

## REFRAMING RAPE - FROM CONSENT TO RESPONSIBILITY

### ABSTRACT

This article proposes a rethinking of rape, with a model that can be applied to other sexual offences. It starts from the proposition that a sexual penetration is a prima facie legal wrong, which requires justification. This imposes an obligation on the person penetrating another to have sufficiently good reasons to justify the penetration. The justificatory reasons are only provided by a reasonable belief in consent, richly understood. Rape should, therefore, be redefined as a sexual penetration without a reasonable belief in the other's consent. This means the focus in rape trials should not be on whether the victim consented, but rather on whether the defendant had good reasons to believe there was sufficiently rich consent.

### KEY WORDS

Rape; Consent; Responsibility; Autonomy; Relationality

### 1. INTRODUCTION

All is not well with the law on rape.<sup>1</sup> Shockingly low prosecution and conviction rates have led to claims that rape has become effectively decriminalised; rape trials are widely thought to more effective at retraumatising victims than producing justice for them; and the law is failing to send a clear message about the regulation of sexual behaviour. Responding to these concerns requires a wide range of responses. This article will explore what the substantive law on rape could do to address these.

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<sup>1</sup> Our focus in this article is on male on female rape. Many of the arguments used could apply to other rapes and sexual assaults.

In this article we propose a reframing of rape. One which puts the spotlight firmly on the defendant and requires him to justify his penetration. The current law of rape suffers greatly from the fact that the victim's<sup>2</sup> consent is seen as central. The question of whether the victim has consented is at the heart of much of the academic literature and often becomes the primary focus at trial. As we shall demonstrate later, this means both in academic discussion and in the courtroom the focus is on the victim and her state of mind. In this article we will critique the centrality of consent and explore ways of changing the definition of rape so that the emphasis is squarely on the defendant's state of mind and his responsibilities. We suggest that the key elements of rape should be:

- (i) D sexually penetrated V
- (ii) D did not reasonably believe that V consents to the penetration.

These two factors, rather than whether the victim did in fact consent, should be the core elements of the offence and the focus of the trial. This is because a sexual penetration is itself a *prima facie* legal wrong and that a reasonable belief in consent, richly understood, may be sufficient to provide a justification. Whether there was consent or not should matter for ascertaining criminal responsibility. We acknowledge that this proposal is radical, and is

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<sup>2</sup> There is a lively debate as to whether the correct terminology to be used should be 'victim' or 'complainant'. The latter is more popular as it avoids any supposition that the defendant is guilty, but we, here, prefer the term victim. However, the terminology of complainant is only used in relation to rape and for all other offences the term victim is used. The use of a special term for someone claiming to be the victim of rape perpetuates a culture of disbelief. Further, it is not inappropriate to describe someone as the victim of rape, even if the defendant is not guilty of the crime (e.g. because they lack *mens rea*). The victim has been subjected to a non-consensual sexual act, something not captured by the label complainant.

certainly not without its difficulties. At the end of this article we posit alternative approaches for those who find our proposal too extreme, but are broadly supportive of our goals.

We identify three particular benefits of our proposed approach. The first is we believe it to be theoretically sound. Secondly, we believe it will have considerable practical advantages over the current law. Thirdly, we believe it will convey a clear message about how sexual consent should be understood within our society. While what we propose is radical and controversial. It is designed to challenge the current legal thought. The law, in its current form is not working, however you perceive and understand justice. Reforming the law, with the same credentials and the same starting positions will almost inevitably lead to similar outcomes. In order to ever achieve change, or indeed imagine what could be possible, requires us to completely rethink our position. In starting from a position that suggests penetration is a prima facie wrong, it allows us the opportunity to ask difficult questions about consent and responsibility and how the law should respond.

## 2. A SUMMARY OF OUR APPROACH

Our approach starts with the claim that when a man sexually penetrates a woman he commits a prima facie or pro tanto legal wrong.<sup>3</sup> That can be justified by demonstrating that he acted with reasonable grounds to believe that the woman consented to penetration. Consent, here, being understood in a 'rich' sense. We will now develop those claims further.

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<sup>3</sup> To be clear the many of the same arguments will apply in the context of male or male rape; female on male sexual assaults; and assaults involving those outside the gender binary. It is expressed in this way as slightly different arguments operate in different contexts and for ease of expression.

Michelle Madden Dempsey and Jonathan Herring developed fully some time ago the claim that a sexual penetration is a prima facie moral wrong. As they put it:

‘When a man penetrates a woman’s anus or vagina, he commits a prima facie moral wrong. Sexual penetration requires a justification, and in the absence of a justification, it will be wrong all things considered.’<sup>4</sup>

This is a controversial approach to take and we will not seek to justify that argument in detail as there has already been extensive justification for it.<sup>5</sup> The claim was based on three wrongs, the first two of which are nearly always present in a male-on-female penetration, and one which is always present. The first wrong is that a sexual penetration involves the use of force against a body.<sup>6</sup> Jesse Wall has supported that claim arguing ‘penetration of the vagina or anus, forceful or otherwise, is the use and control by the other, rather than the use and control by the self’ and hence a prima facie wrong.<sup>7</sup> The second wrong is the non-trivial risks of harms that are often associated with penetrative sex (e.g., sexually transmitted diseases, unwanted pregnancy; abrasions and bruising; and particularly the risk of psychological harm). The third wrong (that is always present in male penetration of women), is the negative social meaning that act communicates in our patriarchal society. That is the ‘the devaluation of women qua women and a disrespecting of women’s humanity’, with which heterosexual sexual penetration is unfortunately always associated in a society marked in rape culture and sexism. As Madden Dempsey and Herring put it:

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<sup>4</sup> M Madden Dempsey and J Herring ‘Why sexual penetration requires justification’ (2007) 27 OJLS 467, which provides a fully developed form of the claim.

<sup>5</sup> J Wall ‘Sexual offences and general reasons not to have sex’ (2015) 35 OJLS 777.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

‘any credible interpretation of the practices of, language regarding, and depictions of sexual penetration in our culture betray a social meaning of sexual penetration which devalues women *qua* women and disrespects women’s humanity to an extent which renders such conduct *prima facie* wrong’.<sup>8</sup>

We emphasise that the claim is that sexual penetration is a *prima facie* wrong. If there are adequate reasons in favour of doing it, then it can, ‘all things considered’, be justified. By claiming that it is a *prima facie* wrong the argument is that it is an act requiring a justification. The actor has the responsibility of providing sufficient reasons why he did the act. If no justification is available, then it will be assessed as an all things considered wrong.

While Madden Dempsey and Herring were arguing that a sexual penetration is a *prima facie* moral wrong. Michelle Madden Dempsey<sup>9</sup> has sought to offer an explanation why it should be seen as only a moral wrong, and not a moral wrong:

Control over what happens to one’s body falls within each person’s jurisdiction. To establish conditions within which we can possibly live in community with one another as free and equal moral agents, individuals must have the final ‘say so’ over how others treat their body. The state is justified in protecting and enforcing this bodily

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<sup>8</sup> Madden Dempsey and Herring above n 4 at 486-487. The article makes it clear there can be other (more positive) meanings that can also be associated with the act.

<sup>9</sup> M Madden Dempsey ‘Victimless conduct and the *volenti* maxim: how consent works’ (2013) 7 *Criminal Law & Philosophy* 11.

jurisdiction, to ensure that no one usurps the jurisdiction of another without her 'say so.

This account explains why sex should only be criminalized when it is non-consensual. Contrary to the positive legal moralist view, which holds that the proper function of criminal law is to 'punish all and only . . . morally wrongful act[s] ', the state is not justified in criminalizing conduct simply because it is morally wrong.

Rather, the state's proper concern is to ensure that its subjects are able to live together in community as free and equal citizens. When it comes to crimes against the person, the state must grant each person the legally recognized and protected power of consent over how her body is treated, but it should neither criminalize nor require justification for sex per se.

We claim a sexual penetration should be seen as a legal wrong. We question whether in current UK society, with widespread sexual assault, which is largely unpunished it is correct for Madden Dempsey to claim that the current law (which does not recognise a sexual penetration as a prima facie wrong) allows us 'to live together in community as free and equal citizens'. In a powerful recent report, Rape Crisis declare 'Rape and sexual abuse have been effectively decriminalised'.<sup>10</sup> The law is evidently failing to enable us in sexual matters, at least in the heterosexual context to live together as free and equal citizens. In fact, a societal setting of the kind Madden Dempsey proposes is more likely to arise if the law saw penetration as a prima facie legal wrong. This would mean the defendant would have a responsibility to ensure he has sufficient reason to perform the act, such that will justify the

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<sup>10</sup> <https://rapecrisis.org.uk/get-informed/the-decriminalisation-of-rape/>

wrong. He will be guilty of a crime unless he can justify his act.<sup>11</sup> This would seem a much more desirable basis for regulating social interactions.

We, argue following Jesse Wall, that a sexual penetration by a man of a woman is a prima facie legal wrong.<sup>12</sup> This is the approach generally taken in criminal law in relation to other offences: consent operates as a defence to what is otherwise a legal wrong. If someone puts their finger into someone ear or eye that will be seen as a prima facie wrong which requires a justification, such as consent (or as we shall argue shortly belief in consent). Wall makes this point powerfully by contrasting two rooms:

Two people enter Room 1, and after some time, one of them emerges from the room with bruising around their eye socket. Two people also enter Room 2, and after some time, one of them emerges with vaginal (or anal) bruising. We know very little about the events that occurred in both rooms except that we know that the bruising was caused by the actions of other person in the room.

The criminal law would treat the events in Room 1 differently from the events in Room 2. The events in Room 1 would satisfy the elements of the offence of assault occasioning actual bodily harm. In the absence of being able to justify the application of force to the eye socket, the applier of the force would be liable for an offence against the person.

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<sup>11</sup> J Herring 'Rethinking sexual crimes' (2023) 17 *Anatomia Do Crime* 19.

<sup>12</sup> It should be noted that Michelle Madden Dempsey has argued against the view a sexual penetration should be regarded as a prima facie legal wrong: see M Madden Dempsey 'The normative force of consent in moral, political, and legal perspective' in T Hornle (ed) *Sexual Assault* (Oxford: OUP, 2023).

Room 2 is different. To find that a sexual offence was committed we would need to establish that the vaginal (or anal) penetration was nonconsensual. In the absence of being able to establish that the penetration was nonconsensual, we are unable to establish that a sexual offence occurred.<sup>13</sup>

As he argues it seems hard to justify the distinction drawn between the two scenarios. In both there

If a sexual penetration is a *prima facie* legal wrong, what role does consent play in providing justification? Madden Dempsey<sup>14</sup> writing in moral terms, argues V's consent gives D an 'exclusionary permission to disregard reasons against acting that are grounded in the well-being of the person who consented.' She explains

When the exclusionary option is taken up by the person ([D]) whose conduct calls for the other's ([V]'s) consent, the moral quality of [D]'s conduct is transformed, such that [D]'s conduct no longer constitutes a wrong against [V].<sup>15</sup>

It is important to note that on this understanding the consent provides an exclusionary permission. In other words the consent is, of course, not requiring D to take up the permission (he may not fancy sex with V), but it permits him to do so. The penetration is then no longer a wrong against V. It is in this sense we claim that consent can provide a justification.

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<sup>13</sup> J Wall 'Sexual offences and general reasons not to have sex' (2015) 35 OJLS 777.

<sup>14</sup> M Madden Dempsey above n 9.

<sup>15</sup> Ibid, 43.

A key argument for this article is that the justification is provided not primarily by the consent itself, but by D taking up the reasons provided for by consent. As Jesse Wall<sup>16</sup> has explained

if sexual penetration is a wrong act, then it calls for a justification. Moreover, such a justification must represent a set of reasons for action that are recognised as acceptable reasons in favour of an otherwise prohibited activity (guiding reasons), and the defendant must have acted on those reasons (explanatory reasons).

In other words, D may be justified if he relies on V's consent as providing a good reason to engage in a penetration. This will be where D accepts that V is entitled to decide whether or not to have sex with V and D is confident that V has made a richly autonomous decision to consent. So, a man who is permitted to engage in sexual penetration of a woman is able to say 'She has made the decision to agree to sex and has decided that is what she wants to do. I will accept her assessment as she alone has the right to decide whether she wants to have sex.'<sup>17</sup> It should be noted that it what is doing the justificatory work here is the attitude of D towards V and whether D has sufficiently good reasons to believe V has consented, rather than whether V has consented as such. As Madden Dempsey puts it:

In order for conduct that calls for justification to be justifiable, one must have an undefeated reason in favor of engaging in that conduct. In order for one to be justified in engaging in that conduct, one must act for an undefeated reason. Thus, it is logically possible for one to engage in justifiable conduct (that is, to act in the

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<sup>16</sup> Wall, above n 13, 294.

<sup>17</sup> J Herring, above n 11.

presence of an undefeated reason), and yet one is not justified in so doing (because one did not act for an undefeated reason).<sup>18</sup>

Applying that in our context D must have good reasons to believe V has consented (richly understood) and that D has acted relying on that belief and then D will be justified. Even if V does consent, if D is not acting based on a belief in consent he is not justified. The consent of V in fact is, therefore, not the key matter. It is whether D is acting for reasons appropriately connected to V's consent.

This has much in common with Tom Dougherty's emphasis on what he describes as "the duty of due diligence" when someone is relying on consent. He expresses that principle in this way:

If X needs Y's consent to perform action A, then X has a duty of due diligence owed to Y regarding X's performance of A. X avoids breaching this duty if and only if

Either (i) X refrains from performing A;

Or (ii) X has adequately investigated that Y has decided that they are willing for X to perform.

This captures the point that before engaging in a sexual penetration D must 'adequately investigate' and ensure he has proper reasons to engage in sex. Having outlined our approach we proceed in this article to explore four important potential consequences for adopting this approach as the legal starting point. We shall develop these in rest of this article.

First, and most importantly, the lack of consent is not core to the wrong. At its very best consent can provide a justification for a wrongful act (turning a wrongful act into a justified

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<sup>18</sup> Madden Dempsey note 5, at 35.

act). The lack of consent is not itself a key element of the wrong (it does not turn a justified act into a wrongful act).

Second, that to justify a penetration a mere consent (e.g. just saying 'yes', with no other evidence of consent) will never be sufficient. If consent has any moral impact on the wrongfulness of the act, it will only do so when there is rich, full consent, something we will explain shortly.

Third, the law's focus should be on the defendant: he is engaging in a prima facie wrongful act and requires sufficiently good reasons for acting in the way he does. The focus should be on whether he has met his responsibilities in ensuring that he is relying on a sufficiently rich form of consent to justify the penetration.

Fourth, these points have important practical significance when it comes to rape trials. If the consent of the victim is not relevant to a conviction this will lessen the burden on the victim in rape trials.

### 3 THE WRONG IS PENETRATION, BUT REASONABLE BELIEF IN CONSENT CAN PROVIDE A JUSTIFICATION

If the act of sexual penetration is a prima facie legal wrong then, unless a justification is provided, will constitute the wrong. Reasonable belief in consent may play a role in establish a justification for that wrong, but the absence of belief is not necessary to establish the wrong. Nothing extra, beyond the penetration, is required to show the act is a legal wrong. In a case where the victim is silent or equivocal, the wrong of rape is made out. That

is because it does not need to be shown positively that there was opposition.<sup>19</sup> The defendant will be criminally liable for the penetration unless he can raise a defence/justification by demonstrating the act was justified by his attitude towards the victim, manifested by a reasonable belief in consent. Silence or equivocation will never provide that.

The consent, comes in, by providing D with a reason for engaging in the penetration. As argued above this is only relevant where the defendant is showing an attitude of respect towards the sexual autonomy of the victim. But there are two important points to make about this. First, at the core of the justification is the attitude of the defendant. John Gardner has helpfully explained that in order for an action to be justified, an act must be justifiable, and the person be justified.<sup>20</sup> Key, therefore, to the justification is that the defendant is seeking to rely on the consent of the victim as an expression of her full autonomous desire. In other words, the attitude D is expressing towards V's sexual autonomy which is key. Even if it turns out that V was consenting, if D is not acting for the justifying purpose (seeking to respect V's sexual autonomy) then he cannot be justified.

It may be that this is particularly a point about sexual relations. In many other cases of justification or permission a defendant may be able to draw on a wide range of independent factors: saving the life of another; preventing damage to property; acting in accordance with a lawful order and so forth. However, for a penetration there is only one possible source of permission or justification: the consent of the victim.<sup>21</sup> So in this context the attitude of the defendant towards consent (the one thing that could justify or permit the *prima facie* wrong) is key.

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<sup>19</sup> *R v Malone* [1998] 2 Cr App R 447.

<sup>20</sup> J Gardner *Offences and Defences* (Oxford: OUP 2009), 131.

<sup>21</sup> Perhaps it is possible to conceive of a justified rape in a case where doing so would save lives, but such scenarios seem to boarder on the realms of fantasy.

This emphasis on the attitude of the defendant as the only route to justify the wrong of penetration is captured by much of the feminist writing on the wrong of rape. For example, Brownmiller writes:

‘rape is not a crime of irrational, impulsive, uncontrollable lust but ... a deliberate hostile violent act of degradation and possession ... designed to intimidate and inspire fear’<sup>22</sup>

Du Toit, drawing on women’s accounts of rape sees it core as serving

‘to affirm the rapist’s sense of masculine self and his sense of having a place in the world through a sharp and violent demarcation of his identity from the feminine’<sup>23</sup>

This is done through ‘the violent erasure of a woman victim’s sexual subjectivity’. The victim’s accounts that she draws on do not highlight the lack of consent itself, but the fact that whether or not there was consent was irrelevant to the actor. Joan McGregor writes that

‘Rape expresses very clearly the message of the inferiority of women. The rapist... sends the message that this woman is for his enjoyment, an object to be used for his pleasure. His actions express her inferiority to him since he does not feel the need to bother to investigate whether she is really consenting...’<sup>24</sup>

These accounts do not posit the woman’s lack of consent per se as the core wrong. The wrong is the male act which ignores, or does not care about, the consent. In theory, the ‘degradation and possession’ and ‘erasure of subjectivity’ could be consistent with their being consent. The focus is on the attitude and acts of the man, not the mindset of the victim.

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<sup>22</sup> S Brownmiller *Against our Will: Men, Women and Rape* (London: Fawcett, 1975), 376.

<sup>23</sup> L du Toit *A Philosophical Engagement with Rape: The Making and Unmaking of the Feminine Self* (Abingdon: Routledge, 2009), 88.

<sup>24</sup> J McGregor *Is it Rape?* (Aldershot: Ashgate, 2005), 230.

#### 4. CONSENT MUST BE RICH CONSENT

At several points in this article, we make reference to the idea that D must reasonably believe V's consent must be 'rich'. We need to explain further what we mean by that.

The liberal legal autonomous subject is intertwined closely with the centrality of consent in the current legislative framework. This liberal legal subject is assumed to be self-sufficient, capable and free to consent or withhold consent as they so wish. As commentators such as Ngaire Naffine;<sup>25</sup> Natalie Stoljar<sup>26</sup> and Jennifer Nedelsky<sup>27</sup> have argued this is a false image of the self. We will explain why shortly, but first it is important to unpack the impact on the concept of consent created by the adoption of the liberal legal autonomous subject.

As consent is so closely linked with the idea of the autonomous self-sufficient being, the starting point invariably assumes that we are all capable and free individuals. It follows that we know what is best for us and our decisions about our lives should be respected. A host of legal doctrines assume this starting point. A good example in contract law is the principle of 'caveat emptor': Let the buyer beware.<sup>28</sup> Under this doctrine a purchaser of goods is under an obligation to check whether the goods are suitable and of satisfactory quality. There is no obligation on the vendor to highlight their defects. This principle (to which there are exceptions in contract law) assumes the purchaser (as an autonomous competent person) is in

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<sup>25</sup> N Naffine *Criminal Law and the Man Problem* (Oxford: OUP, 2020)

<sup>26</sup> N Stoljar 'Relational autonomy and perfectionism' (2017) 4 *Moral Philosophy and Politics* 27.

<sup>27</sup> J Needlessly *Law's Relations* (Oxford: OUP, 2013).

<sup>28</sup> J Buchanan, 'In defense of caveat emptor' (1970) 39 *University of Chicago Law Review*

64. In some contexts this doctrine has been overtaken by legislative provisions.

a good position to make the checks and investigations they need to reach their decision to purchase the goods. The purchaser who fails to investigate or relies on the good of the vendor only has themselves to blame. They are meant to look out for themselves. The assumptions of the all-knowing, all-wise purchaser behind this legal doctrine can be found in relation to rape law too. The victim of a rape is assumed to be rational, reasonable and careful to protect themselves. If we start from here, notions of the ideal victim can be created and reinforced. As Christie originally described the ideal victim as someone who is traditionally vulnerable and innocent, ‘defenceless, innocent’<sup>29</sup> and worthy of ‘sympathy and compassion’<sup>30</sup> who is completely blameless, ‘security conscious, crime preventing subject’.<sup>31</sup> This can then contribute to a ‘hierarchy of victimisation’<sup>32</sup> and contribute to myths and stereotypical assumptions of ideal victim behaviour. Any victim who did not consent to rape would avoid circumstances and situations in which they may be subject to rape. They would not be friends with a rapist. No rational reasonable person would put themselves in a position where they could be raped. The only way they might be raped is if they were unexpectedly and violently assaulted, and then they would resist the attack. If a stranger approached with ‘advances’ they would make it abundantly clear they objected. They would, in short, look after themselves, just as the caveat emptor doctrine requires purchasers to do. Assumptions such as these assumption makes rape between acquaintances hard to prove.

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<sup>29</sup> P Davies, P Francis and C Greer *Victims, Crime and Society: An Introduction* (Bristol: Sage 2017), 49.

<sup>30</sup> *Ibid*

<sup>31</sup> L Gotell, ‘Rethinking affirmative consent in Canadian sexual assault law: neoliberal sexual subjects and risky women’ (2008) 41 *Akron Law Review* 865, 879.

<sup>32</sup> *Ibid* 866.

Where victims do not align to these ideas their creditability can be doubted and their behaviour overly scrutinized which can distract from the defendant's behaviour. Hence, the good victim ('any reasonable woman') is seen as the 'kind of woman' who would never consent to sex with this kind of defendant; whereas the 'bad victim' is just the kind of woman who might consent with such a defendant. Similarly, 'the good victim', being autonomous and competent, will make her objections clear; whereas the 'bad victim' will be ambiguous through her silence. The bad victim (anyone who is not a 'good victim') is portrayed as a 'woman of loose morals' who might have consented to sex with anyone and certainly was the 'kind of woman' who might have agreed to consent with the defendant. Only an autonomous self-sufficient woman who wanted sex would put herself in a position where she might be liable to be raped. Further, being autonomous and self-sufficient she would be able to make any opposition abundantly clear. There is almost a double bind here: if the woman has put herself in a position to be raped it is assumed this is evidence of her independence, autonomy and lack of vulnerability; and those self-same characteristics means she would make utterly manifest her opposition and would respond appropriately by, for example, reporting it to the police. A failure to do so is an indication she must have consented. If she claims that she was too vulnerable to act in this way, this will be disbelieved because she would never have put herself in the position to be rape, if she had not been sufficiently autonomous to do so.

However, this framing does not properly reflect the reality of our lived experience.<sup>33</sup> We can begin to challenge these notions and the centrality of consent by drawing upon insights from theories of universal vulnerability. It is not within the scope of this article to detail how different vulnerability theorists have defined vulnerability.<sup>34</sup> Instead, it will draw on some of

<sup>33</sup> See J Herring, *Law and the Relational Self* (Cambridge: Cambridge University Press, 2019)

<sup>34</sup> See e.g. M Fineman, 'Vulnerability and inevitable inequality' (2017) 4 *Olso Law Review*

the key aspects of vulnerability to reframe the narrative of sexual encounters, focusing on our universal, embedded and welcomed vulnerability to start to move away from the responsabilisation of victims towards the responsabilisation of defendants.

The message of universal vulnerability is that we are all vulnerable to harm. We all need others to care for us. We are all prone to abuse, hurt, harm, confusion and irrationality. We make mistakes. It flows from this we have duties of care to each other, particularly not to exploit each other's vulnerabilities.<sup>35</sup> This duty is heightened when doing an act which is known to be potentially extremely harmful, such as a sexual penetration. This points us away from a focus on the victim's consent and opens up a narrative to question what the defendant did, and did not do, to ensure he was justified in penetration, rather than relying on assumptions about the kind of person the victim was.

The approach taken in the Sexual Offences Act 2003, is based on autonomy and consent. Proof of a lack of consent is seen as a primary issue to be addressed, which is why there are far more statutory provisions on that than any other aspect of the offence. This reflects a fixation on the centrality of consent and a failure to recognise our inherent vulnerability and our reliance on others not to exploit that vulnerability. In other words, the excessive focus on merely saying yes or no, fails to adequately reflect the relational nature of our existence. If, however, we recognise, welcome and reclaim our vulnerability as relational beings, we open up a more nuanced critical analysis of sexual experience that in turn opens up the opportunity to look more critically at the defendant's actions. As Gilson states, a reconceptualised understanding of vulnerability encourages an expansion of our ethical responsibility.<sup>36</sup>

<sup>35</sup> J Herring, above n 35, ch 7.

<sup>36</sup> E Gilson, *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice* (Abingdon: Routledge 2014), 28-29.

Because we are relational beings, and we are vulnerable beings, we are at a constant exposure and risk of exploitation. Because of that nature, we rely on each other, to not exploit our vulnerability. Moreover, we have a responsibility to others not to exploit their vulnerability and to ensure they have the best opportunity to exercise their autonomous choice, free from undue pressure or constraints. The legislative framework should reflect that we owe each other duties, both negative *and* positive ones, not to harm others. This is particularly so where the act is known to be a prima facie wrong which will cause serious harm if unjustified, then there is a particularly strong obligation to ensure our actions are justified.

For consent to do this justificatory work it must be justified. A mere out loud ‘yes’ does not do enough to justify penetration. Someone may internally or ‘altitudinally’ not want to be penetrated, but because of external pressures may express a yes aloud- thereby appearing to be consenting.<sup>37</sup> This is why we suggest the actual existence of consent, is irrelevant for criminal liability, rather we are instead more concerned with a Ds reasonable belief in the existence of that consent.

Catriona Makenzie and Wendy Rogers argue to be able to exercise autonomy we need the following:<sup>38</sup>

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<sup>37</sup> See T Hörnle ‘A comparison of sexual assault laws and some advice for law reform’, in T Hörnle (ed) *Sexual Assault* (Oxford 2023).

<sup>38</sup> C Makenzie and W Rogers ‘Autonomy, vulnerability and capacity: a philosophical appraisal of the Mental Capacity Act’ (2013) 9 *International Journal of Law in Context* 37, 39.

- Self-determining: being ‘able to determine one’s own beliefs, values, goals and wants, and to make choices regarding matters of practical import to one’s life free from undue interference. The obverse of self-determination is determination by other persons, or by external forces or constraints’.<sup>39</sup>
- Self-governing: ‘being able to make choices and enact decisions that express, or are consistent with, one’s values, beliefs and commitments. Whereas the threats to self-determination are typically external, the threats to self-governance are typically internal, and often involve volitional or cognitive failings. Weakness of will and failures of self-control are common volitional failings that interfere with self-governance’.<sup>40</sup>
- Having authenticity: ‘a person’s decisions, values, beliefs and commitments must be her ‘own’ in some relevant sense; that is, she must identify herself with them and they must cohere with her ‘practical identity’, her sense of who she is and what matters to her. Actions or decisions that a person feels were foisted on her, which do not cohere with her sense of herself, or from which she feels alienated, are not autonomous’.<sup>41</sup>

While these are demanding, without them it becomes clear that the decision is not an expression of the autonomy of an individual and such a flawed consent cannot provide a justification for doing a wrong to the victim. For example, if the defendant knows the victim is saying ‘yes’ simply because she feels that is societal expectation, then he knows this is not an authentic expression of her wishes. It is not ‘her’ decision, her voicing of the ‘yes’ is

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<sup>39</sup> Ibid, 40.

<sup>40</sup> Ibid, 40.

<sup>41</sup> Ibid, 41.

society speaking through her. It cannot, therefore, be used by him as evidence that this expresses her will.

To go off on a potential tangent, it might be worth noting that a different attitude could be taken if what the defendant was proposing to do was something beneficial to the victim (e.g. good medical treatment or a gift of money). In such a case a partially flawed consent may be sufficient, in combination with the goodness of the act, to justify the provision of the benefit. At least that is a plausible argument. Where the defendant is, however, proposing to do a prima facie wrong, something which (unlike the good medical treatment or the gift has no inherent goodness) the belief consent is doing all of the justifying work and so must be a belief in a rich consent.

## 5. RESPONSIBILITY AND PENETRATION

A person engaging in a sexual penetration owes duties to the person they are penetrating. In particular, they have a legal duty to ensure they have good reason to believe the other party is consenting in a rich sense. This should be regarded as a legal duty as well as a moral duty.

A person engaging in sexual penetration is doing an act which, as argued, above amounts to a legal wrong, but they are also doing an act that endangers the victim, which has potential to cause them a very serious harm, unless there is sufficiently rich consent. This level of harm is sufficient to place a legal obligation on the penetrator to ensure that the act does not cause that harm.

No one has any reason to decide for someone else that sex is good for them. Indeed, the mindset that a man can tell if a woman needs sex or that a woman will inevitably benefit from sex with him is precisely the kind portrayed in pornography but is rightly rejected. Any

penetrator knows they are engaging in an activity which carries a very high risk of causing a serious harm and infringement of rights in the other person. Indeed, only rich consent can mean the act will not be harmful or a major interference in rights. Knowing that, it seems obvious the penetrator has a particular duty to ensure sufficient justification is present. It is in fulfilling his duty that a permission can be found.

The point can be made in a slightly different way. As John Gardner explained:

To claim that one has justification for doing or believing as one does is to claim, at the very least, that one has reasons for so doing or so believing.<sup>42</sup>

In the literature on justifications in criminal law there is often a distinction drawn between normative (or guiding) reasons and motivating (or explanatory) reasons.<sup>43</sup> John Gardner explains that guiding (normative) reasons are:

reasons which apply to one. They bear on what one ought to do or believe. One may, however, overlook or ignore these reasons.

Explanatory (or motivating) reasons are the reasons that motivates a person to act as they do. An explanatory reason is used by a person to justify their acts. As Gardner then explains this has led to a lively debate:

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<sup>42</sup> J Gardner, above n 21, 131.

<sup>43</sup> M Alvarez 'Reasons for action: justification, motivation, explanation' in E Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Winter 2017 Edition), <<https://plato.stanford.edu/archives/win2017/entries/reasons-just-vs-expl/>>.

Are one's actions and beliefs justified by the reasons which actually applied to one, or by the reasons which, perhaps mistakenly, one thought applied to one and accordingly treated, in one's acting or believing, as if they were reasons which actually applied to one?

Fortunately, we do not need to get into all the nuances of the debate, but there is widespread agreement that the key question in terms of justification is whether the defendant was acting *for good reasons*. Hence a standard explanation for a justification can be seen as a case where 'although the defendant had a reason to not perform an offending act, she had a stronger reason to perform it and acted for this latter reason' and acted for that reason.<sup>44</sup> John Gardner suggests in cases where the defendant justifiably (but incorrectly) believed that the act was justified an excuse could exist. But note, in both these accounts of a justification or an excuse the starting point is the beliefs of the defendant. The foci of whether sex is justified is whether the defendant had good reasons for acting as he did and whether he acted for those good reasons. Whether or not the victim did consent, on this application of Gardner's approach only plays the (in practice) relatively minor role of determining whether there is a justification or an excuse.

This responsibility leads to both negative and positive duties.

### **(a) Negative duties**

As argued above D can only rely on consent where V's consent is sufficient to justify D in relying on it as a rich assessment by V that she wants to have sex. For D to have that state of

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<sup>44</sup> A Simester, *Fundamentals of Criminal Law* (Oxford: OUP 2021), chapter 18.

mind D cannot seek to intervene in V's decision-making in a way to reach an outcome D wants. The kind of behaviour which might do that include:

- i) exploitation, including offering inducements;
- ii) deception;
- iii) use of force;
- iv) threats of force;
- v) undue pressure including, threats of emotional harm including breaking off relationship; threat to commit self-harm and repeated requests.

These concepts need unpacking.<sup>45</sup> However, all of them indicate that D is not seeking to allow V to make V's own assessment of whether they want to have sex, but rather D is trying to get V to express what D wants to hear: 'consent' to sex in our context.

### **(b) Positive duties**

If D is genuinely trying to determine whether or not V has offered full rich consent, it may not be enough simply to avoid interference in V's decision making. Where someone is aware that their actions risk causing avoidable serious harm to another they have a legal responsibility to take steps to ensure they do not act in a way which harms the other.<sup>46</sup> D must therefore listen carefully to V and appreciate how V understands the act within its wider

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<sup>45</sup> We have explored them further in xxxxx.

<sup>46</sup> R Goodin *Protecting the Vulnerable* (Chicago: Chicago University Press, 1985); J Collins 'The contours of vulnerability' in J Wallbank and J Herring (eds), *Vulnerabilities, Care and Family Law* (Abingdon: Routledge 2013).

relational and social meaning.<sup>47</sup> D should be seeking to do what he reasonably can to enable V to make a free, informed decision about sex. That might require positive steps, such as the provision of information, the removal of sources of pressure, or giving time to make the decision.

## 6. CONSENT AND THE TRIAL

Many academics researching rape trials have highlighted how trials often end up with the spotlight falling on the victim, and questions around their blameworthiness.<sup>48</sup> The focus is all too often on the clothes the victim was wearing; where she was; whether she had taken steps to manifest her opposition; how she had responded to the rape. Particular attention in the literature has been paid to the use of evidence of the sexual history of the victim, which is used to imply that consent to sex on previous occasions demonstrates that the victim might have consented to the sex subject to the charge. Studies looking at public attitudes and mock-juries suggest that sexual history evidence makes it more likely that victims are not believed.<sup>49</sup> Despite statutory attempts to limit the use of the evidence, it is still commonly presented.<sup>50</sup> As McGlynn points out, in the context of sexual offences cases, the

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<sup>47</sup> J Herring, 'Relational autonomy and rape' in S Day Sclater, F Ebtehaj, E Jackson and M Richards (eds) *Regulating Autonomy* (Oxford: Hart, 2009).

<sup>48</sup> M Gathings and K Parrotta, 'The use of gendered narratives in the courtroom: constructing an identity worthy of leniency' (2013) 42(4) *J Contemp Ethnogr* 668, at 671.

<sup>49</sup> L Ellison and V Munro 'Reacting to rape: exploring mock jurors' assessments of complainant credibility' (2009) 49 *Br J Crim* 202.

<sup>50</sup> Sections 41–43 of the Youth Justice and Criminal Evidence Act 1999 were introduced following sustained criticism of the approach to sexual history evidence in sexual offence

complainant's sexual history 'contributes to shifting the focus of the trial from the defendant's actions to those of the complainant, thereby also shifting legal and moral blame and responsibility from the defendant to the complainant'.<sup>51</sup> Many other tactics, such as drawing the attention of the juries to delay in the victim reporting the assault; her internet history; 'inconsistencies' in her evidence are used by the defence to focus the jury's attention on the victim.<sup>52</sup> The recent academic attention to the so-called 'rough sex defence' show how even in cases where the victim has been killed defendants have found success in alleging that the victim may have consented to the violence.<sup>53</sup> If even in such extreme cases it seems difficult for juries to be persuaded to the necessary standard of proof that there was no consent, there is little hope in less dramatic cases.

A major benefit, therefore, of our approach is to take the spotlight away from the victim. Questions such as 'why did you wear such a short skirt?' under our approach would be irrelevant. Instead, the question is for the defendant 'why did you think the fact she was wearing a short skirt gave you a good reason to think she consented?' Similarly, the post rape behaviour will be irrelevant because it will tell us nothing about whether the defendant had good reasons to think the victim consented to the sexual interaction. We need now to

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cases. Section 41(1) provides that except with leave of the court, no evidence may be adduced at trial, and no question may be asked in cross-examination, by or on behalf of the defendant about any 'sexual behaviour' of the complainant.

<sup>51</sup> C McGlynn, 'Challenging the law on sexual history evidence: a response to Dent and Paul' [2018] Crim LR 216, 222.

<sup>52</sup> Law Commission, *Evidence in Sexual Offences Prosecutions. Consultation Paper* (London: Law Commission, 2023); R Helm, 'constructing truth in the jury box in serious sexual offence cases' [2023] Crim LR 399

<sup>53</sup> H Bows and J Herring *Rough Sex and the Criminal Law* (York: Emerald, 2022).

amplify the two core elements of rape as we see them: the penetration of the victim and lack of reasonable belief in rich consent.

## 7. APPLYING IN THE CRIMINAL CONTEXT

We next move onto how these ideas may be formulated in the law. What do they mean for the *actus reus* and *mens rea* of rape?

Rape is defined in section 1 of the Sexual Offences Act 2003. The *actus reus* is the penetration of another without their consent. This definition sees the crux of this offence rests on the lack of consent. Penetration is not presumed to be a *prima facie* wrong, and is therefore only considered wrongful, where done so without consent. In short our proposal is:

D is guilty of rape if he sexually penetrates V without a reasonable (objectively assessed) belief in V's consent. Under this proposal whether V consents or not is irrelevant.

Our contention is, if we acknowledge the risks of harm and the negative social meaning of penetration, we accept that the act of penetration is a legal wrong itself. The legislation should reflect this as a starting point, and that penetration needs to be justified to be lawful. As we have outlined above, that justification can come through the execution of duties by the defendant, both positive and negative ones, so that the defendant has reasonable grounds to believe in consent.

This proposal reflects the *prima facie* wrongfulness of penetration. As previously outlined, because a D is engaging in a *prima facie* wrongful act and one which may cause very significant harm to the victim, he must only do so where he is acting on good reasons to do so. The proposal is radical in that the issue of whether or not V consents is irrelevant for

the purposes of the definition of rape in the law. The focus is instead on whether or not D has a reasonable belief in that consent. The purpose of this is two-fold. Firstly, as aforementioned, the excessive focus on whether V did in fact consent can lead to over scrutiny of the victim's behaviour. This in turn can open a narrative informed by stereotypes and myths which can distract from the defendant's behaviour. Therefore, the initial purpose here is to shift the lens away from the complainant and onto the defendant. Moreover, as previously outlined, the excessive focus on the existence of consent also fails to properly reflect our relational existence. The legislation should reflect our inter dependency and vulnerability, and in particular, the ethical responsibilities we owe one another to ensure we do not harm one another, and we do what we can to ensure decisions are free, informed and uncoerced. This is particularly important when seen in terms of the message sent to men. Under the current law the message sent is 'a defendant who sexually penetrates another can only be guilty of rape if it is clear beyond reasonable doubt there is no consent'. Under the proposal it will be 'a defendant who sexually penetrates another will be guilty of rape unless it is clear that there is consent'. We believe the second message is the correct one to send; is in line with most teaching in schools and colleges on consent; and best protects women's sexual integrity.<sup>54</sup>

Second, as outlined above, an act must be justifiable, and the person be justified.<sup>55</sup> This is important because it makes clear that whether or not V was consenting is not really the key question; rather the focus is the attitude D is expressing towards V's sexual autonomy. This radical proposal would likely see a major shift in responsabilisation. The focus would instead likely be on the defendant's actions, scrutinizing their behaviour and

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<sup>54</sup> Of course, the role of the law in educating is limited. But it will help reinforce these messages if they are back up in the law.

<sup>55</sup> J. Gardner above n 21, 131.

questioning their motives and actions. The questions would instead be – did D know what he was doing was wrong? Was D acting for good reason? Did D take steps to ensure he was fully respecting V’s sexual autonomy? Did D use any tactics to attempt to manipulate/sway the attitude of the V so he could feel apparently justified in the penetration? In focussing on the subjectiveness of the D’s belief we would encourage an in-depth scrutiny of the thoughts and actions of the D to determine whether they truly believed they were permitted to engage in penetration.

There is still some debate around the idea of a reasonable belief. To what extent is there to be an element of subjectivity. In other words is the question whether it was reasonable for D to believe there was consent or whether the reasons themselves were objectively good reasons to act on the belief.<sup>56</sup> In other words, to what extent can say it was reasonable for him (as a pornography addict or a committed INCEL believer) to believe there was consent; or is the question whether objectively assessed the consent was justified. The law generally takes the latter view, for good reasons. Our proposal therefore recommends a purely objective test, which would hold the actions of the D to the standards of a reasonable juror.<sup>57</sup> If we take a purely objective approach to assessing the reasonableness of the belief in consent, we could achieve two things. Firstly, we would be holding all defendants, to an expected standard of behaviour, which acknowledges the prima facie wrongfulness of penetration, and the need for their actions to be justified. In determining whether the belief in consent was justified the legislation could make reference to the positive and negative duties as outlined above. Moreover, this could place further onus on the D, therefore further scrutinizing their behaviour. This objective standard of expected behaviour may in turn help

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<sup>56</sup> S Gardner, ‘Rape and inconsiderate rape’ [1991] Crim LR 172.

<sup>57</sup> Indeed, in the initial drafting of the Sexual Offences Act 2003 a wholly objective test was preferred but replaced.

to prevent D from relying on, or allowing them the opportunity to use, a narrative informed by stereotypes and myths to justify their actions. As the issues around consent and sex are well known it does not seem unreasonable to expect the pornography addict for example 'I should be aware my views around sex are impacted by my pornography use and so I should be particularly careful to ensure there is consent' or the public school boy to say 'I have not had much experience of interacting with women and so I must make absolutely sure I have correctly understood what she wants'. We repeat Connaghan's call that rape should set 'what kinds of socio-sexual relations we are trying to promote or discourage'. These are that people should take care in their sexual interactions. In the examples above D will be aware that, for example, due to their schooling they lack familiarity with women and or that their pornography use has impacted on their attitude towards consent, and so they need particular care to ensure they have consent. The problem of sexual stereotypes in relation to consent are well known and again seem to require men to take extra special care to ensure they are not seeking to use a stereotype as a justification for the sex.

This proposal could go further and suggest that evidence of a D failing in his negative duties could amount to a conclusive presumption that he could not have reasonable believed consent was rich and therefore guilty of an offence. A list of circumstances/techniques as outlined above in section 5(b) could be used as examples of where a D would be conclusively presumed to not be justified in relying on the apparent consent obtained.

## 8 OBJECTIONS TO OUR PROPOSALS

Our controversial proposal will certainly raise concerns and we seek to address these here.

It might be argued that the irrelevance of the victim's consent is paternalistic. It saying to women 'your consent is irrelevant to us'. We do not think this is a valid concern. It is worth noting that there is an extent to which that is already true under the current law. If

D reasonably believes V is consenting then he will be acquitted whether V consents or not. Our proposal is no more disregarding of consent than that. In any event, the focus of the criminal law is on the blameworthiness of D. As the House of Lords in *Hinks*<sup>58</sup> recognised sometimes consent is not relevant to the blameworthiness of D. There the consent of the victim was seen as irrelevant to whether D committed theft. As was recognised in that case a defendant can be acting in a criminally wrongful way, even if the victim is consenting to the act. A person may consent and still be objectified or exploited. Indeed, requiring an absence of consent as an element of offence can close off the possibility of protecting victims from exploitation or objectification.

The concern may be presented in a different way: that it presents women as passive within sex, rather than celebrating sexual interactions as a joint endeavour.<sup>59</sup> The difficulty here is that much turns on whether one is describing good sex or rape. To describe good sex as a penetration without a reasonable belief in consent would be a most bizarre description and not capture the experience of that. But as a description of rape, to see this as an act done by the defendant to the victim in which she is acted upon and does not participate, is entirely correct. It is not, therefore, a “sex negative” presentation of sex, but seeks (inevitably inadequately) to describe rape.

Some readers may be particularly troubled by a situation where a D does not have a subjective reasonable belief in the consent of the V, but the V was in fact consenting. He would technically be committing an offence under our proposal. This scenario may raise some concerns.

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<sup>58</sup> [2000] UKHL 53.

<sup>59</sup> See S Marcus ‘Fighting bodies, fighting words: a theory and politics of rape prevention’ in J Butler and J W Scott (eds), *Feminists Theorize the Political* (New York: Routledge, 1992).

It may be thought odd to convict D of rape if V was consenting on the basis there is no harm. However, it is well established as a matter of law that justifications can only be relied upon if the defendant acted for that justifying reason. This is the well-known *Dadson* principle.<sup>60</sup> A defendant who kills a person who, unknown to them, is in fact about to kill them, cannot rely on self-defence. Had they known of the justifying reasons (the self-defence) and acted for them then the justification can be used. However, the principle explains, you cannot seek to rely on a justification you knew nothing about. So, the proposal that a defendant who does not know of the consent (the justifying reason) is entirely consistent with the general approach the law takes to justification. In any event, there is clear evidence of harm because D has used V as an object for his own sexual pleasure, with no reasonable belief in her consent. This is so even if it transpires, unknown to D, V consented. As argued above that is core wrong of rape.<sup>61</sup>

In any event to some extent it is not necessary for us to say that the consent of V is irrelevant to the definition of rape. If D does not reasonably believe that V consents, we doubt V does consent, save in the most bizarre of scenarios. That is because V is consenting, in nearly all cases, based on the assumption that D believes she is consenting. It is extremely unlikely that V would be consenting to sex if she knew that D did not believe she was. In this case, as argued above, we would state that V was not giving rich consent.<sup>62</sup>

A different objection may be that our proposal will not have the practical benefits claimed for it. In a rape trial the defendant can still use the problematic lines of argument mentioned above even under our proposal. Rather than claiming that the V's clothing is evidence of her consent, under our proposal D could still claim that it supported his

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<sup>60</sup> *R v Dadson* (1850) 2 Den 35, 169 ER 407.

<sup>61</sup> The fact V consented could be a relevant factor in sentencing.

<sup>62</sup> J Herring 'Mistaken sex' [2005] Crim LR 511.

reasonable belief in his consent. There is some truth in that point, but it does not rob our proposal of practical benefit. First, our proposal will shut off the relevance of many factors commonly raised in rape trials. The reaction of V after the rape; messages sent to friends before or after the rape; the previous sexual history of V (unless known to D) would all be irrelevant because they would not provide D with any reason which D could have relied upon as evidence of a reasonable belief in consent. Second, the jury will need to focus on whether or not they gave D good reason to believe V consent (in a rich sense). Rather than asking whether, for example, the clothing of V created a reasonable doubt as to whether V consented, the jury must decide whether the clothing gave D a good reason to believe V consented. That is a question which is differently focussed and with a different burden of proof. This makes it far less likely that such pieces of evidence will determine the outcome of a rape trial.

A different concern is that our proposal is inconsistent with the presumption of innocence.<sup>63</sup> That would be true if the view that a sexual penetration is prima facie legal wrong were rejected. However, the objection carries no weight if our starting point is accepted. In other words, this objection is, in effect, no more than a rejection of the view that a sexual penetration is a prima facie wrong. It is no more contrary to the presumption of innocence than the conviction of a defendant who pokes someone in the ear and cannot provide a justification for doing so would be.

Some readers may have some sympathy with our broad approach but hesitate to adopt it as a definition of rape. They may, for example, feel the proposed understanding of rape departs too greatly from the understanding of the 'person in the street'. That might lead to juries being unwilling to convict of our newly defined version of rape because it departs too

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<sup>63</sup> K Kessler Ferzan 'Consent, culpability, and the law of rape' (2015-2016) 13 Ohio State Journal of Criminal Law 397.

far from the colloquial definition. Those concerned by such arguments may prefer an approach which suggests a new sexual offence, named, perhaps ‘acting indifferently to consent’.<sup>64</sup>

Clearly, we would have some sympathy with such a proposal and it would ensure the cases we are concerned about would be caught by the criminal law and would send the kind of clear message that we are hoping the law would convey. There, are however, some concerns about this approach. First, there are real dangers in ‘grading’ rapes and suggesting some are worse than others. Clearly the impact of rape can vary between individual victims and there may be additional wrongs occurring in some cases (such as a physical injury) which might not occur in other cases. However, the core wrong of rape as we have presented it involves a man penetrating a woman without being able to justify that penetration through consent. It is that use a woman, that objectification of her, which is at the core of rape and that exists in all cases that fall under our definition. Second, the concerns raised about departure from the view of the person in the street seem at their strongest where a woman consents, but a man does not reasonably believe she consents. Such a case could, theoretically, fall within our definition and yet would probably not be seen as lack of consent by the victim or the public. However, as we explained above, we doubt that will ever occur. Under our proposal if the woman would not have ‘consented’ had she known the man’s state of mind (that he did not believe she consent) then she does not give effective consent. Theoretically a woman who would have consented even if she knew the man did not believe she consent, would fall within our proposal, we expect such a hypothetical woman exists only in the pornographic imagination.

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<sup>64</sup> We are grateful to an anonymous commentator for this suggestion.

## 9. ALTERNATIVES TO OUR PROPOSAL

It may be that our proposal to render the actual consent of the victim irrelevant to the legal definition of rape is too big a step for some to take, even if they are broadly sympathetic to our arguments, so we posit two alternative approaches which might achieve some of the goals we suggest.

Our first option [Alternative Proposal 1] is as follows:

D is guilty if he sexually penetrates V without a reasonable belief in V's consent, but if D can prove that V did consent this can provide a defence. Here consent is only relevant as a defence and D must satisfy the jury that there was consent.

This is less controversial than our primary proposal in that it retains V's consent as an element of the crime, albeit it as a defence that D can raise. However, it retains some feature of our primary proposal in seeing the actus reus of rape as constituted by the penetration and with a focus on the reasonable belief of D as a key aspect of the offence.

An argument in favour of Alternative Proposal 1 might go along these lines. As Jonathan Herring has suggested: 'the value of sexual penetration (i.e., the positive aspects of sexual penetration) can be found in a wide variety of things...in the circumstances surrounding the act, the meaning the parties attach to it, and the consequences of it'.<sup>65</sup> Perhaps consent, in its current understanding would not be enough to add value to the penetration and act as a justification for the defendant's consent. But a notion of rich consent as outlined above, would provide a permission when combined with the defendant acting for that consent, expressing an attitude of the defendant which respects the sexual autonomy of the victim.

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<sup>65</sup> Herring, above n 11.

We ultimately prefer our primary proposal because we believe the consent of the victim is not relevant to the legal wrong. At least, its inclusion is not required. As argued above, if D does not reasonably believe in V's consent he should be guilty, regardless of her state of mind. It will be extraordinary that V would consent to sex if she knew that D did not believe she was. D is objectifying V by treating her as irrelevant, and so should not be able at the trial to raise her consent: the very thing at the time of penetration he had no regard to. Only where the defendant is seeking to find and respect consent is the consent capable of doing any justifying work. Further, there may be cases where even though the act is consented to there are other aspects of the act which justify criminalisation. Consider for example consensual BDSM which involves re-enacting rape or Nazi atrocities. These may, even if consensual, be criminalised based on the lack of respect or harm done to women or Jewish communities.<sup>66</sup>

In any event, shifting consent to the defence side of the offence/defence distinction may be futile. As Madden Dempsey discusses, the burden of persuasion remains on the prosecution as to both offence elements and the absence of defence affirmative defences.<sup>67</sup> Whilst this may have initially seemed a radical suggestion for reform, it appears upon closer inspection that the practical implications of same would be too limited to achieve pragmatic systemic change.

The second alternative proposal [Alternative Proposal 2] we must consider would come from a perspective that is likely to sympathetic to many of our arguments. Catherine Mackinnon has argued that the law of rape should avoid consent and instead understand it as:

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<sup>66</sup> See J Herring Coercive control and rough sex' in H Bows and J Herring (eds) *'Rough Sex' and the Criminal Law: Global Perspectives* (York: Emerald, 2022).

<sup>67</sup> Madden Dempsey above n.

a physical invasion of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability<sup>68</sup>

While there is much to support in this proposal the focus of it is on the negative duties described in section 5(a) above and there is insufficient attention on the positive duties the penetrator owes, as described in section 5(b) above. Nor does this approach quite capture the wrongfulness of the mere act of penetration. It is not, for example, only wrong to stick a finger in someone's mouth or ear, in cases of exploitation etc. It is wrong itself, without justification, and this (the wrongfulness of sexual penetration) is something MacKinnon's definition does not capture.

The third option [Alternative Proposal 3] is perhaps the least radical of all suggesting:

1. D is guilty if he sexually penetrates V without consent (understood as rich consent)

Under this proposal the *actus reus* and *mens rea* of rape, in its current form, would largely remain the same. The primary change to the current law would be to emphasise that the consent must be rich consent, as described above.

The difficulty with this approach is it fails to capture the wrong of rape being a particular act and attitude done towards women. If D is not acting for the purpose of respecting his partner's sexual autonomy, he is performing the act of treating the woman as his own sexual object; and of erasing female sexual autonomy: whether there is consent or not. Once again, it is not consent that is important: it is the reasonable belief that is. And not just belief in consent in a thin consent, but consent as a rich expression of autonomy. This is the argument we have developed in Section 5 above.

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<sup>68</sup> C MacKinnon 'Rape redefined' (2016) 10 Harvard Law and Policy Review 431, 474.

Under our primary proposal consent or belief in consent is regarded as a defence. By contrast, most jurisdictions place consent to be on the offence side of the offence-defence distinction. This is of course because the orthodox view is that there does not exist general reasons not to have sex.<sup>69</sup> This may provide part of the explanation as to why the current law excessively focuses on the V in cases of rape. It is seeking to find sufficient lack of consent to render the offence rape. However, our proposal posits consent as a defence, rather than part of the offence. Doing so, puts the burden on the defendant to justify his actions. As Wall notes ‘when we are considering justificatory and exculpatory defences, the defendant’s reasons for action are directly relevant to the task of showing that the defendant is justified in, or excused for, the performance of a wrong act’<sup>70</sup>

It is worth emphasising that normally in criminal law consent operates as a defence. This is how it operates in other non-fatal offences against the person such as battery or actual bodily harm. It might, therefore, be thought more natural to take our approach and see consent operating as a defence. Wall makes this point powerfully with his 2 rooms example, cited above.

We therefore believe that our primary proposal is preferable. Although, if that is not accepted our Alternative Proposal 1 is offered an alternative.

## 10. CONCLUSION

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<sup>69</sup> K Greasley ‘Sex, reasons, pro tanto wronging, and the structure of rape liability’ (2021) 15 Criminal Law and Philosophy 159, 164.

<sup>70</sup> J Wall ‘Justifying and excusing sex’ (2019) 13 Criminal Law and Philosophy 283, 290.

This article has argued for a rethinking of the law and rape. It has sought to reopen assumptions about the structure of rape liability, acknowledging that the current definitions are simply not working. It has argued that the two key elements of rape should be seen as a sexual penetration and a lack of a reasonable belief in consent by the defendant. We have supported by this by claiming that a sexual penetration is a prima facie wrong, which requires a justification. The justification can only be found if the defendant taking up good reasons for his action, which can be found in a reasonable belief in the consent (richly understood) of the victim.

Crucially under this proposal whether or not the victim consented should be irrelevant to the legal definition of rape. The focus on is on the defendant who, when preparing to sexually penetrate, is getting ready to engage an act which could very seriously harm the victim. He, therefore, has duties to ensure there is consent, in the sense of a full expression of autonomy from the victim. We have argued that this imposes on him both negative duties (e.g., not to use pressure, deceptions, threats) and positive duties (e.g., to correct any significant<sup>71</sup> mistakes the victim has; to take reasonable steps to remove any pressurising circumstances). The defendant who does not do this and does not have reasonable grounds for his belief is treating the victim without respect for her personhood. Importantly too it recognises our universal vulnerability, which requires us to take care of each other and be alert to the fragility of our humanity.

This approach has considerable benefits in terms of criminal trials. It puts the spotlight clearly on the defendant and away from the victim. Pernicious lines of questioning focusing on what the victim was wearing; how she acted after the rape; the prior sexual history of the victim; communications between the victim and friends before or after the rape; what would all be irrelevant. What would matter would be whether the defendant had good reasons to

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<sup>71</sup> Herring above n. 58

think there was consent. The focus of the trial would be where it should be on the defendant and the key question: did you fulfil your relational responsibilities to the victim, by ensuring you had good reasons to believe the victim was providing rich consent.