanessa E. Munro, 'Rethinking Rape Law' (2010), 107.

53 It should be noted, however, that the prevailing scholarship denies the courts the authority to interpret offences in accordance with the positive obligations of incrimination arising from the Convention. This is said to violate the principle of legality, which is protected by the Convention itself in Article 7. See Francesco Viganò, 'Diritto penale sostanziale e Convenzione europea dei diritti dell'uomo', (2008) Riv It Dir Proc Pen, 42, 95.

54 On the features of this paradigm, see Stephen J. Schulhofer, 'Consent: What it means and why it's time to require it', (2016) University of the Pacific Law Review 47, 665; Aya Gruber, 'Not affirmative consent', *Ivi*, 683.

not applicable to the offence of sexual violence, since the lack of consent is an explicit requirement of the offence, and the error is therefore a mistake about the criminal law".[55]

The evidence is further confirmed by the Court's assumption concerning intent: "Regarding the mental element of the offence of sexual violence, it is sufficient for the perpetrator to be aware of the fact that the consent of the victim to perform sexual acts has not been clearly expressed."[56]

It follows that the only admissible form of mistake concerns an ambiguous expression of consent by the victim. As the Court stated, "a doubt concerning the recurrence of a valid subjective element may instead be taken into consideration only in the event that the mistake is based on the expressive content, in hypothesis equivocal, of precise and positive manifestations of will emanating from the victim".[57]

These principles have been applied to different types of cases, but especially to those where the victim is unconscious due to alcohol or other substances and unable to consent or dissent,[58] which is a difficult situation to address by the paradigm of violent coercion.[59]

H. Final remarks

In the century since 1930 when the Italian Penal Code was enacted, the meaning of sexual coercion by force has changed tremendously. Although practically under the same law, which provides a violence-based definition of rape, the courts have touched both antipodes: from the atrocious and overwhelming violence of the paradigm of "*vis atrox*" to the absence of consent typical of more modern systems that have adopted an affirmative consent model.

The courts have interpreted the changes in social attitudes concerning sexual violence, repudiating the legacy of the historical evolution of the crime such as the burden of resistance on the woman. This change in social attitudes is clearly demonstrated by the reactions to the "rules of thumb" of the "blue-jeans" decision.

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55 Cass. pen., Sez. III, 19.3.2019, n. 20780.
56 Ibid.
57 Cass. pen., Sez. III, 9.3.2016, n. 49597.
58 Cass. pen., Sez. III, 11.7.2018, n. 43565.
59 On the problematic nature of these cases, see Stephen J. Schulhofer, 'Taking sexual autonomy seriously: Rape law and beyond', (1992) Law and Philosophy, 35.

However, this process presents several issues with regard to the constitutional principle of legality. The disappearance of forcible coercion, especially in a model based on affirmative consent, is an interpretation that ignores the wording of the law and, in particular the element of violent coercion which the law requires for the perpetration of the offence. At this point, a legislative reform of sexual offences seems inevitable and urgent. It would have several positive implications, regardless of the paradigm adopted ("no means no" or "only yes means yes").

First, citizens would know more clearly when a rape is committed under Italian law.[60] At present, a person who reads the Penal Code is bound to think that rape requires coercion by violence and consequently – on the basis of what violence means in everyday language – the use of force. It must be admitted, however, that a conviction for rape without the use of force is not unforeseeable – at least by the standards of ECtHR jurisprudence –, because many years have passed since case law has dematerialised the requisite use of force.

Nevertheless, in an area such as sexual relations, where old legacies and traditions still play a role,[61] only a clear change in the law seems adequate to provide clear guidance for citizens in their behaviour. Sexual mores are constantly evolving, and nowhere is it more necessary than in this area of criminal law to offer unambiguous indications. This is especially true for the defendant, but also for victims, many of whom do not report rape because they do not realise they have been raped.[62]

A reform of the law on sexual violence would therefore have an undeniable expressive function: the media would talk more openly about consent in sexual relationships, people would debate the issue, and a change in social attitudes would be accelerated.[63] The recent Italian law on non-consensual pornography is a good example of the potential of

60 See e.g., Michele Papa, 'La fisiognomica della condotta illecita nella struttura dei reati sessuali: appunti per una riflessione sulla crisi della tipicità', in Giovannangelo De Francesco, Alberto Gargani, Domenico Notaro, Antonio Vallini (eds), 'La tutela della persona umana. Dignità, salute, scelte di libertà (per Francesco Palazzo). Atti del Convegno. Pisa, 12 ottobre 2018' (2019), 145.

61 For a review of some Italian statistical and sociological surveys which demonstrate the percistance of many ancient prejudices, see Fenton (note 4), 184.

62 Kadish, Schulhofer, Steiker and Barkow (note 28), 334.

63 On the importance of the expressive function of the law in relation to sex crimes, Danielle K. Citron, 'Hate crimes in Cyberspace' (2014).

the law's expressive function, especially in relation to sexual offences.[64] In 2016, the first Italian victim of revenge porn was mocked, publicly humiliated online, and became the victim of jokes on the radio. In 2020, after the criminalisation, a young kindergarten teacher whose pictures were shared by her boyfriend to his soccer team and then disseminated, was supported by public opinion. Thanks to this support, the teacher obtained the resignation of the female director of the kindergarten who had fired her following the scandal.[65]

Furthermore, once the consent-based model has been implemented in the Code, scholars and judges can debate new problems, such as "stealthing".[66] A law that formally requires the use of force for conviction in fact blocks any kind of deeper investigation on consent and its applications. Therefore, a reform would be the opportunity for a truly systematic reorganisation of the subject of sex crimes in a consent-oriented perspective.

Over the years, sexual coercion by violence has assumed many different meanings. But at the end of this journey, can we really say that coercion by violence still really has a meaning? The evolution of Italian case law shows that the disvalue of rape lies in the perpetration of a non-consensual act, not in the violent manner utilised. Moreover, history shows that the dogma of coercion by force did not emerge for well-considered reasons of criminal policy, but as a result of a normative stratification that had matured during periods of women's subjugation. As argued by Tamar Pitch, an Italian feminist jurist: "Violence begins where there is no consent, since

64 There is a growing consensus that the dissemination of intimate images constitutes a sexual offence, starting from Clare McGlynn and Erika Rackley, 'Image-Based Sexual Abuse', (2017) Oxford Journal of Legal Studies 37, 534.

65 Gian Marco Caletti, 'Can affirmative consent save "revenge porn" laws? Lessons from the Italian criminalization of non-consensual pornography', (2021) Virginia Jorunal of Law and Technology 25, 112, 164.

66 According to those who have addressed the issue in Italian literature, the Italian legal framework does not permit considering stealthing to be sexual violence; see Paolo Caroli and Julia Geneuss, 'La rimozione fraudolenta del preservativo come aggressione sessuale. Lo Stealthing davanti al giudice penale', (2021) Dir Pen Cont Riv Trim, 136. But it is considered highly likely that, if asked to do so, the Supreme Court would rule that stealthing constitutes rape. This is also in view of the fact that the Court has in the past qualified as rape the performance of sexual interaction in a manner different from that agreed upon (e.g., ejaculation in the vagina). See Cass. pen., Sez. III, 18.3.2015, n. 9221. On the issue of stealthing see also in this volume Sebastian Mayr and Kurt Schmoller, 'Particularized Consent and Non-Consensual Condom Removal'.

it is not violence that reveals the lack of consent, but rather the lack of consent that defines the sexual relationship as violent."[67]

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67 Tamar Pitch, 'Un diritto per due: la costruzione giuridica di genere, sesso e sessualità' (1998), 149–190.

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Regulating Expression of Consent in Sexual Relations

Karolina Kremens

A. Introduction

In May 2020 Amnesty International reported that only nine European countries have a definition of rape based on the absence of consent while the remaining twenty-two define it based on force, threat of force or coercion[1]. This may seem a small number (9 out of 31), but the change in thinking about personal autonomy by adopting consent as an important factor shaping law reforms concerning sexual relations is certainly trending. A good example is Sweden, which just recently replaced the original definition of rape focusing on violence with a new approach[2]. The new Spanish rape law is also moving in that direction, at this very moment being processed by the Parliament[3] as a reaction to the current regulations criticized in a heated debate following the controversial "Manda case" judgment[4]. This trend may also be seen as resulting from the powerful #MeToo movement, which has led to societal change in the perception of sexuality from a concept of morality and decency towards individual sexual autonomy.

As criminal justice systems continue to shift away from a traditional approach towards the requirement of receiving consent before engaging in a sexual act, the discussion on how this consent should be expressed becomes more vital than ever. This is because the determination of the absence of consent is becoming decisive to the attribution of guilt throughout criminal processes. It is true in at least some jurisdictions researched

1 Amnesty International, *Criminalization and Prosecution of Rape in Europe* (2020).

2 Ministry of Justice, *Consent – the basic requirement of new sexual offences legislation* (2018).

3 See Josephine Joly, 'Spanish Parliament begins debate on 'Only Yes is Yes' sexual consent law Access to the comments' <https://www.euronews.com/2021/10/15/spanish-parliament-begins-debate-on-only-yes-is-yes-sexual-consent-law> accessed 14 January 2022.

4 See P. Faraldo-Cabana, 'The Wolf-Pack Case and the Reform of Sex Crimes in Spain' (2021) 22 *German Law Journal*, 847.

within this study, and the number of countries that apply this rule is increasing. However, it is the way in which consent should be *expressed* that becomes central in shaping consequences for its existence or the lack of it. Scholars constantly attempt to establish what stands behind this vague concept[5]. What makes the matter even more complex is that consent and the forms in which it is expressed is not limited in law only to sexual relations but has a much broader and established application both in civil and criminal contexts.

For NGOs and those providing help to victims seeking advice on issues concerning sexual violence, the form in which consent is expressed seems not to be that complicated. For example, the RAINN[6] website states that consent "should be *clearly* and *freely* communicated" and that "a *verbal* and *affirmative expression* of consent can help both you and your partner to understand and respect each other's boundaries"[7]. Another American website called Healthline says that "consent is a *voluntary, enthusiastic, and clear agreement* between the participants to engage in specific sexual activity", adding that "there is no room for different views on what consent is"[8]. The National Sexual Violence Resource Center[9] similarly states that consent must be "*freely given and informed*" but also adds that it is "*more than a yes or no*", being "a *dialogue* about desires, needs, and level of comfort with different sexual interactions"[10]. This unfortunately adds only little to the discussion on *how exactly* consent should be expressed, also leaving some room for out-of-place jokes and discussions concerning the need to sign a written contract before engaging in sexual relationships with anyone[11].

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5 See, e.g., V. Munro, 'Constructing consent: Legislating freedom and legitimating constraint in the expression of sexual autonomy' (2008) 41 (4) *Akron Law Review*, 923; M. Beres, 'Rethinking the concept of consent for anti-sexual violence activism and education' (2014) 24 (3) *Feminism & Psychology*, 373.

6 RAINN (Rape, Abuse & Incest National Network) is an anti-sexual violence organization based in the USA (www.rainn.org).

7 RAINN, 'What Consent Looks Like' <https://www.rainn.org/articles/what-is-consent> accessed 14 November 2021.

8 Adrienne Santos-Longhurst, "Your Guide to Sexual Consent" <https://www.healthline.com/health/guide-to-consent#sexual-assault-resources> accessed 14 November 2021.

9 NSVRC (National Sexual Violence Resource Center) is a US nonprofit organization providing information and tools to prevent and respond to sexual violence (https://www.nsvrc.org/).

10 NSVRC, 'About Sexual Assault' <https://www.nsvrc.org/about-sexual-assault> accessed 14 November 2021.

11 D.-E. Dubé, 'Will you have to sign a contract the next time you have a one-night stand?' <https://globalnews.ca/news/3962289/contracts-consenting-sexual-encou

One of the reasons why it is necessary to establish the ways in which consent should be expressed is that the simple answer focusing on verbal confirmation may be too limiting. Non-verbal signs of approval may be misleading, since the reactions of the human body during sexual intercourse may be involuntary. Touching or kissing may cause arousal whether the person wants that or not. Therefore, voluntary consent is a priority, although its form is uncertain. As T. Hörnle aptly argues, "[t]he difference between a pleasant flirt, an appreciated compliment, a funny joke with erotic undertones and the turning point where it becomes unpleasant and annoying is not evident. In borderline cases, labels such as 'amusing' or 'harassment' depend on nuances, personal tastes, situations and moods"[12]. Indeed, sexual communication is very complex, and it can hardly be reduced to unambiguous legal norms.

Therefore, it is one thing to declare that sexual intercourse shall be engaged in only upon consent, as has already been done in some jurisdictions, and another thing to prescribe *how* this consent must be expressed – especially if it must be done in legal language, transferred into articles and provisions of a binding legal act. Adding to consent such adjectives as 'clear', 'voluntary', 'free' or 'informed' is only another layer of confirmation that the consent is somehow to be communicated by a person wishing to consent, but how it should be communicated still appears to be unclear.

Therefore, this chapter aims at analysing how various jurisdictions researched in this study approach the issue of the formal requirements of consent prescribed within a legal framework. For this purpose, this chapter provides a comparative analysis of contemporary approaches to how selected countries regulate the form in which consent shall be given. It must, however, be acknowledged that the countries discussed here do not approach the issue of consent in sexual relations from the same perspective, which also seems to affect the requirements of consent. As a result, the analysis will be undertaken in the light of the preliminary assumption that the countries that have chosen a requirement of consent for sexual relations, which are frequently called "yes means yes countries", provide more straightforward answers to how exactly the consent shall be given. In other words, the hypothesis is that countries that condition the voluntariness of a sexual act on receiving confirmation from the partner before

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nters-app/> accessed 20 January 2022; ABC News, 'Should Lovers Sign a Pre-Sex Contract?' <https://abcnews.go.com/GMA/story?id=128101&page=1> accessed 20 January 2022.

12 T. Hörnle, '#MeToo: Implications for criminal law?' (2018) 6 (2) *Bergen Journal of Criminal Law and Criminal Justice*, 118.

engaging in the sexual act provide clearer definitions of the expression of consent than countries that only consider consent in other contexts.

The chapter proceeds as follows: the first part explores the key international standards with regard to the normative regulation of the form of consent, including international instruments such as the Istanbul Convention as well as the case law of ECtHR on the issue. This will be done despite the fact that not all analysed jurisdictions are part of the Council of Europe's framework. Recognition of the achievements of the ECtHR in the field of interpreting consent to a sexual act should however not be overlooked. The second section briefly discusses approaches towards the form in which consent is expressed in various jurisdictions. The discussion will be based on national reports of ten countries that were delivered within this project, namely: Australia, Austria, England and Wales, Germany, Italy, Poland, Spain, Sweden, Switzerland, and the United States of America. The chapter ends with conclusions that look beyond the form in which consent should be given.

B. Expression of Consent in the International Context

In the international context, some guidance on the expression of consent can be obtained from the Istanbul Convention[13], a landmark treaty of the Council of Europe that created a legal framework at a pan-European level to protect women against all forms of violence, and to prevent, prosecute and eliminate violence against women and domestic violence. The Convention addresses the issue of the form of consent in Article 36 (2), stating that "consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances". Two elements seem to be underlined, that is the freedom (voluntariness) in making the decision and the context in which consent has been given. The latter takes into account the specific nature of the situation occurring among two people engaging in sexual intercourse. As provided in the Explanatory Report to the Istanbul Convention,[14] it is each state's responsibility to "decide on the specific wording of the legislation and the factors that they consider to preclude freely given consent".

13 Council of Europe Convention on preventing and combating violence against women and domestic violence 2011, CETS No. 210.

14 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, 2011.

Other international instruments seem to be even less focused on the form of consent. For example, the Recommendation Rec (2002)5 of the Committee of Ministers of the Council of Europe on the Protection of Women Against Violence[15] obliges the state parties to "penalize any sexual act committed against non-consenting persons, even if they do not show signs of resistance" as well as to "penalize sexual penetration of any nature whatsoever or by any means whatsoever of a non-consenting person" (§ 35). Yet no further explanation on what form of consent is desirable is given, again leaving this for each state to decide.

Even though the European Court of Human Rights (ECtHR) has addressed the issue of consensual sexual activities on several occasions[16], the case law also lacks a deeper discussion on the form of consent. Interpreting Articles 3 and 8 of the European Convention of Human Rights, the ECtHR emphasizes the duty of the state to protect the individual from violations of his or her sexual freedom and to combat and prevent sexual crime. Therefore, during criminal proceedings the state authorities are bound to protect the person who has experienced sexual violence from secondary victimization and must ensure that the law is applied in practice.

The first case in which the ECtHR explicitly addressed sexual autonomy as the test for assessing whether rape has occurred was *M.C. vs. Bulgaria*[17]. The Court focused on the concept of "affirmative consent" (although not using this term), explaining that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim[18]. Interestingly, in the ruling the Court referred to the case law of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor vs. Kunarac, Kovači and Vuković*, in which the ICTY Trial Chamber made it clear that consent must be given voluntarily, as a result of the victim's will, assessed in the context of surrounding circumstances[19]. But even though the judgment was generally received as an important improvement leading to a breakthrough of established cultural patterns which are not adapted

15 Recommendation Rec (2002) 5 of the Committee of Ministers on the Protection of Women Against Violence, 2002.

16 See among others *A. v. the United Kingdom* App no 25599/94 (ECHR 18 September 1998); *Z. and others v. the United Kingdom* App no 29392/95 (ECHR 10 May 2001); *E. and others v. the United Kingdom* App no 33218/96 (ECHR 26 November 2002); *August v. the United Kingdom* App no 36505/02 (ECHR 21 January 2003) and *X. and Y. v. the Netherlands* App no 8978/80 (ECHR 26 March 1985).

17 *M.C. vs Bulgaria* App no 39272/98 (ECHR 4 December 2003).

18 Ibid., § 104.

19 Case no. IT-96–23, 2001.

to the conditions of modern society and which are no longer valid in other countries, it has also been subjected to justified criticism[20]. What is important, however, from the perspective of this study, neither in this case nor in other judgments did the ECtHR specifically address the form in which the informed and voluntary consent needs to be expressed.

C. Expression of Consent in Researched Jurisdictions

Since international instruments appear not to give any specific guidance regarding the way in which consent must be expressed, we shall now analyse selected states with regard to the normative regulation of sexual offences. As previously stated, the preliminary assumption is that countries that decided to explicitly provide for consent in the legal definition of rape will be more eager to lay down the requirements for consent, while those states that still follow the traditional legislative approach might be less clear on that. The approach undertaken by each of the researched jurisdictions will be presented accordingly from the most progressive states in that regard (Australia, US, England and Wales, and Sweden), through those standing somewhere in the middle (Spain and Germany), to those representing a more traditional perspective (Poland, Austria, Italy, and Switzerland).

Among the researched jurisdictions, the most explicit with regard to establishing how consent should be expressed seem to be the **Australian** states of Tasmania and Victoria. Their Criminal Codes not only provide that consent means "free agreement"[21] but further clarify that a person does not freely agree to an act if she or he does not say or do anything to communicate consent[22]. Therefore, consent is considered a "communicated state of mind". This has been criticized by Australian scholars claiming that sometimes what is not communicated can still be considered consensual[23]. And such a strict approach has not been adopted by all Australian states. On the contrary, other criminal law systems in that country provide for more nuanced resolutions. For example, in Queensland even

20 See, e.g., C. Pitea, "Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in M.C. v. Bulgaria" (2005) 3 *Journal of International Criminal Justice*, 447.
21 Criminal Code Act 1924 (Tas), s. 2 A (1).
22 Ibid., s. 2A (2) (a).
23 Andrew Dyer, 'Australia', in this volume.

though consent must be given "freely and voluntarily"[24] there is no additional requirement, like the one in Tasmania and Victoria, that it shall be communicated externally. It is understood that under some circumstances a person can communicate consent even though she or he remains silent[25].

U.S. law also does not provide for a coherent approach towards regulating the expression of consent for the whole country. Although each state of the U.S. has its own criminal code, the social perception of what is rape seems to be shared among these jurisdictions[26]. This is reflected on the doctrinal level in the Model Penal Code, which criminalizes sex without consent[27]. According to it, consent means "willingness to engage in a specific act" and "may be expressed or it may be inferred from behavior – both action and inaction – in the context of all the circumstances"[28]. However, some states have decided to expressly provide for some form of affirmative consent[29]. The meaning of "affirmative consent" remains ambiguous though, and, as A. Gruber reports in this volume, "ranges from the very restrictive – a thoughtful, enthusiastic, and ongoing <<yes>> – to the more permissive – any words or conduct that indicate the person's sexual willingness"[30].

The ways in which consent may be given in **England and Wales** are not clearly determined, as the statute is not prescriptive[31]. The Sexual Offences Act 2003 provides that "a person consents if he agrees by choice, and has the freedom and capacity to make the choice"[32]. This underlines the free will of the person that consents. This approach is also confirmed by the jury instructions, which read that "when a person gives in to something against his or her free will, that is not consent but submission"[33]. Submission may be a result of threat, fear, or persistent psychological coercion.

However, what seems to be determinant for the expression of consent in the English and Welsh system is that the defendant must reasonably

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24 Criminal Code Act 1899 (Qld), s. 348.
25 Andrew Dyer, 'Australia', in this volume.
26 Aya Gruber, 'U.S.A.', in this volume.
27 MPC TD 5 § 213.6(1).
28 MPC TD 5 § 213.0(2)(e).
29 American Law Institute, *Model Penal Code: Sexual Assault and Related Offenses Tentative Draft No. 3*, (2017) 41 no. 93 quoted in Aya Gruber, 'U.S.A.', in this volume.
30 Aya Gruber, 'U.S.A.', in this volume.
31 See Lyndon Harris and Hannah Quirk, 'England and Wales', in this volume.
32 Sexual Offences Act 2003, s. 74.
33 See Lyndon Harris and Hannah Quirk, 'England and Wales', in this volume.

believe that consent was given[34]. And, as explained further in the Sexual Offences Act of 2003, "whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents"[35]. This suggests that for the establishment of consent the context and the circumstances in which the consent has been given (and believed to be given by the alleged offender) are important factors, appearing as more important than the form in which consent is given.

The case of **Sweden**, frequently perceived as a champion in introducing the reformulation of rape, is particularly interesting since the Swedish government decided relatively recently, in 2005, when reforming the criminal law not to replace coercion by lack of consent as the criminal element of rape[36]. It was not until 2018 that the revolution took place. But particularly this reform teaches us how difficult it is to clearly demarcate the area of criminalized behaviour when determining what is and what is not consensual.

Originally, an official Swedish proposal of sex offence regulations of 2016 provided that in order for participation in sexual intercourse to be considered voluntary it had to be expressed either by verbal confirmation ("yes") or through active participation[37]. But the criticism of this concept urged the Swedish Council on Legislation to depart from such a strict approach and to leave the determination of the voluntariness of participation to the judges' discretion in light of the circumstances of each individual case[38]. As a result, the law now provides that having sexual intercourse with a person who is not participating in it voluntarily constitutes rape, while the second part of the definition explains that "when assessing whether participation is voluntary or not, particular consideration is given to whether voluntariness was expressed by word or deed or in some other way"[39]. As interpreted, the assessment of non-voluntariness shall also be

34 This concerns some sexual offences such as rape – see SOA 2003, s. 1(1)(c).

35 SOA 2003, s. 1 (2).

36 See an older perspective on the Swedish system: M. Burman, Rethinking rape law in Sweden. Coercion, consent or non-voluntariness?, in: C. McGlynn, V.E. Munro (eds), *Rethinking Rape Law. International and Comparative Perspectives* (Routledge 2010), 196–208.

37 L. Wegerstad, 'Sex Must be Voluntary: Sexual Communication and the New Definition of Rape in Sweden' (2021) 22 *German Law Journal* 734, 740.

38 Ibid.

39 Chapter 6 Section 1 of the Swedish Criminal Code in English is available at: <https://www.government.se/4b0103/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf> accessed: 14 January 2022.

based on the situation and its context. This leaves lots of room for ways in which the voluntary participation (consent) may be manifested, at the same time shifting the focus to the context in which consent was given[40].

The **German** case seems to be ambiguous. This country should be considered as standing on a middle ground between countries that accept the "yes means yes" and the "no means no" approaches[41]. On the surface, the law requires for the criminal act of sexual abuse the objection of the victim, not the lack of an affirmative consent. § 177 sec. 1 of the German Criminal Code provides that sexual abuse is a sexual act performed "against the recognizable will of another person"[42]. Therefore, the passivity of a person during a sexual act is understood as excluding criminal liability since there is no recognizable will expressed by the victim[43]. The "recognizability" is determined from the viewpoint of an objective observer who is familiar with the relevant facts. If, however, a person does not have a normal power of judgment, e.g., because she or he is drunk or incapacitated in another way, the law requires the person's explicit approval[44]. The idea behind the German law is not to punish persons in unclear and ambivalent situations but to expect adults to communicate their wishes and needs[45]. However, despite its noticeable shift of approach towards sexual offences, German law remains silent on the forms in which consent can be expressed.

Spain seems to be more specific. Although the new bill on sexual offences (which positions that country somewhere in the middle between countries with a modern approach and those with a traditional approach), has not yet been enacted, some interesting conclusions can be drawn from the draft legislation, which states that "consent will only be understood to exist when it has been freely manifested through acts clearly expressing the individual's will, considering the circumstances of the case"[46]. However,

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40 Linda Wegerstad, 'Sweden', in this volume.

41 See generally on changes in German law in that regard T. Hörnle, 'The New German Law on Sexual Assault and Sexual Harassment' (2017) 18 *German Law Journal*, 1309.

42 German Criminal Code 1998, § 177 sec. 1.

43 Thomas Weigend, 'Germany', in this volume.

44 German Criminal Code 1998, § 177 sec. 2 no. 2.

45 Hörnle (note 12), 131.

46 Susana Urra, 'Spain approves sweeping sexual violence protection bill: 'We don't want any woman to feel alone' <https://english.elpais.com/spain/2021-07-07/spain-approves-sweeping-sexual-violence-protection-bill-we-dont-want-any-woman-to-feel-alone.html> accessed 14 January 2022.

this will not bring any change, since non-verbal conduct is understood as an "external act", as is shown in practice and case law.

In contrast to the presented attempts to include some relation to consent in the definition of rape, still there is a group of countries that follow the traditional approach centered around the expression of opposition by the victim as a requirement for rape. In these countries, where consent is just a supplementary element, for obvious reasons the discussion on the form of such consent is less pronounced. It is rather the form in which the victim opposes a sexual act that remains relevant and attracts the attention of scholars.

In **Poland**, even though consent is not mentioned in the definition of rape, in the view of the courts and scholars giving valid consent generally negates the existence of the crime of rape[47]. Therefore, the form of giving valid consent should play a role in the analysis of liability for rape. However, since the emphasis remains on force, threat of force, deceit, and how opposition is expressed[48], there is little in the case law and literature on how consent in sexual relations should be articulated. It seems to be certain that the lack of expressing an affirmative decision to engage in sexual intercourse or indifference should not be equated with lack of consent[49]. This suggests that silence, as a form of implied consent, may be considered as a valid way of expressing agreement under Polish law[50].

In **Switzerland**, where the definition of rape is also based on force used by the perpetrator,[51] consent is barely considered on a normative level. This is also due to a still strong attachment to traditional rules of decency which concentrate on resistance rather than on consent, and, as reported, the lack of protest on the victim's part can even be used to question the responsibility of the accused[52]. Therefore, similarly as in Poland, the discussion on the ways in which consent may be given is not that relevant in Swiss law, although it has been confirmed that it can be given verbally or non-verbally and, in some cases, even implied.

Another country that does not normatively consider consent as an element of sexual offences and therefore does not engage in a discussion on

47 Judgment of Supreme Court of 8 September 2005, OSNwSK 2005, Nr. 1, poz. 1617.
48 Polish Criminal Code 1997, Article 197–198.
49 K. Szczucki, Rola zgody w strukturze przestępstwa na przykładzie przestępstwa zgwałcenia (2011) 1 Czasopismo Prawa Karnego i Nauk Penalnych, 31, 47.
50 Wojciech Jasiński and Karolina Kremens, 'Poland', in this volume.
51 Swiss Criminal Code 1937, Article 190.
52 Nora Scheidegger, 'Switzerland', in this volume.

its form in that context is **Italy**. Even after the most recent reform, Italian law still refers to violence and threats,[53] focusing attention in case law on resistance to the perpetrator's actions[54].

This group of countries is concluded with **Austria**. Despite the social changes, sexual liberalization, and the acceptance of the view that the criminal law on sexual offences primarily protects the right to self-determination and sexual autonomy (rather than public morals), there have not been any changes in the definition of rape. Similar to other traditional countries, the focus remains on coercion and resistance rather than on consent[55]. Scholarly opinion on the form of consent, made with reference to consent in more general terms and not specifically in the context of sexual offences, suggests that consent shall be expressed externally. This can be verbal but may also be implied[56].

D. Conclusions

This chapter was seeking an answer to the questions in what form should consent in sexual relations be expressed and whether countries that adopted the modern "yes means yes" approach that focuses on consent provide some guidance regarding the form of consent. Unfortunately, the answer is somewhat disappointing. The comparative analysis of the ten researched countries shows that states are reluctant to give a straightforward answer to *how* consent should be expressed. Moreover, there is no consistency in how this issue has been resolved in the "modern" group of states. And even if some similarities are visible, it is uncertain whether there is any common reasoning behind choices in that regard. The expectation that countries that have chosen to include consent as an element of sexual offences will specify the form in which consent should be given has therefore not been confirmed. It seems that it was rather a random and individual choice of each jurisdiction to adopt a particular wording rather than a well-thought-out common decision. There is not even agreement visible on a normative level among states on whether the only choice is a verbal statement or whether non-verbal communication can also be considered as a sufficient form of expressing consent.

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53 Italian Criminal Code 1930, Article 609-bis.
54 Gian Marco Caletti, 'Italy', in this volume.
55 Austrian Criminal Code 1974, § 201–202.
56 Sebastian Mayr and Kurt Schmoller, 'Austria', in this volume.

It can thus be concluded that even if a jurisdiction has included an element of consent in the definition of rape, it seems reluctant to prescribe a specific form for the expression of consent.

It is certainly true that the circumstances in which consent to a sexual act is being given matter. In all researched jurisdictions there are rules on how consent can be expressed, whether it refers to reaching an agreement in contract law or consenting to medical procedures. However, the nature of sexual relations appears to be of a specific character and therefore any regulations on that matter, whether normative or customary, may not be that relevant. As a result, it is doubtful whether such a general understanding of the form of consent can be used in the context of consent to sexual intercourse. Indeed, context is everything.

We thus reach a conclusion that does not end with a full stop but rather with a question mark: are we able to define the ultimate *form* of expression of consent in the context of sexual relations? The answer is: most likely it is impossible. But this disappointing answer should not be considered a bad thing. Reaching the conclusion that, due to the complexity of sexual relationships, which by nature are burdened with uncertainty reflected through flirting and passion, we are incapable of delimitating with precision in what form consent should be given allows us to look for other elements of consent besides its form. Interestingly, some of the researched countries, as well as some discussed international instruments such as the Istanbul Convention or ECtHR case law, seem to highlight the "voluntariness" and the "own decision" reached by a consenting person. And this exactly mirrors the "free will" that accompanies the words or non-verbal expressions that we all and especially courts of law should be concerned with. Since free will can be expressed in various ways, it is perhaps not the consent as such and its form but the *communication* between parties that should get our attention.

This is certainly not a novel observation. Many scholars have already abandoned the idea of addressing the *form* of consent in favour of *communication*. As S. Schulhofer has explained, "situational factors often impair people's ability to express willingness or unwillingness. Thus, much sexual interaction falls into the space between 'no' and 'yes'"[57]. K. Harris also supports this position, claiming that "yes means yes" and "no means no"

57 S. Schulhofer, 'Consent: What it means and why it's time to require it' (2016) 17 (4) *University of the Pacific Law Review*, 665, 666.

are just "intentional strategic simplifications"[58]. And even though they are certainly important, the discussion on the expression of consent should not end with them. As Harris further concludes, it is exactly the communication that is key in developing the scope of consent, and that context is certainly needed to evaluate what happened between two people[59]. It is therefore crucial to emphasize the complexity of communication and simultaneously fight myths about communication in sexual relations that suggest that there is a simple and easy answer that can be narrowed down to a simple "yes". Perhaps E. Dowds is right when she proposes that the steps taken by the defendant to ascertain consent are determining his or her guilt, and the *process* of communication, not the *form* of consent as such plays a crucial role here[60].

Certainly, time should be invested in discussions on how consent might be construed and whether this should be the point of discussion of what constitutes rape. Legislative changes should not only be carefully designed but most importantly aimed at enhancing the effectiveness of the criminal process while reflecting the needs of victims and preserving the rights of the accused. In discussing the form of consent, we often forget that what remains crucial during trial is the evidence. Determining whether consent or an objection was communicated comes down to whom the court or jury will believe and who will be found reliable.

This leads us to three conclusions. First, the form of consent is impossible to be normatively regulated and narrowed down to such an extent that it would leave no ambiguity. Although attempts should be made to specify the law to the largest possible extent, prescribing an explicit definition in the law does not solve anything, simply because such a provision may be dead letter. We are not protected by paragraphs but only through their implementation by judicial authorities. Therefore, second, the context and communication are so crucial in sexual relations that they should be left for judicial discretion and decided on a case-by-case basis. Third and perhaps most importantly, to bring about real change the focus should

58 K.L. Harris, 'Yes means yes and no means no, but both these mantras need to go: Communication myths in consent education and anti-rape activism' (2018) 46 (2) *Journal of Applied Communication Research*, 155, 171.

59 ibid.

60 E. Dowds, 'Rethinking affirmative consent. A step in the right direction', in: R. Killean, E. Dowds, A.-M. McAlinden (eds) *Sexual Violence on Trial. Local and Comparative Perspectives*, (Routledge 2021), 162. See also Hörnle (note 12), 128–129 ("The central concepts for modern criminal law on sexual offences should be consent and communication").

be shifted towards education. What should be kept in mind regardless of the form of expression of consent is that legislative changes that may be introduced in that regard are not enough. To achieve real change, educational work has to be done concerning the responsibilities in sexual relations of men and boys and not only women and girls. Teaching the importance of engaging only in consensual sexual intercourse appears to be a crucial factor in changing the behaviour and habits of future generations. Additionally, the drafting of any new law should be accompanied by an information campaign, and training should be offered to police and others engaged in the criminal justice system, so that victims do not experience repeated trauma when reporting crime and testifying. This is the only way in which sexual offenders may eventually be brought to justice.

Affirmative Consent

Aya Gruber[*]

A. Introduction

The slogans are ubiquitous: "Only 'Yes' Means 'Yes'"; "Got Consent?"; "Consent is Hot, Assault is Not." Clear consent is the rule. Forcible rape is totally passé, not in the sense that it does not occur, but in the current legal conception of sexual assault's essence. Rape law scholars regard force as so archaic as to barely merit mention. Far from the bad-old-days in which "real rape" was limited to violent stranger assaults resisted by victims "to the utmost,"[1] contemporary laws and policies widely apply the consent framework, in which rape can include behaviors ranging from brutal to boorish to normal. What matters is "consent."

But what is sexual consent? Some will say that sexual consent is when parties are mentally willing. However, there are diverse conceptions of willingness, ranging from enthusiastic to grudging, from hedonistic to instrumental, from sober to inebriated.[2] Others argue that focusing on victims' intent puts them on trial; thus, sexual consent should be about what the parties say and do, and not what they think.[3] Here, there is also variability. Some hold that engaging in sexual activity without protest, or with weak protest, communicates consent. Others insist that consent be "affirmatively" or "positively" expressed. And "affirmative expression consent," depending on who you ask, runs the gamut from nonverbal foreplay to "an enthusiastic yes."

Actual definitions of consent in criminal codes and university manuals, with their vague references to "free agreement" and "affirmative coopera-

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1 *See People v. Geddes*, 3 N.W.2d 266, 267 (Mich. 1942); *Kinselle v. People*, 227 P. 823, 825 (Colo. 1924).

2 *See infra* Section I.A.

3 *See In re* M.T.S., 609 A.2d 1266, 1273 (N.J. 1992) (moving to affirmative consent standard because old law put victim on trial).

tion," do little to simplify matters.[4] It is no wonder that people come to wholly different conclusions about how consent and affirmative consent standards impact legal decisions and human behavior. Proponents often characterize affirmative consent as a minor change that will not lead to unfair convictions, while opponents hyperbolize that the reform will lead to sex contracts.

What caused so much confusion? In short, decades ago, feminist reformers affected the shift from defining rape as forced sex to defining it as nonconsensual sex to broaden liability for bad sexual behavior.[5] However, even this shift proved unsatisfying to many activists who contended that biased or mistaken decision-makers misapplied the standard, leading to under-regulation of unwanted sex. Activists urged affirmative consent standards to compel legal actors to arrive at the "right" conclusion in contested consent cases. However, couching the affirmative-consent revolution as simply a better way of doing "ordinary" consent obscured the various presumptions and normative commitments underlying reformers' ideas about what *is* the right conclusion—when sex *should* be criminal. Affirmative consent reform is a juggernaut.

The rapid changes have produced a legal terrain marked by uncertainty, contradiction, and hidden value judgments. In this chapter, I categorize and clarify laws, policies, and discourses that purport to define affirmative consent and the normative arguments for and against the standard(s). Currently, the debate over affirmative consent is muddled, with interlocutors who hold different conceptions of the standard simply talking past each other. Commentators also have competing foci: some concentrate on whether sex without a yes is wrongful, while others focus on whether affirmative consent is a proper tool to get at "true" rapists. Accordingly, much of this chapter is taxonomical in nature—it charts consent, categorizes affirmative consent standards, and indexes affirmative consent argument types.

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4 For a thorough discussion of existing consent statutes, see Model Penal Code: Sexual Assault and Related Offenses 58–61 (Am. L. Inst., Preliminary Draft No. 5 2015) [hereinafter MPC Draft 5]. The MPC Tentative Draft No. 1 (Apr. 30, 2014), is available at https://web.archive.org/web/20210213103228/https://jpp.whs.mil/public/docs/03_Topic-Areas/02-Article_120/20140807/03_ProposedRevision_MPC213_Excerpt_201405.pdf (accessed August 25, 2022), but it is substantially different. This chapter refers to Draft 5 throughout, although it differs in meaningful ways from the final approved draft, which does not have an affirmative consent standard.

5 Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 Wash. L. Rev. 581, 587–603 (2009).

I have a second goal: demystification. The consent framework's simplistic championing of "autonomy" has obfuscated the normative bases of a complex socio-cultural reordering.[6] Reformers initially rationalized affirmative consent as a modest tool to control sexist decision-making.[7] But that attempt to manage sexist actors created a legal terrain that *defines* rape as sex without an affirmative *expression*, rather than compelled or unwanted sex. Thus, the prohibition of a large category of questionably wrongful sex (sex without a yes) surreptitiously evolved under the banner of preventing a smaller category of clearly wrongful sex (forced, aversive sex). Responsible sexual and criminal governance demands grappling with the choices underlying the affirmative-consent revolution.

B. Consent

Consensual sex is described variously as desired, wanted, willing, or agreed-to sex.[8] While such terms can mean quite different things, I, like most commentators, will treat them as fungible. The more pressing question is whether sexual consent is a mental state, an external performance, or both. There is little controversy when sexual actors' performances correspond to their mental states. For example, if a person who wants sex says "yes," sex is obviously "consensual." Controversy arises, however, when there is mismatch between the internal state and external manifestations. Affirmative-consent critics recoil at the idea that it can be rape when both parties desired sex simply because the consent performance was deficient (i.e., "yes" was lacking).[9] Likewise, feminists are apt to dismiss as coerced an expressed "yes" that did not reflect internal willingness.[10] Consequently, uncontroversial consent to sex entails what I call

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6 *Cf.* Nicola Lacey, *Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law*, 11 Can. J.L. & Juris. 47, 53 (1998) ("The idea of autonomy... assumes rather than explicates what is valuable about sexuality itself.").

7 *See, e.g.*, Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1102–03 (1986).

8 *See, e.g.*, Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. Pac. L. Rev. 665, 671 (2016) (calling consensual sex "mutually desired").

9 *See* Sarah Gill, *Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA Women's L.J. 27, 61 (1996) (discussing this argument); *infra* notes 89–90 and accompanying text.

10 Some go even further arguing that *any time* a person does not internally want sex it is sexual assault, even if the person freely says yes. *See, e.g.*, Wendy Murphy, Opinion, *Title IX Protects Women. Affirmative Consent Doesn't*, Wash. Post (Oct.

a "consent transaction," involving a sufficient internal mental state and expression.

A sexual consent transaction between two people, A and B, consists of a three-step process. Step 1: A internally agrees to have sex. Step 2: A displays external manifestations of that agreement. Step 3: Based on A's external manifestations and the context, B believes A internally agrees to have sex. Of course, B must also share A's attitude toward the sex, and A must believe B internally agrees.

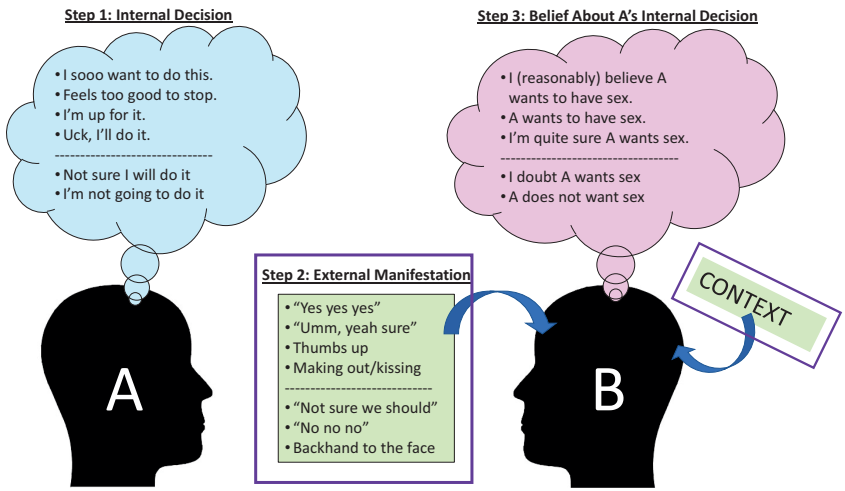

Figure 1: The Consent Transaction

Let us discuss each step, beginning with A's mental state.[11]

15, 2015), https://www.washingtonpost.com/news/in-theory/wp/2015/10/15/title-ix-protects-women-affirmative-consent-doesnt/ (accessed August 25, 2022); *cf.* Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 82 (1987) (the "political" definition of rape is "whenever a woman has sex and feels violated").

11 When examining Figure 1, A may start to look distinctly feminine and B masculine. *See* Lacey, *supra* note 6, at 60 (consent framework establishes asymmetric gendered relationship between sexual participants).

Step 1: A's Internal Agreement to Sex

A consensual mental state involves a "free" decision to have sex. The meaning of free is subject to interpretation. Some feminists assert that because of gendered pressures and gross inequality, coercion is the default for women. However, most theorists do not regard women's agreement to sex as mostly illusory, and they debate which coercive conditions undermine consent (i.e., lies, promises, financial need).[12] In addition, there are controversies about what a consensual mental state is. Figure 1 draws the line at grudging acquiescence, counting it as consensual, but designating being unsure as insufficient. By contrast, some commentators suggest that consent requires sex to be enthusiastic, deliberative, and hedonistic.[13] Thus, although internal consent seems self-evident, it is the outcome of a struggle between value judgments—whether sex can be instrumental rather than hedonistic, whether it is an important life-decision or casual choice, and which person's (man's or woman's, evangelical's or agnostic's) perspective is the default.[14]

Accordingly, the very language of consent precludes open political debate on, for example, the permissibility of unenthusiastic or even undesired sex—an issue sociological studies indicate is more complex than one might initially think.[15] One study, for example, found that college students, female and male, widely agree to "unwanted sex," meaning sex that

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12 *See, e.g.*, Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 Brook. L. Rev. 39 (1998) (fraud and coercion); Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1405–11 (2013) (deception).

13 *See* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 Calif. L. Rev. 881, 925–28 (2016) (cataloguing various colleges' and universities' sexual assault definitions that define consent as enthusiastic, sober, creative, sincere, etc.); *see also infra* Section II.B.

14 *See* Nancy Ehrenreich, *Surrogacy as Resistance? The Misplaced Focus on Choice in the Surrogacy and Abortion Funding Contexts*, 41 DePaul L. Rev. 1369, 1385 (1992) (reviewing Carmel Shalev, Birth Power: The Case for Surrogacy (1989)) ("[J]udicial determinations that contracts (or sexual relations or criminal conspiracies) were freely entered into are *not* determinations about 'what happened,' but rather they are value-based decisions about what should be considered choice.").

15 *See* Charlene L. Muehlenhard & Stephen W. Cook, *Men's Self-Reports of Unwanted Sexual Activity*, 24 J. Sex Rsch. 58 (1988); Lucia F. O'Sullivan & Elizabeth Rice Allgeier, *Feigning Sexual Desire: Consenting to Unwanted Sexual Activity in Heterosexual Dating Relationships*, 35 J. Sex Rsch. 234 (1998); Susan Sprecher et al., *Token Resistance to Sexual Intercourse and Consent to Unwanted Sexual Intercourse: College Students' Dating Experiences in Three Countries*, 31 J. Sex Rsch. 125 (1994). For a fascinating literature survey on sexual compliance and sexual sacrifice, *see*

is not physically desired, for a variety of reasons like status and relationship intimacy and that such sex produces positive outcomes.[16]

Step 2: A's External Manifestations

Given that sexual activity is itself communicative, "unexpressive" sex will be rare. Thus, the primary issue is *which* external acts communicate consent. A popular view is that consenters just tell people what they want. One expert opines: "Parties who mutually desire sexual intimacy normally communicate that desire freely."[17] However, sexual consent negotiation is highly context specific and culturally ordered.[18] Further, considering the long American history of not communicating about desire, it is not surprising that mental states often diverge from external manifestations. Social science confirms that people are recondite about their sexual consent.[19] Thus, decisions about sex generate variable and even contradictory performances, conditioned by community norms, relationship status, age, gender, personality, etc. Some embedded norms influencing sexual communication, like stereotypical sex roles, are unpalatable. This leads reformers to the problematic belief—explored later—that instead of addressing the gendered sexual script, we should randomly punish some who follow the script in the hope that it will change the world.

Step 3: B's Understanding of A's Mental State

In a perfect consent transaction, B's belief that A wanted to have sex is a correct interpretation of A's manifestations. Things get more difficult when B's interpretation is wrong.[20] Indeed, studies show that men are prone to interpret "friendly" behavior as consent, while women view

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Emily A. Impett & Letitia A. Peplau, *Sexual Compliance: Gender, Motivational, and Relationship Perspectives*, 40 J. Sex Rsch. 87 (2003).

16 *See* O'Sullivan & Allgeier, *supra* note 15.

17 Schulhofer, *supra* note 8, at 670.

18 *See* Sprecher et al., *supra* note 15, at 126.

19 *See infra* notes 63–69 and accompanying text.

20 Alternatively, B might be convinced that A is unwilling and decide to pursue sex anyway, but, in fact, A is quietly enthusiastic. We would probably consider B a pretty bad person, but the requirement of actus reus would foreclose liability.

consent as requiring verbalization.[21] But if B has a "reasonable" belief that A is willing, most scholars would agree that B is not liable even if B is wrong.[22] However, where sexist norms prevail, sexist defendants' determinations might be deemed "reasonable."[23] Reformers thus turn to affirmative consent. They identify the manifestations indicative of consent to *non-sexist* people. If such manifestations are not present, B is guilty regardless of whether the larger (sexist) society would agree that A consented.

It gets even more complicated when we subjectivize B's intent. If B is clueless, has an overinflated ego, or follows a bad sexual script, B could honestly but unreasonably believe A agreed to sex. B might be horrified to learn the sex was undesired. The question is whether we can punish B for being negligent. Negligence typically generates civil, not criminal, liability.[24] Under general criminal law principles, a conviction requires the person to know or recklessly disregard that they are committing the crime.[25] Critics argue that negligence is inappropriate and overly punitive, given the variability in how people understand sexual cues.[26] Nevertheless, many jurisdictions adopt a negligence standard.[27]

In sum, an uncontroversial sexual consent transaction involves: (1) A's internal decision to have sex; (2) A's external manifestations reflecting that decision; and (3) B's (reasonable) belief, based on the external manifestations and context, that A is willing. In the typical contested consent case, A claims the sex was internally unwanted. B responds either that A wanted

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21 *See* Antonia Abbey, *Sex Differences in Attributions for Friendly Behavior: Do Males Misperceive Females' Friendliness?*, 42 J. Personality & Soc. Psych. 830 (1982); Susan E. Hickman & Charlene L. Muehlenhard, *"By the Semi-Mystical Appearance of a Condom": How Young Women and Men Communicate Sexual Consent in Heterosexual Situations*, 36 J. Sex Rsch. 258 (1999); Terry P. Humphreys & Mélanie M. Brousseau, *The Sexual Consent Scale – Revised: Development, Reliability, and Preliminary Validity*, 47 J. Sex Rsch. 420, 421 (2010).

22 Some might say that even if B is unreasonable, B's honest belief of consent is enough.

23 *See, e.g.*, Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 Yale L.J. 2687 (1991).

24 *See* Model Penal Code § 2.02(2)I cmt. 5 at 244 (Am. L. Inst. 1962).

25 *See, e.g.*, MPC Draft No. 5, *supra* note 4, at 147 (requiring honest and sincere belief).

26 *See id.* at 171 (noting the concerns over negligence imposing "penal liability greatly disproportionate to fault"). *See also* Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 Tex. J. Women & L. 42, 67 (1993) (advocating that "the minimum culpable mens rea as to consent should be negligence").

27 *See id.* at 169 (negligence standard for sexual assault is "prevailing" standard).

sex or that B (reasonably) believed A did. The jury will resolve the issue by looking at A's external manifestations in context. The tricky part is that decision-makers harbor diverse views about internal willingness, how it is manifested, and how manifestations should be interpreted.

C. *Affirmative Consent*

In determining consent, decision-makers can make bad calls: they may find coerced agreements valid, derive consent from lack of protest, allow the defendant to divine consent from kissing, etc.[28] To reduce bad calls, affirmative consent laws direct decision-makers to focus on the external manifestations themselves and decide whether they are sufficient expressions of consent. Only *certain* step-two external manifestations count as "affirmative consent." There is passionate debate over how narrow or broad that category should be. Narrow formulations (requiring a verbal yes, clear negotiation and acceptance, etc.) decrease the potential for victimization but are highly regulatory and potentially unfair. However, broad formulations that allow all manifestations to count as affirmative consent affect no real reform. The vague language in codes and policies ("positive cooperation") do not illuminate the issue.[29] The below categories of affirmative consent are culled from the vast amount of U.S. criminal law, educational policy, scholarship, and public commentary on affirmative consent.

28 *See* David P. Bryden, *Redefining Rape*, 3 Buff. Crim. L. Rev. 317, 426 (2000); *see also, e.g.*, *In re* M.T.S., 609 A.2d 1266, 1277–78 (N.J. 1992).

29 *See, e.g.*, Cal. Penal Code § 261.6(a) (West 2022) ("positive cooperation"); 720 Ill. Comp. Stat. Ann. 5/11–1.70(a) (West 2021) ("freely given agreement"); Wis. Stat. Ann. § 940.225(4) (West 2005) (same); *In re M.T.S.*, 609 A.2d at 1277 ("affirmatively and freely given authorization"); *see generally* Schulhofer, *supra* note 8.

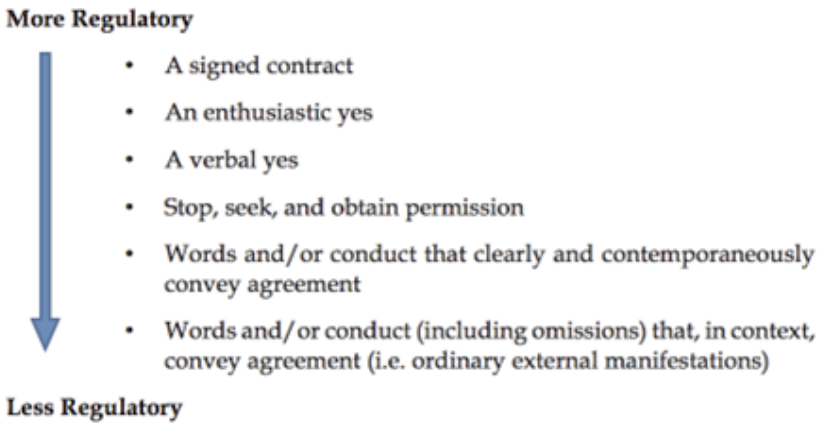

Figure 2: The Affirmative Consent Scale

The following Sections examine each formulation, starting with the most regulatory.

I. The Contract

The most restrictive construction of affirmative consent—the signed contract—is largely a product of the derisive discourse of reform opponents seeking to provoke ridicule of affirmative consent.[30] That said, it is not completely fallacious to invoke the sex contract image. Commentary on the web extolls the written sex contract as best practice.[31] On affirmative-consent.com, one can purchase "Affirmative Consent Kits" for $12.00, which include "Consent Contract Cards."[32] Website founder Alison Berke Morano told the press the cards are not a joke: "We're trying to change the conversation and make people more secure."[33]

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30 *See* Callie Beusman, *'Yes Means Yes' Laws Will Not Ruin Sex Forever, Despite Idiotic Fears*, Jezebel (Sept. 8, 2014), http://jezebel.com/yes-means-yes-laws-will-not-ruin-sex-forever-despite-i-1630704944 (accessed Feb. 8, 2022).

31 *See, e.g.*, Tamsen Butler, *Why You Should Use Sex Contracts*, Love to Know, http://dating.lovetoknow.com/Sex_Contracts (accessed Feb. 8, 2022).

32 *See 2015 Media Kit*, Affirmative Consent, at 5, http://affirmativeconsent.com/wp-content/uploads/2015/12/AffirmativeconsentPressKit1.pdf (accessed Feb. 8, 2022).

33 Blake Neff, *Sexual Consent Contracts Are Now A Real Thing You Can Buy*, Daily Caller (July 8, 2015), http://dailycaller.com/2015/07/08/sexual-consent-contracts-

II. An Enthusiastic Yes

The "enthusiastic yes" mantra is repeated in freshman orientations and enshrined in the feminist blogosphere.[34] Reflexive of the maligned no-means-yes trope, this requirement means that yes means no unless it is declared with alacrity.[35] One blogger opines:

> "Sex" is an evolving series of actions and interactions. You have to have the *enthusiastic consent* of your partner for all of them. And even if you have your partner's consent for a particular activity, you have to be prepared for it to change.... [I]f you want to have sex, you have to be continually in a state of enthusiastic consent with your partner.[36]

Requiring one to obtain perpetual enthusiasm is perhaps a higher burden than getting the signed contract.

III. Yes Means Yes

Prosecutors, reformers, activists, and college administrators frequently invoke this definition.[37] Nonetheless, even the reform-minded recognize

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are-now-a-real-thing-you-can-buy/#ixzz3udpy8nCO (accessed Feb. 8, 2022); *see also* Maura Lerner, *National Group Hopes to Stir Talk With Its Sex Consent Contracts*, Star Trib. (July 9, 2015), https://www.startribune.com/group-hopes-to-stir-talk-with-its-sex-consent-contracts/312694551/ (accessed Feb. 8, 2022).

34 *See* Cheryl Corley, *HBCUs Move To Address Campus Sexual Assaults, But Is It Enough?*, Nat'l Pub. Radio (Sept. 29, 2014), http://www.npr.org/2014/09/29/351534164/hbcus-move-to-address-campus-sexual-assaults-but-is-it-enough (accessed Feb. 8, 2022) (describing a Title IX hearing at Howard University where the administrator stated, "[r]epeat after me – an enthusiastic yes").

35 *See, e.g.*, Yale Univ., 2020 Annual Security Report 32 (2021), https://your.yale.edu/sites/default/files/files/PublicSafety/asr_2020.pdf (stating that the University directs students to "[h]old out for enthusiasm"); Elon Univ., Annual Security Report 8 (2013), https://web.archive.org/web/20160406014206/http://www.elon.edu/docs/e-web/bft/safety/Elon%20University%20ASR%202013.pdf (consent is "comprehensible, unambiguous, positive, and enthusiastic"); *see also* Gersen & Suk, *supra* note 13, at 924–30 (enthusiasm requirement).

36 Jaclyn Friedman, *Consent Is Not a Lightswitch*, amplify: Blog (Nov. 9, 2010), https://web.archive.org/web/20101119203249/http://www.amplifyyourvoice.org/u/Yes_Means_Yes/2010/11/9/Consent-Is-Not-A-Lightswitch (emphasis in original) (accessed Feb. 8, 2022).

37 Although most colleges do not require verbal consent, they counsel strongly in favor of it. *See, e.g.*, *Amherst College Sexual Misconduct and Harassment Policy*, Amherst Coll., https://web.archive.org/web/20160213023908/https://www.amherst.edu/offices/student-affairs/handbook/studentrights#StmtConsent (accessed

the problems with limiting consent communication to a single word. Thus, while "only yes means yes" is a catchy soundbite, many affirmative consent proponents allow for more variability.[38] In this view, the consent performance doesn't have to be "yes," but it does have parameters. An increasingly popular affirmative consent formulation is that a person like B must stop, ask, and obtain clear permission.

IV. Stop and Ask

The stop-and-ask approach appears frequently in university policies and scholarly discourse.[39] California's controversial affirmative consent law mandates that universities specify that "[i]t is the responsibility of each person involved in the sexual activity to ensure that he or she has the affir-

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Feb. 8, 2022) ("Relying on non-verbal communication can lead to misunderstandings.... In the absence of an outward demonstration, consent does not exist.").

38 *See The Johns Hopkins University Sexual Misconduct Policy and Procedures*, Johns Hopkins Univ., http:// sexualassault.jhu.edu/ policies-laws/ #Section%20III%20-%20Definitions (last visited Feb. 8, 2022) [hereinafter *Johns Hopkins Policy*] (accessed Feb. 8, 2022) (requiring "a clear 'yes,' verbal or otherwise").

39 *See, e.g.*, *Gender-Based Misconduct Policy and Procedures for Students*, Colum. Univ. 7 (Aug. 23, 2019), http://www.columbia.edu/cu/studentconduct/documents/GBMPolicyandProceduresforStudents.pdf (last visited Fed. 9, 2022) [hereinafter *Columbia Policy*] ("If there is confusion or ambiguity, participants in sexual activity need to stop and talk about each person's willingness to continue."); *Policy on Sexual and Gender-Based Harassment and Other Forms of Interpersonal Violence*, Univ. Va. 13 (July 1, 2015), https:// vpsa.virginia.edu/ sites/vpsa.virginia.edu/ files/ Title%20IX%20VAWA%20Umbrella%20Policy.pdf (last visited Feb. 9, 2022) ("stop and clarify"); *Student Sexual Misconduct Policy and Procedures: Duke's Commitment to Title IX*, Duke Univ., https://studentaffairs.duke.edu/conduct/z-policies/student-sexual-misconduct-policy-dukes-commitment-title-ix#consent (last visited Feb. 9, 2022) [hereinafter *Duke Policy*] (requirement to "stop[ ] and clarif[y], verbally, willingness to continue."); *Policy Prohibiting Discriminatory Harassment & Sexual Misconduct*, Wesleyan Univ., https://www.wesleyan.edu/studentaffairs/studenthandbook/university_policies/harassment-sexual-misconduct.html#top (last visited Feb. 9, 2022) [hereinafter *Wesleyan Code*] ("It is the responsibility of the person who wants to engage in sexual activity to ensure consent of their partner(s)."); *Administrative Guide: 1.7.1 Sexual Harassment*, Stan. U. (Nov. 4, 2020), https://adminguide.stanford.edu/chapter-1/subchapter-7/policy-1-7-1#:~:text=Prohibited%20Sexual%20Conduct%20is%20the,forms%20of%20Prohibited%20Sexual%20Conduct [hereinafter *Stanford Policy*] ("It is the responsibility of each person involved in the sexual activity to ensure that the person has the Affirmative Consent of the other or others to engage in the sexual activity.").

mative consent of the other or others to engage in the sexual activity."[40] Alarmist opponents call it the sex contract.[41] Defenders say that the law merely demands consent in its ordinary sense.[42] However, the more logical interpretation is that it requires a stop-and-ask ritual.

Under the California law, the sex proponent must take "reasonable steps... to ascertain" and then "ensure" affirmative consent.[43] The "ensure" language appears to obligate sex proponents, before and frequently during foreplay, to stop and ask for permission, something like, "Do you want to do it?," or as one public-awareness video counsels, "Do you want to bump and grind with me?"[44] The sex acceptor must then give an indication of permission, perhaps a thumbs up or "I would really like to bump and grind with you."[45] Some of the stop-and-ask scripts offered by college administrators verge on the humorous. One university pamphlet, "Making Consent Fun," suggests questions like, "Would you like to try an Australian kiss? It's like a French kiss, but 'Down Under.'"[46] This illustrates the difficulty in formulating an enlightened-but-sexy consent script.

V. Clear and Contemporaneous Consent

Many sexual consent policies do not require magic words or an ask-and-answer, but they do demand "clear" agreement specific to each individual sexual act.[47] When pressed, commentators have difficulty identifying the

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40 S.B. 967, 2014 Leg., 2013–2014 Reg. Sess. (Cal. 2014). The name of the bill is "Student Safety: Sexual Assault," but it is widely referred to as the "Affirmative Consent" or even "Yes-Means-Yes" bill.

41 *See, e.g.*, Beusman, *supra* note 30; Yehuda Remer, *California To Redefine Sex As Rape*, Truth Revolt (Mar. 10, 2014), https://web.archive.org/web/20140313090256/http://www.truthrevolt.org/news/california-redefine-sex-rape (last visited Feb. 9, 2022).

42 *See, e.g.*, Beusman, *supra* note 30.

43 S.B. 967; *see also Wesleyan Code*, *supra* note 39 (using the word "ensure").

44 SAVP Vassar, *How do I Ask For Consent?*, YouTube (Apr. 29, 2014), https://www.youtube.com/watch?v=vbyaFyr2h6Q (accessed Feb. 9, 2022).

45 *Id.*

46 *Consent*, Univ. Wyo., http://www.uwyo.edu/reportit/learn-more/consent.html (last visited Feb. 8, 2022). See Gersen & Suk, *supra* note 13, at 928–29 for more examples.

47 *See, e.g.*, *Prohibited Bias, Discrimination, Harassment, and Sexual and Related Misconduct*, Cornell Univ. 14, https://policy.cornell.edu/sites/default/files/vol6_4.pdf (accessed Feb. 9, 2022) (defining affirmative consent as "words or actions [that] create clear permission"); *Sexual Misconduct, Intimate Partner Violence, and*

line between foreplay that expresses consent to just that foreplay and foreplay that expresses consent to more intimate acts. But they are clear that only a *subset* of sexual behaviors express consent to penetration or oral sex. Many agree that "kissing alone" is not consent to penetration but leave vague what is.[48] Most university policies require a specific (although unspecified) consent expression to "each act," indicating escalating intimacy is not enough.[49]

Another specification is that past consent does not "imply" present consent.[50] In interpreting external manifestations (i.e., kissing and petting), sex proponents may consider the immediate context (the sex acceptor said, "Take the lead tonight") but not past evidence (on ten previous occasions, petting led to sex). Most policies do not render past intimacy and relationship irrelevant, but they specify that they are minimally "indicative" of consent, if at all.[51] Thus, the external manifestations must be the type that

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Stalking, Univ. Colo. (Sept. 2, 2021) 15, https://www.cu.edu/sites/default/files/aps/79746-aps-5014-sexual-misconduct-intimate-partner-violence-and-stalking/aps/5014.pdf [hereinafter *Colorado Policy*] ("unambiguous... agreement"); *Sexual Respect: Definitions*, Dartmouth Coll., https://web.archive.org/web/20180109120523/www.dartmouth.edu/sexualrespect/definitions.html (last updated Feb. 3, 2015) ("clear and unambiguous agreement, expressed in mutually understandable words or action"); *Yale Sexual Misconduct Policies and Related Definitions*, Yale Univ., http://smr.yale.edu/sexual-misconduct-policies-and-definitions (last updated Aug. 12, 2020) ("unambiguous... agreement"); *see also* Stephen J. Schulhofer, Unwanted Sex: the Culture of Intimidation and the Failure of Law 271 (1998) (advocating "permission... clearly communicated").

48 *See, e.g.*, *Columbia Policy*, *supra* note 39, at 10 ("Consent to one form of sexual activity does not imply consent to other forms of sexual activity.").

49 *See, e.g.*, *Sexual and Gender-Based Harassment, Sexual Violence, Relationship and Interpersonal Violence and Stalking Policy*, Brown Univ. 7 (Sept. 2, 2016), https://www.brown.edu/about/administration/title-ix/sites/brown.edu.about.administration.title-ix/files/uploads/policy-final-sept-16.pdf [hereinafter *Brown Policy*] (affirmative consent to "each instance of sexual contact"); Michelle J. Anderson, *Negotiating Sex*, 78 S. Cal. L. Rev. 1401, 1420 (2005).

50 *See Brown Policy*, *supra* note 49, at 7 (past or present relationship does not necessarily imply consent); *University of Chicago Policy on Harassment, Discrimination, and Sexual Misconduct*, Univ. Chi., https://harassmentpolicy.uchicago.edu/policy/ (accessed Feb. 9, 2022) [hereinafter *Chicago Policy*]; *Stanford Policy*, *supra* note 39; sources cited *supra* note 49 (consent to one act is not consent to another).

51 *Compare Chicago Policy*, *supra* note 50 (sexual relationship does not "in and of itself" constitute consent), *and Stanford Policy*, *supra* note 39 (dating relationship does not "by itself" indicate consent), *with Colorado Policy*, *supra* note 47, at 15 (previous and current sexual relationships "do not imply consent"), *and Columbia Policy*, *supra* note 39, at 10.

would clearly convey consent to a stranger, even if the sex is within a years-long relationship.[52]

A related concept is that affirmative consent must be "continuous," "persistent," or "ongoing."[53] In terms of internal consent, continuous agreement is epistemologically problematic if it renders sex nonconsensual whenever a person has a fleeting second thought. The requirement of ongoing external consent is similarly confounding. What exactly does a continuous communication of agreement look, or sound, like? The requirements of ongoing consent and consent to each act are thus frequently understood as the necessity to clearly and unambiguously express agreement to some *critical* acts (penetration, oral sex)[54] but not others (touching a breast?).

Having examined the various formulations of affirmative consent, let us now turn to normative debate over the desirability of affirmative consent.

D. The Affirmative Consent Debate

There is considerable confusion in the normative debate over affirmative consent. The justifications and criticisms sometimes assume strong and sometimes assume weak versions of the standard. Debaters frequently make self-contradictory claims. For example, proponents justify the rule because it simply codifies actual sexual practice and because it is an admittedly aspirational standard that is necessary to provoke "cultural change." This Part catalogues and analyzes the affirmative consent debate. A caveat is that the level of persuasiveness of pro and con claims is also a function of which affirmative consent formulation and which legal forum (college, civil, criminal) the claimant assumes.[55] There are four types of debates: empirical, aspirational, retributive, and distributional.

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52 *See Columbia Policy*, *supra* note 39, at 10 ("The definition of consent does not vary based upon... relationship status.").

53 *See, e.g.*, S.B. 967, 2014 Leg., 2013–2014 Reg. Sess. (Cal. 2014) ("Affirmative consent must be ongoing throughout a sexual activity"); *Johns Hopkins Policy*, *supra* note 38; *Sexual Harassment, Sexual Assault, Stalking and Relationship Violence*, Univ. Minn., https://policy.umn.edu/hr/sexharassassault (accessed Feb. 9, 2022) [hereinafter *Minnesota Policy*]; *Stanford Policy*, *supra* note 39.

54 Thus "ongoing" is used in counter-distinction to irrevocable. *See, e.g.*, *Stanford Policy*, *supra* note 39 ("Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time.").

55 I do not probe the distinction between college discipline and criminal prosecution here.

I. The Empirical Argument: Affirmative Consent Reflects Sexual Practice

Affirmative consent proponents argue that decision-makers, due to bias or mistake, regard too wide a range of manifestations as indicating willingness.[56] There are undoubtedly some prejudiced jurors who ignore the consent requirement when a woman "asks for it." However, such a juror would also ignore an affirmative-consent requirement.[57] Thus, proponents more likely have in mind decision-makers who mistakenly assess external manifestations due to inaccurate and sexist background beliefs. Reformers contend that people do not say "no" when they mean "yes;" they move from foreplay to sex only after forthright discussion; and people consent actively not passively.[58] One scholar pronounced it a "myth" that "'no' does not *always* mean 'no.'"[59]

In promoting their views of the empirical world of sex, activists sometimes play fast-and-loose with social science. Stop-and-ask proponent Michelle Anderson argues that negotiation before sex reflects prevailing "social and sexual mores."[60] Anderson bases this conclusion on a national survey of young adults' sexual health, which asked: "Thinking about your current sexual or most recent sexual *relationship*, have you *ever* talked to your partner about what you feel comfortable doing sexually?," to which the majority answered affirmatively.[61] But the fact that young people in relationships at some point talk about sex says very little about how people, strangers or familiars, communicate consent on a specific occasion. The

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56 *See, e.g.*, Beatrice Diehl, Note, *Affirmative Consent in Sexual Assault: Prosecutors' Duty*, 28 Geo. J. Legal Ethics 503, 508 (2015) (affirmative consent standard will combat jurors' adherence to "myths about rape"); *see also supra* note 7 and accompanying text.

57 Social science indicates that jurors' belief systems are more predictive of outcomes in mistaken consent cases than the breadth of the legal definition of consent. *See* Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. Pa. L. Rev. 729 (2010); *see also* Bryden, *supra* note 28, at 417.

58 *See* Schulhofer, *supra* note 8, at 670 (characterizing open communication as normal).

59 Diehl, *supra* note 56, at 508.

60 Anderson, *supra* note 49, at 1433.

61 *Id.* (citing Henry J. Kaiser Family Found., National Survey of Adolescents and Young Adults: Sexual Health Knowledge, Attitudes and Experiences 19 tbl.13 (2003), http://www.kff.org/youthhivstds/3218-index.cfm).

author also speculates that escalating foreplay does not indicate consent to penetration because people engage in foreplay to *avoid* penetration.[62]

Despite this kitchen-sink style of determining sexual communication practices, there is an empirical field of sexuality studies where researchers carefully design studies to measure how people negotiate sex. The studies make clear that the typical way young people express sexual intent is *not* by open verbal communication.[63] Surveying the literature, sociologists Terry Humphreys and Mélanie Brousseau observe: "Numerous studies have demonstrated that the preferred approach to signal consent for both women and men tends to be nonverbal instead of verbal."[64] Even agreement to genital penetration often does not resemble ask-and-answer. Sexual consent signaling is frequently passive: "[M]any men and women passively indicate their consent to sexual intercourse by not resisting, such as allowing themselves to be undressed by their partner, not saying no, or not stopping their partner's advances."[65] This reticence is undergirded by troubling gender dynamics.[66] Studies show that young people adhere to "traditional" sexual scripts in which men initiate and women act as "gatekeepers."[67] Women are keenly aware of the social costs of breaking from the traditional script and engaging in the "wrong" kind of sexual

62 Anderson, *supra* note 49, at 1420 (citing Lisa Remez, *Oral Sex among Adolescents: Is It Sex or Is It Abstinence?*, 32 Fam. Plan. Persp. 298, 298–301 (2000)) ("The more diverse the sexual experiences people participate in – experiences that deliberately do not include vaginal or anal penetration – the less those experiences suggest consent to vaginal or anal penetration.").

63 Many of the studies do not claim to describe the dynamics of same-sex sexual communication. *See* Humphreys & Brousseau, *supra* note 21, at 421.

64 *Id.* (citing studies); *see also* Terry P. Humphreys, *Understanding Sexual Consent: An Empirical Investigation of the Normative Script for Young Heterosexual Adults*, *in* Making Sense of Sexual Consent, 209 (Mark Cowling & Paul Reynolds eds., 2004); David S. Hall, *Consent for Sexual Behavior in a College Student Population*, 1 Elec. J. Hum. Sexuality, Aug. 10, 1998, http://www.ejhs.org/volume1/consent1.htm; Lucia F. O'Sullivan & E. Sandra Byers, *College Students' Incorporation of Initiator and Restrictor Roles in Sexual Dating Interactions*, 29 J. Sex Rsch. 435 (1992).

65 *See* Humphreys & Brousseau, *supra* note 21, at 421 (citing Hall, *supra* note 64).

66 These differentials may not be so pronounced in other countries. *See* Sprecher et al., *supra* note 15, at 130.

67 Hickman & Muehlenhard, *supra* note 21, at 259 (citing studies); Annika M. Johnson & Stephanie M. Hoover, *The Potential of Sexual Consent Interventions on College Campuses: A Literature Review on the Barriers to Establishing Affirmative Sexual Consent*, 4 PURE Insights, 2015, http://digitalcommons.wou.edu/cgi/viewcontent.cgi?article=1050&context=pure (citing studies).

communication.[68] Because of this, "token resistance," that is, communicating refusal when one is willing, continues to be a significant practice.[69]

II. The Aspirational Argument: Affirmative Consent Is a Crucial Objective

Given the scant evidence that sexual communication is affirmative, proponents alternatively argue that it *should be* and that the law can enable the shift toward an edified consent script, involving open negotiation, overt agreement, and frequent double-checking.[70] Of course, "sex positive" commentators regard this as dystopian and argue we should not use state carceral power to stamp out sexual ambiguity.[71] But many progressives rightly regard traditional sexual communication not as ambiguous and fun but as dangerous and sexist.[72] Many affirmative-consent critics agree that best sexual practices involve clear communication.[73] They too hope that sexual conventions will change over time. The debate is over whether criminal law (or college discipline) is the way to achieve this transforma-

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68 *See* Michael W. Wiederman, *The Gendered Nature of Sexual Scripts*, 13 Fam. J. 496 (2005).

69 For a fascinating retrospective on the study of "token resistance," see Charlene L. Muehlenhard, *Examining Stereotypes About Token Resistance to Sex*, 35 Psych. Women Q. 676 (2011); *see also* Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes?*, 54 J. Personality & Soc. Psych. 872 (1988); O'Sullivan & Allgeier, *supra* note 15.

70 *See, e.g.*, Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 Vand. L. Rev. 1321, 1356 (2005) (drawing analogy to civil rights laws that "led popular culture").

71 *See, e.g.*, Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 Colum. L. Rev. 181, 206–07 (2001) ("[T]o evacuate women's sexuality of any risk of a confrontation with shame, loss of control, or objectification strikes me as selling women a sanitized, meager simulacrum of sex"); *see also* Schulhofer, *supra* note 47, at 272 ("A world without ambiguity in erotic interaction might be a very dull place."). *See generally* Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. Rev. 89 (2014).

72 *See* Franke, *supra* note 71, at 208; Gruber, *supra* note 5, at 635 & n.297 (affirmative consent envisions male sex proponents).

73 *See, e.g.*, Cathy Young, *Campus Rape: The Problem with 'Yes Means Yes'*, Time (Aug. 29, 2014), http://time.com/3222176/campus-rape-the-problem-with-yes-means-yes (accessed Feb. 9, 2022) (stating that "[n]o one could oppose" affirmative consent's goals of enthusiasm and mutual desire).

tion.[74] Regulatory affirmative consent laws make wide swaths of the public subject to criminalization in the quest to change culture. Some proponents are candid that ordinary sexual actors will be sacrificial lambs.[75] One opines: "The Yes Means Yes law creates an equilibrium where too much counts as sexual assault. Bad as it is, that's a necessary change. [The] culture... isn't going to be dislodged with a gentle nudge."[76]

One should, however, be wary of the punitive impulse that criminalization is the best tool of social change.[77] In fact, people react poorly to criminalization of "ordinary" behavior, and laws that "nudge" a culture at a tipping point are far more effective than laws seeking to "shove" radical changes.[78] In fact, shoves may produce backlash. Indeed, sexual communicative norms, especially among young people in their formative sexual years, are deeply psychological and socially entrenched.[79] Such norms are likely to be "sticky" and resistant to change, even in the face of the prosecution of a selection of those who abide by the norms.[80] Proponents rejoin that it is "easy" for people to comply with affirmative consent.[81] However, social science indicates that people—especially young people—have strong incentives to eschew direct expression of sexual desire to "save face" in the

74 *See* Judith Shulevitz, Opinion, *Regulating Sex*, N.Y. Times (June 27, 2015), http://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html?r=0 (accessed Feb. 9, 2022).

75 *See* Ezra Klein, *"Yes Means Yes" is a Terrible Law, and I Completely Support It*, Vox (Oct. 13, 2014), https://www.vox.com/2014/10/13/6966847/yes-means-yes-is-a-terrible-bill-and-i-completely-support-it (accessed Feb. 9, 2022); Little, *supra* note 70, at 1356; Schulhofer, *supra* note 8, at 679 ("[U]sing criminal law to discredit harmful social norms can be fair and effective.").

76 Klein, *supra* note 75.

77 *See* Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. Miami L. Rev. 961 (2014).

78 *See* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. Chi. L. Rev. 607, 607 (2000); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 Colum. L. Rev. 1780, 1805 (1992).

79 *See supra* notes 63–69 and accompanying text.

80 *See* Kahan, *supra* note 78. In addition, the more artificial the script, the less likely it is that there will be widespread enforcement by officials. *Id.*

81 *See, e.g.*, Schulhofer, *supra* note 8, at 671–72; Rebekah Kuschmider, *Ask a Feminist: Affirmative Consent. What Is It?*, Huff. Post: Impact (last updated Oct. 29, 2016), http://www.huffingtonpost.com/ravishly/ask-a-feminist-affirmative-consent-what-is-it_b_8153606.html (accessed Feb. 9, 2022) ("[Affirmative consent] can be easy, sexy, not awkward.").

event of rejection.[82] Indeed, one wonders why harsh criminal sanctions would be necessary to compel people to do that which is so easy to do.[83]

Experience shows that decision-makers will use discretion to temper the power conferred by broad criminal laws. The expansive criminal codes in the U.S. outlaw many acts routinely performed by ordinary people (e.g., loitering and trespass). In mediating broad penal power, police and prosecutors tend to apply their authority to the "usual suspects"—poor people of color.[84] In turn, the majority of citizens remain blissfully unaffected by the massive criminal regulatory regime because its negative effects fall on a marginalized segment of society.[85] If strict affirmative-consent laws follow this familiar pattern, only the marginalized will be prosecuted for "yes"-less sex, and the rest of society will have little incentive to break from psychologically entrenched sexual communication practices.[86]

III. The Retributive Argument: Affirmative Consent Is Morally Required

Opponents of affirmative consent argue that it is morally impermissible to sacrifice "innocents" —those who act within current norms—in the quest to secure utopian sexual communication.[87] Proponents respond by summarily declaring that sex without affirmative consent is wrongful, and

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82 Humphreys & Brousseau, *supra* note 21, at 422 (citing studies).

83 *See supra* Part II.

84 *See* Dorothy E. Roberts, Foreword, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. Crim. L. & Criminology 775 (1999).

85 *See* William J. Stuntz, *Unequal Justice*, 121 Harv. L. Rev. 1969, 2012 (2008); Loïc Wacquant, *Race as Civic Felony*, 57 Int'l Soc. Sci. J. 127, 128 (2005). As for all violent crimes, the proportion of blacks arrested for sexual offenses far exceeds the proportion of blacks in society. *See Crime in the United States 2012*, FBI: UCR, https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/43tabledatadecoverviewpdf (accessed Feb. 9, 2022).

86 Even if not discriminatorily applied, affirmative consent is unlikely to change norms. *See* Johnson & Hoover, *supra* note 67 (discussing studies indicating that directives on consent are ineffective because people interpret the term "consent" variably); Humphreys, *supra* note 64 (noting that a decade of affirmative consent in Canadian criminal law has not changed the entrenched sexual script).

87 *See* Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape*, 4 Wm. & Mary J. Women & L. 203, 206 (1997); Douglas N. Husak & George C. Thomas III, *Rapes Without Rapists: Consent and Reasonable Mistake*, 11 Phil. Issues 86, 107 (2001).

those who impose it are morally culpable.[88] To be sure, the slipperiness of retributivism allows lawmakers to declare all kinds of behaviors "wrongful" and all manner of high sentences "deserved." Critics of retributivism argue that it propelled the United States to become the world's biggest imprisoner.[89] Still, retributivists reject that one can simply declare a behavior wrongful to hide that the behavior is being regulated in service of an end.

Retributivist penal theorists argue that the crux of nonconsenual (and therefore wrongful) sex is unwillingness, and defendants are culpable only when they intend to have sex against another's will.[90] They argue that defendants who reasonably—or even honestly—believe that sex is wanted are not culpable, regardless of the consent performance.[91] For the law to hold otherwise, they assert, is to criminally punish the non-culpable to satisfy some other regulatory aim, which is morally repugnant.[92] A legislature might, for example, prohibit "sex during college" in an effort to curb unwanted sex. Most would concede that having sex during college is not wrongful. Similarly, many would scoff at the idea that two people who actively engage in mutually desired sex are *both* culpable because neither procured a verbal "yes."[93]

Affirmative-consent proponents contend alternatively that sex without affirmative consent is not itself immoral, but failure to get a yes *culpably risks* nonconsensual sex. In this view, failure to procure affirmative consent is like speeding or drunk driving: the law can regulate it even when it does not produce harm. But many theorists question the government's power to criminalize when the actor neither causes nor intends harm. Affirmative consent changes the risk question from whether a reasonable person would foresee an unacceptable risk that the sex is unwanted to whether the defendant violated a bright-line rule based on reformers' predeterminations of unacceptably risky behavior. Any sex risks unwanted sex, just as

88 *See, e.g.*, Lois Pineau, *Date Rape: A Feminist Analysis*, 8 L. & Phil. 217, 238–39 (1989) (a "communicative approach" to sex is "morally required").

89 *See* Kyron Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 Mich. L. Rev. 811, 812 (2002).

90 *See* Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 Ohio St. J. Crim. L. 397 (2016).

91 *See id.* at 416; Husak & Thomas, *supra* note 87, at 107–08; *supra* Section I.C.

92 *See* Kimberly Kessler Ferzan, *A Reckless Response to Rape: A Reply to Ayres and Baker*, 39 U.C. Davis L. Rev. 637, 641 (2006).

93 Feminist commentators often assume the criminal prohibition against uncommunicative sex will be applied only to men. *See, e.g.*, Pineau, *supra* note 88, at 239–40 (advocating criminalizing lack of "communicative sexuality" to entrench a "norm of sex to which a reasonable woman would agree").

any driving risks an accident. Is sex-without-a-yes like driving with a blood alcohol level of . 01% or.09 %?

IV. The Distributional Argument: Affirmative Consent Produces Distributive Justice

The final set of arguments in favor of affirmative consent is legal realist in nature: the arguments assert that the law "in action" does not punish people who reasonably believed sex was consensual but did not get a "yes." The reform simply gives prosecutors another tool to go after "real rapists"—those who intentionally force sex or have sex against a person's will. Reformers often simply assume that their proposals will have the effects they intend them to have,[94] so the effort of affirmative consent proponents to trace the effects of nascent reform is positive.[95] However, most of these tracing projects are less about finding out the effects of the affirmative-consent standard and more about *defending* it against criticism that it gives broad authority to the state to prosecute anyone whose sexual communications were not perfect. Affirmative consent proponents maintain that the standard will not lead to more reporting of cases or close cases, and if it does, prosecutors will weed them out.[96]

Strangely, this argument rationalizes affirmative consent laws on the ground that they will *not* be followed. And it seems to conflict with the argument that reform is needed to increase reporting and control recalcitrant police and prosecutors. Nevertheless, proponents say that the standard will increase the *right* kind of reporting and prosecutions. In the status quo, the argument goes, women fail to report forcible and nonconsensual rapes because of embarrassment, fear, traumatization, or other structural barriers. Police and prosecutors decline to pursue cases because of prejudice or concern about losing. Juries acquit because of error

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94 *See* Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 Fordham L. Rev. 3211, 3229–30 (2015); Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, Harv. J. L. & Gender 335, 336 (2006).

95 *See, e.g.*, Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 Akron L. Rev. 957, 979 (2008) (considering how a "sex crimes" court might distribute costs and benefits); Deborah Tuerkheimer, *Affirmative Consent*, 13 Ohio St. J. Crim. L. 441 (2016).

96 *See, e.g.*, Tuerkheimer, *supra* note 95, at 464–68 (fears about "miscommunication" cases are overblown).

or sexism.[97] Affirmative consent standards will encourage these victims to report, these police and prosecutors to pursue cases, and these juries to convict. The net result is more frequent prosecutions and convictions in clear, but not in questionable, rape cases.

Will affirmative consent work out this way? We probably will never get a satisfying empirical evidence answer. Forcible and nonconsensual rapes are already fully criminalized without affirmative consent. Victims of these rapes fail to report because of structural barriers, not for lack of criminalization, and they would continue to face such barriers regardless of affirmative-consent reform. An affirmative-consent law is therefore likely to affect a different class of potential reporters: those who experience questionably consensual sex. Studies reveal that people do not report sex without affirmative consent because they do not see them as "rapes." Affirmative consent laws may have the effect of persuading such victims and/or the people they consult with that sex without enthusiastic consent *is* serious enough to report. Consider this scenario:

A: "B and I were making out heavily, and I just went along with sex. I'm not sure what to do, but it doesn't seem right."

A's Friend: "B did not ask for permission. You did not say yes. That is *rape*, and you should report it."

Encouragement increases reporting, so let us assume A reports.[98] This is obviously a great result for reformers who want to increase reporting of ambiguous consent.[99] However, it runs directly counter to the contention that affirmative consent will *not* increase reporting and prosecution of miscommunication cases. Indeed, some proponents say affirmative consent increases reporting because it signals to victims that they will be believed, will not be "put on trial," and will obtain a favorable outcome. But this incentive structure applies to victims in clear and ambiguous cases alike.[100]

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97 *See supra* notes 56–57 and accompanying text.

98 *See* Lisa A. Paul et al., *Does Encouragement by Others Increase Rape Reporting? Findings from a National Sample of Women*, 38 Psych. Women Q. 222 (2013); *but see* Bryden, *supra* note 28, at 422 (arguing that affirmative consent will not greatly increase reporting because of social norms).

99 Of course, feminists would perhaps not want reporting if we imagine A as a male and B as a female. *See supra* note 11.

100 *Cf.* Ashe Schow, *Student Newspaper Just Fine with False Accusations*, Wash. Exam'r (Oct. 22, 2015, 1:59 PM), http://www.washingtonexaminer.com/student-news-

Some suggest that prosecutors will use their discretion to weed out such cases. Professor Deborah Tuerkheimer, for example, canvassed published appellate cases[101] and found that the term "affirmative consent" cropped up, not in ambiguous consent situations, but in incidents involving force, intoxication, and unconsciousness.[102] This suggests that despite the law, prosecutors continued to pursue only clear force and nonconsent cases. One must, however, exercise caution in drawing conclusions from the fact that the few appeals all involved "traditional" rape scenarios. This may just mean that the ambiguous cases pled out or were not appealed. In any case, one of affirmative consent reform's express aims is to encourage prosecutors to pursue cases they otherwise would not, but one can only speculate on whether this happens.[103]

So let me speculate. Assume that a jurisdiction makes it a low-level felony to have sex without stopping and asking for permission. The law might operate as prosecutorial power often does—compelling defendants in close cases to forego trial and plead guilty. Thus, if evidence of force, coercion, intoxication, or nonconsent is weak, the prosecution can bring up the conviction-friendly affirmative consent law to induce a plea.[104] Whether this is good or bad depends on whether one thinks prosecutors *should* induce pleas in highly contestable cases.

The second possibility is that prosecutors will use the new authority to pursue a subset of ambiguous consent cases. Charges will arise when the prosecutor instinctively views the defendant as "a bad guy" and the victim as a credible "good girl" or when the victim is particularly vehement. These prosecutions might meaningfully overlap with the type of cases reformers think should be pursued, but they might not. Prosecutors' views of true criminality may be influenced more by racial and socioeconomic

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paper-just-fine-with-false-accusations/article/2574703 (discussing student newspaper's claim that false accusation is a justified cost of increased reporting).

101 Tuerkheimer included all jurisdictions whose rape statutes plausibly required performative consent. Tuerkheimer, *supra* note 95, at 447–51.

102 *Id.* at 451–52; *see* David P. Bryden, *Reason and Guesswork in the Definition of Rape*, 3 Buff. Crim. L. Rev. 585, 591 (2000) (noting "danger" that affirmative consent will lower the burden of proof in serious cases).

103 *See* Diehl, *supra* note 56, at 507 (prosecutors have a duty to strictly enforce affirmative consent to educate an "unaware" society about "acceptable sexual behavior").

104 Prosecutors can also take weak force or intoxication cases to trial, with lack of affirmative consent as a fall back.

characteristics than by the nature of the event.[105] Similarly, assessments of victims' credibility may involve race, class, and gender stereotyping. Moreover, the most vehement victims may also be the most biased and uncredible.[106] It is true that these are problems of prosecutorial discretion in general, not just affirmative consent prosecutions; however, rape reformers should not get a "free pass" to write off the problems of the U.S. penal system, especially when creating new and broad carceral authority.

Affirmative consent proponents have faith that the standard will lead to more prosecutions of clear cases of nonconsent, although the law *establishes* lack-of-affirmative-consent cases as "clear" cases. They have faith that reform will produce a yes-means-yes culture without punishing innocents and disproportionately burdening the marginalized. But "faith" is the correct word because there is no reason to believe that this is happening. Consequently, while all thoughtful law reformers should endeavor to determine whether their reform does what it says, affirmative consent proponents are in the strange position of speculating on the effects of the rule, despite what it says.[107]

E. Conclusion

I hope the reader now better understands what policy makers and public intellectuals mean when they tout or reject "affirmative consent" and the types of arguments and counterarguments that follow. This understanding is critical at a moment when the debate over rape law, on each side of the political fence, has a say-anything-for-the-sake-of-argument feel. I also hope I have shed a skeptical light on the virtual consensus that consent is the best framework for rape law. Situating affirmative-consent reform as

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105 *See* Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 Ariz. L. Rev. 305, 360 (2009); Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 Cornell L. Rev. 1811, 1815, 1819–20 (1998) (both discussing race and prosecutorial discretion in capital punishment); *see also* Bryden, *supra* note 102, at 591 (postulating that affirmative consent might lead to discriminatory enforcement).

106 *See* Lynne Henderson, Commentary, *Co-opting Compassion: The Federal Victim's Rights Amendment*, 10 St. Thomas L. Rev. 579, 584 (1998) ("'Victims' are 'blameless,' innocent, usually attractive, middle class, and white.").

107 *But see* Diehl, *supra* note 56, at 507 (urging prosecutors to use affirmative consent to prosecute ambiguous cases).

a mere means to improving the liberal consent inquiry has obscured the very motivations behind rape reform—the empirical and normative beliefs about how sex happens, how it should happen, the benefits and harms of sex, and the role of criminal law in regulating sexuality. This chapter brought those claims into the open, where they should be, as a preface to a clear, communicative, and unambiguous negotiation over the content of rape law.[108]

108 Recently, I was speaking to a student about an affirmative consent paper topic. She said: "I want to argue that affirmative consent is a straightforward standard from contract law that simply requires agreement." So I asked her what actions or communications would constitute such agreement. Concerned, she replied: "If I were to get into that I'd have to talk about sex."

Of Nagging and Guilt-Tripping. Lack of Consent in One's Own Activities?

Nora Scheidegger

A. Introduction: "New law makes new cases"

In recent years, many countries have replaced their outdated rape law with sex offenses that better correspond to the reconceptualization of rape and other sexual offenses as violations of a person's sexual autonomy. As a consequence, consent has replaced the element of force as the focal point of rape law in many jurisdictions.[1] There is little question that nonconsensual sexual interactions have rightly become the focus of the criminal justice system. However, the shift to a consent model has prompted new discussions about the limits of acceptable sexual behavior and acceptable sex regulation. Recent legal developments in rape law have made it possible to critically evaluate so called "grey areas" or "new" problematic behaviors in sexual relationships and sometimes reconstruct such behaviors as rape (or another offense).[2] One example for such a "new" problematic behavior is "stealthing" and other cases of sex-by-deception.[3] In the German criminal law doctrine, for example, the phenomenon of stealthing was not addressed before the reform of 2016. Only the shift to a consent model has allowed for discussions about whether or not stealthing should fall under the new "no-means-no"-statute in § 177 sec. 1 of the German criminal code.[4]

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1 See e.g., Amnesty International, *Europe: Spain to become tenth country in Europe to define rape as sex without consent* (3 March 2020), https://www.amnesty.org/en/latest/news/2020/03/europe-spain-yes-means-yes/.

2 See also Elise Woodard, *Bad Sex and Consent*, in The Palgrave Handbook of Sexual Ethics, 301–324 (David Boonin, ed. 2022) (arguing that we need more fine-grained tools for classifying sex that is not morally neutral yet does not constitute rape).

3 Alexandra Brodsky, *"Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal*, 32 Colum. J. Gender & L. 183–210 (2017). See also Nora Scheidegger, *Balancing Sexual Autonomy, Responsibility, and the Right to Privacy: Principles for Criminalizing Sex by Deception*, 22 German Law Journal 769–783 (2021).

4 See e.g., Kim Philip Linoh & Nico Wettmann, *Sexuelle Interaktionen als objektuale Vertrauensbeziehung, Eine juristisch-soziologische Untersuchung des Phänomens Stealt-*

Another "new" problem that has presented itself in legal scholarship and practice is a phenomenon for which in Sweden the term "nagging sex" ("tjatsex") has been established.[5] "Nagging sex" is used for sexual interactions that were preceded by nagging and/or other forms of non-violent verbal pressure, eventually leading to consent.[6] A similar phenomenon, which is often discussed in online forums, is "guilt-tripping" (for example: "if you really loved me, you would have sex with me").[7] Thus, the issue is not with coercion in a classical sense, but with the "usual" sorts of pressures and manipulations that are a typical part of life in other areas as well. People frequently use several types or forms of verbal pressure to obtain sex from an initially refusing partner,[8] namely "(…) telling a woman that her refusal to have sex was changing the way they felt about her; asserting that 'everybody does it' or questioning the woman's sexuality (…) making the woman feel guilty; (…) pushing her away when she would not have sex (…)."[9] The question arises as to how the law ought to treat these unpleasant techniques people sometimes employ to "seduce" reluctant partners.

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hing, ZIS 2020, 383–396; Johannes Makepeace, *"I'm not sure this is rape, but…" – Zur Strafbarkeit von "Stealthing" nach dem neuen Sexualstrafrecht*, KriPoZ 2021, 10–15. Moritz Denzel & Renato Kramer da Fonseca Calixto, *Strafbarkeit und Strafwürdigkeit der sexuellen Täuschung*, KriPoZ 2019, 347–354.

5 Linnea Wegerstad, *Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden*, 22 German Law Journal 734, 745 (2021).

6 See e.g., Tomas Stark, *Tingsrätten: "Tjatsex är inte våldtäkt"*, mitti, 11.11.2021 (discussing a Swedish case) (https://www.mitti.se/nyheter/tingsratten-tjatsex-ar-inte-valdtakt/repuim!mtYBwnpenQzLd4TzNUIxWg/).

7 See e.g., Crystal Raypole, *What Does Sexual Coercion Look Like?* Healthline, 1.12.2020 www.healthline.com/health/sexual-coercion ("Common coercion tactics include: guilt-tripping, making threats... ").

8 See e.g., Brandie Pugh & Patricia Becker, *Exploring Definitions and Prevalence of Verbal Sexual Coercion and Its Relationship to Consent to Unwanted Sex: Implications for Affirmative Consent Standards on College Campuses,* 8 Behav. Sci. 69 (2018) ("Both men and women report that some men utilize coercive tactics, ranging from complimenting women and indicating how turned on they are, asking repeatedly, and trying to convince, or yelling/getting angry (…) to obtain sexual compliance.").

9 Charlene L. Muelenhard & Jennifer Shrag, *Nonviolent Sexual Coercion*, in Acquaintance Rape, the Hidden Crime 115, 122 (Andrea Parrot & Laurie Bechhofer eds., 1991) (discussing "verbal sexual coercion").

B. Two Cases

The following cases are presented here to help illustrate the legal difficulties that arise in the context of so-called "nagging sex":

The Surgeon:[10] Surgeon A and nurse B work in the same hospital. A as a Surgeon is (at least factually) in a position of power towards nurse B. They start an affair and have consensual sexual relations various times. One day, A demands oral sex from B, which B refuses. A keeps insisting verbally and by trying to guide B's hands towards his penis. Eventually, B performs oral sex on A for a few moments.[11]
The Date:[12] A and B go out together and end up at A's place. They start making out, even though B is not very comfortable with the pace of things going. A suggests having sex, B declines and goes to the bathroom. A few moments later B returns and says: "I don't want to be forced into something." A calms B down, but shortly afterwards A requests oral sex again and says: "Come on, please!". Eventually, B actively performs oral sex on A.

With these two cases in mind, I now briefly want to point out what this article is *not* about: it is not about the notion that "no means no", because in both cases, it is very clear that had A proceeded after the explicit

10 This case is inspired by a German Supreme Court decision, BGH NStZ 2019, 717 (Beschluss vom 21.11.2018 – 1 StR 290/18). For a discussion of this case see e.g., Tatjana Hörnle, *Sexueller Übergriff (§ 177 Abs. 1 StGB) bei aktivem Handeln von Geschädigten?* NStZ 2019, 439–442; Thomas Fischer, *Normative Tatbestandsausweitung bei sexuellem Übergriff – Zur Anwendung von § 177 Abs. 1 StGB bei aktivem Handeln der geschädigten Person*, NStZ 2019, 580–585; Elisa Hoven, *Irrungen und Wirrungen des neuen Sexualstrafrechts*, Einspruch Magazin FAZ, 13.02.2019.

11 This German case has been discussed by German scholars primarily with regard to the specific "No means No"-rule introduced in the German Criminal Code in 2016. Discussions centered around the question whether the oral sex that nurse B actively performed on surgeon A could be considered as a sexual act "against her will" or whether the active performance of oral sex could be seen as a change of mind and therefore consent, which would then negate the definition of the offence in § 177 sec. 1 CC. In this article, the issue shall be addressed from a more general point of view, regardless of a specific rape provision.

12 This case is inspired by the allegations against Aziz Ansari; see Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life*, Babe, 2018, https://babe.net/2018/01/13/aziz-ansari-28355. For a detailed discussion of the case see Kimberly Kessler Ferzan, *Consent and Coercion*, 50 Arizona State Law Journal 951–1006 (2018).

"no" of B and inserted his penis in B's mouth, A would have been guilty of rape (or another serious sexual offense, depending on the respective national law). But these cases are different: Even though B said "no" at first, after some "nagging" B nevertheless performed oral sex on A, which is typically considered to be a functional equivalent to saying "yes" or as tacit consent.[13] Here, the "no means no" principle seems unhelpful or at least incomplete.[14]

The purpose of this article is to address the following question: how *should* the law deal with cases where B, the possible victim, initially says "no", but the other person A keeps requesting sex, culminating in B eventually saying "yes" or actively performing the requested sexual act (which is considered to be tacit consent)? Is sex with "nagged consent" to be treated as consensual or as nonconsensual sex?

C. *Factual consent and valid consent*

Even though the term "nagging sex" might be new, scholars have discussed this sort of behavior and its implications for criminal law for a long time.[15] In order to be able to provide a meaningful reconstruction of the discussions on "nagging sex" and similar behaviors, it might help to categorize the relevant arguments into two basic types. The starting point for this categorization is the understanding that consent can be distinguished into factual consent and legal consent: for a sexual act to be permissible, factual consent must be present. Factual consent means the performance of some "token" of consent, some positive indication of willingness, whereby all relevant circumstances have to be taken into account. Obviously, saying "yes" is one way of providing factual consent, but according to most scholars and legal systems, actively participating in the intimacy also con-

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13 See e.g., David Archard, *"A Nod's as Good as a Wink" – Consent, Convention, and Reasonable Belief*, 3 Legal Theory 273, 282 (1997) ("If a woman responds to a man's question 'Do you want sex?' (or some similar unambiguous formulation) with a wordless but sexually explicit action, then that behavior, in such a context, may be presumed to constitute consent."). See also Joan McGregor, Is it Rape? On Acquaintance Rape and Taking Women's Consent Seriously, 132–35 (2005).

14 Stephen Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 Law and Philosophy 35, 42 (1992).

15 See e.g., Ferzan, *supra* note 12; Sarah Conly, *Seduction, Rape, and Coercion*, 115 Ethics 96–121 (2004); Scott A. Anderson, *Sex under Pressure: Jerks, Boorish Behaviour and Gender Hierarchy,* 11 Res Publica, 350 (2005); Schulhofer, *supra* note 14 at 42–45.

stitutes tacit factual consent. Yet it is evident that factual consent is not a *sufficient* condition for legally valid consent that will preclude criminal liability. A token of consent has the power to bring about a change in the nexus of rights and duties within a relationship only if it sufficiently reflects the agent's own will.[16] Accordingly, we must not only consider the eventual statement of consent but also the acceptability of the means used to procure it.[17] For example, if the victim gives factual consent only after being threatened, the factual consent would not amount to legal or valid consent.[18]

The arguments concerning "nagging sex" can now be categorized based on this distinction.

1. The strictly verbal standard of consent

One possibility to classify "nagging sex" as legally problematic is to argue that in both cases there was no (sufficient) factual consent. According to proponents of a strictly verbal standard of consent, sexual consent is given only if one (voluntarily) utters words like "okay" or "yes"[19] – which is lacking in both the "Surgeon case" and the "Date case". Due to space limitations in this chapter, it is not possible to elaborate in detail as to why a strictly verbal standard of consent seems to be an inadequate standard for criminal law.[20] Suffice it to say that a law stating that every sexual interaction without a verbal "yes" is a crime would not only stray very far

16 Andreas Müller & Peter Schaber, *The Ethics of Consent: An Introduction*, *in* The Routledge Handbook of the Ethics of Consent, 1, 3 (Andreas Müller & Peter Schaber eds., 2018); Thomas Gutmann, *Voluntary Consent*, *in* The Routledge Handbook of the Ethics of Consent, 211 (Andreas Müller & Peter Schaber eds., 2018).

17 See e.g., Kimberly Kessler Ferzan & Peter Westen, *How to Think (Like a Lawyer) About Rape*, 11 Crim. L. & Phil. 759–781 (2017), at 766 (arguing that consent requires that the consenter signaled "assent" and that it was given under sufficient conditions of freedom, knowledge, and capacity).

18 Peter Westen, The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct 10 (2004) (distinguishing between "factual consent" and "legal consent"). See also McGregor, *supra* note 13, at 163.

19 See e.g., Lois Pineau, *Date Rape: A Feminist Analysis*, 8 Law and Philosophy 217–43 (1989) (discussing a model of "communicative sexuality", where noncommunicative sexuality establishes a presumption of nonconsent.).

20 For a detailed discussion of the problematic aspects of a (verbal) affirmative consent rule see Aya Gruber, *Consent Confusion*, 38 Cardozo Law Review 415–458 (2016).

from behavioral practices,[21] it would also infringe on people's liberty to "control... their private sexual conduct."[22] Therefore, it is not surprising that even in jurisdictions with an "affirmative consent" standard in rape law, like Sweden, tacit or nonverbal consent to a sexual interaction is considered sufficient.[23]

2. *The Miranda Analogy*

The question of how a "no" followed by a "yes" should be interpreted has concerned many scholars. Schulhofer rightfully pointed out that an eventual "yes" should be rejected if threats or intimidation produced it. But what about cases where there is no straightforward coercion present? Should "no" irrevocably mean "no"? Should we embrace the idea that a "yes" can be rendered invalid by non-forcible persuasion like cajolery or manipulation of feelings or similar behavior "that refuses to honor the initial 'no'"?[24]

Susan Estrich seemed to hint at such an approach when she contrasted the law of rape to that of police interrogation, mentioning the *Miranda* Rule.[25] According to the *Miranda* Rule, a suspects' refusal to talk must be accepted and all questioning must cease, at least for a certain amount of time, and any "yes" produced by intervening attempts at persuasion are automatically deemed to be compelled.[26] Using this analogy for sexual encounters, we would then conclude that a person's initial "no" has to be protected against *any* modification.

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21 See Terry P. Humphreys & Mélanie M. Brousseau, *The Sexual Consent Scale – Revised: Development, Reliability, and Preliminary Validity*, 47 J. Sex. Res. 420, 421 (2010) ("Numerous studies have demonstrated that the preferred approach to signal consent for both women and men tends to be nonverbal instead of verbal"). See also Melissa Burkett & Karine Hamilton, *Postfeminist Sexual Agency. Young Women's Negotiations of Sexual Consent*, 15 Sexualities 815–833 (2012).

22 Gruber, *supra* note 20, at 449 (citing Lawrence v. Texas, 539 U.S. 558, 578 [2003]).

23 Wegerstad, *supra* note 5, at 740 ("The Swedish law does not state that a defendant can be held liable for rape solely on the ground that the other person did not say yes.").

24 Schulhofer, *supra* note 14, at 43.

25 Susan Estrich, Real Rape 41 (1987).

26 *Miranda v. Arizona*, 384 U.S. 436 (1966), at 461.

However, it is far from clear that a *Miranda*-based rule is appropriate for sexual encounters such as displayed in the "Date Case".[27] The *Miranda* Rule concerns people that find themselves in an extraordinary situation characterized by an immense power imbalance between law enforcement and civilians. Most sexual encounters are not comparable to being held in a police interrogation room, which can be characterized as an inherently compelling environment. Without such an extreme power imbalance in sexual encounters, there is simply no need for a strict rule based on *Miranda*.

Still, the *Miranda* analogy may help us get closer to the actual problem. Intuitively, something resembling a *Miranda* Rule seems more appropriate in the "Surgeon Case". However, it is not the repeated requests for oral sex *per se* that seem problematic, but the power imbalance between A and B that might have influenced B's decision.[28] The real issue in the "Surgeon Case" seems to be the question of *validity* of consent in situations of power imbalance between the "seducer" and the "seduced person". However, this issue may also arise in situations without an initial "no": If B fears for her job in the "Surgeon case", she might even be too frightened to say "no" in the first place. Whether or not a "no" was initially uttered should not be the decisive question here.

3. The "Real change of mind" Rule

A more nuanced view developed by Hörnle asks whether there was a real change of mind after B's initial "no"."[29] According to that view, the possible victim needs to autonomously withdraw his or her rejection. Unless there is a real and recognizable change of mind, the original "no" is not off the table[30]. However, according to Hörnle, a "real change of mind" is

27 Schulhofer, *supra* note 14, 43–44 (arguing that the Miranda analogy seems attenuated); David P. Bryden, *Redefining Rape*, 3 Buff. Crim. L. Rev. 317, 391 (2000) ("The Miranda approach makes little sense in dating").

28 Schulhofer, *supra* note 14, at 43 (pointing out that the *Miranda* Rule is also based on considerations of coercion and psychological pressure).

29 Hörnle, *supra* note 10, developed this view with regard to the offense in § 177 German CC. However, her thoughts can easily be considered here regardless of a specific legal situation.

30 See Hörnle, *supra* note 10, at 441.

not equivalent to "not being coerced" but is a more demanding concept.[31] Hörnle suggests several criteria for determining whether there was such a real change of mind. She proposes to take into consideration the phase between the "no" and the sexual act, the amount of time that had passed, and whether B acted upon a friendly request between partners or merely obeyed an order.[32]

Even though this view is appealing because it offers a nuanced approach to a complex problem, it has some problematic aspects. First, the "real change of mind" rule would impose stricter requirements for valid consent (and therefore a more demanding concept of autonomy) after a "no" than in a case where B did not say "no" before the requested sexual act. This different treatment of (subsequent) consent depending on whether or not a "no" was expressed at first would require more detailed reasoning and explanation - it is not self-explanatory.

In (sexual) consent theory, voluntariness (as an important part of valid consent) is often understood as follows: an act or decision is voluntary if it occurs without coercion affecting the actor's choice.[33] The relevant question for the two cases should therefore be: was the possible victim B *coerced* into performing the sexual act after the initial refusal? If not, B might just as well not have performed the sexual act. It would, however, be inconsistent to claim that B performed the sexual without valid consent although his or her right to self-determination was not in any way affected by coercion (provided B is an informed and competent adult).[34]According to this line of reasoning, the question of whether the victim had said "no" before eventually giving *uncoerced* consent does not play a decisive role.

Second, the above-mentioned criteria implicitly carry a statement about "good" and "bad" motives to have sex, which may not be universally shared.[35] Consider for example the following case: The husband wants to have sex, the wife says "no" twice. Eventually, after the third request, she gives in because she knows that otherwise he would make "the sad face" all week long. Would that be enough to constitute a real change of mind? The

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31 Hörnle, *supra* note 10, at 440 ("Die Überlegungen dazu, wann Handlungsentschlüsse als selbstbestimmte Entscheidungen gelten können und wann nicht, müssen komplexer ausfallen.").

32 Hörnle, *supra* note 10, at 441.

33 Alan Wertheimer, Consent to Sexual Relations 164 (2003).

34 Joachim Renzikowski, Münchener Kommentar zum StGB, § 177 StGB, marginal note 55 (2021); see also Fischer, *supra* note 10, 581–82.

35 Fischer, *supra* note 10, at 583 ("Diese Kriterien sind in der Sache nicht abwegig, beinhalten aber eine Vielzahl von impliziten Wertungen.").

answer is not so clear and might depend heavily on the judge's individual morals and values regarding sex.[36]

4. The Coercion Rule

We have seen that those views which focus mainly on B's initial "no" are not persuasive. As mentioned above, and as the "Real change of mind" rule acknowledges, what matters is what happens after B's initial "no" and whether the subsequent active performance of a sexual act by B can be qualified as the result of a voluntary decision. The relevant question thus is whether "nagged consent" is voluntary (and therefore valid) consent.

The discussion then shifts to the difficult question of what sorts of behavior constitute coercion and thereby undermine consent. This chapter cannot provide a full and comprehensive analysis of the ethics and legality of using pressure techniques in sexual seduction.[37] However, it can be reasonably argued that at least in the "Date Case", A does not coerce B in a legally relevant sense. According to Wertheimer, the critical elements of the test for coercion are whether A acts illegitimately in threatening to impose a certain sanction on B and whether this threat is sufficiently "powerful" to leave B "no choice" (so called Two-Pronged Theory).[38] Only behaviors that meet both criteria count as coercive. However, if B gives consent merely to secure an interest to which she has no antecedent right — B consents to sex with her boyfriend who "threatens" to end the relationship if B does not have sex with him —her consent is valid because B has no right that A continues dating B on terms A does not embrace.[39]

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36 See e.g., Hoven, *supra* note 10 ("Sagt etwa die Ehefrau, dass sie Kopfschmerzen und daher keine Lust auf sexuelle Handlungen habe, gibt dann aber, um ihre Ruhe zu haben, den Bitten ihres Mannes nach, würde sich dieser strafbar machen.") and Hörnle, *supra* note 10, at 441 ("Es dürfte nicht selten sein..., dass ein zunächst geäußertes Nein nach freundlicher Überredung und/oder Zärtlichkeiten wieder zurückgenommen wird. ").

37 For a more detailed discussion see e.g., Stephen J. Schulhofer, Unwanted Sex: The Culture of Intimidation and the Failure of Law (1998); McGregor, *supra* note 13; Westen, *supra* note 18; Wertheimer, *supra* note 33, ALAN Wertheimer, Coercion, especially chs. 12, 14 (1987).

38 Wertheimer, Coercion, *supra* note 37, at 170.

39 Wertheimer, Consent, *supra* note 33, at 170.

Of course, noncoercive "threats" are "ungenerous, hardhearted, and exploitative"[40] and can put a lot of psychological pressure on the victim, but the "moral problem of such an offer (...) does not lie in the fact that it undermines voluntary consent."[41] Or as Conly puts it:

> "It is not rape if the person asking for sex stays within what he has a right to ask for. (..) [O]ne has a right to ask for the other's consent and to try to persuade the other to give consent as long as one does this within legitimate parameters: the other should be a competent adult, capable of making a decision; sanctions should only be those one has a right to impose, like ending the relationship, not violence (…)."[42]

Following Wertheimer's Two-Pronged Theory, A does not coerce B and thus does not engage in nonconsensual sexual act in the "Date Case". The assessment in the "Surgeon Case" might be somewhat different, because the "Surgeon Case" clearly involves the *exploitation* of a relationship characterized by dependency or authority, where blatant coercion is often not necessary in order to get the inferior party to comply. Even in the absence of an explicit and blatant threat the inferior party may legitimately fear that his or her rejection will be sanctioned by the superior party.[43]

5. Position of Power and Dependency

Even without an implicit threat, requesting a sexual favor may *in itself* be problematic in situations where the person making the request has the authoritative power to (illegitimately) sanction the inferior person. Therefore, it may make sense to punish A if he makes use of his authority derived from his position (as, for instance, an employer over his subordinate or as a professor over her student).[44] In Switzerland, for example, Art. 192 and Art. 193 CC criminalize the abuse of a position of power and the exploitation of dependency. These offenses cover situations in which the victim factually and legally consents (because no "classic" coercion is

40 Wertheimer, Consent, *supra* note 33, at 170.
41 Gutmann, *supra* note 16, at 216. See also McGregor, *supra* note 13, at 173.
42 Conly, *supra* note 15, at 118.
43 Stuart P. Green, Criminalizing Sex: A Unified Liberal Theory, 155–56 (2020) (pointing out that offers are sometimes accompanied by implicit threats), see also McGregor, *supra* note 13, at 175–76.
44 Green, *supra* note 43, at 193 (discussing the aims of such provisions).

present), but the consent is nevertheless considered to be somehow "corrupted" by the exploitation of a position of power or dependency.[45] However, it is worth noting that such exploitation and "abuse of power" provisions cannot be justified on the basis that they *directly* protect B's sexual autonomy, since exploitation and abuse of power does *not* undermine the victim's autonomy.[46] Nevertheless, the criminalization of sex that occurs within hierarchical relationships might be justified for other reasons, e.g., the protection of institutions and of institutional roles.[47]

The "Date Case", however, does not involve the exploitation of such a relationship of power imbalance.[48] By performing oral sex without being coerced to do so, B voluntarily consented to the sexual act, even though she did not really "want" it (internally). A's behavior might be morally condemnable, insensitive and annoying. But in Bryden's words: "[W]e are not talking about whether [A] is behaving boorishly; we are talking about whether he should go to prison. Assuming that [B] is free to do so, the proper remedy for requests that are merely tiresome is to leave, not to call the police."[49]

Conclusion

In this chapter, I have argued that not every "boorish" behavior that eventually leads a reluctant partner to consent is legally coercive and thus deserving criminalization. It might be helpful to remind ourselves that even though scholars often speak of the "moral magic" of consent[50],

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45 See Nora Scheidegger, Das Sexualstrafrecht der Schweiz, Grundlagen und Reformbedarf 261 (2018).

46 Green, *supra* note 43, at 200 ("Coercion negates consent and undermines the victim's autonomy in a way exploitation arguably does not.").

47 See e.g., Green, *supra* note 43, at 195–97. See for a more detailed discussion of alternative justifications of exploitation provisions Scheidegger, *supra* note 45, at 264–66.

48 But see Anderson, *supra* note 15, at 350 (arguing that accounts that rely on Wertheimer's work fail to adequately consider the hierarchical gender system we currently live in).

49 Bryden, *supra* note 27, at 396. Similarly, Hoven, *supra* note 10 (arguing that adults should be trusted to be able to make autonomous decisions and to stick to their expressed "no" even in unpleasant situations). The assessment might be different in a case where B legitimately worries that A's behavior might escalate and that A might use force.

50 Heidi Hurd, *The Moral Magic of Consent*, 2 Legal Theory 121–46.

the presence of consent does not guarantee morally "unproblematic" sex.[51] We can consent to sex that we do not actually want or desire and we can consent to sex that is detrimental for our wellbeing. As Robin West stated, consent may well be a good marker for the divide between the criminal and non-criminal, but it is not a good proxy for wellbeing.[52] However, the criminal law must respect competent adults' sexual choices, even if that sometimes means that persons engage in sex they later regret or – even at the time the moment – do not "really" want.

51 See e.g., Burkett & Hamilton, *supra* note 21, at 825–826; Archard, *supra* note 13, at 275; see also Woodard, *supra* note 2, at 324 ("[C]onsent is, at best, a minimal standard for avoiding rape.").

52 Robin West, *Sex, Law and Consent*, in The Ethics of Consent: Theory and Practice 245 (William Miller & Alan Wertheimer, eds. 2009).

Particularized Consent and Non-Consensual Condom Removal

Sebastian Mayr, Kurt Schmoller[1]

A. General Principle

I. Form and range of consent

In the majority of the legal systems examined, consent to sexual relations may be given expressly or impliedly,[2] for example by gestures or other conclusive conduct.

Even in the case of expressly declared consent, however, hardly anyone will consent a priori to every conceivable sexual act. Rather, consent is limited to acts that are foreseeable to the consenting party under the circumstances.[3] Sexual acts that are not to be expected under the circumstances (in particular with regard to the persons involved), are therefore not covered by a "general", non-specific consent. In this respect, every consent in sexual criminal law is "particularized".

II. Expression and circumstances of the declaration of consent

Within this framework, consent can be further specified, e.g., certain acts can be expressly excepted, conditions can be imposed, or consent can be given only to a precisely described sexual act; such restrictions are binding on the other person.[4] If one exceeds these limits, one acts without

1 This text was translated with the help of deepl.com.
2 Cf. the chapters on Germany, Poland, and Sweden in this volume. Restrictions seem to exist in some Australian states, see chapter on Australia. By contrast, § 205a Austrian Criminal Code requires that the victim's opposition to sex must be apparent; cf. chapter on Austria, with references.
3 E.g., chapter on Germany, in this volume.
4 Chapter on Germany, in this volume.

consent.[5] The legal systems represented here seem to agree on this point, at least Germany[6], Italy[7] and especially Poland[8], where the decision about the place, time and form of the sexual acts is understood as part of protected sexual autonomy.[9]

Restrictions may also arise from the circumstances of the declaration. Particularly in the case of long-term sexual relationships, the content of the declaration of consent may differ from the literal meaning, because both parties know how it is to be understood. In a continuing relationship, moreover, sexual behaviour that is generally not expected may be foreseeable for the parties and therefore be covered by the consent.[10]

Individual jurisdictions seem to have developed standards for unclear cases, for example, that consent to vaginal intercourse does not also include consent to anal intercourse[11] but possibly to touching of the breasts.[12] However, one must not forget that the scope of consent to sexual acts must in any event be decided case-by-case.[13]

III. Subsequent extension of consent

In practice, the problem of distinguishing general consent from specific consent is less difficult than one might think. Often only limited consent is given at the beginning of sexual contact. However, this initial consent may be continuously supplemented by further – usually implied – declarations of consent. In this context, the particular importance of the victim's

5 Cf. *Brodsky*, "Rape-adjacent": Imagining legal responses to non-consensual condom removal, Columbia Journal of Gender and Law 32.2 (2017), 183, 190–191, with references to U.S. law.
6 Chapter on Germany, in this volume.
7 Chapter on Italy, in this volume.
8 Chapter on Poland, in this volume.
9 Chapter on Poland, in this volume.
10 Chapter on Germany, in this volume. The prerequisite of foreseeability is a consequence of the general principle that the consenting person must be able to recognize and properly assess the significance and scope of the consequences and risks resulting from his or her consent; *Hinterhofer*, Einwilligung im Strafrecht (1998), 63 with further references.
11 Chapter on Switzerland, in this volume; for a similar case, see chapter on Poland, in this volume. Cf. also *Brodsky* (note 5), 191.
12 Chapter on Switzerland, in this volume.
13 Expressly e.g., chapter on Poland, in this volume.

reaction to a proposed change in the sexual relationship and the subsequent conduct of the perpetrator is emphasised in Poland.[14]

If a person declares his or her consent to sexual contact at the outset without any further details, the standard for a successive extension of consent should not be too strict. It may be sufficient that the person giving consent indicates by his or her behaviour that he or she agrees to the extension of the sexual act. In Sweden, for example, it is argued that consent to a new sexual act may already result from the previous sexual act as sexual activity progresses, without the need for any further statement.[15] However, one clearly cannot simply assume an extension of the original consent if one partner had initially excluded certain sexual acts.

B. "Stealthing" (Nonconsensual condom removal, NCCR)

Determining the scope of consent is crucial in the case of "stealthing", the surreptitious removal of the condom before or during sexual intercourse.[16] The question arises whether such an unauthorized act has the effect that the subsequent sexual act is no longer consensual but now performed involuntarily. One can approach this question from different directions.[17]

I. Incapacity of resistance?

In Switzerland, it has been argued that the clandestine removal of the condom renders the victim incapable of forming her will or of resisting, so that the perpetrator commits the offence of defilement.[18] Similarly in some Australian states, the required "free and voluntary" consent of the victim is doubted in such cases.[19] This would have to apply, however,

14 Chapter on Poland. in this volume.
15 Chapter on Sweden, in this volume.
16 This phenomenon received broader attention among experts through the studies of *Brodsky* (note 5), 183; cf. *Sagmeister*, Stealthing verletzt die sexuelle Selbstbestimmung, juridikum 2017, 296.
17 The following distinction is essentially also made by *Brodsky* (note 5), 190 et seq., who considers, on the one hand, the existence of another sexual act and, on the other hand, the concept of "rape by deception" (term of *Brodsky* (note 5), 194).
18 Chapter on Switzerland, in this volume. For this Argument cf. also *Brodsky* (note 5), 196–197.
19 Chapter on Australia, in this volume.

to all cases of deliberate deception, because any mistake would cause the victim to be incapable of consenting to the true facts. Moreover, it would presuppose that coitus without a condom is a sexual act different from coitus with a condom and is therefore no longer covered by the original consent.[20] Only if this is the case, the victim may be unable to form her will or to resist with regard to the new sexual act, which requires a new consent. However, the character of intercourse without a condom as a different sexual act is precisely the issue that needs to be clarified.

II. Different sexual act?

Is sexual intercourse without a condom a sexual act different from safer sex?[21] German case law has assumed that this is the case whenever the perpetrator secretly removes the condom and ejaculates in the victim's body.[22] However, not every naturalistic deviation from the original consent may constitute a different sexual act,[23] and one does not continue the sexual act itself without consent only because of a slight divergence from what had been agreed. For example, the person giving consent may insist that the sexual partner shall wear uncomfortable high heels during the sexual act. If the partner removes them during the act, there is still no *other* sexual act. The delimitation of relevant and irrelevant deviations under criminal law must therefore be carried out according to normative criteria. In the case of stealthing, the fact that direct skin contact can have far more serious physical consequences than protected sexual intercourse speaks in

20 This is at least partly assumed in Switzerland, see chapter in this volume.

21 The Italian case law seems to point in this direction, according to which consent can be lacking if the modalities deviate from the original agreement; see chapter on Italy, in this volume.

22 KG Berlin, Judgment of 27 July 2002, (4) 161 Ss 48/20 (58/20). See also *Geneuss/Bublitz/Papenfuß*, Zur Strafbarkeit des "Stealthing", Juristische Rundschau 2021, 189, 191–192 with further references in note 6; on Austria, see *Germ*, Zur Strafbarkeit von Stealthing in Österreich, Österreichische Juristen-Zeitung 2022, 511, 514.

23 KG Berlin (note 22) therefore based its decision on the "substantially different character" and the "different (sexual offence-related) legal quality of an extent that justifies punishability". Cf. *Makepeace*, Zur Strafbarkeit des "Stealthing" nach dem neuen Sexualstrafrecht, Kriminalpolitische Zeitschrift 2021, 10, 13–14.

favor of an *aliud*[24] since the risk of unwanted pregnancy and infection with sexually transmitted diseases (STDs) is significantly increased.[25] On the other hand, punishability cannot be based simply on a violation of sexual self-determination,[26] since it is *the scope* of this autonomy that is in question.

III. Invalid consent due to deception or error?

Some of the legal systems examined assume that stealthing causes a lack of will that eliminates the initial consent.[27] According to this view, effective consent is lacking not (only) because the sexual act performed deviates from the one agreed upon, but because the victim's mistake about the use of the condom renders the original consent invalid from the beginning. In some jurisdictions, these considerations give rise to criminal liability on the basis of "rape by deceit".[28] This seems particularly apt if the victim declared before or at the start of sexual intercourse that he or she wants it only if a condom is used, and the perpetrator deliberately deceives the victim about his intentions. However, even if the perpetrator makes a spontaneous decision to remove the condom after consent has been given and during sexual intercourse, the victim is subject to an error that could constitute a lack of will.[29] The existence of such a consent-relevant error is assumed, for example, in parts of Australia[30] and Poland.[31]

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24 E.g., chapter on Germany, in this volume. Parts of Swiss doctrine also seem to favor classification as a different sexual act; see chapter on Switzerland, in this volume.

25 *Brodsky* (note 5), 190 et seq., also mainly relies on this argument for the punishability of stealthing; see also KG Berlin (note 22).

26 See KG Berlin (note 22).

27 This applies in particular to the explanatory memorandum on the Swedish Criminal Code, which considers NCCR to be an insignificant deception (chapter on Sweden, in this volume). In Poland and the U.S., stealthing is also discussed as a case of deception; see the respective chapters in this volume.

28 Cf. the arguments in the chapter on Poland, in this volume.

29 *Makepeace* (note 23), 13 argues that criminal liability should only arise if the act of unprotected sex is a different sexual act. But this view is not convincing. On the one hand, even a mistake without conscious deception might affect the validity of consent (e.g., *Hinterhofer* (note 10), 102 et seq.), and on the other hand, the continuation of the sexual act without protection could constitute implied deception.

30 Chapter on Australia, in this volume.

31 Chapter on Poland, in this volume.

However, not every error and deception will render consent invalid.[32] For example, pretending a false identity, noble origin, an intention to marry, etc. should not affect the effectiveness of consent.[33] The opinion that a mistake about the use of a condom is relevant to consent can be based on the same arguments that speak for the assumption of another sexual act: Unprotected sexual intercourse threatens serious physical consequences, in particular a higher risk of unwanted pregnancy and of contracting STDs.[34] These reasons that speak for an *aliud*, a different sexual act, also support the assumption of a relevant error eliminating consent. Both approaches lead to the same delimitation and therefore to the same result.[35]

IV. Analysis of the protected legal interest

It must be explained in more detail why the direct skin contact and the increased risk of unwanted pregnancy and infection with STDs are relevant but the removal of high heels or the pretension of being of noble origin are not. The reason lies in the normative character of sexual offenses. Sexual assaults are a form of inappropriate physical treatment. Sexual offenses are therefore, by their very nature, specific offenses against bodily integrity; their sexual character adds a special aspect to the protected legal interest. Sexual integrity is an aspect of physical integrity. The answer to the questions of whether the same sexual act is present and whether a mistake renders consent invalid depends on whether the deviation affects the legal

32 See chapter on Germany, in this volume; for the inconsistent legal situation in Australia, see chapter on Australia.

33 To such and other errors and consequences under German criminal law *Hoven/Weigend*, Zur Strafbarkeit von Täuschungen im Sexualstrafrecht, Kriminalpolitische Zeitschrift 2018, 156, 157–158, and the chapter on Germany, in this volume.

34 Cf. KG Berlin (note 22); *Brodsky* (note 5), 191–192: Even if the perpetrator does not continue sexual intercourse until ejaculation, there is a risk of pregnancy and infection. For a similar result based on slightly different reasoning see *Germ* (note 22), 514.

35 *Corrêa-Camargo*, Sexuelle Selbstbestimmung als Schutzgegenstand des Strafrechts, Zeitschrift für die gesamte Strafrechtswissenschaft 134 (2022), 351, 368–369 claims, however, that the doctrine that only errors matter that relate to the legal interest protected by the offence in question cannot be applied to sex-related deceptions.

interest protected by the sexual offence.[36] This is always the case if the intervention has a significantly different effect on the victim's body. Stealthing affects the legally protected interest because of the risk of serious physical consequences due to the direct skin contact. Pretending to use a condom thus results in sexual intercourse being performed without consent – at least from the time when the condom has been removed. The same applies, for example, to feigning a lack of procreative capacity[37] or to concealing one's sexually transmissible disease when there is a real risk of infection. For the Austrian legal system, the relevant qualifications of sexual offenses confirm this aspect of legal protection. For example, rape is punished much more severely if it results in grievous bodily harm (§ 84 para. 1 Austrian Criminal Code) or pregnancy of the person raped. The sexual offenses in the Austrian Criminal Code therefore clearly also protect physical integrity and against unwanted pregnancy.[38] In order to avoid gaps in criminal liability, the abstract possibility of causing pregnancy or infection should be sufficient to constitute a sexual offense.

V. Legal consequences

Based on the arguments put forward here, effective consent to sexual intercourse is lacking in the case of stealthing. Whether and according to which offense definition the nonconsensual removal of the condom is punishable differs according to the significance of consent in sexual relations in each jurisdiction's criminal law. If only consent has the effect of exempting a person from punishment ("only yes means yes")[39], the offender may be liable for rape – as under the Israeli concept of "rape by deception".[40]

If, on the other hand, rape and similar offences require a special modality of the act, such as the use of force or coercion, these offence definitions

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36 Some German scholars have correctly pointed out that the legal interest protected by the sexual offense is decisive for the question whether a deception is relevant; cf. *Corrêa-Camargo* (note 35), 366–367 with further references.

37 Cf. *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 375 (Ct. App. 1983), cited in *Brodsky* (note 5), 192. A different assessment applies under § 205a Austrian Criminal Code; see *Germ* (note 33), 513 and for Germany *Corrêa-Camargo* (note 35), 375.

38 Even if protection against unwanted pregnancy is only a minor aspect of sexual self-determination; cf. *Germ* (note 33), 512.

39 For this concept in England and Wales cf. *Hoven/Weigend* (note 33), 156.

40 As to this concept, see *Brodsky* (note 5), 194 with further references and *Hoven/Weigend* (note 33), 157. Cf. also the chapter on Sweden, in this volume.

are usually not met. However, subsidiary offences may apply, which sanction the non-consensual sexual act as such.[41] In Austria, for example, the lack of consent can give rise to criminal liability for "violation of the right to sexual self-determination"[42] (§ 205a Austrian Criminal Code)[43] if the victim has indicated that he or she only consents to protected sexual intercourse.[44] In this case, the perpetrator commits the crime because he performs the sexual intercourse "against that person's will"[45].

In Switzerland, a verdict of rape in a Stealthing case was reversed and the perpetrator was convicted of "defilement" because the court assumed that the victim was unable to properly form a will or to resist.[46]

In addition to a sexual offence, the perpetrator may also be guilty of an offense against public health (especially §§ 178, 179 Austrian Criminal Code) if the sexual act can lead to transmission of special STDs. If the unprotected sexual intercourse causes a real risk of disease transmission or even harms the victim's body or health, offences against the life and limb of individuals may apply.

In 2021, California became the first U.S. state to enact an explicit civil law provision for stealthing cases.[47] Pulling off the condom without the consent of the other person during the act thus entitles the victim to claim damages but does not seem to create a (further) basis for criminal prosecution.[48]

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41 E.g., § 177 para. 1 German Criminal Code; see KG Berlin (note 22).

42 Translation by *Schloenhardt/Höpfel*, Strafgesetzbuch. Austrian Criminal Code (2016), 270.

43 Cf. the chapter on Austria, in this volume, with references.

44 *Germ* (note 22), 515–516.

45 Translation by *Schloenhardt/Höpfel* (note 42), 270; *Germ* (note 22), 515–516.

46 With reference to this decision, *Sagmeister*, juridikum 2017, 296.

47 *Paz*, California makes Stealthing or removing condom without consent illegal, New York Times, October 8, 2021, https://www.nytimes.com/2021/10/08/us/stealthing-illegal-california.html (accessed October 17, 2022); Cf. also the chapter on the U.S., in this volume.

48 *Stewart*, CNN, October 15, 2021, https://edition.cnn.com/2021/10/15/opinions/stealthing-california-law-michaela-coel-stewart/index.html (accessed October 17, 2022); *Anguiano*, "Stealthing": California poised to outlaw removing condom without consent during sex, The Guardian, September 9, 2021, https://www.theguardian.com/us-news/2021/sep/09/california-stealthing-ban-remove-condom-sex (accessed October 17, 2022); *Chesser*, In an Australian first, stealthing is now illegal in the ACT. Could this set a precedent for the country?, The Conversation, October 12, 2021, https://theconversation.com/in-an-australian-first-stealthing-is-now-illegal-in-the-act-could-this-set-a-precedent-for-the-country-169629 (accessed October 17, 2022).

Mistaken Beliefs about Consent

Andrew Dyer[*]

A. Introduction

Australian commentators tend to commence any discussion of the mental element for rape and like offences with the House of Lords' controversial decision in *Morgan v Director of Public Prosecutions.*[1] As is well-known, in that case, a majority of their Lordships held that a man would only 'rape a woman' within the meaning of s 1(1) of the *Sexual Offences Act*[2] if he had non-consensual sexual intercourse with her, knowing that she was not consenting or 'not caring'[3] whether she was a willing participant. In other words, a man would be acquitted of rape if he may have had a genuine, though mistaken, belief in consent; such a belief need not also have been reasonable.[4]

For many years after *Morgan*, certain Australian jurisdictions followed the approach stated in that case.[5] In New South Wales ('NSW'), for example, the law stated until 2008 that a person would only be guilty of 'sexual assault'[6] if, at the time s/he had non-consensual sexual intercourse with another person, s/he knew of the complainant's non-consent, or was 'reck-

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1 *DPP v Morgan* [1976] AC 182 ('*Morgan*').

2 *1956*, 4 & 5 Eliz 2 c 69 (repealed).

3 *DPP v Morgan* [1976] AC 182, 215 (Lord Hailsham). See also at 203–4 (Lord Cross).

4 Ibid. 203–4 (Lord Cross), 214 (Lord Hailsham), 237–9 (Lord Fraser).

5 That said, certain Australian jurisdictions did not. When *Morgan* was decided, it had long been the case in Tasmania, Western Australia and Queensland that a person accused of rape would not be excused simply because he might have believed that the complainant was consenting. It also had to be possible that it was reasonable for him to believe that she was participating willingly. Those jurisdictions maintained that approach after *Morgan*. See, eg, *Snow v The Queen* [1962] Tas SR 271; *Arnol v The Queen* [1981] Tas R 157; *Attorney-General's Reference No 1 of 1977* [1979] WAR 45; *R v Thompson* [1961] Qd R 503, 516.

6 *Crimes Act 1900* (NSW) s 61I.

less' as to the relevant circumstance.[7] Because recklessness entailed (a) an actual realisation that the complainant might not be consenting or (b) a failure to advert at all to the question of consent,[8] an accused who might have believed, however unreasonably, that a non-consenting complainant was consenting, would be excused.

In 2008, however, the NSW Parliament altered this position. According to the then Attorney General, the *Morgan* test was 'outdated'.[9] From now on, he announced, the law would state that a person would have the mens rea for sexual assault, not merely if s/he knew that the complainant was not consenting or was reckless as to her or his consent, but also if s/he believed unreasonably that the complainant was consenting.[10] Furthermore, the Minister said that, when assessing whether a particular accused had the requisite mens rea, the trier of fact would be required to take into account 'any steps taken by the [accused] … to ascertain whether' consent had been granted.[11] This remained the law in NSW until 1 June 2022;[12] and the position is much the same in the majority of Australian jurisdictions:[13] if the Crown can prove that the accused had non-consensual intercourse with the complainant, believing unreasonably that s/he was consenting, the accused will be guilty of rape/sexual assault/sexual penetration without consent.[14]

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7 *Crimes Act 1900* (NSW) s 61R(1) (repealed). At the time of writing, two Australian jurisdictions continue to follow the *Morgan* approach: see *Criminal Code Act 1983* (NT) s 192(3); *Criminal Law Consolidation Act 1935* (SA) s 48(1).

8 See, e.g., *Mitton v R* (2002) 132 A Crim R 123, 129 [28]. In a case of such inadvertence, the Crown additionally had to prove that the risk of non-consent would have been obvious to a person of the accused's mental capacity had s/he turned his or her mind to the relevant matter.

9 New South Wales, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3585 (John Hatzistergos, Attorney General).

10 Ibid. 3586.

11 Ibid.

12 As noted in the latter sections of this chapter, on that date certain changes to the NSW law regarding non-consensual sexual offending came into effect. It remains the case that a person will be liable for sexual assault if s/he had non-consensual sexual intercourse with the complainant believing unreasonably that the complainant was consenting: *Crimes Act 1900* (NSW) s 61HK(1)(c). But s 61HK(2) severely limits the availability of honest and reasonable mistake of fact to those accused of non-consensual sexual offending.

13 See, e.g., *Crimes Act 1958* (Vic) s 38(1)(c); *Criminal Code Act 1899* (Qld) ss 24, 348A. Cf *Criminal Law Consolidation Act 1935* (SA) ss 47–48.

14 The terminology used to describe such offending differs as between the various Australian jurisdictions. See, e.g., *Criminal Code Act 1899* (Qld) s 349(1), creating the offence of 'rape', *Crimes Act 1900* (NSW) s 61I, creating the offence of 'sexual

In this chapter, I consider recent Australian proposals to tighten up the mental element for non-consensual sexual offending still further, or to remove it completely.[15] I argue that many of these proposals are objectionable – essentially because, if they were enacted (as they essentially now have been in two jurisdictions[16]), they would have the potential to cause blameless actors to be convicted of very serious offences.[17] That said, one can see what is motivating those who have campaigned for such reforms. In the face of very low conviction rates for sexual offences in Australia,[18] it is understandable that people should look for ways to ensure that those who commit such offences are held to account. And, given 'the ease with which [a person] … can ascertain the consent of his partner',[19] it is perhaps unsurprising that some believe that *all* those who fail to take this step should be convicted if their respective partners are unwilling.[20] It is argued here that the law can respond to the concerns voiced by such commentators while also upholding 'the rights of accused persons'.[21] It can do this by providing that juries must *take into account* an accused's failure to do or say something to ascertain whether the complainant was consenting, when those juries assess whether it might have been reasonable for the accused

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assault'; and *Criminal Code Act 1913* (WA) s 325(1), creating the offence of 'sexual penetration without consent'.

15 See, e.g., Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform', 39 *University of Queensland Law Journal* 1, especially 25–31 (2020); Wendy Larcombe et al, ''I Think it's Rape and I Think He Would be Found Not Guilty': Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law', 25(5) *Social and Legal Studies* 611, 623 (2016).

16 *Crimes Act 1900* (NSW) ss 61HK(2)-(3); *Crimes Act 1900* (ACT) s 67(5). See also *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic), which at the time of writing has not yet come into force.

17 As I have argued at length elsewhere. See, e.g., Andrew Dyer, 'Contemporary Comment: Affirmative Consent in New South Wales: Progressive Reform or Dangerous Populism?', 45(3) *Criminal Law Journal* 185 (2021); Andrew Dyer, 'Progressive Punitiveness in Queensland', 48 *Australian Bar Review* 326 (2020).

18 See, e.g., New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences,* Report No 148 (2020) 15–22 [2.10]-[2.36].

19 David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Criminal Law*, 15th edition 2018, 791.

20 See, e.g., Rachael Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform', *59 British Journal of Criminology* 296, 302 (2019); Rachael Burgin and Jonathan Crowe, 'The New South Wales Law Reform Commission Draft Proposals on Consent in Sexual Offences: A Missed Opportunity?', 32(3) *Current Issues in Criminal Justice* 346, 354–6 (2020).

21 See, e.g., New South Wales Law Reform Commission (note 18), 139 [7.120].

mistakenly to believe that s/he was.[22] It should go no further than this, however.

B. Recent reform campaigns in Australia

It is necessary at this stage briefly to note the events that have led to calls in various Australian jurisdictions – most particularly, NSW and Queensland – for amendments to the mental element for rape/sexual assault and like offences.

The NSW campaign resulted primarily from 'community concern'[23] arising from litigation involving Luke Andrew Lazarus, who had been charged with one count of sexual assault after an encounter that he had had with a young woman in a Sydney laneway in May 2013. Within minutes of meeting each other on the dancefloor of a nightclub that was part-owned by Lazarus's father, Lazarus and the complainant had repaired to a laneway near the premises, where consensual kissing took place.[24] 'I should get back to my friend', said the complainant, after a while.[25] 'No, stay with me, your friend won't miss you', came the reply.[26] The complainant stayed in the laneway.[27] After some more kissing, Lazarus directed the complainant to put her hands against a nearby wall.[28] His tone, the judge at his second trial found, was neither 'aggressive' nor 'intimidatory'.[29] The complainant complied with the request that Lazarus had made, whereupon he pulled her stockings and underpants down.[30] The complainant did nothing to resist this.[31] Lazarus then attempted unsuccessfully to engage in penile-vaginal intercourse with the complainant.[32] 'Shit you're tight', he announced.[33] 'What do you expect?' the complainant replied. 'I'm a

22 Ibid. 141.
23 Ibid. 5 [1.25].
24 *R v Lazarus* (Unreported, District Court of NSW, Tupman DCJ, 4 May 2017) ('*Lazarus trial*').
25 Ibid.
26 Ibid.
27 Ibid.
28 Ibid.
29 Ibid.
30 Ibid.
31 Ibid. However, the complainant had pulled her undergarments up when Lazarus had tried to pull them down at a previous stage in the laneway.
32 Ibid.
33 Ibid.

fucking virgin'.[34] After a further attempt to penetrate the complainant's vagina, Lazarus had penile-anal intercourse with her.[35]

At Lazarus's first trial, a jury convicted him as charged, and Judge Huggett sentenced him to a minimum period of three years' imprisonment.[36] However, Lazarus then successfully appealed to the NSW Court of Criminal Appeal ('NSWCCA') against his conviction. The trial judge, their Honours found, had misdirected the jury about the mental element for sexual assault.[37] At a second trial, heard by Judge Tupman sitting alone,[38] the judge acquitted the accused. While the Crown had proved that the complainant was not consenting to the intercourse that occurred, her Honour found, Lazarus might have believed on reasonable grounds that she *was* consenting.[39] Crucial to Judge Tupman's conclusion on this point were two factual findings that she had made, namely, that (a) Lazarus had not behaved aggressively and (b) the complainant had not said 'stop' or 'no' or resisted in any other way.[40]

The problem, however, was that, when assessing whether Lazarus had the mens rea for sexual assault, Judge Tupman had failed to comply with her obligation, then imposed by s 61HA(3)(d) of the *Crimes Act 1900* (NSW), to have regard to any 'steps' that Lazarus had 'taken … to ascertain whether' the complainant was consenting.[41] On a prosecution appeal to the NSWCCA, that Court held that this failure amounted to an error; but their Honours also held that it would be oppressive to Lazarus to order

34 Ibid.
35 Ibid.
36 *Lazarus v The Queen* [2016] NSWCCA 52, [19].
37 Ibid. [156]. The trial judge's error was to imply that the jury should convict Lazarus if it was satisfied that a *hypothetical reasonable person* would have realised that the complainant was not consenting. The correct question is, in fact, whether any belief that the accused had in consent was a reasonable one *for him or her* to hold. This distinction has often been drawn in Australian cases where the accused's liability has hinged on whether his or her conduct or beliefs might have been reasonable: see, e.g., *R v McCullough* (1981) 6 A Crim R 274, 281; *Aubertin v Western Australia* (2006) WAR 87, 96 [41]-[43]; *R v Wilson* [2009] 1 Qd R 476, 482–3 [19]-[20] (McMurdo P), 488 [38]-[39], 490 [52] (Douglas J).
38 The trial was heard by judge alone due to the publicity that the case had attracted and the consequent risk of jury prejudice; *Lazarus trial* (Unreported, District Court of NSW, Tupman DCJ, 4 May 2017).
39 Ibid.
40 Ibid.
41 *R v Lazarus* (2017) 270 A Crim R 378, 406–7 [143]-[148].

that he be tried for a third time.[42] As a result, the question of whether Lazarus was guilty of sexual assault was left unresolved.[43]

This outcome was unpopular with the public, which had long been encouraged by the press to regard Lazarus as a spoilt and entitled individual who had behaved disgracefully in the laneway.[44] Moreover – and most relevantly for the purposes of this chapter – certain commentators were critical of the reasoning that Judge Tupman had deployed when acquitting the accused. According to these commentators, the judge had not *only* wrongly failed to take into account any 'steps' that Lazarus took to ascertain whether the complainant was consenting, when her Honour determined whether his asserted belief in consent might have been reasonable. In addition, it was said, Judge Tupman placed undue emphasis on the complainant's failure to resist, when her Honour made the findings that she did about the accused's mental state. For Horan and Goodman-Delahunty, because 'genuine victims of sexual assault … [do not always] 'say 'stop' or 'no' and will [not always] attempt to escape or fight back',[45] it was wrong for the judge to attach any significance to the complainant's passivity when resolving the mens rea question. For Cossins, likewise, the complainant's 'lack of physical resistance' did not rationally bear on whether Lazarus had made a reasonable mistake.[46] '[T]he law on rape',[47] she said, was deficient. It was deficient because it allowed a 'fact-finder to decide that sexual intercourse with a non-consenting person is not a criminal offence'.[48]

In my view, these comments are misconceived. It was perfectly rational for Judge Tupman to find that the complainant's failure to resist Lazarus

42 Ibid. 411 [168].
43 As noted by Mark Speakman and Pru Goward, 'Sexual Consent Laws to be Reviewed' (Media Release 8 May 2018) https://www.justice.nsw.gov.au/Documents/Media%20Releases/2018/sexual-assault-consent-laws-to-be-reviewed.pdf (accessed August 25, 2022).
44 A prominent Sydney-based radio announcer seemed to sum the situation up accurately when he told Lazarus in an interview that 'the court of public opinion views you as scum': 'Ben Fordham Confronts Luke Lazarus' https://www.2gb.com/exclusive-ben-fordham-confronts-luke-lazarus/ (accessed August 25, 2022).
45 Jacqueline Horan and Jane Goodman-Delahunty, 'Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned', 43(2) *UNSW Law Journal* 707, 708 (2020).
46 Annie Cossins, 'Why Her Behaviour is Still on Trial', 42(2) *UNSW Law Journal* 462, 489 (2019).
47 Ibid. 477.
48 Ibid.

was relevant (though no more than that) to whether he might have believed on reasonable grounds that she was consenting. That is because, as Duff has pointed out, it is only where there is no resistance – and no aggression from the accused – that a person can make a reasonable mistake about consent.[49] Or, to put the matter in a different way, if the complainant's failure to resist could *not* be taken into account when resolving the reasonable belief question, it is hard to see how an accused could ever be excused on the basis of a lack of mens rea. Cossins's suggestion that, in fact, an accused *should* never be excused on this basis – that is, her apparent contention that there should be a conviction in *all* cases where an accused engages in non-consensual intercourse with another person – must be rejected. Before elaborating on this point, however, it is necessary to note that Cossins is not the only commentator who has made such claims. In recent years, for instance, two Queensland commentators have argued that Parliament should render the honest and reasonable mistake of fact excuse 'inapplicable to the issue of consent in rape and sexual assault cases' in that State.[50] Like Cossins, these commentators are troubled by the fact that, while a person who fails to resist is not necessarily consenting, her or his lack of resistance may provide the foundation for 'the mistake of fact excuse'.[51]

C. *Why Mens Rea Is Important – and Why Certain Australian Rape/Sexual Assault Law Reform Proposals Are Therefore Untenable*

In *Sweet v Parsley*, Lord Reid referred to 'the public scandal of convicting [a person] on a serious charge'[52] without the prosecution's first proving that that person had a blameworthy state of mind when s/he performed the relevant conduct. And in *Thomas v The King*, Dixon J stated, similarly, that 'the most fundamental element in a rational and humane criminal code'[53] is the requirement that a person be convicted of serious criminal wrongdoing only upon proof that s/he has *culpably* inflicted the relevant harm. But *why* is the matter so fundamental? And *why* is imposing criminal liability without fault so 'scandal[ous]'?

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49 RA Duff, 'Recklessness and Rape', 3(2) *Liverpool Law Review* 49, 62 (1981).
50 Crowe and Lee (note 15), 4–5.
51 Ibid. 9.
52 *Sweet v Parsley* [1970] AC 132, 150.
53 *Thomas v The King* (1937) 59 CLR 279, 309 ('*Thomas*').

Ashworth has answered these questions in clear and persuasive terms. There are, he says, 'two principal' reasons[54] why it is objectionable for the state to punish the blameless. The first reason concerns the rule of law and the avoidance of state arbitrariness. The criminal law, Ashworth observes, should be a 'guide to action':[55] it should respect individual autonomy by warning the citizen in advance of the consequences that will ensue if s/he does what the law prohibits. But the law displays 'contempt'[56] for individual autonomy when it punishes those who, though they have been warned, could in reality have done nothing more than what they did to heed that warning. In such circumstances – in circumstances, that is, where we punish those who had no 'fair opportunity'[57] to avoid doing what the law proscribes – the state's compliance with the fair warning requirement is illusory. The second reason concerns state censure[58] and can be stated briefly. Quite simply, a person should not be subject to harsh punishment and all of the stigma that goes with it, unless s/he has acted culpably. In other words, if we punish without culpability, we visit hard treatment upon and expose to 'public condemnation'[59] those who are morally innocent.[60]

It follows that it is impossible to agree with those Australian commentators who support an absolute liability[61] standard for rape and similarly stigmatic sexual crimes. No one would consider convicting of a homicide offence those who blamelessly kill,[62] so why should the position be different regarding those who blamelessly engage in non-consensual sexual relations with others? Certainly, such persons exist. Take, for example, the person with an intellectual disability[63] who believes, reasonably for him

54 Andrew Ashworth, 'Should Strict Criminal Liability Be Removed from All Imprisonable Offences?', 45 *Irish Jurist* 1, 5 (2010).
55 Ibid. 5.
56 Ibid. 6.
57 HLA Hart, 'Negligence, *Mens Rea* and Criminal Responsibility' in HLA Hart, *Essays in the Philosophy of Criminal Law*, 2nd ed. 2008, 136, 152.
58 Ashworth (note 54), 5.
59 Ibid. 7.
60 See, e.g., Kimberley Kessler Ferzan, 'Consent, Culpability and the Law of Rape', 13(2) *Ohio State Journal of Criminal Law* 397, 421 (2016).
61 Liability without fault is commonly referred to in Australia as 'absolute liability': cf the English practice of referring to such liability as 'strict liability': see, e.g., *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428, 469 (Lord Steyn).
62 Ferzan (note 60), 422.
63 Note, eg, the accused's accounts in cases such as *R v Mrzljak* [2005] 1 Qd R 308 and *Butler v Western Australia* [2013] WASCA 242.

or her, that a non-consenting complainant is consenting. To say that the conviction of such an individual is acceptable,[64] because his or her 'lack of culpability … [can] be reflected in his [or her] sentence',[65] is to ignore the fact that s/he should not be being sentenced in the first place.[66]

For like reasons, we should reject 'affirmative consent' proposals that, if enacted, would have the law state that a person may be acquitted of rape or a like offence on the basis of a lack of mens rea, only if s/he has first 'ensure[d]'[67] that the complainant was consenting. For, in truth, such proposals attempt to achieve indirectly what the proposal just discussed would achieve directly: the removal of a culpability requirement for non-consensual sexual crimes. If the only person who could successfully rely on honest and reasonable mistake of fact were the person who had 'obtain[ed] clear, expressed indications of consent [from the complainant] before engaging in the acts(s)',[68] that 'excuse' would in fact be preserved in form only. It would have no actual operation.[69] That is because the person who has obtained 'clear ... and positive'[70] expressions of consent is having consensual sex, and therefore does not need to rely on a claim that s/he reasonably though *mistakenly* believed that the complainant was consenting.

With all that said, however, it is necessary to make two observations. The first observation is that we should not exaggerate the number of defendants who do, in fact, blamelessly engage in non-consensual sexual activity. Given the defendant's proximity to the complainant at the time of the relevant conduct, it will in many cases not be reasonable for him or her wrongly to believe that consent has been granted.[71] The second observation is a related one. However critical we might be of 'affirmative consent' provisions, it is easy to 'agree that best sexual practices involve clear communication'.[72] And it can readily be conceded that, often, it is

64 Jonathan Crowe and Bri Lee, 'Mental Incapacity', *Consent Law in Queensland* (Web Page) https://www.consentlawqld.com/mental-incapacity (accessed Agusut 25, 2022).

65 See *R v Hess* [1990] 2 SCR 906, 955 (McLachlin J) ('*Hess*').

66 Ibid. 924 (Wilson J). See also *CC v Ireland* [2006] 4 IR 1, 76 [34] (Hardiman J).

67 Burgin, (note 20), 302.

68 Ibid.

69 As I have argued on a number of occasions elsewhere. See, e.g., Andrew Dyer, 'Yes! To Communication about Consent; No! To Affirmative Consent: A Reply to Anna Kerr', 7(1) *Griffith Journal of Law and Human Dignity* 1, 11–12 (2019).

70 Crowe and Lee (note 15), 28.

71 Duff (note 49), 62.

72 Aya Gruber, 'Consent Confusion', 38 *Cardozo Law Review* 415, 445 (2016).

not unduly burdensome to the initiator of sexual activity to check with the other person whether this is something that s/he is willing to do. To be sure, there are cases where it is unfair to hold a person liable for non-consensual sexual offending simply because s/he has neither said nor done anything to ascertain whether the other participant is consenting. Defendants with intellectual disabilities, mental illnesses, or autism spectrum disorders are perhaps the most obvious exemplars of this point.[73] But, if we return to *Lazarus*, it seems reasonable for commentators to have argued[74] that the defendant there ought to have checked whether the complainant, whom he knew to be a virgin, and whom he had met only minutes before, was 'willing to have anal intercourse'.[75] Given this, it would also seem reasonable for the law to require triers of fact to *have regard to* such defendants' passivity when deciding whether they might have believed on reasonable grounds that the complainant was consenting. I shall develop this point in the next section.

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73 See, e.g., Dyer, 'Contemporary Comment' (note 17), 190.

74 See, e.g., Gail Mason and James Monaghan, 'Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus* Cases', 31(1) *Current Issues in Criminal Justice* 24, 33 (2019).

75 *Lazarus* [2016] NSWCCA 52, [130]. What if Lazarus had succeeded in having penile-vaginal intercourse with the complainant the first time he attempted to do so? My own view is that, in those circumstances, it might have been reasonable for him to believe that she was consenting. In the absence of aggression from him, or resistance from the complainant (although she had pulled her underwear up the first time Lazarus tried to pull it down), and without any knowledge on his part that the complainant was a virgin, his failure to ask 'are you consenting?' might have been more understandable than was his same failure when events unfolded as they in fact did. Note the similar example in Janet Halley, 'The Move to Affirmative Consent', 42(1) *Signs: Journal of Women in Culture and Society* 257, 266 (2016); and note, too, that as Hörnle has suggested, we should be circumspect about inflicting 'potentially life-destroying criminal conviction[s]' on those who 'fail … to deal appropriately with ambiguity': Tatjana Hörnle, 'The New German Law on Sexual Assault and Sexual Harassment', 18(6) *German Law Journal* 1309, 1320 (2017). With that said, however, I have no difficulty in accepting that, even on those facts, Lazarus would have acted with a 'troubling insensitivity' (to use the words of Kyron Huigens, 'Is Strict Liability Rape Defensible?' in RA Duff and Stuart Green, *Defining Crimes: Essays on the Special Part of the Criminal Law*, 2005, 196, 207). And I maintain that any person who is found by a judge to have engaged in non-consensual intercourse with another person should examine his or her conduct and beliefs: Andrew Dyer, 'Sexual Assault Law Reform in New South Wales: Why the Lazarus Litigation Demonstrates No Need for s 61HE of the Crimes Act to be Changed (Except in One Minor Respect)', 43(2) *Criminal Law Journal* 78, 86 (2019).

D. Consideration of a defendant's 'steps' to ascertain whether the complainant was consenting

We have seen that, on a prosecution appeal against Judge Tupman's decision to acquit Luke Lazarus, the NSWCCA found that her Honour had erred by failing to consider which 'steps', if any, Lazarus took to ascertain whether the complainant was consenting. Section 61HA(3)(d) of the *Crimes Act 1900* (NSW) made it perfectly clear that, when a trier of fact assessed whether the accused might have had a reasonable belief in consent, it (or s/he) was *required* to have regard to such steps.[76] But what is a 'step'? According to the NSWCCA, a person could take a 'step' within the meaning of the relevant sub-section without either saying anything or performing any 'physical … act'.[77] Rather, the Court held, 'a "step" … extends to include a person's consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives.'[78] Under such an approach, Judge Tupman would have committed no error if she had taken into account in Luke Lazarus's favour, when her Honour resolved the reasonable belief question, his formation of a positive belief that the complainant was consenting. As many commentators have argued, this would seem to defeat the purpose of the 'steps' provision.[79] For so long as triers of fact can take into account in the accused's favour the fact that s/he formed a positive belief in consent, when assessing whether that same belief might have been reasonable, little encouragement is provided to people to take more active measures to determine whether their sexual partners are consenting.

Shortly after the Lazarus litigation had concluded, the NSW government required the NSW Law Reform Commission ('NSWLRC') to consider whether reforms should be made to the NSW law relating to consent and knowledge of non-consent for the purposes of sexual assault and similar offences.[80] In its Final Report, issued in September 2020,[81] the

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76 This provision stated that, '[f]or the purpose of making any … finding' about mens rea in a sexual assault case, 'the trier of fact *must* have regard to … any steps taken by the [accused] … to ascertain whether' the complainant was consenting. (Emphasis added).

77 *Lazarus* (2017) 270 A Crim R 378, 407 [147].

78 Ibid.

79 See, e.g., Mason and Monaghan (note 74), 33; Dyer, 'Sexual Assault Law Reform in New South Wales' (note 75), 97–99.

80 Speakman and Goward (note 43).

81 New South Wales Law Reform Commission (note 18).

NSWLRC recommended that a number of reforms be made. Relevantly to the present discussion, one of those recommendations was that 'the concept of "steps" be clarified to direct the attention of fact finders [at sexual offence trials] to whether the accused person said or did anything to ascertain whether the complainant consented and, if so, what.'[82] In other words, according to the Commission, trial judges should be required to instruct juries that they must consider whether the accused took any *verbal or physical* steps to ascertain whether the complainant was consenting, when those juries determine whether it might have been reasonable for the accused mistakenly to believe in the existence of consent.[83]

It is submitted that this recommendation is eminently reasonable. It is inevitable that, when resolving the reasonable belief question, juries will focus to an extent on what the complainant did and did not do around the time of the relevant sexual activity. If s/he did not resist, then, depending on the circumstances, that might mean that the accused had a reasonable basis for any mistake s/he has made about consent.[84] It seems only fair to require juries also to consider the accused's omissions when answering the same question. If the accused did not ask, by word or gesture, 'are you consenting?', this might, in a particular case, allow the jury more readily to conclude that it was not reasonable for him or her to think that s/he was.

It is, however, regrettable that the NSW government decided to 'go further' than the NSWLRC urged it to go.[85] Responding to the NSWLRC's proposals, the NSW Attorney General on 25 May 2021 announced that the government intended to alter the law, so as to have it provide that an accused's belief in consent was not reasonable unless he or she 'said or did … something to ascertain consent'.[86] 'This means that we will have an affirmative model of consent', the Attorney General said, 'which will address issues that have arisen in sexual offence trials about whether an

82 Ibid. 146 [7.160].

83 Note the similar recommendation of the Queensland Law Reform Commission, which has also recently issued a Report about consent and mistake of fact in non-consensual sexual offence cases: Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact*, Report No 78 (2020) 189 [7.108]. The Queensland government has now acted on this recommendation: *Criminal Code Act 1899* (Qld) s 348A(2).

84 See, e.g., *R v IA Shaw* [1996] 1 Qd R 641, 646 (Davies and McPherson JJA).

85 Mark Speakman, 'Consent Law Reform' (Media Release, 25 May 2021) https://www.dcj.nsw.gov.au/news-and-media/media-releases/consent-law-reform (accessed August 25, 2022).

86 Ibid.

accused's belief that consent existed was actually reasonable.'[87] 'No one', he continued, 'should assume that someone is saying 'yes' just because they don't say 'no' or don't resist physically'.[88]

It is true that the resulting Bill,[89] which was passed by the NSW Parliament on 23 November 2021 and became law on 1 June 2022, was marginally less draconian than some[90] had feared it would be. I referred above to defendants with intellectual disabilities, mental illnesses or other cognitive impairments. Due to the inability of such persons to perceive events accurately, they might mistakenly, but reasonably for them, believe that their respective partners are consenting to sexual activity – and that there is therefore no need to 'say or do anything' to ascertain whether such consent has been granted. It 'would not be rational to impute blame' to such persons;[91] indeed, it would be deeply unjust. The NSW government has, to a limited extent, acknowledged this difficulty. Certainly, NSW law does now hold an accused's belief in consent not to have been reasonable if he or she 'did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person [was] consent[ing] … to the sexual activity'.[92] But this does not apply to those who, at the time of the sexual activity, had a 'cognitive impairment' or 'mental health impairment' that was 'a substantial cause' of their failure to 'say … or do … anything'.[93] That said, it is for such an

87 Ibid.

88 Ibid.

89 *Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021* (NSW).

90 See, e.g., Dyer, 'Contemporary Comment' (note 17), especially 190–1; Stephen Odgers SC, 'Peril in Sexual Consent 'Reform'', *Sun Herald*, 30 May 2021, 25. Others, however, failed to perceive any difficulties with the Attorney General's proposal: see, e.g., Justin Gleeson SC, 'Sexual Consent Reforms Will Brings Laws into Line with Community Standards', *The Sydney Morning Herald*, 3 June 2021 <https://www.smh.com.au/national/nsw/sexual-consent-reforms-will-bring-laws-into-line-with-community-standards-20210602-p57xgn.html> (accessed August 25, 2022); Eden Gillespie, ''Cautiously Optimistic': Experts Respond to NSW Consent Law Reform', *SBS*, https://www.sbs.com.au/news/the-feed/cautiously-optimistic-experts-respond-to-nsw-consent-law-reform> (accessed August 25, 2022).

91 *R v Lavender* (2005) 222 CLR 67, 108 [128] (Kirby J).

92 *Crimes Act 1900* (NSW) s 61HK(2).

93 *Crimes Act 1900* (NSW) s 61HK(3). Note that, in the Australian Capital Territory, a new 'affirmative consent' provision contains no such exception. *Crimes Act 1900* (ACT) s 67(5) simply states that the belief in consent of a person accused of non-consensual sexual offending is 'taken not to be reasonable … if the accused person did not say or do anything to ascertain whether the other person consented.' This means that the person with, say, an intellectual disability, whose mistaken

accused to prove on the balance of probabilities that his or her cognitive difficulties did substantially contribute to his or her passivity[94] (which of course constitutes an attack on the presumption of innocence and has the potential to facilitate the conviction of blameless actors[95]); and there are other problems with the new law.

All of these problems stem from the one cause: the law states to be true that which is not.[96] In other words, according to it, an accused who has failed to 'say or do anything' to ascertain whether a non-consenting complainant is consenting, can only possibly have a reasonable belief in consent if that accused had a 'cognitive impairment' or a 'mental health impairment' at the relevant time. But this is wrong. It is easy to think of cases where an accused's mistaken belief in consent might be reasonable, though s/he (a) has neither said nor done anything to determine whether

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belief in consent is a reasonable one for *him or her* to hold, will nevertheless be convicted of a very serious offence if s/he failed to say or do anything to work out whether his or her partner was consenting.

94 *Crimes Act 1900* (NSW) s 61HK(4).

95 The point was made well by Dickson CJ in *R v Oakes* [1986] 1 SCR 103, 132. 'If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence,' his Lordship said, 'it would be possible for a conviction to occur despite the existence of a reasonable doubt'. It is true that s 61HK(4) does not require the accused to disprove an *essential element of an offence*. But it does require him or her to prove a matter before the jury may consider whether the Crown has proved the mental element of sexual assault and like offences. Accordingly, it leaves open the possibility of a conviction in a case where it is reasonably possible that the accused lacked mens rea. In a case where it is possible, but not probable, that the accused's 'cognitive impairment' or 'mental health impairment' was a 'substantial cause' of his or her failure to say or do anything to ascertain whether the complainant was consenting, it might also be possible that the accused reasonably believed that the complainant was consenting: i.e. lacked mens rea. Yet such an accused will now be convicted in NSW.

96 A case that comes to mind here is the Supreme Court of Canada's decision in *Vaillancourt v The Queen* [1987] 2 SCR 636. In that case, the impugned provision allowed a person who had caused the death of another to be convicted of murder without proof of subjective fault on his or her part. It was enough for the Crown to prove, for instance, that s/he had 'a weapon upon … his [or her] person' at the time that s/he performed the relevant conduct: at 646. Crucial to the majority's conclusion that the provision breached ss 7 and 11(d) of the *Canadian Charter of Rights and Freedoms 1982* was its finding that it enabled murder convictions in cases where the accused had displayed neither subjective nor objective culpability: at 656–9. As I argue below, the NSW provision suffers from the same vice. It allows convictions for serious sexual offending in cases where the accused displayed no fault: that is, where s/he might have had a reasonable belief in the existence of consent.

the complainant was consenting to the sexual activity and (b) was experiencing no cognitive or mental health problems when the non-consensual activity occurred.

Consider, for example, the youth, who, because of his or her inexperience, mistakenly believes that his or her sexual partner is an enthusiastic participant, and who therefore never asks that person, by word or gesture, 'are you consenting?' Is it really accurate to say that such a person's belief in consent will *never* possibly be reasonable?

Consider, too, that the new provision will apply, not just to penetrative sexual activity, but also to sexual touching and sexual act offences.[97] If a person, while kissing a person with whom s/he has recently engaged in sexual activity, intentionally touches that person sexually, is it necessarily unreasonable for him or her to believe that that other person is consenting to the touching? And if a person kisses, or attempts to kiss, a person whom s/he wrongly thinks will welcome such attentions, is s/he invariably acting culpably? The answer that NSW law delivers to both of these questions is 'yes'. It is submitted that such a response is an irrational one that, additionally, reflects an unrealistic approach to how certain morally unproblematic sexual activity occurs.[98]

E. Conclusion

At the conference at which I delivered the paper upon which this chapter is based, no participant commented unfavourably on the argument that I have just presented; indeed, various participants were surprised to hear that there is now so much enthusiasm in jurisdictions such as NSW and Queensland for rape and like offences to become (or effectively to become) offences of absolute liability. How different this response was from the response that I have received from some Australian commentators when I have expressed similar ideas.[99]

Contrary to what those latter commentators have argued, proposals to remove a culpability requirement for very serious sexual offences, either di-

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97 *Crimes Act 1900* (NSW) s 61HG(1). The sexual touching offences are created by *Crimes Act 1900* (NSW) ss 61KC and 61KD. The sexual act offences are created by ss 61KE and 61KF.

98 See New South Wales Law Reform Commission (note 18), 138 [7.114].

99 The same sentiment exists in other Anglophone jurisdictions, as is demonstrated by the country reports in this volume for the United States and England and Wales.

rectly or by stealth, are not in the least bit 'progressive'.[100] And nor is it objectionably conservative to insist that we honour our centuries-long commitment to the 'humane [and] … liberal'[101] notion that those responsible for a harm, however grave, should only be imprisoned if they have displayed some form of culpability.[102] To be sure, the law should place some onus on those who initiate sexual activity to show a proper concern for the welfare and interests of those who are the object of their attentions. Moreover, there is much to be said for the view that, the more information an accused person has, and the more accurately s/he perceives the events with which s/he is confronted, the less understandable it might be for him or her to refrain from taking verbal or physical steps to ascertain whether his or her partner is consenting.[103] But to criminalise all mistakes about consent would be a punitive and retrograde response.[104] Even if such a policy were to increase conviction rates for sexual offences by very much – and it is doubtful whether it *would*[105] – such pragmatic considerations cannot justify the abandonment of our principled objections to punishment without fault.

100 Larcombe et al (note 15), 624.
101 *Thomas* (1937) 59 CLR 279, 302 (Dixon J).
102 See, e.g., *Hess* [1990] 2 SCR 906, 918 (Wilson J).
103 Huigens (note 75), 209.
104 See, e.g., Halley (note 75), especially 276–8; Hörnle (note 75), 1320.
105 This is because, at most non-consensual sexual offence trials, the only controversial question is whether the complainant consented. Only at a minority of such trials will the accused claim that, even if the complainant was not consenting, the accused believed (reasonably) that s/he *was*. On this point, see, e.g., *Director of Public Prosecutions for the Northern Territory of Australia v WJI* (2004) 219 CLR 43, 77 [107] (Kirby J).

Sense and Caution. A Comparative Perspective on Sweden's Negligent Rape Law

Linnea Wegerstad

A. Introduction

As this volume shows, many jurisdictions have broadened the scope of criminal sexual violence through the introduction of consent-based models. At the same time, measures have been taken with regard to the subjective elements of criminal liability in response to a common defence in rape cases: namely, that the defendant lacked knowledge of the other person's lack of consent. While some jurisdictions have introduced limitations to the defence of mistaken belief in consent – for example, the 'reasonable steps' provision in Canada – other countries, like Sweden, have introduced negligence as a sufficient fault element for rape liability. In this chapter, I examine the recently established negligent rape law in Sweden as one instance of a trend: a move in sex crimes law towards introducing a duty of diligence for persons who initiate sexual acts. I use a rape case from a Swedish Court of Appeal to illustrate fault elements across jurisdictions and to discuss some implications of the criminal law operating with a diligence standard.

B. Background

The reform of Swedish rape law – from a coercion-based definition of rape to a definition based on voluntariness – was complemented by a broadening of the mens rea requirement criminalising grossly negligent behaviour in sexual situations. The reform was preceded by almost twenty years of activism and discussion in the press and in parliament. Gabriella Nilsson has shown that the discursive field in which the process took shape consisted of news reports and debate about a number of high-profile Swedish group rape cases.[1] In the course of this discursive process, the notion of

1 *Gabriella Nilsson*, 'Towards voluntariness in Swedish rape law: Hyper-medialised group rape cases and the shift in the legal discourse', in: Marie Bruvik Heinskou,

negligence was gradually introduced as part of a critique of court cases in which defendants were acquitted due to lack of intent. Voices in the media debate stressed that accountability should be put where it belongs, meaning that men should be responsible for making sure that the other person wants to have sex before performing a sexual act. The following quote from a daily newspaper op-ed in 2003 captures this criticism of the criminal justice system:

> Swedish legislation has an implied prerequisite: women are basically available for sexual intercourse – unless otherwise specified. On the other hand, men are not being held responsible for finding out whether women consent to intercourse. And if a woman finds herself in a helpless state, it is sufficient for the men to be too dumb to realise that for them to walk completely free.[2]

While changes concerning the actus reus of rape were gradually implemented, there was more hesitation about revising the fault element required for rape.[3] In 2010, a governmental inquiry stated that there was no need to criminalize rape committed through negligence.[4] Almost ten years later and after another governmental inquiry reached the opposite conclusion, the Government found reasons for criminalising negligent rape.[5] One of these reasons was that sexual abuse is a serious crime and that the harm caused to the victim is independent of whether the act is committed intentionally or through negligence. It was further stated that there is just as much reason to use society's resources to prosecute negligent sexual crimes as intentional ones. Another argument put forward was: "A law based on voluntary participation is founded on the premise that anyone who intends to have sexual intercourse with someone else must ensure that the will to have such intercourse is mutual. Therein lies a requirement for caution."[6] Finally, the Government was inspired by the

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May-Len Skilbrei and Kari Stefansen (eds), Rape in the Nordic Countries. Community and Change (2019).

2 *Nilsson* (note 1), 109.

3 Before non-voluntariness was introduced, reforms of the actus reus of rape had taken place in 2005 and in 2013; Prop. 2004/05:45 En ny sexualbrottslagstiftning, Prop. 2012/13:111 En skärpt sexualbrottslagstiftning.

4 SOU 2010:71 Sexualbrottslagstiftningen – utvärdering och reformförslag, 218.

5 SOU 2016:60 Ett starkare skydd för den sexuella integriteten; Prop. 2017/18:177 En ny sexualbrottslagstiftning byggd på frivillighet, 23.

6 Prop. 2017/18:177 (note 5), 23 (author's translation).

sexual offence laws of England and Scotland, which were said to have "a kind of negligence liability".[7]

C. Rape law and a duty of diligence in a comparative perspective

For the following brief comparative overview, I will use as an example a case that the Prosecutor-General appealed to the Swedish Supreme Court.[8] The defendant (A) was charged with rape. Both the District Court and the Court of Appeal found that the complainant (B) was asleep and did not participate voluntarily when the defendant inserted his fingers into her vagina. The District Court found A responsible for intentional rape, while the Court of Appeal acquitted A on the ground that neither intent nor negligence could be proven. The established facts, based on the defendant's description of the course of events, were, in summary, as follows. A and B were friends, had never been in a romantic relationship, and had no intention to have sex. On the night in question, B, feeling sad, had sought support from A. B was tired when she came to A's house at night and fell asleep fully dressed in A's bed. A also fell asleep but later woke up again. B was then in the same position that she had been in before, on her side facing away from A. A moved nearer to B and lay close to her back. B took his hand and brought it to her chest. They played with each other's hands. Neither of them said anything. A begun to touch B's breasts and then her genitals. At that point B rolled over on her back, and A inserted his fingers into her vagina. He had his fingers in her vagina for a few minutes. B woke up and left the apartment.

This is the type of case that presumably will become more common in courts in the wake of the move to a rape law based on non-voluntariness. In the absence of violence, threat, or other means of coercion, it may be difficult to derive intent from the defendant's physical actions. Evidence for the subjective element is mainly found in the details as told by the complainant and the defendant. In cases like these, defendants often claim that they did not know or could not possibly understand that the other party did not want to participate in sex. One way to hold A liable is to

7 Prop. 2017/18:177 (note 5), 23: "ett slags oaktsamhetsansvar" (author's translation).

8 Hovrätten för Västra Sverige, judgement 2020–11–17 in case no. B 2279–20, Prosecutor-General petition for appeal 2020–12–15 (AMR-8753–20), Supreme Court decision 2021–05–05 in case no B 6632–20. A review permit was not granted by the Supreme Court. I used the prosecutor's appeal documents to describe the facts of the case.

say: even if A did not know, he should have taken sensible precautions and ensured B's consent before initiating the sexual act. To repeat the words of the journalist quoted above, A should not escape blameworthiness because he was "too dumb to realise" that B did not consent. This requires measures to reduce the mens rea standard. The purpose of the following brief overview is to show that while differences exist across jurisdictions, we can still discern a general trend towards criminal law discourse prescribing a duty of diligence in sexual situations.

The most serious fault elements are usually described as direct and indirect intent.[9] In applying the Swedish law to the example above, intent means that A must have been aware of, have known, or have been practically certain that B did not consent. In our example, the prosecutor could not prove that A knew that B was not consenting. We could also say that A raised the defence that he honestly believed that B was consenting.

Many civil law jurisdictions do not restrict mens rea requirements to direct or indirect intent, which means that A could be liable for intentional rape if he was aware of the risk that B did not consent. The lowest fault element in civil law systems such as Germany, Austria, and Switzerland is described as conditional intent/dolus eventualis (or reckless/indifference intent, the terminology used in Sweden).[10] This includes a two-step assessment: first, awareness of the risk for a circumstance to occur (a cognitive element), and second, acceptance of the risk (a volitional element). In our example, this means that for liability for intentional reckless rape in Sweden, it must be established that A was aware of the risk that B did not consent, and that this knowledge did not stop A from proceeding, or, in other words, that A accepted the realisation of the risk that B was not participating voluntarily.[11]

The concept of recklessness used in common law jurisdictions is similar to dolus eventualis, but recklessness there constitutes a separate type of fault and is generally not understood as the lowest degree of intent.[12] In the U.S. Model Penal Code, recklessness in relation to sexual offences

9 *Jeroen Blomsma* and *David Roef*, 'Forms and Aspects of Mens Rea', in: Johannes Keiler and David Roef (eds), Comparative Concepts of Criminal Law (2016), 129–132.

10 *Bloemsma* and *Roef* (note 9), 132–139; see also the chapters on Germany, Austria, and Switzerland in this volume.

11 NJA 2004 s. 176.

12 *Blomsma* and *Roef* (note 9), 139; *Dennis Martinsson* and *Ebba Lekvall*, 'The Mens Rea Element of Intent in the Context of International Criminal Trials in Sweden', Scandinavian Studies in Law 2020, vol. 66, 107.

means that a person must be aware of the substantial risk that the victim is not a willing party and proceed anyway.[13]

With regard to negligence, civil law systems usually distinguish between advertent (or conscious) and inadvertent (or unconscious) negligence.[14] Advertent negligence means that A foresees a possibility of B not consenting, but wrongfully relies on the idea that B consents. A is indifferent only to the risk, not to its realization. The lowest threshold of intent (conditional or reckless intent) and advertent negligence both require that A appreciates that there is a risk that B is not participating voluntarily. The distinction between the two appears in the second step – was A indifferent as to whether the complainant does not participate voluntarily? If yes, reckless intent is established. If no, A cannot be held liable for intentional rape, because A was indifferent to the risk, but not to its realization. A can be punishable only if negligent rape has been criminalized.

The fault elements described – whether in conditional intent, recklessness or advertent negligence – all require that A subjectively (from his standpoint) either was aware of B's lack of consent or had realized the risk that there was a lack of consent. To repeat again the journalist's words: "It is sufficient for the men to be too dumb to realise that for them to walk completely free." This criticism seems to call for (at least partly) objectivizing the assessment of the guilty mind. In common law systems, this has been achieved through the limitation of exculpation to instances of a *reasonable* mistake or through a requirement to affirmatively establish non-consent. In civil law systems, "inadvertent negligence" has been criminalized. Common to both solutions is the fact that A's behaviour is assessed not only subjectively but also from the point of view of an objective observer.

When negligent rape – which includes inadvertent negligence – was implemented in Sweden, the scope of criminal liability was extended considerably, because the new law made it possible to convict those who were truly ignorant. Inadvertent negligence is usually described as a two-step assessment: A *should* have been aware of this risk and *could* have done something to become aware of it. To be a bit more specific, to establish liability for inadvertent negligent rape according to Swedish law, first we must find out whether A breached a duty of care, whether A was careless.[15] This means considering what could be expected of a sensible and diligent

13 See the chapter on the United States in this volume.
14 *Blomsma* and *Roef* (note 9), 146.
15 NJA 2019 s. 668 para. 28.

person, with regard to the concrete circumstances and the context. Next it must be established that A could have met the required standard of care. A could have done something – like asking B – to determine whether B consented or not. Further, Swedish law prescribes that the degree of carelessness must be gross, 'clearly reprehensible'.[16]

This terminology of advertent and inadvertent negligence does not match with common law, where negligence refers only to inadvertent negligence.[17] However, the effect of criminalizing inadvertent negligence is similar to the effect of other lesser requirements for mens rea. A Canadian sexual assault law reform in 1992 involved a limitation of the defence of mistaken belief: the accused must have taken 'reasonable steps' to ensure consent, and there can be no such defence if the mistaken belief arises through 'recklessness' or 'willful blindness'.[18] The test of reasonable belief in the English Sexual Offences Act 2003 includes a two-step assessment.[19] First, did A subjectively believe that B consented? Second, did A (objectively) *reasonably* believe that B consented? This second step seems in effect to be somewhat similar to asking, under the inadvertent negligence assessment, whether A deviated from a standard of care. As described in the chapter on Australia, in some jurisdictions a defendant cannot rely on a defence of honest and reasonable mistake of fact unless it is established that he took reasonable steps to ascertain whether the complainant was consenting.[20] The chapter on the U.S. notes that jurisdictions regularly employ a negligence standard, requiring that people's conclusions about whether there was consent were reasonable.[21]

At the risk of over-simplifying, even if the terminology and criminal legal classifications differ, all legal constructions such as 'inadvertent negligence', 'reasonable belief' or 'reasonable steps' direct the focus toward the defendant's actions, and not only introduce a standard of diligence in sexual situations but also produce a sensible and careful subject in legal discourse.

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16 'Klart klandervärd', Prop. 2017/18:177 p. 8. See also Supreme Court decision 2022–04–07 in case number B 779–21.

17 *Blomsma* and *Roef* (note 9), 146.

18 *Lise Gotell*, 'Canadian sexual assault law: neoliberalism and the erosion of feminist-inspired law reforms', in: Vanessa Munro and Clare McGlynn (eds), Rethinking rape law: international and comparative perspectives (2010), 212.

19 Rape and Sexual Offences – Chapter 6: Consent, https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent, (accessed January 23, 2022). See also the chapter on England and Wales in this volume.

20 See the chapter on Australia in this volume.

21 See the chapter on the U.S. in this volume.

D. Concluding discussion

If the aim of past and ongoing reforms of sexual offences is to provide an increased protection for the individual's – especially women's – sexual integrity and autonomy, then changes to the fault element seem as important as amendments of the actus reus elements. In the example I have used, the actus reus definition of non-voluntary participation means that B, objectively, was raped. B had not in any way expressed consent and was also asleep when A inserted his finger into her vagina. Her bodily and sexual integrity was violated. If the message that criminal law sends about the protection of sexual integrity is to extend beyond a merely symbolic function, it seems insufficient to rely on A's subjective perception that he thought B consented. An objective standard, a duty of diligence for the person who initiates sexual acts, moves the focus from what B should have done in order not to be raped (not falling asleep in A's bed?) to what A should have done before he inserted his finger into her vagina in order to avoid violating her bodily and sexual integrity. Taking into consideration the context of this case, it can be argued that a diligent person in this situation should have realized that B was not voluntarily participating in the sexual act. A could have taken control measures, or in common law language, reasonable steps to ascertain that B consented. Therefore, A can be blamed for doing nothing to determine whether B was participating voluntarily although that he should have done something to make sure that she did. What is at stake is whether the subject that sexual offence laws intend to protect is perceived as available, and, especially, the female body as subject only to her autonomous determination.[22]

That said, a broadening of the fault element required for criminal liability does not come without problems. One concern that has been expressed concerning 'reasonable belief' is that jurors have difficulties in making this assessment, so that the intended objectivization slides into a subjectivized assessment.[23] In the Swedish context, where there are no jurors, a review by the Swedish National Council for Crime Prevention of court cases after

22 *Ulrika Andersson*, 'The unbounded body of the law of rape: the intrusive criterion of non-consent', in: Kevät Nousiainen et al. (eds), Responsible selves: women in the Nordic legal culture (2001), 333.

23 *Clare McGlynn*, 'Feminist activism and rape law reform in England and Wales: a Sisyphean struggle?', in: Clare McGlynn and Vanessa Munro (eds), Rethinking rape law: international and comparative perspectives (2010), 144; *Sharon Cowan*, 'All change or business as usual? Reforming the law of rape in Scotland', ibid., 165.

the 2018 reform concluded that the mens rea assessment became more difficult after the introduction of non-voluntary participation and negligent rape.[24] There seems to be, in court practice, an ambiguity in the language of the lowest threshold of intent and negligence. Another study of court judgments found that 'it appears arbitrary [as to] when the judge finds that gross negligence is attained' and 'the practice of proving gross negligent behavior appears difficult.'[25] This arbitrariness is problematic from the point of view of legal certainty, and it poses the broader, important question: what should be the required standard of care in sexual situations? Further, criteria for the assessment need to be worked out that take into account the significance of the protection of sexual integrity but prevent the punishment of conduct that lies within the limits of a reasonable degree of carelessness. There certainly is a need for future comparative studies in this field.

24 Brottsförebyggande rådet Rapport 2020:6 Den nya samtyckeslagen i praktiken, 53–55.

25 *Lisa Wallin et al.*, 'Capricious credibility – legal assessments of voluntariness in Swedish negligent rape judgements', 22 Nordic Journal of Criminology 3, 11 (2021).

National Reports

Australia

Andrew Dyer

A. Introduction

'I believe that the main object of our legal system is to preserve individual liberty', said *Lord Salmon* in the well-known English case of *Director of Public Prosecutions v Majewski*.[1] 'One important aspect of individual liberty', his Lordship continued, 'is protection against physical violence.'[2] There is an obvious tension between these two statements. No doubt, as *Lord Salmon* indicated, the state must take reasonable measures to protect the community from violent acts.[3] If it were to do otherwise, it would fail properly to respect the autonomy of those who might be victimised by such conduct. But those responsible for the content of the criminal law must not '*exclusive[ly]* focus on victims' perspectives'.[4] For, when they do so, they usually produce 'harsh and intrusive policies'[5] that show insufficient concern for the autonomy and rights of the accused. In other words, as *Hörnle* has observed, '[c]riminal prohibitions should be based on a fair balancing of what can be expected of citizens on *both* sides, that is, potential offenders and potential victims'.[6]

Does Australian sexual offence law achieve a fair balance between the interests of the complainant and those of the accused? Until recently, the answer to this question was largely 'yes' – and this continues to be the case in some Australian jurisdictions. This balance is under threat, however. It is under threat from elements in Australian society who have been led by their understandable concern about the low conviction rates for sexual offending in this country to advocate legal reforms that, according

1 *DPP v Majewksi* [1977] AC 443, 484.
2 Ibid.
3 See e.g., *Mastromatteo v Italy* [2002] VIII Eur Court HR 151, 165–6 [67]-[68].
4 Tatjana Hörnle, '#MeToo – Implications for Criminal Law?' 6(2) *Bergen Journal of Criminal Law and Criminal Justice* 115, 124 (2018) (emphasis added).
5 Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law*, 7th ed. 2013, 26.
6 Hörnle (note 4), 124 (emphasis in original).

to them, will 'shift … the focus'[7] of non-consensual sexual offence trials and 'ensure more effective prosecutions'.[8] It is very doubtful whether these reforms will have the intended effect. There is little evidence that such law reform initiatives will either produce 'cultural change'[9] or increase by very much the conviction rate for non-consensual sexual offending. But, even if there were such evidence, certain of these reforms would be undesirable. The Victorian Law Reform Commission is probably correct to observe that the New South Wales ('NSW') government's recent decision largely to remove a mens rea requirement for very serious sexual offences 'has elicited a 'generally … positive'[10] response from the media and the public. But it is certainly wrong to state that this response indicates that 'a stronger model of affirmative consent' should now be enshrined in Victorian law.[11] The media and public support all kinds of punitive irrationality.[12] Such support provides no basis for treating those accused of rape and like offences unfairly.

In part 2 of this chapter, I set out the Australian legal position concerning sexual offending. My main focus is on non-consensual sexual offences, though I also note sexual offences against (i) minors[13] and (ii) those with mental[14]/cognitive[15] impairments. And I note the uneven treatment across Australia of cases where a person participates in sexual activity because s/he has made a mistake about some matter.[16] In some jurisdictions, the accused who has fraudulently induced such a mistake is always (at least, on the face of it),[17] or usually,[18] guilty of a non-consensual offence. In

7 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences,* Report No 148 (2020) 88 [6.49].
8 New South Wales, *Parliamentary Debates,* Legislative Assembly, 20 October 2021, 7507 (Mark Speakman, Attorney General).
9 Stephen J Odgers, 'Reform of "Consent" Law', 45 *Criminal Law Journal* 77 (2021).
10 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, Report (September 2021) 303 [14.62].
11 Ibid. 304 [14.70].
12 See, e.g., John Pratt, *Penal Populism*, 2007, especially chapters 1–3.
13 See, e.g., *Crimes Act 1900* (NSW) Division 10, Subdivisions 5–9.
14 See, e.g., *Criminal Code Act 1913* (WA) s 330(1) and the offences created by s 330(2)-(8).
15 See, e.g., *Crimes Act 1900* (NSW) s 66F(2)-(3).
16 On this point see Jianlin Chen, 'Fraudulent Sex Criminalisation in Australia: Disparity, Disarray and the Underrated Procurement Offence', 43 *UNSW Law Journal* 581 (2020).
17 See, e.g., *Crimes Act 1900* (ACT) s 67(1)(i) – though cf *R v Tamawiwy (No 2)* (2015) 11 ACTLR 82, 92 [55], 93 [59] (Refshauge ACJ).
18 See, e.g., *Crimes Act 1900* (NSW) s 61HJ(1)(k) and (3).

others, only some such accused persons will be guilty of a non-consensual sexual offence:[19] the remainder, it seems, are guilty of the offence of procuring sexual activity by fraud.[20] In the Northern Territory, there is no procurement offence – and only a limited number of frauds will lead to non-consensual sexual offence liability.[21]

In part 3, I note some broad recent trends in the Australian law concerning non-consensual sexual offending and I argue that not all of them are worthy of emulation. The first such trend is to treat consent, not as what it is – a state of mind,[22] but as what it is not – 'a communicated state of mind'.[23] The second is to provide explicitly in the relevant legislation that sexual activity that continues after consent has been withdrawn is non-consensual[24] (a proposition to which no one could sensibly object) – but that such withdrawal only becomes effective once communicated by 'words or conduct'[25] (which seems wrong). The third is to treat all 'consents' that are obtained by threats,[26] and at least most 'consents' that are induced by fraud,[27] as in fact not being consents at all. The fourth is to prevent those accused of non-consensual sexual offending from relying on the 'defence' of honest and reasonable mistake of fact unless they have taken 'reasonable steps',[28] or have said or done something,[29] to ascertain whether the other person was consenting to the sexual activity at issue.

In part 4, I conclude by arguing that, while Australian sexual offence law rightly seeks to 'privilege … individual autonomy',[30] it does not in fact do so in certain respects. Increasingly, the law's failure to give proper

19 See, e.g., *Criminal Code Act 1899* (Qld) s 348(2)(e) -(f).
20 See, e.g., *Criminal Code Act 1899* (Qld) s 218(1).
21 *Criminal Code Act 1983* (NT) s 192(2)(e)-(g).
22 On this point, see, e.g., Larry Alexander, Heidi Hurd and Peter Westen, 'Consent Does Not Require Communication: A Reply to Dougherty', 35(6) *Law and Philosophy 655* (2016).
23 New South Wales Law Reform Commission (note 8), 84 [6.28]. See also, eg, *Criminal Code Act 1924* (Tas) sch 1 s 2A(2)(a); *Crimes Act 1958* (Vic) s 36(2)(l).
24 See, e.g., *Criminal Code Act 1899* (Qld) s 348(4).
25 See, e.g., *Criminal Code Act 1899* (Qld) s 348(4).
26 See, e.g., *Criminal Code Act 1913* (WA) s 319(2).
27 See, e.g., *Crimes Act 1900* (NSW) s 61HJ(1)(k) and (3). Cf Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact*, Report No 78 (2020) 117 [6.31] and *Criminal Code Act 1899* (Qld) s 348(2)(e)-(f).
28 *Criminal Code Act 1924* (Tas) sch 1 s 14A(1)(c).
29 *Crimes Act 1900* (NSW) s 61HK(2); *Crimes Act 1900* (ACT) s 67(5).
30 Tom O'Malley and Elisa Hoven, 'Consent in the Law Relating to Sexual Offences' in Kai Ambos et al (eds), *Core Concepts in Criminal Law and Criminal Justice, Volume I*, 135, 141 (2020).

recognition to this value stems from a concern to protect the interests of complainants – though, as shown by its approach to the question of withdrawal of consent, this is not always so.

B. *Australian sexual offence law*

In Australia, the criminal law is generally a matter, not for the Federal government, but for the governments of the (six) States and (two) Territories. When it comes to the law regarding sexual offending, the position taken by the various State and Territory governments is broadly similar.[31]

In most Australian jurisdictions, a person will commit an offence (variously described as rape,[32] sexual assault[33] and sexual penetration/intercourse without consent[34]) if s/he sexually penetrates another person[35] without both that person's consent[36] and a reasonable belief that s/he is consenting.[37] The two exceptions are South Australia ('SA') and the Northern Territory ('NT'), where a slightly more exacting mens rea standard applies.[38] In those jurisdictions, the person who has sexual intercourse with a non-consenting person will be acquitted if s/he may have believed,

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31 For a review of Australian rape laws, see Andrew Hemming, 'In Search of a Model Provision for Rape in Australia', 38(1) *University of Tasmania Law Review* 72 (2019).

32 *Crimes Act 1958* (Vic) s 38(1); *Criminal Code Act 1899* (Qld) s 349; *Criminal Code Act 1924* (Tas) s 185(1).

33 *Crimes Act 1900* (NSW) s 61I.

34 *Criminal Code Act 1913* (WA) s 325(1); *Crimes Act 1900* (ACT) s 54; *Criminal Code Act 1983* (NT) s 192(3).

35 Such penetration need not be by a penis – it may be by any part of the body of the other person or by an object – and it need not be female genitalia that is penetrated: anal penetration, cunnilingus and fellatio all potentially give rise to liability for rape/sexual assault/sexual penetration without consent: *Criminal Code Act 1913* (WA) s 319(1) (definition of 'to sexually penetrate'); *Crimes Act 1900* (NSW) s 61HA; *Criminal Code Act 1924* (Tas) sch 1 s 2B(1); *Crimes Act 1958* (Vic) s 35A(1); *Criminal Code Act 1899* (Qld) s 349(2) – and see also s 6.

36 *Crimes Act 1900* (NSW) s 61I; *Crimes Act 1958* (Vic) s 38(1)(b); *Criminal Code Act 1899* (Qld) s 349(2); *Criminal Code Act 1924* (Tas) sch 1 s 185(1); *Criminal Code Act 1913* (WA) s 325(1).

37 *Crimes Act 1900* (NSW) s 61HK(1)(c); *Crimes Act 1900* (ACT) s 67(4); *Crimes Act 1958* (Vic) s 38(1)(c); *Criminal Code Act 1899* (Qld) ss 24(1) and 348A; *Criminal Code Act 1913* (WA) s 24; *Criminal Code Act 1924* (Tas) sch 1 ss 14 and 14A – and see also *Arnol v The Queen* [1981] Tas R 157.

38 Though it is unclear how much longer the relevant governments will permit this situation to continue.

however unreasonably, that the other person was consenting.[39] But s/he will be convicted of rape[40]/sexual intercourse without consent[41] if the Crown can prove that s/he actually knew that the complainant was not,[42] or might not,[43] have been consenting, or altogether failed to consider the matter of consent.[44]

What about the accused who engages in *non-penetrative* sexual activity on, or with or towards, a non-consenting person?

In all Australian States and Territories, a person is guilty of an offence (variously described as 'sexual touching',[45] 'sexual assault',[46] 'indecent assault',[47] 'gross indecency without consent'[48] and 'act of indecency without consent'[49]), if s/he performs an act of intentional non-consensual sexual

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39 See *Criminal Law Consolidation Act 1935* (SA) ss 48 and 47; *Criminal Code Act 1983* (NT) s 192(3) and (4A).

40 *Criminal Law Consolidation Act 1935* (SA) s 48(1).

41 *Criminal Code Act 1983* (NT) s 192(3).

42 *Criminal Law Consolidation Act 1935* (SA) s 48(1); *Criminal Code Act 1983* (NT) s 192(3)(b).

43 *Criminal Law Consolidation Act 1935* (SA) ss 48(1) and 47(a)-(b); *Crimes Act 1983* (NT) ss 192(4)(b) and 43AK. See also *Gillard v The Queen* (2014) 88 ALJR 606, 612–3 [26] ('*Gillard*'). Note that it is slightly imprecise to say, as I have in the text, that, in the Northern Territory, it is enough for the Crown to prove that the accused realised that the complainant might not be consenting. More precisely, the Crown must prove that the accused realised that there was a substantial risk that the complainant was not consenting and that, having regard to the circumstances known to the accused, it was unjustifiable for him or her to take the risk. That said, it would be a rare case where the accused realised that there was a possibility that the complainant was not consenting and yet lacked the mens rea for the crime of sexual intercourse without consent. On this point, see *Banditt v R* (2004) 151 A Crim R 215, 232 [92].

44 *Criminal Law Consolidation Act 1935* (SA) ss 48(1) and 47(c); *Crimes Act 1983* (NT) s 192(3)(b) and (4A). It is true that the High Court of Australia in *Gillard* (2014) 88 ALJR 606, 613 [26], expressed no final view about whether such inadvertence amounted to 'reckless[ness]' for the purposes of *Crimes Act 1900* (ACT) s 54(1). However, if the Courts are ever called upon to determine this question, they would surely find that an intellectually able accused who did not even bother to consider the question of consent was 'reckless'. On this point, see, e.g., *Tolmie v R* (1995) 37 NSWLR 660.

45 *Crimes Act 1900* (NSW) s 61KC.

46 *Criminal Code Act 1899* (Qld) s 352; *Crimes Act 1958* (Vic) s 40.

47 *Criminal Code Act 1913* (WA) s 323; *Criminal Code Act 1924* (Tas) s 127; *Criminal Law Consolidation Act 1935* (SA) s 56.

48 *Criminal Code Act 1983* (NT) s 192.

49 *Crimes Act 1900* (ACT) s 60.

touching[50] and, at the time of the relevant conduct, has the requisite mens rea.[51] As with the penetrative sexual offences just discussed, the culpability requirement for such offending differs as between the relevant jurisdictions. In many jurisdictions, the person who engages in such conduct will be convicted upon proof that s/he lacked a reasonable belief that the complainant was consenting.[52] In some jurisdictions, however, it is necessary for the Crown to prove that the accused knew the complainant was not consenting or was reckless as to whether s/he was consenting.[53]

In *Fairclough v Whipp*,[54] it was held that the respondent had wrongly been convicted of an English indecent assault offence, in circumstances where he had exposed his penis to a girl and told her to 'touch it', which she did. That is because there had been no assault.[55] If, in Australia today, a person were to perform similar conduct – that is, if s/he were to incite a non-consenting[56] person to touch him or her in such a way – s/he would be guilty of an offence,[57] so long as (in some jurisdictions, anyway)

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50 A classic example of 'sexual touching' is the touching of another person's breasts or genital region: see, e.g., *Harkin v R* (1989) 38 A Crim R 296, 301.

51 *Crimes Act 1900* (NSW) s 61KC; *Criminal Code Act 1899* (Qld) s 352(1)(a); *Crimes Act 1958* (Vic) s 40(1); *Criminal Code Act 1924* (Tas) s 127(1); *Criminal Code Act 1913* (WA) s 323; *Crimes Act 1900* (ACT) s 60; *Criminal Code Act 1983* (NT) s 192(4); *Criminal Law Consolidation Act 1935* (SA) s 56(1).

52 *Crimes Act 1900* (NSW) s 61HK(1)(c); *Crimes Act 1900* (ACT) s 67(4); *Criminal Code Act 1899* (Qld) ss 24(1) and 348A; *Crimes Act 1958* (Vic) s 40(1)(d); *Criminal Code Act 1913* (WA) s 24; *Criminal Code Act 1924* (Tas) sch 1 ss 14 and 14A.

53 *Criminal Code Act 1983* (NT) s 192(4)(b); *South Australian Criminal Trials Bench Book* (2nd ed, September 2020) 373. 'Recklessness' seems to mean the same thing for the purposes of these offences as it does for penetrative sexual offences: see notes 43–44 and the text accompanying those footnotes. See also *Criminal Code Act 1983* (NT) ss 192(4)(b) and 43AK; *Gillard* (2014) 88 ALJR 606, 612–3 [26]; *South Australian Criminal Trials Bench Book* (2nd ed, September 2020) 373, citing *Fitzgerald v Kennard* (1995) 38 NSWLR 184.

54 (1951) 35 Cr App R 138.

55 Ibid. 140.

56 Because the complainant in *Fairclough* was aged nine, consent was not in issue in those proceedings.

57 *Crimes Act 1900* (NSW) s 61KC; *Criminal Code Act 1899* (Qld) s 352(1)(b)(i); *Crimes Act 1958* (Vic) s 41(1); *Criminal Law Consolidation Act 1935* (SA) ss 48A(1); *Criminal Code Act 1983* (NT) s 133 (and note that s 133(1) creates the offence of indecent dealing with *a child*); *Crimes Act 1900* (ACT) s 60(1); *Criminal Code Act 1924* (Tas) s 137 (and note that s 125B creates the offence of doing an indecent act with a child); *Criminal Code Act 1913* (WA) ss 203(1) and 204 (and note that s 321(4) and (5) make it clear that the person who incites *a child* to touch him or her sexually has offended seriously – see also s 319(1) (definitions of 'deals with' and 'indecent act') and (3)).

s/he lacked a reasonable belief in consent[58] and (in SA) s/he was at least 'reckless' as to the complainant's consent.[59]

The final non-consensual sexual offence scenario that we must consider is the case where there has been no touching at all, but the accused has performed a sexual act in the presence of a non-consenting person (such as, for example, an act of masturbation[60]). Where the accused has the applicable mental element, such conduct is criminal in all Australian jursidictions,[61] although there is no uniformity across Australia about what precisely must be proved in such a case. The contrasting approaches in NSW and Victoria give us a glimpse of the complexities here. In the former jurisdiction, the Crown must prove that the accused carried out a 'sexual act'[62] with or towards a non-consenting complainant and lacked a reasonable belief that that person was consenting.[63] In the latter, consent is not an issue. The Crown must instead prove that: the accused engaged in sexual activity;[64] the complainant saw this activity; the accused knew that it was at least probable that the complainant would see the activity or part of it; and the accused intended, or knew, or knew it was probable, that the complainant would thus experience fear or distress.[65]

Before we consider some recent trends in Australian non-consensual sexual offence law reform initiatives, it is necessary to deal with two other matters.

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58 *Crimes Act 1900* (NSW) s 61HK(1)(c); *Crimes Act 1900* (ACT) s 67(4); *Crimes Act 1958* (Vic) s 41(1)(d); *Criminal Code Act 1899* (Qld) ss 24(1) and 348A.

59 *Criminal Law Consolidation Act 1935* (SA) s 48A(1). Note, however, that non-consent is not an element of the offences created by *Criminal Code Act 1983* (NT) ss 132 and 133; *Criminal Code Act 1924* (Tas) s 137 or *Criminal Code Act 1913* (WA) ss 203(1), 204, 321(4)-(5). Concerning non-consent and the *Criminal Code Act 1924* (Tas) s 125B offence, see s 125B(3).

60 For a recent example of such offending, see *Veljanoski v R* [2021] NSWCCA 255, [8].

61 *Crimes Act 1900* (NSW) s 61KE(a); *Crimes Act 1958* (Vic) s 48(1); *Criminal Code Act 1899* (Qld) s 352(1)(b)(ii); *Crimes Act 1900* (ACT s 60(1); *Criminal Code Act 1924* (Tas) s 137; *Criminal Code Act 1983* (NT) s 133 (note, however, that the Crown must prove that the accused's conduct took place in public); *Criminal Code Act 1913* (WA) ss 203(1) and 204; *Summary Offences Act 1953* (SA) s 23.

62 As to which, see *Crimes Act 1900* (NSW) s 61KE.

63 *Crimes Act 1900* (NSW) s 61KE and 61HE(3)(c).

64 As to which, see *Crimes Act 1958* (Vic) s 35D.

65 *Crimes Act 1958* (Vic) s 48(1).

The first is that, in all Australian jurisdictions, there are crimes of engaging in sexual activity with a person who is under the age of consent,[66] or who has a 'cognitive impairment'[67] (to use the language that is favoured in NSW[68]). It would be wearisome to discuss all of these offences. It suffices to say that, throughout Australia, a person behaves prima facie[69] criminally if s/he: engages in penetrative sexual activity with a child;[70] intentionally touches a child sexually;[71] incites a child to touch the accused sexually;[72] or performs a sexual act in the presence of a child.[73] Moreover, it can be

66 See, e.g., *Crimes Act 1900* (NSW) Division 10 Subdivisions 5–9; *Crimes Act 1958* (Vic) ss 49A-49F, 49H, 49J-49K, 49N-49S; *Criminal Code Act 1899* (Qld) ss 210, 213, 215, 217, 218A-219; *Criminal Code Act 1983* (NT) ss 127, 131–131A; *Criminal Code Act 1913* (WA) ss 320–322; *Criminal Code Act 1924* (Tas) ss 124–125D; *Criminal Law Consolidation Act 1935* (SA) ss 49–50; *Crimes Act 1900* (ACT) ss 55, 61. As these offences show, the age of consent to both heterosexual and homosexual sexual activity is 16 in all Australian jurisdictions apart from Tasmania and SA, where it is 17.

67 See, e.g., *Crimes Act 1900* (NSW) s 66F; *Criminal Code Act 1899* (Qld) s 216; *Crimes Act 1958* (Vic) s 52B-52E; *Criminal Code Act 1924* (Tas) s 126; *Criminal Law Consolidation Act 1935* (SA) s 51; *Criminal Code Act 1913* (WA) s 330; *Criminal Code Act 1983* (NT) s 130; *Crimes Act 1900* (ACT) s 36A (note the definition of 'abusive conduct' in s 36A(5)).

68 The term 'cognitive impairment' is defined in *Crimes Act 1900* (NSW) s 61HD.

69 I say this because the accused might be able to raise a defence successfully or otherwise excuse his or her conduct. For example, the accused who might honestly and reasonably, but mistakenly, have believed that the complainant was 16 years or over will not be convicted of the NSW offence of having sexual intercourse with a person who is aged 14 or 15, even though s/he has performed the prohibited conduct; *CTM v The Queen* (2008) 236 CLR 440.

70 *Crimes Act 1900* (NSW) ss 66A and 66C; *Criminal Code Act 1983* (NT) s 127; *Crimes Act 1958* (Vic) ss 49A-49B; *Crimes Act 1900* (ACT) s 55; *Criminal Law Consolidation Act 1935* (SA) s 49(1) and (3); *Criminal Code Act 1913* (WA) s 320(2); *Criminal Code Act 1924* (Tas) s 124(1); *Criminal Code Act 1899* (Qld) s 215.

71 *Crimes Act 1900* (NSW) ss 66DA(a) and 66DB(a); *Criminal Code Act 1983* (NT) s 127(1); *Crimes Act 1958* (Vic) s 49D; *Criminal Law Consolidation Act 1935* (SA) ss 56(2) and 58(1)(a); *Criminal Code Act 1913* (WA) s 321(4) – and see s 319(1) (definition of 'deals with'); *Criminal Code Act 1899* (Qld) s 210(1)(a); *Crimes Act 1900* (ACT) s 60(1)-(2); *Criminal Code Act 1924* (Tas) s 127(1)-(3).

72 *Crimes Act 1900* (NSW) ss 66DA(b)-(c); *Criminal Law Consolidation Act 1935* (SA) s 58(1)(b); *Criminal Code Act 1913* (WA) s 321(4) – and see s 319(3)(a)-(b); *Criminal Code Act 1924* (Tas) s 125B(1); *Crimes Act 1958* (Vic) s 41(1); *Criminal Code Act 1899* (Qld) s 210(1); *Crimes Act 1900* (ACT) s 61(1)-(2); *Criminal Code Act 1983* (NT) s 132(2) and (4).

73 *Crimes Act 1900* (NSW) s 66DC(a) and 66DD(a); *Criminal Law Consolidation Act 1935* (SA) s 58(1)(a); *Criminal Code Act 1913* (WA) s 321(4) – and see s 319(3)(c); *Crimes Act 1900* (ACT) s 61(1)-(2); *Criminal Code Act 1983* (NT) s 132(2)

noted that s 130(2) of the *Criminal Code Act 1983* (NT) creates an offence of a kind that features in many Australian criminal law statutes.[74] That sub-section states that it is a crime for a person who provides 'disability support services' to a 'mentally ill or handicapped person' to have sexual intercourse with, or commit an act of gross indecency upon, that person. That said, s 132(3) goes on to provide that the person accused of such offending will be excused if s/he can prove either that s/he was the 'spouse or de facto partner' of the complainant or 'did not know that the person was a mentally ill or handicapped person.'

The second matter that must be dealt with is Australian law's approach to situations where a person fraudulently induces another person to engage in sexual activity. As noted in part 1, there is no consistency across the various jurisdictions about this issue.

In the NT, an accused who induces another person to engage in sexual intercourse or sexual touching, by making a false representation as to 'the nature or purpose of the act',[75] or who knowingly capitalises on a mistake that the complainant has made about the accused's identity,[76] will be guilty of a non-consensual sexual offence.[77] But in at least most[78] other cases where an accused has fraudulently induced a complainant to participate in such sexual activity, there would seem to be no criminal liability at all.

On the other hand, in Western Australia ('WA'), the Australian Capital Territory ('ACT') and Tasmania, it would seem that in at least most cases where an accused has fraudulently procured sexual activity for him or herself, s/he will be guilty of non-consensual sexual offending. In all of these jurisdictions, the relevant statute provides that there is no consent where a complainant's participation in sexual intercourse or certain other sexual activity has been 'obtained by … *any* fraudulent means' (to use the WA language).[79] Under reforms that came into force in NSW on June 1, 2022, the position is much the same. NSW law now states that there is no

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and (4); *Criminal Code Act 1924* (Tas) s 125B(1); *Criminal Code Act 1899* (Qld) s 210(1)-(4A); *Crimes Act 1958* (Vic) s 49F(1).

74 See, e.g., *Crimes Act 1900* (NSW) s 66F(2); *Criminal Law Consolidation Act 1935* (SA) s 51(1)-(2).

75 *Criminal Code Act 1983* (NT) s 192(1)(g); see also s 192(e)-(f).

76 *Criminal Code Act 1983* (NT) s 192(2)(e).

77 *Criminal Code Act 1983* (NT) s 192(3)-(4).

78 I say this because the list of vitiating circumstances in s 192(2) is stated to be non-exhaustive.

79 *Criminal Code Act 1913* (WA) s 319(2)(a) (emphasis added). See also *Criminal Code Act 1924* (Tas) s 2A(2)(f); *Crimes Act 1900* (ACT) s 67(1)(i).

consent to sexual activity if 'the person participates in the sexual activity because of a fraudulent inducement'[80] – though the relevant legislation also provides that a 'fraudulent inducement … does not include a misrepresentation about a person's income, wealth or feelings'.[81]

The remaining jurisdictions – that is, Queensland, Victoria and SA – take yet another approach to this issue. As in the NT, in these jurisdictions, an accused who has fraudulently induced another to participate in sexual activity will be guilty of non-consensual sexual offending only in limited circumstances.[82] If the accused has induced the complainant to believe, wrongly, that the act is not a sexual act,[83] or that the accused is the complainant's regular sexual partner,[84] or that 'the act is for medical or hygienic purposes',[85] the accused will be guilty of the relevant non-consensual offence. However, if the accused has used some other fraud to induce the complainant to participate, s/he will – in most cases, at least – be guilty of the offence of procuring sexual activity by fraud.[86]

C. Recent Trends in Australian Non-consensual Sexual Offence Law

I am now in a position to note some broad recent trends in the Australian law concerning non-consensual sexual offending.

The first of these trends relates to what precisely consent is. In all Australian jurisdictions the relevant legislation provides for a positive definition of consent.[87] 'A person consents', we are told, 'if [s/he] … freely

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80 *Crimes Act 1900* (NSW) s 61HJ(1)(k).

81 *Crimes Act 1900* (NSW) s 61HJ(3).

82 *Crimes Act 1958* (Vic) s 36(2)(h)-(j); *Criminal Code Act 1899* (Qld) s 348(2)(e)-(f); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(g)-(h).

83 For an example, see the case of *R v Williams* [1923] 1 KB 340, where a choirmaster induced a girl to participate in penetrative acts on the basis that this would improve her singing voice. On one view, because of Victorian naivety about sexual matters the girl did not know what sexual intercourse was and therefore had been caused mistakenly to believe that s/he was not engaging in a sexual act.

84 Note, e.g., *R v Pryor* (2001) 124 A Crim R 22, where the complainant had sexual intercourse with a burglar because of her mistaken belief that he was her boyfriend.

85 To use the Victorian language: *Crimes Act 1958* (Vic) s 36(2)(j).

86 *Crimes Act 1958* (Vic) s 45(1); *Criminal Code Act 1899* (Qld) s 218(1); *Criminal Law Consolidation Act 1935* (SA) s 60.

87 *Crimes Act 1900* (NSW) s 61HI(1); *Crimes Act 1900* (ACT) s 50B(a); *Crimes Act 1958* (Vic) s 36(1); *Criminal Code Act 1899* (Qld) s 348(1); *Criminal Code Act 1913*

and voluntarily agrees to the sexual activity.'[88] In other words, if a person autonomously participates in sexual activity, s/he is consenting to it; but if his or her participation is not 'free', his or her sexual autonomy is being infringed and the accused has performed the actus reus of a non-consensual sexual offence.

In my view, this positive definition creates no difficulties. What creates difficulties, at least potentially, is the increasing tendency of Australian legislatures to supplement this definition with a provision that states that a person does not autonomously participate in sexual activity if s/he 'does not say or do anything to communicate consent'.[89] The double negative here might leave readers in a state of confusion. What exactly does this provision mean? It means that, if A squeezes her husband on the bottom without warning, he is not consenting to the touching - even if he is in fact willing to be touched in this way. Why not? The answer is that he has neither said nor done anything to communicate to his wife his willingness to be touched sexually. Yet it seems clear that A has not infringed this man's sexual autonomy.[90]

Why does the law in an increasing number of Australian jurisdictions provide, wrongly, that a person consents only once s/he has said or done something to communicate his or her willingness? The answer lies in pragmatism. According to the NSW Law Reform Commission ('NSWLRC'), the provision just noted will cause juries at non-consensual sexual offence trials to focus less on what the complainant did, if anything, to resist the

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(WA) s 319(2)(a); *Criminal Code Act 1924* (Tas) s 2A(1); *Criminal Code Act 1983* (NT) s 192(1); *Criminal Law Consolidation Act 1935* (SA) s 46(2).

88 To use the SA language: *Criminal Law Consolidation Act 1935* (SA) s 46(2).

89 *Criminal Code Act 1924* (Tas) s 2A(2)(a). See also *Crimes Act 1900* (NSW) s 61HJ(1)(a); *Crimes Act 1900* (ACT) s 50B(b); *Crimes Act 1958* (Vic) s 36(2)(l). The position in Queensland is similar but subtly different. That State's Court of Appeal has held that, because consent must be 'given' (see *Criminal Code Act 1899* (Qld) s 348(1)), it only becomes effective once the complainant has represented to the accused in some way that s/he is willing. That said, in some circumstances, silence is capable of amounting to such a representation. See *R v Makary* [2019] 2 Qd R 528, 543 [49]-[50].

90 As I have argued elsewhere. See, e.g., Andrew Dyer, 'A Reasonable Balance Disrupted (in New South Wales): The New South Wales and Queensland Law Reform Commissions' Reports about Consent and Culpability in Sex Cases Involving Adults – and the Governments' Responses' 51(1) *Australian Bar Review* 28, 42 (2022); Andrew Dyer and Thomas Crofts, 'Reforming Non-consensual Sexual Offences in Hong Kong: How Do the Law Reform Commission of Hong Kong's Proposals Compare with Recent Recommendations in Other Jurisdictions?' (2022) 51(3) *Common Law World Review* 145, 155-156.

accused, and more on what s/he said or did, if anything, to communicate her or his willingness.[91] But will it? The NSWLRC provides no evidence to support its assertion that it will. And it is necessary also to note this. The non-resisting complainant will nevertheless almost always have done *something* around the time of the sexual activity. Where s/he has, it seems inevitable that, despite a provision of the kind being discussed, juries will continue to focus on her or his lack of resistance. If a complainant, for example, places her hands on a wall at the accused's request,[92] juries will (rightly) take into account her or his lack of resistance at the relevant time when assessing whether such an act was, or was not, done to communicate to the accused that s/he was a willing participant.

In short, the onus should be on those who claim that the law should say that consent is something that it is not, to establish that this will bring about practical benefits. They have not discharged this onus.[93]

This brings me to the second recent trend in non-consensual sexual offence law reform in Australia. If, in truth, consent is a state of mind, and exists without communication, then surely the same must be true of withdrawal of consent? Take, for example, the person who, while engaging in sexual intercourse, 'freezes' and decides that this is not something that s/he is any longer willing to do. Such a person is clearly not autonomously participating in any further sexual activity that takes place. Yet the law in Queensland takes a different view – and the same is true in NSW and the ACT.[94] 'If an act is done or continues after consent is withdrawn *by words or conduct*', the relevant Queensland provision states, 'then the act continues without consent.'[95]

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91 New South Wales Law Reform Commission (note 7), 88 [6.49].

92 To use the facts of *R v Lazarus* (Unreported, District Court of NSW, Tupman DCJ, 4 May 2017).

93 Cf, however, the arguments presented by James Duffy, 'Sexual Offending and the Meaning of Consent in the Queensland Criminal Code', 45 *Criminal Law Journal* 93, 109 (2021). Duffy is one of those rare people – an Australian advocate of 'affirmative consent' (see at 93, fn 5) who is willing to engage with the arguments of those who take a different stance.

94 *Crimes Act 1900* (NSW) s 61HI(2); *Crimes Act 1900* (ACT) s 67(1)(a).

95 *Criminal Code Act 1899* (Qld) s 348(4) (emphasis added). Note the slightly different wording of *Crimes Act 1900* (ACT) s 67(1)(a). It seems clear that, in all jurisdictions, a person can withdraw her or his consent to sexual activity, though this is not always expressly stated in the relevant statute – and, where it *is*, the statute does not make it clear whether such withdrawal only becomes effective once it is communicated: see, e.g., *Criminal Law Consolidation Act 1935* (SA) s 48(1); *Crimes Act 1958* (Vic) s 36(2)(m).

Why have the Queensland, ACT and NSW Parliaments accepted that withdrawal of consent only becomes effective once the complainant actually communicates this withdrawal? The answer seems to be fuzzy thinking. According to the NSWLRC, '[f]airness dictates that, if consent has been freely and voluntarily given, its withdrawal should be communicated before a person acting on the consent … could be convicted of a criminal offence.'[96] But, if the law were to provide that withdrawal of consent is a state of mind, the accused who reasonably believed that the complainant was continuing to consent would *not* be convicted. S/he would lack the requisite mens rea. It is true that the accused who lacked such a reasonable belief *would* be liable. But that is as it should be. It is not in the least bit unfair to convict of a non-consensual sexual offence a person who continues with sexual activity despite having such a culpable state of mind.

The third noteworthy recent development in Australian non-consensual sexual offence law concerns the negation of consent.

In all Australian jurisdictions, the law provides that a person is not consenting to sexual activity where s/he participates in it because of force[97] or a threat of force.[98] In many Australian jurisdictions, the law states that there is no consent where a person participates in sexual activity because s/he: is unlawfully detained;[99] is overborne by a person in a position of authority over him or her;[100] is unconscious or asleep;[101] is so affected by

96 New South Wales Law Reform Commission (note 7), 64 [5.45].

97 *Crimes Act 1900* (NSW) s 61HJ(1)(e); *Crimes Act 1958* (Vic) s 36(2)(a); *Criminal Code Act 1899* (Qld) s 348(2)(a); *Criminal Code Act 1913* (WA) s 319(2)(a); *Criminal Code Act 1924* (Tas) s 2A(2)(c); *Criminal Code Act 1983* (NT) s 192(2)(a); *Crimes Act 1900* (ACT) s 67(1)(b) and (f); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(i).

98 *Crimes Act 1900* (NSW) s 61HJ(1)(e); *Crimes Act 1958* (Vic) s 36(2)(a); *Criminal Code Act 1899* (Qld) s 348(2)(b)-(c); *Criminal Code Act 1913* (WA) s 319(2)(a); *Criminal Code Act 1924* (Tas) s 2A(2)(b)-(c); *Criminal Code Act 1983* (NT) s 192(2)(a); *Crimes Act 1900* (ACT) s 67(1)(c); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(i).

99 *Crimes Act 1900* (NSW) s 61HJ(1)g); *Crimes Act 1900* (ACT) s 67(1)(o); *Crimes Act 1958* (Vic) s 36(2)(c); *Criminal Code Act 1924* (Tas) s 2A(2)(d); *Criminal Code Act 1983* (NT) s 192(2)(b); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(b).

100 *Crimes Act 1900* (NSW) s 61HJ(1)(h); *Criminal Code Act 1899* (Qld) s 348(2)(d); *Criminal Code Act 1924* (Tas) s 2A(2)(e). See also *Crimes Act 1900* (ACT) s 67(1)(k).

101 *Crimes Act 1900* (NSW) s 61HJ(1)(d); *Crimes Act 1900* (ACT) s 67(1)(m)-(n); *Crimes Act 1958* (Vic)

alcohol or drugs as to be incapable of consenting[102] or, for some other reason, lacks the capacity to consent/[103]'understand … the sexual nature of the act'/[104] 'understand the nature of the act.'[105] There seems little to disagree with here.[106] But other aspects of the law concerning negation of consent are more contentious – and this brings me to the recent trend in Australian law that I wish to highlight. That trend is this: Australian law seems increasingly to be accepting the notion that a person is not consenting: (i) *whenever* s/he has participated in sexual activity because of a non-violent threat;[107] and (ii) *in most circumstances (at least)*, where the accused has used fraud to induce such participation.[108] How sound is such an approach?

My own view is that the first of these developments is sound. It is true that the person who participates in sexual activity because of a threat, say,

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s 36(2)(d); *Criminal Code Act 1899* (Qld) s 348(1); *Criminal Code Act 1924* (Tas) s 2A(2)(h); *Criminal Code Act 1983* (NT) s 192(2)(c). See also *Criminal Law Consolidation Act 1935* (SA) s 46(3)(c).

102 *Crimes Act 1900* (NSW) s 61HJ(1)(c); *Crimes Act 1900* (ACT) s 67(1)(g); *Crimes Act 1958* (Vic) s 36(2)(e); *Criminal Code Act 1899* (Qld) s 348(1); *Criminal Code Act 1924* (Tas) s 2A(2)(h); *Criminal Code Act 1983* (NT) s 192(2)(d). See also *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d).

103 *Crimes Act 1900* (NSW) s 61HJ(1)(b); *Crimes Act 1900* (ACT) s 67(1)(l); *Criminal Code Act 1899* (Qld) s 348(1); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(e).

104 *Crimes Act 1958* (Vic) s 36(2)(g); *Criminal Code Act 1983* (NT) s 192(2)(d).

105 *Criminal Code Act 1924* (Tas) s 2A(2)(i); See also *Criminal Law Consolidation Act 1935* (SA) s 46(3)(h).

106 But cf Odgers (note 9), 77–8. Julia Quilter, 'Getting Consent 'Right': Sexual Assault Law Reform in New South Wales', *Australian Feminist Law Journal* 1 (2021) has recently argued that the law should do more than it does to state when consent is *present*, as opposed to when it is absent (at 20), and seems to believe that a person consents only when s/he enthusiastically participates in sexual activity. The person who participates reluctantly, as a result of persuasion, is not consenting, Quilter seems to think (at 21). Such views are misconceived. To use an example that I have used elsewhere, if a woman persuades a man to engage in sex that a doctor has prescribed as fertility treatment, the man is clearly consenting despite his reluctance: Andrew Dyer, 'Yes! To Communication about Consent; No! To Affirmative Consent: A Reply to Anna Kerr', 7(1) *Griffith Journal of Law and Human Dignity* 1, 5 (2019).

107 *Crimes Act 1900* (NSW) s 61HJ(1)(f); *Crimes Act 1900* (ACT) s 67(1)(d)-(f); *Criminal Code Act 1899* (Qld) s 348(2)(b); *Criminal Code Act 1913* (WA) s 319(2)(a); *Criminal Code Act 1924* (Tas) s 2A(2)(c). See also *Criminal Code Act 1983* (NT) s 192(2)(a); *Crimes Act 1958* (Vic) s 36(2)(b).

108 See, e.g., *Crimes Act 1900* (NSW) s 61HJ(1)(k) and (3); *Crimes Act 1900* (ACT) s 67(1)(i).

to 'tell her fiancé that she had been a prostitute',[109] or to report her for shoplifting,[110] makes a freer choice than does the person who participates with a gun at her or his head.[111] Nevertheless, there seems much to be said for the view that, because she 'mentally object[s]'[112] to the sexual activity, she is not participating autonomously in it.

What about the second of these developments? If a person procures 'consent' by telling the complainant, falsely, that he has had a vasectomy,[113] or poses no real risk of transmitting HIV,[114] or will not ejaculate inside him or her,[115] or will pay him or her,[116] should s/he be guilty of rape? Consistently with what I have argued elsewhere,[117] I believe that the answer to this question is 'yes.' The person who 'consents' because of any of these mistaken beliefs – or any other mistaken belief, for that matter – is participating in the sexual activity no more autonomously than the person who participates due to a mistaken belief as to the accused's identity or the nature or purpose of the activity.[118] But that is not to say that that liability should arise – for non-consensual sexual offending, or for anything else – in *all* cases where an accused has fraudulently induced another person to participate in sexual activity.

The first type of case in which liability should not arise is where the accused's fraud concerns a trivial matter. In other words, the NSW Parliament is right to hold that, where the accused procures 'consent' by lying about his or her 'income, wealth or feelings',[119] a conviction should not be possible. However non-consensual such conduct in fact is, such prosecutions would bring the criminal law into disrepute. That said, there are reasons to doubt whether the NSW approach goes far enough. On the face

109 *R v Olugboja* [1982] 1 QB 320, 328.
110 *R v Aiken* (2005) 63 NSWLR 719, 727 [33].
111 Jennifer Temkin, 'Towards a Modern Law of Rape', 45(4) *Modern Law Review* 399, 406–7 (1982).
112 Larry Alexander, 'The Ontology of Consent', 55(1) *Analytic Philosophy* 102, 111 (2014); see also 112–3.
113 *R v Lawrance* [2020] 1 WLR 5025.
114 See, e.g., *R v Zaburoni* [2014] QCA 77, [7].
115 *R(F) v DPP* [2014] QB 581.
116 See, e.g., *R v Linekar* [1995] QB 250.
117 See especially Andrew Dyer, 'Mistakes that Negate Apparent Consent', 43(3) *Criminal Law Journal* 159, 165–8 (2019).
118 For similar views, see, e.g., Tom Dougherty, 'Sex, Lies and Consent', 123(4) *Ethics* 717, 728 (2013); Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy', 122(6) *Yale Law Journal* 1372, 1376–8 (2013); Jonathan Herring, 'Mistaken Sex', *Criminal Law Review* 511, 517 (2005).
119 See, e.g., *Crimes Act 1900* (NSW) s 61HJ(3).

of things,[120] in NSW, a person will now commit sexual assault if s/he, say, induces: (i) his or her spouse to 'consent' to sexual intercourse by falsely telling him or her that s/he is not having an affair; or (ii) his or her lover to 'consent' by falsely telling him or her that s/he does not have a spouse. That does not seem desirable.

The second type of case in which there should be no liability is where the accused's lie concerns a matter about which s/he has a reasonable expectation of privacy, or where a successful prosecution would see the law conniving at discriminatory attitudes.[121] In other words, if an accused induces a complainant to participate in sexual activity by lying about, say, his or her race, or sexual or gender history,[122] there seem good reasons for the law not to treat his or her conduct as criminal. To the extent that the law in most Australian jurisdictions allows such persons to be convicted of serious offending,[123] it seems clear that that law is misconceived.

The fourth recent trend in Australian non-consensual sexual offence law is the most pernicious – at least from the point of view of criminal law principle. We have seen that, in the majority of Australian jurisdictions, an accused will be guilty of non-consensual sexual offending if the Crown can prove that s/he engaged in non-consensual sexual activity with the complainant *and lacked a reasonable belief that the complainant was consenting*. In recent years, in response to claims or suggestions that an accused should be convicted of serious sexual offending simply upon proof that s/he in fact engaged in non-consensual sexual activity with the complainant,[124] certain Australian legislatures have adopted measures that severely limit

120 Cf New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 October 2021, 7510 (Mark Speakman, Attorney General). The Attorney General describes the statutory list of 'trivial lies' as 'non-exhaustive', but there is nothing in the statutory language itself that makes this clear.

121 See, e.g., Nora Scheidegger, 'Balancing Sexual Autonomy, Responsibility and the Right to Privacy: Principles for Criminalizing Sex by Deception', 22 *German Law Journal* 769, 780–782 (2021).

122 On this point, see, e.g., Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent', 3 *Criminal Law Review* 207 (2014).

123 See *Crimes Act 1900* (NSW) s 61HJ(1)(k) and (3); *Criminal Code Act 1913* (WA) s 319(2)(a); *Crimes Act 1900* (ACT) s 67(1)(i); *Criminal Code Act 1924* (Tas) s 2A(2)(f); *Criminal Code Act 1899* (Qld) s 218(1); *Crimes Act 1958* (Vic) s 45(1); *Criminal Law Consolidation Act 1935* (SA) s 60.

124 See, e.g., Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform', 39 *University of Queensland Law Journal* 1, 4–5, 25–27 (2020); Wendy Larcombe et al, ''I Think it's Rape and I Think He Would be Found Not Guilty': Focus Group Percep-

the availability of honest and reasonable mistake of fact in sexual offence cases. I discuss this issue more fully in my other chapter in this volume. It is enough to note two things at this stage.

First, in Tasmania, a person accused of, relevantly, rape or indecent assault, may only hope to raise honest and reasonable mistake of fact successfully if s/he took 'reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.'[125] It is unclear what a 'step' is for the purposes of this provision;[126] but if a person only takes a 'step' by saying or doing something,[127] there is an obvious problem. The person who says or does something to ascertain whether another person is consenting, is seldom mistaken about whether consent has been granted. If it is only persons of this kind who can rely successfully on honest and reasonable *mistake* of fact, then it seems to follow that that 'defence' has practically been abolished. And yet there are certainly people who, because they reasonably believe that a non-consenting person is consenting, have not acted at all culpably, and therefore should be excused on the basis of their reasonable belief. I provide examples of such persons in my other chapter.

The second thing that must be noted is that NSW law now provides that, certain persons with mental health or cognitive impairments aside, an accused's belief in consent will be incapable of being reasonable unless, 'within a reasonable time before, or at the time of the sexual activity', s/he said or did something to 'find out whether the other person' was consenting[128] – and the Victorian government has recently followed suit.[129] Now that the two largest Australian jurisdictions have failed to resist the punitive allure of 'affirmative consent', it is hard to believe that the other

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tions of (un)Reasonable Belief in Consent in Rape Law', 25(5) *Social and Legal Studies* 611, 623–624 (2016).

125 *Criminal Code Act 1924* (Tas) s 14A(1)(c).

126 On this point, see the Canadian case of *Barton v The Queen* [2019] 2 SCR 579, 634–9 [101]-[113], where the Supreme Court of that country did its best to elucidate the precise meaning of a provision that is similar to s 14A(1)(c).

127 Cf *Lazarus v The Queen* (2017) 270 A Crim R 378, 406–7 [146]-[147].

128 See *Crimes Act 1900* (NSW) s 61HK(2).

129 *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic).

Australian States and Territories will exhibit greater restraint.[130] The floodgates seem to have opened.[131]

It is not as though such laws are likely to lead to widespread injustice: because the lively issue at most Australian sexual offence trials is consent,[132] not the accused's knowledge of the complainant's non-consent, juries will probably not be required very often to consider whether the accused might have taken the prescribed steps. But these laws might well cause *some* injustice; and this is essentially because they uphold a fiction. Above, we encountered the woman who, without warning, squeezes her husband on the bottom.[133] In NSW, such conduct now amounts to a serious crime. We have seen that, according to NSW law, the man is not consenting. Partly because she has neither done nor said anything to work out whether he is consenting, the woman is deemed to have the requisite mens rea. Of course, this particular case would be very unlikely to lead to a prosecution. Nevertheless, when it deems to be culpable those who are not, the law plays a dangerous and unprincipled game. Again, I elaborate on this point in my other chapter.

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130 Indeed, the ACT government has already adopted the NSW approach – or, to be more precise, an even stricter one. According to *Crimes Act 1900* (ACT) s 67(5), a person accused of sexual intercourse without consent or a like offence cannot rely on honest and reasonable mistake of fact if s/he 'did not say or do anything to ascertain whether the other person consented.' Unlike in NSW, this requirement applies to *all* those accused of the relevant offences: no exception is made for those with a cognitive or mental health impairment.

131 In early 2022, the WA government requested the Law Reform Commission of that State to review the law relating to sexual consent: John Quigley and Simone McGurk, 'Two Major Reviews to Examine Western Australia's Sexual Offence Laws' 8 February 2022 < https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/02/Two-major-reviews-to-examine-WAs-sexual-offence-laws.aspx > (accessed August 25, 2022). Nobody expects that the WA Law Reform Commission will recommend against the adoption of an affirmative consent model – but it should. It also seems practically certain that the Queensland government will adopt such a model in that State, despite its refusal to do so in 2020. See Women's Safety and Justice Taskforce, *Hear Her Voice: Women and Girls' Experiences Across the Criminal Justice System*, Report Two, Volume 1 (2022) 216, cf 222–4.

132 See, e.g., *Director of Public Prosecutions for the Northern Territory of Australia v WJI* (2004) 219 CLR 43, 77 [107] (Kirby J).

133 See text accompanying notes 89–90.

D. Conclusion

'[T]he aim of the law on rape', announces *Cossins*, 'is to preserve 'human dignity''.[134] According to that commentator, however, Australian law has traditionally not achieved this aim. This is because it has required the Crown to prove, not merely that there was non-consensual sexual activity, but also that the accused had a culpable state of mind.[135]

What *Cossins*'s analysis overlooks is that it is not only sexual offence complainants who have human dignity: those accused of such offending have it, too.[136] Accordingly, while the law must do what it can do to protect the sexual autonomy of complainants, it must ensure that this interest is appropriately balanced against the autonomy and other interests of the accused. It should not allow for the conviction of morally innocent persons. Because the fictions that Australian law is increasingly endorsing allow for such convictions, they are unjustified. And so too is Australian law's increasing tendency to treat withdrawal of consent as being effective only once it is communicated. In this latter respect, Australian law *does* fail sufficiently to protect complainants' sexual autonomy.

134 Annie Cossins, 'Why Her Behaviour is Still on Trial', 42(2) *UNSW Law Journal* 462, 477 (2019), quoting *R v Kitchener* (1993) 29 NSWLR 696, 697 (Kirby P).

135 Ibid.

136 See Simon Bronitt and Patricia Easteal, *Rape Law in Context: Contesting the Scales of Injustice*, 2018, 170.

Austria

Sebastian Mayr, Kurt Schmoller[1]

A. Social and legal background

1. Sexuality and gender equality in society

The historical development of Austrian criminal law on sexual offences reflects the change in society's approach to sexuality – from extensive taboo until the 1960s to respect for and protection of the sexual autonomy of each individual.[2] Originally intended to preserve public morals,[3] the criminal law on sexual offences now primarily protects the right to make self-determined decisions about the nature and extent of sexual activity.[4] In addition, criminal law is to guarantee adolescents an undisturbed sexual development,[5] which is understood as part of the development of the personality.[6]

Gender equality *before the law* is constitutionally guaranteed in Article 7 para. 1 of the Federal Constitutional Law, and the state is committed to providing *de facto* equality of men and women in para. 2 of this Article. Although numerous laws have been passed to reach this goal, especially

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1 We thank teaching assistant Johanna Hiesleitner MSc, LLB.oec for her support on this report. This text was translated with the help of deepl.com.

2 Cf. *Kienapfel/Schmoller*, Strafrecht Besonderer Teil III[2] (2009) Vorbem §§ 201 ff. recital 4 f.

3 Cf. for example the explanatory memorandum in 105 BlgNR (attachment to stenographic minutes of the National Council) 6. GP (legislative period), 4 on the Pornography Act 1950 (translated): "Such expressions of an unbridled will to live and a striving to free oneself from traditional ties have, as world history shows, been the regular consequence of every great catastrophe of mankind".

4 Cf. the headline of the 10th division of the Austrian Criminal Code (ACC) "Offences against sexual integrity and self-determination", translation by *Schloenhardt/Höpfel,* Strafgesetzbuch. Austrian Criminal Code (2016), 266.

5 Mainly by the offences against the sexual abuse and exploitation of minors in §§ 206 ff. ACC.

6 Grundsatzerlass Sexualpädagogik (Basic Decree on Sex Education), BMBF-33.543/0038-I/9d/2015.

the Federal[7] and State Acts on Equal Treatment[8], further efforts are needed to accomplish it.[9] In addition to the desired equalisation of incomes on the labour market – the gender pay gap has slightly decreased[10] – the protection against misogynist and sexualised violence is dominating the public discourse.[11]

While sexual liberation and the liberalisation of criminal law on sexual offences originally proceeded in parallel with the quest for legal equality of the sexes, the expansion of the criminal law is increasingly seen as a means to enforce equality in practice. Sexual violence is understood as a patriarchal instrument for the oppression of women, who are disproportionately affected by sexual offences.[12] The legislature has taken this into account most recently when passing the Protection Against Violence Act 2019[13] and the extension of the punishability of joint sexual harassment.[14] Criminal law is meant to combat new, socially undesirable phenomena and increase their rejection by the public.[15] This development increasingly

7 Of particular importance is the prohibition of direct and indirect gender-based discrimination in employment (§ 4 of the Federal Act on Equal Treatment).

8 Gleichbehandlungsgesetze (GlBG).

9 Cf. the statement of the Council of Europe Commissioner for Human Rights on Austria, 2021. https://www.coe.int/de/web/commissioner/view/-/asset_publisher/ugj3i6qSEkhZ/content/austria-should-step-up-efforts-to-protect-women-s-rights-and-gender-equality-and-improve-the-reception-and-integration-of-refugees-asylum-seekers-and-?_101_INSTANCE_ugj3i6qSEkhZ_languageId=en_GB (accessed October 17, 2022).

10 Statistics Austria analysis of income-related gender statistics 2019, https://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/soziales/gender-statistik/einkommen/index.html (accessed October 17, 2022).

11 The increase in murders of women in the first half of this year caused general concern, cf. e.g., *Hagen*, *Ruep* and *Scherndl*, Femizide in Österreich: Land der toten Frauen, Der Standard, May 6, 2021, https://www.derstandard.at/story/2000126439940/femizide-in-oesterreichland-der-toten-frauen (accessed October 17, 2022).

12 Cf., e.g., the contributions to the parliamentary debate, stenographic minutes of the 6th session of the National Council of 11.12.2019, 27. GP, 30 f.

13 Gewaltschutzgesetz 2019, BGBl. (Federal law gazette) I no. 105/2019, which implements the guiding principle of "tougher sentences for sexual and violent offenders" of the government programme from 2017, IA (initiative application of members of the National Council) 970/A 26.GP, 23.

14 Specifically, sexual harassment in § 218 of the ACC was supplemented by two additional paragraphs by BGBl. I no. 117/2017.

15 Currently, for example, there are calls for the criminalisation of so-called "catcalling", where a person is harassed in public space with obscene slogans, cf. e.g. *Saoud*, *Lettner* and *Çelik*, Musikerin Christl: "Catcalling sollte nicht zu unserem Alltag gehören", Der Standard, June 3, 2021, https://www.derstandard.at/story/20

brings sexual offences again closer to a moralising criminal law, from which the legislature deliberately distanced itself with the Austrian Criminal Code (ACC) 1975 and in the following decades.[16]

The renunciation of a moralising criminal law on sexual offences from the 1970s onwards[17] can be seen, for example, in the decriminalisation of homosexual acts and the comprehensive protection of male sexual self-determination. For example, the convergence of the age of consent for heterosexual and homosexual acts among men in 2003[18] eliminated the last gender-specific discrimination.[19] Prior to this, the criminal offences of rape and sexual coercion in §§ 201 f. ACC were deliberately formulated in a gender-neutral way by an amendment in 1989,[20] and subsequently the criminal prohibition of homosexual prostitution was repealed.[21]

2. *Purpose of criminal law on sexual offences*

a) *Protected interests in sexual criminal law*

The ACC consolidates the central sexual offences under the heading "Offences against sexual integrity and self-determination"[22], thus emphasising their orientation towards the protection of sexual autonomy.[23] Sexual violations of public decency that do not affect individual interests can be pun-

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00127112366/musikerin-christl-catcalling-sollte-nicht-zu-unserem-alltag-gehoeren (accessed October 17, 2022);. *Hoven/Weigend*,"Nein heißt Nein" – und viele offene Fragen, JZ 2017, 182 use the term "re-moralisation" of criminal law for Germany.

16 Cf. the development and amendments in *Kienapfel/Schmoller*, BT III[2] Vorbem §§ 201 ff. recital 4 f.

17 Conceptually, especially by eliminating the term "Unzucht" (fornication) *Hinterhofer* in Triffterer/Hinterhofer/Rosbaud (eds), Salzburger Kommentar zum StGB Vorbem (11. delivery 2004) §§ 201 bis 220a recital 45.

18 Entry into force on 28.2.2003, BGBl. I no. 101/2002.

19 However, not by the ordinary legislator, but by a decision of the Constitutional Court (VfGH 21.6.2002, G 6/02–11 = JBl 2002, 579), cf. *Kienapfel/Schmoller*, BT III[2] Vorbem §§ 201 ff. recital 55.

20 BGBl. no. 242/1989.

21 BGBl no. 243/1989, cf. the overview of the reforms in sexual criminal law in *Kienapfel/Schmoller*, BT III[2] Vorbem §§ 201 ff. recital 5.

22 Cf. note 4.

23 The original title ("Criminal offences against morality") and the respective explanatory memorandum (30 BlgNR 13. GP, 339) on the original version ("norms for the protection of a special field of general morality, namely morality in the field of sexuality") read differently.

ished as administrative offences[24] but do not require a court sentence.[25] In this respect, the criminal offence of sexual intercourse between close relatives under § 211 of the ACC is questionable, since its antiquated title ("blood defilement") and formulation suggest vague protected interests ("purity of blood"), while the delimitation of the criminal offence can hardly be explained rationally.[26]

Criminal law on sexual offences protects sexual autonomy from various forms of infringement, especially from forced and other involuntary sexual acts (§§ 201, 202, 205a as well as 212 and 213 ACC). There is also protection under Austrian criminal law against the financial exploitation of sexuality (§§ 213 para. 2 and 214 – 217 ACC) and against harassment through sexual acts as well as against unwanted confrontation with sexual behaviour of others (§§ 218 and 219 ACC). Another central aspect is the protection of particularly vulnerable persons, especially children and adolescents (§§ 206 – 208a ACC), the defenceless and the mentally impaired (§ 205 ACC).[27]

b) Criminal sanctions as ultima ratio

The focus on the protection of sexual integrity and self-determination stands in the way of defining as sexual offences conduct that only infringes

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24 Cf. e.g., § 27 Salzburger Landessicherheitsgesetz (Provincial Act on Public Security).

25 The performance of a sexual act is, however, punishable by the court if it takes place in public and is, according to the circumstances, likely to cause justified annoyance through direct perception (§ 218 para. 2 ACC). At least originally, the Pornography Act (cf. fn. 3) aimed to protect public morals; although it is still in force, it has largely lost its significance due to restrictive interpretations. Assuming a protection of individual legal interests *Kienapfel/Schmoller*, BT III[2] Vorbem §§ 201 ff. recital 16 and *Philipp* in Höpfel/Ratz (eds), Wiener Kommentar zum StGB[2] (WK) (253.-255. delivery 2020), § 218 recital 1.

26 Cf. the references *in Hinterhofer/Rosbaud*, Strafrecht Besonderer Teil II[6] (2016) Vorbem §§ 201 ff. recital 6. Rightly in favour of deleting this provision without replacement, e.g., *Hinterhofer* in Triffterer/Hinterhofer/Rosbaud (eds), Salzburger Kommentar zum StGB (SbgK) (17th delivery 2007), § 211 recital 14; *Kienapfel/Schmoller*, BT III[2] § 211 and *Schmoller*, Unzureichendes oder überzogenes Sexualstrafrecht? JRP 2001, 64 (82). *Philipp*, WK[2] § 211 recital 3 is against a deletion. Cf. *Abel*, Blut und Schande – Inzest im Strafrecht, juridikum 2006, 193 for a comprehensive history of the prohibition of incest.

27 *Hinterhofer/Rosbaud*, BT II[6] Vorbem §§ 201 ff. recital 2 ff.; *Hinterhofer*, SbgK Vorbem §§ 201 bis 220a StGB recital 14 ff.

on general interests or that causes no major harm (petty cases).[28] Moreover, due to the severity of criminal sanctions and the stigma of conviction for a sexual offence, criminal law must only be the last resort to protect major interests. Nevertheless, the criminal law on sexual offences has been broadened step by step in the last decades and has recently been expanded to an alarming extent in both the scope of the punishability and the severity of penalties. The Criminal Law Amendment Act 2004,[29] in particular, raised the upper penalty limits to such an extent that in many cases even life imprisonment is possible if the perpetrator of a sexual assault thereby negligently killed the victim. This extension based only on the consequences of the act blurs the distinction between basic offences of different gravity.[30]

In addition to the level of punishment, the scope of sexual criminal law has also been significantly enlarged. Since the ACC entered into force in 1975, the offence of pimping has been expanded (§ 216 ACC) and dealing with child pornography (§ 207a ACC) was made a severely punishable offence.[31] After its introduction, the criminal liability for sexual harassment in § 218 of the ACC has been gradually expanded; its paragraph 1a now covers, in addition to sexual acts, the intensive touching of a part of the body belonging to the sexual sphere if the victim's dignity is thereby violated (which covers grabbing the victim's bottom)[32]. The recent demand to also penalise "verbal sexual harassment"[33] demonstrates a progressive tendency towards over-criminalisation[34] and a surreptitious departure from the ultima ratio principle in sexual criminal law.[35]

28 Cf. e.g. *Kienapfel/Schmoller,* BT III[2] Vorbem §§ 201 ff. recital 1.

29 BGBl. I no. 15/2004.

30 Cf. *Grafl/Schmoller,* Entsprechen die gesetzlichen Strafdrohungen und die von den Gerichten verhängten Strafen den aktuellen gesellschaftlichen Wertungen? Verhandlungen des 19. ÖJT 2015 III/1 (Gutachten) (2015), 128.

31 As above, note 27.

32 For example, *Philipp,* WK[2] § 218 recital 2 and 19/7.

33 Cf. above note 13.

34 Cf. *Grafl/Schmoller* (note 30); on German criminal law *Hoven/Weigend* (note 15), 183.

35 A consequence of this principle is the structure of sexual harassment according to para. 218 subsecs. 1 and 1a ACC as "Ermächtigungsdelikt", which may not be prosecuted without the consent of the injured person (para. 218 subsec. 3 ACC); *Philipp,* WK[2] § 218 recital 4.

3. Overview of sexual coercion offences

Within the meaning of the "Offences against liberty"[36] (esp. § 105 ACC), coercion means bringing about the victim's conduct by force or by threats directed against certain legal interests and able to cause the victim justified concern ("dangerous threat"[37], § 74 para. 1 no. 5 ACC).[38] The same means of action are required for *sexual coercion* under § 202 ACC, and stronger means are required for *rape* under § 201 ACC (violence, deprivation of liberty, threat of present danger to life or limb). Both offences are therefore sexual coercion offences in a narrow sense. All other sexual offences are not directly related to violence or threats but for the most part contain elements of coercion since they are to protect sexual self-determination from unacceptable influence. A large proportion of sexual offences are therefore "coercive offences" in a broader sense[39] and are intended to protect against sexual acts without the effective consent of the victim.

Coercion in a narrow sense to perform sexual acts is punished by the highest penalties in §§ 201, 202 ACC. The level of punishment is due both to the intensity of the means of coercion and the forced sexual act. Serious consequences of the act, such as the victim's injury or death, have an aggravating effect on the punishment if caused at least negligently. The basic offence of rape (§ 201 para. 1 ACC) has the highest penalty range (two to ten years of imprisonment); it is defined as coitus or an equivalent sexual act brought about by violence, deprivation of liberty, or threat of a present danger to life or limb. For example, a person commits rape if he or she coerces the victim to perform vaginal intercourse (coitus) or oral intercourse

36 Translation by *Schloenhardt/Höpfel*, Austrian Criminal Code, 136.

37 Translation by *Schloenhardt/Höpfel*, Austrian Criminal Code, 113.

38 The offence of coercion in § 105 para. 1 ACC reads as follows: "Any person who coerces another to do, acquiesce, or omit to do an act by use of force or dangerous threat is liable for imprisonment for up to one year or a fine not exceeding 720 penalty units." (Translation by *Schloenhardt/Höpfel*,Austrian Criminal Code, 242). Dangerous threats are legally defined in § 74 para. 1 (5) ACC as a threat of injury to body, freedom, honour, property (or the most personal sphere of life by making accessible, disclosing or publishing facts or images). The threat has to be likely to cause well-founded fears with regard to the circumstances and the personal condition of the threatened or the importance of the threatened evil. It is thereby of no regard weather the threatened evil is directed against the threatened person himself or herself, against his or her relatives or against other persons placed under his or her protection or persons personally close to him or her, *Jerabek/Ropper/Reindl-Krauskopf/Schroll* in Höpfel/Ratz (eds), Wiener Kommentar zum StGB[2] (delivery 2021) § 74 recital 27.

39 Except for incest, § 211 ACC.

(equivalent sexual act)[40] by beating (violence) or threatening to strangle the victim on the spot (imminent, present danger to life). The perpetrator of sexual coercion under § 202 para. 1 ACC is punished less severely if he forces the victim to perform other sexual acts[41] or utters less serious threats, e.g., to the victim's property or honour. The effective consent of the victim to coitus or other sexual acts negates the offences of rape and sexual coercion, because they require forced sexual behaviour.[42]

By the Criminal Law Amendment Act 2015[43], the legal protection against involuntary sexual acts has been expanded considerably. According to the new § 205a ACC, anyone who engages in sexual intercourse or an equivalent sexual act with a person (1.) against that person's will, (2.) taking advantage of a predicament or (3.) after prior intimidation is punishable for "violation of the right to sexual self-determination".[44] Sexual intercourse or an equivalent sexual act include vaginal and oral intercourse as well as vaginal penetration with objects.[45] This offence does not require that the perpetrator overpowers the victim's will by any particular means.[46] The perpetrator acts "against the will" of the victim not only where he or she expressly objects, but also where the victim's non-consent is known to the perpetrator.[47] If, on the other hand, there is consent, it is conceptually impossible to act against the will of the person concerned.

The abuse of defenceless and mentally impaired persons is punishable by severe penalties if the perpetrator takes advantage of their condition to perform coitus or an equivalent sexual act (§ 205 para. 1 ACC) or any other

40 Cf. *Kienapfel/Schmoller*, BT III[2] Vorbem §§ 201 ff. recital 54 ff. with further references.

41 A sexual act only occurs when a primary or secondary sexual characteristic is touched intensively; OGH (Oberster Gerichtshof, Supreme Court) JBl 1990, 807; *Hinterhofer/Rosbaud*, BT II[6] § 202 recital 10; *Hinterhofer*, SbgK § 202 recital 24; *Bertel/Schwaighofer*, Österreichisches Strafrecht Besonderer Teil II[14] (2020) § 202 recital 2. Cf. on this term *Kienapfel/Schmoller*, BT III[2] Vorbem §§ 201 ff. recital 19 ff.

42 For example, *Philipp*, WK[2] § 201 recital 38 and § 202 recital 17.

43 BGBl. I no. 112/2015.

44 Translation by *Schloenhardt/Höpfel*, Austrian Criminal Code, 270.

45 Cf. *Philipp*, WK[2] § 201 recital 20 ff.

46 In the case of the first variant of § 205a ACC ("against that person's will") the distinction between socially adequate and punishable conduct is solely the will of the victim; *Oberlaber/Schmidthuber*, Die Verletzung der sexuellen Selbstbestimmung gemäß § 205a StGB, Österreichische Richterzeitschrift (ÖRZ) 2015, 175.

47 *Oberlaber/Schmidthuber*, (note 46); 689 BlgNR 25. GP, 34 gives the example that the victim begins to cry. Cf. also § 177 of the German Criminal Code, which refers to the "noticeable" will of the victim, and *Hoven/Weigend* (note 15), 183 ff.

sexual act (§ 205 para. 2 ACC). Sexual abuse of juveniles under § 207b para. 1 ACC has a certain proximity to sexual coercion offences if the lack of maturity of a person under 16 years of age and the perpetrator's age-related superiority are exploited for sexual acts. Coercion elements are also contained in § 207b para. 2 ACC, which requires the exploitation of a minor's predicament. § 212 ACC similarly penalises "taking advantage" of certain positions of authority, such as that of a chaplain or educator,[48] if the person in authority thereby causes a sexual act to be performed by or on the victim.[49] The victim's "consent" is irrelevant in all these cases because the perpetrator takes advantage of circumstances that prevent the victim from forming a free will and therefore does not obtain his or her effective consent. From the victim's point of view, the sexual act is "involuntary".[50]

The production of pornographic images of minors by use of severe force according to § 207a para. 2 subset 2, 1st case ACC is also a sexual coercion offence. The same applies to coercion to prostitution or to participation in pornographic depictions under § 106 para. 1 (3) ACC – which, however, is not classified as a sexual offence but as an offence against liberty.

4. Consent in criminal law

The ACC does not contain any general provision on consent in criminal law; its effect and scope result from the interpretation of individual offences.[51] § 90 ACC, however, expressly regulates consent for the offences of bodily harm; these offences are not committed unlawfully if the injured person consents and the injury is not immoral.[52]

a) Dogmatic classification

The effective consent of a person who can dispose of the interest in question eliminates criminal liability because either no statutory offence is

48 *Kienapfel/Schmoller,* BT III[2] §§ 212 – 213.

49 Cf. on the regulation in detail and on the special intent requirements § 212 paras 1 and 2 ACC.

50 *Hinterhofer,* SbgK Vorbem §§ 201 bis 220a StGB recital 15.

51 For the preconditions of effective consent elaborated in the literature, cf. B. below.

52 Other provisions refer to consent, for example §§ 96, 98, 102 or 169 StGB; with further references *Kienapfel/Höpfel/Kert,* AT I[16] recital 15.55.

committed or the act is justified.[53] Whether consent negates or justifies an offence depends on the wording and the interpretation of that offence. The wording of some offences negates the possibility of consensual commission, e.g., if the definition provides that the offender "coerces" (e.g., §§ 105, 201 f. ACC[54]), acts "against the will" of the victim (§ 205a ACC) or acts "without the consent of the person entitled" (§§ 110, 136 para. 1 ACC); this is referred to as assent negating the offence.[55] The same applies if a criminal offence requires a "deprivation of liberty" (§ 99 ACC), a "kidnapping" (§§ 100 et seq. ACC) or a "privation" (§ 127 ACC). By contrast, consent may eliminate the unlawfulness of the act (consent in the narrow sense) if the wording of the offence also covers consensual commission, such as in the offences of bodily injury in §§ 83 ff. ACC.[56] It is disputed whether consent to damage to property (§ 125 ACC) negates the offence[57] or justifies it.[58]

The victim's consent does not exempt the perpetrator from conviction where the definition of the offence implies consent (e.g., homicide on demand of the victim, § 77 ACC) or where the purpose of the norm (e.g., due to the victim's particular vulnerability) requires punishment even in the case of consent.[59] In general, individuals cannot effectively consent to an act or a result if the offence also protects general legal interests[60] or is intended to protect individual rights of an indeterminate number of persons (e.g., public health or the health of an unlimited group of persons, § 178 ACC).[61]

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53 E.g. *Hinterhofer* in Hinterhofer (ed), Praxishandbuch Untreue (2015), 126 f.

54 Cf. E.g. *Philipp*, WK² § 201 recital 38.

55 E.g. *Steininger*, Strafrecht Allgemeiner Teil I³ 11/91 with further references.

56 Cf. *Hinterhofer*, Einwilligung im Strafrecht (1998), 10 ff. with further references on the state of opinion in literature. In the following, the term "consent" is used in a broader sense that includes assent excluding an offence.

57 This is the prevailing opinion in literature and jurisdiction, cf. OGH EvBl 1986/50 and *Kienapfel/Schmoller*, Strafrecht Besonderer Teil II² (2017) § 125 recital 57 with further references.

58 Cf. *Fuchs/Zerbes*, Strafrecht Allgemeiner Teil I¹¹ (2021) 16/5.

59 Cf. *Hinterhofer*, Einwilligung im Strafrecht, 42 ff.

60 *Steininger*, AT I³ 11/93; for a different opinion cf. *Triffterer*, Strafrecht Allgemeiner Teil² (1994) 11/151, according to whom the individual interest must merely outweigh the general interest.

61 Referring to general interest cf. *Murschetz* in Höpfel/Ratz (eds), Wiener Kommentar zum StGB² (279th Delivery, 2020) § 178 recital 1 u 6; *Flora* in Triffterer/Hinterhofer/Rosbaud (eds), Salzburger Kommentar zum StGB (20. Delivery 2009) § 178 recital 38. Referring to an indeterminate number of affected persons *Kienapfel/Schmoller*, BT III² §§ 178–179 recital 16.

b) Principle of autonomy

A liberal criminal law protects individual rights only in the interest of their holders[62] – exempting consented acts from punishment is therefore an expression of the autonomy of the individual to dispose of their own legal positions and to renounce them.[63] Consent to the violation of individual legal rights, however, is ineffective if the need for protection against hasty decisions outweighs the need for temporary autonomy.[64] For example, consent to sterilisation can generally only be given after the age of 25 (§ 90 para. 2 ACC). Consent to genital mutilation never has the effect of exempting a person from punishment (§ 90 para. 3 ACC). The scope and limits of consent derive conclusively from the concept of autonomy.

c) Limits of consent

Effective consent must be declared externally before the offence is committed.[65] Consent presupposes that the declarant can dispose of the legal interest protected by the penal provision[66] and is capable of recognising and assessing both the value of this legal interest and the consequences of his consent.[67] This is not the case, in particular, if the formation of the person's will has been illicitly influenced by others.

Under these conditions, consent is in principle effective even if it appears incomprehensible or unreasonable to third parties – the core of the right to self-determination is precisely to be able to disregard the opinions of others.[68] However, according to § 90 ACC, consent to bodily harm and threats to physical safety can only be given to a limited extent: The injury or endangerment must not in itself be contrary to *boni mores*.[69] One can

62 Consent means in this context a conscious waiver of legal protection, *Steininger*, AT I[3] 11/89 and 290.
63 "Recognition of the individual's right to self-determination", *Hinterhofer*, Einwilligung im Strafrecht, 8.
64 *Schmoller*, Sterbehilfe und Autonomie – Strafrechtliche Überlegungen zum Erkenntnis des VfGH vom 11.12.2020, Juristische Blätter (JBl) 2021, 147 (152 et seq.).
65 Prevailing opinion, cf. e.g., *Triffterer*, AT[2] 11/161 with further references.
66 *Hinterhofer*, Die Einwilligung im Strafrecht, 23.
67 *Kienapfel/Höpfel/Kert*, Strafrecht Allgemeiner Teil I[16] (2020) recital 15.71 with further references.
68 *Hinterhofer*, Die Einwilligung im Strafrecht, 69 et seq. with further references.
69 On sterilisation or genital mutilation, see above b).

without any additional requirements consent to minor bodily injuries.[70] Yet, as a matter of principle, the infliction of serious bodily injuries is against *boni mores* and therefore cannot be consented to,[71] exept in cases where the serious bodily injury serves a specific, legally accepted interest, such as the removal of an organ for transplantation. In this assessment, not only positive law but also moral values recognised in the community must be taken into account.[72]

B. Prerequisites for consent to sexual acts

1. Capacity to consent

a) Age of consent

In the Austrian criminal law on sexual offences, different age limits ("age of consent") apply to consent to sexual acts. Children, i.e., persons who have not yet reached the age of 14 years, cannot effectively consent to sexual acts. There is, however, no criminal punishment[73] for sexual abuse of children if the victim is of a minimum age,[74] there is only a small age difference between the perpetrator and the victim,[75] and the victim has neither been treated cruelly nor has been particularly humiliated for a long period, nor have serious consequences occurred. The lack of "consent" of a child victim of sexual acts is significant insofar as the offences of rape and sexual coercion (§§ 201 f. ACC) can apply – in addition to the sexual abuse of children – when violence or threats have been used.[76]

Juveniles under the age of 16 years are protected from exploitation of their lack of maturity by § 207b para. 1 ACC and from endangerment of their moral and mental development by § 208 ACC. If the victim has not

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70 On this differentiation according to the severity of the injury cf. e.g., *Kienapfel/Schroll*, Strafrecht Besonderer Teil I[4] (2016) § 90 recital 55 ff. with further references.

71 Cf. 30 BlgNR 13. GP, 221.

72 *Schütz* in Höpfel/Ratz (eds), Wiener Kommentar zum StGB[2] (149[th] delivery 2016) § 90 recital 69.

73 The offence is nevertheless committed illegally and culpably, but punishment is exempted, cf. e.g., *Kienapfel/Schmoller*, BT III[2] §§ 206 – 207 recital 5 and 40; *Hinterhofer/Rosbaud*, BT II[6] § 206 recital 14 and § 207 recital 10.

74 At least twelve (§ 207 para. 4 ACC) or thirteen (§ 206 para. 4 ACC) years of age.

75 Not more than three (§ 206 para. 4 ACC) or four years (§ 207 para. 4 ACC).

76 Cf. e.g., *Hinterhofer/Rosbaud*, BT II[6] § 206 recital 16.

yet reached the age of 18 years, anyone who takes advantage of a predicament for sexual acts commits sexual abuse of juveniles (§ 207b para. 2). In both cases, the "consent" of the particularly vulnerable juvenile does not exempt the perpetrator from punishment.[77]

Similarly, children and juveniles cannot give legally valid consent to the production of pornographic images and their dissemination (§ 207a ACC) or to sexual acts for payment (§ 207b para. 3 ACC).

b) Capacity of insight and judgment

Any consent requires that the declaring party is able to recognise and assess the value of the legal interest concerned and the consequences of the consent.[78] In contrast to capacity under civil law, however, no comprehensive capacity is required,[79] but only a natural, offence-specific capacity of recognition and assessment.[80] This presupposes a certain degree of mental maturity, which may be lacking even if the age of consent has been reached, for example if the person giving consent is mentally retarded or intoxicated.[81] Whether drunk persons can consent to sexual acts depends on the circumstances of the individual case,[82] especially on the degree of alcoholisation.[83]

Neither §§ 201–202 nor § 205a ACC focus on explicit consent but require coercion or at least acting against the will of the victim. Ineffective consent therefore does not directly establish criminal liability for these offences.[84] A perpetrator can commit the offence under § 205 ACC only if he or she takes advantage of the condition of a defenceless person or of a per-

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77 This follows the idea that these groups cannot – depending on the situation -exercise their right to sexual self-determination at all or only to a limited extent, *Philipp*, WK² § 207b recital 5 with further references.

78 *Triffterer*, AT² 11/164.

79 Cf. *Steininger*, AT I³ 11/93.

80 *Kienapfel/Höpfel/Kert*, AT¹⁶ recital 15.71; *Hinterhofer*, Einwilligung im Strafrecht, 82 ff; *Zipf*, Die Bedeutung und Behandlung der Einwilligung im Strafrecht, ÖJZ 1977, 379 (384).

81 E.g. *Schütz*, WK² § 90 recital 33.

82 Cf., e.g., *Steininger*, AT I³ 11/93 with further references.

83 According to *Kienapfel/Höpfel/Kert*, AT¹⁶ recital 15.72, however, the consent of drunk persons should only be legally effective in exceptional cases.

84 The situation is different if the perpetrator intoxicates the victim and forces him or her to perform sexual acts in an intoxicated state; *Hinterhofer/Rosbaud*, BT II⁶ § 201 recital 8 with further references.

son who is not (or no longer) capable of understanding or acting due to mental impairment to abuse the victim for sexual acts. Mentally impaired persons are persons suffering from mental illness, mental disability, a profound disorder of consciousness, or an equivalent serious mental disorder.

2. *Form of consent*

Consent is an expression of will which appears externally in the behaviour of the person waiving legal protection.[85] This declaration can be explicit or implied, i.e., expressed non-verbally through conclusive behaviour.[86] In the case of sexual coercion offences, the preconditions for effective consent are regarded restrictively[87] – violence and threats indicate a lack of consent. Consent is not given, for example, if the victim merely does not defend himself or herself after having explicitly expressed his or her rejection of the sexual act.[88] Ambiguous statements also do not usually constitute consent.[89]

3. *Ineffective consent*

If the perpetrator uses violence or threatens the victim in order to make him or her sexually submissive, the victim's "assent" does not constitute effective consent. Even if the victim tolerates the perpetrator's sexual acts, he commits rape or sexual coercion if the threat[90] could give the victim reason for concern and was directed against specific, important legal interests. Influencing the victim's will ("intimidation"[91]) below this threshold may be punishable as a violation of sexual self-determination under § 205a ACC if coitus or an equivalent sexual act is performed.[92]

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85 *Schütz,* WK² § 90 recital 30.
86 Prevailing opinion, cf., e.g., *Triffterer,* AT² 11/161 with further references. Especially for § 205a ACC punishability should not depend on this mere inner will, 689 BlgNR 25. GP, 34.
87 *Philipp,* WK² § 201 recital 39.
88 Cf. note 70 with reference to OGH 5.3.2015, 12 Os 9/15p.
89 Cf. note 70.
90 Cf. note 32.
91 "Einschüchterung"; on this term, which is below violence and dangerous threat cf. *Philipp,* WK² § 205a recital 15.
92 *Hinterhofer/Rosbaud,* BT II⁶ § 205a recital 7.

In principle, obtaining consent by deception does not make a sexual act punishable. Although the victim cannot form his or her will without defects when false facts are pretended, the perpetrator only performs the sexual act "against the will" of a person in the case of *deception related to legal interests*.[93] A violation of sexual self-determination under § 205a ACC is committed if the victim is led to believe that vaginal penetration with an object is a necessary medical treatment, but not if a person is persuaded to engage in sexual acts by a false promise of a reward.[94] Errors that do not concern the sexual act as such but only the intention (willingness to marry, interest in a long-term relationship), person (noble origin, wealth), or other circumstances of the partner (sincere, unmarried, faithful) or third parties do not affect the validity of consent. The situation is different if the victim is not deceived about characteristics of the sexual partner, but about the identity of the person with whom he or she is having sexual intercourse (e.g., by pretending to be the victim's spouse in the dark). In such cases, an error is relevant to the protected legal interest and makes the sexual act a punishable interference with sexual self-determination.

4. Significance of consent

Only minors, mentally impaired and defenceless persons are comprehensively protected against non-consensual interference with their sexual self-determination. In all other cases, the perpetrator is only liable to prosecution if he uses force, threatens, intimidates the victim, exploits the victim's predicament, or at least acts against the victim's will. Coitus or equivalent sexual acts, however, are only committed against the victim's will as defined in § 205a ACC if the victim's rejection is expressed in a way that it is recognisable.[95] It is not the consent that must be declared, but the opposing will – a mere internal rejection is not sufficient.[96] Whether the victim

93 *Hinterhofer/Rosbaud*, BT II[6] § 205a recital 7. For details on the deception related to legal interests *Hinterhofer*, Einwilligung im Strafrecht, 97 et seq. Generally in favour of criminal liability in the case of deceptive consent, *Oberlaber/Schmidthuber*, ÖRZ 2015, 178.

94 *Hinterhofer/Rosbaud*, BT II[6] § 205a recital 7: Inducing minors to engage in sexual acts directly against payment, however, is punishable under § 207b para. 3 ACC. The opposing view (*Oberlaber/Schmidthuber*, ÖRZ 2015, 178) also subsumes cases of false promises ("I'll get you a career as a photo model") under § 205a ACC.

95 *Oberlaber/Schmidthuber*, ÖRZ 2015, 175.

96 Sceptic about this *Tipold* in Leukauf/Steininger, Strafgesetzbuch. Kommentar[4] (2017), § 205a recital 9.

in fact declared his or her refusal of sexual acts or there was only a sham protest is to be judged according to the circumstances of the individual case – in principle, however, a refusal is to be taken seriously.[97] There is no action "against the will" of a person, for example, if the apparent protest is part of a consensual, agreed-upon ritual between partners.

C. Scope of consent to sexual acts

1. Time of consent and revocation

Consent can be validly given only before the relevant act has been performed.[98] Subsequent consent to a sexual act that was involuntary at the time of the offence, or forgiveness of it, do not affect criminal liability under §§ 201 ff. ACC.

Conversely, the victim's remorse after the sexual act about the previously declared consent does not cause the partner's criminal liability for a sexual offence. Nevertheless, once consent has been given, it can be revoked at any time without reason or form until the end of the sexual act, e.g., during coitus.[99] As long as such a revocation has not been expressly or impliedly declared, the continuation of the sexual act remains lawful even if the victim now inwardly rejects it.[100] If, on the other hand, the offender objectively could have noticed the revocation, a sexual offence may be committed if and as soon as he has corresponding intent.[101] For example, if the perpetrator after some time during the initially consensual coitus notices that the victim is crying, he commits the offence under § 205a ACC if he continues the coitus. If in this situation he uses force to make the crying victim comply with his wishes, he commits rape (§ 201 ACC).

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97 In the case of sexual coercion offences, consent is only cautiously assumed, cf. note 70.

98 Prevailing opinion, cf., e.g., *Triffterer*, AT[2] 11/161 with further references.

99 The revocability of consent depends on the legal interest protected by the offence (*Fuchs/Zerbes*, AT I[11] 16/32). Sexual autonomy does not allow considering the declarant to be bound to his once declared consent. This follows in particular from § 205a ACC, because the will of the victim can be formed anew at any time.

100 On the requirement of a declaration of consent in general and on the requirement of an outwardly expressed, rejecting will in the case of § 205a ACC, see above B. 2. and A. 3.

101 Thus, in the case of § 205a ACC, the perpetrator must at least seriously consider it possible and accept the fact that he is now acting against the victim's will.

2. Extent of consent

The extent of consent is to be determined according to the concrete circumstances of the individual case; its content may also differ from the objective meaning of the declaration, especially between persons who are familiar with each other. In principle, however, consent only extends to sexual acts that are to be expected under the circumstances, but not to sexual practices that are unusual in a given situation – consent only covers what the person giving consent can foresee.[102] Usually, initial consent to sexual acts is not granted across the board, but further statements and gestures can gradually extend a preliminary limited consent.

An offender who exceeds the scope of consent may commit a sexual coercion offence even if the victim does not notice his or her arbitrary behaviour. If a condom is secretly removed before or during coitus and the sexual act is continued unprotected, although the victim had expressly or impliedly insisted on safe sex ("stealthing"), the perpetrator acts against the victim's will from this point on and commits an offence under § 205a ACC;[103] the victim is mistaken about circumstances relevant to the legal interest because the prohibition of sexual offences also aims to protect the victim against unwanted pregnancy and sexually transmitted diseases.[104] The same applies to feigning a lack of procreative capacity, e.g., due to an

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102 This is a result of the general principle that the consenting person must be able to recognize and properly assess the significance and scope of the consequences and risks resulting from his or her consent, *Hinterhofer,* Einwilligung im Strafrecht, 63 (for this principle) with further references.

103 Also: *Sautner/Halbig,* in Gewaltschutz und familiäre Krisen, § 205a StGB recital 5; *Germ,* Zur Strafbarkeit von Stealthing in Österreich, ÖJZ 2022, 514–515.

104 Cf. the qualifications of pregnancy or grievous bodily harm of the victim in § 201 ACC. With a few exceptions (e.g., incest under § 211 ACC), sexual offences imply a "mistreatment" because like offences against life and limb, they protect against inappropriate physical force. For Austria, the question discussed for § 177 para. 1 German Criminal Code as to whether sexual intercourse without the use of a condom constitutes a "different sexual act" than "safer sex" may remain undecided (*Geneuss/Bublitz/Papenfuß,* Zur Strafbarkeit des Stealthing". Anm zu KG Berlin 27.7.2002, (4) 161 Ss 48/20 (58/20), Juristische Rundschau (JR) 2021, 189 (191 et seq.)). The criminalisation of sexual acts against the will of the victim is – except in cases of threat and use of force – only punishable (§ 205a ACC) if the non-consensual conduct consists of coitus or an equally severe sexual act. The victim consented to coitus, but only due to deception about facts relevant to legal interests (!) and sexual self-determination was violated in a punishable manner (with the same result *Sagmeister,* Stealthing verletzt die sexuelle Selbstbestimmung, juridikum 2017, 296 (297)).

alleged vasectomy.[105] On the other hand, there is no error that eliminates consent if a sexually transmitted disease is concealed but its transmission is impossible under the concrete circumstances ("safe sex", medical suppression of an infection, etc.).

Whether a person actively participates in the performance of the sexual act has no effect on punishability under §§ 201 et seq. ACC. The wording of the sexual offences explicitly also covers cases in which the victim is coerced or induced by the perpetrator to perform sexual acts on the perpetrator or on himself, herself, or a third party.[106]

3. Final refusal?

Once consent to sexual acts has been given, it can be revoked at any time without any reason or form. The same applies to the refusal of engaging in sexual acts, as long as the will of the victim is not unduly influenced, i.e., by coercion, intimidation, or deception, and the victim is not in a situation of predicament. Persuading another person to perform or tolerate sexual acts is generally permitted; physical advances, however, may be punishable as sexual harassment under § 218 para. 1 or 1a ACC, especially if the person had explicitly refused.

D. Intent as to absence of consent

Criminal offences against sexual integrity and self-determination can only be committed intentionally; the ACC does not comprise any negligent sexual offences. This means that the offender must at least seriously consider the possibility of fulfilling all elements of the offence and accept that possible result.[107] If serious consequences of the offence, however, increase the penalty, e.g., if a rape results in pregnancy or the death of the victim (§ 201 para. 2 ACC), these circumstances are attributed to the offender if he has caused them negligently (§ 7 para. 2 ACC).

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105 Against criminal liability under § 205a ACC *Germ*, ÖJZ 2022, 513.

106 Cf., e.g., § 201 para. 1, § 202 para. 1, § 205 paras 1 and 2 and § 205a para. 2 ACC.

107 Increased requirements are stipulated in § 207a para. 3a ACC regarding the punishable access to child pornography on the internet, which must be done with definite knowledge.

The sexual coercion offences require that the offender at least seriously deems it possible that he coerces the victim (§§ 201–202 ACC), that he takes advantage of his or her predicament or previous intimidation, or that he acts against the victim's will (§ 205a ACC), and accepts the requisite circumstance. In the case of offences that protect sexually vulnerable groups of persons, the intent must relate to the victim's defencelessness, psychological impairment, low age, etc. (§§ 205, 206 et seq. ACC).

A person who has sexual intercourse with another person against his or her will is punishable under § 205a para. 1, case 1 ACC only if he or she recognises the victim's (expressed) refusal, i.e., includes it in his or her intent.[108]

The perpetrator's intention to coerce another person implies the knowledge of acting without the latter's consent.[109] The subjective element of rape is fulfilled, for example, if the perpetrator threatens the victim with a knife because he seriously believes that the victim may not consent to sexual intercourse, and thus accepts the possible lack of consent. If, on the other hand, the perpetrator relies on the victim's consent – even for incomprehensible reasons –, he does not intend to commit the offence as defined in §§ 201, 202 and 205a ACC. Since the courts, however, usually infer the offender's intent from external circumstances, it is hardly possible to assume a lack of intent when the perpetrator has used force, deprivation of liberty, or serious threats.[110] Nevertheless, the absence of consent may not be assumed in principle – this would be contrary to the presumption of innocence; nor does consent have to be expressly confirmed. If the sexual assault, however, comes as such a surprise to the victim that he or she is unable to express his or her refusal, criminal liability for sexual harassment under § 218 ACC may apply.[111]

E. Special status of sexual offences in criminal law

Sexual offences are subject to numerous special provisions with regard to sanctions and procedural law. For example, the early termination of proceedings without a finding of guilt if the accused fulfils certain conditions

108 E.g., *Philipp*, WK² § 205a recital 21.

109 Coercion objectively requires acting against the will of the other person, cf. *Philipp*, WK² § 201 recital 38.

110 *Hinterhofer*, Einwilligung im Strafrecht, 123.

111 *Philipp*, WK² § 205a StGB recital 8. In contrast, §§ 201-202 ACC applies if the perpetrator "assaults" the blindsided victim with violence.

(diversion), is considerably restricted in sexual offence cases. Normally, diversion can be granted for offences with a range of sentences up to five years imprisonment; for sexual offences, diversion is possible only if the maximum sentence is three years imprisonment or less.[112]

In the case of a conviction for serious sexual offences against minors or defenceless persons, professional or other activities in institutions with these vulnerable persons can be prohibited for an indefinite period of time ("ban on activities", § 220b paras 1 and 2 ACC).[113]

Moreover, a conviction of a sexual offence is expunged after one and a half times, in serious cases after twice the period provided for other offences (§ 4a para. 1 and 2 Austrian Expungement Act). Previous convictions are hence publicly visible for a longer period of time and burden the sexual offender, especially in his professional advancement.

If the victim was a child or a juvenile at the time of the commission of the offence, the limitation period for a sexual offence does not start until the victim reaches the age of 28 years (§ 58 para. 3 (3) ACC).[114]

If a person convicted of a sexual offence or a sexually motivated act of violence[115] is conditionally released from prison or from a preventive measure,[116] it is possible to place him or her under "judicial" supervision to prevent further delinquency; the enforcement of supervision may be entrusted to the police (§ 52a ACC).

Finally, the Protection against Violence Act 2019[117] provides that prison sentences imposed for rape under § 201 ACC can no longer be fully suspended (§ 43 para. 3 ACC).

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112 Thus, of the sexual coercion offences in the narrower sense, only § 205a ACC is eligible for diversion, cf. on the other sexual offences *Schroll/Kert* in Fuchs/Ratz (eds), Wiener Kommentar zur StPO (297. delivery 2019) § 198 recitals 6 and 12. Opposing the exclusion of diversion for §§ 202 and 205 ACC *Kienapfel/Schmoller,* BT III[2] Vorbem §§ 201 ff recital 85.

113 The prerequisite is that such activity was already carried out or at least intended at the time of the offence and that there is a danger that the activity will be used to commit further such offences with not merely minor consequences.

114 The same applies to criminal offences against life and limb and against freedom.

115 These are offences against life and limb or freedom if committed for the purpose of sexual arousal or sexual gratification (§ 52a para. 1 (2) ACC).

116 In particular, mentally abnormal offenders can be housed in institutions for an indefinite period of time by the criminal court if they are still dangerous (§ 21 ACC).

117 BGBl. I no. 105/2019.

F. Summary

Austrian criminal law on sexual offences protects the autonomy of each individual to decide freely on the type and extent of his or her sexual activity. A person's valid consent therefore negates the offences of rape (§ 201 ACC) and sexual coercion (§ 202 ACC). Sexual acts are punishable as crimes of coercion under § 205a ACC only if the victim declared that he or she does not consent to the act. Children, juveniles, mentally impaired persons, defenceless persons and persons in dependency, however, are particularly protected under criminal law and can consent to sexual acts only to a limited extent or not at all.

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England and Wales

Lyndon Harris, Hannah Quirk

A. Background of criminal laws on sexual conduct

The law governing consent to sexual relations in England and Wales has changed in response to social mores and to new behaviours. Such determinations are made for 'reasons of political pragmatism rather than a considered societal response.'[1] The first age of consent was effectively set in 1275[2] by a law that made it a misdemeanour to 'ravish a maiden within age' with or without her consent. Blackstone contended that this meant the age of marriage for girls, which was then set at 12. In 1576, sex with girls under the age of 10 was made a felony but sex with girls aged 10–12 remained a misdemeanour.[3] The felony age was raised to 13 in 1875.[4] The Criminal Law (Amendment) Act 1885 raised the age of consent for heterosexuals, from 13 to 16, in response to concerns about child prostitution.[5] The Buggery Act of 1533 moved the issue of sodomy from the ecclesiastical to the criminal courts. Section 11 of the Criminal Law (Amendment) Act 1885 made all homosexual acts of 'gross indecency' illegal (legislation that is still in force in many Commonwealth countries; lesbian sexual acts have never been subject to the criminal law). Male homosexuality was decriminalised in 1967 for men over 21 (then the age of majority). The homosexual age of consent was lowered to 18 in 1994 and equalised at 16 with heterosexuals in 2000. A higher age of consent of 18 was created for those in a position of trust (heterosexual or homosexual). This was later extended to other forms of exploitation, including prostitution and the taking, making or distribution of an indecent photograph of a child. Successive governments

1 A. A. Gillespie, & S. Ost, 'The "higher" age of consent and the concept of sexual exploitation' in: A. Reed, M. Bohlander, N. Wake, N. & E. Smith (eds), *Consent: domestic and comparative perspectives*, London Routledge 2016, 161–176.
2 Statute of Westminster I, Chapter XIII.
3 Benefit of the Clergy Act 1575.
4 Offences Against the Person Act 1875.
5 Sex with a girl between 13 and 16 years was defined as a misdemeanour, whereas sex with a girl under 13 was a felony.

have resisted proposals to lower the age of consent further, largely on child protection grounds.

Sexual offences were a mix of statute and common law, consolidated in the Sexual Offences Act 1956. The Sexual Offences Act 2003 was a wholesale reform of the law of sexual offences in England and Wales. It replaced previous legislation and created new criminal offences (discussed below). Some changes are relatively recent. Marital rape was only criminalised (by judicial decision) in 1991.[6] Male rape was recognised as a specific crime in the Criminal Justice and Public Order Act 1994.[7] Offences have been enacted in response to new types of sexual misconduct such as 'upskirting' (taking a photograph of another's genitals, buttocks or underwear without their consent) and 'revenge porn' (sharing intimate private images of another).[8] A recently enacted offence of 'controlling and coercive behaviour'[9] – a domestic abuse offence of violence, not a sexual offence – has brought the issue of coercion in relationships to the fore. Further, sexual offences committed abroad can now be prosecuted in England and Wales (in response to 'sex tourism' cases whereby men were travelling to developing countries to sexually exploit children).[10] Bigamy remains a crime and it is now a criminal offence to force someone to marry.[11] There is no statute of limitations on the prosecution of serious sexual offences.

The criminal law has reflected the debate between H.L.A. Hart and Lord Devlin – broadly speaking Hart's philosophy that the law should intervene only to prevent harm to others; Devlin's thesis that when, in the collective judgment of a society, a behaviour reaches the limits of "intolerance, indignation and disgust," legislation against it is necessary. Some of the older cases took a more Devlin-esque approach. In *Shaw* v *DPP*,[12] the appellant argued that his conviction for conspiracy to corrupt public morals had no basis in law (he created magazines containing adverts for and photographs of prostitutes). The court held that it had a duty to protect the public's morals and accordingly that it had the ability to create offences. The courts appear to be criminalising the practice of 'stealthing', (removing a condom during intercourse without the other

6 *R. v R* [1991] UKHL 12.
7 Criminal Justice and Public Order Act 1994 s.143. Previously it was dealt with under the 'unnatural offence' of buggery (Sexual Offences Act 1956, s.12).
8 Sexual Offences Act 2003 s.67A and Criminal Justice and Courts Act 2015 s.33.
9 Serious Crime Act 2015, s.76.
10 Sexual Offences Act 2003, s.72.
11 Anti-social Behaviour, Crime and Policing Act 2014, part 10.
12 *Shaw v DPP* [1962] AC 220.

person's knowledge or consent). Rather than creating a separate offence, it has been held that doing so vitiates consent, and can, therefore, amount to rape.[13]

In *R.* v *Brown*,[14] the House of Lords held that it was not legally possible for individuals to consent to sado-masochistic assaults. They had been convicted under the Offences against the Person Act 1861, but the sexual nature of their behaviour was significant to the decision. It held that public policy required that society be protected by criminal sanctions against a cult of violence which contained the danger of the proselytisation and corruption of young men and the potential for the infliction of serious injury. The decision has become of significance again recently with the so called 'rough sex defence' (in which women have been fatally strangled by partners who claimed that the death was an accident resulting from consensual sexual activity).

The role of prosecutorial discretion in relation to charging decisions is important and has changed recently. Generally, if there is sufficient evidence to provide 'a realistic prospect of conviction' a prosecution will follow unless there 'are public interest factors tending against prosecution which clearly outweigh those tending in favour.'[15] Most frequently, perhaps, the exercise of this discretion is seen in cases of 'consensual' sexual activity between children under the age of consent. The Crown Prosecution Service (CPS) Legal Guidance states: "prosecutors should bear in mind the overriding purpose of the legislation was to protect children and it was not Parliament's intention to punish children unnecessarily or for the criminal law to intervene where it was wholly inappropriate."[16] Conversely, the police and prosecution have taken an increasingly purposive approach to investigating and prosecuting elderly defendants on charges of historical sex abuse.

The greatest attrition rate occurs with offences not being reported to the police (84 %). The number of complaints regarding sexual offences is higher than previously, however in the year to March 2020, just 1.4 % of rape cases recorded by the police resulted in a suspect being charged. The Victims' Commissioner has said that this amounts to 'the de-criminalisation

13 See *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin).

14 *R. v Brown* [1993] UKHL 19.

15 Crown Prosecution Service (CPS), Principles, www.cps.gov.uk/principles-we-follow (accessed August 24, 2022).

16 CPS, Rape and Sexual Offences: Sexual Offences and Youths, 21 May 2021, https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-12-sexual-offences-and-youths (accessed August 24, 2022).

of rape'.[17] Undoubtedly action could be taken to improve this figure – for example, investment in technology and officer numbers so that cases could be investigated more quickly. Yet the nature of the offence means that these are often difficult cases to prosecute due to a lack of independent evidence and the partially subjective test of mens rea (discussed below). In 2019–2020, a prosecution for the offence of rape was authorised in 58.7 % of cases received by the prosecuting authority from the police; of those prosecutions, 68.5 % resulted in a conviction, which is comparable to or better than many other types of offence.[18]

Evidential requirements and obstacles have been reduced regarding investigations and trials for sexual offences in repeated attempts to 'improve' the conviction rate. The CPS has a Violence Against Women and Girls Strategy[19] and now takes a more proactive stance in pursuing prosecutions involving sexual offences. The judge no longer has to warn the jury about the danger of convicting the accused on the uncorroborated evidence of the complainant,[20] and similar fact, bad character and hearsay evidence are now easier for the prosecution to adduce.[21] Complainants can give pre-recorded evidence[22] and they may appear behind a screen or by video link. There can be no evidence, including cross examination, about a complainant's sexual experience with a person other than the accused,[23] without the leave of the judge. This is given in very limited circumstances.

17 *2019/20 Annual Report,* Dame Vera Baird QC Victims' Commissioner for England and Wales HC 625.

18 CPS, Rape Annual Data Tables Year Ending March 2020 (Excel spreadsheet), AR15, tables 2 and 3, https://www.cps.gov.uk/publication/cps-data-summary-quarter-4-2019-2020 (accessed August 24, 2022).

19 CPS, Violence Against Women and Girls, https://www.cps.gov.uk/publication/violence-against-women-and-girls (accessed August 24, 2022).

20 See e.g., The Crown Court Compendium, Part I, § 10–2, https://www.judiciary.uk/wp-content/uploads/2021/08/Crown-Court-Compendium-Part-I.pdf (accessed August 24, 2022).

21 Criminal Justice Act 2003.

22 Youth Justice and Criminal Evidence Act 1999, s.28.

23 Youth Justice and Criminal Evidence Act 1999, s.41.

B. General attitude in society toward sexual relations

I. Is there an emphasis on traditional rules of decency and morals or on autonomy?

Social attitudes have changed significantly since the Wolfenden Report 1957 recommended that homosexual acts between two consenting adults should no longer be a criminal offence on the basis that there 'must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business'.[24] A review of the British Social Attitudes (BSA) data in the thirty years since it began in 1983 concluded that there was an increasing sense of 'live and let live' when it comes to prevailing views on other people's relationships and lifestyles. Three-quarters see nothing wrong with sex outside marriage compared with 42 % when the BSA began. Two-thirds now say that sex between two adults of the same sex is "not wrong at all", an increase of almost 50 percentage points since the question was first asked in 1983.[25] Changes in other areas of law may have had an influence on this. Heterosexual and homosexual couples now have an equal right to marry or to have a civil partnership. Adoption and fertility treatment is not restricted to married heterosexuals. Adultery is, however, still grounds for divorce, as is one spouse obtaining a gender recognition certificate.

There has been concern for some time about the perpetuation of so-called 'rape myths' and their possible influence in sexual offences trials. A 2005 Amnesty International Report (Sexual Assault Research) found that more than a quarter (26 %) of those asked said that they thought a woman was partially or totally responsible for being raped if she was wearing 'sexy or revealing' clothing, and more than one in five (22 %) held the same view if a woman had had many sexual partners. More than a quarter of people (30 %) said that a woman was partially or totally responsible for being raped if she was drunk, and more than a third (37 %) held the same view if the woman had failed to clearly say no to the man. There are other, perhaps more subtle, misperceptions regarding delays in making a complaint, demeanour in giving evidence or inconsistency in complaint. Views may have changed since the Amnesty survey with campaigns such as the

24 *Report of Committee on Homosexual Offences and Prostitution* (Cmnd 247), para. 14.

25 Park et al (2013), 'Key Findings: How and Why Britain's Attitudes and Values are Changing' in: Park, A., Bryson, C., Clery, E., Curtice, J. and Phillips, M. (eds), British Social Attitudes: the 30th Report, London: Nat Cen Social Research, 19 (2013).

#MeToo movement. Nevertheless, such is the recognition of this risk that the Court of Appeal (Criminal Division) and the editors of the Crown Court Compendium (a guide for judges on their direction to juries) have given guidance on this topic and suggested matters to be addressed to avoid injustice to the complainant.

II. Sex equality

There has been legislation against sex-based discrimination since 1975.[26] Women and girls (whether married or not) now have access to contraception. Abortion is not a right but is relatively straightforward to access. Almost all jobs are open to those of both sexes but, overall, men still occupy the most senior positions and earn 15.5 % more.[27] The UK is ranked 13 on the UN Gender Inequality Index.[28] In terms of societal attitudes to sex equality, there remains much work to be done. One need only look to media coverage of celebrity to see that objectification of women remains prevalent, for example.

There are parts of the law that remain different as between the sexes; most notably, that "rape" can only be committed by penile penetration (there is an equivalent offence of assault by penetration for acts not involving a penis). Women are much more likely than men to be victims of sexual violence and are less likely to perpetrate sexual or violent crimes. 71 % of women of all ages in the UK have experienced some form of sexual harassment in a public space – this number rises to 86 % among 18–24-year-olds.[29] For the year ending March 2020, the Crime Survey for England and Wales (CSEW) estimated that 3.8 % of adults aged 16 to 74 years (1.6 million people) had experienced sexual assault by rape or penetration (including attempts) since the age of 16 years (7.1 % for women and 0.5 % for men).[30]

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26 Sex Discrimination Act 1975.

27 Office for National Statistics, *Gender pay gap in the UK 2020*, November 3, 2020, https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2020 (accessed August 24, 2022).

28 Human Development Reports, *Gender Inequality Index (GII)*, http://hdr.undp.org/en/content/gender-inequality-index-gii (accessed August 24, 2022).

29 APPG, *Report on prevalence and reporting of sexual harassment in UK public spaces*, March 2021, APPG-UN-Women_Sexual-Harassment-Report_2021.pdf (unwomenuk.org) (accessed August 24, 2022).

30 Office for National Statistics, *Sexual offences prevalence and trends, England and Wales*, March 18, 2021, https://www.ons.gov.uk/peoplepopulationandcommunity

C. Structure of the Sexual Offences Act 2003 and the interests to be protected

Part 1 of the Sexual Offences Act 2003 defines the non-consensual offences of rape, assault by penetration, sexual assault, and causing a person to engage in sexual activity without consent. Another group of offences is based, not on the absence of consent, but rather (1) the age of the complainant at the time of the incident (offences committed against a child under the age of 13 are distinguished from those committed against a child aged 13–15); (2) the status of the defendant; offences involving an abuse of a position of trust (e.g. a teacher or a sports coach) are distinct from offences involving family members (often referred to as 'incest'). It also covers offences relating to prostitution, indecent photographs of children and trafficking, preparatory offences, such as administering a substance with intent to commit a sexual offence, and a number of miscellaneous offences, such as voyeurism and intercourse with an animal. It defines "consent" and "sexual" and sets out evidential and conclusive presumptions about consent.[31]

D. Consent

Lack of consent is an element of the offence so, where the absence of consent (and/or the absence of reasonable belief of consent) is not proved by the prosecution, the defendant should be acquitted. This requirement means that (a) the complainant did not in fact consent and (b) that the defendant did not reasonably believe that the complainant was consenting. Thus, a complainant and a defendant can simultaneously – each correctly – have opposing views of the issue of consent, and non-consensual intercourse does not necessarily amount to an offence of rape.

Section 74 simply provides: "For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice." Each non-consent offence relies on a definition of consent in s.74 (supplemented by conclusive and rebuttable presumptions about consent). Section 75 provides certain presumptions that can be displaced, for instance, if the defendant used violence immediately prior to the sexual

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/crimeandjustice/articles/sexualoffencesprevalenceandtrendsenglandandwales/yearendingmarch2020 (accessed August 24, 2022).

31 Part 2 contains measures for protecting the public from sexual harm through notification requirements, sexual harm prevention orders and risk of sexual harm orders. Part 3 contains general provisions relating to the Act, including minor and consequential amendments and commencement provisions.

act in question, the complainant is taken to have not consented unless evidence is produced to "raise an issue" as to whether the defendant reasonably believed the complainant was consenting. Similar provisions apply if the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act; the complainant was asleep or otherwise unconscious at the time of the relevant act; due to physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented; any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act. Section 76 provides conclusive presumptions that cannot be displaced, for example, where the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act, it is to be presumed that the defendant did not reasonably believe in the complainant's consent and that the complainant did not in fact consent.

I. General capacity to give consent

Thus, factors such as consciousness, mental health, lack of intoxication and other factors including any element of knowledge or deception can be used to address the issue of whether the complainant was capable of giving consent. In some offences, they will be factors on which the prosecution can draw as evidence of an absence of consent, such as if the jury find that the complainant was so intoxicated she was not capable of providing consent. With other offences, the position regarding consent is conclusive; offences committed against children under the age of 13 (or persons with a mental disorder impeding their choice) do not require the prosecution to prove an absence of consent.

In outline, the age of consent in England and Wales is 16, notwithstanding the fact that the law largely defines a child as a person under the age of 18. Children aged 13–15 are taken to be able to consent (factually if not lawfully) to sexual activity and thus, there are three sets of offences capable of being committed against a child: (a) non-consensual offences committed against those aged 16–17 (which are indicted as the same offences as for adult complainants); (b) offences where the complainant is aged 13–15 and where the prosecution do not have to prove an absence of consent; and (c) offences where factual consent is not an element of the offence by virtue of the age of the complainant, namely under 13. Where factual

consent is an element of the offence, the prosecution must always prove that the defendant did not hold a reasonable belief that the complainant was consenting.

II. Methods of giving valid consent

The law in England and Wales is not prescriptive as to how consent is to be given. Regarding rape it provides "(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents."[32] There is no affirmative consent provision as in some Australian states.[33]

III. Grounds for negating the validity of formal consent

With regard to deception, the courts have taken a mixed approach. Broadly speaking, the distinction has been whether the deception goes to 'the nature and purpose of the act'. For example, a patient's consent to a breast examination is not valid if, unbeknownst to her, the procedure is medically unnecessary and merely for the doctor's sexual gratification. Deception as to the sex of the defendant vitiates consent[34] whereas deception as to general identity (other than impersonating someone known to the victim) does not vitiate consent. False representations as to factors such as marital status, wealth, occupation or HIV status do not vitiate consent[35] but, as described above, removing a condom may.

IV. Withdrawal of consent

In theory – *ceteris paribus* – the point at which a complainant for example communicated a withdrawal of consent, there would be both (a) an ab-

32 Sexual Offences Act 2003, s. 1(2).

33 Caitlin Cassidy, 'What do the affirmative sexual consent law reforms passed in NSW and proposed in Victoria mean for each state?', The Guardian, November 24, 2021, https://www.theguardian.com/global/2021/nov/24/what-do-the-affirmative-sexual-consent-law-reforms-passed-in-nsw-and-proposed-in-victoria-mean-for-each-state (accessed August 24, 2022).

34 *R. v McNally* [2013] EWCA Crim 1051.

35 *R. v EB* [2006] EWCA Crim 2945; [2007] 1 W.L.R. 1567.

sence of consent and (b) an absence of the defendant reasonably believing the complainant was consenting, and thus the elements of a non-consent offence may be present. An offence will only be committed if the relevant activity continues where (a) the complainant no longer consents AND (b) the defendant does not reasonably believe that the complainant consents.

V. Scope of consent

Consent need not be explicit and need not be specific as to the nature and scope of each act. Consent can be implied and can change as a sexual act continues. As described above, the non-consent offences require (a) the absence of consent and (b) that the defendant did not reasonably believe the complainant consented.

VI. If a person gives general consent to sexual relations, what does it include?

There is no longer a general consent to sexual relations. 'The idea that a wife by marriage consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections… is no longer acceptable. It can never have been other than a fiction, and fiction is a poor basis for the criminal law.'[36] Where a person consents to some sexual activity, to what extent that consent extends will depend upon all the circumstances. For example, the complainant may say they consented to sexual touching but not penetration, the defendant may seek to rely on the general consent to bolster the claim that they reasonably believed the complainant consented to penetrative activity. There can therefore be a difference between (a) the complainant's consent (b) what the defendant genuinely believed as regards the complainant's consent and (c) what the defendant reasonably believed as regards the complainant's consent.

36 *R. v R* [1992] 1 A.C. 599.

VII. *Can a person actively perform a sexual act and still claim that s/he did not consent to this act?*

A person may perform a sexual act for many reasons. The critical question as per section 74 SOA is whether the person "agrees by choice, and has the freedom and capacity to make that choice." As to whether a person can actively perform a sexual act and later make a complaint that they did not consent, there is a difference between submission and consent. There are examples of cases where the complainant has been starved or otherwise coerced into performing an act, ostensibly consensually but where in fact the circumstances reveal that the consent was not freely given and thus was not consent at all. Ormerod and Laird have questioned the perceived difference between a threat ('if you do not have sex with me I will sack you') and a promise ('if you have sex with me I will give you a pay rise')[37] Juries are generally directed that:

> "A person consents if they agree to something when they are capable of making a choice about it and are free to do so. Consent can be given enthusiastically or with reluctance, but it is still consent. But when a person gives in to something against his/her free will, that is not consent but submission. They may submit due to threats, out of fear or by persistent psychological coercion."

The position is therefore that there are specific circumstances where there is an evidential presumption against consent that can apply where the complainant has performed the relevant sexual activity. This is underpinned again by the approach to consent in the 2003 Act, namely the emphasis on autonomy.

Additionally, there are offences (formerly under the Sexual Offences Act 2003, ss.57 – 59A, now under the Modern Slavery Act 2015) concerning trafficking for exploitation which includes the intention that the victim be sexually exploited by the commission of a Sexual Offences Act 2003 offence.

37 D.C. Ormerod and K. Laird, *Smith & Hogan's Criminal Law*, 16th Edn, 2021, Oxford), 791.

VIII. If a person says "no", is it still possible for the other person to obtain his/her valid consent?

Just as consent can be withdrawn, it can be re-instated. Thus, a person may consent, change their mind and withdraw consent, then re-instate their consent. They may do so as many times as they wish. These are all circumstances which, evidentially, may make a conviction more or less likely. But in law, they do not alter the fact of consent; whether a person consents to a sexual act is entirely a matter for them and it is dynamic.

Germany

Thomas Weigend

A. Background

I. General attitude in society toward sexual relations

German society is fairly open-minded regarding sexual relations. Heterosexual as well as homosexual sex among consenting persons older than 14 years is almost generally accepted; only some religious groups (including the Catholic church) object to extra-marital sex.

Most criminal laws regarding sexual acts are gender neutral. The only exception is exhibitionism, which is criminal only if committed by a man (§ 183 German Penal Code [PC]).

II. Background of criminal laws on sexual conduct

The role of criminal law in regulating sexual conduct has long been subject to debate. When in the past the protection of public morals was regarded as the main purpose of criminal prohibitions, liberal reformers argued that criminal law should not be utilized for regulating private consensual behavior and that criminal prohibitions based on the alleged immorality of sexual relations (such as male homosexuality and adultery) should be abolished.[1] This movement of the 1960s led to a decrease of criminal prohibitions in this area and to a re-definition of the general rationale of criminal prohibitions concerning sexual relations. Since 1973, this rationale is the protection of the sexual autonomy of the persons involved.[2]

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1 *Friedrich-Christian Schroeder,* Neue Juristische Wochenschrift (NJW) 1994, 1501; *Joachim Renzikowski*, in: Münchener Kommentar Strafgesetzbuch, 4th ed. 2021, Vor § 174 marginal notes 2–3.

2 *Thomas Fischer,* Strafgesetzbuch, Kommentar, 68th ed. 2021, Vor § 174 marginal note 1; *Renzikowski* (note 1), Vor § 174 marginal note 6; *Theo Ziegler*, in: Bernd von Heintschel-Heinegg (ed), Beck'scher Online-Kommentar Strafgesetzbuch (BeckOK StGB), 53rd ed. 2022, § 174 marginal note 2.

The key role of autonomy in regulating sexual conduct can be seen, *inter alia*, in the laws regarding prostitution. In 2001, prostitution of adults was legalized mostly to protect prostitutes' economic interests against fraud and coercion.[3] More recent legislation sought to give better protection to sex workers against coercion and exploitation. Having sexual relations with prostitutes younger than 18 years or with persons who have been coerced into prostitution now are criminal offenses (§§ 180 sec. 2, 232a sec. 6 PC). In the current political debate, several groups demand a reversal of the general legalization of buying sexual services, arguing that very few women sell such services based on a truly autonomous decision.[4] Some authors also advocate the Scandinavian model of making punishable the purchase but not the sale of sexual services.[5]

After the reform of the early 1970s, only conduct that manifestly violated a person's sexual autonomy continued to be prohibited by the criminal law. But since the beginning of the 21st century, a greater sensitivity developed in German society for structural and implied pressures on women to tolerate sexual conduct even though it was not welcome. Consequently, the reach of the criminal law was extended to prohibit more subtle violations of sexual autonomy beyond using or threatening physical force. Typical results of this development toward a broader understanding of autonomy and its protection are the prohibitions of

- sexual acts "against the recognizable will" of another person (§ 177 sec. 1 PC);
- sexual harassment of another person by touching him or her in a sexually connoted way (§ 184i PC);
- participating in a group of persons who harass another person in order to commit an offense against him or her, if a sexual offense is committed by any group member (§ 184j PC); and
- unlawfully taking a photograph of the genitals, buttocks, or the female breast of another person if these parts of the body are covered by clothing (§ 184k sec. 1 no. 1 PC).

3 The present legislation is *Gesetz zum Schutz von in der Prostitution tätigen Personen (Prostituiertenschutzgesetz)* (Bundesgesetzblatt 2016 I, p. 2372), in force since 2017.

4 *Wolfgang Weiß* and *Stefanie Höfer,* Neue Juristische Online-Zeitschrift (NJOZ) 2021, 1473; *Wolfgang Weiß* and *Stefanie Höfer,* Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2022, 31.

5 *Beate Merk,* Zeitschrift für Rechtspolitik (ZRP) 2006, 252.

The protection of children against sexual predation has also been extended, for example, by creating the crime of "cyber grooming" (§ 176 sec. 4 no. 3 PC).

III. Definition of sexual coercion offenses

Until 2016, the crime of sexual coercion[6] required that the perpetrator used force or threats of force, or took advantage of a situation in which the victim was without protection against his acts. Since force or threat of force were means to subordinate the victim's will according to the perpetrator's wishes, the victim's consent in the performance of sexual acts negated the element of coercion and thus the completion of the offense. Critics pointed out that the legal definition of sexual coercion did not cover situations in which the victim's autonomous will is overborne by other means, such as taking advantage of his or her surprise or psychological inability to resist ("freezing").[7]

A reform law passed in 2016 fundamentally changed the legal situation.[8] The traditional crime of sexual coercion became an aggravated case of the new basic offense called sexual abuse (*sexueller Übergriff*). Sexual abuse is defined as the performance of a sexual act (by the perpetrator or the victim) against the victim's "recognizable will" (§ 177 sec. 1 PC). His or her valid consent in the sexual act therefore negates the objective element of this offense. However, the following subsection (§ 177 sec. 2 PC) provides for the punishability of sexual acts in certain situations in which the victim is prevented from expressing his or her will or is inhibited in forming the will autonomously. In addition to the obvious cases of sexually abusing a person who is unconscious, asleep, or drunk[9] (§ 177 sec. 2 nos. 1 and 2 PC), the law also prohibits performing sexual acts if the victim is tak-

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6 "Rape" (*Vergewaltigung*) was and still is defined as an aggravated case of sexual coercion involving sexual penetration or similar acts that have a particularly humiliating effect on the victim.

7 *Tatjana Hörnle,* Neue Zeitschrift für Strafrecht (NStZ) 2017, 13, 17; *Ralf Eschelbach*, in: *Holger Matt* and *Joachim Renzikowski* (eds), Strafgesetzbuch (StGB), 2nd ed. 2020, § 177 marginal notes 36–37.

8 For assessments of this law, see *Elisa Hoven* and *Thomas Weigend*, JuristenZeitung (JZ) 2017, 182; *Hörnle* (note 7); *Elisa Hoven,* Neue Zeitschrift für Strafrecht (NStZ) 2020, 578.

9 If the other person's ability to form or express his or her will is "significantly diminished" due to his or her bodily or mental state, the actor is permitted to perform sexual acts only if he or she has obtained the partner's specific consent (§ 177

en by surprise (§ 177 sec. 2 no. 3 PC), if the actor coerces him or her by threatening them with a significant harm (§ 177 sec. 2 no. 5 PC), or if the perpetrator intentionally takes advantage of the fact that someone else may do harm to the victim if he or she resists (§ 177 sec. 2 nos. 4 PC). In the latter two situations, the victim may appear to express consent to the sexual act, but that consent is vitiated by the pressure exerted on the victim, and the perpetrator is aware of this.

IV. General role of consent in criminal law

Under German law, the victim's valid consent can have the effect of negating the *actus reus* of the offense. For example, the offense of criminal trespass (§ 123 PC) cannot be committed if the owner of the building in question has agreed to a visit by the actor. Sexual coercion is another case in point, as has been mentioned above: one cannot be coerced to do an act that one wishes to do.

There are other offenses, however, whose *actus reus* can be committed regardless of whether the affected person consents. Examples are inflicting bodily injury (§ 223 PC) and destruction of property (§ 303 PC). Regarding these offenses, the victim's consent leaves the *actus reus* intact but can have the effect of *justifying* the actor. If, for example, D asks owner V if it is alright if D destroys V's old bicycle, and V gives his consent, the destruction of the bicycle meets the definition of § 303 PC,[10] but D's act is justified by V's consent. The reason for giving legal effect to consent is respect for the affected person's autonomy.[11] If, in our example, V wishes to get rid of the bicycle and thanks D for taking care of its destruction – why should the

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sec. 2 no. 2 PC). The legislature thus wished to impose the "only yes means yes" rule for this situation, especially if the victim is drunk.

10 § 303 PC: "Whoever unlawfully damages or destroys an object that belongs to someone else is punishable by imprisonment up to 2 years or a fine." The word "unlawfully" here is regarded not as a specific element of the actus reus but only refers to the general rule that there is no punishability of lawful conduct. See *Brunhild Wieck-Noodt*, in: *Volker Erb* and *Jürgen Schäfer* (eds), Münchener Kommentar Strafgesetzbuch, 3rd ed. 2019, vol. 5, § 303 marginal note 64. For a differing interpretation of the above hypothetical (V changes the function of the bicycle to an object to be destroyed, hence D does not complete the actus reus of § 303 PC) see *Hans-Heinrich Jescheck* and *Thomas Weigend*, Lehrbuch des Strafrechts, Allgemeiner Teil, 5th ed. 1996, 376.

11 *Thomas Weigend*, Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW) 98 (1986), 41; *Thomas Rönnau*, in: *Gabriele Cirener* et al. (eds), Leipziger Kommentar

state interfere by holding D criminally responsible? This rationale of justification holds true even if an objective observer would disapprove of V's decision, for example, because the bicycle is valuable and still in good shape.

Consent does not, however, justify an otherwise criminal act under all circumstances. First, justification presupposes that the person giving consent has a right to dispose of the legal interest in question. In the above hypothetical, consent given by V's spiteful neighbor N, who encourages D to destroy V's bicycle, is not relevant for D's punishability (unless D thinks that the bicycle belongs to N). The same is true if the legal interest in question is a communal interest, such as the preservation of the environment. In that case, no private individual can dispose of the interest and give valid consent, e.g., to the pollution of a lake.

Homicide and bodily injury are special cases. Actor D who kills V because V had earnestly and expressly requested D to kill him will be punished. Yet, his conviction will not be of murder but of the special offense of "killing on request" (§ 216 PC), which carries a much lesser sentence than murder or manslaughter.[12] The reason for punishing even well-intentioned "mercy killings" has been subject to debate.[13] One explanation refers to the state's interest in preserving human life; but that interest should not trump the earnest wish of the "victim" to have his or her life terminated. The most plausible explanation lies in the difficulty of disproving a homicide defendant's claim that he acted upon the deceased person's request when there are no witnesses to the transaction.[14]

With regard to causing bodily injury, § 228 PC provides that a person who injures another person with his or her consent acts unlawfully only if the act violates "good moral standards (*gute Sitten*)" despite the consent. After some back and forth on the question of what "good moral standards" mean here, the Federal Court of Justice has come to the conclusion that "good moral standards" do not refer to the morality of the conduct in question but are violated only if the act of causing injury implies a serious

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Strafgesetzbuch, 13th ed. 2019, vol. 3, Vor § 32 marginal notes 146–146a; *Claus Roxin* and *Luis Greco*, Strafrecht Allgemeiner Teil I, vol. I, 5th ed. 2020, 655–657.

12 The penalty for murder is life imprisonment, whereas killing on request is punishable by imprisonment between 6 months and 5 years.

13 See *Andreas Jurgeleit,* Neue Juristische Wochenschrift (NJW) 2015, 2708; *Josef Franz Lindner,* ZRP 2020, 66.

14 *Hartmut Schneider*, in: Münchener Kommentar StGB, 4th ed. 2021, § 216 marginal notes 5 et seq.

risk to the victim's life.[15] In relation to sexual conduct, this means that even acts of sado-masochistic sex causing injury are justified by the victim's consent unless the act is life-endangering (as in choking the sexual partner with an iron bar[16]).

B. Requirements for valid consent

In the following paragraphs, I explain the general rules on the preconditions of a valid consent and its scope in German criminal law. It should be borne in mind, however, that the offense of sexual abuse (§ 177 sec. 1 PC) requires more than the absence of the victim's consent; the actor is punishable only if the victim has "recognizably" (*erkennbar*) expressed his or her opposition to sexual acts.

I. General capacity to give consent

Generally, a person's capacity to give consent to conduct that would otherwise be criminal does not depend on that person's age but on his or her ability to understand the nature of the act in question and its possible consequences.[17] However, the law has established special rules for sexual acts. Children younger than 14 years are conclusively assumed to be incapable of giving voluntary consent; hence any sexual act involving children (even as mere spectators) is prohibited and punishable by imprisonment of up to 15 years (§§ 176, 176a PC). Young persons of 14 and 15 years are generally regarded as capable of making autonomous decisions; however, a person older than 21 years who performs a sexual act with a juvenile under 16 years and thereby intentionally abuses the individual inability of that person to make autonomous decisions in sexual matters is punishable by imprisonment of up to three years (§ 182 sec. 3 PC). It follows from these

15 Federal Court of Justice (*Bundesgerichtshof* – BGH), Judgment of 11 Dec. 2003, 3 StR 120/03, 49 Entscheidungen des Bundesgerichtshofes 34; Judgment of 26 May 2004, 2 StR 505/03, 49 Entscheidungen des Bundesgerichtshofes in Strafsachen 166.

16 That was the situation in the leading Judgment of 26 May 2004, 2 StR 505/03 (note 15).

17 *Rönnau* (note 11), Vor § 32 marginal notes 192–195; *Detlev Sternberg-Lieben*, in: *Albin Eser* et al., Schönke/Schröder, Strafgesetzbuch Kommentar, 30th ed. 2019, Vor § 32 marginal note 39 with further references.

rules that persons of 16 years and older are presumed to be able to give valid consent in sexual matters unless they suffer from an individual defect.

Persons of any age can be unable to give valid consent as a result of a mental disease or a severe impairment of intelligence (cf. § 177 Sec. 2 nos. 1 and 2 PC). A temporary inability can be the consequence of consuming alcohol or drugs that impair the person's ability to think clearly or to control his or her impulses. Some writers draw a parallel between the ability to give valid consent and the criminal responsibility for offenses; they think that a person cannot give consent if he or she would not be held responsible, due to a chronic or temporary mental impairment, for an offense he or she commits.[18] But according to the majority view, these two issues should be treated separately and be decided according to different criteria.[19] Hence the capacity to consent depends, among other factors, on the specific conduct that the actor is to perform[20] – even a young teenager can give informed consent to the extraction of a tooth but not to the investment of her inherited funds in a dubious business enterprise.

II. Ways of giving valid consent

In sexual relations, a person's consent can be relied upon if he or she expressed it verbally or in non-verbal forms, such as nodding one's head when asked whether one wishes to have sex. Problems with regard to sexual conduct can occur if one partner to a sexual act expresses neither consent nor dissent but just remains passive while the other person touches him or her sexually. The definition of sexual abuse in § 177 sec. 1 PC describes the *actus reus* as performing a sexual act "against the recognizable will" of the other person. This implies that the victim must have made up his or her mind against accepting the sexual act that the perpetrator is about to perform. But an internal opposition is not sufficient. The victim must also have expressed – verbally or non-verbally – his or her rejection of the proposed sexual act. Only if the victim uses words or gestures indicating his or her disagreement with the perpetrator's intended act can the victim's opposition be deemed "recognizable". If the victim remains passive while the other person performs a sexual act, the victim's opposing will is

18 *Eschelbach* (note 7), § 177 marginal note 49.
19 *Eschelbach* (note 7), § 177 marginal notes 49, 53.
20 *Renzikowski* (note 1), § 177 marginal note 50.

not "recognizable", even if the actor knows from prior encounters that the other person is unlikely to consent to his sexual acts.[21]

"Recognizability" is determined from the viewpoint of an objective observer who is familiar with the relevant facts. German law thus accepts the rule "No means No" but shifts to the affected person the burden of taking some action to express his or her opposition. A lack of protest thus equals consent.[22] This is true even if the victim is generally afraid of the perpetrator and therefore refrains from expressing his or her opposing will. Without a recognizable expression of rejection, sexual abuse exists only if the victim is unable to form or freely express his or her will for a specific reason listed in the Code, for example, because the perpetrator takes advantage of the victim's surprise or makes threats to prevent any opposition (see § 177 sec. 2 nos. 3, 5 PC).

If the victim protests and the actor nevertheless performs a sexual act because he thinks that the protest is not meant seriously but is part of a role play, the perpetrator acts at his own risk. If it turns out that the other person indeed objected to the perpetrator's plan, there was a "recognizable expression" of his or her opposition, and it is doubtful whether the court will later accept the defendant's claim of a *bona fide* mistake of fact on his part.

III. Grounds for negating validity of consent

The use of force or threats of force to make the victim submit to the perpetrator's will clearly negates the effect of any ostensible expression of consent by the victim. German law goes even further: a person is guilty of sexual abuse if he or she threatens the victim with inflicting any serious harm and thereby makes the victim submit to a sexual act (§ 177 sec. 2 no. 5 PC). Even taking advantage of someone else's threats against the victim is regarded as a form of sexual abuse: If D knows that X will beat V if V refuses to have sex with D and takes advantage of V's vulnerable position for having sex with V, D is guilty of sexual abuse (§ 177 sec. 2 no. 4 PC). This leaves open the question of whether an express or implied "threat" of a negative turn in professional relations between A and B in case B refuses to comply with A's sexual wishes is sufficient to negate any effect of B's de-

21 See *Eisele*, in: Schönke/Schröder (note 17), § 177 marginal note 19.

22 BGH, Judgment of 30 March 2022 – 2 StR 292/21, in: Neue Zeitschrift für Strafrecht, Rechtsprechungsreport (NStZ-RR) 2022, 211; *Hoven* (note 8), 579.

clared consent or B's active participation in mutual sexual acts.[23] Similar questions arise if A tells B that he intends to terminate their relationship unless B agrees to have sex with him. In deciding on the coercive character of such threats, courts need to balance B's sexual autonomy against A's freedom to continue a relationship with B, which should normally prevail.[24]

While German law rules out valid consent if the victim's autonomy has been affected by threats, *deceptive behavior* for the purpose of obtaining consent in sexual acts is not expressly mentioned in the Penal Code. With regard to instances where consent is a ground of justification, there is general agreement that consent is invalid if the person giving consent has been tricked into doing so by a misrepresentation of relevant facts.[25] But some authors view the matter differently if lack of consent is an element of the *actus reus* of an offense, as, e.g., in criminal trespass or larceny: In that instance, they claim that it does not matter how the person has been motivated to declare consent – its mere verbal or factual declaration is said to be sufficient to negate the *actus reus.*[26] It must be doubted that this view holds true as a general principle, because the impact of fraud and deceit on a person's free will can hardly depend on whether consent is regarded as negating the *actus reus* or the unlawfulness of the actor's conduct.[27]

But it may make sense, as a matter of criminal policy, to distinguish among different instances of deceit with regard to consent in sexual matters.[28] Consent should not be valid if the actor made the victim believe

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23 For a controversial decision on this question, see Federal Court of Justice (Bundesgerichtshof) of Nov. 21, 2018, 1 StR 290/18, in 2019 Neue Zeitschrift für Strafrecht (NStZ) 717, and the comments by *Tatjana Hörnle*, 'Sexueller Übergriff (§ 177 Abs. 1 StGB) bei aktivem Handeln von Geschädigten', 2019 NStZ 439, 440, and *Elisa Hoven*, 'Das neue Sexualstrafrecht. Ein erster Überblick', 2020 NStZ 578, 579–580.

24 But see the decision of the Karlsruhe Appellate Court of Jan. 17, 2019, 2 Ws 341/18, in 2019 NStZ 350 (emphasizing the need to take B's subjective situation into account when deciding on the coercive character of A's threat to leave B).

25 *Rönnau* (note 11), Vor § 32 marginal notes 203 et seq.

26 *Johannes Wessels, Werner Beulke* and *Helmut Satzger*, Strafrecht Allgemeiner Teil, 50th ed. 2020, marginal notes 554, 560; *Fischer* (note 2), Vor § 32 marginal note 3b.

27 See *Rönnau* (note 11), Vor § 32 marginal notes 157–160 (arguing in favor of making the effect of fraud depend on the offense type); *Horst Schlehofer*, Einwilligung, in: *Eric Hilgendorf, Hans Kudlich* and *Brian Valerius* (eds), Handbuch des Strafrechts, vol. 2, 2020, marginal notes 117–121.

28 For extensive argument, see *Elisa Hoven* and *Thomas Weigend*, Kriminalpolitische Zeitschrift (KriPoZ) 2018, 156; *Rita Vavra*, Zeitschrift für internationale Strafrechtsdogmatik (ZIS) 2018, 611; see also *Roxin* and *Greco* (note 11), 700.

that his or her act is not sexual at all but, e.g., a necessary medical examination. Deceit about one's identity also vitiates the victim's consent because a person's willingness to permit sexual intimacy normally depends on the identity of the partner. It should thus be regarded as sexual abuse if the actor makes the victim believe that he or she is another person with whom the victim is familiar.[29] On the other hand, consent in sexual acts is still valid if the actor made false promises (e.g., to pay the other person some money or to marry him or her) or misled the other person about his or her personal qualities (e.g., pretending to be rich or to be a gentle person). Forming a wrong impression about another person is a general risk of social life, and making the decision to enter into sexual relations on the basis of such a false impression is a risk that should be borne by the victim even if the actor is responsible for creating the impression. It should be mentioned, however, that these issues have not yet been discussed much in German case law and legal literature.[30]

C. *Reach of consent*

I. *Timing of consent*

As a general rule, consent is relevant in criminal law only if it was expressed before the relevant act took place.[31] Hence, if the actor performs a sexual act although the other person "recognizably" expressed his or her opposition, the actor commits the offense of sexual abuse even if the victim later declares that he or she forgives the perpetrator or that he or she enjoyed the sexual act. In the latter instance, however, the victim is unlikely to report the matter to the police.

Consent expresses the will of a person at the time when it is given. This implies that consent may be withdrawn at any time, even while sexual intercourse or similar acts are being carried out. If one person lets the other person know, verbally or by gestures, that he or she no longer consents to the sexual act in question, the other partner must immediately

29 This would not cover the case that a person who meets the victim for the first time introduces himself or herself using a false name.

30 But see *Hoven* (note 8), 581; *Renzikowski* (note 1), § 177 marginal note 52; *Ziegler* (note 2), § 177 marginal note 10; *Beatriz Correa Camargo,* Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW) 134 (2022), 355.

31 *Sternberg-Lieben*, in: Schönke/Schröder (note 17), Vor § 32 marginal note 44; *Engländer*, in: Matt/Renzikowski (note 7), Vor § 32 marginal note 20.

terminate the act. If the actor continues after consent has been withdrawn, he or she commits the *actus reus* of sexual abuse.[32] However, withdrawal of consent does not work retroactively; hence anything that happened before the person said "stop!" remains a consensual sexual act.

II. Scope of consent

Consent to sexual acts can be general or specific. If one of the partners limits his or her consent to certain acts and/or specifically excludes some acts, that specification is binding on the other partner. If "general" consent is given, that normally extends to sexual acts that can be expected under the circumstances, including sexual intercourse. To what extent "unusual" sexual acts are included depends on the relationship between the persons involved. The other person may, however, express his or her opposition to specific acts even if he or she had agreed to them at prior occasions, and that opposition is binding on the actor.

A case decided by the Federal Court of Justice in 2018[33] has led to a spirited debate about the possible scope of non-consent.[34] In that case, a hospital nurse had had an affair with a doctor, her boss. After she ended the affair, he asked her to give him oral sex one more time. She said that she didn't want to do that, but when he presented his penis, she took it between her lips for a few moments in order to avoid possible negative consequences for her employment. This case raised the question of whether a person can claim to withhold consent when he or she actively performs a sexual act, such as giving oral sex. Unless that person's will had been subdued by force or threats, actively performing a sexual act normally implies a conscious decision to do so, even if the person does not "like" to do this act or performs it only for ulterior purposes (e.g., to stay in friendly relations with the other person). Barring exceptional circumstances, an unforced sexual activity therefore should not be regarded as being involuntary.[35]

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32 *Renzikowski* (note 1), § 177 marginal note 49.

33 BGH, Decision of 21 November 2018 – 1 StR 290/18, NStZ 2019, 717.

34 For discussions, see *Thomas Fischer,* NStZ 2019, 580; *Tatjana Hörnle,* NStZ 2019, 439; *Hoven* (note 8), 579.

35 The District Court convicted the defendant of sexual abuse, arguing that he knew that the nurse did not wish to have oral sex with him. The Federal Court of Justice reversed, criticizing the District Court for not sufficiently explaining in the written judgment how the nurse's ambivalent behavior (verbal protest but

In recent years, courts increasingly had to deal with a phenomenon called "stealthing", i.e., the secret removal of a condom by the male partner before or during intercourse.[36] A clear majority regard this conduct as a form of sexual abuse, arguing that the woman's consent is normally limited to protected intercourse, given the risks of pregnancy and transmission of diseases if no condom is used.[37] Hence if the male partner secretly removes the condom before or during intercourse, the ensuing penetration is not covered by her consent unless she had explicitly agreed to unprotected sex.

III. Finality of non-consent

If a person declares that he or she does not consent to (certain) sexual acts, that declaration does not exclude a later change of mind. The other person therefore should be free to try to persuade the partner to re-think his or her opposition to sexual acts. Whereas verbal persuasion is not covered by the criminal law, performing sexual acts in the hope that the unwilling partner may change his or her mind clearly falls under the heading of sexual abuse in the sense of § 177 sec. 1 PC ("against the recognizable will of the other person").

D. Intent as to lack of consent

All offenses of sexual abuse and coercion in the German Penal Code require intent. The scope of the intent is not altogether clear in the basic offense of sexual abuse (§ 177 sec. 1 PC), because the offense is defined as acting against the "recognizable" will of the other person. Since the victim's will must be "recognizable" for an objective observer, the offense definition does not refer to the perpetrator's negligence about ascertaining the victim's consent but to his intent as to the perception of an objective ob-

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active sexual conduct) could be understood by the defendant. The case against the defendant was eventually dismissed in exchange for a payment of 9,000 Euro.

36 See, e.g., Kammergericht, Decision of 27 July 2020 – 4 Ss 58/20, in: BeckRS 2020, 18243; Oberlandesgericht Schleswig, Judgment of 19 March 2021 – 2 OLG 4 Ss 13/21, NStZ 2021, 619; Bayerisches Oberstes Landesgericht, Decision of 20 August 2021 – 206 StRR 87/21, in: BeckRS 2021, 31633.

37 See *Felix Herzog*, in: *Stephan Barton* et al., Festschrift für Thomas Fischer, 2018, 351; *Thomas Michael Hoffmann*, NStZ 2019, 16; *Hoven* (note 8), 580–581.

server: the perpetrator must be aware that a well-informed objective observer would interpret the victim's behavior as indicating opposition to the sexual act proposed by the perpetrator.[38] "Intent" in German law includes so-called conditional intent (*dolus eventualis*), that is, consciously taking the risk that the perpetrator's conduct meets the offense definition. Regarding the lack of consent, it is thus sufficient that the perpetrator thinks that it is possible that the victim's conduct expresses his or her lack of consent, and still decides to perform the sexual act.[39] The German solution thus approaches the recognition of "reckless" sexual coercion.

On the other hand, any mistake of fact on the part of the defendant negates intent. It is thus not sufficient for conviction that other reasonable persons would have interpreted the victim's conduct as clearly expressing opposition to the defendant's plans. The defendant can be convicted of intentional sexual abuse only if he or she knew or at least accepted the possibility that an observer would interpret the victim's conduct as expressing lack of consent.[40] Although there is no formal burden of proof on the prosecution, the court may convict only if the judges, after evaluating all the evidence, are convinced of the defendant's guilt beyond a reasonable doubt.[41] Conversely, if the conflicting testimony of the participants of a sexual encounter does not present a clear picture as to the "recognizable" lack of one partner's consent, the court must acquit the defendant. There is in any event no burden on the defendant of proving consent, nor are there evidentiary presumptions that non-consent is deemed to exist in certain situations (but see E. below).

E. Are there sexual offenses that do not require lack of consent?

As mentioned above, children younger than 14 years are deemed incapable of giving valid consent to sexual acts (§ 176 PC). A similar irrefutable assumption of non-consent applies to persons who are in a defined situation of dependence on the perpetrator. Examples are

38 *Eisele* (note 17), § 177 marginal notes 19–21; *Renzikowski* (note 1), § 177 marginal note 47.

39 *Monika Frommel*, in: *Urs Kindhäuser, Ulfrid Neumann* and *Hans-Ullrich Paeffgen* (eds), Strafgesetzbuch, Kommentar, 5th ed. 2017, § 177 marginal note 58; *Renzikowski* (note 1), § 177 marginal note 62.

40 *Ziegler* (note 2), § 177 marginal note 9.

41 § 261 Code of Criminal Procedure; see *Klaus Miebach,* NStZ 2020, 72.

- minors younger than 16 years who have been placed under the perpetrator's care for their education or training (§ 174 sec. 1 no. 1 PC);
- prisoners, other persons in detention, and patients in a hospital in relation to persons employed by the institution if the perpetrator abuses his or her position of authority (§ 174a PC);
- patients in relation to physicians or psychotherapists who have accepted them for treatment, if the perpetrator abuses his or her position (§ 174c PC).

In these and similar cases, the person in authority is punishable for perpetrating sexual acts even if the other person agreed to them.

Italy

Gian Marco Caletti

A. General attitude in society toward sexual relations

The social attitudes of Italians toward sexual relations have been significantly changing recently. For many years, especially in certain areas of the country, the emphasis was primarily on rules of decency and morals, rather than on the recognition of women's sexual autonomy. In recent years, society's perceptions have changed, and more types of conduct are considered abusive and harmful to the free sexual self-determination of individuals. These new cultural impulses have been mirrored in many court decisions (see *infra*) and in some scholarly papers[1]. However, the new attitudes have only been partially implemented at the legislative level (see *infra*).

In this phase of change, old male stereotypes cyclically re-emerge, reproposing logics considered obsolete by the majority of the population. An implementation of sexual education on mutual respect and consensual sexual relations would be appropriate to eliminate some subcultural stereotypes still linked to old clichés. Some surveys show that numerous men are still convinced that rape is, in many cases, provoked by women (eg. if they dress provocatively, if they agree to go out, etc..) or that a married woman cannot refuse to have sex with her spouse[2].

Gender equality has been a central topic in Italian politics in recent years. Regrettably, it has often been enhanced only with symbolic initiatives. There is considerable attention to gender language and great social condemnation of sexist discourse. Unfortunately, this often results in a mere tendency towards linguistic "political correctness", whereas in fact there are still evident disparities, particularly in the workplace.

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1 The Italian association of criminal law professors has officially suggested a reform of rape law with a consent-based definition. See the document 'Reati contro la libertà e l'autodeterminazione sessuale' on www.aipdp.it.

2 See Virginia Piccolillo, 'Violenza sulle donne. Colpa di come vestono', in Corriere della Sera, 26.11.2019. In Italian criminal law scholarship, Luciana Goisis, 'La violenza sessuale: profili storici e criminologici', in Dir. Pen. Cont., 31.10.2012.

B. Background of criminal laws on sexual conduct

The current Italian legislation on sexual crimes was introduced in 1996 (with law no. 66 of February 15, 1996)[3].

The lynchpin of the reform is that the law now classifies sexual offences as "offences against personal freedom". Previously, under the 1930 Rocco Code, sexual autonomy had not been protected as an interest in itself, but rather as a part of the public good of "public morality and decency". This was an expression not only of the fascist ideology underpinning the code but also of the historical legacy of the Italian legal tradition, which conceptualized sexual activity as tied to legitimate procreation[4].

The change was charged with a strong cultural and symbolic meaning, especially by Italian feminist movements. The symbolic potential of law has been used to promote the value of the right to sexual autonomy: by defining sexual crimes in terms of "individual freedom" and no longer as public morality and decency, the intention was to reaffirm that protection in sexual crimes is directly centered on the person, whose sexual freedom is not protected as a projection of public interests such as public morality or family order and legitimate procreation[5].

On the other hand, as noted by several scholars, there have been few innovations in terms of the structural elements of the offence of sexual violence. The offence continues to be based upon coercion, as opposed to lack of consent, and predicated upon the traditional components of violence and threat[6]. Indeed, the main features of the reform were: the abolition of the distinction between penile penetration and other sexual acts; an increase in the minimum and maximum sentences; a list of aggravating circumstances which increase the sentence; some recognition of the sexual autonomy of minors and people with disabilities; and a special provision and harsher sentence for gang rape.

However, even the new systematic placement within the Italian Penal Code has raised doubts. Several scholars have pointed out that it would have been more appropriate to include the crimes among those against

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3 Marta Bertolino, 'La riforma dei reati di violenza sessuale', (1996) Studium Iuris, 401.

4 Tullio Padovani, 'Pre-Art. 609-bis c.p. Commento ad Art. 2 l. 15 febbraio 1996, n. 66', in: Alberto Cadoppi (ed), 'Commentario delle norme contro la violenza sessuale e contro la pedofilia' (4th edn. 2006), 431. See also the chapter 'Coercion by violence and its changing meaning. The experience of Italy', in this volume.

5 Giuliano Balbi, 'Violenza sessuale' in: Enciclopedia Giuridica (1998), 1, 3.

6 Padovani (note 4); Bertolino (note 3).

"moral freedom", rather than against "individual freedom" (immediately after kidnapping)[7].

If until the 1990s, scholars and courts emphasized the role of the criminal law as an *extrema ratio* in the sexual sphere[8], recently more attention has been paid to the protection of the interests damaged by the conduct of sexual violence. This is particularly true for the jurisprudence of the Supreme Court ("Corte di Cassazione"), which in recent years has used a very broad interpretation of the concept of violence[9]. Scholars, on the other hand, have for several years been calling for a reform of sexual violence beyond the concepts of force and threat[10].

C. Definition of sexual coercion offenses

Under the original 1930 version of the Rocco Code, there was a division between the serious offence of "*congiunzione carnale*" (literally "joining of the flesh")[11], art. 519 of the Penal Code, constituted by vaginal, anal and oral penetration; and the less serious offence of "*atti di libidine*" (literally "acts of lust"[12] or "libidinal acts"), art. 521 of the Penal Code, defined simply as acts different from *congiunzione carnale*.

In 1996, the lawmaker unified the two crimes under a single offence provided for in Article 609-*bis* of the Penal Code, entitled "*violenza sessuale*" (sexual violence). It requires the performance of "sexual acts" (in Italian: "*atti sessuali*"), which includes both penetration and other sexually related conduct. This all-encompassing category remained undefined by the law and continues to create extensive problems of interpretation[13].

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7 David Brunelli, 'Bene giuridico e politica criminale nella riforma dei reati a sfondo sessuale', in: Franco Coppi (ed), 'I reati sessuali. I reati di sfruttamento dei minori e di riduzione in schiavitù per fini sessuali' (2nd edn. 2007), 37.

8 Giovanni Fiandaca, 'Violenza sessuale' in Enciclopedia del diritto (1993), 953.

9 See the chapter 'Coercion by violence and its changing meaning', in this volume.

10 See supra notes 1 and 6.

11 Translation by Rachel A. Fenton, 'Rape in Italian law: towards the recognition of sexual autonomy' in: Clare McGlynn and Vanessa E. Munro (eds), 'Rethinking Rape Law' (2010), 183.

12 Ibid.

13 Alberto Cadoppi, 'La violenza sessuale alla ricerca della tassatività perduta', (2016) Dir Pen Proc, 1469. The "unification" within article 609-bis of the two crimes made it necessary to provide for an attenuated form of sexual violence in order to punish less severely those cases in which the sexual acts were not so invasive and

The reasons for this original legislative solution were manifold, but two were central. Naively, it was expected that in trials it would no longer be necessary to ask invasive and embarrassing questions to the victim to establish whether there had been penile penetration. Furthermore, feminists believed that the distinction did not recognise that acts not involving penetration may be even more offensive and degrading to the victim.

The offence of sexual violence under art. 609-bis c.p. now reads:

> "*Whosoever, by violence or threat or by abuse of authority coerces another to commit or submit to sexual acts is punished by imprisonment of six to twelve years.*
> *The same punishment is applicable to him who induces another to commit or submit to sexual acts:*
> 1. *abusing the physical or psychological inferiority of the victim at the time of the offence;*
> 2. *deceiving the victim as to the identity of the perpetrator.*
>
> *In less serious cases the punishment is reduced by not more than two thirds*"[14].

The crime of sexual violence thus includes two types of actus reus: the so-called "coercive" violence (comma 1) and the violence so-called "by induction" (comma 2). Apart from violence "by induction" (see *infra*), despite the rhetoric of the reform, the Italian legislation has maintained a model based on coercion by force or threat. The criminal relevance of the conduct of sexual aggression does not lie in the fact that it is carried out in the absence of the consent or despite the dissent of the offended person, but in its perpetration through (a) violence, (b) threats, (c) abuse of authority. Coercion on the part of the perpetrator is necessary, at least on a literal level, and specifically – dwelling on case (a) – that this takes place with violence.

Despite the fact that the word "violence" obviously recalls the use of force, in case law – especially of the Supreme Court – the requirement of violence has been completely dematerialised. This issue is extensively addressed in the chapter "Coercion by violence and its changing meaning. The experience of Italy", hence this report only highlights the essential features of the process of dematerialisation.

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serious (see comma 3 of art. 609-bis c.p.). In fact, the crime includes extremely heterogeneous conduct, ranging, for example, from a kiss on the cheek to rape.

14 Translation by Fenton (note 11).

Initially, many decisions adopted an extremely broad definition of the concept of violence, which includes also the so-called "improper violence", defined as conduct that has a "coercive effect" *lato sensu*, regardless of the manner in which it is realized. This kind of interpretation was already widespread before the 1996 reform. For example, rapid and unexpected sexual acts (e.g., sudden touching, a stolen kiss) were considered "violent" acts because the victim is unable to defend herself or dissent explicitly[15].

The Supreme Court then went beyond the element of violence, focusing on the dissent of the victim, declaring that "the new law is aimed at a more modern concept of personal freedom, which in principle is equally offended by non-consensual relations as it is by violent relations" and that "the material element of the offence coincides with the committal of any sexual act without the consent of the partner".[16] In this perspective, the absence of consent is considered an implicit element of the offence.

D. General role of consent in criminal law

At a general level, in Italian criminal law consent can assume the role of:

(a) an element of the offence, as in art. 644 of the Penal Code (c.p.) (usury) or art. 573 c.p. (Consensual kidnapping of a child). The lack of consent, which can be expressed as a requirement of dissent ("no means no"), as in art. 614 c.p. (violation of home), where the entry into the home must take place against the express or tacit will of the holder of the *ius excludendi alios*) or as the absence of consent ("yes means yes"), as in the recent art. 612-ter c.p. ("Illegal dissemination of sexually explicit images or videos", where the law requires that the actus reus occurs in the absence of the consent of the person depicted[17]).

(b) a special element of a specific criminal offence that distinguishes it from another one that is characterized by a greater disvalue: for example, in the case of art. 579 c.p. ("Homicide of a consenting person"

15 See Alberto Cadoppi, 'Art. 609-bis c.p.', in: Alberto Cadoppi (ed), 'Commentario delle norme contro la violenza sessuale e contro la pedofilia' (4th edn. 2006), 439, 501.

16 Cass. pen., Sez. III, 3.12.1999, n. 13829.

17 Gian Marco Caletti, 'Can affirmative consent save "revenge porn" laws? Lessons from the Italian criminalization of non-consensual pornography', (2021) Virginia Journal of Law and Technology 25, 112.

where consent means that the more serious offence of intentional homicide under (art. 575 c.p.) is not perpetrated);

(c) a cause of justification as per art. 50 p.c. In this case, the consent of the person who can validly dispose of the right that the agent has damaged or endangered leads to the lawfulness of the act.

In the context of sexual offences, although consent is not an element expressly required by the offence but nevertheless valued by the criminal courts, scholars usually consider it as an element of the offence and not a cause of justification. This is because consensual sexual intercourse is not to be considered an offence but a normal fact of private life which does not require a defence[18]. Much more debate has occurred, however, regarding informed consent in the medical field, long considered a cause of justification because life and physical integrity in the perspective of the Fascist Civil Code are classified as non-disposable assets.

There is no intention where the defendant makes a mistake as to consent. There is no formal requirement that any mistake be reasonable (the crime of sexual violence can be committed only with intention or recklessness), but the defendant must prove their honest mistake.

I. Requirements for valid consent to sexual acts

The 1996 reform introduced a new regime for non-coerced sexual acts with minors.

Art. 609-quater ("Sexual acts with minors") of the Penal Code provides the same punishment of art. 609-bis for a person who "*performs sexual acts with a person who, at the time of the act: 1) has not reached the age of fourteen years; 2) has not reached the age of sixteen years, if the perpetrator is the ascendant, the parent, even adoptive, or the cohabitant, the guardian, or another person to whom, for reasons of care, education, supervision or custody, the child is entrusted or who has, with the latter, a cohabitant relationship*".

In both cases described, there is no reference to the "coercion" that characterizes the crime of sexual violence, since the elements from which the criminal relevance of the fact can be deduced are based on the age of the offended person (comma 1) or on his age in combination with a relationship of "trust" that exists between the victim and the offender (comma 2).

18 Marco Pelissero, 'Bondage e sadomasochismo: i limiti della responsabilità penale tra fine di piacere e libero consenso', (2017) Cass. Pen., 350.

This legal regime has been accused of being predominantly paternalistic[19]. The law is not interested in determining whether a person under 14 years of age may have the emotional or sexual maturity to freely determine the expression of their sexuality. As ruled by the Court of Cassation, the legal interest here is not sexual autonomy but rather the protection of the psycho-physical integrity of the minor's sexual development[20].

However, some sexual autonomy is recognized for adolescents aged 13 or over who have consensual relations with another minor, as long as there is no more than a four-year age gap. In this case, art. 609-quater c.p. provides for an exemption from punishment (comma 4).

In any case, it should be specified that if a minor is forced into a sexual act according to the modalities of art. 609-bis c.p., the latter norm will be applied, which provides for a higher penalty than art. 609-quater. The sanction moreover is aggravated by the fact that the sexual violence is perpetrated against a minor according to art. 609-ter c.p. If the sexual intercourse is consensual, the defendant will be convicted under art. 609-quater c.p., otherwise the defendant will be convicted under art. 609-bis c.p., with an aggravated sentence because of art. 609-ter c.p.

Even with regard to consciousness, mental health, and lack of intoxication, Italian law is not particularly up to date[21]. The conditions of the victim are taken into consideration in the second paragraph of art. 609-bis p.c., in relation to violence by induction (see supra, § 3).

In this kind of sexual violence, the consent of the person induced to submit to or to perform sexual acts is flawed. However, the Supreme Court has emphasized that the notion of abuse of a person's condition of mental or physical inferiority (art. 609-bis, comma 2 c.p.) includes the case in which one takes advantage of a pathological state of the victim as well as the case in which the condition of (even partial) unconsciousness is the result of a state of intoxication by alcohol or drugs. The Courts have thus improperly relied on violence by induction to punish cases of sexual intercourse with persons unable to express any consent, for example, because they are unconscious due to alcohol.[22] This interpretation is highly problematic: the word "*induzione*" actually implies a suggestion,

19 Fenton (note 11), 192.

20 Cass. pen., Sez. III, 13.5.2004, Sonno.

21 Alain Maria Dell'Osso, 'Gli assensi artificiali: abuso di sostanze psicotrope e capacità di autodeterminazione nel prisma della violenza sessuale', (2021) Riv. it. med. leg., 409.

22 Very recent judgments have framed the case of the unconscious victim as an absence of consent, being relevant due to the existence of an affirmative consent

moral/psychological pressure, or persuasion. In cases where the victim is unconscious there is neither coercion nor induction into sex[23].

1. *Ways of giving valid consent*

Since the crime is formally based on forcible or threatening coercion, the answer to the question of how consent is given must be found in the law in action rather than in the law in the books.

The Supreme Court of Cassation has ruled that "a manifestation of dissent, which can also be non-explicit but based on conclusive facts clearly indicative of the contrary will and can intervene *in itinere*, excludes the lawfulness of the sexual act"[24].

This is the currently prevailing approach. There have also been striking episodes over the years in which the Supreme Court returned to requiring a strong resistance by the victim, falling into the pattern of *vis grata puellae.*[25] However, these were isolated judgments that have not occurred for many years, at least in the case law of the Supreme Court.

2. *Grounds for negating validity of formal consent*

As already explained, the offence of sexual violence is based on coercion and induction, which also negates the validity of consent in cases where it was formally given.

Furthermore, the Supreme Court has specified: “It is not required that the violence is such as to override the will of the passive subject, but that this will is coerced by the conduct of the agent, nor is it necessary that the use of violence or threat is concomitant with sexual intercourse for the entire time, from the beginning until the conjunction; it is sufficient that the unwanted intercourse is consumed even if only taking advantage of a state of prostration, distress, or decreased resistance to which the victim has been reduced”[26].

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paradigm. For further details and references, see Gian Marco Caletti, ‘Coercion by force and its meaning’, in this volume.

23 Cadoppi (note 15), 513–526.

24 Cass. pen., Sez. III, 20.11.2019, n.7590.

25 Cass. pen., Sez. III, 6.11.1998 (dep. 1999), Foro It, 1999, II 163.

26 Cass. pen, Sez. III, 24.1.2017, n.1660.

For example, consent was held invalid in the following case: After the end of a party, a woman on her way home was attacked by a stranger who threatened to force her to have sexual intercourse. The woman, after futile attempts to fight him off, offered her assailant a condom before the intercourse was performed in order to prevent at least an unwanted pregnancy or the transmission of serious infections[27].

Consent is also invalid if coercion occurs through abuse of authority. The possible presence of the victim's consent is irrelevant if it has been intrinsically vitiated by her state of "subjection", related to the "supremacy" of the agent. The authority can be public or private (teachers, parents, employers, healthcare workers, etc.)[28].

Fraud

Italian criminal law leaves little room for rape by fraud.

The case is regulated by comma 2 of art. 609-bis c.p.: "*The same punishment is applicable to those who induce another to commit or submit to sexual acts: […]; deceiving the victim as to the identity of the perpetrator*".

The law requires a real substitution for another subject: in fact, it aims at criminalizing the man who gets into the bed of a woman pretending to be her husband – a case that today is absolutely fanciful and unreal[29]. Nevertheless, sometimes courts use this statute to convict of sexual violence defendants who concealed the sexual nature of an act or made false statements about their personal circumstances or qualities. A typical case is that of a man who pretends to be a doctor in order to perform sexual acts with an unaware patient.

False promises, however, are not criminally relevant.

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27 Trib. Genova, 26.6.2001, in Giur. merito, 2002, 508.

28 Cass. Pen., Sez. un., 16.7.2020, n. 27326.

29 The origin of the offence is in the case law, although Italy is not a common law country. The courts began to apply the offence of sexual violence in this case, so the legislature in 1930 incorporated the crime into the new Criminal Code. See Alberto Cadoppi, 'La genesi delle fattispecie penali. Una comparazione tra civil law e common law', in Giovanni Fiandaca (ed), 'Sistema penale in transizione e ruolo del diritto giurisprudenziale' (1997), 164.

II. Reach of consent

According to the case law, consent must be present continuously throughout the sexual encounter; consensual relations will become an offence if one party withdraws his or her consent at any time (and the partner does not interrupt the intercourse)[30]. Therefore, the so-called "rape by omission" (or "post-penetration rape") exists in Italian law[31].

Consider, for example, this decision from the Supreme Court: "In relationships between adults, the consent to sexual acts must continue throughout the relationship without interruption, with the result that the offence in art. 609-bis c.p. is committed by the continuation of intercourse if, subsequently to a consent originally given, a manifestation of dissent intervenes 'in itinere', even if it is not explicit but conclusive facts clearly indicate the contrary will"[32].

Consent thus has to be actual and has to last for the entire sexual relationship. It follows that consent is not irrevocable during the intercourse, nor can consent have a retroactive effect. Yet, even if in theory a retroactive consent does not prevent the offence from having taken place, on a practical level the prosecution of the offence requires a complaint by the victim. It is unlikely that the victim will file a complaint if he or she thinks that the sexual encounter took place consensually.

1. Scope of consent

It is not required that the dissent of the victim be manifested (without interruption) for the entire period of the sexual act. Therefore, the defendant will be convicted even if the dissent was manifested only once at the beginning of the act[33].

If the sexual relationship was initially consensual, the defendant will be charged under art. 609-bis, comma 1 c.p. if a manifestation of dissent occurred later and the perpetrator nevertheless continued with the sexual

30 Cass. Pen., Sez. III, 24.2.2004, Guzzardi, Cass. pen. 2005, 25.

31 Maria Chiara Parmiggiani, 'Rape by omission, ovvero lo "stupro omissivo": note a margine di un recente caso californiano', (2005) Ind. Pen., 311.

32 Cass. Pen., Sez. III, 11.12.2018, n. 15010.

33 Paolo Veneziani, 'Note in tema di violenza di gruppo ed "estrinsecazione iniziale" del dissenso della vittima' in Alberto Cadoppi (ed), 'La violenza sessuale a cinque anni dalla legge n. 66/96. Profili giuridici e criminologici' (2001), 167.

act. As has already been pointed out, consent to sexual acts must continue throughout the entire act without interruption.

The Supreme Court has stated that consent originally given is no longer valid if the modalities of the relationship change and are no longer agreed upon by the victim. Thus, even where there is consent to intercourse as such, ejaculation into the vagina without consent is sufficient to constitute the offence[34].

There are currently no indications of decisions that have dealt directly with so-called "stealthing". However, from what has been summarised so far, it can be argued that when there has been consent to a protected sexual relationship (with the use of a condom) and the partner removes it without the knowledge of the other person, the courts may consider that such change leads to the actor's responsibility for the crime of sexual violence (art. 609-bis c.p.).

Can a person actively perform a sexual act and still claim that s/he did not consent to this act?

The answer to this question under Italian criminal law is rather controversial. Clearly, if the victim decides to actively engage in the sexual act as a result of violence or a threat, this is considered sexual violence. However, there are also cases of an active sexual act where the defendant is convicted of sexual violence even though they did not use force or direct threats. These are cases where there are coercive circumstances (in the dark, in an isolated place, with no possibility of escape, a relationship of supremacy, etc.) which make the victim submit to the sexual act even without a direct threat or violence. It is called "costrizione ambientale" (literally "environmental coercion")[35].

Criminal responsibility is excluded in cases where a person performs sexual acts in order to obtain an advantage of any (public or private) kind. The courts negate coercion in these cases because the person is persuaded to perform the sexual act in view of an advantage. In some cases, this perspective risks being a little superficial. It is not clear in many cases whether the person performs the sexual act out of fear of being harmed or just to gain an advantage.

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34 Cass. Pen., Sez. III, 10–5–96, in Cass. Pen., 1997, 1739 ss.

35 Francesco Macrì, 'Costrizione "ambientale" agli atti sessuali: la tutela del dissenso tra legalità ed esigenze repressive in un raffronto tra codice penale italiano e StGB tedesco', (2007) Riv It Dir Proc Pen, 1492.

Finality of consent
If a person says "no", it is still possible for the other person to obtain his/her valid consent, but consent must be obtained without any form of coercion, not even "environmental" coercion (see above).

III. Intent as to lack of consent

The offence of "*violenza sessuale*" must be committed intentionally. Although it is not, as stated many times, an element of the crime, according to the interpretation of the courts the lack of consent must be known by the perpetrator.

Are there offenses of reckless or negligent sexual coercion, dispensing with the requirement of intent?
To simplify, recklessness can be the *mens rea* of the crime. The reason is that *dolus eventualis* ("*dolo eventuale*") is a sufficient form of intent to commit the offence. However, it should be remembered that the notion of *dolus eventualis* is narrower than that of recklessness[36].

Some scholars advocate a provision in this direction *de iure condendo*, particularly with regard to (gross) negligence in not having realized that the victim was not consenting[37].

IV. Other particularities of Italian law on sexual coercion offenses

There is a form of strict liability in relation to the age of the victim (*error aetatis*) in cases where there is sexual intercourse with a person under the age of 14[38]. In fact, awareness of the true age of the child is not required, nor even a culpable error about the same to affirm criminal responsibility.

The 1996 law contains a new and autonomous provision for gang rape[39]. Art. 609-octies defines gang rape ("*violenza sessuale di gruppo*") as

36 Gian Marco Caletti, 'Recklessness' in Massimo Donini (ed), 'Il reato colposo', Enciclopedia del Diritto (2021) 1047.
37 Matteo L. Mattheudakis, 'L'imputazione colpevole differenziata. Interferenze tra dolo e colpa alla luce dei principi fondamentali in materia penale' (2020), 438.
38 Lucia Risicato, 'Error aetatis e principio di colpevolezza: un perseverare diabolicum?', (2000) Riv it dir proc pen, 584.
39 Massimo Donini, 'Art. 609 octies c.p.' in: Alberto Cadoppi (ed), 'Commentario delle norme contro la violenza sessuale e contro la pedofilia' (4th edn 2006), 718.

"*violenza sessuale*" by at least two persons acting together. The Supreme Court has clarified that little is expected in the way of dissent from a victim in these circumstances[40]. The sentence is more severe than for single offenders.

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The Netherlands

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A. Background

I. General attitude in society towards sexual relations

The general attitude in society towards sexual relations in the Netherlands has largely followed the overall political climate in Western Europe. Very fundamental to the present sexual offences is the liberal rationale with which the chapter on sexual offences was originally introduced in 1886. This rationale can be summarized as "the protection of sexual integrity of persons who, at that time or in general, are not able to protect it themselves".[1] This seemingly honourable rationale also carries a flip-side: it implies that, as long as a person is able to protect his or her own sexual integrity, criminal law does not offer protection. In other words: the law implies a duty to resist or run away if one is reasonably able to do so. And up to this date, this rationale is manifestly present in the offences of rape and indecent assault, which require coercion. The high threshold for the applicability of these coercive offences is causing more and more societal disapproval, propelled by the #metoo-movement and the international obligation formulated in article 36 of the Istanbul Convention to criminalize intentionally engaging in non-consensual sexual acts. It is evident that the Dutch sexual offences are still not in compliance with this obligation, but a major reform has been planned, as will be discussed below. All in all, it is clear that a societal shift is taking place in the Netherlands with regard to sexual integrity. Not only is there growing support for a consent-based rape offence, but there is also growing attention for the responsibility to ascertain whether there is consent.

1 Cited from the relatively recent *Kamerstukken II* (Parliamentary Papers, Second Chamber) 1988/89, 20930, 5, p. 4. But this rationale is also visible in the preparatory papers of the DCC from 1886 and in the structure of the chapter on sexual offences. All translations in this chapter are by the author, unless stated otherwise.

II. Background of criminal laws on sexual conduct

The criminal provisions on sexual conduct have been incorporated in the general Dutch Criminal Code (*Wetboek van Strafrecht*; hereafter: DCC) ever since it came into force in 1886. The specific chapter is labelled "Offences against the Morals" (*Misdrijven tegen de Zeden*; articles 239–254a DCC) and has been amended many times. Although most provisions have a sexual context, there are some offences that have a broader reach. In that respect, the chapter title refers to public morals. Article 240a DCC, for example, criminalizes the act of showing harmful images to a minor, and is also applicable in cases of harmful violent images.

Unfortunately, a very conspicuous characteristic of the chapter on sexual offences is its lack of structure. Provisions that have a substantive connection to each other are scattered throughout the chapter, so that there is no thematically coherent order of offences. One can, however, discern six categories of protected interests of a sexual nature. There are offences against public sexual morals[2], sexual offences against persons with a mental or physical incapacity[3], sexual offences concerning relationships of dependency or subservience[4], sexual offences against children[5], sexual offences concerning animals[6], and finally sexual offences by use of coercion[7].

The general terms of these categories suggest that the underlying interests enjoy a broad protection. However, in a country where legality plays a pivotal role in criminal law, the relevant provisions have a specific wording. Additionally, the Dutch Supreme Court is generally hesitant to adopt an interpretation that clearly goes beyond the wording of the provision and beyond what the legislature had in mind. And as stated above, the Dutch legislature has had a predominantly reserved view on interfering in the sexual life of citizens: only those who cannot protect themselves are deemed to need protection by the criminal law. As a result, one could say that the sexual offences have a conservative scope. This is especially the case with regard to the coercion offences: rape and indecent assault.

2 Indecent exposure and pornography (articles 239 and 240 DCC).
3 Articles 243 and 247 DCC, of which article 247 also contains offences against children.
4 Article 249 para., 2 DCC.
5 Child-related offences can be found in articles 239, 240a, 240b, 244, 245, 247, 248a, 248b, 248c, 248d, 248e, 248f, 249, 250, 252 and 253 DCC.
6 Article 254 (bestiality) and article 254a (animal pornography) DCC.
7 Article 242 (rape) and article 246 (indecent assault) DCC.

Even in this day and age, the Supreme Court continues to interpret "coercion" as to require substantially more than just acting with knowledge of non-consent (see paragraph I.3 for more details). One exception to the conservative interpretation of sexual offences is the interpretation of offences against children. Lower courts and the Supreme Court have frequently given an extensive interpretation to the elements of these offences, apparently in order to offer a more robust and modernized protection. Although this is understandable, these interpretations also have led to significant overlaps between provisions, making it very hard to distinguish one provision from the other and therefore causing new problems of their own.

In the last few decades, the already unclear structure of the chapter on sexual offences was worsened by an increase of amendments. Many changes were made as a result of new international obligations and, to a lesser extent, of national discussions on criminal policy;[8] but these changes were never systematically thought through. Together with the growing overlap of sexual offences against children, the chapter on sexual offences was becoming more and more difficult to understand. In 2015, this was confirmed by an extensive report on Dutch sexual offences. The report had been commissioned by the government because of the growing concern about the functioning of the relevant chapter. According to the report, the chapter on sexual offences contained "a high degree of inconsistency, complex regulations and vague standards". The report substantiated that it was becoming too difficult to distinguish between provisions, even between those with a very high maximum penalty and those with a low maximum penalty. Furthermore, the report found that interpretations varied widely among courts, causing similar cases to be treated unequally, and that the provisions were not adequately formulated to clearly cover the various forms of "hands-off" sexual abuse and increasing digitization. The report concluded that a comprehensive revision of the chapter on sexual offences should be considered.[9] The government endorsed this conclusion and announced that a complete overhaul of the chapter on sexual offences would be drafted, adding that contemporary societal views on sexual in-

8 For example, the criminalization of sexual corruption and grooming of minors stem from the Council of Europe Lanzarote Convention, whereas the criminalization of bestiality and animal pornography are a direct result of a national debate.

9 K. Lindenberg and A.A. van Dijk, *Herziening van de zedendelicten? Een analyse van Titel XIV, Tweede Boek, Wetboek van Strafrecht met het oog op samenhang, complexiteit en normstelling*, WODC 2015, paragraph 4.7 (available online via the University of Groningen website www.rug.nl, including an English summary).

tegrity would also be taken into account, like the views connected with the #metoo-movement.[10]

In 2020, a predraft of the new chapter was published for consultation[11], and in 2021, the draft itself was made public.[12] At the time of writing the draft is awaiting its evaluation by the Council of State, after which it will be discussed in parliament.

Because the current legislation, the predraft, and the draft all differ fundamentally regarding many topics – especially the role of consent in the context of rape and sexual assault –, the drafts will be discussed frequently in the following paragraphs. The point of departure will however always be the present law.

III. Definition of sexual coercion offences: rape and indecent assault

As mentioned above, people with a certain vulnerability – for example: young age, a permanent or temporary incapacity, or a dependent relationship – are protected by specific provisions on sexual abuse. People who lack these specific vulnerabilities, however, primarily have to rely on the provisions on "rape" and "indecent assault" (*verkrachting* and *aanranding*) for the protection of their sexual integrity. These offences are defined as follows:

> Article 242 DCC (Rape)
> "Any person who by an act of violence or any other act, or by threat of violence or threat of any other act, compels a person to endure acts comprising or including sexual penetration of the body, shall be guilty of rape and shall be liable to a term of imprisonment not exceeding twelve years (…)."

> Article 246 DCC (Indecent assault)
> "Any person who by an act of violence or any other act, or by threat of violence or threat of any other act, compels a person to perform or to tolerate lewd acts, shall be guilty of indecent assault and shall be liable to a term of imprisonment not exceeding eight years (…)."

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10 *Kamerstukken II* (Parliamentary Papers, Second Chamber) 2015/16, 29279, 300.

11 The predraft and its explanatory memorandum are available at www.internetconsultatie.nl/wetseksuelemisdrijven.

12 The draft and its explanatory memorandum are available at www.internetconsultatie.nl/wetsvoorstelseksuelemisdrijven.

The main structure of these provisions dates back to 1886, when the DCC was introduced, but significant changes were made in 1991: (i) the provisions were made gender-neutral, (ii) the marital exception for rape was abolished, (iii) the crime of rape was broadened so as to encompass not only intercourse but also other forms of sexual penetration, and (iv) the means by which the victim is compelled were expanded from "violence" and "threat of violence" to basically all acts that have the potential of compelling someone (through the addition of "any other act" and "threat of any other act").[13]

The legislature never gave a clear definition of the element of coercion – "to compel" – but the central characteristics can be derived from the case law of the Dutch Supreme Court. In short, the verb "to compel" demands four components to be present:

(1) Non-consent on the part of the victim;
(2) Intent on the part of the defendant with regard to non-consent;
(3) Unavoidability for the victim;
(4) Intent on the part of the defendant with regard to unavoidability.[14]

The non-consent and *mens rea* aspects will be elaborated upon in paragraphs II and IV respectively. As for the third component, the word "unavoidability" represents the view of the Supreme Court that there can only be coercion (compulsion) if the victim could not reasonably do anything but comply with the perpetrator's wish or tolerate his act. The situation therefore must have been more or less unavoidable for the victim. The Supreme Court has strictly upheld this component, which can be demonstrated by the following case: A fifteen-year-old girl hesitantly accepted a body massage from her mother's male friend, who used to be a sports masseur. Lying down naked on a bed, the girl heard the man say that "she has a very nice pussy" and that he wanted to "rub oil on her pussy". She then expressly told him to stop. The man nevertheless put oil on his hand and started to touch her vagina. Once more the girl told him to stop. She then jumped off the bed and left the room. In the criminal case that followed, the Supreme Court eventually quashed the conviction for indecent assault, stating that the evidence did not sufficiently support the

13 See Lindenberg and Van Dijk 2015 (note 9), paragraph 2.7.1.
14 See K. Lindenberg, *Strafbare dwang*, Antwerpen/Apeldoorn, 2007, paragraph 3.3; Lindenberg and Van Dijk 2015 (note 9), paragraph 2.7.3.

conclusion that it had been so difficult for the victim to avert the acts by the defendant that his conduct could be characterized as coercion.[15]

This example illustrates that the aspect of unavoidability, together with the requirement of a corresponding intent (component 4), causes the Dutch system to remain a clear-cut coercion model with regard to rape and sexual assault, as opposed to coercion models that have moved towards a consent-model through interpretation.

The new draft on sexual offences aims to change the essence of rape and indecent assault into a model based on lack of consent. This was, however, not the initial plan. The predraft did not propose to alter the provisions on rape and indecent assault at all, but instead wanted to introduce lesser offences of "sex against the will":

> Article 239 of the Predraft on Sexual Offences
> ("Sex against the will")
> "1. Any person who commits sexual acts with another person (…) whilst he knows or he reasonably should assume that these acts take place against the will of the other person, shall be liable to a term of imprisonment not exceeding four years (…).
> 2. If the acts referred to in the first paragraph comprise or include sexual penetration of the body, the term of imprisonment shall not exceed six years."

This provision in the predraft was heavily criticized for different reasons. A frequent critique was that this provision carried an implied label of a "rape-*light*"-offence, and that this would cause more harm than good for victims of sexual abuse in search of justice.[16] Furthermore, there were objections from academia that the new provision would not only groundbreakingly introduce a lower *mens rea* threshold in this context – in the form of negligence ("reasonably should assume") – but that it would also not distinguish between intent ("knows") and negligence with regard to

15 Dutch Supreme Court (*Hoge Raad*), Judgment of June 2nd 2009, ECLI:NL:HR:2009:BH5725300. Although the conduct of the defendant cannot be characterized as coercion, it fits the provision on committing lewd acts with minors younger than sixteen years (article 247 DCC, carrying a term of imprisonment not exceeding six years).

16 This critique was also clearly present in the NGOs' reactions to the governmental online consultation on the predraft, available at www.internetconsultatie.nl/wetseksuelemisdrijven.

the label and severity of the offence.[17] Finally, legal scholars questioned the need for a new consent model, stating that there was room for expanding the coercion offences by way of interpretation.[18]

Without clearly stating why, the current draft has dropped the separate provision on "sex against the will" and now aims to redefine rape and indecent assault altogether. The proposed offences consist of three forms: a negligent, an intentional, and an aggravated form. For rape, the definitions are as follows (the proposed provisions for indecent assault are similar, but obviously lack the element of sexual penetration):

> Article 242 of the Draft on Sexual Offences ("Negligent rape")
> "Any person who commits sexual acts comprising or including sexual penetration of the body with another person, whilst he has serious reason to assume that the will of the other person is lacking thereto, shall be guilty of negligent rape and shall be liable to a term of imprisonment not exceeding four years (…)."

> Article 243 of the Draft on Sexual Offences
> ("Intentional rape" and "aggravated rape")
> "1. Any person who commits sexual acts comprising or including sexual penetration of the body with another person, whilst he knows that the will of the other person is lacking thereto, shall be guilty of intentional rape and shall be liable to a term of imprisonment not exceeding nine years (…).
> 2. Any person who is guilty of intentional rape that was preceded, accompanied, or followed by coercion, violence, or a threat, shall be liable to a term of imprisonment not exceeding twelve years (…)."

Looking at the previously mentioned criticism, it is noteworthy that now separate offences of negligence and intent are to be introduced and that all forms will carry the label of "rape". Other notable aspects are the changes in the phrasing of negligence (from "reasonably should assume" in the

17 See in greater detail K. Lindenberg, 'Onvrijwillige seksuele interactie', *Ars Aequi* 2020,1014. Although statutory equalization of intent and negligence is not uncommon in Dutch criminal law, the DCC at the same time strongly differentiates between intent and negligence in many areas. For example, intentional homicide carries a maximum sentence of fifteen years (article 287 DCC), whereas negligent homicide carries a maximum sentence of only two years (article 307 DCC). The legislature has yet to make clear what the systematic rationale is for choosing an equalization or a differentiation.

18 L.E.M. Schreurs, J. van der Ham and L.E.M. Hamers, 'Dwang bij misdrijven tegen de zeden in het afgelopen decennium', *Delikt en Delinkwent* 2019/59.

predraft to "serious reason to assume" in the draft) and of non-consent (from "against the will" in the predraft to a "lacking will" in the draft). These aspects will be discussed further below.

IV. General role of consent in criminal law

Before 1886, substantive criminal law in the Netherlands was based on the French *Code Pénal*, which predominantly carried offences against interests of the state. The DCC of 1886 introduced more offences concerning individual interests[19], and more have been introduced since then. This gradual development of offences against individual interests may explain why Dutch criminal law does not have a rich history of a consent doctrine and that the criminal law does not deal with consent systematically. The role of consent depends on the specific context.[20] There are offences that protect a private interest in some way but additionally serve a public interest. It is clear that in this hybrid context, the presence of consent does not necessarily negate the offence.[21] Various examples can be given: human trafficking, intentionally causing grievous bodily harm, killing someone on their request, and committing sexual acts with a minor.

On the other hand, there are criminal provisions that are principally in place to protect a private interest, making the absence of consent part of the essence of the offence. In other words, if there is consent, there is no crime (*volenti non fit iniuria*). However, the characteristics of this element of non-consent differ greatly between provisions.

A relatively narrow conception of (non-)consent exists in the context of the central theme of this book: rape and sexual assault. As will be described in more detail later on, the core element of these offences – coercion, "to compel" – not only implies non-consent on the part of the victim but also requires that this non-consent, this not-wanting something, is actively perceived as such by the victim at the time of the conduct.[22] This immediately rules out the existence of coercion (and therefore rape)

19 D. Simons, *Leerboek van het Nederlandsche strafrecht – eerste deel*, Groningen 1937, p. 49.

20 For an extensive analysis of these contexts, see A. Postma, 'The Netherlands', in: A. Reed and M. Bohlander (eds), *Consent – Domestic and Comparative Perspectives*, London 2017.

21 Comparable to the rationale in *Laskey, Jaggard and Brown v The United Kingdom*, ECtHR, Judgment of 19 February 1997, 09/1995/615/703–705.

22 Lindenberg and Van Dijk 2015 (note 9), paragraph 2.7.3.

if the victim, for example, is sleeping or positively complies due to deceit. In both cases there is no conscious negative experience, and therefore no non-consent in the way required.[23]

A broader, richer notion of consent can be found in crimes against property, like theft and fraud, that revolve around permission and its validity.[24] Furthermore, there are crimes that are linked more directly to the general interest of autonomy than to the issue of consent. Insult, defamation, and slander can be placed in this category. It is the existing or assumed infringement on an aspect of personal autonomy that is the gist of the crime. Consent still plays a role in this category, but in a broader sense, in the form of an attitude: if there is a clearly neutral or positive (assumed) attitude towards the conduct, then there is no reason to believe that there is an infringement. The crime of stalking (article 285b DCC) fits into this category. Central to that offence is an infringement on privacy, which requires that the victim has a negative attitude towards the offender's conduct. If the victim's attitude towards the conduct is completely neutral or even positive, one cannot say that the conduct constitutes an infringement on privacy.[25] However, in terms of consent, the Supreme Court treats this offence very differently than rape and sexual assault. A statutory element of stalking is that the offender acts for the purpose of coercing someone into doing, not doing, or tolerating something, or causing fear. In a case brought before the court, the defendant had shadowed the victim and taken pictures of her, without the victim noticing anything. According to the defence, these acts were not committed for the purpose of causing coercion or fear. On the contrary, the defence argued, it was the defendant's objective to have the victim not notice anything at all. The Supreme Court, however, decided that conduct could amount to stalking if it was the objective of the defendant to prevent the victim from being able to resist the acts, and *thereby* to coerce the victim to tolerate his acts.[26] It is evident from this case that the interpretation of coercion (and of "tolerate", for that matter) is completely different in this context from

23 See below for a discussion on the protection of persons who are asleep or deceived.

24 See extensively on Dutch property offences V.M.A. Sinnige, *De systematiek van de vermogensdelicten*, Deventer 2017.

25 *Kamerstukken II* (Parliamentary Papers, Second Chamber), 1997/98, 25768, 5, p. 16.

26 Dutch Supreme Court, Judgment of April 21 2020, ECLI:NL:HR:2020:673. See A.B. van der Velde, 'Over het oogmerkbestanddeel in artikel 285b Sr, dwang en heimelijke belaging', *NTS* 2020/104.

the interpretation of these terms in the context of rape. With regard to stalking, a victim can be coerced to tolerate something even if he or she is not aware of the perpetrator's activity. Supposedly on the basis of the legislature's preparatory papers on stalking, the Supreme Court wanted to make sure the offence of stalking would protect against acts that are not noticed at the time, or are not noticed at all, because these too can infringe on autonomy, and therefore the Supreme Court broadened the meaning of coercion in this context. These differences in defining coercion and consent make it apparent that the concept of consent is highly context-sensitive in Dutch criminal law.

B. Requirements for valid consent to sexual acts

I. General capacity to give consent

In Dutch criminal law, the capacity to give consent is not stipulated as such in the provisions of the Code but is implied by the choices made by the legislature in the statutory definition of offences. In connection to the protected interests mentioned in paragraph I.2, the capacity to give consent can be differentiated in the same manner. The capacity to consent to sexual acts relates to age, intellectual or physical capacity, and dependency or subservience.

As for age, the age of consent is considered to be sixteen years.[27] However, children below the age of sixteen can, under certain circumstances, have sexual relations without the other person being criminally liable. Sexual acts with a child between the age of twelve and fifteen only constitute a criminal offence if the acts can be characterized as "lewd acts".[28] In short, "lewd" means "contrary to socio-ethical norms", and sexual acts are not considered lewd if they are age-appropriate, taking into consideration the age difference, the genuineness of consent, and the nature of the acts. Thus, consensual sexual relations between, for instance, two fifteen-year-olds who are dating can be legal, but sexual relations between a fourteen- and a twenty-year-old are not, even if there is a consensual and affective relationship. Furthermore, any non-consensual sexual act will be considered lewd in this context, as will sexual acts that, by their nature, are not seen

27 Sexual offences concerning minors are discussed in detail in Lindenberg & Van Dijk 2015 (note 9), paragraph 2.4.

28 Articles 245 and 247 DCC.

as age-appropriate, such as group sex, even though there is full consent. If a child is below the age of twelve, sexual acts that do not include penetration follow the "lewd acts"-criteria, but sexual penetration of a person below that age is criminalized as such.[29] A child under the age of twelve can thus give valid consent to moderate sexual acts with a peer, but never to sexual penetration.

The "lewd acts" criteria are quite refined, which has the benefit of giving criminal judges the opportunity to make a case-by-case assessment. The disadvantage, however, is the limited foreseeability of such an assessment, as it contains many factors and is susceptible to subjective interpretation. There is indeed some disparity in case law.[30] In an attempt to improve foreseeability, the draft on the new sexual offences proposes to do away with the "lewd acts" element. The draft will introduce the neutral term "sexual acts" and starts from the assumption that sexual acts with a person below the age of sixteen are criminal. Additionally, the provision itself will contain an exception for acts involving twelve- to fifteen-year-olds. It reads, in rough translation: "A person is not liable when he commits these acts as a peer, in the context of an equal situation between him and the other person."[31] This might be considered a step forward for ordinary citizens wanting to know the limits of their sexual freedom, because they are now presented with more statutory clarity than merely the current phrase "lewd acts". But for legal professionals in criminal law, this change will not immediately bring an improvement. The change seems to be limited to a codification and rephrasing of what already was case law in relation to "lewd acts": for the meaning of the legal exception, the explanatory memorandum on the draft refers to factors that strongly resemble those presently describing "lewd acts".[32] All in all, it seems that the legislature still prefers to give the judges flexibility to take all the circumstances into account rather than to have relatively rigid legal certainty. The latter would be the case if, for example, the capacity to consent was limited to defined age differences.

Although the age of consent has been sixteen since the introduction of the DCC in 1886, there have always been exceptions. As was just discussed, the first exception is the fact that minors younger than sixteen can legally consent to sex under certain circumstances. A second exception concerns

29 Articles 247 and 244 DCC.
30 Lindenberg and Van Dijk 2015 (note 9), paragraphs 2.4 and 4.5.
31 Articles 248 and 249 of the Draft on Sexual Offences.
32 The explanatory memorandum is available at www.internetconsultatie.nl/wetsvoorstelseksuelemisdrijven.

minors who are sixteen and seventeen. There are specific provisions criminalizing sexual acts with minors in this age group. They relate to (i) sexual acts that were brought about by instrumental means, like offering money and presents[33], (ii) sexual acts that took place in a dependent relationship, e.g., sexual acts with a parent or teacher[34], and (iii) sexual acts in the context of prostitution[35]. The draft on the new sexual offences plans to keep these exceptions and add a new, general one for performing sexual acts with a sixteen- or seventeen-year-old who is in a vulnerable situation.[36]

Sexual acts with a person who is mentally, intellectually, or physically vulnerable are not criminalized categorically. Rather, the chapter on sexual offences targets a specific selection of these vulnerabilities:

> Article 243 DCC
> "Any person who commits acts comprising or including sexual penetration of the body with a person whom he knows to be unconscious, to have diminished consciousness or to be physically incapacitated, or to be suffering from such a degree of mental disease, psychogeriatric condition or intellectual disability that such person is incapable or not sufficiently capable of determining or expressing his will thereto or of offering resistance, shall be liable to a term of imprisonment not exceeding eight years (…)."[37]

Unconsciousness and physical incapacitation are absolute pathological situations in which the body is incapable to resist, including deep sleep. In 1991, the categories of mental disability were added ("suffering from…"). The phrasing tries to strike a balance between those who cannot sufficiently look after their own interests and those who can. The rationale is that the latter category should not be sexually untouchable and should be able to fulfil their sexual desires.[38] Finally, in 2002, the category of "diminished consciousness" was added to protect people in a vulnerable mental state that did not fit the existing categories. This new category

33 Article 248a DCC.
34 Article 249 DCC.
35 Article 248b DCC (and additionally article 273f DCC, human trafficking).
36 Article 247 para. 1 b, of the Draft on Sexual Offences.
37 Article 247 DCC targets committing 'lewd acts' (without penetration) with the same vulnerable persons and carries a maximum sentence of six years.
38 Lindenberg and Van Dijk 2015 (note 9), paragraph 2.5; Noyon/Langemeijer/Remmelink, *Wetboek van Strafrecht*, article 243 DCC, comments 1 and 2 (online, updated 1 April 2021). The phrasing of these categories has been slightly amended since the introduction in 2002.

concerns a state of mind that is between deep sleep and unconsciousness on the one hand and being fully aware on the other, like being half-asleep or in a daze due to intoxication caused by drugs, alcohol, or medication. It is important to mention that these are all quantitative states of diminished awareness. One could say that, in a way, deception as to the circumstances (e.g., posing as someone else) also causes a "diminished consciousness" on the part of the victim. But such qualitative impairments do not fall under this category. During the preparation of the amendment in 2002, the legislature considered criminalizing sexual deceit, but chose not to criminalize it, fearing an overreach of such a provision.[39]

Adults in a relationship of dependency or subservience are protected, but only to a limited extent. The relevant provision explicitly mentions some relationships, leaving others unprotected *e contrario*. In summary, the provision protects a person who, continuously or situationally, is under the authority of (i) a civil servant, (ii) an employee of a penitentiary, child-protection centre, orphanage, hospital, or charitable institution, or (iii) an employee in the area of health care or social care. Principally, a person who is dependent in one of these relationships does not have the capacity to validly consent to sexual acts with the person in authority. For example: even if a prisoner consents to engage in sexual acts with a prison guard, and this consent seems valid apart from the formal authoritative relationship, the guard will still be held criminally liable. There is a statutory exception, however, for situations in which this liability would clearly be misplaced. The sexual acts are termed "lewd acts" in the provision, leaving normative room for judges to come to the conclusion that, in a certain case, the relationship fits the standard and the acts were of a sexual nature, but the acts were not "contrary to social-ethical norms" and hence not "lewd acts". For instance, if a physician has his wife as a patient and their relationship did not start during the doctor-client relationship, sexual acts between them will not be considered lewd acts.[40]

For sexual offences in a relationship of dependency, the new draft on sexual offences intends to keep the definitions more or less unchanged.[41] It introduces some clarifications here and there, e.g., making explicit that situations in which the victim merely visits the mentioned institutions as an outpatient also fall under the scope of the provision. What is surprising,

39 See Lindenberg and Van Dijk 2015 (note 9), paragraph 2.5.

40 Dutch Supreme Court, Judgment of 18 February 1997, ECLI:NL:HR:1997:ZD0645 and Judgment of 22 March 2011, ECLI:NL:HR:2011:BP2630.

41 Article 244 of the Draft on Sexual Offences.

however, is the plan to change "lewd acts" to "sexual acts". The explanatory memorandum of the draft does not shed light on this change, raising the question whether the new provision will be able to offer a mechanism against over-inclusiveness, with reference to cases like the married couple in a doctor-client relationship. Apparently, the legislature is willing to leave this new problem to be solved by prosecutorial discretion.

II. The primary characteristics of (non-)consent

As was outlined in paragraph I.4, the Dutch coercive offences of rape and sexual assault carry a narrow concept of (non-)consent: coercion ("to compel") not only implies non-consent on the part of the victim, but also requires that this non-consent is actively perceived as such by the victim at the time of the conduct.[42] In other words: the victim has to be consciously unwilling; there has to be self-perceived involuntariness. This requirement rules out coercion if the victim is asleep, if the victim is awake but is not aware of the presumed coercive conduct (e.g., does not notice that the door is locked)[43], and if the victim is persuaded to comply by means of deceit.[44] Because of this requirement, instances of sexual fraud and deception normally cannot constitute rape or indecent assault. The only forms of fraud and deception that fall within the scope of these offences are those that cause psychological pressure, i.e., an active negative attitude towards the conduct and its consequence. An example would be that the perpetrator tells a vulnerable religious person that God will be very angry if she does not engage in the sexual acts that the perpetrator wishes to perform.[45]

The victim's active unwillingness is a necessary condition for non-consent, but it is also a sufficient condition; apart from this internal attitude, there are no other requirements for the essential component of non-consent in the definition of coercion (component 1 in paragraph I.3). In par-

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42 Lindenberg and Van Dijk 2015 (note 9), paragraph 2.7.3; Lindenberg 2007 (note 14), paragraph 3.3.4.

43 Dutch Supreme Court, Judgment of 13 June 1995, *Delikt en Delinkwent* 1995/387.

44 Dutch Supreme Court, Judgment of 24 March 1998, ECLI:NL:HR:1998:ZD0980. The requirement of active unwillingness has never been stated as a manifest, independent component by the Supreme Court. However, it can be clearly deduced from its case law, of which only a few examples have been shown here.

45 An example can be found in Dutch Supreme Court, Judgment of 27 August 2013, ECLI:NL:HR:2013:494.

ticular, non-consent does not have to be communicated in any way since it represents an internal situation. In court, the presence of non-consent will be assessed on the basis of all the evidence.

As a consequence of this one-dimensional definition of coercion, there is no need for a rich concept of "valid consent". Any consent given by a victim of coercion is invalid. But the question whether consent can be called valid beyond that minimal requirement of non-coercion has no bearing on the offence. However, this probably will change when the newly proposed offences in the draft come into force, as will now be discussed.

The intended provisions for the new crimes of rape and indecent assault were cited in paragraph I.3. The aim is to shift from a coercion model to a consent model, with only two main components: non-consent and *mens rea* as to non-consent. Where non-consent currently is implied in the verb "to compel", the draft will make the non-consent element explicit with the phrase "lacking will" ("… that the will of the other person is lacking thereto"). The explanatory memorandum, however, is very ambiguous with regard to the meaning of a "lacking will". The comments are vague and even contradict each other. They refer to clear external signs of unwillingness, but also to the absence of a manifestly responsive attitude.[46] The first seems quite a high threshold, apparently including a responsibility for the victim to communicate non-consent. The latter seems an extremely low threshold, resembling affirmative consent.

Furthermore, the unclarity in the explanatory memorandum leads to difficulties in distinguishing between the consent model offences (rape and indecent assault) and the specific provisions protecting vulnerable persons. For example, the explanatory memorandum states in the context of rape and indecent assault that a sexual act with a victim who is not capable of freely giving consent – e.g., because he or she is mentally or physically incapacitated – can "(also)" constitute the separate offence against mentally or physically incapacitated persons.[47] The addition "*also*" between brackets – which is cited from the explanatory memorandum – implies that the offences of rape and indecent assault are also applicable in these cases. In other words: it is implied that if a victim is not capable of freely giving consent because he or she is incapacitated, this too can constitute a "lacking will". This may not seem so farfetched from an isolat-

46 See the memorandum at www.internetconsultatie.nl/wetsvoorstelseksuelemisdrijven.

47 Article 245 of the Draft on Sexual Offences.

ed perspective but poses serious systematic problems. It causes immediate overlaps between sexual offences, including those that differ in maximum sentences. Additionally, for the new offence against mentally or physically incapacitated persons, only intentional conduct suffices, while the draft includes an alternative negligence offence for rape and sexual assault. Is the prosecution free to choose between them?

A separate issue that arises from such a broad definition of a "lacking will" is that it seemingly does not exclude sexual fraud and deceit. The explanatory memorandum, however, does not mention this at all, and it would be a surprising maiden introduction of that crime in Dutch law. Finally, all of this leads to the question why there should be numerous separate offences to protect carefully formulated vulnerabilities, if the law at the same time introduces such a broad definition of a "lacking will" for the consent offences that they become catch-all provisions. This creates the risk of making non-consent ("lacking will") unnecessarily multi-faceted and extremely complex, while also causing far-reaching systematic issues.

It is evident that the legislative process in parliament will have to provide more clarification, including distinct examples of (in)valid consent.

C. Reach of consent

For the current coercive offences, the requirement for non-consent to consist of active unwillingness influences the reach of consent and non-consent. The timing of non-consent must correspond with the sexual acts. If, for example, a woman indicates in the evening that she only wants to have protected sex, her partner nevertheless does not commit rape if he removes the condom during sexual intercourse ("stealthing") later that night if the woman is not aware of this. The temporal frame of reference is the sexual act, and the sexual act was not actively against her will *at that time*.

The decisive temporal scope of non-consent also makes it impossible for the victim or anyone else to retro-actively change the label of voluntariness. This means that the status of actual consent or non-consent at the time of the sexual acts remains unchanged by a differing future perspective. If the victim subsequently feels different about her lack of consent, this may lead to a decision not to prosecute, but that is certainly not obligatory. Furthermore, the described temporal scope of non-consent enables a person to withdraw consent at any time and also to give valid consent where there was an explicit previous refusal. Of course, this all relates to substantive criminal law. From an evidentiary standpoint (and obviously from an ethical one), it may be perilous for a person to rely on the other

person's consent after he or she has refused just moments before. In court, the refusal may be easy to prove while the subsequent consent may not.

The reach of consent with regard to the element "lacking will" in the proposed new offences of rape and indecent assault in the draft is still unclear. As was illustrated in paragraph II.2, the explanatory memorandum is highly ambiguous with respect to the meaning of a "lacking will".

D. Mens rea and consent

As was discussed in paragraph I.3, the current coercive offences of rape and indecent assault require four components:

(1) Non-consent on the part of the victim;
(2) Intent on the part of the defendant with regard to non-consent;
(3) Unavoidability for the victim;
(4) Intent on the part of the defendant with regard to unavoidability.

The *mens rea* of these offences consists of the intent mentioned in components 2 and 4, for which conditional intent (*dolus eventualis*) suffices. Generally speaking, the use of violence and threats will make it easy for judges to conclude that both forms of intent were present. A salient exception was a case from 1987, where a man and a woman had an on-again, off-again relationship, in which they also regularly engaged in intense sadomasochistic sexual acts. At one point, the woman told the man that she wanted to terminate the relationship definitively. The man did not believe her and dragged her onto the bed. Despite her scratching his arm and attempting to flee, the man did not stop and threatened to break her arm. She subsequently complied and they had intercourse. In the criminal case, the court of appeal acquitted the defendant because it did not find that the man had intent with regard to the woman's non-consent. The court found it believable that the defendant thought the situation very much resembled previous encounters of breaking-up and having consensual make-up SM sex. The Dutch Supreme Court upheld the decision, causing an uproar in Dutch media.[48]

There are also examples in case law that represent a relatively low threshold for the proof of intent. In an interesting recent case, the defendant secretly entered his wife's house after they had broken up and he had

48 Dutch Supreme Court, Judgment of 16 June 1987, *Nederlandse Jurisprudentie* 1988/156.

been formally prohibited from visiting her without permission. The victim was startled when she found her husband hiding behind her bedroom door at night. The man grabbed her cell phone and closed the door, visibly carrying duct tape. After that, the woman pre-emptively took the initiative in the situation. She acted friendly, started a calm conversation, and eventually engaged cooperatively in sexual acts. Although there was a relatively long period of time in which she seemingly consented, the Supreme Court upheld the conviction for rape, stating that under these circumstances it was clear that the victim had complied to prevent worse, and that the lower court's conclusion that the defendant had conditional intent regarding her non-consent was valid.[49]

Although criminal judges may be inclined to approach the proof of intent pragmatically, the two components of intent (regarding non-consent and unavoidability) still pose a significant hurdle in cases where the victim freezes as a result of tonic immobility. It is important to note that the coercive offences of rape and indecent assault do not imply an obligation to ascertain the other person's consent. It is therefore permissible to let oneself be guided by the impression of the situation. If the situation looks consensual – which it will in many cases of tonic immobility – it will be hard to prove intent with regard to non-consent, let alone with regard to unavoidability.

The only way for Dutch criminal law to effectively address the issue of tonic immobility is to introduce negligence offences, since these will impose a duty to examine the question whether the other person is actually consenting. And it is indeed the aim of the legislature to create separate negligence offences for rape and indecent assault (see paragraph I.3 for their structure). But unfortunately, the explanatory memorandum is as unclear about the meaning of negligence as it is about the requirement of "lacking will" (the actor is supposed to be negligent if he has *serious reason to assume* that the other person lacks the will to have sexual relations). Because a clear definition is still lacking, it is still impossible to say what facts the courts would have to establish to find that a negligent rape was committed.

49 Dutch Supreme Court, Judgment of 27 November 2018, ECLI:NL:HR:2018:2194.

E. Concluding remarks

The Netherlands still has a conservative coercion model with regard to the offences of rape and sexual assault. This model is based on the presumption that only those who are permanently or temporarily unable to defend themselves are in need of protection by the criminal law. The implication that one must (try to) defend one's own sexual integrity in order to benefit from the protection of the criminal law seems clearly out-dated. And more importantly from a legal standpoint, the current system falls short of the requirements of Art. 36 of the Istanbul Convention, which obliges member states to criminalize any intentional non-consensual sexual act. Because of this, the Netherlands is planning a shift from the coercion-based model to a consent model.

In implementing this international obligation, it is quite difficult to strike a balance between all relevant interests. It is a political question whether it is a fair to label sex without consent as rape even when the conduct was only negligent. However, the drafting on new sexual offences in a state of transition poses important legal issues. Regarding the principle of legality, it is alarming that essential elements of the new offences of rape and indecent assault (e.g., "lacking will" and the scope of negligence) have not been clarified in the important explanatory memorandum. Additionally, it appears that the new element "lacking will" will carry a broad concept of consent, which seems counterproductive. The broader this concept is, the more problems of complexity and overlap with other offences will arise. As has been discussed above, these problems were the reason for an overhaul of the sexual offences in the first place. A broad concept of consent is not necessary as long as the additional offences (concerning age, incapacity, dependence etc.) sufficiently serve to provide the desired protection. It is disconcerting that even the ECtHR in its case law seems to demand a highly context-sensitive definition of rape and thus implies a broad concept of consent, which makes it more difficult for states to resist creating a catch-all rape provision.[50]

50 See, among others, ECtHR, *I.C. v. Romania*, Judgment of 24 May 2016, no. 36934/08, paras. 55–58; *M.G.C. v. Romania*, Judgment of 15 March 2016, no. 61495/11, paras. 64–73.

Poland

Wojciech Jasiński, Karolina Kremens

A. Background

I. General attitude in society towards sexual relations

Poland is for the most part a conservative, Catholic country. This fact has a strong impact on social relations also in the sphere of sexuality. Even though members of the younger generation are more liberal and tolerant, most Poles represent the traditional approach. This is particularly true regarding those who are responsible for decision-making in law and reflected in provisions concerning sexual offences.

A recent debate concerning modifications in the investigation of rape in Poland may serve as a good example of the traditional perspective towards sexual relations. In 2013, an amendment[1] of the Criminal Code (CC)[2] and the Code of Criminal Procedure (CCP)[3] was adopted that introduced entirely new provisions. These amendments abolished rule that rape was only investigated and prosecuted upon a victim's complaint and introduced a system in which rape cases were in all cases investigated *ex officio*, that is, without the need for an official complaint from the victim.[4] While some scholars expressed their positive opinion on this change,[5] the majority of academics and state entities issuing official opinions during the legislative process advanced critical arguments. They complained of a "dramatic interference in the personal sphere of the victim" if all rapes were

1 Act of 13 June 2013 on changes in the Criminal Code and Code of Criminal Procedure 2013. The Act entered into force on 21 January 2014.
2 Criminal Code 1997.
3 Code of Criminal Procedure 1997.
4 See on the distinction between offences investigated upon complaint and without complaint Wojciech Jasiński and Karolina Kremens, *Criminal Law in Poland*, 2019, 215–216.
5 See Monika Płatek, 'Kryminologiczno-epistemologiczne i genderowe aspekty przestępstwa zgwałcenia', 32 *Archiwum Kryminologii* 345 (2010); Wojciech Jasiński, 'Uwagi o trybie ścigania przestępstwa zgwałcenia', 1 *Prokuratura i Prawo* 68 (2014).

to be investigated.[6] It was also argued that preserving the system of investigating rape only upon complaint is essential to protect the victim from the trauma inevitably connected with going through the criminal process.[7] And although the amendment also introduced significant changes in the process of reporting rape and other sexual offences and modified the way in which the victim was questioned to reduce trauma, scholars doubted that the changes would affect the number of reported cases of rape and other forms of sexual assault.[8]

Most importantly in the context of this report, the Polish system has to date not responded to the "only yes means yes" movement and has not accepted a definition of rape based upon lack of consent. Although at least one research study exploring the results of the 2014 amendment recommended that the requirement of consent should be included in the definition of rape in accordance with the standards of the ECHR and the Istanbul Convention,[9] the traditional approach towards the definition of crimes concerning sexual relations focusing on force and deceit is still prevalent.[10] As a result, there is a lack of significant Polish case law and academic literature on issues of consent in the context of sexual assault. This causes significant difficulties in reconstructing the nature of consent in these crimes and has resulted in calls for changes in the law.[11]

II. Background of criminal laws on sexual conduct

In the old CC of 1969, sexual offences were dispersed among chapters related to liberty (rape) and decency (dissemination of pornography, pimping, adultery and child abuse). By contrast, the present CC contains a comprehensive chapter dedicated to sexual offences, entitled Offences against Sexual Liberty and Decency (Chapter XXV).

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6 See National Council of Judiciary, *Report on the member of parliament's draft bill on changes in the Criminal Code and Code of Criminal Procedure*, 2012 (in Polish).

7 Andrzej Sakowicz, *Opinia prawna na temat projektu ustawy o zmianie ustawy – Kodeks karny oraz ustawy – Kodeks postępowania karnego* (druk nr 532), 2012.

8 Łukasz Cora, 'Bezwarunkowy tryb ścigania przestępstwa zgwałcenia a "podmiotowość" pokrzywdzonego', 4 *Wojskowy Przegląd Prawniczy* 55, 71 (2015).

9 Artur Robert Pietryka, *'Odmowy wszczęcia i umorzenia postępowań w sprawach o zgwałcenia popełnione po zniesieniu wnioskowego trybu ścigania'*, 2014, 80.

10 See Sec. 1.2.

11 Monika Płatek, 'Zgwałcenie. Gdy termin nabiera nowej treści. Pozorny brak zmian i jego skutki', 218 *Archiwum Kryminologii* 263, 317 (2018).

Although during the legislative process it was argued that the offences defined in Chapter XXV of the CC of 1997 are directed simultaneously against sexual liberty and decency (public morals), it is believed that the individual interests of victims should have priority over interests related to public morals and that the latter have only secondary significance.[12] However, it is a disputed question whether rape and similar offences including sexual relations without valid consent exclusively protect sexual liberty or also affect decency understood as a set of social rules related to acceptable sexual conduct. Some authors criticize the idea that such rules of decency, if it is even possible to identify them, should be a reason for criminalisation.[13] At present, the protection of sexual liberty by the criminal law has become a point of a major interest, which was not necessarily the case in the past.

III. Definition of sexual coercion offences

The Polish CC contains several sexual offences related to non-consensual sexual penetration and other sexual acts. The first one, defined in Article 197 CC, is commonly named rape (*zgwałcenie*). This is also a statutory term, although paradoxically it is used only in Article 197 § 3 CC constituting aggravated types of rape and not in the definition of rape itself (§§ 1–2). Articles 198 and 199 CC criminalise subjecting a person to sexual penetration or other sexual acts where the victim is vulnerable or is for various reasons unable to express valid consent to engage in sexual activity. The way of classifying sexual offences is clearly based on the assumption that rape is inherently related to the use of force or the threat of its use. In ordinary language, the terms "*gwałt*" or "*zgwałcenie*" are associated with the use of force or the threat of its use in order to engage in sexual penetration.[14] The statutory definition in Article 197 CC is however perceived as broader, since it encompasses deceit as a method of inducing a person to sexual penetration and forms of sexual activities other than penetration.[15]

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12 See Jarosław Warylewski in: Jarosław Warylewski (ed), *System Prawa Karnego. Tom 10. Przestępstwa przeciwko dobrom indywidualnym*, 2nd edn. 2012, 577–588.

13 Warylewski (note 12), 580–590.

14 The word "*gwałt*" is an old-fashioned equivalent of the word "*przemoc*" (force).

15 See Jarosław Warylewski, 'Zgwałcenie – zagadnienia definicyjne' in: Lidia Mazowiecka (ed), *Zgwałcenie. Definicja, reakcja, wsparcie dla ofiar*, 2016, 18 (arguing that the statutory definition is too broad).

The way offences are formulated in Articles 197–199 CC clearly proves not only the inherent relation between sexual abuse and the use of force (or threat of use of force), but also the notion that only these types of forced sexual relations are perceived as highly blameworthy. It is symptomatic that the statutory penalty for the offence defined in Article 197 § 1 CC is imprisonment between two and twelve years, while the penalty for sexual abuse of a vulnerable person without recourse to force in Articles 198 and 199 CC is imprisonment between six months and eight years and up to three years, respectively. Moreover, while the statutory penalty range for rape in Article 197 §§ 1–2 CC was raised significantly in 2005, the offences covered by Articles 198 and 199 CC remained unchanged. Also, while Article 197 CC contains aggravated types such as group rape or rape committed with particular cruelty, Articles 198 and 199 CC do not possess similar features.[16] This clearly demonstrates that the lawmakers took the perpetrator's and not the victim's perspective, as the protection of the victim seems to be much weaker.

The law also provides for the offence of engaging in sexual intercourse or other sexual activity with a minor under 15 years of age (Article 200 § 1 CC). The victim of this crime as well as of other offences prescribed in Articles 197–199 CC can be of any gender. Sexual maturity is irrelevant.

The definition of the offenses discussed relies on a distinction between "*obcowanie płciowe*" (sexual penetration) and "*inna czynność seksualna*" (other sexual act). The first term covers vaginal, oral and anal sex. In the case law, *obcowanie płciowe* has been extended to the penetration of body orifices (e.g., anus) with the hand or with objects (e.g., dildo, bottle).[17] In the literature, however, the penetration of the victim's body orifices other than the vagina by objects has not always been qualified as *obcowanie płciowe*. On a more general level, *obcowanie płciowe* is understood as a sexual activity during which there is a penetration of the female or male genitalia or anus on the side of the victim or a penetration of other natural orifices of the victim's body that may be considered a surrogate of the female genitalia, regardless of the sex of the victim.[18] It is also controversial

16 That is a clear axiological inconsistency, as Marek Bielski has rightly pointed out. See Marek Bielski, 'Komentarz do art. 198, t. 2' in: Włodzimierz Wróbel and Andrzej Zoll (eds), *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117–211a*, 2017.

17 Marek Bielski, 'Komentarz do art. 197, t. 24' in Włodzimierz Wróbel and Andrzej Zoll (eds), *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117–211a*, 2017.

18 Marek Bielski, 'Komentarz do art. 197, t. 26' in Wróbel and Zoll (n. 17).

whether forcing a victim to insert an object into her vagina should be qualified as "*obcowanie płciowe*". There are both proponents[19] and opponents[20] of that view.

The term "*inna czynność seksualna*" covers a variety of behaviours which do not constitute "*obcowanie płciowe*" yet are of a sexual nature. Their sexual nature should be assessed based on their objective cultural context, not necessarily on the intent of the perpetrator. His intent can be sexual but the behaviour may not be qualified as such, and vice versa.[21] Legal doctrine defines "*inna czynność seksualna*" as a sexual activity other than sexual penetration which involves physical contact between the participants, or at least physical contact with the intimate parts of the body of the perpetrator or of the victim which in the specific cultural context is of a sexual nature and can therefore be regarded as a form of gratification or stimulation of the human sex drive, even if it does not involve physical contact between the persons involved. "Other sexual activity" must involve the touching of an intimate area of the body, that is, the vaginal, genital, and anal areas or the female breasts.[22] It is not possible to list all forms of other sexual acts, but it bears emphasis that not all types of behaviour that might have a sexual context can be qualified as sexual activity as regulated in Article 197 § 2 CC. Behaviour like forcing a kiss, pinching a buttock, touching a knee, exposing the body, or verbal molestation are perceived as falling outside of the scope of that provision.[23] The same applies to masturbation without any contact with another person[24].

With regard to the offences defined in Articles 197–199 and 200 § 1 CC, the perpetrator does not have to be the person performing the sexual activity; The victim can also be forced to engage in sexual activity with another person.[25]

In the crime of rape (Article 197 CC), the central element is not the lack of the victim's consent. The decisive factor is the perpetrator's use of

19 Marek Bielski, 'Komentarz do art. 197, t. 28' in Wróbel and Zoll (n. 17).
20 Konrad Lipiński, 'Komentarz do art. 197' in Jacek Giezek (ed), *Kodeks karny. Część szczególna*, 2021.
21 Ibid.
22 Marek Bielski, 'Wykładnia znamion "obcowanie płciowe" i "inna czynność seksualna" w doktrynie i orzecznictwie sądowym', 1 *Czasopismo Prawa Karnego i Nauk Penalnych* 211, 227 (2008).
23 Ibid., 228–229. Such behaviour might be qualified as a violation of physical integrity prohibited by Article 217 § 1 CC.
24 Marek Bielski, 'Komentarz do art. 197, t. 38' in Wróbel and Zoll (note 17).
25 Marek Bielski, 'Komentarz do art. 197, t. 19' in Wróbel and Zoll (note 17).

force, unlawful threats, or deceit[26]. As a result, the significance of consent is marginalized, and situations where the victim does not consent are equated with those where the perpetrator uses force, unlawful threats, or deceit. There exist, however, situations where the perpetrator uses neither force nor unlawful threats nor deceit, but the victim does not consent to sexual acts. This can happen when the victim is too scared or paralysed or overwhelmed by the whole situation to object to sexual penetration. In such a case, the perpetrator cannot be found guilty of rape. That is an important lacuna in the protection of sexual integrity. It is surprising that some Polish scholars claim that the reference to the use of force, unlawful threats, or deceit is better than reference to consent, considering the latter as being too subjective and problematic.[27]

Articles 198, 199 and 200 § 1 CC define various situations in which the perpetrator undertakes sexual activity without valid consent, but without recourse to the use of force, unlawful threats, or deceit. The lack of valid consent (although factual consent can be given) stems from the victim's age (under 15 years of age – Article 200 § 1 CC), her psychophysical helplessness (Article 198 CC), the relation between perpetrator and victim, or the situation (Article 199 CC). However, in the case of a victim's helplessness due to temporary incapacitation (Article 198 CC) it is claimed that the victim's consent is valid if it was given before the victim, being a person generally capable of sexual self-determination, reached the state of helplessness.[28]

Article 198 CC provides for two characteristics of the victim that constitute necessary elements of the offence: 1) helplessness (*bezradność*) and 2) inability to recognise the meaning of the act or to control her conduct resulting either from a mental deficiency (*upośledzenie umysłowe*) or a mental disease (*choroba psychiczna*).

Article 199 CC is focused on situations where consent in sexual activities is affected by objective external factors, such as the existence of a relationship of dependency (e.g., at work) or a crisis situation (e.g., the victim lacks money for medical treatment) and the abuse of such situations by the perpetrator. A relationship of dependency can be of any kind (formal or informal, continuous or temporary). It is also irrelevant whether the

26 For an explanation of the terms force, unlawful threat and deceit, see 2.3 below.

27 Krzysztof Szczucki, 'Rola zgody w strukturze przestępstwa na przykładzie przestępstwa zgwałcenia', 1 *Czasopismo Prawa Karnego i Nauk Penalnych* 31 (2011).

28 Marek Bielski, 'Komentarz do art. 198, t. 4' in Wróbel and Zoll (note 17).

relationship of dependency or the crisis situation of the victim has been caused by the perpetrator.[29]

The offences defined in Articles 197–199 and 200 § 1 CC can only be committed with direct intent.[30]

IV. General role of consent in criminal law

Consent of the "person disposing of the protected interest" (*dysponent dobra chronionego*) is relevant for criminal liability for several reasons. First, consent can be an element of a crime (e.g., termination of pregnancy with the consent of the pregnant woman but in violation of the law – Article 152 CC). Second, the lack of consent can be an element of an offence. It may be expressed in the relevant provision explicitly (e.g., termination of pregnancy without the consent of the woman – Article 153 § 1 CC) or implicitly (e.g., theft, which implies lack of consent to the taking of one's property). Third, consent can be a ground for excluding the unlawfulness of a prohibited act (*kontratyp*). This approach is based on the presumption that the person disposing of the protected interest is free to decide about his or her interests. This freedom implies the ability to express consent to at least some behaviours that are generally prohibited as posing danger to socially recognised and protected interests (e.g., bodily integrity, property). However, not all such behaviours are subject to consent. In the case of important interests that society wishes to protect (e.g., life), consent is irrelevant.[31]. The view that consent is a ground for excluding the unlawfulness of a prohibited act is not universally accepted. Some scholars claim that in case of a valid consent there exists no danger for the protected interest (personal freedom, property, etc.) and therefore behaviour accepted by the person disposing of the protected interest cannot constitute an offence. According to this view, such an act is completely legal and does not need to be legalised by excluding its unlawfulness.[32]

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29 Marek Bielski, 'Komentarz do art. 199, t. 14–19' in Wróbel and Zoll (note 17).

30 See: Marek Bielski, 'Komentarz do art. 197, t. 102'; 'Komentarz do art. 198, t. 24'; 'Komentarz do art. 199, t. 34'; 'Komentarz do art. 200, t. 46' in Wróbel and Zoll (note 17).

31 This is expressly provided for cases of human trafficking and of euthanasia.

32 For a general discussion on the role of consent in criminal law see Jerzy Lachowski in: Lech Paprzycki (ed), *System Prawa Karnego. T. 4. Nauka o przestępstwie. Wyłączenie i ograniczenie odpowiedzialności karnej*, 2016, 497–498 and sources cited therein. For a critique of treating consent as a ground excluding the unlawfulness

Leaving these doctrinal disagreements aside, the discussion concerning consent in criminal law is a consequence of acknowledging an individual's right to self-determination and the subsidiary role of criminal law. In cases where the interests protected by criminal law are perceived as primarily or exclusively private, the individual is left with some discretion in deciding whether his or her interests should be protected by the criminal law. An additional important factor influencing the role of consent in determining criminal liability is the evaluation of the risk posed to the legally protected interest in question. Where the risk for society is too high, consent will be irrelevant for attributing criminal liability. But even in cases where consent does not negate criminal liability, it may nonetheless play a role in sentencing, as a factor influencing the amount of social harm and blameworthiness.[33]

Several conditions must exist for consent to be valid. Apart from the condition that consent must concern an interest that is at the disposal of the person consenting, consent must be voluntary, conscious, informed, and given prior to or at the time when the act is committed. Post-factum consent does not exclude criminal liability, although it may influence the sentence.[34] It should also be noted that consent can be withdrawn, at least in situations where the actor can still stop his or her action.[35] For consent to be valid, the person giving it must have a certain level of maturity[36]. The last important condition is that the perpetrator must be aware of the consent. Otherwise, he or she can be held criminally liable for his or her acts.[37]

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of a prohibited act see, e.g., Elżbieta Hryniewicz, 'Czy zgoda dysponenta dobra może wyłączyć bezprawność czynu?', 9 Prokuratura i Prawo 55 (2014).

33 Dominik Zając, 'Zgoda dzierżyciela dobra prawnego na zachowanie ryzykowne jako okoliczność wpływająca na zakres odpowiedzialności karnej', 2 *Czasopismo Prawa Karnego i Nauk Penalnych* 89, 104–109 (2018).

34 Jerzy Lachowski in: Lech Paprzycki (ed), *System Prawa Karnego. T. 4. Nauka o przestępstwie. Wyłączenie i ograniczenie odpowiedzialności karnej*, 2016, 502; Zając (note 33), 91.

35 Paweł Daniluk, 'Warunki determinujące skuteczność zgody uprawnionego w prawie karnym', 2005 (1–2) *Palestra* 34, 39.

36 Lachowski (note 34), 502.

37 Ibid., 503.

B. Requirements for valid consent to sexual acts

I. General capacity to give consent

1. Age

The problem of capacity to give consent with regard to age seems to be resolved in Polish law by Article 200 § 1 CC, which declares punishable any sexual act with a minor below the age of 15. This provision covers any form of engagement in sexual acts or leading a minor to submit to such acts or to perform such acts. The age limit is a consequence of the assumption that the consent to sexual acts given by a person under 15 is not covered by the concept of sexual freedom since younger persons cannot freely dispose of this good due to their objective immaturity in this respect.[38]

There is however an ongoing discussion concerning sexual relations between a person under 15 and a slightly older partner, e.g., a 17-year-old, with the consent of the minor. According to M. Płatek, it is necessary to adopt in the CC a new 'ground excluding the unlawfulness of a prohibited act' (*kontratyp*) or to make such an act at least unpunishable when the age difference between the perpetrator and the victim does not exceed three to four years and the circumstances indicate that the victim's trust was not abused, which is not that exceptional considering German and Dutch legislation.[39]

2. Consciousness and mental health

Valid consent may also be given only with proper discernment, free from any factors that disturb the intellect or will of the victim[40]. Sexual penetration of a person who is unable for the above reasons to provide valid consent is considered a crime (Article 198 CC) separate from rape. The reason for the criminalization of this conduct is the victim's lack of capability to express valid consent and the offender's taking advantage of this situa-

38 Cf. Judgment of Supreme Court of 14 July 1988, II KR 163/88, OSNKW 1988, No. 11–12, Item 83. See also Jarosław Warylewski in: Andrzej Wąsek (ed) *Kodeks karny. Komentarz, Część szczególna, t. 1*, 2006, 917.

39 Monika Płatek, 'Pozorna ochrona dziecka przed wykorzystaniem seksualnym (po nowelizacji k.k.)' 2011 (2) *Państwo i Prawo* 3, 17.

40 Daniluk (note 35), 36.

tion.[41] However, if the perpetrator had caused the victim to enter such a state of incapacity, he will be convicted of rape (Article 197 § 1 and § 2 CC). In other words, in the case of Article 198 CC, the perpetrator merely finds the victim in a state of helplessness (which the perpetrator did not cause), whereas in the case of Article 197 § 1 and 2 CC, such state has been caused by the perpetrator.[42]

As mentioned in section A.III., Article 198 CC provides for two characteristics of the victim that constitute necessary elements of the offence: 1) helplessness (*bezradność*) and 2) inability to recognise the meaning of the act or to control her conduct.

A helpless person within the meaning of Article 198 CC has been defined in case law as "a person with such properties or in such a situation that deprives her of the ability to dispose of herself in the field of sexual freedom. Helplessness thus is not necessarily of a physical or physiological nature. It can be a disability, even a temporary physical weakness, but can also be an inability to cope with a given situation because of various objective as well as subjective reasons".[43] What matters is that the victim is incapable of resisting the perpetrator's behaviour[44] even though her helplessness does not necessarily involve a loss of consciousness.[45]

The state of helplessness is treated in Polish law as complementing the lack of the victim's ability to recognise the meaning of the act or to control her conduct[46]. This expression ("lack of victim's ability…") must be considered in the light of Article 31 § 1 CC that discusses the state of insanity (*niepoczytalność*) of the perpetrator of a crime.[47]. It has been acknowledged that the mental deficiency and the mental illness of the victim must be determined by two experts of psychiatry.[48]

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41 Judgment of Court of Appeal in Katowice of 26 August 2010, II Aka 213/10, Lex 686856.

42 Judgment of Court of Appeal in Łódź of 11 December 2012, II Aka 256/12, Lex 1353514.

43 Judgment of Supreme Court of 20 April 2006, IV KK 41/06, Lex 183010.

44 Judgment of Supreme Court of 25 November 2009, V KK 271/09, Lex 553764.

45 Decision of Supreme Court of 20 April 2016, III KK 489/15, Lex 2044482.

46 Decision of Supreme Court of 2 June 2015, V KK 36/15, LEX 1750151.

47 Decision of Supreme Court of 19 January 2002, I KZP 30/01, OSNKW 2002, Nr 3–4, poz. 16.

48 Decision of Supreme Court of 16 December 1974, Z 41/74, OSNKW 1975, Nr 3–4, poz. 48; Judgment of Supreme Court of 16 October 2012, V KK 262/12, LEX 1226785.

3. *Lack of intoxication*

Intoxication should be discussed separately, although Polish law regards it as a case of helplessness falling under Article 198 CC[49]. It is currently uncontested that a state of helplessness may result from alcohol intoxication or from the use of drugs.[50] If a person is unable to resist the perpetrator due to her intoxication, she must be considered to be helpless.[51] A state of intoxication therefore makes a victim unable to give valid consent to sexual acts. Importantly, it makes no difference if the victim brought herself to the state of intoxication willingly and consciously.[52]. There are however voices in Polish legal doctrine that dissent from this view. J. Warylewski claimed (in 2020!) that "it is of vital importance whether the person consuming the alcohol foresees not only the consequences in terms of exclusion or limitation of her capacity for understanding but also whether she consumes the alcohol in circumstances which – even hypothetically – could lead to sexual intercourse or other sexual acts. If she does so in the company of others (regardless of their sex), she in principle accepts all the consequences, including sexual intercourse".[53]

II. Ways of giving valid consent

Although lack consent is not mentioned in the definition of rape, giving valid consent is generally understood as negating the existence of rape. The court is therefore obliged in every case to determine whether valid consent had been given.[54] The way in which valid consent can be given thus plays a role in examining liability for rape.

Still, not much has been written on the form and validity of consent in cases of sexual offences beyond the form of the resistance (see below). Without any reference to sexual assault offences, it is accepted that the victim's consent must be externalised.[55] The law does not, however, pro-

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49 See 2.3. below.
50 Decision of Supreme Court of 20 April 2016, III KK 489/15, LEX 2044482.
51 Judgment of Supreme Court of 25 November 2009, V KK 271/09, Lex 553764.
52 Judgment of Supreme Court of 16 March 2006, IV KK 427/05, LEX 190765.
53 Jarosław Warylewski, 'Komentarz do art. 198, nb. 40' in Ryszard Stefański (ed), *Kodeks karny. Komentarz*, 2021.
54 Judgment of Supreme Court of 8 September 2005, OSNwSK 2005, Nr 1, poz. 1617.
55 Daniluk (note 35), 40 and quoted literature.

vide for any formal requirements for consent; it is assumed therefore that consent may be given implicitly as well as explicitly.[56] Again, it must be emphasized that the way in which Article 197 CC has been written suggests that a lack of consent does not automatically make the person responsible for committing any sexual offence. Therefore, according to Polish law, the lack of expressing a positive decision to engage in sexual intercourse or even mere indifference should not be equated with lack of consent.[57] In this context, "lack of consent" should rather be regarded as a negative decision, which makes the sexual act illegal. This suggests that silence may indeed be considered a valid way of expressing implied consent under Polish law.

In a controversial judgment, the Court of Appeal in Cracow stated that if the victim gives consent but does so reluctantly, the ensuing sexual penetration cannot be considered rape.[58] One author claims that even a consent expressed with "disgust" may be considered as valid, since what counts is the content of the victim's decision, not her emotions.[59]

It is widely agreed that marital rape is a crime.[60] The fact that a woman is married thus does not imply a generalized consent to sexual intercourse with her husband. Yet some scholars argue that because of the bond that exists between spouses (*debitum carnale*), if one of them is drunk or in another way helpless an implied consent to sexual intercourse nevertheless persists.[61] As a result, the other spouse may be held responsible for taking advantage of the helpless spouse only if the latter objects to the intercourse. This view is doubtful since a drunken, unconscious spouse is unable to express valid consent.[62]

The definitional association of force with physical force and coercion in the case of rape as defined in Article 197 § 1 and § 2 CC generates the requirement of some form of *resistance* (*opór*) on the victim's part which

56 Ibid., 41.
57 Szczucki (note 27), 47.
58 Judgment of Court of Appeal in Cracow of 23 March 1994, II Akr 11/94, KZS 1994, z. 4, poz. 18.
59 Natalia Kłączyńska, 'Komentarz do art. 197, nb. 11' in Jacek Giezek (ed), *Kodeks karny. Część szczególna. Komentarz*, 2014.
60 See e.g. Radosław Krajewski, *Prawa i obowiązki seksualne małżonków. Studium prawne nad normą i patologią zachowań*, 2009, 233; Aneta Michalska-Warias, *Zgwałcenie w małżeństwie. Studium prawnokarne i kryminologiczne*, 2016.
61 Stanisław Śliwiński, *Prawo karne materialne. Część szczególna*, Nakład Gebethnera i Wolffa 1948, 121. See also Konrad Lipiński, 'Komentarz do art. 197, nb. 13' in Giezek (note 20).
62 See more in section C.I.2 above.

should be externalised and visible to the perpetrator.[63] However, "the victim's resistance does not have to take a physical form and, depending on the situation, its manifestation, perceived by the perpetrator, may come down to other forms, e.g., crying, oral statements, jerking, or attempts to call for help".[64] Moreover, the absence of body injuries, including the lack of genital abrasions, does not automatically imply that there was no resistance.[65] It is also unnecessary to express resistance in all possible forms, nor is it necessary to resist throughout the sexual act. On the contrary, it is sufficient if the victim remains passive after her initial resistance was broken once.[66] The victim's resistance must, however, be real. Pretended or unreal resistance (*opór pozorny* or *opór nierzeczywisty*), traditionally called *vis haud ingrata*, is not enough for a rape conviction. If an act of resistance is part of a scenario agreed upon and accepted by the persons concerned, or if it belongs to a specific "love game" characteristic of a given culture or community, even if force is used there is no "real resistance".[67]

III. Grounds for negating validity of formal consent

According to Article 197 § 1 CC, rape means subjecting another person to sexual penetration using force, unlawful threats, or deceit. What may be called "grounds for negating validity of formal consent" are thus included in the definition of rape.

Force (*przemoc*) is understood as a physical impact (physical force) intended to break the victim's resistance and used in such a way that it creates coercion.[68] The physical force must have a certain degree of intensity. The Supreme Court has defined force as the objective ability to cause

63 Konrad Lipiński, 'Komentarz do art. 197, nb. 25' in Giezek (note 20).
64 Judgment of Court of Appeal in Katowice of 8 April 2009, II AKa 72/09, LEX No. 519644.
65 Judgment of Court of Appeal in Katowice of 26 October 2017, II AKa 430/17, LEX no. 2461349.
66 Decision of Supreme Court of 18 February 2014, II KK 19/14, LEX No. 1458630; Marek Bielski, 'Komentarz do art. 197, nb. 43' in Włodzimierz Wróbel and Andrzej Zoll (eds), *Kodeks karny. Część szczególna. vol. II, part I*, Wolters Kluwer online 2017.
67 Jarosław Warylewski, 'Komentarz do art. 197, nb. 13' in Stefański (note 53).
68 Judgment of Supreme Court of 14 June 2006, WA 19/06, OSNwSK 2006, nr 1, poz. 1243.

coercion in a way uncomfortable to the victim[69]. The intensity of force is measured in the light of expected reactions of an average person. However, it is unnecessary to evaluate how much force was used – using enough force to create a sense of coercion in a victim is sufficient.[70] Physical force used to influence the victim's decision-making process can be used on a person or an object[71]. Importantly, the association of force with physical force and coercion creates the requirement of some form of resistance by the victim.[72]

A person also commits rape if he makes a threat that he will use force (unlawful threats, *groźba bezprawna*). Polish criminal law contains various definitions of threats, namely the so-called criminal threat (*groźba karalna*),[73] the threat of initiating criminal or other proceedings in which an administrative penalty may be imposed, and the threat of making a statement that contains an insult to the honour of the threatened person or a person very close to him or her (Article 115 § 12 CC). An unlawful threat in the context of rape must bring about fear and feelings of helplessness in the victim. Even if the victim, after having been threatened, formally expresses consent or does not object to the sexual act, her consent is legally irrelevant.[74] The Supreme Court has indicated in many judgments that the seriousness and reality of the threat being carried out must be assessed from the victim's point of view.[75] A relevant threat thus exists even if the perpetrator does not intend to carry it out.

The third possible way by which rape can be committed is deceit (*podstęp*). Deceit consists in a misrepresentation or in exploitation of the victim's error in order to engage in sexual contact. Under Polish criminal law, the concept of deceit is understood broadly, including situations where 1) the victim makes an independent decision about entering into

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69 Judgment of Supreme Court of 14 June 2006, WA 19/06, OSNwSK 2006, nr 1, poz. 1243.

70 Judgment of Supreme Court of 8 March1973, III KR 307/72, Lex 21556.

71 Szczucki (note 27), 45–46.

72 See section B.III above.

73 'Criminal threat' is a separate type of crime. Article 190 § 1 CC provides that "Whoever threatens another person with a crime to her detriment or to the detriment of a person closest to her, if the threat makes the threatened person reasonably afraid that it will be carried out, shall be subject to a fine, penalty of restriction of liberty or imprisonment for up to 2 years".

74 Szczucki (note 27), 47.

75 Judgment of Supreme Court of 17 April 1997, II KKN 171/96, Lex 30361; Judgment of Supreme Court of 26 January 1973, III KR 284/72, Lex 21544; Judgment of Supreme Court of 9 December 2002, IV KKN 508/99, Lex 75496.

sexual activity which is based on erroneous premises, or 2) the victim is deprived of the possibility to give valid consent because of the state in which she is due to the perpetrator's actions.[76] Examples of the latter form of deceit are giving the victim a "rape pill", tying the victim up under a false pretext, or causing a state of numbness of the victim. Importantly, if the perpetrator only takes advantage of the helplessness of another person while she is unconscious (as a result of fainting or epilepsy), asleep, under hypnosis, or drunk, sexual contact with the victim falls under Article 198 CC[77], which carries a lesser penalty. It is thus crucial who has caused the victim's state: If the perpetrator caused the disturbance of the victim's motivational processes, he is punishable for rape under Article 197 § 1 or 2 CC.

A difficult problem in this context arises where the perpetrator provides alcohol for the victim. In a 1974 judgment, the Supreme Court stated that "it does not constitute such deception to induce an adult woman who knows the effects of alcohol to drink alcoholic beverages, even if the inducer intended to have sexual intercourse with the intoxicated woman".[78] In that case the victim, a 19-year-old woman, had been drinking alcohol with two men and after consuming a considerable amount of alcohol lost consciousness and was raped by both of them.[79] The Supreme Court decided that there was no sign of deception and changed the legal qualification of the first-instance judgment from rape to taking advantage of the helplessness of another person – a crime carrying a lesser penalty (Article 169 CC of 1969, analogous to Article 198 CC).[80]

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76 Judgment of Supreme Court of 27 May 1985, II KR 86/85, Lex 17642. See also Jarosław Warylewski, 'Komentarz do art. 197, nb. 39–42' in Stefański (note 53); Konrad Lipiński, 'Komentarz do art. 197, nb. 29' in Giezek (note 20).

77 Judgment of Supreme Court of 2 May 1975, IV KR 361/74, Lex 21676 and Judgment of Supreme Court of 16 March 2006, IV KK 427/05, Lex 180765.

78 Judgment of Supreme Court of 26 September 1974, III KR 105/74, OSNKW 1974, nr 12, poz. 229.

79 According to the Supreme Court, it is crucial whether the person is aware of how alcohol works. In another case involving a 15-year-old girl it was accepted that if a person is unaware of the effect of alcohol the perpetrator will be responsible for rape under Article 197 § 1 CC (see Judgment of Supreme Court of 8 July 1983, IV KR 124/83, OSNKW 1984, nr 1, poz. 13).

80 This perspective is accepted by the majority of commentators. See, e.g., Konrad Lipiński, 'Komentarz do art. 197, nb. 33' in Giezek (note. 20); Jarosław Warylewski, 'Komentarz do art. 197, nb. 51' in Stefański (note 53). For an opinion disagreeing at least in part, see Natalia Kłączyńska, 'Komentarz do art. 197, nb. 15' in Giezek (note 59). See also, more broadly, Hubert Myśliwiec, 'Podstęp jako znamię przestępstwa zgwałcenia', 11 *Prokuratura i Prawo* 64, 74–77 (2012).

Other examples of rape by deceit are situations in which a gynaecologist subjects a patient to sexual intercourse under the pretext of gynaecological examinations, or a man has sexual intercourse at night with his twin brother's wife, who obviously is mistaken about her partner's identity.[81] However, a false promise of marriage or a false promise of material compensation for engaging in a sexual act have not been considered deception.[82]

C. Reach of consent

I. Timing and finality of consent

It is an obligation of the court to determine whether consent to sexual acts was given, when it was given, and what was its scope.[83] With regard to timing, consent to any sexual act must be given before the actor starts to perform an act that would be criminal unless covered by consent.[84] Consent given after the act has occurred does not change its criminal character.[85] It is also generally accepted that consent may be withdrawn.[86] However, withdrawal is regarded as valid only if undertaken before the act to which the victim had consented.[87] But if a woman, after consenting to sexual intercourse, changes her mind during the act and objects to the continuation of the intercourse, that is considered a valid withdrawal of consent. If the man in that situation uses force, threats of force, or deceit and thereby continues the sexual act, his act qualifies as rape. Withdrawal of consent in such a situation must however be clear and explicit, leaving no doubt to the other person.

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81 Szczucki (note 27), 49.
82 Judgment of Supreme Court of 26 September 1974, III KR 105/74, OSNKW 1974, no. 12, poz. 229.
83 Judgment of Supreme Court of 8 September 2005, II KK 504/04, Palestra 2007, nos. 11–12, poz. 308.
84 Daniluk (note 35), 38 and quoted literature.
85 Ibid.
86 Seweryn Cieślik, 'Zgoda dysponenta dobra prawnego na wkroczenie w sferę wolności seksualnej (analiza prawnoporównawcza modelu przyjętego na gruncie polskiego Kodeksu karnego oraz koncepcji Yes Means Yes)', 11 *Czasopismo Prawa Karnego i Nauk Penalnych,* 12 (2018).
87 Daniluk (note 35), 39.

II. Scope of consent

According to case law, an attack on a person's sexual autonomy occurs if the actor engages in sexual acts in a way not consented by the victim.[88]. The scope of protected sexual autonomy extends to the place, time, and form of sexual acts[89]

There is no general answer in the law, case law and literature as to the extension of a general consent to sexual activities. The court must determine on a case-by-case basis how far the victim's consent to engage in sexual relations extended.[90] In most cases, the victim's resistance to a sexual act will be determinative. If the defendant then used force or threats of force to overcome her resistance and perform a new sexual act (e.g., oral or anal penetration), he is likely to be convicted of rape although the victim had earlier consented to vaginal intercourse.[91]

There is no discussion in Polish legal literature concerning the use and removal of a condom as a form of rape. It may however be argued that if the person consents to sexual intercourse only with the use of a condom and then during sexual intercourse the perpetrator secretly takes off the condom, such behaviour can constitute rape. Since rape can be committed by deceit, the act of lying about condom use falls in the scope of Article 197 § 1 CC. Given the lack of relevant case law, it is however debatable whether stealthing would be successfully prosecuted as a form of rape by deceit.

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88 Judgment of Supreme Court of 9 April 2001, II KKN 349/98, OSNKW 2001, nos. 7–8, poz. 53 ("The fact that the victim accepted the sexual act, or even wanted it, does not at all prejudge her consent to every form of it").

89 Leon Peiper, *Komentarz do kodeksu karnego: prawa o wykroczeniach i przepisów wprowadzających wraz z niektórymi ustawami dodatkowemi i wzorami orzeczeń do prawa o wykroczeniach*, Leon Frommer1933, 423 quoted after Marek Bielski, 'Komentarz do rozdziału XXV, nb. 8' in Włodzimierz Wróbel and Andrzej Zoll (eds), *Kodeks karny. Część szczególna. vol. II, part I* (Wolters Kluwer online 2017).

90 Judgment of Supreme Court of 8 September 2005, II KK 504/04, Palestra 2007, nos. 11–12, poz. 308.

91 Judgment of Supreme Court of 9 April 2001, II KKN 349/98, OSNKW 2001, nos. 7–8, poz. 53; Jarosław Warylewski, 'Komentarz do art. 198, nb. 7' in Stefański (note 53).

D. Intent as to lack of consent

To be found guilty of rape, the perpetrator must have been aware of the lack of consent. Any expression of non-consent is assessed objectively, not based on how the perpetrator interpreted the victim's conduct. According to the literature, it is theoretically possible that a person is mistaken as to the other person's lack of consent, for example, if a man mistakenly regards the woman's resistance as a form of foreplay. Article 28 CC provides that a justified error as to the circumstances that constitute an element of a prohibited act excludes criminal liability. Such an error must, however, be assessed very carefully, keeping in mind the context and the defendant's cultural background.[92]

There are no explicit evidentiary presumptions regarding consent in sexual offences in Polish criminal law. Generally, non-consent may be assumed. Some authors, however, claim that a person engaging in sexual intercourse with his or her spouse does not commit an offence, even where the spouse is helpless or mentally ill, claiming that married persons are presumed to consent to sex with their spouse. Hence, where the spouse does not object, according to these authors the offence defined in Article 198 CC is not committed.[93] The claimed presumption is based on Article 23 of the Family and Guardianship Code, which provides that spouses are obliged to maintain a sexual relationship. This view is subject to serious objections, however, since a presumption of a general consent to sex does not necessarily follow from Article 23 of the Family and Guardianship Code. It can well be argued that the marital obligation to engage in sexual relations is in every instance conditioned on consent.

The notion that a legally insane person can give valid consent to sexual acts is very problematic. But if such a person can enter into a marriage and the spouses are not only entitled but also obliged to engage in sexual relations, it is not possible to conclude that each act of sexual intercourse in such a marriage constitutes an offence under Article 198 CC. Therefore, each case needs to be assessed individually considering its specific circumstances, especially since sexual offences involving coercion require intention.

92 Marek Bielski, 'Komentarz do art. 197, t. 44' in Wróbel and Zoll (note 17).

93 Marek Bielski, 'Komentarz do art. 198, t. 7' in Wróbel and Zoll (note 17). See also the recapitulation of views expressed in the legal doctrine in: Krajewski (note 60), part II.3.2.

E. No requirement of lack of consent

In offences defined in Articles 198, 199 and 200 § 1 CC (see section A.III), the consent of the victim (if given) is irrelevant. Her factual consent may, however, be taken into consideration by the court in assessing the blameworthiness of the perpetrator's act. The situation where an adult sexually abuses a young child is radically different from the situation of a 17-year-old teenager having consensual sexual intercourse with a girl who is almost 15 years old.[94] In the offence defined in Article 199 CC, the situation and the pressure from the perpetrator makes the victim's factual consent legally irrelevant.[95]

F. Sexual offences and penal populism

Sexual offences is one of the areas where the influence of penal populism on Polish law is clearly visible.[96] M. Filar has shown that the waves of penal populism regarding sexual offences in 2005 and 2009 led to a significant increase in the statutory penalties for rape and sexual offences committed against minors, the elimination of the statute of limitations in cases where the offender is sentenced to imprisonment without probation for a crime against sexual freedom and decency if the victim was under 15 years of age, and to expanding the applicability of security measures (*środki zabezpieczające*) for sexual offenders, although there were no justified reasons stemming from an analysis of tendencies in sexual offences to introduce such drastic changes.[97]

None of these changes were introduced after a debate involving experts. Unfortunately, it does not seem that the current governing majority intends to change its attitude towards criminal policy regarding sexual

94 Marek Mozgawa, 'Komentarz do art. 197, t. 2' in Marek Mozgawa (ed), *Kodeks karny. Komentarz aktualizowany*, 2021.

95 Marek Mozgawa, 'Komentarz do art. 199, t. 3' in Mozgawa (note 94).

96 For a general accounts of Polish penal populism and the methods applied, see, e.g., Karolina Kremens, 'The new wave of penal populism from a Polish perspective' in: Elisa Hoven and Michael Kubiciel (eds), *Zukunftsperspektiven des Strafrechts: Symposium zum 70. Geburtstag von Thomas Weigend*, 2020, 123–136, Piotr Chlebowicz, 'Przejawy populizmu penalnego w polskiej polityce kryminalnej' 9 *Studia Prawnoustrojowe* 497 (2009).

97 Marian Filar, 'Kiedy ofiarą zgwałcenia pada zdrowy rozsądek' in Marek Mozgawa (ed), *Przestępstwo zgwałcenia*, 2012, 61–67.

offences. At the beginning of 2021, the Polish Ombudsman addressed the Minister of Justice, asking him to consider a change in the definition of rape, so that sexual activity without consent would qualify as such. The request was turned down, but the Minister of Justice concluded that he intended "to significantly increase the statutory threat of punishment also in the case of offences against sexual freedom and decency, which will be the subject of a separate legislative initiative".[98] This, unfortunately, shows a logic of penal populism that assumes that increasing statutory penalties is a universal measure for improving modern societies. Sadly, this attitude also blocks any attempt to commence a reasonable discussion on crucial problems regarding the criminalisation of sexual offences, their social background and their implications – issues that have been debated for a considerable time in many other European states. In Poland, it is time to rethink the way rape is perceived and regulated by law.

98 Łukasz Starzewski, 'Nie będzie zmiany prawa co do zgwałcenia. MS odpowiada Rzecznikowi Praw Obywatelskich' <https://bip.brpo.gov.pl/pl/content/nie-bedzie-zmiany-prawa-w-sprawie-zgwalcenia-ms-odpowiada-rpo> accessed 9 January 2022.

Sweden

Linnea Wegerstad

A. Background

I. General attitude in society toward sexual relations

In Swedish policy as well as in criminal law, the emphasis is on individual autonomy rather than traditional values and morals. The current Government describes itself as a feminist government with the goal of ending men's violence against women.[1] Sexual and reproductive health and rights (SRHR) have a strong position in Swedish politics (e.g., access to safe and legal abortions, mandatory sexual education in teacher education and in schools). Since the beginning of the 1990s, sexual violence has been framed as related to gender inequality in society, although there have been, and still are, tensions surrounding the conceptualization of violence and to what extent the problem of violence is rooted in structural gender inequality.[2] Criminalization has been a crucial tool in Swedish policy for combatting men's violence against women.[3] However, the rather strong alliance between feminism and the state has been questioned across the Nordic countries.[4] Some activists have voiced concerns about feminism turning too much to criminalization as a way to stop sexual violence.[5]

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1 Fact sheet: A feminist government ensures that decisions promote gender equality [https://www.government.se/information-material/2019/03/a-feminist-government/] (accessed January 19, 2022).

2 E.g. SOU 1995:60 Kvinnofrid, Prop. 1997/98:55 Kvinnofrid; *U. Andersson and S. Bengtson*, 'Support to battered women in Sweden. Non-profits and public authorities collaborating, counteracting and competing' in: J. Niemi, L. Peroni and V. Stoyanova (eds), International Law and Violence Against Women Europe and the Istanbul Convention (2020).

3 *M. Burman*, 'The ability of criminal law to produce gender equality: Judicial discourses in the Swedish criminal legal system', 16 Violence Against Women 173 (2010).

4 *M. Bruvik Heinskou, M.L. Skilbrei and K. Stefansen*, Rape in the Nordic Countries. Community and Change (2019), 3.

5 *L. Wegerstad*, 'Theorising sexual harassment and criminalisation in the context of Sweden', 9 BJCLCJ 61, 62 (2021).

While reporting rape to the police is strongly encouraged in official discourse,[6] the criminal justice system has been criticized for its low prosecution rates.[7]

In 2017, a large nation-wide study on SRHR was conducted.[8] Regarding exposure to sexual violence, the study shows that 42 percent of women and 9 percent of men have been subjected to sexual harassment.[9] More than every third woman (39 percent) and almost every tenth man (9 percent) have been subjected to some form of sexual assault. Eleven percent of women and one percent of men have been the victims of attempted rape through physical violence or the threat of violence. LGBT people experience such victimization to a higher degree than heterosexuals: 30 percent of lesbians and 10 percent of gay men reported having been the victims of attempted rape. The results also show that the majority of the Swedish population are satisfied with their sex life, find sex important, and have had sex during the past year.[10] However, 63 percent of women and 34 percent of men have at least once engaged in sex although they did not really want to do so.[11] A total of 72 percent of men reported that they consumed pornography, while 68 percent of women reported never consuming pornography.[12] Almost 10 percent of men – but fewer than one percent of women – reported having paid for sexual favours at least once.[13]

Sweden's move to a consent-based rape law was a 20-year process that included several governmental inquiries taking place in parallel with a public discussion of consent in sexual relations, as well as social media initiatives regarding how to deal with gray zones in sexual encounters.[14]

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6 *M. Hansen, K. Stefansen and M.-L. Skilbrei,* 'Non-reporting of sexual violence as action: acts, selves, futures in the making', 2020 Nordic Journal of Criminology 1.

7 *C. Diesen and E.F. Diesen*, Övergrepp mot kvinnor och barn: den rättsliga hanteringen (2013), ch. 1; 'Rape and sexual offences' Brottsförebyggande rådet [https://bra.se/bra-in-english/home/crime-and-statistics/rape-and-sex-offences.html] (accessed January 19, 2022).

8 *Folkhälsomyndigheten,* Sexuell och reproduktiv hälsa och rättigheter i Sverige 2017 (2019).

9 Id. at 17.

10 Id. at 17–18.

11 Id. at 19.

12 Id. at 20.

13 Id. at 21.

14 SOU 2001:14 Sexualbrotten, ett ökat skydd för den sexuella integriteten och angränsande frågor; SOU 2010:71 Sexualbrottslagstiftningen – utvärdering och reformförslag; SOU 2016:60 Ett starkare skydd för den sexuella integriteten; *M. Burman*, 'Rethinking rape law in Sweden: coercion, consent or non-voluntariness?' in: V. Munro and C. McGlynn (eds), Rethinking rape law: international and

Nongovernmental organizations now offer tools and courses on how to communicate and express consent in sexual encounters. In addition, there is scholarly interest in researching consent. One indication of the pervasiveness of consent in public discourse is that, in 2022, the primary education curriculum on SRHR was amended to include instruction about the meaning of consent.[15]

II. Background to criminal laws on sexual conduct

Between the nineteenth and the mid-twentieth century, the primary legal interest protected in Swedish criminal law with respect to sexual offences shifted gradually from public morality to individual integrity and sexual self-determination.[16] No clear distinction between sexual self-determination and sexual integrity exists in the preparatory works, and the two concepts are often used together to describe the primary interest in sexual offence cases, as in the statement that the point of departure for sexual offence legislation is that every person in every situation has the right to decide about his or her own body and sexuality and that his or her desire not to engage sexually must be respected unconditionally.[17]

Since 1962, when the current penal law was introduced, the definition of rape has been reformed and expanded several times. Briefly, the result of these amendments was a gradual lowering of the threshold for violence/threat, so that, in 2018, the lack of voluntariness became the decisive criterion for rape. In addition, the rape definition has expanded to encompass many kinds of sexual acts instead of only penile-vaginal intercourse.

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comparative perspectives (2010);*G. Nilsson*, 'Towards voluntariness in Swedish rape law: Hyper-medialised group rape cases and the shift in the legal discourse', in: M. Bruvik Heinskou, M.-L. Skilbrei and K. Stefansen (eds), Rape in the Nordic Countries Community and Change (2019); *L. Karlsson*, 'Towards a language of sexual gray zones: feminist collective knowledge building through autobiographical multimedia storytelling', 19 Feminist Media Studies 210 (2019).

15 *Skolverket*, Nytt i läroplanernas inledande delar 2022. [https://www.skolverket.se/undervisning/grundskolan/aktuella-forandringar-pa-grundskoleniva/nytt-i-laroplanernas-inledande-delar-2022] (accessed January 13, 2022).

16 *L. Wegerstad*, Skyddsvärda intressen & straffvärda kränkningar. Om sexualbrotten i det straffrättsliga systemet med utgångspunkt i brottet sexuellt ofredande (Lund University, 2015).

17 SOU 2016:60, 176–177; Prop. 2017/18:177 En ny sexualbrottslagstiftning byggd på frivillighet 15. See also Prop. 2004/05:45 En ny sexualbrottslagstiftning 21–22.

Only four years after the major revision of sexual offences was carried out, the law was amended again in August 2022.[18]

While the focus of this chapter is on sexual coercion offences, there are also sexual offences related to interests other than the integrity and self-determination of the individual. These include intercourse between adult relatives, the purchase of sexual services, and procuring.[19] Especially regarding the purchase of sexual services, the rationale for criminalization has been questioned.[20]

In Sweden, preparatory works are an important source for interpreting the meaning of legal texts, and especially so with new legislation. I therefore rely to a large extent on the preparatory works for the reformed rape law, such as the explanatory notes in the Bill, to describe the law.[21]

III. Definition of sexual coercion offenses (especially concerning the role of consent)

Three types of sexual coercion offences exist: rape, sexual assault, and sexual molestation/harassment. While the last of these may not fit into the category of sexual coercion offences, I will mention it in this section; the remaining part of the paper focuses on rape and sexual assault. Sexual offences against minors are regulated separately (see chapter E below).

18 SFS 2022:1043, Prop. 2021/22:231 Skärpt syn på våldtäkt och andra sexuella kränkningar, SOU 2021:43 Ett förstärkt skydd mot sexuella kränkningar. Most noteworthy is an increase in the minimum sentence for rape (from two years to three years imprisonment) and an expansion of the definition of rape. It now includes situations when the victim performs a sexual act on herself/himself without the perpetrator being present in real time, not even digitally, which was required before the amendment.

19 Criminal Code Chapter 6 Section 7 (SFS 2022:1043), 11 (SFS 2022:1043), 12 (SFS 2018:601).

20 *C. Lernestedt and K. Hamdorf,* Sexköpskriminaliseringen – till skydd av vad? Del 1, Juridisk tidskrift (2000); *P.-O. Träskman*, Sexuella och andra (farliga) förbindelser samt försök därtill. Legalitetsprincipen och köp av sexuella tjänster, in: Lars Heuman et al. (eds), Festskrift till Suzanne Wennberg (2009).

21 Prop. 2017/18:177.

Rape

Chapter 6, Section 1 of the Swedish Criminal Code reads:

> A person who performs vaginal, anal or oral sexual intercourse, or some other sexual act that in view of the seriousness of the violation is comparable to sexual intercourse, with a person who is not participating voluntarily is guilty of rape and is sentenced to imprisonment for at least three and at most six years. The same applies to anyone who induces a person who is not participating voluntarily to undertake or tolerate such treatment. When assessing whether participation is voluntary or not, particular consideration is given to whether voluntariness was expressed by word or deed or in some other way. A person can never be considered to be participating voluntarily if:
> 1. their participation is a result of assault, other violence or a threat of a criminal act, a threat to bring a prosecution against or report another person for an offence, or a threat to give detrimental information about another person;
> 2. the perpetrator improperly exploits the fact that the person is in a particularly vulnerable situation due to unconsciousness, sleep, grave fear, the influence of alcohol or drugs, illness, bodily injury, mental disturbance, or otherwise in view of the circumstances; or
> 3. the perpetrator induces the person to participate by seriously abusing the person's position of dependence on the perpetrator.
>
> If, in view of the circumstances associated with the offence, the offence is considered less serious, the person is guilty of rape and is sentenced to imprisonment for at most four years.
>
> If an offence referred to in the first paragraph is considered gross, the person is guilty of gross rape and is sentenced to imprisonment for at least five and at most ten years. When assessing whether the offence is gross, particular consideration is given to whether the perpetrator used violence or a threat of a particularly serious nature, or whether more than one person assaulted the victim or took part in the assault in some other way, or whether, in view of the method used or the young age of the victim or otherwise, the perpetrator exhibited particular ruthlessness or brutality.[22]

22 Criminal Code Chapter 6 Section 1 (SFS 2022:1043). The Swedish Criminal Code translated by the Swedish Governmental Office, available at https://www.government.se/government-policy/judicial-system/the-swedish-criminal-code/.

Rape is thus defined as occurring when a person performs vaginal, anal or oral sexual intercourse, or some other sexual act that in view of the seriousness of the violation is comparable to sexual intercourse, with a person who is not participating voluntarily. Sexual acts comparable to sexual intercourse include, e.g., the penetration of the vagina or anus with objects or body parts other than the penis. The rape definition also includes situations when the complainant has been induced to perform sexual acts on themselves or with a third person, and it is not that the perpetrator is present in real time, not even through a webcam.

The law also specifies situations when participation may never be considered voluntary: (1) if participation is a result of an assault, other violence or a threat of a criminal act, a threat to bring a prosecution against or report another person for an offence, or a threat to give detrimental information about another person; (2) if the perpetrator improperly exploits the fact that the other person is in a particularly vulnerable situation due to unconsciousness, sleep, grave fear, the influence of alcohol or drugs, illness, bodily injury, mental disturbance or otherwise in view of the circumstances; or (3) if the perpetrator induces the other person to participate by seriously abusing their position of dependence on the perpetrator. As described below in section II, the Swedish law on rape does not operate in a straightforward way concerning the distinction between restrictions of the capacity to give consent and grounds for negating the validity of consent.

Sexual assault

Chapter 6, Section 2 of the Swedish Criminal Code reads:

> A person who performs a sexual act other than those referred to in Section 1 with a person who is not participating voluntarily is guilty of sexual assault and is sentenced to imprisonment for at least six months and at most two years. The same applies to anyone who induces a person who is not participating voluntarily to undertake or tolerate such treatment. When assessing whether participation was voluntary or not, Section 1, first paragraph, second and third sentences apply.[23]

23 Criminal Code Chapter 6 Section 2 (SFS 2022:1043). The Swedish Criminal Code translated by the Swedish Governmental Office, available at https://www.government.se/government-policy/judicial-system/the-swedish-criminal-code/.

Sexual assault applies to sexual acts that are not comparable to sexual intercourse; in all other respects the definition of this crime is the same as for rape. The term 'sexual act' is not statutorily defined, but according to the preparatory works the point of departure should be a lasting contact between the perpetrator's body and the other person's genitals, or the other person's body and the perpetrator's genitals. Acts that do not involve such lasting physical contact may, however, also be covered. In such cases, the requirements are that the act had a sexual character and violated the victim's sexual integrity.

Sexual molestation/harassment

Sexual molestation is a catchall provision for acts that cannot be prosecuted under the heading of more severe sexual offences, such as rape or sexual assault.[24] Flashing is explicitly mentioned in the provision. In addition, other types of behaviour (including physical and verbal intrusions) can amount to that crime if the behaviour violates a person's sexual integrity. The scope of the provision thus rests on whether the act is of such a nature that, from an objective standpoint, it violates the victim's sexual integrity. This objectivized assessment implies both that it is not necessary to prove that the conduct had this impact on the victim, and, conversely, that the victim's apprehension of the event does not matter.

IV. General role of consent in criminal law

Until 2018, when rape was defined on the basis of coercion, consent negated the definition of rape/sexual assault in practice.[25] The complainant's lack of consent played a decisive role without being explicitly stated in the old rape definition, and it was used in court practice both as a defence of consent, claimed by the defendant, and as a hypothesis of consent, applied by the court.[26] Now this implicit use of consent has been replaced by the

24 Criminal Code Chapter 6, Section 10 (SFS 2022:1043).

25 For the wording of the provision in force at the time, see Criminal Code Chapter 6, Section 1 (SFS 2013:365).

26 *U. Andersson*, The unbounded body of the law of rape: the intrusive criterion of non-consent, in: Kevät Nousiainen et al. (eds), Responsible selves: women in the Nordic legal culture 337 (2001); *P. Asp P and M. Ulväng*, 'Sweden', in: A. Reed et al. (eds), Consent: domestic and comparative perspectives (2017), 431.

explicit criteria of 'nonvoluntary participation'. The term 'consent' was not used in the new rape definition because it already existed as a general justificatory ground in the Criminal Code.[27] It was argued that consent had a meaning that did not fully correspond to the meaning the term should have when used in connection with sexual offenses.

The general provision on consent as a justificatory ground reads: 'An act committed by a person with the consent of the person at whom it is directed only constitutes an offence if, in view of the damage, violation or danger that it results in, its purpose, and other circumstances, the act is unjustifiable.'[28] The rationale is that everyone has the right, within certain limits, to decide for themselves, and that the state should not protect an interest that the individual has given up.[29] Consent is a ground for justification only if it is valid, that is, if it is present during the whole act; given by someone who has the authority to dispose of the interest affected; given by someone who has the capacity to understand the meaning and consequences of consenting; given with 'free will' and with knowledge of the relevant circumstances; and meant as a serious expression of consent.[30]

Consent as a justificatory ground also encompasses a moral dimension: if the act is unjustifiable/indefensible, there is no ground for justification.[31] Society has an ethical interest in not allowing serious interference with the bodily integrity of the individual, and the provision aims at striking a balance between, on the one hand, the individual's interests and, on the other hand, society's demand that ethically indefensible acts should not go unsanctioned.[32] A guiding principle is that acts leading to more harm than what is considered the normal degree of assault cannot be defensible.

To sum up, the criteria of non-voluntariness in the rape definition has a different meaning than consent as a general justificatory ground, and therefore the latter does not apply in cases of sexual coercion.

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27 Prop. 2017/18:177 30–31.

28 Criminal Code Chapter 24 Section 7 (SFS 1994:458). The Swedish Criminal Code translated by the Swedish Governmental Office, available at https://www.government.se/government-policy/judicial-system/the-swedish-criminal-code/.

29 SOU 1988:7 Frihet från ansvar: om legalitetsprincipen och om allmänna grunder för ansvarsfrihet, 99.

30 Prop. 1993/94:130 Ändringar i brottsbalken mm, 40; *Asp and Ulväng*, 420. 2016.

31 Asp and Ulväng use the term 'indefensible', while the governmental translation uses the term 'unjustifiable'.

32 SOU 1988:7, 119 – 123.

B. Requirements for valid consent to sexual acts

While some jurisdictions provide a clear distinction between the capacity to give consent on the one hand, and grounds for negating validity of consent on the other hand, this is not the case in Swedish sexual coercion offences. There is one exception where this distinction is used, and that is age. In the first section below I will therefore address issues that in other jurisdictions may be categorized either as capacity to give consent or as grounds for negating consent. Briefly, states of unconsciousness, physical or psychological disability, or intoxication do not per se make a person legally unable to give valid consent, as there is an additional requirement of the exploitation of said situation in order to constitute rape. The existence of violence or a threat does, as a main rule, negate consent, but participation in the sexual act must be the result of violence or threat in order to constitute rape.

I. General capacity to give consent and grounds for negating validity of formal consent

Age

The minimum age for capacity to give consent to sexual acts is 15 years.[33] However, and as described in section E, underage individuals can give valid consent under certain circumstances. If the victim is the perpetrator's descendant or is being brought up by or has a comparable relationship with the perpetrator, or is someone for whose care or supervision the perpetrator is responsible by decision of a public authority, the age of consent is 18 instead of 15 years.

Consciousness, mental health, and intoxication

According to the definition of rape, states of unconsciousness, mental disturbance, and intoxication can negate consent: 'Participation may never be considered voluntary if the perpetrator improperly exploits the fact that the other person is in a particularly vulnerable situation due to unconsciousness, sleep, grave fear, the influence of alcohol or drugs, illness, bodi-

33 Criminal Code Chapter 6 Section 4 (SFS 2022:1043).

ly injury, mental disturbance, or otherwise in view of the circumstances'.[34] Even before the criterion of non-voluntariness was introduced, this kind of exploitation was included in the definition of rape.[35] It may be debated whether the mentioned situations should be considered as a matter of capacity to give consent or as grounds for vitiating consent. The legal definition uses the expression '…may never be considered voluntary…'. However, consent is not vitiated per se if the victim is in a particularly vulnerable situation, since the additional condition that the perpetrator 'improperly exploits' the situation is required. A particularly vulnerable situation exists when the victim has clearly limited opportunities to protect his or her sexual integrity.[36] Criminal responsibility does not require the victim to be completely unable to defend him-/herself or control his or her actions. For example, the requirement that the person was in a particularly vulnerable situation is fulfilled even if the person was not so intoxicated that he or she was completely unable to perceive the sexual assault. This assessment is based on the situation and its context.[37]

Position of dependence

The definition of rape additionally includes situations where a person abuses a superior position: when the perpetrator 'induces the other person to participate by seriously abusing their position of dependence on the perpetrator'.[38] A relationship of dependency must exist between the offender and the person against whom the act is being perpetrated, as in, for example, the health worker/patient and prison guard/prisoner relationships. The employer/-employee relationship, as well as a drug addict's dependence on a drug dealer, are also covered by the provision.[39] 'Seriously abusing' means that the dependent person is under pressure of serious import to him or her, and that the act appears to be an abuse of power against a weaker person. Promises of financial assistance to a person in a difficult situation do not amount to such pressure.[40] Again, it may be debated whether the situations mentioned should be considered as a matter of

34 Criminal Code Chapter 6 Section 1 (SFS 2022:1043).
35 Prop. 2012/13:111 En skärpt sexualbrottslagstiftning.
36 Prop. 2012/13:111, 112.
37 Id.
38 Criminal Code Chapter 6 Section 1 (SFS 2022:1043).
39 Prop. 1962 nr 10 Förslag till Brottsbalk. Del B, lagrådsremissen den 2 maj 1958.
40 Prop. 1983/84:105 Om ändring i brottsbalken m.m. (sexualbrotten) 52.

capacity to give consent or as grounds for vitiating consent. While the legal definition uses the expression '…may never be considered voluntary…', consent is not vitiated per se if the victim is in a position of dependence, since the additional condition of 'seriously abusing' the position of dependence is required.

Constraint – violence, threat and grave fear

The definition of rape specifies that participation may never be considered voluntary 'if participation is a result of an assault, other violence or a threat of a criminal act, a threat to bring a prosecution against or report another person for an offense, or a threat to give detrimental information about another person'.[41] *Violence* includes the obstruction of someone's bodily movements, e.g., by spreading the victim's legs. Other milder forms of violence are also included, e.g., pulling or tearing another person's arm or clothes, pushing him or her away, or holding someone firm.[42] A *threat* to perform a criminal act includes not only threats against the life or health of the individual but also threats against property.[43] Threats to give detrimental information can include sharing nude pictures of the victim (so-called revenge porn).[44]

The prerequisite 'participation is a result of' – that is, the causal relationship between violence/threat and participation in a sexual act – can be difficult to apply in cases of intimate partner violence.[45] In addition, it has been debated to what extent so-called BDSM sex, where the individuals agree that violence should be included as part of the sex, can constitute rape. The answer is that if the choice to participate in the sexual act cannot be considered a result of the violence, the act does not qualify as rape.[46]

As mentioned above, participation may never be considered voluntary if the person is in a particularly vulnerable situation due to *grave fear*.[47] This fear must be of a severe kind, and it includes states of 'frozen fright', that is, situations in which the victim, due to the perpetrator's behaviour,

41 Criminal Code Chapter 6 Section 1(SFS 2022:1043).
42 Prop. 2004/05:45 134.
43 Id.
44 Prop. 2017/18:177, 80.
45 Id. At, 39.
46 Id. At, 38.
47 Criminal Code Chapter 6 Section 1 (SFS 2022:1043).

for example suddenly locking the door or changing character, becomes paralyzed by fear and responds to the abuse with passivity.[48]

Fraud

So-called *rape by deception* is generally not considered a crime. False claims about celebrity, age, employment, gender identity, or whether contraception has been or will be used do not vitiate consent, the bill states.[49] Deception regarding a person's identity, however (pretending to be someone else in a dark room or in the presence of a blind person, for example), can amount to a particularly vulnerable situation and thereby negate voluntariness.[50]

II. Ways of giving valid consent

There are no formal restrictions on how voluntariness must be expressed to be legally valid, but to demarcate the area of criminalized behaviour more clearly, the rape definition states: 'When assessing whether participation is voluntary or not, particular consideration is given to whether voluntariness was expressed by word or deed or in some other way.'[51] Non-consent is implied in situations where a person suddenly performs a sexual act against another person, who due to the suddenness cannot express their lack of consent (so called 'surprise rape').[52] Examples of situations where this presumption applies might be a physician who during a medical examination performs a sexual act, or sexual assaults that occur in crowds during festivals, concerts, and the like.

The complainant's inner volition (wanting sex, or positive consent) is not decisive for criminal responsibility. Instead, what matters is the complainant's choice to participate, or not to participate.[53] This is motivated by the right to self-determination – one has the right to choose to have sex that one does not want – and the notion that a person who has sex with someone who has expressed that he or she wants to participate should

48 Prop. 2012/13:111, 113.
49 Prop. 2017/18:177, 79.
50 Id., 42.
51 Criminal Code Chapter 6 Section 1 (SFS 2022:1043).
52 Prop. 2017/18:177, 78–79.
53 Id., 33, 78.

be able to rely on that expression.[54] The assessment of non-voluntariness is based on the situation and its context. A study of court judgments in rape cases concluded that inclusion of the context becomes more significant when the victim's external expression of voluntariness was deemed unclear.[55] In one case, the Supreme Court of Sweden ruled that the fact that the parties agreed to sleep in the same bed in only their underwear did not necessarily entail that the complainant voluntarily participated in sexual acts.[56]

According to the bill, the assumption is that persons who participate voluntarily in a sexual act will express their desire to do so, and the lack of such expression should normally be interpreted as nonvoluntary participation.[57] In exceptional cases, tacit consent to sexual interaction may be enough to indicate voluntariness, but if the complainant denies voluntary participation, the existence of some evidence to suggest consent should be required for the defendant to avoid conviction.[58] The Supreme Court has stated that there is 'limited room for assessing pure passivity as an expression of a choice to participate in a sexual act'.[59]

Asp offers a useful summing-up of non-voluntariness under the definition of rape.[60] Firstly, there is the situation where no choice to participate has been expressed at all. This situation may include cases where there is no voluntariness as well as cases where voluntariness is nevertheless considered to exist. Secondly, there is the situation where a choice to participate has been expressed, but this choice is not considered to be voluntary. This situation includes two types of cases: on the one hand, cases falling into one of the categories addressed in points 1–3, which means that the choice to participate cannot be considered voluntary; and on the other hand, cases not covered by points 1 to 3, but where the choice to participate can

54 Id., 33.
55 *L. Wallin et al*., Capricious credibility – legal assessments of voluntariness in Swedish negligent rape judgements, 22 Nordic Journal of Criminology 3, 13 (2021).
56 NJA 2019 s. 668 para. 33.
57 Prop. 2017/18:177, 80.
58 Id.
59 NJA 2019 s. 668 para. 15. Author's translation.
60 *P. Asp*, Brottsbalken (1962:700) 6 kap. 1 § Lexino 19 august 2019, at 2.2.1, available at JUNO, Nordstedts Juridik/Karnov group.

nevertheless not be considered voluntary (since, according to the bill, there is scope to consider involuntariness even outside of points 1–3).

C. *Reach of consent*

I. *Timing of consent*

Voluntariness must exist when the sexual act is performed and throughout the sexual act.[61] If a person has stated in advance that he or she wants to participate in a sexual act, this does not necessarily mean that the act if performed later is to be considered voluntary.[62] Consent can be withdrawn *in actu*.

II. *Scope of consent*

Whether consent must be specific to each sexual act – and, relatedly, whether voluntary participation in one sexual act can be seen as valid consent to participate in other sexual activities – was a matter of dispute in the legislative process.[63] The official Commission of Inquiry, whose work laid the ground for the government bill, offered the example that moving a hand from a person's breast to her other breast does not constitute a new sexual act that requires a specific expression of voluntariness, while the opposite is true when moving from vaginal intercourse to anal intercourse.[64] The bill, however, does not provide any clear answer.[65] Asp argues that it would be unrealistic to assume that in a sexual situation new consent is required in advance for each individual act.[66] Instead, after sexual activity has been initiated, consent can be given gradually and through reactions to new initiatives. Asp also states that there must be limits to what can be accepted regarding 'new' sexual acts without prior consent and that, ul-

61 Prop. 2017/18:177, 78.
62 Id. at 79.
63 For a short summary, see *L. Wegerstad*, Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden, 22 German Law Journal 740 (2021).
64 SOU 2016:60, 200.
65 Prop. 2017/18:177, 32.
66 *P. Asp*, Brottsbalken (1962:700) 6 kap. 1 § Lexino 19 August 2019, at 2.2.3, available at JUNO, Nordstedts Juridik/Karnov group.

timately, it must be a matter for the courts to decide where the boundaries are.

It is difficult to provide a clear answer as to what general consent to sexual relations includes; this issue must be assessed on a case-to-case basis. Nonetheless, there is some support for the view that a sexual act which amounts to a qualified sexual act as defined in the rape provision should constitute a new act in relation to the previous one, such that voluntary participation in vaginal intercourse, for example, cannot be considered as agreeing to anal penetration.

Also of note, the bill states that persons who know each other well may make sexual approaches to wake one another, and, therefore, in some instances sexual acts towards a person who is asleep may be considered to be permitted.[67]

As mentioned in section II, stealthing, or non-consensual condom removal (NCCR), has been conceptualised in preparatory works as a form of deception that does not vitiate consent. Following up on Brodsky's 'literal approach', however, which proposes that consent to penetration with condom use is distinct from consent to penetration without condom use, in Swedish law NCCR can also be understood as a sexual act different from the one that the parties agreed on.[68] This means that NCCR could potentially be equated with so-called 'surprise rape' and covered by the definition of rape. However, no such cases have yet been tried by the courts. NCCR is often associated with the case in which a pre-trial investigation was launched against Wikileaks founder Julian Assange regarding rape and sexual molestation.[69] But since the preliminary investigation was dropped, the suspicion regarding Assange's condom use was never heard by a court.

Participation can be non-voluntary also in situations where the victim actively performs or initiates a sexual act, which follows from the broad definition of the term 'performs'.[70]

67 Prop 2017/18:177,83.

68 *A. Brodsky,* Rape-Adjacent: Imagining Legal Responses to Nonconsensual Condom Removal, 32 Columbia Journal of Gender and Law 183 (2017).

69 *Åklagarmyndigheten,* Kronologi i Assangeärendet, www.aklagare.se/nyheter-press/for-media/assangearendet/kronologi/] (accessed January 19, 2022).

70 Prop. 2017/18:177, 79.

III. Finality of consent

As mentioned in section II, what matters for valid consent is the complainant's choice to participate. A consequence is that so-called 'tjatsex', or 'sex that one is nagged into having', i.e., when a person makes the choice to participate in a sexual act only after much persuasion, does not constitute rape.[71]

D. Intent as to lack of consent

I. For a conviction of intentional sexual coercion, is it necessary to prove that the perpetrator knew that the victim did not consent?

Intent is the standard form of mens rea, and the other type of mens rea in Swedish law – negligence – can only be applied if explicitly stated, which is the case with negligent rape and negligent sexual assault.[72] There is no legal provision that defines intent; instead, the different forms of intent and their meaning have been developed in the case law of the Swedish Supreme Court, and, to some extent, doctrinal literature. There are three forms of intent: direct intent (*avsiktsuppsåt*), indirect intent (*insiktsuppsåt*), and reckless intent (also described as indifference intent, *likgiltighetsuppsåt*). The latter two are used in relation to circumstances, e.g., nonvoluntary participation by the complainant.

Regarding rape cases and the question of voluntary participation, the intent requirement is fulfilled if the defendant was certain – in practice, practically knew - that the complainant's participation was nonvoluntary. This means that the defendant knew, e.g., that the complainant did not participate voluntarily, was heavily intoxicated, or participated in the sexual act due to violence – the circumstances, in other words, that are required for criminal responsibility for rape. The intent requirement is also fulfilled if the defendant has reckless intent. In brief, this means that the defendant 1) appreciates that there is a risk that the complainant does not participate voluntarily (a cognitive status), and 2) is indifferent as to whether that

71 Id. at 33.

72 Criminal Code Chapter 1 Section 2 para. 1 (SFS 1994:458); *S. Wennberg,* Criminal law, in: Michael Bogdan (ed) Swedish legal system 164–165, (2010). For a short description and comparison, see *D. Martinsson and E. Lekvall*, The Mens Rea Element of Intent in the Context of International Criminal Trials in Sweden (2020), 101–108.

is true (a volitional status). The latter means that the defendant does not perceive the circumstance or the risk of the circumstance – nonvoluntary participation – as a reason for refraining from performing the act; the defendant accepts the circumstance in the sense that it does not have an impact on his/her acting. If the perpetrator perceives the likelihood of the circumstance occurring as very high, this provides significant evidence of indifference.

II. Are there lesser requirements for mens rea?

If the person honestly was mistaken, intent cannot be established. Lesser requirements for mens rea used in common law systems, such as exculpation only in case of a reasonable mistake or requirements to affirmatively establish non-consent, are not applicable. Instead, Sweden has introduced negligence as a sufficient fault element for rape liability, which is described below. There is no evidentiary presumption of non-consent, which means that the evidence standard "beyond a reasonable doubt" applies.

III. Are there offenses of reckless or negligent sexual coercion, dispensing with the requirement of intent?

Negligent rape and negligent sexual assault were introduced as offences in 2018. They cover situations where the defendant did not have criminal intent but showed gross negligence regarding the circumstance that the other person was not participating voluntarily.[73]

Gross negligence includes situations where the defendant appreciates that there is a risk – i.e., suspected – that the complainant does not participate voluntarily, but nevertheless goes through with the sexual act.[74] This form of culpa is usually referred to as advertent negligence (*medveten oaktsamhet*). In both cases of reckless intent and cases of advertent negligence, the defendant appreciates that there is a risk that the complainant does not participate voluntarily. The distinction between the two appears in the second step – was the defendant indifferent as to whether the complainant's participation was not voluntary? If yes, reckless intent is established; if no,

73 Criminal Code Chapter 6 Section 1a and 3 (SFS 2018:618).
74 Prop. 2017/18:177 85.

the defendant was negligent. So, negligence means that the defendant is indifferent to the risk, but not to its realization.[75]

However, gross negligence also includes situations where the defendant did not actually appreciate such a risk but should and could have done so. This form of culpa is usually referred to as inadvertent negligence (*omedveten oaktsamhet*). To be held criminally liable for negligent rape requires that what the defendant could do is something that he or she also ought to do. Negligence leaves room for considering what in other jurisdictions is referred to as reasonable mistakes and requirements to affirmatively establish consent. For example, if the defendant did not make any effort to make sure that the complainant participated voluntarily, when there were strong reasons to do so, the defendant can be held liable.[76] Reasons to take steps to ensure consent could be that the complainant appeared to be intoxicated or asleep.

The term *gross* sets a limit and means that the defendant's negligence must be 'clearly reprehensible' ('klart klandervärd').[77] If the act is less serious, the provision states that the person should not be held responsible.

E. Are there sexual offenses that do not require lack of consent?

Sexual offences against children under the age of 15 years, or in some cases, as described in section B.1, under 18 years, are regulated separately, as rape of a child, sexual exploitation of a child, and sexual assault of a child.[78] As a general rule, consent of the underage person is of no relevance. However, if it is obvious that the act did not involve an assault on the child due to a minor difference in age and development between the person who committed the act and the child (e.g., if the two were aged 16–17 and 13–14 respectively), the defendant is not held responsible.[79] In assessing whether the act involved an assault on the child, it is important whether the child consented or not. Negligence regarding the fact that

75 *A. Bäcklund et al.*, Brottsbalken. En kommentar. JUNO, version 18, 1 January 2021, Norstedts Juridik, Chapter 1 Section 1 Para. 1. See also NJA 2019 s. 668.
76 Prop. 2017/18:177 85.
77 Id. See also Supreme Court decision 2022–04–07 in case number B 779–21.
78 Criminal Code Chapter 6 Section 4 (SFS 2022:1043), Section 5 (SFS 2018:618) and Section 6 (SFS 2022:1043.
79 Criminal Code Chapter 6 Section 14 (SFS 2022:1043).

the victim was underage is sufficient for the defendant to be held responsible.[80]

There are additional sexual offences covering the sexual exploitation of underage persons. The crime of exploitation of a child for sexual posing covers situations where a person promotes or exploits the performance of or participation in sexual posing by a child under the age of 15 years, and, if the posing is liable to damage the child's health or development this section also applies to a child who has reached 15 but not 18 years of age.[81] The crime of sexual molestation makes it illegal for a person to sexually touch a child under 15 years, or to induce the child to undertake or participate in an act with sexual implications.[82] So-called grooming, i.e., proposing or agreeing to a meeting with a child under 15 years with the aim of committing a sexual offence against the child, has also been made a crime.[83] Lastly, inducing a child under eighteen years to undertake or submit to a sexual act in return for payment has been criminalised.[84]

80 Criminal Code Chapter 6 Section 13 (SFS 2018:618).
81 Criminal Code Chapter 6 Section 8 (SFS 2022:1043).
82 Criminal Code Chapter 6 Section 10 paragraph 1 (SFS 2022:1043).
83 Criminal Code Chapter 6 Section 10a (SFS 2017:1068).
84 Criminal Code Chapter 6 Section 9 (SFS 2019:806).

Switzerland

Nora Scheidegger

A. Background

I. General attitude in society toward sexual relations

In Swiss society as a whole as well as in the area of sexual offences law, at least in theory, the autonomy of the individual rather than traditional rules of decency is becoming more and more the central issue. However, rape myths are still deeply engrained both in society and in the justice system.[1] To cite just one example: In several police advice manuals, one could until recently find advice for women on how to prevent sexual assault. One such advice was that women should not consume too much alcohol because that would make them appear to be "an easy target".[2] Media coverage of sexual violence also frequently perpetuates myths and stereotypes about rape, rapists, and rape victims.When it comes to gender equality, Switzerland is not doing particularly well. According to the Global Gender Gap Report 2022, Switzerland is ranked only 47th on "Economic Participation and Opportunity".[3] Despite equal opportunity laws in place, discrimination still occurs, in particular due to the traditional role assignment and division of labor between the sexes. There are still significant gaps in gender equality.[4]

1 See, e.g., Miriam Suter, Karin Wenger, "*Die Einvernahme war für mich so schlimm wie die Vergewaltigung selbst*", Republik 18.06.2020 < https://www.republik.ch/2020/06/18/die-einvernahme-war-fuer-mich-so-schlimm-wie-die-vergewaltigung-selbst>.

2 See, e.g., Silvan Zemp, *Kapo St. Gallen entschuldigt sich wegen Frauenratgeber*, srf-news 15.03.2021, < https://www.srf.ch/news/schweiz/fall-sarah-everard-kapo-st-gallen-entschuldigt-sich-wegen-frauenratgeber> (citing the manual).

3 Wold Economic Forum, *Global Gender Gap Report 2022*, 328.

4 See also Anne-Sylvie Dupont, Zoé Seiler, *Die direkte rechtliche Ungleichbehandlung von Frauen und Männern im Schweizerischen Bundesrecht*, Rechtgutachten, 2021.

II. Criminal laws on sexual conduct

Title Five of the Swiss Criminal Code is entitleded "Offences against Sexual Integrity", the first subchapter is "Endangering the development of minors", and the subchapter containing the sexual coercion offences is entitled "Offences against sexual liberty and honour". The legislature intends, however, to delete the word "honour" as soon as possible.[5] According to the Federal Supreme Court, criminal laws on sexual conduct are intended to protect two legal interests: the "undisturbed sexual development of children and adolescents" and the "right to sexual self-determination".[6]

In Switzerland, the importance of the *ultima ratio* principle is strongly emphasized, including by the legislature. However, the current trends in modern criminal law tend to point in a different direction. For example, criminal law has recently been toughened with regard to pornography, although the legitimacy of this offence is quite questionable.[7]

III. Definition of sexual coercion offences

The legal definitions of rape and indecent assault are to be found in Art. 189 and 190 of the Swiss Criminal Code.[8] The articles read as follows:

> ***Art. 190 Offences against sexual liberty and honour / Rape***
>
> *[1] Any person who forces a person of the female sex by threats or violence, psychological pressure or by being made incapable of resistance to submit to sexual intercourse is liable to a custodial sentence of one to ten years.*
>
> *[2] Repealed.*
>
> *[3] If the offender acts with cruelty and in particular if he makes use of an offensive weapon or any other dangerous object, the penalty is a custodial sentence of not less than three years.*

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5 18.043, Strafrahmenharmonisierung und Anpassung des Nebenstrafrechts an das neue Sanktionenrecht, Vorlage 3: Bundesgesetz über eine Revision des Sexualstrafrechts, Bericht der Kommission für Rechtsfragen des Ständerates vom 17.02.2022 (hereafter cited as: Explanatory Report), BBl 2022 687.

6 See, e.g., Bundesgericht (Federal Supreme Court, BGer), 6B_1265/2019, 9.4.2020, E. 3.5.2.

7 See, e.g., Nora Scheidegger, *Ist das noch Kinderpornografie?*, Schweizer Zeitschrift für Strafrecht 2014, 327; Anna Coninx, Nora Scheidegger, *Gewaltpornografie und moderne Sexualmoral*, Zeitschrift des Bernischen Juristenvereins 2022, 339.

8 In this chapter, Articles without further specification are those of the Swiss Penal Code.

Art. 189 Offences against sexual liberty and honour / Indecent assault

[1]Any person who uses threats, force or psychological pressure on another person or makes that other person incapable of resistance in order to compel him or her to tolerate a sexual act similar to intercourse or any other sexual act shall be liable to a custodial sentence not exceeding ten years or to a monetary penalty.

[2] Repealed.

[3] If the offender acts with cruelty, and in particular if he makes use of an offensive weapon or any other dangerous object, the penalty is a custodial sentence of not less than three years.

The Swiss Criminal Code thus defines rape as "coerced sexual intercourse" involving either violence, threats, psychological pressure or making the (female) victim incapable of resistance. Acting without the other person's consent or even ignoring the victim's explicit "no" is hence not sufficient to establish the elements of the sexual offence of rape or indecent assault.[9]

The rape provision covers only vaginal rape, whereas coerced anal and oral penetration are covered by article 189 (Indecent assault). However, the Supreme Federal Court consistently holds that the penalty for coerced sexual acts that are similar to intercourse may not be significantly lower than the penalty the judge would have imposed for rape (given otherwise comparable circumstances).[10]

After many years of advocacy by the scientific community and NGOs,[11] the Swiss parliament is currently debating the introduction of a consent-based definitioneof rape and indecent assault ("No means No"-Rule). According to the draft, the arts. 189 and 190 will also cover acts that the perpetrator performs on the victim against her or his (verbally or non-verbally) expressed will, even without an element of coercion. Additionally, according to the draft all offenses are to be formulated in a gender-neutral manner. The proposed amendments to the current wording of the arts. 189 and 190 read as follows:

9 BGer 6B_912/2009, 22.2.2010, consid. 2.1.3., see also Nora Scheidegger, *Das Sexualstrafrecht der Schweiz. Grundlagen und Reformbedarf* (2018).

10 BGE 132 IV 120, consid. 2.5.; BGer, 6B_78/2017, 6.9.2017, consid. 2.1.

11 See, e.g., Nora Scheidegger, *Das Sexualstrafrecht der Schweiz. Grundlagen und Reformbedarf* (2018); Nora Scheidegger, Agota Lavoyer, Tamara Stalder, *Reformbedarf im schweizerischen Sexualstrafrecht – Egoistisch, rücksichtslos, kaltherzig – aber strafrechtlich nicht relevant?* https://sui-generis.ch/article/view/sg.122.

Art. 189 Draft Criminal Code
(1) Any person who, against the will of another person, performs a sexual act on that person or makes that person perform such an act shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

Art. 190 Draft Criminal Code
(1) Any person who, against the will of another person, performs on that person or makes that person perform coitus or an act similar to coitus involving penetration of the body shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

IV. General role of consent in criminal law

Depending on the offence, consent is a justification or negates the definition of the offence. Crimes for which consent may provide a justification include those that result in bodily harm, including assault.

There is no general statutory provision on consent in the Swiss Criminal Code. Therefore, the requirements for valid consent have been developed by case law and doctrine.[12] Essentially, four cumulative conditions must be met for consent to be valid:

a) Consent must be declared or communicated.
b) The person concerned must be capable of giving consent.
c) The person concerned must be entitled to give up the legal interest. (One can only dispose of one's own legal interests. No one may consent to the violation of interests of the general public.)
d) Consent must be voluntary and informed.

Since both the crimes of rape and sexual indecent assault implicitly require that the victim did not consent to the sexual conduct, (factual) consent negates the definition of these offences. Similarly, consent may also negate certain property crimes, such as trespassing (Art. 186, Unlawful entry) or theft (Art. 139).[13]

The underlying rationale for recognising consent is to respect individual autonomy and agency. The constitutionally protected rights to physical integrity, sexual self-determination, property etc. entitle individuals to ma-

12 See, e.g., Günter Stratenwerth, *Schweizerisches Strafrecht, Allgemeiner Teil I, Die Straftat*, 4th ed. 2011, § 10 Die Rechtswidrigkeit, 205–259.
13 Stratenwerth, *supra* note 12, at 209.

ke their own decisions about their bodies, health, sexuality etc. These individual decisions are also to be respected by the criminal law.[14]

The defence of consent has several limits due to considerations of public policy. The current criminal law in Switzerland does not recognise consent by the victim as a defence for deliberately killing others. According to Art. 114 of the Swiss Criminal Code, the killing of a person is punishable even if it was carried out at the serious and insistent request of the person killed. On the other hand, killing by omission (passive euthanasia) can be effectively consented to.[15] Also, negligent homicide may be consented to, thus exempting the perpetrator from punishment – for example, a drunk driver is not liable for negligent homicide if his passenger has joined him in the car knowing that he was drunk.[16]

There are limits to consent in relation to one's own body. Female genital mutilation (Art. 124 Swiss Criminal Code), for instance, is an offense to which consent cannot be validly given.[17] According to legal doctrine and case law, consent may only be given for non-aggravated bodily injury. In the case of serious bodily harm (Art. 122), consent is only valid if it appears proportional to the reasonable interest of the consenting person (e.g., in the case of necessary surgery or an organ donation). This restriction can be explained by the fact that the German rule on consent (§ 228 German Penal Code) has been uncritically adopted in Switzerland, even though the Swiss Criminal Code does not provide for such a restriction on consent.[18]

14 Martino Mona, *Die Einwilligung im Strafrecht,* 2017.

15 Christopher Geth, *Passive Sterbehilfe*, 2010.

16 Laura Jetzer, *Einverständliche Fremdgefährdung im Strafrecht – zugleich ein Beitrag zur Mitwirkung an Selbstgefährdung*, 2015.

17 05.404 Parlamentarische Initiative, Verbot von sexuellen Verstümmelungen, Bericht der Kommission für Rechtsfragen des Nationalrates, *5651*, *5669* ("Weil eine Genitalverstümmelung nach Artikel 124 StGB in der Regel kein sinnvoller und vertretbarer Eingriff darstellt, können weder die urteilsfähige erwachsene Person noch die Eltern eines urteilsunfähigen Kindes in eine Genitalverstümmelung nach Artikel 124 StGB einwilligen.").

18 See Philippe Weissenberger, *Die Einwilligung des Verletzten bei den Delikten gegen Leib und Leben*, 1996, 50.

B. Requirements for valid consent to sexual acts

I. General capacity to give consent

1. Age

The legal age for sexual consent is 16 years of age (Art. 187 (1)(1)). However, there is a special provision for sexual activity between peers: According to Art. 187 (2), no penalty may be imposed if the difference in age between the persons involved is three years or less. However, if the juvenile offender uses force or coercion, arts. 189 or 190 may apply.

If the offender is younger than 20 years of age at the time of the first sexual act, and if there are special circumstances (e.g., a relationship between offender and victim), *or* if the victim is the spouse or registered partner of the offender, the responsible authority may dispense with prosecution, referral to the court, or the imposition of a penalty (Art. 187 (3)). However, the legislature is planning to eliminate this "marriage exemption".[19]

Art. 188 provides for an additional protection for minors. This offense makes it criminal for a person to engage in sexual acts "by exploiting his or her relationship with a minor over the age of 16 who is dependent on him due to a relationship arising from the minor's education, care or employment or another form of dependent relationship".

2. Consciousness, mental health

Art. 191 criminalizes the abuse of persons who are "incapable of judgment or resistance". Therefore, individuals with mental impairments can validly consent to sex if they have a certain knowledge and voluntariness with respect to the decision to engage in a specific sexual activity. But even if a mentally disabled person completely lacks competence in judgement, engaging with her would not automatically lead to criminal punishment for the other person (because this would impose an absolute ban on sexual activities for adults with severe mental disabilities). This is why the term "missbrauchen",i.e., *abuse*, in Art. 191 of the Swiss Criminal Code is important: It makes it possible to differentiate between actual exploitation

19 Explanatory Report (note 5), BBl 2022 687, 21.

of a handicapped person and – at least "factually" – consensual sexual relations.[20]

Unconscious persons are "incapable of resistance" in the sense of Art. 191. However, there are some grey areas: if intercourse with the sleeping partner has been established as "a facet of the relationship" and the partner consents to it in advance, courts will usually not apply Art. 191, because the element of "missbrauchen" (abuse) would not be present.

Art. 192 and Art. 193 criminalize the abuse of a position of power (e.g., in a mental institution) and the exploitation of dependency (e.g., between a psychiatrist and his or her patient). If the victim consents, but his or her consent is or may be considered as induced by the exploitation of a position of power or dependency, the offender is liable to a custodial sentence not exceeding three years or to a monetary penalty.

3. Intoxication

If the victim is (voluntarily) intoxicated to the point of being incapable of judgment or resistance and the offender knowingly has sexual relations with that person, the offence of "Sexual acts with persons incapable of judgment or resistance" in Art. 191 is applicable. It may not always be easy to differentiate between "substance-affected consent" and "intoxicated consent". According to the Supreme Federal Court, a person is not yet "incapable of resistance" if her or his inhibitions are merely diminished due to alcohol. However, the application of art. 191 does not require unconsciousness in the sense of a comatose state. Generally speaking, a person is probably too intoxicated to consent if he or she is too intoxicated to walk or talk, is vomiting or urinating on himself or herself, or is too uncoordinated to undress.[21]

If the offender himself sedates or intoxicates an unknowing victim, Arts. 189 and 190 (rape and indecent assault) apply.

II. Ways of giving valid consent

Consent to sexual relations can be expressed verbally or nonverbally, and in certain circumstances consent can even be implied. Depending on the

20 BGer 6S. 359/2002, 07.08.2003 consid. 4.2.
21 See for example BGer 6B_96/2015, 20.08.2015 consid. 2.3.

specific circumstances of a particular situation, consent can be implied, e.g., from the request to wear a condom. However, if the offender previously used coercion, the request to wear a condom cannot be interpreted as consent.[22]

A mere lack of protest does not count as consent *per se*. But, as noted above, the Swiss Criminal Code defines rape (Art. 190) based on the force used by the perpetrator or the resistance of the victim rather than on a lack of freely given consent. Therefore, if the victim does not protest or resist, the offender usually does not have to use coercion, and arts. 189 and 190 do not apply. Additionally, resistance has an important evidentiary significance, and a lack of resistance can be used to question the *mens rea* of the offender.

In general, the *mens rea* element is not satisfied if the offender genuinely believed that the victim consented to the sexual act. According to some scholars, the notion of *vis haud ingrata* can be relevant with regard to the offender's *mens rea*, meaning that the offender may lack *mens rea* if the victim yields after what the offender believed was just "sham resistance".[23] However, the Swiss Federal Court stated that the *mens rea* element is usually satisfied if the victim clearly protested and/or resisted and that there is thus usually no room for the defense of mistake of fact about consent in such cases.[24]

III. Grounds for negating the validity of formal consent

1. Constraint

If the offender uses force, threats of force or psychological pressure to induce the victim to "consent" to sex, this token consent is considered invalid and the offender is guilty of rape or indecent assault.[25] The variant of the offence of "putting the victim under psychological pressure" covers,

22 See BGer 6B_278/2011,. 16.6.2011.

23 Günter Stratenwerth, Guido Jenny, Felix Bommer, *Schweizerisches Strafrecht, Besonderer Teil I: Straftaten gegen Individualinteressen*, 2010, § 8, N. 15.

24 6B_267/2016, 15.02.2017 consid. 5.2. and 6B_894/2021, 28.03.2022, consid. 3.4. (« L'élément subjectif est réalisé lorsque la victime donne des signes évidents et déchiffrables de son opposition, reconnaissables pour l'auteur, tels des pleurs, des demandes d'être laissée tranquille, le fait de se débattre, de refuser des tentatives d'amadouement ou d'essayer de fuir.).

25 See, e.g,. BGer 6B_278/2011, 16.6.2011.

for example, constellations in which the offender threatens to use violence against persons close to the victim, as well as situations of persistent intimidation, continuous bullying or sustained psychological terror in which no additional violence or threat is required to make the victim comply.[26]

2. Fraud

Currently, sex by deception is not a criminal offence in Switzerland, although there has been some discussion as to whether faking a medical indication to get the patient to consent to what in fact is a sexual act should be considered a crime (more specifically: "Sexual acts with persons incapable of judgement or resistance", Art. 191).[27] After the proposed revision of the Swiss criminal code, this conduct is to be covered by a separate offense (Art. 193 Draft Criminal Code: "Deception about the sexual character of an act").

C. Reach of consent

I. Timing of consent

In general, consent must be obtained before any sexual act begins. According to legal doctrine and case law, there is no such thing as "retrospective consent" or of obtaining consent *after* the sexual act. However, arts. 187, 192 and 193 currently permit non-prosecution or the withholding of a penalty if the perpetrator has married the victim after the offence was committed. The legislature plans to eliminate this exemption because of concerns that victims may feel pressured to agree to a marriage or a registered partnership in order to avoid legal consequences for the older person.[28]

"Non-consent" in sexual assault cases includes situations where consent was initially given but subsequently withdrawn by the victim. A person who initially consents to sexual intercourse does not thereby give up her right to terminate the encounter at whatever point she chooses. So, if a

26 See 6B_1040/2013, 17.8.2014.

27 See, e.g., BGer 6B_453/2007, 19.02.2008 consid. 3.4.3.(«Diese Übergriffe hat sie nur wegen ihres Irrtums über die medizinische Indikation geduldet. Dies allein reicht für die Annahme einer Widerstandsunfähigkeit nicht aus, womit der Beschwerdegegner den Tatbestand der Schändung nicht erfüllt hat.»).

28 Explanatory Report (note 5), BBl 2022 687, 21.

person tells her or his partner to stop, and he or she forces her to continue through some form of coercion, he or she is guilty of rape or indecent assault, provided that he noticed that the victim withdrew consent. However, if the victim just says "no", the offender usually does not have to use coercion so that arts. 189 and 190 (at least currently) do not apply.

II. Scope of consent

It is generally accepted that consent to a specific sexual act does not automatically constitute consent to other sexual acts. For example, consent to vaginal penetration does not extend to anal penetration. On the other hand, consent to vaginal penetration probably includes consent to touching the breasts. However, it is difficult to establish generally applicable rules. Some scholars argue, e.g., that in cases of "stealthing" there is no consent at all.[29] They reason as follows: We accept the premise that different sexual acts require separate consent. Contact with the skin of a penis is significantly distinct from contact with a condom. Therefore, in cases of "stealthing", these two different sexual acts each require separate consent because what happened (unprotected penetration) is not that for which consent was given (protected penetration).[30] However, acting without the other person's consent *per se* is not sufficient to establish the definitional elements of the sexual offense of rape. This is why there has been a lot of discussion in recent years about whether "stealthing" should be considered a sexual act with a person "incapable of judgement or resistance" (Art. 191). The Federal Supreme Court recently decided that "stealthing" is not punishable under art. 191, since a victim of "stealthing" is not principally incapable to resist. As noted above, the Swiss parliament is currently debating a draft act amending the sexual offenses. According to this draft and the accompanying explanatory report, "stealthing" is to be punishable under the revised articles 189 (indecent assault) and/or 190 (rape) of the Swiss Criminal Code.[31]Consent that has been given in a factual sense does not necessarily amount to legally effective consent. A token of consent,

29 See the review of the relevant literature in BGer 6B_265/2020, 11.05.2022.

30 BGer 6B_265/2020, 11.05.2022, consid. 4.3. ("Das Entfernen des Kondoms gegen den Willen und ohne das Wissen der Partnerin [bildet] eine Zäsur zum bisher einvernehmlichen Geschlechtsverkehr. Es begründet eine gesonderte, neue Handlung …").

31 Explanatory Report (note 5), BBl 2022 687, 34 («Die Einwilligung in eine sexuelle Handlung mit Kondom deckt somit dieselben Handlungen ohne Kondom nicht

e.g., saying "yes" or participating actively, has the power to bring about a change of rights and duties within a relationship only if it sufficiently reflects the agent's own will. In the presence of autonomy deficits, even though a person may appear to have "given consent" in a factual manner, the consent is not legally valid. First, competence is a key component of consent. Persons who are not able to understand the meaning and purpose or the scope and significance of their decisions are considered to be incapable of making an autonomous decision, and thus, incapable of giving valid consent to sexual relations (arts. 187 and 191).[32] Second, consent is considered deficient or flawed if the victim has been coerced into consenting (Arts. 189 and 190). Therefore, if a victim says "Let's just get it over with" after having been coerced, her consent is not considered valid.[33] Similarly, if the victim only participates actively because she is in a state of dependence, her active participation is not considered legally valid. As the Swiss Federal Court stated: "Where the person is dependent on the offender, he or she is no longer entirely free in his or her decision to consent to or refuse sexual acts. In this situation, if the person allows sexual acts to take place and even gives his or her express consent and cooperation, the perpetrator is still punishable under Art. 193 if the person's dependence has made him or her comply".[34]

III. Finality of consent

In general, it is accepted that it is possible to validly consent to sex after saying "no" several times. On the other hand, no valid consent can be given in situations involving coercion, threats, intimidation, or physical force. However, the legal definition of coerced sex (rape and indecent assault) generally does not include less severe tactics (e.g., persuasion, emo-

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ab. Dies ist also strafbar und wird vom Tatbestandsmerkmal "gegen den Willen" erfasst.»).

32 BGE 146 IV 153consid. 3.5.6 ("Lassen sich Kinder im Alter wie vorliegend (achteinhalb- bis zehneinhalbjährig) ohne sich zu wehren in sexuelle Handlungen involvieren, kann daraus nicht auf eine freiwillige Mitwirkung geschlossen werden; es ist eine immer nur vermeintliche Freiwilligkeit.").

33 BGer, 6B_278/2011, 16.6.2011.

34 BGE 131 IV 114: "Ist [die Person] vom Täter abhängig, so ist sie in ihrer Entscheidung, in sexuelle Handlungen einzuwilligen oder sie zu verweigern, nicht mehr völlig frei. Duldet sie in dieser Lage sexuelle Handlungen, ja gibt sie dazu ihre ausdrückliche Zustimmung und Mitwirkung, so ist der Täter doch strafbar [nach Art. 193], wenn die Abhängigkeit der Person sie gefügig gemacht hat."

tional manipulation, promises) applied to autonomous adults. Therefore, mere persuasion is an accepted way of getting the other person to consent. Courts even assume that it might not be "uncommon" that in a relationship the man insists on sex, and the woman does not actually want it but then eventually (implicitly) agrees to it and "lets the man – albeit joylessly – have his way".[35] That being said, it might be difficult in specific cases to differentiate between persuasion and verbal coercion.

D. Intent as to lack of consent

For a conviction of rape or indecent assault (arts. 189 and 190), it is necessary to prove that the perpetrator acted intentionally. However, conditional intent ("Eventualvorsatz" or *dolus eventualis*) is enough. *Dolus eventualis* is defined in the second sentence of art. 12 para. 2 of the Criminal Code. According to this provision, a person is presumed to have intent "as soon as he regards the realization of the act as being possible and accepts this". Regarding the offence of rape, it is necessary to prove that the offender realized the possibility that the other party is not consenting and that he is coercing her and nevertheless proceeded with the sexual act, accepting that risk. It is important to note that the question of *mens rea* does not only apply to the element of non-consent but also to the element of coercion and the "conjunction of coercion and nonconsent".

The actor's honest belief in consent negates the *mens rea* of the offense, even if such belief was not based on reasonable grounds. However, the Federal Supreme Court has stated that verbal resistance must be taken seriously.[36] In rape cases involving physical violence or express threats of physical harm, proof of the *actus reus* usually is sufficient to establish *mens rea* with respect to coercion as well as non-consent.[37]

Currently, there is no offence in the Swiss Criminal Code that covers mere negligence with regard to sexual conduct. Instances of reckless conduct are, however, often considered to be *dolus eventualis*.[38] The only of-

35 Appellate Court of Zürich, OGer, SB110706 v. 23.4.2012 ("Es dürfte nicht selten vorkommen, dass in einer Beziehung der Mann auf Sex drängt, die Frau indes – ohne Nennung eines spezifischen Grundes – dies nicht will, sich dann aber schliesslich (implizit) doch damit einverstanden erklärt und den Mann, wenn auch freudlos, gewähren lässt.").

36 BGer 6B_1149/2014, 16.07.2015 consid. 5.11.

37 Scheidegger (note 11), at 219.

38 A special category of "recklessness" does not exist in Swiss Criminal Law.

fence covering negligent behaviour can be found in Art. 187 (Sexual Acts with Children), para. 4: "If the offender acts under the misconception that the child is 16 years of age or older, but he would not have made this error had he exercised due care, the penalty is a custodial sentence not exceeding three years or a monetary penalty."

E. Sexual offenses that do not require lack of consent

Some sexual offences do not require lack of consent. Regarding the offence of Art. 187, it is irrelevant whether the child gave factual consent, because children under the age of 16 years cannot give valid consent.[39] Similarly, mentally impaired person may not be able to give valid consent. However, the presence of their mere factual consent can help to differentiate between criminal exploitation of handicapped persons (Art. 191) and at least "factually" consensual sexual relations with mentally disabled persons, which are not illegal per se.

Arts. 188, 192, 193 cover several types of abuse of dependence and power relations. In these cases, the victim typically consents to the sexual acts but does so only because of her inferior position.[40]

39 But see above for the "close-in-age exemption in Art. 187 para. 2, allowing minors to consent to sex with partners three or fewer years older.

40 Cf. note 34.

Turkey

R. Barış Atladı

A. Consent as a Ground of Justification

This chapter deals with consent in sexual offenses. This topic has been problematic in Turkish law. Social, religious, and moral values have directly affected the criminal law on this subject as well as its implementation both today and in the past. Below, an attempt will first be made to introduce the consent of the concerned person as provided for in the Turkish Penal Code (TPC) as a general ground of justification; the subject will then be considered in detail with regard to sexual offenses.

The notion of "consent of the concerned person" was not mentioned in the former Turkish Penal Code (no. 765) of 1926. However, consent has been regulated explicitly as a ground of justification in Art. 26 para. 2 of the TPC of 2005:

> *"Art. 26 (2) No penalty shall be imposed in respect of any act committed as a result of the declared consent of another person, provided that such person has the full authority to give the consent."*

According to this provision, the consent of the concerned person renders any otherwise criminal act justifiable if the conditions mentioned in the provision are satisfied. The general conditions as to the validity of consent will be discussed here briefly before we will turn to the issue of justification by consent in the context of sexual offenses.

I. Capability to consent

The primary and fundamental condition for a valid declaration of consent is the person's capability to consent. In Turkish criminal law doctrine and practice, the capability to consent is not linked to the age of majority, which the Turkish Civil Code sets at 18 years, but to a person's ability to comprehend the purview and the consequences of his consent to the relevant act. However, the TPC explicitly defines the victim's age regarding the validity of consent to sexual acts (see below). In judicial practice, the

condition to have attained the age of 15 years, which applies to valid consents to sexual acts, is also used for other crimes, for instance, "deprivation of liberty" (Art. 109 TPC). This practice contradicts the general structure of capacity to consent. As will be explained in detail below, the capability to give consent to sexual acts is generally set at 18 years. With regard to younger persons, their capability depends on the nature of the sexual act. Whereas minors under the age of 15 years cannot validly consent to any sexual act, young persons between 15 and 18 years can consent to sexual acts other than sexual intercourse.

II. The Existence of a Personal Right that can be Disposed of

For consent to be a valid justification, it must concern a personal right of which the person concerned can dispose. For instance, the right to life cannot be disposed of, since Turkish law does not permit euthanasia. Even though sexual acts are, in principle, considered as absolutely disponible rights, the legislature has restricted the disposition of these rights depending on a person's age.

III. Declaration of Consent

For consent to be a valid justification, it must be declared explicitly or tacitly at the latest at the moment when the act is committed, and the existence of consent must continue during the whole time when the act is committed. While theoretically this rule also applies to sexual offenses, Turkish practice has adopted an approach in favor of the perpetrator if an initially declared consent is later withdrawn.

IV. Act Corresponding to the Declared Consent

For the perpetrator's act to be justifiable due to consent by the concerned person, the act must correspond to the scope of the consent. An intentional failure to correspond to the consent will lead to full criminal liability, whereas a negligent disregard of the limits of consent will engender liability for a negligent offense if such an offense exists (Art. 27 para. 2 TPC). In sexual offenses, exceeding the limits mostly occurs in connection with the withdrawal of consent.

B. Sexual Offenses in the Turkish Penal Code and the Relevance of Consent

I. Sexual Offenses in the TPC and their Reform

The former TPC of 1926 had directly transferred provisions of the Italian Criminal Code (Codice Zanardelli) into Turkish law. In that Code, which was amended several times, sexual offenses were defined in the chapter on crimes against moral values of the society and the family order. Moral and religious rules rather than individual and sexual freedom thus formed the background of the criminal offense definitions. For example, fornication was treated as a crime, while sexual abuse within a marital relationship was deemed an offense against the family order. The former TPC's focus on public morality remained intact until the new TPC entered into force. In the new TPC, which was influenced by the German Criminal Code, sexual offenses appear in the chapter on offenses against individuals and are defined as offenses against sexual integrity. It should be pointed out, however, that especially in light of judicial practice, one cannot conclude that sexuality is now approached from the aspect of freedom and that the attitude of male domination has been abandoned.

II. The Legal Interest Protected by Sexual Offenses

The definition of the legal interest protected by sexual offenses reflects the perspective of society and law on sexual freedom and also determines the scope of application of these offenses. As has been mentioned above, the TPC of 1926 prioritized the value of public morals and regulated sexual offenses in this context, whereas the TPC of 2005 treats them as part of the crimes against individuals. Although this change appears to denote a paradigm shift, in fact, paternalist and patriarchal approaches have endured when the new TPC was being drafted. This fact is manifested in certain offenses against sexual integrity. For example, the official Materials on the crime of sexual assault on an adult person (Art. 102 TPC) read as follows[1]: "Acts which constitute the qualified version of a sexual assault offense may be committed against the spouse. The marital union burdens spouses not only with the duty of loyalty but also with the mutual duty to satisfy each other's sexual desires. However, even in a marital union, it is

1 Official Reasons on TPC of 2005, https://www5.tbmm.gov.tr/sirasayi/donem22/yil01/ss664m.htm (accessed August 24, 2022).

certain that there are medical and legal boundaries concerning demands for the satisfaction of sexual desires. Any acts performed on the spouse which constitute the qualified version of the sexual assault offense and violate such boundaries require penal sanction. However, the initiation of an investigation and criminal proceedings are subject to a complaint of the victim." Although the official statement of reasons is not binding for the application of the law, it demonstrates that Turkish law does not focus on the protection of individual sexual autonomy when dealing with intrafamilial sexual assault.

A public morals approach toward sexual freedom and integrity manifests itself also in relation to sexual harassment (Art. 105 TPC). When defining sexual harassment, the official statement of reasons to this article declares: "Sexual harassment refers to a sexual disturbance of the victim contrary to moral purity." In determining whether an act is against moral purity, the courts rely on the concept of "average public morality". Therefore, relatively normal acts which are not treated as an offense in many jurisdictions are considered sexual harassment in Turkey.

A paternalist approach is dominant also with regard to sexual acts against minors. This approach leads to outcomes contrary to criminal law theory. For example, Art. 104 TPC raises the question of who is the victim and who is the perpetrator of consensual sexual intercourse by minors between the ages of 15 and 18; moreover, the definition of the legal interest protected by this crime is incompatible with criminal law principles as well as foreign legislation on the subject. Evidence for the paternalistic and moralistic approach that still prevails is also provided by the interpretation of Art. 116 TPC concerning the protection of the residence. Whereas the consent of a resident generally negates the wrongfulness of entering someone else's residence, paragraph 3 of that article provides that the consent of a minor is not sufficient for justification if it concerns entrance for the purpose of performing sexual acts. This is true even if the minor's consent to the sexual act is valid; the visitor is then still liable for punishment for illegal entering.

III. Assessment of the Consent of the Concerned Person

As mentioned in the general explanation, consent of the concerned person leads to the justification of an otherwise criminal act. With regard to certain crimes, however, consent negates even the commission of the offense itself (see, e.g., Arts. 90 para. 4, 99 para. 1, 116 para. 1, 132 para. 3 TPC). With regard to sexual offenses, the general opinion regards consent

as a ground of justification. But in offenses that require overcoming the victim's opposition (e.g., Arts. 102, 103 para. 1-b, 105), it is clear that the other person's consent eliminates the existence of force, threats, and fraud, which are parts of the crime definition. Therefore, the consent of the concerned person negates the typicality of these sexual offenses, as has been explained in legal literature.[2]

In each sexual offense, consent is subject to different validity conditions and has different effects on the punishability of the act. Therefore, the effects of consent must be examined separately for each sexual offense. Sexual offenses under the TPC are classified into two categories, depending on whether they require physical contact. Crimes with physical contact are sexual assault (Art. 102 TPC), child molestation (Art. 103 TPC), and sexual intercourse with persons below the legal age of consent (Art. 104 TPC). By contrast, sexual harassment (Art. 105 TPC) does not require physical contact.

1. Sexual Assault

The crime of sexual assault can be committed against persons who have attained the age of 18 years. According to the general commentary on the TPC and the doctrine, Art. 102 TPC protects the individual's sexual integrity, the right to his or her body, and sexual preferences. Contrary to the former Penal Code, social values such as good manners or morals are no longer the protected legal interest.[3] It is suggested that since the prohibition of sexual assault is to protect individual freedom, the objectively expressed consent of the concerned person is recognized as a valid justification.

Doctrine and practice recognize an exception to the punishability of sexual assault (Art. 102 TPC) with regard to married couples. According to this view, a sexual assault that does not involve the insertion of an organ or other object into the body cannot be committed between spouses, regardless of the spouse's consent.[4] The Supreme Court held that a husband who pulled his wife close and kissed her against her will did not commit a

2 *Fahri Gökçen Taner*, Türk Ceza Hukukunda Cinsel Özgürlüğe Karşı Suçlar (*Offenses Against Sexual Freedom in Turkish Criminal Law)*, 120.

3 *Mehmet Emin Artuk and Ahmet Gökcen*, Ceza Hukuku Özel Hükümler (*Criminal Law Special Provisions)*, 379.

4 *Artuk and Gökcen* (note 3), 383.

crime.[5] The Court reasoned that according to Art. 102 para. 2 TPC the prosecution of a spouse for sexual assault with penetration of the body requires the victim's complaint, while other forms of sexual assault are not mentioned at all in this provision.[6] According to another view, even Art. 102 para. 2 TPC (sexual assault with penetration of the body) cannot be committed against a spouse, based on the reasoning mentioned above.[7] According to this approach, only sexual assaults which exceed the medical and legal boundaries should be punished as crimes against the family order. From the perspective of autonomy and human rights, this view, which is based on concepts of male domination, patriarchy, and the sanctity of the family, cannot be accepted. Notably, some authors state that even sexual assault without penetration can be committed against one's spouse. They claim that the only purpose of Art. 102 para. 2 TPC is to provide for the necessity of a complaint if the assault occurred within the family. According to this view, Art. 102 para. 1 TPC already provides that the crime is prosecuted upon complaint, and therefore the word "spouse" need not necessarily be mentioned separately.[8] It should be noted that the conservative approach dominant in Turkish society and the tendency of criminal justice agencies to protect families considerably complicate prosecutions of sexual offenses committed against one's spouse.

In practice, a patriarchal perspective often prevails. Her lifestyle, her relationship status, and her past relations with the perpetrator are held against a woman who complains of having been victimized, the acts go unpunished, and this reinforces her helpless status. The Supreme Court, in its settled case-law, relies on concepts such as "the existence of hostility between the victim and the defendant", "contradictions between the victim's statements and the ordinary course of life", and "the victim failing to report the case for a long time without just cause" in order to put the victim's statements into doubt and to mark them as untrue, concluding that sexual intercourse must have occurred with the woman's consent.[9] Patriarchal views can also have the reverse effect, however. Many courts evaluate conflicting evidence in sexual offense cases on the assumption that a woman would not want to label herself a victim of a sexual offense

5 Supreme Court, 14th Criminal Chamber, Judgment 2014/1689.
6 *Artuk and Gökcen* (note 3), 383.
7 *Mahmut Koca and İlhan Üzülmez*, Türk Ceza Hukuku Özel Hükümler (*Turkish Criminal Law Special Provisions)*, 327.
8 *Taner* (note 1), 92; *Ali Kemal Yıldız*, 5237 sayılı Türk Ceza Kanunu (*Turkish Penal Code no. 5237)*, 213.
9 *Taner* (note 1), 263.

and thereby impair her status without cause; hence a woman who does take that step should be believed. Courts thus tend to override the maxim *in dubio pro reo* based on social moral rules and conventional wisdom.

Prevailing moral and religious standards in Turkish society regarding sexual freedom and autonomy also have an impact on the crime of prostitution (Art. 227 TPC). Although committing an act of prostitution has not been defined as a crime, those who are engaged in prostitution are defined as "persons who have been lured into prostitution", and Art. 227 para. 8 TPC provides treatment and psychological therapy for prostitutes.

2. *Child Molestation*

Like sexual assault under Art. 102 TPC, the crime of child molestation (Art. 103 TPC) requires some physical contact with the victim. According to Art. 103 TPC, only minors can be victims of child molestation. The term "minor" is defined in Art. 6 TPC as any person who has not reached the age of 18 years. The age of giving valid consent can be inferred from Art. 103 para. 1, subpara. a-b: Victims of child molestation can be persons younger than 15 years. Consent by children of this age group to any sexual act irrespective of its graveness and quality is legally invalid under any circumstances. But minors who are 15 years or older can also be victims of the crime under Art. 103 TPC if they "lack the ability to understand the legal (!) meaning and consequences" of relevant sexual acts. With good reason, doctrine and practice commonly hold that the term "legal meaning and consequences" does not refer to criminal law dogmatic. To be criminal, any sexual act against minors who have attained the age of 15 must have been committed "by force, threat, fraud, or any other means that affects the willpower", in line with Art. 103 para. 1-b TPC. In other words, any consensual sexual act with a healthy minor between 15 and 18 years is punishable only if force, threats, or fraud have been used before or during such activities. However, consent by a minor will be recognized only for acts that do not amount to sexual intercourse (Art. 104 TPC).

Regarding Art. 103 TPC, the definition of the terms "force, threats, and fraud" is not ambiguous, but questions are raised by the alternative "any other reason that affects the willpower". Examples cited in practice and doctrine refer to the victim being unconscious, asleep, under hypnosis, drunk, or drugged. The fact that the young person was offered money does

not generally affect her willpower,[10] but a false offer of money can amount to fraud.[11] With regard to force or threats, judicial practice tends to presume that a victim who fails to offer physical resistance to a sexual act can be considered to have consented; mere verbal protest is not deemed sufficient because the opposite view might lead to problems of proof. Acts of resistance such as crying out and calling for help may, however, be considered as significant evidence of a lack of consent. But a woman is deemed to have consented if she refrained from putting up an amount of physical resistance that could have prevented the sexual act in light of the accompanying circumstances.[12] The following excerpt from a Supreme Court judgment is illustrative of the courts' approach: "… it follows from the facts that, in a room where five persons were present, the accused held the victim by her leg and pulled her inside, but the victim remained silent. The grandmother who saw the event did not interfere. In the domestic environment, the victim was seen lying under the accused under a blanket. The victim nevertheless did not oppose the defendant, remained silent, and did not ask for help from those who were in the room then; no force was exerted in the event…".[13] There is no doubt that such an approach leads to secondary victimization of sexual offense victims, in particular those of intrafamilial sexual molestation. Such acts fall in a broad "grey area" in the framework of social structure and conventional attitude. The courts' approach, therefore, leads to many molestation cases going unpunished. In Turkey, most intrafamilial molestation cases are prosecuted only if the victim becomes pregnant or some legal conflicts arise between family members.

On the other hand, the present legislation on sexual molestation of minors leads to the criminalization of some consensual sexual acts between minors. At first sight, the legislation might be considered to represent a comprehensive approach toward the protection of minors' sexual freedom and integrity; but in fact, it leads to negative effects on the formation of gender identity and pedagogy. Under Art. 103 TPC, any sexual act, even without physical contact, between two minors under the age of 15 years will entail criminal responsibility for both. Since criminal responsibility in Turkey sets in at the age of 12 years, the criminal law covers any instance of sexual acts between minors if at least one of them is 12 years or older.

10 *Nurullah Kantarcı*, Reşit Olmayanla Cinsel İlişki Suçu (*Sexual Offense Against Minor*), 176.
11 Supreme Court, 14th Criminal Chamber, Judgment 2013/11802.
12 Supreme Court, 14th Criminal Chamber, Judgment 2014/10136.
13 Supreme Court, Assembly of Criminal Chambers, Judgment 1999/240.

There have in fact been cases where both minors were punished; in other cases, only the boy or the minor who was more active was taken to be the perpetrator. This practical experience as well as the unreasonably severe sanctions for sexual molestation (8 to 15 years imprisonment for molestation that does not include penetration of the body; 16 to 20 years imprisonment for molestation involving the insertion of an organ or another object into the body) led the legislator, in 2016, to enact a basic version of this crime, called sexual harassment, with a sentence range of three to eight years imprisonment. At the same time, the legislature required a victim's complaint for prosecution for sexual molestation without penetration.

The law also provides for aggravation of the offense if force or threats of force are used against a person younger than 15 years or younger than 18 years and lacking perception or willpower. With regard to any victim younger than 18 years, the use of a weapon leads to more severe penalties. The same applies where the perpetrator is in a relationship of supervision or influence, including within the family, over the minor victim (Art. 103 para. 3 TPC).

3. Sexual Intercourse with persons under 18 years

Perhaps the most problematic provision with regard to the role of consent concerns the punishability of consensual sexual intercourse between young persons older than 15 but younger than 18 years. Debates have arisen as to the legal interest protected by this provision. Although the doctrine predominantly argues that the minor's sexual integrity and freedom are the legal interest protected, it should be noted that this offense has been placed among the laws that are to protect public morals and prevent premarital sexual intercourse, based on social concerns.[14] Moreover, in a legal system in which one can be granted permission by a court to marry at the age of 16, it is impossible to understand that sexual intercourse based on the consent of a minor older than 15 years is a criminal act that can be prosecuted upon complaint. In enacting this provision, the legislature has evidently been moved by moral and social concerns. In my opinion, the high age threshold for sexual intercourse, which differs from many other jurisdictions, cannot be reconciled with the ultima ratio function of criminal law. I believe that this provision reflects the moralistic approach

14 *Kantarcı* (note 10), 95.

dominant in Turkish society as well as the legislature's paternalistic attitude toward the stability of gender identity.

In addition, this provision raises issues as to its content. Sexual intercourse for the purposes of this provision has been defined as the insertion of a man's sexual organ into a woman's vagina or man's or a woman's anus. Neither oral sex nor lesbian sex[15] of any kind falls under the definition of this crime. The Turkish legislature generally seems to adhere to the stereotype of male activity and female passivity. Another issue raised by this offense concerns the situation where both persons involved in sexual intercourse are in the 15 to18 age category. This situation has led to intensive debates as to who should be treated as the perpetrator and who should be regarded as the victim. The doctrine predominantly argues that the party who persuades the other person to engage in sex should be treated as the active party, whereas judicial practice tends to treat the young man as the perpetrator. Another issue concerns the impact of being granted majority has on the applicability of this provision. Majority can be declared by court decision as early as at the age of 15 years and can also be obtained through marriage, which is possible at 16 years. There is agreement that the right and obligation to have sexual relations in marriage provides a justification (Art. 26 para. 1 TPC) for sexual acts with one's spouse even if he or she is younger than 18 years. But the issue remains debated with regard to persons who have been granted majority by court decision and then have intercourse with persons not their spouse. In my opinion, consent that is declared by a young person granted majority should be recognized. But the question remains whether intercourse conducted without the young person's consent falls under sexual assault (Art. 102 TPC) or molestation of children (Art. 103 TPC).

For offenses that are only prosecuted upon complaint, the question arises whether a minor who has become a victim may file the complaint herself. The Supreme Court has answered that question in the affirmative. Yet, some authors as well as the Military Chambers of the Supreme Court[16] take the paternalistic view that it is not the minor herself but her parents that are entitled to make a complaint.

Another issue associated with this crime arises when a person has consensual sexual intercourse with a minor above the age of 15 who has run away from home. The Supreme Court held that this act was not covered by the offense of kidnapping and detention of a child (Art. 243 para. 3 TPC),

15 See Supreme Court, 14th Criminal Chamber, Judgment 2014/5373.
16 Supreme Court, Assembly of Military Chambers, Judgment 2007/44.

arguing that minors who have attained the age of 15 are free to go where they please for any purpose, hence their consent must be deemed lawful. But the legislature thereupon amended Art. 243 TPC, which now declares that a person who has intercourse with a minor of 15 years who had left his home without having notified his legal representatives or obtaining their consent is guilty of sexual intercourse with a person below the age of consent as well as of kidnapping or detention of a child.[17]

4. Sexual Harassment

Sexual harassment is an offense that significantly reflects the moralistic views of the public. As mentioned above, an act constitutes sexual harassment if it is "contrary to moral purity". This evidently is an ambiguous concept. Therefore, although the doctrine does not require sexual motives for being guilty of sexual harassment, the Supreme Court is inclined to regarding as sexual harassment certain acts which would be viewed as neutral in other jurisdictions, such as a dating proposal or a declaration of love. For instance, sending SMS messages that included "I love you"[18] or "Hi, how can I get you and win your heart?"[19] were treated as sexual harassment. But the victim's consent operates as a ground of justification with respect to sexual harassment, as emphasized in several decisions of the Assembly of Criminal Chambers of the Supreme Court.[20]

C. Consent in Turkish Criminal Procedural Law

The issues mentioned above on the validity of consent to sexual crimes also give rise to legal problems in evidence law. Theoretically, consent (not based on fraud) by the parties to a sexual act must exist from the first moment of such act and continue during the whole act.[21] Yet, it is difficult to establish in practice whether consent was declared. Courts take the perspective of protecting the woman in cases where the sexual act between the

17 Supreme Court, 14th Criminal Chamber, Judgment 2014/12496.
18 Supreme Court, 14th Criminal Chamber, Judgment 2015/9257.
19 Supreme Court, 18th Criminal Chamber, Judgment 2019/14439.
20 E.g., Judgment 2014/446.
21 Therefore, acts such as stealthing, which are controversial in other jurisdictions, are treated as criminal under Turkish law since they are not covered by the woman's original consent.

perpetrator and the victim was not based on intimacy and a relationship existing prior to such act. In several decisions, the Supreme Court argued, in that respect, that a woman "would not tell lies to the detriment of her chastity"[22] because she would thereby place herself in a difficult position in society. Likewise, the victim's statements can be taken to be credible if she "lacks reasonable or grave cause to slander the accused".[23] These arguments show that the courts are more influenced by public moralistic views than by general rules of criminal evidence. As a result of this tendency, courts have found that the woman consented to sexual intercourse on such shaky grounds as "contradictions in the victim's statements and her statements being contrary to the ordinary course of life", "following from the victim's allegations that she intends to excuse her situation in front of the community", "the victim denying the case for a long time without just cause", etc. When courts use a moralistic approach and base their findings on certain features of the victim, in particular, her lifestyle, way of dressing, alcohol use, and past extramarital sexual intercourse, this is bound to lead to secondary victimization of the woman concerned. It should also be noted that courts tend to refer to moralistic community standards predominantly in cases where the victim had initially consented but then withdrew her consent. If the initial declaration of consent is at issue, however, the possibility of withdrawal is not taken into account.

The main issue with regard to proving sexual crimes is the fact that many involuntary sexual acts are never brought before the courts. Many women or minors who became victims of sexual assault and molestation never disclose their trauma. This is due to problems that may follow from being labeled a victim of sexual crime in society as well as from the patriarchal approach predominantly adopted by police and prosecutors. These problems arise, in particular, in cases of intrafamilial sexual assault, minor victims of child molestation, and voluntary adolescent intercourse. Intramarital sexual assaults tend to be reported only where a divorce is imminent, and molestation of children becomes known only if the girl became pregnant and is seeking an abortion. Cases of intercourse between teenagers often become known to the authorities when the young person involved claims that she was raped in order to protect herself. Given this haphazard way of investigating and prosecuting such crimes, it cannot be said that there exist criminal justice or social mechanisms that can adequately protect victims of sexual assault.

22 Supreme Court, Assembly of Criminal Chambers, Judgment 2009/128.
23 Supreme Court, 5th Criminal Chamber, Judgment 2010/714.

D. Consent in Criminal Policy, Criminology and Victimology

Turkish lawyers and society at large engage in intense debates on how to deal with sexual offenses. Under the influence of many publications on the subject in the media and social media, the Turkish legislature amended the relevant provisions of the criminal law in 2014 and 2016. The gist of these changes was an increase in sentence levels for some sexual offenses and the introduction of new crime definitions with severe sentences, such as incestuous intercourse (Art. 104 para. 2 TPC). Sex offenders receive high sentences, and they cannot be released before having served three quarters of their sentence (which is a greater portion than in ordinary crime). Moreover, the legislature passed a new regulation providing for the chemical castration of sex offenders. This was however later stricken by the Council of State. It appears that the legislature opted for combatting sexual crime by increasing sanctions. But this approach failed to lower the rate of sexual offenses committed; and the stricter rules on serving sentences also failed to reduce recidivism.

The conservative and family-oriented patriarchal attitude that presently dominates Turkish society makes it difficult for many victims of sexual crime to find recognition. They can hardly expect that their complaints will even be adequately considered by public agencies. From a victimological viewpoint, it should be pointed out that learned helplessness poses a problem in Turkey, in particular with respect to victims belonging to the lower economic strata.

On the other hand, punishing sexual intercourse at an early age may raise certain issues in light of social and conventional reality in Turkey. Setting the age threshold for consent to sexual intercourse relatively high (if no complaint was made by the victim, by the attainment of the age of 15 years) can lead to punishment of young persons who are parties to a *de facto* existing partnership that is unproblematic from a conventional perspective (generally imam marriage). A draft law proposed in 2016 intended to eliminate this problem by providing that perpetrators of child molestation without using force or threat (consensually) committed before 16 November 2016 would not be punished or a sanction would cease to be executed if the perpetrator married the victim. The social reaction to this proposal was mostly negative, and the draft law was not enacted. The reason for the social rejection of the proposal lies in the reality of child brides who are forced to marry without their consent. The proposal had not limited the rule of impunity to cases of a small age difference between the perpetrator and the victim. The rejection of the draft law appears well-founded because there unfortunately still exists the reality that female children

are forced, against their will, to marry much older males in a religious ceremony. This custom is due to the socio-economic conditions in Turkey, the suppressed sexual identity development, and parents' recognized authority that enables them to make decisions in the name of their children. In fact, parents who oversee or encourage such marriages should be punished as perpetrators, by virtue of their status as guarantors, whereas in practice, such persons are not punished or punished only for assisting forced marriages. Some authors even suggest that the rule on mistake of law (Art. 30 para. 4 TPC) should apply to parents who allow such relationships (based on imam marriage) at an early age. By contrast, the age of consent to sexual acts between peer minors in Turkey is set extremely high. This leads to grave problems for adolescent parties in sexual relationships.

E. Conclusion and Assessment

The subject of sexuality and consent to sexual acts must be regarded as completely deadlocked in Turkish social and legal system. On the one hand, still-existing moralistic and religion-based attitudes in some parts of society allow for sexual intercourse at an early age so long as a religious marriage has been conducted; on the other hand, the same parameters are rigorously and strictly denied when sexual intercourse among minors occurs without a religious marriage. This split attitude is based on a paternalistic-moralistic approach. As for the legal order, in the course of secularization with the establishment of the Republic, the age of consent for sexual acts was set high to protect minors and to prevent them from becoming mere objects for sexual acts. To achieve this goal, severe sanctions for sexual molestation and incest offenses were prescribed. Yet, in my opinion, these measures are insufficient for preventing child molestation. Moreover, these legal rules have been implemented in a conservative and moralistic way, with the effect that peer adolescents were sent to prison for consensual sexual acts. A patriarchal and moralistic attitude also prevails in the legal enactment and its implementation with regard to marital sexual assaults. The emergence of a liberal socio-legal regulation of sexual behavior in Turkey is not likely to be realized as long as the social perspective towards consent to sexual acts and autonomy does not change.

United States

Aya Gruber[*]

A. Background

I. Attitudes in the United States toward Sex Crimes and Sex Crime Laws[1]

Most Americans, even sophisticated and critical analysts, believe that adding sex to a criminal law scenario radically changes the substantive law and state power equations. People across the ideological spectrum hold that sexual assault is of a totally different magnitude and character than nonsexual assault, that uninvited sexual compliments are more harmful than nonsexual insults, and that sexual commerce is distinct from nonsexual commerce. A person who commits a nonsexual assault during a fight is a hothead; a person who commits a sexual assault—sex without consent or even without an "affirmative expression of consent"—is a rapist. I have previously observed, "There is a deeply entrenched belief that sex is inherently more important than other forms of human labor, other endorphin-producing physical actions, and other human interactions that risk disease, injury, and pregnancy."[2]

Criminal law in the United States carves out the specific category, "sex crimes," and fits within that category diverse harmful behaviors—assaults, bribes, extortions, and commercial transactions. The criminal law's structure unites diverse misconduct involving sex under one umbrella and keeps the focus squarely on the "sex" and less on the "misconduct." Once conduct is characterized as *sexual* harm, it warrants a wholly different legal and sociocultural treatment than all nonsexual harm. Once a person is categorized as a *sex* offender, that person occupies a wholly different legal and sociocultural world than the one occupied by the most heinous nonsexual criminal actors. Furthermore, the problem of sex crime resonates

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1 The analysis and history here are drawn directly from Aya Gruber, *Sex Exceptionalism in Criminal Law* (article in progress, forthcoming *Stanford Law Review* 2023).

2 Aya Gruber, *Sex Wars as Proxy Wars*, 6 Critical Analysis L. 102, 106 (2019).

on the right and left and has become an indispensable trope supporting the carceral status quo. Thus, sex offenses and offenders are exceptional in several senses: worse than their nonsexual counterparts, punished more severely, and frequently exorcized from the progressive mass-incarceration critique.

For social conservatives, the sex-sin connection is both subconsciously felt and consciously defended. Modern progressives also maintain a reflexive position that sex crimes are the worst of the worst. Alternatively, progressives adhere to a canonical feminist view that sex crimes are particularly bad because they subordinate women, and the patriarchal state has long tolerated them. In the canonical progressive account, the history of American sexuality is one of ubiquitous predatory male libido celebrated by sexist society and enabled by feckless law enforcement. The underenforcement account resonates precisely because it reflects a modern conception of rape law as a subset of assault and battery law meant to protect people from private violence, based on gender-neutral principles of bodily integrity. Within this paradigm, the harm of rape is physical and psychological injury, and sex operates like any other aggravating factor that increases the severity of a physical assault. Indeed, the logic of battery law—that individuals have a right to be free from physical injury or offensive contact—has always been relatively uncontroversial.

However, from its inception in American criminal codes, sex-crime law was completely separate from assault and battery law, with a very different underlying structure and set of animating principles. Illegal sexual contact was not assault at all; it was "rape," "deviate sexual intercourse," "sodomy," "fornication," "adultery," "lewdness," and the like. In fact, in the nineteenth century, the word "rape" was not often uttered, the preferred parlance being that the man "outraged" or "ravished" the proper woman.[3] The crux of sex crime was not preventing physical injury but an array of goals, including vindicating religious mores, cabining nonmarital sex, and suppressing hedonism. Far from being a device to control male violence and liberate women, criminal rape law was born of the patriarchy and structured to control female sexuality. Indeed, when legal actors dis-

3 *See* Cyril J. Smith, *History of Rape and Rape Laws*, 60 Women Law. J. 188, 190 (1974); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 Iowa L. Rev. 1253, 1260–62 (2009) [hereinafter Murray, *Strange Bedfellows*] (lawmakers resisted term "marital rape" because marital sex was consensual per se); Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 Colum. L. Rev. 573, 578–84 (2016) [hereinafter Murray, *Rights and Regulation*] (discussing the "marriage-crime binary").

missed the rape claims of "unchaste" women, they did not fail to enforce rape law; they *enforced* it consistent with its purpose of policing female virtue. Chastity controlled rape's contours, creating a simple dichotomy: outraging a chaste woman was the worst crime imaginable, while forcing sex on an unchaste woman was nothing.

After the Civil War, controlling Black men's sexuality and providing cover for terroristic lynching campaigns also became primary influences on rape law.[4] Indeed, criminal sex law's substance and enforcement adapted to the sexual anxieties of the times: the post-Civil War fear of Black-male sexuality, the turn-of-the-century concern with urban vice, the Progressive-era preoccupation with hygiene, and the mid-century panic over "sexual psychopathy" and homosexuality. Over time, exceptional status extended from sex crimes to sex offenders, who became a discrete pathological subclass.

It was not until the late twentieth century that lawmakers and theorists began to rename "rape" and "deviate behavior" as "sexual assault and battery" and reconceptualize sex crime as nongendered physical violence rather than offenses to chastity, morality, and marriage. Civil libertarians and liberal feminists championed these changes to *separate* sex-crime law from its ancient patriarchal roots. Nevertheless, the canonical view that *the* problem with the criminal sex regime was sexist underenforcement prefigures a modern sensibility that liberation means constantly expanding criminal rape law to cover more types of harmful, even imperfect, sexual conduct. The move from force to consent was a manifestation of this sensibility.

During the so-called second wave of American feminism, beginning in the late 1960s, the sense that criminal law had always tolerated indiscriminate rape of women put rape law at the top of their agenda. From the 1970s to the 1990s, rape reformers highlighted cases in which rape-permissive courts, jurors, and lawmakers narrowly defined force to prohibit violently compelled sex but permit a wide variety of otherwise coerced sex (i.e., subtle intimidation, "pinning," or capitalizing on scary

4 *See generally* Estelle Freedman, Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation, chs. 5–6, 89–124 (2013); Hazel V. Carby, "*On the Threshold of Woman's Era": Lynching, Empire, and Sexuality in Black Feminist Theory,* 12 Critical Inquiry 262, 270 (1985); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581, 600 (1990); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 Harv. Women's L.J. 103, 118–21 (1983).

circumstances).[5] Thus, advocates sought to broaden the category of sexual incidents subject to criminal regulation. Some jurisdictions did this by expanding force to include more situations, for example, "emotional" or "moral" coercion.[6] Other jurisdictions broadened regulation by defining rape as sex without consent, rendering the defendant's coercive behavior (or lack thereof) mere circumstantial evidence of consent or irrelevant.

Feminists were concerned that so-called "date rapes" were underenforced, and they argued that nonconsensual sexual penetration with a date is as bad or *worse* than violent and forcible stranger rape and should be met with all the moral and penal reprobation directed at the latter.[7] The effort to elevate date rape to "real rape" upset the liberal program of grading rape along an injury and coercion axis, rather than a sexual-activity-specific axis with penetration on top. Reform transformed rape into a big-tent category covering forcible penetration, emotionally coercive penetration, noncoercive but nonconsensual penetration, and eventually penetration without affirmative consent.[8]

II. U.S Criminal Laws that Punish Sex without Consent

According to a recent survey by the reporters of the Model Penal Code (MPC) Sexual Assault Project,[9] thirty-six out of the fifty-three penal codes

5 Two Pennsylvania cases figure prominently in that critique. *See* Commonwealth v. Berkowitz, 609 A.2d 1338, 1347 (Pa. Super. Ct. 1992) (holding no "forcible compulsion" when complainant repeatedly said "no"), *aff'd in part*, 641 A.2d 1161 (Pa. 1994); Commonwealth v. Mlinarich, 498 A.2d 395, 396 (Pa. Super. Ct. 1985) (holding that adult guardian's threat to return fourteen-year-old to juvenile detention was not "forcible rape"), *aff'd*, 542 A.2d 1335 (Pa. 1988).

6 *See*, *e.g.*, State v. Eskridge, 526 N.E.2d 304, 306 (Ohio 1988) ("Force... can be subtle and psychological."); Commonwealth v. Rhodes, 510 A.2d 1217, 1226 (Pa. 1986) (rape may involve "moral, psychological or intellectual force"). Many feminists prefer the move toward broad coercion, rather than liberal consent.

7 *See e.g.,* Vernon R. Wiehe & Ann L. Richards, Intimate Betrayal: Understanding and Responding to the Trauma of Acquaintance Rape 43–45 (1995).

8 For proposals to scale rape law on a force/injury axis, see Meredith J. Duncan, *Sex Crimes and Sexual Miscues: The Need for a Clearer Line Between Forcible Rape and Nonconsensual Sex*, 42 Wake Forest L. Rev. 1087, 1112 (2007); Ian Ayres & Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. Chi. L. Rev. 599 (2005); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 Colum. L. Rev. 1780, 1785 (1992).

9 The Model Penal Code (MPC) is a model legislation promulgated by the American Law Institute (ALI). The MPC influences legislatures and courts, and some

in the United States (the codes of fifty states, Washington D.C.'s code, the federal code, and the uniform code of military justice) punish sexual penetration in the absence of consent, without requiring any showing of force, vulnerability, or refusal.[10] Three of these jurisdictions have felony provisions that appear to require the victim to communicate unwillingness. Twelve jurisdictions do not define consent, making it plausible that they require refusal or some other circumstances, leaving twenty-four that treat sex as a crime when there is lack of consent as determined under the totality of the circumstances ("contextual consent") or when the victim has not outwardly manifested affirmative agreement ("affirmative consent"). Of these twenty-four jurisdictions, fourteen designate the crime of nonconsensual sex a felony with penalties varying from five years in prison to life imprisonment, and ten make the crime a misdemeanor, with penalties ranging from ninety days in jail to one and a half years.

American sentences for nonconsensual sex, which range from a few months to presumptive life in prison, are not necessarily reflective of differences in levels of culpability. They are products of political priorities, drafting, and the idiosyncrasies of legislating. Consider, for example, that Vermont employs an affirmative consent standard that requires "*words or actions* indicating a voluntary agreement" and prescribes up to life in prison whenever there is sex without such words or actions,[11] while in Kansas, subjecting "another person to sexual contact without [their] consent" is a misdemeanor with a maximum of 90 days in jail.[12]

As indicated above, American jurisdictions define consent in varied and disparate manners. Some definitions of consent narrow the scope of the criminal offense and some make criminal liability extremely broad and therefore mediated only by prosecutorial discretion. The narrowest construction of nonconsent, and thus the standard most favorable to defendants, is one that requires the *victim* to communicate some unwillingness or refusal. In New York, for example, sex without express or implied

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jurisdictions like New York and New Jersey have adopted it nearly in full. Scholars and lawmakers have long criticized the sexual assault provisions of the Code as badly outdated. The project to revise and update those provisions began in 2012 and ended in 2021 with a final draft approved by the ALI membership. I was one of about 40 advisers to the project.

10 Stephen J. Schulhofer & Erin E. Murphy, Current State of the Law-- Consent-Only Offenses (July 2017) (on file with author). *See also* Model Penal Code: Sexual Assault and Related Offenses 268–70 (Am. L. Inst.., Tentative Draft No. 5 2021, membership approved) [hereinafter MPC TD 5].

11 Vt. Stat. Ann. tit. 13, §§ 3251–3252, 3271 (West 2022).

12 Ky. Rev. Stat. Ann. §§ 510.130, 532.090 (West 2022).

consent is a misdemeanor,[13] but sex when "the victim clearly expressed that he or she did not consent" is a felony.[14] Ten of the twenty-four jurisdictions that outlaw nonconsensual sex permit the jury to determine whether the victim has consented from the totality of the circumstances. In these jurisdictions, the focus is often not on the victim's language (whether they expressly refused or agreed) but on the victim's state of mind. The circumstance that renders sexual activity a crime is the lack of *internal* willingness on the part of the victim. Of course, factfinders determine whether the victim was internally willing by looking at what both parties said and did in context.[15] Nevertheless, contextual consent standards depart significantly from affirmative consent standards that focus solely on whether agreement to sex has been sufficiently *communicated*, not whether it internally exists. The difference between contextual and affirmative consent will be discussed in detail further below.

The newly approved Model Penal Code sexual assault provisions criminalize sex without consent as a 5th degree felony (maximum three years). Section 213.6, Sexual Assault in the Absence of Consent, provides that a person is guilty when the person "causes another person to submit to or perform an act of sexual penetration or oral sex, and the other person does not consent."[16] The penalty goes up to five years if, in addition, "the other person has, by words or actions, expressly communicated unwillingness to submit to or perform the act, or the act is so sudden or unexpected that the other person has no adequate opportunity to express unwillingness before the act occurs."[17] The MPC adopts a contextual consent approach

13 N.Y. Penal Law § 130.20 (McKinney 2022).

14 N.Y. Penal Law § 130.05(2)(d) (McKinney 2022); *see also* Neb. Rev. Stat. Ann. §§ 28–318(8), 319(1) (2022).

15 I use the term "victim" to refer to the person who claims to have been the subject of the criminal sex act and the term "accused" to refer to the person who is accused of committing the criminal sex act. I realize that both terms are problematic. Some would, for example, prefer that the person I am labeling a "victim" be referred to as an "alleged victim," "complainant," or "accuser," while others would say that such terms presume that women do not tell the truth about rape. Some prefer the term "survivor" to "victim" for political reasons. I choose the word "victim" for clarity purposes *only* and not to comment on either the credibility of those who claim to have been subject to sexual crimes or how those crimes affect people's lives. Similarly, some would say that "accused" is depersonalizing and dehumanizing language, while others would prefer more reprobative language like "offender" or "perpetrator." I use "accused" simply to designate the person who is alleged to be the sexual wrongdoer.

16 MPC TD 5, *supra* note 10, § 213.6(1).

17 *Id.* at § 213.6(1).

and defines consent, not as an expression, but as "willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact."[18]

Unlike affirmative-consent statutes that specify that there cannot be consent unless the victim engages in a sufficient "affirmative expression," the MPC provides that "consent may be express or it may be inferred from behavior—both action and *inaction*—in the context of all the circumstances."[19] However, the MPC also adopts a controversial "no means no" interpretation of consent. It states, "A clear verbal refusal—such as "No," "Stop," or "Don't" —establishes the lack of consent."[20] This means that even if a jury could reasonably conclude that, in the context of the specific sexual encounter, the person who said "no" did not mean it (e.g., the encounter otherwise appeared mutually agreeable and the person was laughing when they said "no"), the mere utterance of the word "no" compels the jury to find that consent was lacking. While this may seem unfair, the standard does have the benefit of controlling sexist jurors who are inclined to always believe that "no means yes."

III. The Legal Operation of Consent in American Criminal Law

As observed above, the lack of consent frequently operates as substantive element of the crime of sexual assault (also called rape, sexual battery, gross sexual imposition, and other names). Nonconsent, standing alone, renders sexual activity a crime. Consent can also be a defense to rape and sexual assault crimes that require physical force or compulsion. The law on when consent can be used to negate the actus reus of force or when the accused's belief that there is consent can negate mens rea regarding force is sparse and often contradictory. One well-known 1989 case from Connecticut, *State v. Smith*,[21] involved a man who imposed sex on a woman despite her saying "no," kicking him, and spitting on him. He was convicted of first-degree sexual assault, which required "compel[ling]" sex by "threat" or "use of force." The man argued that he believed the victim consented to the sexual intercourse. On appeal, the court observed that "[a] finding that the complainant had consented would implicitly negate a claim that the actor had compelled the complainant by force or threat

18 *Id.* at § 213.0(2)(e).
19 *Id.* (emphasis added).
20 *Id.*
21 554 A.2d 713 (Conn. 1989).

to engage in sexual intercourse." Because consent operated to negate the element of compulsion by force, the prosecution had an obligation to prove beyond a reasonable doubt that the victim did not consent to the sex. The court nonetheless upheld the conviction because there was "more than sufficient" evidence to conclude that the victim did not consent.

Cases like this left open the question of what to do about consent to force in cases where it was plausible that the victim agreed to a degree of force beyond that inherent in the sexual activity. In another well-known case, the 1998 Pennsylvania case *Commonwealth v. Fischer*,[22] the accused was convicted of aggravated indecent assault, which required proof that the accused used "forcible compulsion" to obtain sex. The incident involved the accused physically restraining the victim and forcing her to engage in oral sex. Both parties testified that a couple of hours prior to the incident, the two were in the accused's dorm room engaging in sexual activity. The accused characterized the prior encounter as "rough sex" where the victim restrained him and engaged in various forceful activities. He argued that this, along with the victim saying she had time for "a quick one," reasonably led him to believe the victim wanted to engage in a similarly rough second encounter. The court, expressing some discomfort with their ruling, held that under the legislative scheme a reasonable belief that the sex (and the physical force accompanying it) were consensual was immaterial to the charge. Thus, no matter the strength of the evidence that a victim consented to "rough sex," the very fact that the accused used physical violence was enough to sustain the criminal charge.

By contrast, in the New York case *People v. Jovanovic*,[23] the accused was convicted of sexual assault and other crimes arising from an incident where he tied up the victim, poured hot wax on her, and subjected her to forcible penetration. The appellate court reversed the conviction because the trial court had excluded emails in which the victim expressed interest in BDSM,[24] noting that such evidence was relevant to "complainant's state of mind on the issue of consent, and [the accused's] own state of mind regarding his own reasonable beliefs as to the complainant's intentions." Still, the cases that outright declare that consent is a defense to forceful and even injurious sex are few.

The MPC draft addresses this gap in the law by creating a novel, and very detailed, "Affirmative Defense of Explicit Prior Permission":

22 721 A.2d 1111 (Pa. Super. 1998).
23 700 N.Y.S. 2d 156 (N.Y. App. Div. 1999).
24 Bondage, Discipline, Sadism, and Masochism.

Section 213.10. Affirmative Defense of Explicit Prior Permission

(1)It is an affirmative defense to a charge under this Article that the actor reasonably believed that, in connection with the charged act of sexual penetration, oral sex, or sexual contact, the other party personally gave the actor explicit prior permission to use or threaten to use physical force or restraint, or to inflict or threaten to inflict any harm otherwise proscribed by Sections 213.1, 213.2, 213.4, 213.7, or 213.9, or to ignore the absence of consent otherwise proscribed by Section 213.6.

(2) Permission is "explicit" under subsection (1) when it is given orally or by written agreement:
   (a) specifying that the actor may ignore the other party's expressions of unwillingness or other absence of consent;
   (b) identifying the specific forms and extent of force, restraint, or threats that are permitted; and
   (c) stipulating the specific words or gestures that will withdraw the permission.

   Permission given by gestures or other nonverbal conduct signaling assent is not "explicit" under subsection (1).

(3) The defense provided by this Section is unavailable when:
   (a) the act of sexual penetration, oral sex, or sexual contact occurs after the explicit permission was withdrawn, and the actor is aware of, yet recklessly disregards, the risk that the permission was withdrawn;
   (b) the actor relies on permission to use force or restraint or ignore the absence of consent at a time when the other party will be unconscious, asleep, or otherwise unable to withdraw that permission;
   (c) the actor engages in conduct that causes or risks serious bodily injury and in so doing is aware of, yet recklessly disregards, the risk of such injury...

B. Requirements for Valid Consent

I. Consent and Capacity

In the United States, the law generally categorizes the conditions that negate capacity to consent—youth, physical helplessness, mental incapaci-

ty, intoxication—as specific crimes or crimes of "incapacity," rather than nonconsent crimes. The laws in the United States that regulate sex between minors and adults and among minors are many, divergent, and too detailed to report here. In addition, intoxication can operate as an independent circumstance that renders sex illegal. Finally, various other incapacities, both internal and external, physical and mental, render sex a crime and are often criminalized under blanket incapacity provisions.

Age

It would be misleading and inaccurate to describe the operation of age in U.S. sex-crime law simply as a circumstance that negates the capacity of the victim to consent to sex. Were it so, laws in the U.S. would designate a threshold age of capacity and designate sex with anyone under that age as sex without consent. This is *not* what most U.S. laws do. Although some jurisdictions define age-based crimes solely by reference to the victim's age, especially for very young victims, most states' sex-crime laws contain a variety of age-based crimes that involve different age cliffs for victims and accuseds and intricate schemes for when sex between people of different ages is prohibited. The age of victim, accused, or both can be independent grounds for criminal liability, or they may serve as aggravators that enhance the penalties of other sex crimes.

There is no coherent logic in the operation of age in American sex-crime law. As the MPC reporters note:

> A comprehensive review of all existing law governing sexual offenses committed by and against minors, as well as of secondary sources compiling and analyzing this material, reveals a body of law that defies logic. Jurisdictions exhibit marked variation in the structure of their schemes, the ages for liability, the use of defenses versus elements in defining applicable age thresholds and age gaps, the penalties imposed, the use of specialized statutes (such as "continuous sexual abuse") and the manner in which prohibited behavior is defined.[25]

25 MPC TD 5, *supra* note 10, at 399.

The MPC reporters offer the following illustration of states' age-based laws:

> Colorado has a general sexual-assault provision that punishes sexual penetration of a person younger than 15 where the actor is at least four years older, or 15 to 17 where the actor is at least 10 years older. The under-15 offense is a felony punishable by up to six years in prison; the 15-to-17 offense is a misdemeanor. The state punishes sexual contact with a minor under 15, where the actor is four or more years older, with up to six years in prison. Colorado courts have upheld strict liability for age-based offenses....[26]
>
> Montana provides that persons younger than 16 are generally incapable of consent. It then penalizes sexual intercourse with a person younger than 16. If the actor is 18 or older, and the complainant 12 or younger, the offense is a 100-year felony. If the complainant is at least 14 and the actor is 18 or younger, then the offense is a five-year felony. The statutory scheme also penalizes sexual contact with a person younger than 14 by an actor three or more years older as a six-month misdemeanor. The scheme also punishes incest, which includes siblings of the whole or half-blood, ancestors, descendants, and stepchildren, as well as adoptive relationships, with life imprisonment or 100 years.... Montana permits a defense of reasonable mistake for statutory cases that depend on the victim being younger than 16, but forecloses it if the complainant is younger than 14.[27]
>
> Delaware provides that generally children under 16 cannot consent to sex with a person more than four years older, and that children under 12 cannot consent at all. Generally there is no mistake-of-age defense, but an actor no more than four years older than a complainant aged 12 to 16 may offer a defense of the complainant's consent. The most serious statutory offense permits a life maximum for intercourse with a complainant under 12 by an actor 18 or older under specific aggravating circumstances. Next is a 25-year felony for sexual penetration of a complainant under 12 by an actor 18 or older, as well as for intercourse between a complainant not yet 16 with an actor 10 years

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26 *Id.* at 400 (first citing Colo. Rev. Stat. § 18–3–402(1)(d)–(e) (2018); then citing § 18–3–402(2)–(3); then citing § 18–3–405(1)–(2); then citing People v. Salazar, 920 P.2d 893, 895–896 (Colo. App. 1996)).

27 *Id.* (first citing Mont. Code Ann. § 45–5–501(b)(iv) (2019); then citing § 45–5–503(1)–(2), (4)(a)(i), (5); then citing § 45–5–502(2)(a), (5)(a)(ii); then citing § 45–5–507(1)–(3); then citing § 45–5–511(1)).

older, or a complainant not yet 14 with an actor 19 or older; then a 15-year felony for intercourse or penetration of a complainant under 16, or intercourse with a complainant not yet 18 and an actor 30 or older.[28]

The MPC draft's new scheme is no less complicated, although it is quite a bit more permissive of teenage sex than other schemes. The following charts out the MPC's age scheme:

AGE of CW	Liability	Penalty	Provision
Over 18	*Can consent to sexual penetration, oral sex, or sexual contact with any person*		
16 to 18	Can't consent to penetration or oral sex by parental figures, grand parental figures, guardians over 18	3rd degree felony	213.8(2)
	Can't consent to penetration or oral sex with authority figures exploiting their authority who are more than 5 years older	5th degree felony	213.8(3)
	Aggravated punishment for sexual contact when actor more than 5 years older, and contact occurs in circumstances akin to 213.1 – 5 or 213.8(2) or (3) (force, vulnerability, extortion, incest, authority role)	4th degree felony	213.8(5)
	Can consent to sexual penetration, oral sex, and sexual contact with persons any age, other than parental or authority figures.		
12 to 15	Can't consent to penetration or oral sex by an actor more than 5 years older	Actor 21+, 4th degree felony Actor 17–21, 5th degree felony	213.8(1) 213.8(1)
	Can't consent to penetration or oral sex by parental figures, grand parental figures, guardians, etc. over 18	3rd degree felony	213.8(2)
	Can't consent to penetration or oral sex with authority figure exploiting authority and more than 5 years older	5th degree felony	213.8(3)
	Can't consent to fondling by an actor more than 7 years older	5th degree felony	213.8(4)
	Aggravated punishment for sexual contact when actor more than 5 years older, and contact involves circum-	3rd degree felony	213.8(5)

28 *Id.* at 401–02 (first citing Del. Code Ann. tit. 11, § 761(l) (2019); then citing § 762(a), (d); then citing § 777(a); then citing § 773(a)(5), (c); then citing 772(a)(2)(g); then citing § 4205(b); then citing § 771(a)(1); then citing § 770; then citing §§ 768–769; then citing § 766).

	stances akin to 213.1 – 5 or 213.8(2) or (3) (force, vulnerability, extortion, incest, authority role)		
	Can't consent to sexual contact, including tongue touches, with actor more than 7 years older	misdemeanor	213.8(6)
	Can consent to penetration and oral sex with peers within 5 years and fondling and sexual contact with peers within 7 years		

Under 12	Can't consent to penetration or oral sex by any person more than 5 years older	Actor 21+, 3rd degree felony	213.8(1)
	Can't consent to penetration or oral sex by parental figures, grand parental figures, guardians, etc. over 18	3rd degree	213.8(2)
	Can't consent to fondling by an actor more than 5 years older	Actor 21+, 4th degree felony Actor under 21, 5th degree felony	213.8(4)
	Aggravated punishment for sexual contact when actor 5+ years greater, and contact involves circumstances akin to 213.1 – 5 or 213.8(2) or (3) (force, vulnerability, extortion, incest, supervisory role)	4th degree felony	213.8(5)
	Can't consent to sexual contact, including tongue touches, with actor more than 5 years older	Actor 21 or more, 5th degree felony; Actor 12–21, misdemeanor	213.8(6)
	Penetration, oral sex, fondling, and sexual contact with peers within 5 years are not punished, but may be subject to other regulatory systems (e.g., family welfare etc.)		

Reminders:

- For all offenses under section 213.8, section 213.0(2)(g) requires the actor be 12+ years of age.
- For any offenses that uses force or threats, causes serious bodily injury, or occurs in any condition or circumstances covered by 213.1–.7 (including lack of consent), those offenses and their associated penalties apply.
- Section 213.8(9) provides a defense of marriage for offenses based solely on age.

Intoxication

Like age, intoxication is frequently an independent ground for criminal sex liability. Some jurisdictions have specific sections that specify when intoxication renders sex a crime, while in others, intoxication is one of several conditions that make a person "physically helpless" or "mentally incapacitated." Twenty-four jurisdictions have dedicated provisions for "involuntary intoxication," that is, situations where a person surreptitiously administered intoxicating substances to the victim for the purpose of causing the victim's submission to sex.[29] Intoxication can also be a condition rendering a person "incapacitated" under sex-crime incapacity statutes. Some of those statutes require that the intoxication be involuntary, for example, Connecticut, which defines "mentally incapacitated" as "temporarily incapable of appraising or controlling such person's conduct owing to the influence of a drug or intoxicating substance administered to such person without such person's consent, or owing to any other act committed upon such person without such person's consent."[30] Others extend the criminal liability to cases involving "voluntary intoxication." For example, Alabama defines "incapacitated" as "temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or intoxicating substance."[31]

In jurisdictions that criminalize sex with a voluntarily intoxicated person, the inevitable question is "How drunk is too drunk?". Sex with a person who is intoxicated to the point of unconsciousness is clearly a crime under the provisions that prohibit sex with an unconscious or sleeping person. The harder line to draw is when sex with an intoxicated but still conscious person should garner criminal penalties. Many statutes define the threshold level of intoxication as the person being *unable* to resist, communicate consent, control their actions, or "appraise the situation." Others hold that the intoxication need only "substantially impair" the

29 *See, e.g.*, Colo. Rev. Stat. § 18–3–402(4)(d) (2018) ("The actor has substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission."); Del. Code Ann. tit. 11, § 761(k)(5) (2019) ("The defendant had substantially impaired the victim's power to appraise or control the victim's own conduct by administering or employing without the other person's knowledge or against the other person's will, drugs, intoxicants or other means for the purpose of preventing resistance.").

30 Conn. Gen. Stat. Ann. § 53a-65(5) (2019).

31 Ala. Code § 13A-6–60(2)(b) (2019).

victim's abilities. And a few indicate that almost *any* level of intoxication can give rise to criminal liability. For example, Iowa requires only that "the other person was under the influence of [a] controlled substance."[32] One California court specified that a victim meets the legal definition of incapacitation by intoxication when the victim "would not have engaged in intercourse with [the defendant] had she not been under the influence."[33]

Courts interpret broadly the phrase "inability to appraise the situation" and require the intoxicated victim to exhibit a level of clarity about the meaning of the sex that even sober people often do not have. Such interpretations that require that the intoxicated victim exercise "reasonable judgment" about the sex can even be moralistic and puritanical. One California appeals court declared that intoxication is incapacitating unless "the woman is able to understand and weigh the physical nature of the act, its moral character, and its probable consequences."[34] Courts have regularly upheld convictions on the basis that a victim was too drunk to "appreciate the consequences of [her] actions."[35] The MPC draft sets its line for voluntary intoxication at "physically unable to communicate lack of consent."[36] The Reporters explain, "Someone under the influence of a heavy narcotic or sedative who is glassy-eyed, staring, and paralyzed may be 'physically unable to communicate.' But an intoxicant that renders a person's speech sloppy but not 'unable,' or that affects *mental* coherence cannot satisfy Section 213.3(1)(b)(i)."[37]

Finally, let me note that the accused's intoxication—even if more severe than the victim's—is *not* a defense to sex with an intoxicated and incapacitated person in most jurisdictions. Although the more liberal MPC allows a voluntary intoxication defense for crimes requiring high intent levels (purpose and knowledge), the default intent level for sex crimes is "recklessness," and the MPC declared long ago, for policy reasons, that this mental state could not be negated by the accused's intoxication.

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32 Iowa Code § 709.4(c) (2021).
33 People v Giardino, 98 Cal. Rptr. 2d 315, 327 (Cal. Ct. App. 2000).
34 People v. Smith, 120 Cal. Rptr. 3d 52, 56 (Cal. Ct. App. 2011) (internal quotations omitted).
35 *See, e.g.*, State v. Al-Hamdani, 36 P.3d 1103, 1108 (Wash. Ct. App. 2001).
36 MPC TD 5, *supra* note 10, at § 213.3(1)(b)(i).
37 *Id.* at 199.

Other incapacities

Criminal laws in the United States outlaw sex under a variety of circumstances where the victim has an incapacity under "physically helpless," "mentally incapacitated" and "unconsciousness" provisions. Uncontroversial situations involve persons who cannot physically communicate because of restraints or paralysis, comatose and unconscious persons, and people with extreme mental divergences that make them unable to communicate. Things get trickier, however, in specific situations. One such situation is when spouses or other long-term partners engage in "wake-up sex" or "morning sex," that is, when one partner begins sexual intercourse with a sleeping partner with the expectation that the partner will wake up and enjoy the sexual activity. Such sex falls squarely under unconscious/sleeping provisions. Currently, only a handful of states make exceptions to the sleep provision for married couples, and none make an exception for non-married long-term couples that may have a pattern of engaging in "wake-up" sex. Still, the MPC Reporters were unmoved by the argument that there should be an exception for long-term partners with a history of wake-up sex. They explain:

> "Even the act of rousing a sexual partner with a sexually intimate act is often preceded by physical touches that first stir the other person from unconsciousness. But to the extent that an actor engages in an act of sexual penetration or oral sex with a fully unconscious individual, who then awakens to the sensation of that penetration, it is the actor who assumes the risk that the penetration or oral sex is not in fact welcome."[38]

Another controversy arises over the ability of people who are mentally and psychologically divergent to legally consent to—and thus be able to have—sex. On the one hand, people with physical and psychological divergences can be vulnerable to coercion and manipulation into sexual activity that physically and emotionally harms them. On the other, the presumption that differently abled people cannot choose to have sex not only denies this category of people sexual liberty it also tracks with moral and eugenic reprehension at the thought of differently abled people engaging in sex and reproduction. Nevertheless, U.S. jurisdictions widely presume that people with significant intellectual, mental, and psychological divergences cannot consent to sex. Many of these laws contained language that today is seen

38 *Id.* at 152.

as discriminatory, ableist, and dehumanizing. Although most legislatures have eliminated use of terms like "imbecile," "feeble minded," "idiot," and "retarded," legislatures continue to widely criminalize sex with people they designate as "mentally defective."[39] Moreover, case language often emphasizes that immorality is the primary reason for not allowing sex with and among the "mentally defective." One court opined, "An understanding of coitus encompasses more than a knowledge of its physiological nature. An appreciation of how it will be regarded in the framework of the societal environment and taboos to which a person will be exposed may be far more important. In that sense, the moral quality of the act is not to be ignored."[40]

II. Consent and Coercion

Coercion by Physical Force or Threat

In the Connecticut *State v. Smith* case, discussed above, the court maintained that a finding of consent to sex would impliedly negate a claim that the sex was the product of forcible compulsion. One big problem with the court's analysis is that it did not address *timing*. A person who says "yes, yes, yes" in the face of an uplifted knife cannot be said to have consented. The issues that arise when the accused claims that the victim consented to the *force* itself (e.g., the BDSM situation) are addressed above. Nevertheless, it is well-settled in the United States that forcible compulsion negates consent, despite any appearances to the contrary. Most statutory regimes have separate provisions for forcible sex that are graded as or more seriously than nonconsensual sex. A person who compels sex by physical force or coercion can be held liable under either the force or nonconsent provisions of a criminal code.

Things get trickier, however, when the coercion is more subtle,for example, when the accused is big and intimidating looking, the victim is isolated, and the sex occurs in the middle of the night, and under other scary circumstances not necessarily related to the accused's actions. Of course, a victim's undisclosed fear may establish that the victim *in fact* felt coerced, but the prosecution would have a harder time proving intent—

39 Jasmine E. Harris, *Sexual Consent and Disability*, 93 N.Y.U. L. Rev. 480, 521–22 (2018).

40 People v. Easley, 364 N.E.2d 1328 (N.Y. 1977) (internal citation omitted).

that the accused knew or should have known that the victim felt coerced—especially if the victim feigned consent. In such cases, a jury might find that the scary circumstances did amount to force or threat, or alternatively, it might find that although not a forcible rape, the scary circumstances were evidence that the sex was not consensual.[41]

Coercion by Status

American law recognizes that certain relational power imbalances negate a victim's ability to consent to sex. However, as with age, there are a variety of approaches regarding which relationships preclude the parties from having sex. Some laws expressly forbid sex between people in certain status relationships, while others specify that the existence of such a relationship creates a rebuttable presumption that sex is not consensual. States widely criminalize sex between people within a relationship of custodial authority. All fifty states forbid sexual intercourse between a prison guard and a person detained in prison, and they either explicitly or implicitly eliminate consent as a defense in such cases.[42] The MPC draft also criminalizes such relationships, prohibiting a person in a supervisory position from having sex with a person "in custody, incarcerated, on probation, on parole, under civil commitment, in a pretrial release or pretrial diversion or treatment program, or in any other status involving a state-imposed restriction on liberty." The MPC makes an exception for cases where the two people had a preexisting sexual relationship.[43]

States also prohibit sex between doctors and patients, between therapists and those in their care, and between care-workers and people in hospital settings.[44] Several jurisdictions do not criminalize sex between a therapist and patient per se, but only when the therapist "use[s] the position of trust or power to accomplish the sexual contact."[45] States also prohibit sexual

41 *See, e.g.*, People v. Iniguez, 872 P.2d 1183 (Cal. 1994) (finding force requirement satisfied when the accused awoke the victim, a houseguest sleeping in the living room, quickly penetrated her, ejaculated, and left); State v. Eskridge, 526 N.E.2d 304, 306 (Ohio 1988) (Force... can be subtle and psychological.").

42 *See, e.g.*, Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety,* 15 Colum. J. Gender & L. 185, 187–188 (2006).

43 MPC TD 5, *supra* note 10, at § 213.3(3).

44 Alaska Stat. Ann. § 11.41.420(a)(4) (West 2019); N.D. Cent. Code Ann. § 12.1 – 20–06 (West 2021).

45 Tenn. Code. Ann. § 39–13–527(a)(3) (West 2021).

relations between older teens (16, 17, and 18) and persons in a position of trust, such as a teacher, coach, cleric, doctor, or scout leader.[46]

Coercion by Deception

Closely related to coercion by status, there are various situations where deceptions render consent to sexual activity invalid. Many jurisdictions prohibit authority figures like a clergy member, doctor, therapist, or counselor—or someone holding themselves out to be one—from falsely representing that sex is part of treatment. The Model Penal Code draft does not require that the accused be or pretend to be an authority figure but simply that the accused's false claim that the sex "had diagnostic, curative, or preventive medical properties... caused the other person to submit."[47] This would cover both "fraud in factum" cases where, for example, the victim believes they are undergoing a gynecological exam, and "fraud in the inducement," where the victim believes that sex is part of the healing process. Another fraud commonly prohibited by criminal statutes is when the accused pretends to be the victim's spouse, significant other, or sexual partner.[48] The MPC draft expresses this as "the actor caused the other person to believe falsely that the actor was someone else who was personally known to that person."[49]

Increasingly, states have criminalized deceptions regarding health status, but interestingly, only one health status generally counts—HIV status.[50]

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46 Ohio Rev. Code Ann. § 2907.03 (West 2019).

47 MPC TD 5, *supra* note 10, at § 213.5(1).

48 People v. Hough, 607 N.Y.S. 2d 884, 885–87 (N.Y. Dist. Ct. 1994) (accused led victim to believe he was her boyfriend, his twin brother); Mathews v. Superior Court, 173 Cal. Rptr. 820, 821 (Cal. Ct. App. 1981) ("[D]efendant sexually fondled and caressed a woman as she slept in the bed she usually shared with another man. The bedroom was dark and she assumed, as defendant intended, that he was the bedmate.").

49 MPC TD 5, *supra* note 10, at § 213.5(1)(b)(ii).

50 Colo. Rev. Stat. Ann. § 18–3–415.5 (West 2018) (outlining mandatory sentences where the actor failed to disclose HIV status before committing a sexual penetration, defined pursuant to Colo. Rev. Stat. Ann. § 18–3–401(1.7), (6) (West 2018)); Mich. Comp. Laws Ann. § 333.5210 (West 2019) (defining failure to disclose HIV status to an intercourse partner as a felony if HIV is transmitted, or a misdemeanor if not); N.J. Stat. Ann. § 2C:34–5(b) (West 2019) (defining the sexual penetration of a person without "informed consent" of the actor's known HIV status as a "crime of the third degree").

For the most part, other contagious diseases that might be passed through the act of sex do not merit such treatment.[51] Because of the discriminatory origins of such laws and public health experts' criticism that such laws discourage people from knowing their serostatus, the MPC draft does not contain an HIV disclosure provision.[52] As for "stealthing" or nonconsensual condom removal, with the revelation that there are entire Reddit threads devoted to how to "stealth," there has been a popular push to regulate surreptitious condom removal. In California, legislative analysts opined that such behavior could be prosecuted under existing sexual battery laws. However, the main reform push has been to make the act a civil wrong entitling the victim to sue for damages.[53]

Seduction laws that criminalized the false promise of marriage to obtain sex are largely legacies of the past.[54] Although there have been some commentators who want to penalize lies that induce sex more broadly, the criminal law has so far avoided criminalizing sexual deception generally. The MPC reporters explain:

> "Individuals commonly lie about their age, occupation, job prospects, marital status, involvement with others, parenthood status, and whether they are interested in a serious relationship. And people pervasively lie about the state of their affection for the other party.... In sum, the policy impediments to criminalizing sexual fraud far exceed plausible concerns with criminalizing fraud in property transactions. Current law has strong grounding for its unwillingness to broadly

51 Even when statutes criminalize deceptions regarding non-HIV sexual infections, they punish the non-disclosure of those infections less harshly than non-disclosure of HIV status. *See* N.J. Stat. Ann. § 2C:34–5(a) (West 2019) (treating non-disclosure of HIV status as a "crime in the third degree," but non-disclosure of gonorrhea or syphilis as a "crime in the fourth degree").

52 MPC TD 5, *supra* note 10, at 250.

53 Jonathan Edwards, *No State Has Outlawed the Secret Removal of Condoms During Sex. California Could Be the First*, Wash. Post (Sep. 9, 2021, 7:01 AM), https://www.washingtonpost.com/nation/2021/09/09/california-secret-condom-law/(accessed August 25, 2022).

54 *See* Franklin v. Hill, 444 S.E.2d 778, 781 (Ga. 1994) (holding the state seduction statute to be unconstitutional, partly on grounds of nonuse); People v. Evans, 379 N.Y.S. 2d 912, 919 (N.Y. Sup. Ct. 1975) (internal citations omitted) ("[T]his State looks with disfavor on actions for seduction since the civil action was abolished more than forty years ago... there are no presently existing penal sanctions against seduction.").

> criminalize even some material misrepresentations used to induce sexual consent."[55]

Coercion by Extortionate Threat

Criminal law in the United States is unambiguous that sexual coercion from threats of *physical* harm are serious offenses. The law is less clear and uniform when it comes to other types of threats (extortions) and promises of benefits (bribes). Several states prohibit obtaining sex by threatening "retaliation" or "by extortion."[56] Others are more specific, prohibiting, for example, a police officer from threatening to charge the victim with a crime.[57] Texas specifies that its force requirement covers threats of "harm," with "harm" defined as "anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested."[58] Idaho broadly prohibits obtaining sex by threatening to "expose a secret... tending to subject any person to hatred, contempt or ridicule."[59] Statutes and cases also criminalize official promises of benefits in exchange for sex. States, for example, commonly prosecute police for offering not to arrest in exchange for sex.

The MPC draft, in addition to covering the crime-threat scenario and official misconduct scenarios, contains a non-specific provision covering extortions of all types that are difficult to resist. It prohibits sexual intercourse obtained by a threat:

> "(i) to accuse that person or anyone else of a criminal offense or of a failure to comply with immigration regulations; or (ii) to take or withhold action as an official, or cause an official to take or withhold action, whether or not the purported official has actual authority to

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55 MPC TD 5, *supra* note 10, at 246–48.

56 Mich. Comp. Laws §§ 750.520d(1)(b), 750.520b(f)(iii) (2022) ("extortion"); N.H. Rev. Stat. § 632-A:2(I)(d)–(e) (2021) ("submits under circumstances involving... extortion" or a threat "to retaliate against the victim"); N.M. Stat. Ann. § 30–9–10(A)(3) (2018) (defining force to include "extortion or retaliation"); S.C. Code Ann. § 16–3–651(b) (2018) (defining impermissible coercion to include "extortion").

57 Del. Code Ann. tit. 11, § 774(4) (2021).

58 Tex. Penal Code Ann. § 22.011(b)(2) (2021) (compelling another to submit by threatening "to cause harm" to the other person constitutes sexual assault); *id.* § 1.07(a)(25) (defining "harm").

59 Idaho Code Ann. § 18–6101(10) (West 2021).

> do so; or (iii) to take any action or cause any consequence that would cause submission to or performance of the act of sexual penetration or oral sex by someone of ordinary resolution in that person's situation under all the circumstances."[60]

III. Consent and Communication

As indicated in the last Part, the notion of what it means to consent to sex varies by jurisdiction and by statute. Refusal statutes, which are few, establish that sex is consensual so long as the victim did not expressly communicate refusal to the act. More common is what the MPC draft calls the "contextual-consent standard" where consent is a matter of the internal willingness of the victim and a jury may determine if that internal state existed through examining all the circumstances, including the parties' communications, in context.

There is little controversy when the actors' communications correspond to their internal states. For example, if a person really did not want sex and candidly expressed that lack of desire, the sex is uncontroversially nonconsensual. Controversy arises, however, when there is mismatch between the internal state and external manifestations. An accused person might argue that despite the victim's utterance of a "no" or ambivalent attitude toward sex, the victim nonetheless consented. Under a contextual consent standard, the accused can make such an argument, and the jury could find that, in fact, the victim did consent or that the accused had reasonable grounds to believe there was consent. But under "no means no" formulations, like the Model Penal Code draft's, "no" conclusively establishes nonconsent. Nevertheless, under the MPC, juries can find that a wholly passive and seemingly ambivalent person who never said "yes" nonetheless consented to sex.

Rape reformers were rightfully concerned that decision-makers could make bad calls by, for example, finding subtly coerced agreements valid, always deriving willingness from silence, or allowing the defendant too much leeway to interpret anything as consent. To reduce the risk of bad calls, reformers advocate for affirmative consent. Affirmative consent laws direct decision-makers to focus on *communication*what the victim said or did that communicated agreement—and not on what the victim internally desired. This is not necessarily such a radical change, given that jurors in

60 MPC TD 5, *supra* note 10, at § 213.4(1)(b).

contextual consent cases would in fact look to the parties' communications to determine whether the victim internally agreed. The affirmative consent standards become more controversial when they seek to *narrow* the world of external manifestations that count as a consent communication. Say, for example, that a jury decides a sexual encounter is consensual (internally wanted), despite the victim having said "no" while laughing because there was increasingly intimate foreplay. The question becomes whether the foreplay and the "no" can also constitute an "affirmative expression of consent"? If they can , then affirmative consent does little to avoid the problems of contextual consent because it too allows defendants to argue that "no means yes" and passivity equals consent. If they cannot, then the law must delve into the tricky issue of *what* counts as affirmative consent.

A popular stance today is that "only yes means yes," so that in the absence of a verbal and clear expression of agreement, the sex is criminal. A big drawback of this standard, however, is that many couples, especially those in established relationships, have sex without practicing such communicative rituals. Thus, affirmative consent turns a lot of regular folks into rapists. Back in the 1980s, some states already defined consent by terms like "active cooperation" and "free agreement" (today, fourteen jurisdictions adopt affirmative consent language).[61] Decades ago, courts grappled with whether this language meant to criminalize just unwanted sex or all sex without a sufficient consent performance. Unsurprisingly, courts punted—and they continue to do so, leaving the affirmative consent standard perpetually shrouded in mystery.

The 1980 Wisconsin case *State v. Lederer* involved a defendant's constitutional challenge to Wisconsin's sexual assault statute, which required "words or overt actions... indicating a freely given agreement to have sexual intercourse."[62] Lederer argued that the statute was overbroad because it outlawed mutually desired sex when the statutorily required "words or overt actions" were absent. The Wisconsin appeals court disagreed, arguing that it was impossible for a person to have desired sex without "manifest-

61 The MPC reporters surveyed rape statutes in every jurisdiction and determined that nine jurisdictions – Florida, Hawaii, New Jersey, Oklahoma, Oregon, Pennsylvania, Vermont, Wisconsin, and the UCMJ – had felony statutes that expressly require affirmative permission, positive agreement, or active cooperation, and five – Colorado, D.C., Kansas, Minnesota, and the United States – had misdemeanor affirmative consent statutes. Model Penal Code: Sexual Assault and Related Offenses 41 N. 93 (Am. l. inst., Tentative Draft No. 3, April 6, 2017).

62 Wis. Stat. § 940.225(4) (1980); *State v. Lederer*, 299 N.W. 2d 457, 459–60 (Wis. Ct. App. 1980).

ing freely given consent through words or acts." The court explained, "We know of no other means" by which "two parties may enter into consensual sexual relations."[63] The court avoided the overbreadth objection by characterizing affirmative consent as exhaustive of the ways people agree to sex. However, if "words or overt actions" include *every* way of agreeing to sex, then "words or overt actions" necessarily include silence and inaction. Sexual consent researchers find that "many men and women passively indicate their consent to sexual intercourse by not resisting, such as allowing themselves to be undressed by their partner, not saying no, or not stopping their partner's advances."[64]

Today, in criminal codes, popular discourse, and college discipline cases, the meaning of affirmative consent ranges from the very restrictive—a thoughtful, enthusiastic, and ongoing "yes"—to the more permissive—any words or conduct that indicate the person's sexual willingness. The potential breadth of the standard combined with the indeterminacy of its application poses unique dangers in a country where criminal law enforcement is marked with racial and other biases. When sex without a yes is criminal, police and prosecutors may use their broad authority to pursue a subset of cases where sufficient consent communication is lacking. Charges may arise when the prosecutor instinctively views the defendant as a true criminal (not a regular guy), when the prosecutor regards the victim as "credible," or when the victim is vehement. These discretionary prosecutions might meaningfully overlap with the type of cases scholars think should be brought, but they might not. Prosecutors' views of true criminality may be influenced more by racial and socioeconomic characteristics than by the nature of the sexual event.[65] Similarly, assessments of victims' credibility may involve race, class, or gender stereotyping. Moreover, the most vehement victims may also be the most biased and unbelievable.

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63 *Lederer*, 299 N.W.2d at 460.

64 Terry P. Humphreys and Mélanie M. Brousseau, *The Sexual Consent Scale – Revised: Development, Reliability, and Preliminary Validity*, 47 J. Sex Rsch. 420, 421 (2010). *See also* Charlene L. Muehlenhard et al., *The Complexities of Sexual Consent Among College Students: A Conceptual and Empirical Review*, 53 J. Sex Rsch. 457 (2016).

65 Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 Ariz. L. Rev. 305, 360 (2009); Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 Cornell L. Rev. 1811, 1815, 1819–20 (1998) (both discussing race and prosecutorial discretion in capital punishment).

C. Other Legal Parameters of Consent

I. Consent and Timing

A common formulation of consent requires that a person consent to "each specific act" of sexual penetration or oral sex. Now, this is not necessarily meant to convert one incident of sexual intercourse into multiple crimes of nonconsensual penetration. Rather, it is meant to express that consent to one sexual activity like oral sex, even in the same intimate encounter, does not automatically mean there is consent to another sexual activity like penetration. Indeed, laws and cases commonly specify that consent to one act or consent to past sexual activity does not necessarily mean there is consent to the present activity. Under the Model Penal Code standard of contextual consent, the factfinder is permitted to look at *all* the circumstances, including past sexual interactions and present sexual interactions, in determining whether the victim consented to the specific act of sex at issue. In an affirmative-consent jurisdiction, the jury may be required to focus solely on the communication immediately preceding the sex act to determine consent.

Most jurisdictions provide that consent may be revoked or withdrawn at any time. The Model Penal Code draft further specifies that "revocation or withdrawal of consent may be overridden by subsequent consent given prior to the act of sexual penetration, oral sex, or sexual contact."[66] The MPC and many criminal codes contemplate a situation where consent can be given, withdrawn, given again and so forth. College codes and laws regulating college disciplinary procedures have taken a more regulatory approach, and many require "ongoing" consent throughout an entire sexual encounter.[67] In terms of *internal* consent, continuous agreement is epistemologically problematic if it renders sex criminal whenever a party has a fleeting second thought. The requirement of ongoing *external* consent is similarly confounding. What exactly does a continuous communication of agreement look, or sound, like? More plausible is that persistent consent means there must be an overall mental state of agreement and the victim is free to change their mind and revoke the consent.

66 MPC TD 5, *supra* note 10, at § 213.0(2)(e).

67 *See, e.g.*, S.B. 967, 2014 Leg., 2013–2014 Reg. Sess. (Cal. 2014) ("Affirmative consent must be ongoing throughout a sexual activity").

II. Consent and Burdens

The lack of consent is an element of the sexual assault offense, which means that the prosecution always bears the burden to prove lack of consent beyond a reasonable doubt. Consent rarely operates as an affirmative defense, the exceptions being for some age-based and status-based sex crimes. The MPC draft has an explicit prior permission affirmative defense that can apply to certain forcible and incapacitation sex crimes. In those cases, the burden of proof and production could shift to the accused. Now, some theorists have critiqued affirmative consent as "burden shifting," because it presumes that the accused is guilty. But this is not technically the case. The prosecution still bears the burden of proving that there was no affirmative expression of consent. The substance of the critique is really about *what* the prosecution must prove. Critics worry about a standard in which all the prosecution has to prove is that "yes" was not uttered.

III. Consent and Mens Rea

The criminal law disfavors punishing people who did not intend the criminal act. There is a small carve out for "regulatory" or "public welfare," like toxic dumping and product tampering, that cause widespread and indiscriminate harm. However, for "garden variety" offenses like rape, assault, and homicide there must be some unity of act and intention. Generally speaking, the most serious crimes require knowledge or purpose on the defendant's part. The Model Penal Code specifies that the lowest level of mens rea required for criminal liability is subjective recklessness, that is, a person's *conscious* disregard of a substantial and known risk that they are engaging in the crime. Per the MPC, there is generally no criminal liability when the actor has no awareness of the risk of criminality, even if a reasonable person would be aware of a high risk. The Supreme Court, disapproving of the trial court's imposition of a negligence (unreasonableness) standard in a criminal threats case, observed, "[w]e 'have long been reluctant to infer that a negligence standard was intended in criminal statutes.'"[68] The Court emphasized that "wrongdoing must be conscious to be criminal."[69]

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68 Elonis v. United States, 575 U.S. 723, 738 (2015) (quoting Rogers v. United States, 422 U.S. 35, 47 (1975) (Marshall, J., concurring)).

69 *Id.* at 734 (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)).

Despite this well-settled criminal law principle, when it comes to sex crimes, jurisdictions regularly employ a negligence standard, requiring that people's conclusions about consent be reasonable. Regarding age-based crimes, some courts have upheld strict liability, permitting a finding of guilt even when the accused reasonably believed that the victim was old enough to consent. The Model Penal Code, following its established scheme, generally prescribes recklessness for sex crimes. Thus, to be guilty of nonconsensual sexual assault, a person must be aware of the substantial risk that the victim is not a willing party. This is true of most of the other MPC sex crimes (e.g., the defendant must be aware of a substantial risk that the victim is incapacitated).

Some theorists have called affirmative consent "substantive strict liability" because it renders a person criminal even when they reasonably believed the victim consented. Like the burden shifting argument, the main objection is that affirmative consent standards substantively punish conduct that people commonly engage in (sex with passive consent communication/sex without a "yes"). Still, the prosecution is required to prove that the accused did not reasonably believe there was "yes." Thus, technically, affirmative consent does not create strict liability.

D. Other Peculiarities of American Sex-Crime Law

Sex-crime cases are treated quite differently than non-sex criminal cases. Examples of differential treatment include:

- Special Evidentiary Rules: Rape shield laws make the victim's past and current sexual behavior, even behavior that could be relevant to a particular defense, presumptively inadmissible. There are also exceptions to the general evidentiary ban on prior-crimes and bad-acts evidence for those accused of sex crimes. Unlike other defendants, their prior charged and uncharged misconduct, so long as it is sexual, is presumptively admissible.
- Sex Offender Registration and Notification Laws: The United States has a notoriously draconian post-sentencing system that purports to "manage" sex offenders in the name of treatment and security, but is in fact criminogenic, sadistic, and bad policy born of societal sex panic. The MPC reporters observe, "there is clear evidence, widely acknowledged by professionals in the field, that these laws are seriously counterproductive. They are expensive for local police to administer, unduly hinder the rehabilitation of ex-offenders, and ultimately defeat

their own central purposes by *impeding* law enforcement and *increasing* the incidence of sexual offenses."[70]

70 MPC TD 5, *supra* note 10, at 485–86.

Synopsis

Thomas Weigend, Elisa Hoven

This volume is dedicated to exploring a key issue in the definition of sexual offenses: the pre-conditions and the scope of legally valid consent of persons involved in sexual interactions. Consent in sexual relations presents special problems. These problems result from the discrepancy between the decisive role of consent, which makes the difference between an act of mutual pleasure and a serious violation of sexual autonomy, and the fragile, even elusive character of consent and its expression in sexual relations. Social conventions and roles as well as the private and individualized character of sexual activities make it particularly difficult not only to define consent in this context but also to determine its presence or absence in any given sexual situation, especially in judicial retrospect. This difficulty becomes obvious if we compare consent in the sexual sphere with, e.g., consent in the transfer of chattel: If A takes a bicycle that belongs to B, no one will assume that B consents to this act unless there is an unambiguous declaration on B's part to that effect. The situation can be much more ambivalent if it is not B's bicycle but B's sexual autonomy that is at stake. Under certain social or individual conditions, B may deem it inappropriate to expressly declare her[1] consent to being touched sexually by A although B is not unhappy about A's acts. Further complications result from the fact that even a declared verbal consent may not be legally valid, for example, because B's consent was affected by a threat or a fraudulent statement made by A.

Although this volume cannot claim to even approach a complete overview of possible solutions to the consent problem, the jurisdictions included in this comparative study[2] present an amazing variety of approach-

1 In most instances, A (signifying the more active participant in a sexual interaction) will be male and B (the more passive participant) will be female. In order to avoid stereotyping, however, we use male and female pronouns intermittently.

2 This volume comprises reports on Australia, Austria, England and Wales, Germany, Italy, the Netherlands, Poland, Sweden, Switzerland, Turkey, and the United States of America. Australia and the U.S. each have several penal codes within their federal systems, hence the number of jurisdictions covered here is more than 60.

es. In this synopsis, we attempt to briefly summarize the main issues connected to our topic and the ways in which they are resolved or discussed in various countries. We have good reason to refrain from proposing "optimal" solutions to the controversial questions raised, knowing that any solution must be rooted in the cultural, social and legal preferences of each jurisdiction. We still hope that we can define the main choices that need to be made.

We start out with two important background questions: First, what legal interests are to be protected by the criminal prohibition of certain sex-related conduct? Second, what is the role of consent in criminal law generally and in sexual offenses in particular? We then turn to the ways in which the basic offense of "rape" can be defined (use of force or lack of consent as the relevant paradigm?) and what role consent can play in each of these definitions. Before that background, we approach the central question of the pre-conditions of valid consent in sexual acts, both with regard to the personal conditions of the person consenting (e.g., age and mental capacity) and the situational circumstances possibly affecting his freedom of will (e.g., threats, deceit, or personal dependence). The way in which consent needs to be expressed is another critical issue (e.g., "no means no" or "only yes means yes"). Finally, we discuss the issue of mens rea as it relates to non-consent and the option of introducing a special offense of negligent rape.

I. Background of rape[3] offenses

1. Protected interest – public morals or individual autonomy?

In most jurisdictions covered in this volume, the aim of the laws on sexual crime has undergone a shift in recent times. These criminal laws no longer seek to uphold "public morality" as a communal interest but are designed to protect a specific individual interest. A typical sign of this shift is the decriminalization of ancient "morals" offenses such as male homosexual practices (e.g., Austria and Germany[4]), procuring, and adultery (Germany). The change of the protected legal interest is noticeable

3 In this chapter, we use the word "rape" as a generic term referring to all criminal offenses concerning sexual acts.

4 References to national reports are not meant to be exhaustive. Readers interested in details are invited to refer to the national reports in this volume.

even in jurisdictions that formally retain the ancient category of "offenses against morals" (Netherlands). However, in Turkey the re-orientation of sexual offenses toward the protection of individual autonomy seems not to have been totally embraced by official announcements of the legislature and the courts, which still refer to concepts such as "moral purity" when interpreting the new provisions on sexual offenses. To the extent that general prohibitions of distributing or acquiring pornography still exist, they can also be viewed as protecting public morality rather than individual interests (Austria, Switzerland). This statement of course does not refer to child pornography based on the sexual abuse of children.

The individual interest to be protected is variously defined as sexual integrity, sexual autonomy, or a combination of both (Austria, Sweden). It is not easy to clearly distinguish between these two concepts because they both refer to a person's right to determine when, with whom, and to what extent he or she wishes to engage in sexual relations. Where the emphasis is on integrity, the person's body and privacy seem to be the object of protection, whereas the concept of autonomy directly refers to the person's freedom of decision, which means that the lack of consent is the key feature of criminal violations.

The shift from public morals to individual autonomy does not necessarily imply an overall reduction of the conduct subject to criminal prohibition. While some ancient morals offenses have been abolished, a greater sensitivity has developed as to the need to protect sexual autonomy against more subtle violations. At the same time, the quest for equality of the sexes has led to the abolition of some traditional prerogatives of men in sexual relations, most prominently the permission for a husband to demand sex of his wife and to force her to submit to his sexual wishes even against her will. But even beyond this obvious example of the recognition of sexual autonomy for every person, the heightened attention to true consensuality in sexual relations has in some jurisdictions led to the inclusion of psychological pressure in the ambit of sexual offenses (U.S.), to the criminalisation of the non-consented removal of a condom during intercourse ("stealthing", see VI. *infra*), to demands for a clear expression of consent for it to be legally valid ("only yes means yes"), and to changes in the law of evidence that are to encourage women to report sexual offenses short of forcible rape (e.g., English and American "rape shield" laws preventing the defense from cross-examining a female prosecution witness about her prior sexual experiences).

2. Basic concepts of rape offenses

a) Compulsion

The traditional concept of rape does not focus on the will of the victim but on the acts of the perpetrator. Under this concept, the offense is defined as a sexual interaction brought about by certain means, typically physical force, threats of force, or (in Poland) deceit. In some jurisdictions, exploiting the victim's pre-existing state of helplessness is treated as an equivalent to the use of force (Austria, Germany). This traditional model of rape by compulsion is (still) employed in the Netherlands, Poland, and Switzerland. Dutch doctrine justifies this narrow definition of rape by the consideration that the criminal law should only come into play when a person is unable by himself to resist unwelcome sex. Italy is a special case: The Penal Code uses a traditional definition of rape, demanding the use of violence or threats as elements of the actus reus. The Italian High Court (Corte di Cassazione) has however given an extremely broad meaning to the term "violence", equating it with any means that has a coercive effect on the victim, thus in effect treating as rape most cases in which the victim has not consented to sexual acts performed by the perpetrator.

b) Lack of consent

The majority of the legal systems included in this volume (including a draft amendment of the Penal Code in the Netherlands) have moved to a more expansive definition of rape that makes the absence of the victim's consent the cornerstone of the crime.[5] A typical example is Ch. 6 section 1 of the Swedish Penal Code, which defines as rape the performance of sexual intercourse (or a similar act) "with a person who is not participating voluntarily". Austria and Germany employ a mixed model, with non-consensual sex as the basic offense and the use of force or other means of compulsion as an aggravating factor.[6]

Clearly, the non-consent model of rape is to be preferred if the criminal law aims at protecting individual autonomy in sexual matters. This model focuses on the victim's individual interest and protects his will from being

5 For a thorough discussion see the chapter "Defining rape – in quest of the optimal solution" by Wojciech Jasiński, in this volume.

6 For a strong argument in favor of this model see Jasiński (note 5).

overborne by any means, including by surprise assaults or exploitation of his inability to become active in his defense. Yet one should keep in mind that even a verbal expression of consent may not be sufficient in all cases. As will be discussed below, there are persons whose consent cannot be regarded as legally valid, at least in certain situations where they are prevented from freely forming their will. The non-consent model also raises the question of how "free" a person's consent must be – does B have to be "enthusiastic" about the prospect of having sex with A, or is it sufficient that B accepts A's sexual acts as a lesser evil or as a means for her to obtain some exterior benefit?[7]

II. The role of consent in criminal law, especially in sex offenses

In a frequently cited article, Heidi Hurd writes of the "moral magic" worked by consent.[8] She claims that consent can transform "trespasses into dinner parties… and rape into lovemaking…".[9] Although this *can* be a function of consent, its effect on the moral appreciation of a human interaction may be less "magical" than appears at first sight. Nora Scheidegger correctly points out that "the presence of consent does not guarantee morally 'unproblematic' sex"[10] – just consider instances of prostitution, of a teenager giving consent in a state of drunkenness, or of B agreeing to having sex with his boss A to further (or not to harm) his own career prospects. And even if we turn from a moral to a legal perspective, consent is, in the words of Elise Woodard, "at best, a minimal standard for avoiding rape".[11]

Respect for an individual's personal autonomy is the basic reason that makes valid consent negate an unlawful violation of certain criminal prohibitions (Austria, Germany, Netherlands, Poland, Sweden, Switzerland). If a legally protected interest implies the individual's right to dispose of

7 See B.III. *infra*.

8 Heidi M. Hurd, 'The Moral Magic of Consent', 2 Legal Theory 121 (1996).

9 Heidi M. Hurd, 'Was the frog prince sexually molested?', 103 University of Michigan Law Review 1329 (2005). See also Tom O'Malley and Elisa Hoven, 'Consent in the Law Relating to Sexual Offences', in Kai Ambos et al. (eds), Core Concepts in Criminal Law and Criminal Justice, vol. I, 135–136 (2020).

10 Nora Scheidegger, 'Of Nagging and Guilt-Tripping: Lack of Consent in One's Own Activities?', in this volume. See also Michelle M. Dempsey, 'Victimless Conduct and the Volenti Maxim: How Consent Works', 7 Criminal Law and Philosophy 11, 12 (2013).

11 Cited in Scheidegger (note 10), note 2.

that interest (e.g., a property interest), the law would contradict itself by punishing A for participating in B's voluntary act of disposal (e.g., if A destroys B's bicycle that B wishes to get rid of). However, all legal systems recognize public interests that limit an individual's freedom of disposing of his material and immaterial goods. For example, the consent of a car's passengers does not permit the driver to ignore applicable speed limits, because the passengers cannot dispose of the public interest in the safety of road traffic. More controversially, B may not be able to exempt A from criminal liability for murder or mayhem by requesting A to kill or seriously wound B. The reason for this limitation on the "magic" of consent is sometimes found in a public interest in preserving the lives and good health of all citizens. An alternative – and probably more convincing – explanation is the policy argument that consensual killings should not be left to a spontaneous and private interaction between two persons but should be based on a regulated process.

Many Continental legal systems differentiate between consent as negating the *actus reus* of an offense and as providing a justification for performing the *actus reus* (Austria, Germany, Poland, Switzerland). Generally, consent works as a ground of justification where the act in question (e.g., causing bodily harm or destroying someone's property) normally violates a protected interest and the affected person's consent exceptionally affords the actor a license to cause the harm. Michelle Dempsey would categorize sexual intercourse in that group of offenses, claiming that "penetration involves forcible entry through B's sphincteric musculature (in cases of vaginal or anal penetration), and risks physical and psychological harm to B".[12] Yet, in the (frequent) ideal case of consensual sexual intercourse, there is neither "forcible entry" into B's body nor any risk of physical or psychological harm but a mutually pleasurable sexual act. B's consent in any "normal" sexual interaction should therefore be seen as negating the existence of an offense, not only where non-consent is explicitly mentioned as an element of the *actus reus* (as in Austria, Germany and Sweden) but also in legal systems that define rape offenses by elements of violence or threats (Italy, Switzerland, Turkey, U.S.). Normally, if B has previously consented to sexual penetration, A will not act "violently", nor will he use threats.

12 Michelle M. Dempsey, 'The Normative Force of Consent in Moral, Political, and Legal Perspective', in Tatjana Hörnle (ed), Sexual Assault and Rape – What Can We Learn from and for Law Reform? (forthcoming), text at note 17.

Special issues may arise in instances of "rough sex", that is, consensual use of force in connection with sexual acts. Swedish law regards as rape only instances where A's violent act is the *cause* of B's decision to participate in a sexual act, not a feature of that act voluntarily accepted by B. Yet, since the fact that A, for example, handcuffs B, pulls her hair or beats her does not normally suggest that B is a consenting partner, the latest draft of the American Model Penal Code wisely requires that A obtains B's prior express verbal consent to the use of violence (U.S.).[13]

III. Prerequisites of valid consent

Section 74 of the English Sexual Offences Act 2003 provides: "For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice." This sums up the general standard that seems to be recognized internationally with regard to the general prerequisites of a valid consent to sexual acts.[14] It is quite clear, from this definition, that B does not have to positively "desire" sex with A. It may be morally dubious for A to decide to have sex with B if he knows that B consents only for an ulterior purpose and does not "really" want sex with him. But the criminal law is satisfied with an unconstrained agreement on B's part and is not interested in B's motives for consenting.[15]

The problem in the definition of the English act cited above consists in determining what it means to have "the freedom and capacity to make that choice". But there is a broad consensus on some instances in which this freedom or capacity is clearly lacking – for example, if B is unconscious, asleep, or physically unable to resist. In what follows, we take a closer look at these instances.

1. Age

Children are generally deemed incapable of giving valid consent to sexual acts because they lack sufficient insight into the character of sexuality

13 See also the report on England and Wales in this volume, citing the 1993 decision of the House of Lords *in Q. v. Brown* and the "rough sex defence".

14 For similar formulations in other common law systems see the report on Australia in this volume.

15 For a discussion of this policy decision, see Michelle Dempsey (note 12), text at note 33; Stuart P. Green, Criminalizing Sex, 30–31 (2020).

and/or because they are mentally and physically unable to resist an adult's advances. Although this rule is accepted in all legal systems, there exists an immense variety of regulations as to the legal "age of consent". Moreover, many jurisdictions provide for exceptions from the general restrictions on consensual sex with minors in order to avoid criminalising normal (and to some extent even desirable) sexual experimentation among teenagers.

The age at which a young person can give valid consent to sexual acts with any other person has in many jurisdictions been set at 15 years (Poland, Sweden, Turkey) or at 16 years (England, Netherlands, Switzerland). Turkish law distinguishes between different kinds of sexual acts, providing for a threshold of 18 years for acts of penetration and of 15 years for other sexual acts. In Austria, Germany, and Italy, the general age of consent is as low as 14 years, but adults are punishable if they exploit the lack of experience of a child younger than 16 years.

Sexual experimentation clauses can be found in many legal systems. They typically exempt young persons between 12 and 16 years from criminal responsibility unless they employed force or threats (Italy, Netherlands). In England, such cases are resolved through prosecutorial discretion to refrain from prosecution. In some jurisdictions, even children younger than 12 years can validly consent to sexual acts with teens up to 15 years (see, e.g., the latest draft of the American Model Penal Code cited in the report on the U.S.).

2. *Mental incapacity*

Many legal systems seek to protect people with serious mental disabilities from being exploited by others for sexual purposes. Typically, special provisions criminalize sexual acts with such persons and thus declare any consent given by them to be legally irrelevant. The same applies to persons who are not permanently disabled but at the time of the sexual interaction are in a state of unconsciousness or of strongly diminished consciousness which makes it difficult for them to make rational decisions.

Although such laws pursue a laudable goal, they present several problematic issues. In Sweden and the U.S., there have been debates about so-called wake-up sex, i.e., the practice among long-term couples for A to perform sexual acts while B is still asleep, assuming that B will enjoy being awakened in that way. Technically, A's conduct falls under the prohibition of having sex with a person who is asleep. But the problem is rather theoretical because prosecution in such cases is highly unlikely.

A more difficult problem is to distinguish between severe mental disabilities precluding valid consent and lesser impairments that still leave the afflicted person's sexual autonomy intact. Terminology such as in Art. 243 of the Dutch Penal Code, criminalizing intercourse with a person "suffering from such a degree of mental disease, psychogeriatric condition or intellectual disability that such person is incapable or not sufficiently capable of determining or expressing his will thereto or of offering resistance", leaves the determination of criminal liability to a large extent to an *ex post facto* assessment of the potential victim's mental capacity at the time of the interaction without offering the court clear standards for making this determination. Similar open-ended descriptions of particularly "vulnerable" persons exist, e.g., in German, Polish, and Swedish law.

Strict rules on the legal irrelevance of consent declared by persons with mental handicaps can have the effect of barring these persons from legally having sexual relations with anyone, even their spouse, thus violating their right to the enjoyment of sex. Some legal systems have sought to remedy this problem by limiting criminal liability to persons who "exploit" or "abuse" the mentally handicapped person's inability to understand the meaning of consenting to sexual acts, thus leaving open a legal path to sexual relations embedded in a personal relationship (Germany, Poland, Switzerland, U.S.).

3. Intoxication

Similar problems arise with respect to persons who are drugged or intoxicated. There is no doubt that a person who is so drunk that he is unconscious or close to that state cannot give valid consent to sexual acts. The same applies where A secretly drugs B in order to make her agree to sexual relations with A. But even "voluntary" drunkenness of various degrees can remove normal inhibitions and can make B consent to sexual acts with a partner whom B would not find acceptable if B were sober. Between the extremes of sobriety and drunken unconsciousness, in some jurisdictions the test of ability to give valid consent turns on vague formulae such as a "substantial impairment" of one's ability to resist or to control one's actions (U.S.). The Swiss courts may have devised an operable and pragmatic line of demarcation by saying that a person is too intoxicated to consent if he is too intoxicated to walk or talk, is vomiting or urinating on himself,

or is too uncoordinated to undress.[16] German law (§ 177 subsec. 2 no. 2 Penal Code) accepts B's consent even if his ability to form or express his will is significantly impaired, but in that instance requires A to ascertain B's consent to each sexual act.

4. *Personal dependence*

Many legal systems take account of the fact that power imbalances between A and B can vitiate B's consent to A's sexual acts. B is consequently not regarded as capable of giving valid consent to A's sexual acts if B is in a position of personal dependence on A. Some jurisdictions have made it a criminal offense, for example, for a prison warden to have sex with a prisoner of his institution, even if the prisoner has previously declared his consent (Germany, Netherlands, U.S.). Laws differ, however, as to what extent sex in situations of personal dependence is outlawed. Frequently, sexual acts between a doctor or other health worker and his patient are prohibited, and so is sex in counseling relationships (Germany, Netherlands, U.S.). Some jurisdictions go further in declaring invalid consent in any relationship between an employer and his employee (Sweden) or between a civil servant and a citizen over whom the civil servant has a position of authority (Netherlands). A merely financial dependence is generally not covered by such provisions (Sweden). Special rules apply if B is younger than 18 years. In that case, laws in some countries make it a crime for her teacher, guardian, trainer, priest, or other person in a position of authority to have sex with the young person (Germany, Italy, Netherlands, Sweden, Switzerland, U.S.).

Such rules are necessary to protect particularly vulnerable persons from sexual abuse. It is possible, however, that a *bona fide* loving partnership exists between the person in authority and the "dependent" person, e.g., between a psychotherapist and her client, so that sexual acts in that relationship do not create the risk of overbearing the client's will. Criminal prohibitions should not apply in such (exceptional) situations. It is therefore recommendable that criminal liability is imposed only if the person in authority "abuses" the client's or patient's trust or dependency (Germany, Netherlands, Sweden, U.S.).

16 Swiss Federal Court, Judgment of 20 Aug. 2015, BGer 6B_96/2015, E. 2.3 (cited in Nora Scheidegger, 'Switzerland', in this volume).

5. *Threats*

In addition to circumstances concerning the personal status of the individual affected, situational factors may vitiate a verbal declaration of consent to sexual acts. One typical factor of this kind is threats. If A threatens B with violence in case B refuses to engage in sex with A, any consent expressed by B is legally irrelevant; on the contrary, sexual penetration following such a threat is a typical case of the most serious form of sexual assault (Austria, Germany, Italy, Poland, Switzerland, U.S.). Problematic cases are those in which the degree of interference with the person's free will is lower than in threats of using violence. Some laws list those threats that vitiate consent, as for example A threatening to commit any crime (even against property), to report B for a crime (Sweden), or to disclose other "detrimental information" about B (Australia, Poland, Sweden, and some states of the U.S.). According to Austrian and German laws, B's consent is invalid if A had threatened to harm any important interest of B. Such open-ended formulations raise difficult questions, for example, whether B can give valid consent after A has announced that he would terminate their relationship unless B agrees to have sex with him. Perhaps the broadest extension of criminal liability based on threats can be found in the draft of the American Model Penal Code, which makes it a crime to have sex with a person after threatening "to take any action or cause any consequence that would cause submission to or performance of the act of sexual penetration or oral sex by someone of ordinary resolution in that person's situation under all the circumstances."

In some legal systems, the borderline between illicit psychological pressure and acceptable persuasion or seduction seems to become more fluid (Sweden, Switzerland). But as of now, "nagging sex", i.e., persistent and ultimately successful efforts at persuasion, do not lead to criminal liability, even when A makes B feel guilty in case B refuses to have sex with A.[17]

6. *Deceit*

A judge of the Supreme Court of Canada wrote in 1998, "Deceptions, small and sometimes large, have from time immemorial been the by-pro-

17 For a thorough discussion, see Nora Scheidegger, 'Of Nagging and Guilt-Tripping', in this volume.

duct of romance and social encounters."[18] Being aware of this deplorable phenomenon, many legal systems tend to accept B's consent to sexual acts as valid even where A induced that consent by telling lies about his wealth, profession, or marital status, and especially about his feelings for B. Some penal codes tellingly list threats, force, and lack of consciousness as grounds for vitiating consent, but do not mention deceit, thereby implying *e contrario* that the criminal law does not sanction the introduction of "alternative facts" for making a person agree to a sexual encounter (Austria, Germany, Netherlands, Sweden, Switzerland). But the tide may be turning. Based on an increasing emphasis on the need for full autonomy in decision-making on sexual relations, some countries explicitly list deceit (along with violence and threats) as one form of committing rape (Poland[19]) or consider doing so (Australia).

Many jurisdictions have already made punishable any deceit about the "basics" of a sexual interaction, most importantly about the fact that sex (and not a medical examination) is involved (Austria, England, U.S.).[20] Since consent to a sexual act is at stake, B should at a minimum be aware that A is acting in order to achieve sexual satisfaction. Similarly, consent is not recognized as valid where A has misled B to thinking that the person she deals with is not A but B's regular partner X (Austria, England, Italy, Sweden, U.S.). However, other instances of lying about one's name or other factors defining one's social identity have mostly not been considered to vitiate consent; the same applies to lies about A's intentions for the future, e.g., to pay B a sum of money or to marry B (Australia, Germany, Poland, U.S.).

Other subject matters are treated differently in different jurisdictions. This concerns, for example, lies about one's medical condition (especially about the fact that one suffers from sexually transmissible diseases such as HIV[21]), one's gender (England), and one's ability to procreate (Austria). Since these factors will often be critical for B's decision whether to have sexual relations with A, the trend toward criminalizing fraud in these

18 McLachlin, J., in R. v. Cuerrier, [1998] 2 Supreme Court Reports 371, § 47.

19 In Poland, the concept of "deceit" extends to instances in which A uses deceit to make B physically incapable of resistance, e.g., by allowing A to tie him up.

20 For a review of relevant case law in England and commonwealth jurisdictions, see O'Malley and Hoven (note 9), 155-160.

21 In many states of the U.S., lying about one's HIV status has been singled out as negating the validity of consent by the sexual partner. England, by contrast, does not regard deceit about one's HIV status as relevant for the legal validity of consent.

matters is to be welcomed.[22] On the other hand, the law should maintain the option to lie about facts that should be irrelevant to consent to sexual relations and the disclosure of which can lead to invidious discrimination (e.g., one's religion, ethnic background, or social class) (Australia). Legislatures and courts must try to resolve the tension that exists between tolerance for little white lies told to obtain another person's sexual favors and an effective protection of personal autonomy in sexual matters. As the emphasis in sex offense law shifts toward a broad protection of autonomy, tolerance for untruths in matters relevant for intelligent decision-making is likely to decrease.

IV. Expressing consent

In the context of our topic, probably the most controversial question is whether and – if so – how B's consent must be expressed to save A from liability for rape. It is fairly clear that A cannot be convicted of rape (or any other crime) if B wishes to have sex with A and tells A about this wish. But communication between A and B in situations where sex may be at issue can be difficult and ambiguous. Some people find verbal communication on sexual matters embarrassing and consequently do not express their wishes with clarity. Social role expectations can exacerbate this problem: in societies that assign women a role subservient to men, it may be that a woman says "yes" although she does not want sex with the man.[23] The criminal law, entering the scene long after the fact, is a problematic tool for resolving such problems of communication. Some legislatures have nevertheless introduced potential criminal liability in order to encourage persons involved in sexual interactions to ascertain the wishes (or lack of them) of their partners before they take action (Sweden, U.S.)

The traditional view of rape, which limits punishability to the use of violence or threats, reduces the need for A to communicate with B to exceptional situations, e.g., where A wishes to perform acts of "rough sex" including beating or restraining B. In all other instances, B is assumed to agree to sex as long as B does not resist and A does not find it necessary

22 The imposition of criminal liability is not necessary, however, if the use of a condom makes it highly unlikely that the disease in question is transmitted from A to B; cf. Sebastian Mayr and Kurt Schmoller, 'Austria', in this volume.

23 In societies that expect "decent" women not to initiate sex, the reverse situation may also occur; see Karolina Kremens, 'Regulating Expression of Consent in Sexual Relations', in this volume.

to employ threats or physical force to overcome B's resistance.[24] B's mere silence and passivity can thus be regarded as a token of consent (Poland, Switzerland, Turkey).

Matters are more complicated in systems that define rape as sexual intercourse without consent. A variety of approaches to the necessity of expressing consent (or the lack of it) can be found in such jurisdictions. A conservative approach is to require B to "recognizably" express her opposition to sexual acts; if she does not do so, B will be assumed to have consented (Austria, Germany). The "recognizability" standard in these jurisdictions is an objective one – it is not what A understood B to say that is determinative, but how an objective observer would have interpreted B's words or conduct. This approach puts much of the burden of possible misunderstandings on B – it is B's responsibility to clearly communicate her unwillingness to enter into sexual relations with A.

The opposite approach has been taken, e.g., by some states in Australia as well as in the U.S. Under these laws, A is liable for rape (or a similar crime) unless B has previously made a clear verbal or non-verbal statement of consent to the sexual acts that A performs. Such laws seek to protect B's sexual autonomy by placing the burden of any misunderstanding on A: "If in doubt", the rule tells A, "ask before you act!". But such laws have been criticized for (at least theoretically) criminalizing conduct that is perfectly normal between long-term partners, i.e., A initiating sexual contact without first asking for B's permission, because A assumes from experience that B doesn't mind such contacts.[25] Seen in context with the participants' earlier interactions, even B's express "no" may not be intended to stop A from going ahead with sexual acts.[26] Since highly individualized sexual relations defy the rules of contract law, their over-formalization extends criminal liability too far and may even expose the criminal law to ridicule.

A preferable approach may therefore be to require B's affirmative consent but to allow the court or the jury to determine its existence from all

24 Remnants of the ancient doctrine that a spouse is presumed by law to have agreed to have sex with his or her spouse at any time can still be found in Turkish and Polish law; see the reports by Wojciech Jasinski and Karolina Kremens (Poland) and Baris Atlidi (Turkey), in this volume.

25 See the discussions in Andrew Dyer's report on Australia and Aya Gruber's report on the U.S., in this volume.

26 See the report on Polish law by Wojciech Jasinski and Karolina Kremens, in this volume. But see also the reference to an absolute "no means no" rule in the draft of the American Model Penal Code in Aya Gruber's report on the U.S. in this volume.

the circumstances, including prior interactions between A and B (England, Netherlands, Sweden, U.S.).[27] In jurisdictions following this approach, B's "true", interior consent is determinative. If B did not adequately express her opposition to A's advances, this is not regarded as a substitute for B's consent but only may have an impact on A's mens rea (see VII. *infra*).

V. Timing of consent

Since attitudes toward sexual acts are not necessarily stable over time, the timing of consent is of critical relevance. The general principle is that consent must be present at the time when the sexual acts are performed. That means that statements indicating consent or lack of it made some time before the sexual interaction occurs do not automatically remain in effect, unless the circumstances clearly indicate that B still adheres to his earlier statement (Netherlands, Sweden). In fact, B may withdraw his prior consent at any time, even while the sexual interaction takes place. If B does so, A must immediately desist from any sexual act no longer covered by consent.[28]

Since A cannot well be made to guess at his own risk about possible changes in B's attitude as to the continuation of sexual acts, the law should require that B must communicate his change of mind to make it legally relevant (Austria, England, Germany, Poland). This is true even in jurisdictions that follow the "only yes means yes" maxim. If it were otherwise, A would have to continually ask B to confirm her consent while the sexual interaction is going on. Withdrawal of consent need not, however, be indicated verbally; it is sufficient that B's conduct (e.g., crying, turning away from A) clearly indicates to A that his sexual acts are no longer welcome (Australia, Austria, Italy).

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27 Swedish law follows this rule but helpfully declares that "when assessing whether participation is voluntary or not, particular consideration is given to whether voluntariness was expressed by word or deed or in some other way" (Criminal Code, Chapter 6 section 1).

28 In countries like Switzerland, which requires the use of force or threats for the commission of rape, a mere verbal withdrawal of consent may, however, not be sufficient if A does not then use force or threats to overcome B's unwillingness to continue with the sexual interaction. See Nora Scheidegger, 'Switzerland', in this volume.

A denial or withdrawal of consent need not be B's last word in the matter. If B at a later point (again) shows his willingness to engage in sexual relations with A, neither of them is bound by B's earlier statement.[29]

VI. Scope of consent

Since verbal or non-verbal agreements to have sex rarely contain itemized statements as to what sexual acts are consented by both parties, misunderstandings may occur about how far A may go, and B may subsequently feel violated in her sexual autonomy by A's acts that B had not even thought of when agreeing to have sex with A. One typical example is A's transition from vaginal to anal intercourse. The scope of an unspecific agreement to "have sex" is difficult to establish in general terms. A good guideline is to ask what B could have expected to happen, given the circumstances – which, of course, can differ greatly, as between teenagers on their third date and a couple after ten years of marriage. The problem of the uncertainty of that standard is diminished by the explorative character of sexual interactions: on the one hand, A may try to gradually move forward into uncharted territory, prompting B to extend an originally narrow consent; on the other hand, B can withdraw her consent at any time, thus restricting the scope of an initial (seemingly) broad agreement. Given these limitations, A is likely to incur criminal liability for rape only if he knowingly goes beyond the limit that he can reasonably expect without waiting for B's reaction (Poland).

A special issue concerning the scope of consent that has increasingly been discussed in recent years concerns the secret removal of a condom during sexual intercourse, so-called stealthing.[30] As a matter of criminal policy, instances of stealthing should be made punishable because the actor creates an increased risk of transmitting diseases and (in vaginal intercourse) causing pregnancy, which goes beyond any risk connected with the protected intercourse B had originally consented to. One way of dealing with these cases is to treat A's conduct as deceit vitiating B's consent (Austria, England, Poland). In other jurisdictions, intercourse without a condom is regarded as a sexual act separate from the prior intercourse with

29 See III.5. *supra* for the question of whether and – if so – by what means A can try to make B change his mind once B has said "no".

30 For a comprehensive treatment of this topic, see Sebastian Mayr and Kurt Schmoller, 'Particularized Consent and Non-consensual Condom Removal', in this volume.

a condom, hence A can be said to have started a new sexual act not covered by B's original consent (Sweden, Switzerland). In jurisdictions that treat non-consensual intercourse as rape even where the actor uses neither force nor threats, A can then be convicted of rape. Although both approaches lead to similar results, the latter theory seems preferable because it avoids the problem of cases in which A originally tells B the truth about his willingness to use a condom and only later spontaneously decides to remove the protection; in this case, an element of deceit is difficult to establish.

VII. Mens rea as to lack of consent

In most jurisdictions, the crimes of rape, sexual assault, and similar offenses presuppose that the perpetrator acts intentionally. Regarding the fact that the victim does not consent, full intent requires that the actor knows about the absence of consent. However, since sexual interactions normally take place without eyewitnesses, proof of A's awareness of B's non-consent will often be difficult unless A makes a confession as to his knowledge. In many cases that go to trial, though, A will remain silent or will claim that he thought that B agreed to having sex with him. In that situation, the court must either rely on a general analysis of A's reliability as a witness as compared to B's, or else determine A's state of mind as to B's non-consent based on the objective circumstances presented at the trial. If the judges or jurors conclude that B did not in fact consent to A's sexual acts, they are likely to ask further whether a reasonable person in A's position would have thought that B is consenting. If, for example, there is credible evidence that B protested in A's presence or that A used force against B, A is unlikely to be heard with the claim that he (reasonably) believed in B's consent (Austria, Switzerland). If the judges or jurors see no reason why A should not have realized that B did not want sex with him, they are very likely to make a finding that A acted intentionally.

Legal systems have devised several additional doctrines to overcome the difficulty of proving A's intent. Some jurisdictions apply the concept of "conditional intent" (*dolus eventualis*) according to which it is sufficient for a finding of intent that A is aware of the *possibility* that B does not consent and still goes ahead with his plan, accepting the possibility that he acts against B's wishes (Austria, Germany, Switzerland). Similarly, some jurisdictions recognize offenses of "reckless" rape, for which it is sufficient that the actor consciously takes the risk that the victim does not consent to his sexual acts (Sweden, U.S.). Another group of countries permit an acquittal based on a mistake of fact only if the defendant *reasonably* believed that

the victim consented (Australia), which introduces an objective criterion for assessing A's claim that he believed in B's consent. Some of these jurisdictions recognize the reasonableness of a relevant mistake only if the defendant made an effort to ascertain the other person's true will – which can lead to the conviction of defendants who honestly believed in the victim's consent but did not explicitly ask (Australia, U.S.).[31] Finally, a few legal systems have taken (Sweden) or are about to take (Netherlands) the step of criminalizing "negligent rape", that is, engaging in a sexual interaction against the other person's will while being grossly negligent about determining that person's true wishes. Under these laws, A's inadvertent negligence can be established if he did not make any effort to make sure that B participated voluntarily although there were strong reasons to do so (Sweden). Negligent rape in these legal systems carries a lesser sentence than intentional rape.

This last step toward a comprehensive protection of B's sexual autonomy may be the most consistent approach to dealing with the problem of proving the actor's mens rea. It is more honest to punish a person for negligent rape than to over-extend the concept of intent to avoid impunity if full and convincing proof of the defendant's knowledge is not available, or to shift the burden of proof to the defendant (as has been done in Italy).

VIII. Conclusion

It is anything but easy to draw a composite picture of the diverse developments described by the contributors to this volume. But two trends appear clearly discernible: first, a broadening of the definition of rape from an act of violence to a violation of sexual autonomy by a variety of means; second, a movement toward more stringent demands on the legal relevance of a person's consent to sexual acts. Since consent is becoming the key element in discerning between mutually desirable and criminal sex, these two trends taken together inevitably lead to an expansion of potential criminal liability in sexual relations. Depending on one's perspective, this tendency can be regarded as a welcome strengthening of the protection of individual autonomy in an area that is particularly sensitive due to the highly intimate character of the acts involved and the lingering

31 For an extensive discussion, see Andrew Dyer, 'Mistaken Beliefs about Consent', in this volume.

problem of social inequality between men and women,[32] or as an alarming tendency toward over-criminalization of private activities that the state has no mandate to regulate.[33]

We think that the trends mentioned go into the right direction. Due to various factors including physical and social power differentials between men and women, sexual autonomy is at constant risk, and criminal law is needed to offer some (albeit imperfect) protection of this important good. This need implies, in principle, that sexual autonomy should be protected not only against raw force but also against more subtle attempts at invading B's sexual sphere despite B's unwillingness to have sexual relations. It should therefore not be sufficient for A to point out that B remained passive or even said "yes" when A made a sexual advance, but B's outwardly consenting behavior must also reflect B's "true" will formed without constraint. The vivid debate on the effect of various kinds of deception used by A in this context shows, however, that the limits of this general concept are uncertain and fluid.

The tendency in many jurisdictions to broaden the scope of sexual offenses suggests that a single offense of "rape" is no longer sufficient to cover the variety of possible violations of sexual autonomy and their differing seriousness. Legislatures should devise a consistent but flexible system of criminal prohibitions, ranging from relatively minor instances of sexual harassment to the most serious assaults involving violence or threats of violence.[34] Consent has a role to play in each of these offense types, because B's willingness to cooperate in the sexual acts proposed or performed by A negates the violation of B's autonomy and hence the need (and even the legitimacy) to set the mechanism of criminal law into motion.

This raises the question of whether criminal law should differentiate between instances in which B gives "full", uninfluenced, enthusiastic consent and those where B's consent is affected by her reduced willpower (possibly due to intoxication), mistaken expectations (based on A's false promises or statements), or fear of negative consequences if she does not cooperate. Although a concept of "reduced" consent may be helpful in analyzing certain situations, we would not recommend transferring such a concept into the

32 See the analysis of this point in Linnea Wegerstad's report on Sweden, in this volume.

33 For such an assessment, see the report by Sebastian Mayr and Kurt Schmoller on Austria, in this volume.

34 Cf. Dempsey (note 12), text at notes 62–65 for a good overview of policy choices in this area.

law as a basis of criminal liability. Given the wide variety of motives that a person may have for consenting to sexual relations, it would be impossible to define with the necessary precision the circumstances which so reduce B's capacity to make a free decision that A should not be allowed to rely on B's consent. It will thus remain the task of prosecutors and criminal courts to determine in each case whether B's apparent consent was sufficiently based on B's will.

Regarding the issue of mens rea, we have seen that the ostensible differences in legal provisions as to the requirements of intent to commit a sexual assault become less pronounced when the "small print" of judicial interpretation and evidentiary rules is taken into account. In most jurisdictions, A is likely to be convicted if he realized that B might not consent to his sexual acts and nevertheless went ahead without seeking to clarify B's position. It is an open policy question whether it is necessary to go one step further – as has been done in Sweden – and hold A criminally liable even if he did not realize the possibility of B's non-consent but could easily have found out that B was unwilling to have sex with him.

On this and other issues of defining the borders of criminal liability, jurisdictions are likely to come to differing conclusions based on their cultural and political preferences. But there seems to be a growing international consensus that the objective of the criminal law must be to provide sufficient protection for everyone's ability to make their own decisions in the sensitive area of sexuality.

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