Synopsis

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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

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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

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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

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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.