



FACULTY OF LAW  
University of Lund

Sofia Gårdving

# Consent in rape law – A comparison of three models

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Ulrika Andersson

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# Summary

Rape violates international human rights law; global and regional human rights mechanisms clearly establish this. There is an obligation on states to investigate, prosecute and punish instances of rape. When it comes to defining what rape is, which acts states are obliged to prosecute the international mechanisms provide little guidance though. The European Court of Human Rights provides the most instructive answer in this respect when it in the case of *M.C. v. Bulgaria* describes consent as the dividing line between legitimate and illegitimate behaviour and declares that states are obliged to penalise any nonconsensual sexual act.

Prohibiting nonconsensual sexual acts is an imprecise obligation though as consent itself is not a well-defined term of which courts, legal commentators and people in general have a shared common understanding. Furthermore, the term consent is used to mean different things. Even courts use the term consent both to signify an empirical fact – someone chooses to engage in sexual acts regardless of the reasons for doing so – and as a demarcation between legal sex and illegal rape. Furthermore, there is disagreement about whether consent (in the meaning empirical fact) is a mental state a person experiences or an expression a person performs. Applying consent as either mental state or expression has implications for the two opposing interests rape legislation seeks to reconcile. Protection of negative sexual autonomy – the right not to engage in or be subjected to sexual acts – which all modern rape legislation aims to protect, and upholding the legal rights of the accused of which the presumption of innocence is the most important.

Applying consent as an expression of verbal rejection has the virtue of holding those who act in contradiction to another's expressed choice liable. Applying consent as an affirmative expression has the added advantage of protecting passive victims. Those who are passive out of fear, to avoid injury, or due to intoxication are protected. Applying consent as a mental state appears deficient in comparison as it seems a man may proceed in the face of negative signals in the hope that his victim chooses sex in her mind (under conditions acceptable within the jurisdiction), and if she does, escape liability. However, rules prohibiting attempts mean that a perpetrator is liable for subjecting his victim to sexual acts he infers or ought to infer she does not choose. If in fact the victim chooses sex in mind (under conditions acceptable within the jurisdiction), the perpetrator is liable for the lesser crime of attempted rape. If the victim does not choose sex in her mind or if she chooses sex under conditions not acceptable within the jurisdiction, the perpetrator is liable for rape.

Yet even though applying consent as expression or mental state has somewhat different consequences for the protection of negative sexual autonomy, what is more important for said protection is determining which factors invalidate consent. This is of equal importance for the different

views of consent. A robust and extensive understanding of the factors that vitiate consent ensures good protection of negative sexual autonomy as it explains when a yes, the absence of a no or a mental state of choosing sex is not a defence against rape liability.

Applying consent as either mental state or expression has implications for the legal rights of the accused as well. Applying consent as an expression appears preferable; as long as a man adheres to a woman's words and behaviour he does not incur rape liability (naturally provided the situation does not involve another vitiating circumstance such as fraud). The attitudinal view appears problematic since what is decisive is the victim's mental state, into which the defendant has no access. Yet, rules on mens rea mean that a man is safe to trust a woman's words and signals under an attitudinal view as well. As long as the accused has no reason to assume lack of consent, he is not liable. The difference in consequences for the accused between the two views lies in the fact that the attitudinal view provides a finer instrument for grading liability. The expressive view only considers the defendant's blameworthiness; when the defendant acts in opposition to his victim's expressed choice, he is liable for rape. Applying consent as a mental state considers the defendant's blameworthiness as well but also considers the resulting harm. When the defendant acts in opposition to his victim's expressed choice but his victim chooses sex in her mind under conditions acceptable within the jurisdiction, he is only liable for attempted rape.

# Sammanfattning

Våldtäkt kränker internationella mänskliga rättigheter; detta fastslår globala och regionala MR-mekanismer tydligt. Stater har en skyldighet att utreda, åtala och straffa våldtäktsfall. Men när det gäller att definiera vad våldtäkt är, vilka gärningar stater är förpliktigade att beivra, erbjuder de internationella mekanismerna knapp vägledning. Den europeiska domstolen för mänskliga rättigheter tillhandahåller det mest informativa svaret i detta avseende i fallet *M.C. v. Bulgarien* när domstolen beskriver samtycke som skiljelinjen mellan lagligt och olagligt handlande samt förkunnar en skyldighet för stater att straffbelägga sexuella handlingar som utförs utan samtycke.

Kravet på stater att förbjuda sexuella handlingar utan samtycke innebär dock en vag skyldighet eftersom samtycke i sig inte är en väldefinierad term vars betydelse domstolar, doktrin och människor i allmänhet har en delad förståelse av. Vidare används termen samtycke för att benämna olika saker. Även domstolar använder termen samtycke både för att beteckna ett empiriskt faktum – någon har valt att ägna sig åt sexuella handlingar oavsett vad den bakomliggande orsaken är – samt för att beteckna en skiljelinje mellan lagligt sex och olaglig våldtäkt. Därutöver råder det oenighet om samtycke (i betydelsen empiriskt faktum) är ett mentalt tillstånd en person upplever eller en handling hon utför. Att tillämpa samtycke som antingen mental inställning eller handling har konsekvenser för de två motstående intressen våldtäktslagstiftning ämnar tillgodose. Skydd för negativ sexuell självbestämmanderätt – det vill säga rätten att inte delta i eller utsättas för sexuella handlingar – det intresse all modern våldtäktslagstiftning säger sig värna, samt att upprätthålla den tilltalades rättssäkerhet där oskyldighetsprincipen är den viktigaste rättigheten.

Lagstiftningsmodeller som bygger på brist på samtycke och har krav på verbalt motstånd har fördelen att hålla de personer som handlar tvärtemot en annan människas uttryckta vilja till svars. Att se samtycke som en jakande handling har en ytterligare fördel i och med att passiva offer skyddas. De som är passiva utav rädsla, för att undvika skada, eller på grund av berusning är skyddade. Att förstå samtycke som en mental inställning framstår som bristfälligt i jämförelse eftersom det verkar som en man tillåts fortsätta med sexuella handlingar trots negativa signaler i förhoppning att offret mentalt sett väljer att ha sex (under omständigheter som hennes jurisdiktion tillåter) och om han har rätt, undgå ansvar. Emellertid innebär reglerna som förbjuder brott på försöksnivå att den som utsätter en annan för sexuella handlingar han borde inse är utan samtycke hålls till svars. Om offret de facto väljer sex (under omständigheter jurisdiktionen tillåter) hålls förövaren endast till svars för försök till våldtäkt. Om offret i själva verket inte väljer sex eller väljer sex under omständigheter som jurisdiktionen ej tillåter, hålls förövaren istället till svars för våldtäkt.

Men även om förståelsen av samtycke som antingen handling eller mental inställning har något olika konsekvenser för skyddet av negativ sexuell självbestämmanderätt är det viktigare för att tillgodose detta skydd att bestämma vilka faktorer som negerar samtycke. Detta är av lika stor betydelse för de olika sätten att se på samtycke. En robust och grundlig förståelse av de faktorer som negerar samtycke säkerställer ett bra skydd för negativ sexuell självbestämmanderätt eftersom den förklarar när ett ja, avsaknad av ett nej eller en mental inställning av att välja sex inte förtar våldtäktsansvar.

Att tillämpa samtycke som antingen mental inställning eller handling har även konsekvenser för den tilltalades rättssäkerhet. Att förstå samtycke som en handling framstår som fördelaktigt; så länge mannen agerar i enlighet med kvinnans ord och signaler ådrar han sig ej våldtäktsansvar (naturligtvis under förutsättning att situationen inte innehåller andra samtyckesnegerande omständigheter t.ex. bedrägeri). Samtycke som mental inställning kan förefalla problematiskt eftersom det avgörande med detta sätt att se på samtycke är offrets mentala inställning till handlingen, en inställning den tilltalade ej har tillgång till. Emellertid innebär reglerna om mens rea att en man kan lita till en kvinnas ord och handlingar när man tillämpar detta synsätt också. När den tilltalade ej borde ha förstått att det saknades samtycke hålls han ej till svars. Skillnaden i konsekvenser för den tilltalade mellan de två sätten att se på samtycke ligger i att samtycke som mental inställning tillhandahåller ett känsligare instrument för att utmäta ansvar. Samtycke som handling tar endast hänsyn till den tilltalades straffvärdighet; när han agerar tvärtemot sitt offers uttryckta vilja hålls han till svars för våldtäkt. Att tillämpa samtycke som mental inställning tar också hänsyn till den tilltalades straffvärdighet men väger också in den resulterande skadan. När den tilltalade agerar tvärtemot sitt offers uttryckta vilja men hon likväl mentalt väljer sex (under acceptabla omständigheter vad jurisdiktionen beträffar), hålls han endast till svars för försök till våldtäkt.

# Preface

Rape is a topic that has long held my interest; why it occurs, how it can be prevented, what has historically been and what is currently the legal response to such acts, and for that matter which acts amount to rape in various state legislation and finally which acts should amount to rape. As with all complex issues, investigation into this topic has often provided more questions than answers. Yet by working on this thesis, I have gained a better understanding of the complexity of rape as well as the concept of consent and my interest in this topic has if anything increased.

I wish to express my gratitude to my supervisor Ulrika Andersson for her valuable advice and feedback and for pushing me to finish this thesis. I also wish to thank Christina Johnsson for encouragement and guidance.

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# Abbreviations

CAT	Convention against torture and other cruel, inhuman or degrading treatment or punishment
CEDAW	Convention on the elimination of all forms of discrimination against women
ECHR	European convention of human rights
ECtHR	European court of human rights
ICCPR	International covenant on civil and political rights
UN	United Nations

# 1 Introduction

## 1.1 Background

In Sweden, a question frequently raised by women's groups, politicians and others is whether it would be better to base the Swedish rape law on consent instead of as it is now, on a combination of coercion and exploitation. One opinion often put forward is that legislation based on consent would better protect against sexual violations, without further discussion of how to construct such legislation or indeed recognition that it can take many different forms. While working on this thesis I have realized that consent needs to be thoroughly and well defined to protect sexual autonomy whereas I before thought consent an already fairly robust and precise term in the legal context. I initially intended to compare rape legislation based on force and exploitation as is common in civil law European states with rape legislation based on consent as is frequently used in common law states. My realization of the variability of the term consent led me instead to examine different models of consent based rape legislation.

## 1.2 Subject and purpose

As a student of human rights and humanitarian law, I became interested in rape as a human rights violation. Rape is a persistent and prevalent problem in many states, this is true also for states not involved in armed conflict and dedicated to ensuring equality between the sexes. Therefore, this thesis will examine *what international mechanisms and legal obligations of states exist to protect civilians against rape by non-state actors, and do these clarify how rape legislation should be modelled.*

The definition of the crime of rape in various states consists of two elements: first, specific sexual acts – usually vaginal, anal or oral penetration – second, how these sexual acts came about. It is the second element of the definition that separates lawful from unlawful behaviour<sup>1</sup> and states focus either on the issue of consent or on a combination of force and exploitation by the defendant.<sup>2</sup> It is this second element of the crime that I will focus on and the use of consent as the delineator between non-criminal sex and criminal rape.

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<sup>1</sup> Westen, Peter, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 334.

<sup>2</sup> Great Britain and most common law (and common wealth) states such as Canada, Australia, New Zealand, South Africa and India apply consent-based rape legislation. Leijonhufvud, Madeleine, *Samtyckesutredningen*, p. 54. Most civil law states on the other hand apply a combination of force and exploitation by the defendant, See Case of M.C v. Bulgaria, application no. 39272/98, paras. 91-97.

The purpose of this thesis is to get a better understanding of consent in the context of rape in criminal law and to examine the different conceptions of consent in said context. The focus will primarily be on the conception of consent as either attitude or expression and an examination and comparison of suggested rape legislation models that represent these two different ways of understanding consent. When comparing the models my aim is to understand *the consequences for negative sexual autonomy of treating consent as either attitude or act* and to answer *which model provides the best protection of negative sexual autonomy*. I base my comparison on negative sexual autonomy because it is the interest modern rape legislation seeks to protect, the right not to partake in or be subjected to sexual acts.<sup>3</sup> The removal or obstruction of choice, the disregard for another's subjectivity, is what constitutes the gravamen of rape. I will also examine *the consequences for legal security of seeing consent as attitude or act* and answer *which of the examined models provide the best protection of the legal rights of the accused*, as this interest has to be protected in all criminal law and for which the presumption of innocence makes up the core. Those accused of crimes also have rights under international human rights law as enumerated in articles 14-15 of the ICCPR and articles 6-7 of the ECHR. These two interests and the reasons why they form the foundation for my comparison of rape models will be discussed in greater detail in chapter four.

### 1.3 Delimitations

This thesis focuses on rape as a human rights issue and is therefore limited to rape in peacetime. Rape during armed conflict involves partly different issues; the state apparatus may be broken down, unable to uphold law and order or the state may itself be involved in systematic attacks on civilians as a means of warfare. Humanitarian law is applicable during armed conflict, which retains its own separate set of legal documents and rules.<sup>4</sup> I am interested in rape committed by non-state actors, as this is the most prevalent scenario in states outside the context of armed conflict.

I will focus on rape committed by and against adults. Rape of children differs from rape of adults in how society views such violations and how they are dealt with under law. Moreover, children cannot give consent that works as a defense to rape conviction under any legislation.<sup>5</sup>

Consent is also most relevant where the defendant and putative victim knew each other at least superficially. Even in historical cases, the resistance

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<sup>3</sup> ICTY came to this conclusion after reviewing national criminal law. Prosecutor v. Kunarac, Kovac and Vukovic para. 457 of the judgment. The ECtHR also came to this conclusion in the case of M.C v. Bulgaria (para. 165 of the judgment) after conducting a survey of member-state law and practice.

<sup>4</sup> See Greenwood, The law of war (international humanitarian law) *in* International law, pp. 789-790

<sup>5</sup> For an overview of the age of consent in various states see [http://en.wikipedia.org/wiki/Age\\_of\\_consent](http://en.wikipedia.org/wiki/Age_of_consent) or <http://www.avert.org/age-of-consent.htm>

requirement was waived in cases where the attacker was a stranger. Then as now, nonconsent is assumed when the rapist is a complete stranger – the only plausible defence in these cases is usually mistaken identity.<sup>6</sup>

This thesis is limited to discussing rape of women by men. As far as we know, in cases where both offender and victim are adult and outside some specific environment such as prison, the overwhelming number of cases consists of this constellation. In addition there is far more literature on heterosexual rape.

Finally, I am only interested in the second element of the rape crime that which delineates lawful from unlawful behaviour namely, how sexual acts came about. I will not be discussing what sexual acts reach a level of severity that justifies labelling the acts rape.

## 1.4 Disposition, method and material

The second chapter of this thesis focuses on *lex lata* – what the law is in the context of international human rights when it comes to the crime of rape. I study the sources of international law<sup>7</sup>; the relevant UN covenants (ICCPR, CAT and CEDAW) and the general comments and decisions of the bodies set up to monitor and elucidate rights in the conventions.<sup>8</sup> I then proceed to study the regional European mechanism, the European convention of human rights and the case law of the court set up to monitor and clarify the convention obligations.

In chapter three, I examine the concept of consent in the context of rape in criminal law as it is at the national level the term has evolved and its meaning has been discussed and interpreted to the greatest extent. I clarify the different meanings courts and legal commentators give consent in said context using mostly Peter Westen's analysis of consent.<sup>9</sup> I discuss the use of the term consent as both empirical fact and as demarcation between legal sex and illegal rape. I also discuss the view of consent as either mental state or expression. Finally, I bring up and respond to various critique lodged against the very use of consent as delineator between sex and rape.

Chapter four focuses on the interests to be reconciled in rape legislation: negative sexual autonomy that all modern rape legislation aims to protect

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<sup>6</sup> Leijonhufvud, *Samtyckesutredningen*, p.36; Bryden, *Redefining rape*, p. 34

<sup>7</sup> The sources of international law are enumerated in article 38 of the statute of the International Court of Justice and are as follows (in shortened form): a. international conventions b. international customs c. general principles d. judicial decisions and teachings of highly qualified publicists. Rules of international law must derive from one of these sources. Thirlway, *The sources of international law*, in *International law*, pp. 117, 120

<sup>8</sup> General comments provide substantive interpretations of convention articles. The treaty bodies decisions or 'views' are considered morally if not legally binding on states. Steiner, *International protection of human rights*, in *International law*, p. 768

<sup>9</sup> Westen, *Some common confusions about consent in rape cases*, *Ohio state journal of criminal law vol.2*, pp. 333-359 and Westen, *The logic of consent. The diversity and deceptiveness of consent as a defense to criminal conduct*

and, the legal rights of the accused that always have to be upheld in criminal law. These interests also form the basis for my subsequent analysis and comparison of three consent-based models; examining how well the models protect these two interests.

In chapter five, I focus on *lex ferenda* and examine three suggested rape legislation models that exemplify understanding consent as either act or attitude and their effect on negative sexual autonomy and the legal rights of the accused. Expressive and attitudinal consent is applied in various forms in state legislation but for pragmatic reasons, to better elucidate the differences between the two approaches to consent, I choose to examine them as presented in legal scholarship. I will however discuss what I and various legal commentators believe would be the outcome in practice of these theoretical models. I will also use real cases to illustrate the differences in outcome between the compared models and to highlight possible problem areas for the models. In two instances, I discuss what the outcome actually is in practice (*lex lata*); when I discuss the minor impact of negligence liability and the fact that when models are implemented in law they work in combination with other rules such as *mens rea*.

Since the states applying consent-based rape legislation and the judicial scholars mostly occupied with the issue of consent are states of common law tradition my material is mainly of British and Anglo-American origin. In addition to examining my chosen models, I have studied texts, comments and suggested rape legislation models from a variety of prominent legal commentators concerned with the issue of rape in order to help analyze the strengths and weaknesses, differences and similarities, of my examined models.

In the sixth and final chapter, I compile my previously drawn conclusions concerning *lex lata* in the context of rape in international human rights law and provide a short recapitulation of the different conceptions of consent and response to the criticism against the concept and its use in the criminal law of rape. Thereafter I account for the general conclusions I have drawn about consent when examining the three models. Followed by an analysis of which model provides the best protection of negative sexual autonomy and the legal rights of the accused respectively and an account of the effects on these two interests when understanding consent as either a mental state or an expression.

## 2 Rape under Human rights law

Under the UN-scheme, the covenants of possible interest when examining rape as a human rights violation are the International covenant of civil and political rights (ICCPR), the Convention against torture and other cruel and inhuman or degrading treatment or punishment (CAT) and the Convention on the elimination of all forms of discrimination against women (CEDAW).

CAT is only applicable when a state is involved in or acquiesces to ill-treatment.<sup>10</sup> It is therefore irrelevant to my inquiry as I am interested in rape committed by non-state actors i.e. civilians.

The ICCPR has several articles that could be relevant such as prohibition of torture<sup>11</sup> (art. 7), right to privacy (art. 17) and right to equal protection of the law (art. 26). The human rights committee, the body established to monitor the convention, issues general comments clarifying the convention articles. In the general comments relating to articles, 7, 17 and 26<sup>12</sup> the committee states an obligation to protect these rights even against interference by non-state actors. However none of the general comments mention rape nor does the issue of consent in relation to rape come up in the committee's concluding observations on state reports or in the context of individual complaints brought forth.<sup>13</sup>

The most relevant UN covenant is therefore CEDAW. Article 2 of the convention requires state parties to condemn all forms of discrimination against women. According to the committee established by the convention, gender-based violence is a form of discrimination that impairs the enjoyment of several rights afforded civilians such as freedom from torture, equal protection under the law, highest attainable standard of health, liberty and security of person.<sup>14</sup> These rights are also protected against interference by other individuals acting in a private capacity.<sup>15</sup> In other words, states are required to take measures to prevent, investigate and punish rape committed by non-state actors in order to live up to their convention obligations.<sup>16</sup> In addition, the Committee repeatedly urges states to define rape as sexual intercourse without consent in its concluding observations to state reports.<sup>17</sup> Unfortunately, no further guidance concerning how to define consent is given.

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<sup>10</sup> Article 1 of the convention

<sup>11</sup> ICCPR has no requirement of state involvement or acquiescence.

<sup>12</sup> General comments no. 7, 16 and 20

<sup>13</sup> I have used [www.bayefsky.com](http://www.bayefsky.com) to scan the contents of the various human rights bodies concluding observations on state reports and the individual complaints brought forth.

<sup>14</sup> General recommendation no. 19, p. 1, 7

<sup>15</sup> General recommendation no. 19, p. 9.

<sup>16</sup> CEDAW articles 2b,c,e,f, 5a and general recommendation no. 19, p. 9.

<sup>17</sup> See e.g. CEDAW, A/55/38 part II (2000) 61 at paras. 151; CEDAW, A/57/38 part I (2002) 13 at paras. 98.

[http://www.bayefsky.com/themes/equality\\_gender\\_violence\\_concluding\\_part2.php](http://www.bayefsky.com/themes/equality_gender_violence_concluding_part2.php)

The most well developed regional human rights mechanism is the European convention (and court) of human rights (ECHR).<sup>18</sup> Over the years the court has established a clear obligation on states to protect convention rights from interference by non-state actors.<sup>19</sup> The court has also dealt specifically with the issue of rape in the case of *M.C v. Bulgaria* and made clear that rape violates the rights under articles 3 (prohibition of torture) and 8 (right to privacy) of the convention.<sup>20</sup>

According to the court, consent is the instrument to use in order to protect sexual autonomy. Consent works as the dividing line between legitimate and illegitimate behaviour. Accordingly, all investigations should focus “on the issue of consent”<sup>21</sup> and “any non-consensual sexual act”<sup>22</sup> should be penalised and prosecuted. This does not necessarily mean that states have to prosecute all such proscribed acts as rape. The Court usually does not regulate in detail how states should live up to their obligations; the means of implementation are left to state discretion. In other words, in all likelihood states may reserve the rape label for sexual acts obtained by use of violence or threat thereof as long as these states also criminalise other ways of achieving non-consensual sexual acts.<sup>23</sup>

The court uses the phrase “any non-consensual sexual act”<sup>24</sup> which could indicate a very inclusive approach to sexual offences. A wide variety of actions and situations could be relevant such as threat to other interest than life/health, deceit, cases involving an unconscious or drunk victim and so on. However, the range of sexual conduct that must be penalised depends on the meaning given ‘consent’ and elaboration of factors that can invalidate consent. Unfortunately, the judgment gives little guidance here. Yet it is apparent the court places certain conditions on consent, not anything will count as such. For instance, absence of physical resistance by the victim will not count as consent as this does not reflect the evolving understanding of rape victim’s reactions.<sup>25</sup> Verbally expressing non-consent as *M.C* did seem to be sufficient to warrant criminal sanction. If states are also under an obligation to prosecute nonconsensual cases where the victim was unable to express nonconsent is unclear. The Court places strong emphasis on considering all surrounding circumstances when determining whether the situation involved nonconsent (*actus reus*) though.

Surrounding circumstances are also relevant when determining *mens rea*.

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<sup>18</sup> It is only the regional European mechanism that has the jurisdiction to consider individual complaints. ECHR art. 34; American Convention on Human Rights art. 61; Statute of the African Court of Justice and Human Rights art. 29-30

<sup>19</sup> *M.C. v. Bulgaria*, Application no. 39272/98, 2003, para. 149 of the judgment

<sup>20</sup> *M.C. v. Bulgaria*, Application no. 39272/98, 2003, para. 187 of the judgment

<sup>21</sup> Para. 181 of the judgment

<sup>22</sup> Para. 166 of the judgment

<sup>23</sup> Petter Asp also comes to this conclusion in *M.C. v. Bulgaria – a Swedish perspective*, *Scandinavian Studies in law* vol. 54, pp. 191-211

<sup>24</sup> *M.C. v. Bulgaria* para. 166 of the judgment

<sup>25</sup> Paras. 164, 166 of the judgment

In M.C.'s case, the "coercive environment" created by the men – taking M.C. to a deserted area where she was alone with three men she barely knew and dependant on them to get back home – was highly relevant.<sup>26</sup> The court regrettably gives no further guidance on mens rea, for instance if belief in consent has to be reasonable. In other words, it is unclear whether dolus (intent) is required or if culpa (negligence) is sufficient for liability.

In conclusion, rape is a recognized human rights violation on both global and regional level. State parties to CEDAW and ECHR are under an obligation to prevent, investigate and punish rape. On the regional European level states are obliged to focus on consent and penalize any nonconsensual sexual act and on the global level they are urged to do so. However neither UN nor European mechanism clarifies to any great extent what is required of consent in order to work as defence against criminal liability for rape.

States are obliged to incorporate human rights into their national legislation when they have ratified human rights conventions. In the case of rape, states have to align their criminal law and its application with the convention obligations. As it is national criminal law that in the end shall protect civilians against rape the rest of this thesis will focus on consent in the criminal law of rape. The following chapter will look at the concept of consent and the various meanings given consent in the criminal law context and a subsequent chapter will examine and compare various possible models of consent-based rape legislation that exemplify viewing consent as either mental state or expression.

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<sup>26</sup> Para. 180 of the judgment



## 3 Consent in the context of rape in criminal law<sup>27</sup>

Consent creates a privilege in the context of criminal law. When someone consents to another's conduct (that would otherwise constitute a crime), the consent removes the obligation to refrain from the conduct in question.<sup>28</sup>

This is naturally conditioned on the fact that the person giving the consent has the right to decide over the interest at hand.<sup>29</sup> X can for instance not consent to Y killing him, nor can X give Y consent to have sex with B.

In the context of rape, provided the consenter has the right to decide over the interest, consent removes the obligation to refrain from having sex with the other person and in so doing negates criminal liability for rape. Yet this is only one way to perceive of consent, for the term holds different meanings within criminal law and in the context of rape. Courts and legal commentators use one word to signify different things and confusion ensues. There exist three pairs of crosscutting conceptions of consent in the rape context: factual versus legal, attitudinal versus expressive, actual versus imputed.<sup>30</sup>

### 3.1 Factual versus legal consent

I will start by explaining the difference between factual and legal consent. In the rape context, there are situations that involve no consent at all and there are situations that involve some type of consent. For instance, when an assailant has his victim completely physically overpowered, beats or finds his victim unconscious and proceeds to have sex with her there is no consent at all. In these situations, the assailant removes any possibility of choice from his victim. If an assailant instead tells his conscious victim 'have sex with me or I will beat you' he is giving her a choice, albeit limited. He is enlisting her cooperation and if she chooses sex – even if it is just because she prefers it to being beaten – the situation involves an instance of 'factual consent' to sex.<sup>31</sup> Factual consent does not involve moral considerations

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<sup>27</sup> I have used a simplified version of Westen's description of consent and its different meanings, for a more detailed account read Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, pp. 333-359

<sup>28</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, pp. 333-334

<sup>29</sup> Asp, Sex och samtycke, pp. 90-91

<sup>30</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, pp. 335-337

<sup>31</sup> I have borrowed the terms 'factual' and 'legal' consent from: Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, pp. 333-359. Factual and legal consent corresponds with descriptive and normative consent, terms frequently used by other authors. I use Westen's terminology as he to my knowledge has written the most elaborate and illuminating description of the two forms of consent and the differences between them.

about how consent was attained; it merely describes the empirical fact that a person chooses sex regardless of the underlying reason. A woman (or man) factually consents to sex, whether in mind or manifestation, when she chooses sex because she unconditionally desires it, she wants it for another reason than desire or she considers it the best alternative in the situation she finds herself.<sup>32</sup>

Rape law cannot cease to apply as soon as a situation involves factual consent. If it did a lot of harmful and culpable behaviour would go unpunished. In order to protect individuals' sexual integrity rape law has to contain a normative dimension. Legal consent consists of instances of factual consent under "such conditions of competence, knowledge and freedom" as the state considers adequate for the consent to constitute a defence to rape.<sup>33</sup> Where factual consent relates to the ability to make a choice in the first place, legal consent relates to the voluntariness of such a choice. Yet the voluntariness has nothing to do with whether the victim thinks her choice voluntary, instead it has to do with whether the relevant jurisdiction sees her choice as voluntary enough to constitute a defence to rape.<sup>34</sup> Legal consent therefore involves normative yet objective deliberation in that the preconditions for legal consent are decided by the state and not the subjective beliefs of the victim.<sup>35</sup> So the woman who only chooses to have sex with her boyfriend because he threatens to leave her otherwise consents legally (unless her jurisdiction makes her boyfriend's behaviour illegal) regardless of how invalid and coerced she believes her consent to be.

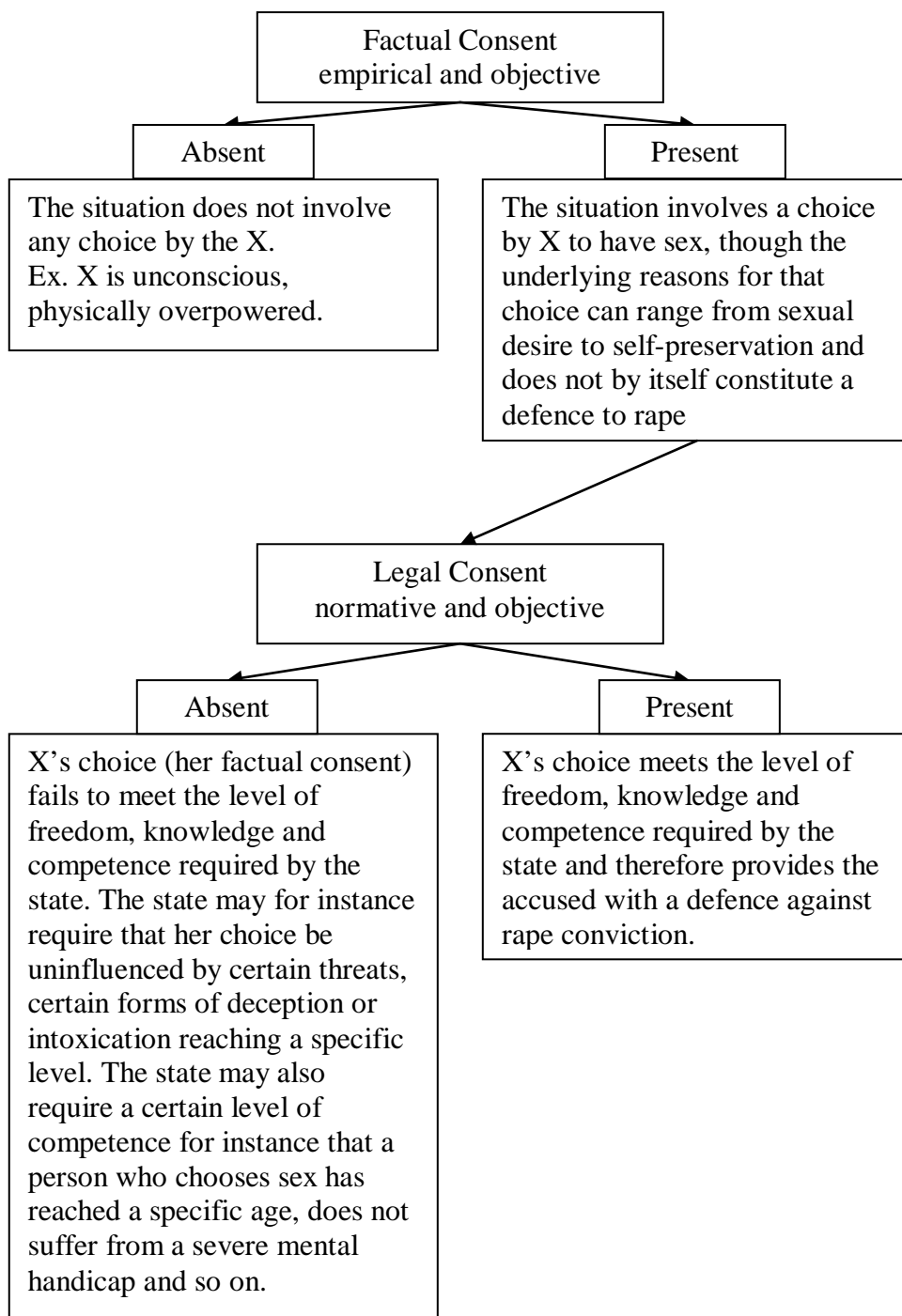
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<sup>32</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 335. I have exchanged Westen's alternative "sufficiently indifferent to it as to be willing to leave its occurrence to others" with 'want it for other reason than desire' because I think it better describes the underlying reason for the choice. I believe Westen's phrase is too narrow, if someone chooses sex for instance to get pregnant or to impress friends the reason for their choice is not sexual desire but it is also not indifference. Indifference also fits under my description, as it is merely another way to describe wanting to let someone else decide.

<sup>33</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 340. To simplify matters I do not divide legal consent into 'prescriptive' and 'imputed' as Westen does. Instead I disregard 'imputed' consent and use legal consent only in its 'prescriptive' form that is, actual consent under the conditions required by state.

<sup>34</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 335

<sup>35</sup> Wertheimer, What is consent? And is it important?, *Buffalo criminal law review vol. 3*, p. 562



However, rape statutes do not speak of ‘factual’ or ‘legal’ consent, statutes speak simply of consent and use consent in *either* the factual or the legal sense. A situation can involve both factual and legal consent but not within one jurisdiction, consent is used either in a factual as opposed to legal sense

or in a legal as opposed to factual sense.<sup>36</sup> Consider a case involving a woman who has consented under such conditions as two jurisdictions (the first defining consent as factual, the second defining consent as legal) both regard as adequate to dismiss rape liability. The jurisdiction that uses consent legally need only say the woman consented as the normative dimension is here included in the term consent. A jurisdiction applying consent factually on the other hand will have to add a separate normative element (since it uses consent more narrowly, merely to describe the fact that a woman has chosen sex regardless of her reasons) saying for instance that the consent was 'valid' or 'lawful'.<sup>37</sup>

Example of a statute that applies consent legally

*[A] man commits rape if he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it...*<sup>38</sup>

Example of a statute that applies consent factually

*A male person commits rape when he has sexual intercourse with a female person who is not his wife,*  
*a. without her consent, or*  
*b. with her consent if the consent*  
*i. is extorted by threats or fear of bodily harm,*  
*ii. is obtained by impersonating her husband, or*  
*iii. is obtained by false and fraudulent representations as to the nature and quality of the act.*<sup>39</sup>

A relevant question is which demands states should place on choice to reach the level of legal consent. Unlike legal consent that is all or nothing, autonomy comes in degrees.<sup>40</sup> Our choices are rarely entirely free from any outside influence and internal factors such as intoxication and mental health, affects our choices as well. Obviously, states cannot demand that choice be free from any influence as few if any would then be able to give legal consent. The challenge is to achieve a balance between protection against harmful infringements on personal choice while at the same time refraining from unduly obstructing people's positive sexual autonomy.<sup>41</sup> In western state legislation, there is abundant support to view underage and use or

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<sup>36</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 338

<sup>37</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 339

<sup>38</sup> Sexual offences act (amendment) Act. 1976, 24 & 25 Eliz. II, c. 82, § 1(1) (Eng.). cit; Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 339

<sup>39</sup> Criminal code, R.S.C., ch. C-34, § 143 (1970) (Can.) (repealed 1980-81). cit; Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 338

<sup>40</sup> McGregor, Is it rape?, p. 120

<sup>41</sup> Wertheimer, What is consent? And is it important? *Buffalo criminal law review*, p. 564

threat of violence as factors that invalidate consent.<sup>42</sup> State legislation and to an even greater extent legal scholarship also provides ample support to view mental retardation/illness, intoxication, deception and coercion<sup>43</sup> as factors that may vitiate consent depending on severity.<sup>44</sup>

### 3.2 Attitudinal versus expressive consent

The second conceptual pair is attitudinal versus expressive<sup>45</sup> consent and relates to how people can actually choose sex for themselves. The difference is between subjectively experiencing choice and objectively manifesting choice.<sup>46</sup> Below I will use the term consent in the factual sense – as choice regardless of circumstances – where nothing else is stated.

Under an attitudinal consent model, consent is a subjective mental state one has.<sup>47</sup> Courts and legal commentators have often treated attitudinal consent as a desire the putative victim has.<sup>48</sup> This is erroneous I think, one can desire sex without choosing it for instance thinking it too early in a relationship. Reversely, one can choose sex without feeling sexual desire, without it being a matter for the state.<sup>49</sup> If a mental state is to be an essential part (though insufficient by itself) in protecting autonomy it has to emanate from a conscious mind capable of reflection. It has to be a product of will, a mental state of choice.<sup>50</sup> We do not choose nor control our desires, merely whether to act on them.<sup>51</sup> Furthermore, the requirements for legal consent concerning freedom, knowledge and competence do not make sense if factual consent is desire. Violence, threats etc do not change what the victim desires it does however change what she chooses.<sup>52</sup>

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<sup>42</sup> All states (with the exception of some states where all sex outside of marriage is illegal) have a set age of consent, see [http://en.wikipedia.org/wiki/Age\\_of\\_consent](http://en.wikipedia.org/wiki/Age_of_consent) or <http://www.avert.org/age-of-consent.htm>. Furthermore, all states criminalize securing sex by means of threat of death or extreme injury or pain. Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 351

<sup>43</sup> Threatening something other than violence, for instance to destroy something of great economic value.

<sup>44</sup> See McGregor, Is it rape?, chapters 5-6; Estrich, Real rape, p. 103; Case of M.C. v. Bulgaria, Application no. 39272/98, paras. 89-90, 92-95; Sexual offences act 2003 chapter 43 (England); 6 kap. 1-2 §§ Brottsbalken (Sweden)

<sup>45</sup> I use Westen's term 'expressive' but this type of consent is often referred to as 'performative'. See for instance: Wertheimer, What is consent? And is it important?, *Buffalo criminal law review* vol. 3, p. 566; McGregor, Is it rape?, p. 125

<sup>46</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 336

<sup>47</sup> McGregor, Is it rape?, p. 118

<sup>48</sup> McGregor, Is it rape?, p.121

<sup>49</sup> For short discussions on the subject see McGregor, Is it rape?, p. 121; Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 338

<sup>50</sup> Hurd, The moral magic of consent, *Legal theory* vol. 2, pp. 124-126

<sup>51</sup> Kessler Ferzan, Clarifying consent: Peter Westen's The logic of consent, *Law and philosophy* vol. 25, p. 205

<sup>52</sup> Kessler Ferzan, Clarifying consent: Peter Westen's The logic of consent, *Law and philosophy* vol. 25, pp. 205-206

Expressing this mental state of choice is neither necessary nor sufficient under an attitudinal model.<sup>53</sup> Consequently, ability to act (outwardly) voluntarily is not necessary but the previously mentioned cognitive abilities consciousness and ability of reflective thought are, since the victim must be capable of making a choice.<sup>54</sup>

Expressive consent models see consent as something one does, an act.<sup>55</sup> However, the act has meaning because it refers to an underlying mental state.<sup>56</sup> Expressive models focus on the manifestation of choice instead of the mental state it refers to because proponents argue the way consent protects autonomy is by acting as permission to sexual acts.<sup>57</sup> In order to work as permission, consent needs to be communicated. Without communication, people have no reason to alter their behaviour and engage in sexual acts with others.<sup>58</sup> The focus on act not mental state does not mean expressive models look no further than consenting behaviour though. The circumstances surrounding the consenting behaviour need to be morally legitimate (as determined by the jurisdiction) meaning that if a situation involves circumstances that invalidate consent (again, as determined by the jurisdiction) the victim's expression of consent does not exculpate, in other words there is no legal consent.

Expressive models see expression as necessary *and* sufficient to determine whether a situation involved factual consent.<sup>59</sup> However, there are also hybrid models that consider expression necessary yet *not* sufficient to determine factual consent. These models can also be referred to as weak expressive or weak attitudinal views. They are a sort of combination of expressive and attitudinal model; the victim's expression needs to be accompanied by a mental state.<sup>60</sup>

I will examine this conceptual pair in more detail in a later chapter when I compare different consent-based models, one expressive, one attitudinal model and one hybrid.

### 3.3 Actual versus imputed consent

The final conceptual pair is that of actual and imputed consent. Actual consent relates to a choice an individual has made for herself whether that choice was experienced or manifested; factual (and thus in itself not a defence against rape charges) or legal (and thus in accordance with the

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<sup>53</sup> McGregor, *Is it rape?*, p. 118

<sup>54</sup> McGregor, *Is it rape?*, p. 120

<sup>55</sup> Westen, *Some common confusions about consent in rape cases*, *Ohio state journal of criminal law vol.2*, p. 336

<sup>56</sup> McGregor, *Is it rape?*, p. 125

<sup>57</sup> McGregor, *Is it rape?*, p. 114

<sup>58</sup> McGregor, *Is it rape?*, p. 124. See also Wertheimer, *What is consent? And is it important?*, *Buffalo criminal law review vol. 3*, p. 568, discussing consent as authorization.

<sup>59</sup> Wertheimer, *What is consent? And is it important?* *Buffalo criminal law review*, p. 566

<sup>60</sup> Wertheimer, *What is consent? And is it important?* *Buffalo criminal law review*, p. 566

jurisdictions demands regarding competence, knowledge and freedom).<sup>61</sup> Imputed consent is the opposite of actual consent; it is a legal fiction of actual consent. When a jurisdiction applies imputed consent it means that although a situation involves no consent (factual or legal, attitudinal or expressive) the law will act as if the situation did involve consent and furthermore under such conditions as to work as a defence against rape liability.<sup>62</sup> The marital exemption is one example of imputed consent. In states that still apply the exemption women cannot bring rape charges against their husbands, by marrying women are considered to consent to all future sex within that marriage.<sup>63</sup> Another example of imputed consent applied in some states is the rule that a woman cannot change her mind during intercourse. The initial (legal) consent is considered to last throughout the act even if the woman changes her mind.<sup>64</sup> Hereafter I will completely disregard imputed consent and focus on actual consent as does my examined rape models.

### **3.4 Relationships between conceptual pairs**

These three conceptual pairs of consent do not only interact within pairs but also between pairs. Every instance of subjective (attitudinal) or objective (expressive) choice to have sex is an instance of actual consent. Equally, every instance of actual consent involves a woman choosing sex in mind or deed or both.<sup>65</sup> Every instance of factual consent is an instance of actual consent because factual consent is the empirical fact that a woman chooses sex regardless of her reason for doing so.<sup>66</sup> The other relationships between pairs all involve imputed consent and are therefore not relevant for this thesis.<sup>67</sup>

### **3.5 Criticism against the use of consent in rape law**

The very use of consent to establish the legal boundary between sex and rape has been criticized for various reasons. Feminists criticize the

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<sup>61</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 337

<sup>62</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 337

<sup>63</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 337

<sup>64</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 337

<sup>65</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 339

<sup>66</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 340

<sup>67</sup> For more examples of interaction between conceptual pairs of consent see Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, pp. 339-340

application of consent arguing that law is disingenuous about consent in the sexual context.<sup>68</sup> Even though liberal consent theory demand that consent be ‘freely given’, courts have historically found and to some extent still find situations involving submission and reluctant acquiescence to be consensual.<sup>69</sup>

Westen argues that nowadays failure to demand ‘freely given’ consent may often be due to jury confusion about consent, rather than gender discrimination.<sup>70</sup> Judges fail to give jury’s instructions about which type of consent they should examine, which type of consent the statute refers to – factual or legal. He gives the example of a Texan grand jury, which dismissed rape charges in a case involving a woman submitting at knifepoint on the condition that her attacker put on a condom. Westen believes the jury understood the prosecutor as using consent factually, in other words as that which the victim preferred under the circumstances. Indeed, the woman did consent in the factual sense as she chose sex over knife injuries yet hardly in the legal sense as she was under threat of serious injury.<sup>71</sup>

Yet, even disregarding the problem with confusion about the different meanings of consent, the problems commentators speak of lie not with the concept of consent itself. It lies with the normative understanding within states of what kinds of pressures employed to obtain sex should be prohibited.<sup>72</sup> If this normative understanding is deficient in some way the protection of negative sexual autonomy will suffer regardless of whether states use consent or some other legal construct in their rape laws. When the norms are changed to protect negative sexual autonomy better, they can be ‘fully codified in terms of consent.’<sup>73</sup>

Commentators have also criticized the different application of consent when it comes to sexual offences from its application in other areas of law.<sup>74</sup> In other areas of law, consent has to be sought out; it is not – as in rape law based on lack of consent – presumed.<sup>75</sup> Furthermore, circumstances that vitiate consent in other areas of law do not when it comes to sexual relations or if they do, they are applied in a much narrower fashion.<sup>76</sup> Take the

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<sup>68</sup> MacKinnon, *Towards a feminist theory of the state*, pp. 168, 175; cit. McGregor, *Is it rape?* p. 77

<sup>69</sup> Pateman, *Women and consent*, *Political theory* 8(2); cit. Cahill *Rethinking rape*, p.172; MacKinnon, *Toward a feminist theory of the state*; cit. McGregor, *Is it rape?*, pp. 79-80

<sup>70</sup> Westen, *Some common confusions about consent in rape cases*, *Ohio state journal of criminal law vol.2*, p. 341

<sup>71</sup> Westen, *Some common confusions about consent in rape cases*, *Ohio state journal of criminal law vol.2*, p. 341

<sup>72</sup> Westen, *Some common confusions about consent in rape cases*, *Ohio state journal of criminal law vol.2*, p. 359

<sup>73</sup> Westen, *Some common confusions about consent in rape cases*, *Ohio state journal of criminal law vol.2*, p. 359

<sup>74</sup> McGregor, *Is it rape?*, p. 104

<sup>75</sup> Rape statutes do not explicitly express a presumption of consent but imply it when requiring physical or verbal resistance. McGregor, *Is it rape?*, p. 104

<sup>76</sup> McGregor, *Is it rape?*, p. 100



example of fraud, theft by fraud is illegal both as fraud in factum and as fraud in inducement. However, even states that see deception in sexual relations as a vitiating circumstance refer only to fraud in factum.<sup>77</sup> Both of these points of criticism will be discussed below under the Yes Model subchapter.

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<sup>77</sup> McGregor, *Is it rape?*, pp. 181-183. Fraud in factum exists when someone is deceived as to the nature of the act; he/she consents to X but is subjected to Y. For instance a gynecologist has attained consent to insert a medical instrument but inserts his penis instead (see *McNair v. State*, 1992). Fraud in inducement exists when someone deceives another in order to get her to consent, she is not deceived about the act but her reasons for consenting came about through deception. A gynecologist deceives his patient into thinking that he can cure her deadly disease by penetrating her with his penis (see *Boro v. Superior Court*, 1985).

## 4 The foundation for my analysis – two competing interests

In this chapter, I will discuss the two competing interests that all modern rape legislation seek to reconcile – protection of negative sexual autonomy and the legal rights of the accused. How well these interests are protected constitutes the basis for my examination of consent-based rape legislation models in the subsequent chapter.

### 4.1 Protection of negative sexual autonomy

Historically rape legislation has aimed to protect anything from male property right to the institution of marriage, to morals.<sup>78</sup> Currently there is broad consensus that rape legislation aims to protect sexual autonomy and integrity.<sup>79</sup> States should protect negative sexual autonomy, meaning the right not to partake in or be subjected to various types of sexual activity. Positive sexual autonomy on the other hand, should be free from state interference as long as there is no harm to others, leaving people free to choose their sexual lives for themselves.<sup>80</sup>

Why then is the choice to refuse sex so central to the crime of rape. Our choice may be superseded in other situations without it being considered a significant harm to us. The significance lies in what the choice ranges over;

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<sup>78</sup> Rape legislation initially evolved as a form of protection of male property rights. Fathers had an interest in their daughters' value on the marriage market and husbands had an interest in having sole sexual access to their wives, not least to their reproduction to ensure the children they reared were their own and their sons the rightful heirs to their property. Later on, the interests became rather to protect marriage and Christian values, during this time all extramarital sex was criminalized and so it did not matter if a woman had happily chosen to have sex with the man accused of raping her. A married woman, on the other hand, could be violently forced to have sex with her husband without having recourse to the courts. Later still the interest became protecting common decency and morals but also the freedom of the individual. *See* McGregor, *Is it rape?*, p. 29; Dripps, *Beyond rape: An essay on the difference between the presence of force and the absence of consent*, *Columbia law review* vol. 92, pp. 1780-1781

<sup>79</sup> ICTY came to this conclusion after reviewing national criminal law in search of general principles common to the world's major legal systems in the context of rape. *Prosecutor v. Kunarac, Kovac and Vukovic* para. 457 of the judgment. The ECtHR also came to this conclusion in the case of *M.C v. Bulgaria* (para. 165 of the judgment) after conducting a survey of member-state law and practice. Sexual autonomy is also what several western states claim to be protecting with their rape legislation. *SOU* 2001:14, p. 143; *NJA* 2004 s. 231; *People v. Cicero*, California court of appeal (Cal. App. 3d at p. 475). There is also general consensus among legal commentators that rape law ought to protect negative sexual autonomy. *See* McGregor, *Is it rape?*, pp. 111-112, Asp, Petter, *Sex och samtycke*, p. 31

<sup>80</sup> McGregor, *Is it rape?*, pp. 111-112

our bodies, our gender and sexuality.<sup>81</sup> So much of our identities are tied to these facets of our being. They are as important to describing who we are as our thoughts and feelings are.<sup>82</sup> Since sexuality and sexual expression is such an important part of adult life, self-determination in this area is fundamental.<sup>83</sup>

It is also vital to have control over one's own body. This does not mean that all matters involving the body will have equal importance and claim to protection. For instance when it comes to physical contact some body parts simply carry more meaning, here sexuality comes in again. Unwanted contact has greater effect where body parts connected with sexuality are involved.<sup>84</sup> Patting someone's back does not carry as much meaning as patting someone's behind. The first act does not have the same power to hurt feelings and humiliate.

Additionally, it is often in sexual situations we are at our most exposed, physically and psychologically, so the removal of choice affects us at our most vulnerable.<sup>85</sup> In rape cases, the blatant disregard for the victim's choice also shows a disregard for her subjectivity. She is turned into a mere sexual object, a tool to fulfil the perpetrator's sexual needs or desire. She is treated as inferior to the assailant as her choice is irrelevant and need not be respected.<sup>86</sup>

The very possibility of female sexual autonomy has however been questioned. MacKinnon has argued that in a world of compulsory heterosexuality and sexual hierarchy women's inferior status make even "normal" heterosexual sex coercive.<sup>87</sup> She argues that women cannot exercise free choice in the heterosexual context making the difference between rape and heterosexual sex one of quantity (i.e. involving more or less coercion) not of quality.<sup>88</sup>

This view shows an all or nothing approach to autonomy. However, absolute autonomy is a flawed notion since no one (female or male) is entirely unaffected from outside influence.<sup>89</sup> Autonomy comes in degrees and the absence of absolute autonomy in no way implies total lack of autonomy. While gender hierarchy might limit women's choices, it does not remove all female agency.<sup>90</sup> MacKinnon's view also disregards women's

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<sup>81</sup> McGregor, *Is it rape*, p.221

<sup>82</sup> Cahill, *Rethinking rape*,

<sup>83</sup> McGregor, *Is it rape*, p. 224

<sup>84</sup> McGregor, *Is it rape*, p. 224

<sup>85</sup> McGregor, *Is it rape*, p. 225

<sup>86</sup> McGregor, *Is it rape*, p. 225

<sup>87</sup> Cahill, *Rethinking rape*, p. 42

<sup>88</sup> Cahill, *Rethinking rape*, pp. 37-38, 40

<sup>89</sup> West, *The difference in women's hedonic lives: A phenomenological critique of feminist legal theory*, in *At the boundaries of law: Feminism and legal theory*; cit. Cahill, *Rethinking rape*, p. 46

<sup>90</sup> West, *The difference in women's hedonic lives: A phenomenological critique of feminist legal theory*, in *At the boundaries of law: Feminism and legal theory*; cit. Cahill, *Rethinking rape*, p. 45

own experiences as few women see mutually chosen sex as similar to rape. If heterosexual sex were as similar to rape as MacKinnon argues, women would not need to fear rape as much as they do as they would already be experiencing some (albeit lesser) form of rape on a regular basis.

Another question is whether sexual practices can be harmful even where sexual autonomy is not violated. Take the example of sadomasochism; in these situations, there certainly exists a risk of physical harm even if no one's choice is overridden. States should not ban all such activity or persecute its practitioners, as this would entail an undue interference with positive sexual autonomy.<sup>91</sup> However, outside the sexual context and with the exception of sports and minor injuries, consent does not remove criminal liability for violence.<sup>92</sup> Neither should it in the sexual context, here too consent should only be allowed as a defence to minor injuries. With all due respect for individual's positive sexual expression, any other system would likely do masochists more harm than good as it would leave them entirely without protection or possibility of redress.<sup>93</sup> In addition, it could harm rape victims as well if perpetrators were successful in arguing consent even in the face of violence.<sup>94</sup> Situations as these should however not fall under the rape paragraph, as the gravamen of rape is the violation of sexual autonomy. In fact, the practice of sadomasochism helps show that the principal harm of rape is disregard for sexual choice since masochists do not feel their autonomy or integrity is injured due to their sadomasochistic practices.

Another circumstance that shows that violation of sexual autonomy is the gravamen of rape is the fact that research shows that the psychological effects on rape victims are the same whether the victim was subjected to extrinsic force or not.<sup>95</sup> Focusing merely on the violence used to obtain sexual acts as some commentators have done neglects to see the violence involved in the nonconsensual penetration of the victim.<sup>96</sup> Furthermore, the right to be free of violence or threat thereof is protected under other criminal provisions. While the use of violence to ensure intercourse does not constitute the gravamen of rape, violence can and perhaps should constitute an aggravated offence as here the perpetrator violates additional interests the state seeks to protect.

So far, this chapter has focused on the harm to the victim. Yet the occurrence of rape has consequences that go beyond the harm to the individual women victimized. The great prevalence of rape makes the threat of being raped a real and continuous one for all women. The threat in itself, even without personal experience of sexual assault, can influence women's

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<sup>91</sup> McGregor, *Is it rape*, p. 245

<sup>92</sup> McGregor, *Is it rape*, p. 106

<sup>93</sup> McGregor, *Is it rape*, p. 244

<sup>94</sup> McGregor, *Is it rape*, p. 244

<sup>95</sup> Wiehe et al, *Intimate betrayal: Understanding and responding to the trauma of acquaintance rape*,

<sup>96</sup> West, *Legitimizing the illegitimate: A comment on Beyond rape*, *Columbia law review* vol. 93, p. 1445

lives and work to impede their freedom of movement<sup>97</sup> and their contacts with the opposite sex with the result of reducing their world and depriving them of certain experiences in life.

In the heterosexual context and when all involved are adults essentially all perpetrators are male, all victims female. Some commentators argue that the gender constellation and high prevalence of rape results in sending a message of inferiority to all women (not only those subjected to rape) and that states reinforce this message by its inadequate response.<sup>98</sup> Rape therefore is not only a result of inequality but also perpetuates the same.

## 4.2 Rights of the accused

The protection of negative sexual autonomy must be weighed against the rights of the accused to due process and a fair trial. There is an obvious conflict between the defendant's interests and the interest of the state not to convict an innocent man on the one hand and the victim's interest in justice and the state interest of crime prevention and deterrence on the other hand. The lower the burden on the prosecution is the greater the imbalance becomes between the powerful and more resource equipped state and the individual. The risk of convicting an innocent man also becomes greater, a problem in itself and one that may also result in a loss of faith in the justice system.

On the other hand, the higher the requirements for conviction are the fewer rape victims obtain redress from the court, which has negative consequences not only for the individual but also for the general protection of sexual autonomy. Fewer victims obtaining justice can also lead to decreased faith in the justice system in relation to this crime; this is especially problematic when it comes to crimes with a strong gender aspect such as rape with predominantly female victims and male perpetrators. This in turn may lead to even fewer victims reporting incidents of rape<sup>99</sup> resulting in even more rapists going unpunished and further negative consequences for sexual autonomy ensue.

Yet, the cardinal rule is the 'presumption of innocence'. When I analyze suggested rape legislation models in the following chapter, I will examine whether certain ways of understanding consent or certain elements of the models entail negative consequences for the defence and if so are they justified. For instance, what are the consequences for the defendant of understanding consent as: a mental state into which he has no access, an expression alone without considering whether it was seriously meant? Do the models furnish a bright line between criminal and non-criminal behaviour. Are the suggested vitiating circumstances too imprecise or do

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<sup>97</sup> By making women consciously or unconsciously avoid certain places or activities etc.

<sup>98</sup>McGregor, *Is it rape?*, pp.230-231.

<sup>99</sup> Rape is one of the most underreported crimes which can at least partially be explained by the justice systems inadequate response to the crime. (on underreporting see *Contemporary issues in law*, p.10)

they go too far. Finally, do the models deviate too much from the general public's understanding of what constitutes rape.

## 5 Analysing 3 consent-based rape legislation models

In this chapter, I will examine a few different consent-based rape legislation models proposed by legal commentators. One thing my chosen models all have in common is that they all go further than the traditional force-resistance approach of rape law; they all extend the group of potential victims of rape. The victim traditionally recognized by rape law – one subjected to actual or threatened violence or one who resists advances physically – also enjoys protection under the models I have examined. I will not discuss the sleeping/unconscious victim below, as she is not even capable of giving factual consent; there is no possibility of choice when one is unconscious.<sup>100</sup> Below I will use consent in the factual sense where nothing else is stated.

Below I will examine three different consent-based models. I will look at how well the models protect negative sexual autonomy by examining what is required of those who do not wish to engage in sexual acts and in which situations women are protected. Additionally, are men held liable for unreasonable beliefs and does violent rape constitute an aggravated offence?<sup>101</sup> When looking at how well the models protect the legal rights of the accused the questions naturally mirror those above. What are required of those who seek to have sex with someone else, which factors vitiate consent and which type of mens rea establishes liability for rape?

I will examine models that exemplify three different ways of understanding consent: one is expressive, one is a hybrid and one is attitudinal. I will start with the No Model, which is the expressive model meaning expression is necessary and sufficient. It is expression of nonconsent that is relevant, in other words victims are required to verbally resist in order to have recourse to the court, passivity connotes (factual) consent. The resistance requirement is waived however in situations involving threat or use of violence, misrepresentation of material fact or extortionate threats.<sup>102</sup> Under the No Model, negligence is sufficient to establish liability.<sup>103</sup>

The second model under scrutiny is the Yes Model. This is a hybrid (or a weak expressive model), which requires expression but also a mental element namely an intention to consent.<sup>104</sup> Under this model, those who

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<sup>100</sup> Westen, *The logic of consent. The diversity and deceptiveness of consent as a defense to criminal conduct*, p. 25

<sup>101</sup> Making violent rape an aggravated offence has consequences for protection of negative sexual autonomy as well as separating offences increases chances of conviction for non-violent rape. Dripps, *Beyond rape: An essay on the difference between the presence of force and the absence of consent*, *Columbia law review* vol. 92, p. 1790

<sup>102</sup> Estrich, *Real rape*, p. 103

<sup>103</sup> Estrich, *Real rape*, p. 103

<sup>104</sup> McGregor, *Is it rape?*, p. 126

want to engage in sexual intercourse need to receive affirmative expressions in either verbal or behavioural form, passivity does not entail (factual) consent.<sup>105</sup> Under the Yes Model underage, intoxication, mental illness/retardation, deception and non-violent coercion are all factors that in addition to violence can vitiate consent when sufficiently grave.<sup>106</sup> Men are held liable for negligence also under the Yes Model.<sup>107</sup>

Finally, the attitudinal model will be examined under which a mental state of choosing sex is required for factual consent. Expression (whether affirmative or negative) is neither necessary nor sufficient, consenters need not even have ability to act outwardly voluntary.<sup>108</sup> They must however have certain cognitive abilities such as consciousness and ability for reflective thought since they must be capable of making a choice.<sup>109</sup> Since no expression signifies consent, passivity does not signify either consent or nonconsent under this model. As my account of attitudinal consent is not a suggested model per se but instead based on an analysis of attitudinal consent by Westen it contains no list of vitiating factors. However, Westen makes it clear that vitiating factors are indispensable and encompass three categories – competence, freedom and knowledge.<sup>110</sup>

## 5.1 The No Model

Susan Estrich introduced the No Model in her 1987 book entitled *Real rape* where she stated that “consent should be defined so that no means no”,<sup>111</sup> a nowadays famous slogan when discussing rape. Estrich argues that verbal rejection should be enough to establish liability for rape, requiring physical resistance from victims means demanding women risk injury even in cases where the defendant’s intent is clear.<sup>112</sup> It also means giving immunity to those assailants whose victims are scared or shocked enough to refrain from physically resisting.<sup>113</sup>

### 5.1.1 Sexual autonomy

The No Model is an example of a strong expressive model. Estrich argues that liability for rape should include those “rapes where the woman *says* no”.<sup>114</sup> Estrich sees that expression and attitude does not always converge and then expression is decisive.<sup>115</sup> Since strong expressive consent models

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<sup>105</sup> McGregor, *Is it rape?*, p. 130

<sup>106</sup> McGregor, *Is it rape?*, chapters 5-6

<sup>107</sup> McGregor, *Is it rape?*, p. 202

<sup>108</sup> McGregor, *Is it rape?*, pp. 118, 120

<sup>109</sup> McGregor, *Is it rape?*, p. 120

<sup>110</sup> Westen, *The logic of consent. The diversity and deceptiveness of consent as a defense to criminal conduct*, p. 180

<sup>111</sup> Estrich, *Real rape*, p. 102

<sup>112</sup> Estrich, *Real rape*, p. 96

<sup>113</sup> Estrich, *Real rape*, p. 96

<sup>114</sup> Estrich, *Real rape*, p. 103

<sup>115</sup> Estrich, *Real rape*, p. 102. “I have no doubt that women’s silence sometimes is the product not of passion and desire but of pressure and fear. Yet if yes may often mean no, at



do not inquiry about mental state this model should mute arguments along the line of ‘she said no but meant yes’ to the benefit of protecting negative sexual autonomy.

From the negative sexual autonomy perspective, the No Model is preferable to a traditional force-resistance approach.<sup>116</sup> It is more inclusive when it comes to potential victims of rape as women who verbally refuse sex also enjoy protection under law. It seems unwarranted to demand of victims the tougher task of physically resisting when verbal refusal will also establish nonconsent and intent, especially if Estrich is right in saying that this places women at greater risk of (further) physical violence. However, there is disagreement about the interaction between physical force by the perpetrator and physical resistance by the victim. Some commentators argue that physical resistance provokes more force by perpetrators.<sup>117</sup> Other commentators argue that violent attacks provoke physical resistance and not the other way around<sup>118</sup>. In situations involving an unarmed acquaintance most women resist unwanted advances and are successful in doing so while at the same time sustaining little or no injury<sup>119</sup>, which would suggest they needed to employ little or no physical resistance.

Verbal rejection is according to Estrich also a form of resistance more compatible with how women respond to attack, to demand physical resistance is to enforce a male standard of response to assault.<sup>120</sup> Studies of rape victims confirm that common responses are to try to get an attacker to calm down and to stall, victims will often try to dissuade their attacker by talking or pleading.<sup>121</sup> When defence strategies like the above amount to verbal rejection victims will have recourse to the courts under the No Model unlike a traditional force-resistance regulation. Unlike the Yes Model where consent can be given behaviourally and therefore being able to read your partner’s signals correctly is key, the No Model should work equally well for new acquaintances as for long-time partners. Verbal rejection should be just as easy to comprehend for the acquaintance as for the husband since it involves less reading of signals – you do not have to know your partner as

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least from a woman’s perspective, it does not seem so much to ask men, and the law, to respect the courage of the woman who does say no and to take her at her word.”

<sup>116</sup> Some modern versions of the force-resistance approach are very inclusive though as they require very little in the form of force or resistance. Swedish rape law is an example where force may be established already by forcibly separating the victims legs while she is clenching them together (resistance).

<sup>117</sup> Marshall et al, Handbook of sexual assault: Issues, theories, and treatment of the offender; cit. Marx et al, Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivors, *Clinical psychology: Science and practice* Vol. 15 Issue 1, p. 80 at <http://www3.interscience.wiley.com/cgi-bin/fulltext/119412264/HTMLSTART>.)

<sup>118</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, note. 199

<sup>119</sup> Rozee et al., The personal perspective of acquaintance rape prevention: A three-tier approach, in *Acquaintance rape: The hidden crime* 216, 337, 349; cit. Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 17 notes. 196-197)

<sup>120</sup> Estrich, Real rape, pp. 62, 65

<sup>121</sup> SOU 2001:14, p. 89

well to understand what her behaviour signifies as under the Yes Model,<sup>122</sup> no means no.

Expressing non-consent through behaviour – short of physical resistance – will not do under the No Model however. Yet there are studies that show that men and women frequently use behaviour to indicate both consent and nonconsent to sex.<sup>123</sup> One study showed that a significant percentage of women considered behaviour the most important way to refuse sex.<sup>124</sup> Thus, one may criticize the No Model for limiting the ways women can (and often do) refuse sex. If many women express nonconsent by not giving positive signals, by remaining passive, this is problematic for the No Model since the model equates passivity with consent. However, it is unclear how great this problem is as other studies show that while men and women typically consent to sex nonverbally they usually express nonconsent in a more direct and verbal manner.<sup>125</sup> The research on sexual cues for both accepting and declining sex is ambiguous in other words; there remains a risk of inadequate protection under the No Model.

Taken a step further from women who do not express verbal rejection to women who cannot do so, the No Model has been criticized for not protecting victims who experience peritraumatic reactions.<sup>126</sup> That is psychological and physiological reactions during the traumatic event itself as opposed to post traumatic stress where reactions come after the event. Several studies show that paralysis and dissociation are common responses among rape victims.<sup>127</sup> Since the No Model requires verbal resistance, it is criticized for leaving these victims without protection.<sup>128</sup> However, these studies show that women experiencing a high level of dissociation are more likely to believe their life was in danger<sup>129</sup> and those experiencing temporary paralysis are considerably more likely to report physical restraint, perceived threat to life, being attacked by a stranger and sustaining physical injury during the attack.<sup>130</sup> These findings seem to make the critique against the No Model largely unjustified since the model does not require verbal refusal in situations involving violence or threat thereof.<sup>131</sup> Based on the research it seems unlikely or unusual for the most common victim of rape

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<sup>122</sup> In defense of the Yes Model ambiguous body language should not be considered a green light under the Yes Model either.

<sup>123</sup> McGregor, *Is it rape?*, pp. 208-209

<sup>124</sup> McGregor, *Is it rape?*, pp. 208-209

<sup>125</sup> Rosenthal and Peart, *The rules of the game: Teenagers communicating about sex*, *Journal of adolescence*, p. 325 and; McCormick and Jones, *Gender differences in nonverbal flirtation*, *Journal of sex education and therapy*, pp. 271-282; cit. Cowling, *Should communicative sexuality be written into English law on rape?*, pp. 57-59, *Contemporary issues in law Vol. 6 Issue 1*

<sup>126</sup> Anderson, *Negotiating sex*, *Southern California law review Vol. 41*, p. 105

<sup>127</sup> See generally SOU 2001:14, p. 88-90, Anderson, *Negotiating sex*, pp. 115-117.

<sup>128</sup> Anderson, *Negotiating sex*, *Southern California law review Vol. 41*, p. 117

<sup>129</sup> Griffin et al, *Objective assessment of peritraumatic dissociation: psychophysiological indicators*, *American journal of psychiatry* vol. 154, p. 1085

<sup>130</sup> Finn, *Paralysis common among sexual assault victims*, *Family practice news*, March 1, 2003, p. 44

<sup>131</sup> Estrich, *Real rape*, p. 103

and the one I focus on in this thesis— an adult who is raped by an acquaintance<sup>132</sup>, who sustains little or no injuries extrinsic to the forced penetration and who is not afraid for her life<sup>133</sup> – to experience temporary paralysis. As for cases where the victim was attacked by one or several complete strangers the assessment of the court has a different focus. In these cases the only feasible defense is usually misidentification, not consent.<sup>134</sup>

Even though the No model does provide better protection of negative sexual autonomy than a traditional force-resistance regulation it is deficient in scope. It provides no protection for someone who is drunk, high on drugs, mentally ill or mentally handicapped and taken advantage of. It is possible that Estrich meant for these groups of victims to fall under a lesser sexual offence, though this is speculation on my part. Estrich makes no comment at all about these potential groups of victims she does however explicitly state that misrepresentation of material fact and extortionate threats negate consent.<sup>135</sup> This amendment is important as these victims would otherwise not be protected either, the fraud or threat would make victims refrain from verbal refusal. Estrich argues there should be liability for “at least those non-traditional rapes where the woman ... submits only in response to lies or threats which would be prohibited were money sought instead.”<sup>136</sup>

Finally, the No Model may be criticized for requiring victims to verbally refuse sex to have recourse to the court unless a vitiating factor is present. It is thereby the responsibility of the person subjected to advances to decline such in a manner the court finds acceptable and not the responsibility of the person seeking sex to await affirmative consent. The presumption is in other words consent. It may be questionable if this is acceptable or at least desirable for a legislation that seeks to protect negative sexual autonomy.

It is preferable from an ethical and educational point of view to require men to await positive signals of sexual interest instead of allowing them to go ahead until they meet verbal resistance. However, I believe the No Models greatest deficiency in protecting negative sexual autonomy lies in an incomplete catalogue of vitiating factors. After all, it is no less reprehensible taking advantage of someone who has the mental capabilities of a five-year-old or someone too drunk to realize what is going on because the victim said or signalled yes to sex. When wanting to protect negative sexual autonomy, even more important than requiring positive signals is in my opinion having a robust list of vitiating circumstances that tell the court when a yes does not mean yes and when the absence of an uttered no does not mean consent.

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<sup>132</sup> Bryden et al, Rape in the Criminal Justice System, *Journal of criminal law and criminology* vol. 87, p. 1203 note. 56; cit Bryden, Redefining rape, p. 17 note 191

<sup>133</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, note. 198

<sup>134</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 351. See also Estrich, Real rape, p.50 and note 84 where she lists cases where the attacker was a stranger and the courts stated that consent was not the issue.

<sup>135</sup> Estrich, Real rape, p. 103

<sup>136</sup> Estrich, Real rape, p. 103

## 5.1.2 Rights of the accused/legal security

One argument in favour of a strong expressive model such as the No Model is that it provides men some protection from false accusations – a woman cannot express consent and later in court argue there was no consent (unless the situation involved a vitiating circumstance of course).

Under the previous heading, I discussed the critique against the No Model for only allowing verbal rejection and not behavioural rejection to negate consent even though studies show that women often use nonverbal communication to convey both consent and nonconsent.

The mentioned studies have been used to criticize the No Model from a legal security perspective as well. Since women (and men) often consent behaviourally, some commentators question whether verbal rejection can establish guilt beyond a reasonable doubt arguing that no does not always mean no.<sup>137</sup> These commentators cite studies that show that women sometimes say ‘no’ even when they want sex; they perform so-called ‘token resistance’.<sup>138</sup> In the arguably most well known study 39 percent of the women reported having engaged in token resistance at some point.<sup>139</sup> Yet this study and others like it provide poor foundation to disqualify verbal rejection. The majority of the women (60.7%) reported they had never engaged in token consent and of those that had, more than three-fourths had only done so rarely namely fewer than five times.<sup>140</sup> In other words when a woman said no it meant no in the overwhelming majority of instances. Furthermore, in rough numbers one fifth said no due to some form of inhibition (for example moral or emotional concerns), another fifth said no for practical reasons (ex. fear of sexually transmitted diseases or appearing promiscuous) and finally one fifth said no for game-playing reasons (ex. anger with a partner, wanting to be in control).<sup>141</sup> It seems these women merely desired sex. They did not choose/consent to sex for a wide variety of reasons and rape law should protect their choice.<sup>142</sup>

Consequently, it seems sound that verbal rejection can establish the *actus reus* element of the rape crime. The fact that some or even many men believe that women say no and mean yes, does not make it reasonable to think so and should certainly not give men a right to act accordingly. How do these men suggest women say or manifest no when this word will not do. It cannot be reasonable to require women to physically resist because men choose to believe no means yes. What if men believe physical resistance is also only token resistance, in one study one third of the men approved of

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<sup>137</sup> McGregor, *Is it rape?*, pp. 205-208

<sup>138</sup> McGregor, *Is it rape?*, pp. 207-208

<sup>139</sup> Muehlenhard and Hollabaugh, *Do women sometimes say no when they mean yes?*, p. 878; cit. Bryden, *Redefining rape*, *Buffalo criminal law review* vol. 3, p. 340

<sup>140</sup> Muehlenhard and Hollabaugh, *Do women sometimes say no when they mean yes?*, pp. 877-878; cit. Bryden, *Redefining rape*, *Buffalo criminal law review* vol. 3, p. 340

<sup>141</sup> Muehlenhard and Hollabaugh, *Do women sometimes say no when they mean yes?*, pp. 877-878; cit. Bryden, *Redefining rape*, *Buffalo criminal law review* vol. 3, p. 340

<sup>142</sup> See McGregor, *Is it rape?*, p. 206

using force to get sex when a partner had a change of mind<sup>143</sup> – what options are women then left with, resistance to the utmost? Men who interpret no to mean yes must at least be aware they might be wrong. Considering the terrible odds against no meaning yes and the harm caused if one is mistaken, these men are reckless in the absence of extremely convincing evidence to the contrary.<sup>144</sup>

Verbal refusal draws a bright line between lawful and unlawful behaviour, which is positive from a legal security perspective.<sup>145</sup> Men are made aware of nonconsent just as men who encounter physical resistance are made aware of nonconsent. Verbal refusal also provides courts with a corroborative of nonconsent (evidence of the victim's nonconsent) and the perpetrator's intention to have non-consensual sex since the refusal is audible to him.<sup>146</sup> This helps mitigate difficulties in the fact-finding process, courts are not left entirely to the parties' subjective mindsets.<sup>147</sup>

There is always a risk that the complainant or the defendant lies about the existence of a verbal refusal. Lies however, present equally great problems for other rape legislation models including traditional force-resistance models; threats of violence leave no physical marks. In cases where there is no physical evidence of violence, lies will hamper a court's fact-finding process equally whether it applies a force-resistance model or a model based on lack of consent.

A positive aspect of the No Model when it comes to legal security is that it opens up for grading rape acts. Estrich states where violence was used or life was threatened the rape may be considered aggravated.<sup>148</sup> It is reasonable that a violent rape should carry a higher sentence than a non-violent rape. The violent rapist violates two interests the state seeks to protect, sexual autonomy and freedom from violence. The general perception is also that violent rapes are more abhorrent and deserves harsher punishment.<sup>149</sup>

There is however, another matter to consider when applying the No Model and that is how long an expressed no reigns over a situation. If sex occurs directly after a verbal refusal the case for rape is strong, yet this assertion becomes progressively weaker the more time passes.<sup>150</sup> If a woman refuses sex, but one or several hours later behave in a way that indicates she has changed her mind, her previous 'no' should not still reign – people do

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<sup>143</sup> McGregor, *Is it rape?*, p. 212

<sup>144</sup> Bryden, *Redefining rape*, *Buffalo criminal law review* vol. 3, p. 340

<sup>145</sup> Bryden, *Redefining rape*, *Buffalo criminal law review* vol. 3, p. 343

<sup>146</sup> Bryden, *Redefining rape*, *Buffalo criminal law review* vol. 3, p. 343

<sup>147</sup> Bryden, *Redefining rape*, *Buffalo criminal law review* vol. 3, pp. 336-337

<sup>148</sup> Estrich, *Real rape*, p. 103

<sup>149</sup> Dripps, *Beyond rape: An essay on the difference between the presence of force and the absence of consent*, *Columbia law review* vol. 92, p. 1790. See also Jeffner, *Liksom våldtäkt, typ. Om ungdomars förståelse av våldtäkt*. (On adolescents view of real rape as an act that involves violence.)

<sup>150</sup> Bryden, *Redefining rape*, *Buffalo criminal law review* vol. 3, p. 341

change their minds.<sup>151</sup> For Estrich repeated requests are inherently coercive.<sup>152</sup> She does not clarify how much time must pass before repeating a request is acceptable. One thing is clear though, repeated requests in close succession amount to coercion according to Estrich.<sup>153</sup>

The prominent commentator Bryden believes women should have to repeat their refusals even when requests/attempts come in close succession. Bryden argues: “the proper remedy for requests that are merely tiresome is to leave, not to call the police”.<sup>154</sup> Although Bryden objects to this kind of boorish behaviour, he does not believe it should establish liability for rape. Bryden sees repeated attempts to have sex merely as nagging so long as the woman is free to leave. Seen in this light imposing a prison sentence seems unduly harsh. Yet seen from the victim’s perspective this behaviour may very well be intimidating, when someone repeatedly disregards a no a woman might correctly think this man will not take no for an answer or let her walk away for that matter. Bryden’s position undermines the very core of the No Model, which is to demand respect and give weight to women’s words – women are required to say no but need do no more. Bryden’s view that refusals need to be repeated when time has passed and behaviour indicative of consent has been conveyed is reasonable. Repeated requests/attempts in close succession however amount to coercion in my understanding.

### 5.1.3 Liability for negligence

Mens rea is divided into dolus and culpa – intent and negligence. Dolus is further divided into purpose, knowledge and recklessness. There is general agreement that these three forms of mens rea result in criminal liability whereas negligence liability is more controversial.<sup>155</sup>

Under the No Model, negligence is sufficient to establish mens rea.<sup>156</sup> The harm caused victims is sufficiently grave and the need for added incentive urgent enough to warrant holding negligent men liable according to Estrich.<sup>157</sup> Men are negligent when they do not take a no to mean no.<sup>158</sup>

Liability for rape based on negligence is an interesting topic that I will discuss further below under the Yes Model. I do not feel the need to discuss it here as I have previously argued that when a man proceeds to have sex with a woman who verbally refuses he is not merely negligent; he is reckless in the absence of extremely convincing contrary evidence.<sup>159</sup>

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<sup>151</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 341

<sup>152</sup> Estrich, Real rape, p. 41; cit. Bryden, Redefining rape, p. 341

<sup>153</sup> Contrasting with suspect’s Miranda rights she says “no” must mean no, and questioning must be terminated.” Estrich, Real rape, p. 41

<sup>154</sup> Bryden, *Buffalo criminal law review* vol. 3, Redefining rape, p. 343

<sup>155</sup> McGregor, Is it rape?, p. 197

<sup>156</sup> Estrich, Real rape, p. 98

<sup>157</sup> Estrich, Real rape, p. 98

<sup>158</sup> Estrich, Real rape, p. 103

<sup>159</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 340

## 5.2 The Yes Model

A number of scholars propose requiring affirmative consent to sexual acts.<sup>160</sup> I will examine a model proposed by Joan McGregor, which I find to be an elaborate and robust account of consent. This is a hybrid (or a weak expressive) model, in addition to requiring affirmative expressions – verbal or behavioural – there must exist an intention to consent.<sup>161</sup>

### 5.2.1 Sexual autonomy

The Yes Model goes further when it comes to protecting negative sexual autonomy than the No Model. Victims neither need to physically nor verbally resist. In the previous chapter, I explained that studies show that a common response among rape victims is to cry or to become passive. The Yes Model protects these victims.

McGregor's model distinguishes between aggravated and nonaggravated rape. Aggravated rape involves weapons or physical abuse or threat of physical abuse.<sup>162</sup> By distinguishing the offences, the model acknowledges that sexual violations achieved by use of violence are more serious than sexual violations accomplished by other means while still recognizing the latter as serious enough to warrant criminal sanctions.<sup>163</sup> The state can punish aggravated rape more severely and deservedly so as in these cases the perpetrator violates his victim's negative sexual autonomy as well as her right to be free from violence. In addition, chances for conviction of unaggravated rape increase because the court (or jury) is not only left with the choice of acquittal or placing an unaggravated rape in the same category as the most violent of rapes.<sup>164</sup> The division also makes it possible to focus on different elements of the rape crime, which this model does. For aggravated rape the focus is on the violence, consent is not an issue.<sup>165</sup> The focus of unaggravated rape is on the other hand consent.<sup>166</sup>

Historically most statutes defined rape as "sexual intercourse with force and without consent, many statutes still use this definition."<sup>167</sup> McGregor objects to this conjunction. It seems redundant to require both 'with force and without consent'. Outside sadomasochistic practices, the presence of force should imply the absence of consent though the absence of force should not imply consent.<sup>168</sup> If the man had consent, why did he need to use force? Society condemns violence with few exceptions; the question is why courts have so often been willing to accept violence in sexual situations.

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<sup>160</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 343

<sup>161</sup> McGregor, Is it rape?, pp. 126, 130

<sup>162</sup> McGregor, Is it rape?, p. 68

<sup>163</sup> McGregor, Is it rape?, p. 69

<sup>164</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 345

<sup>165</sup> McGregor, Is it rape?, p. 245

<sup>166</sup> McGregor, Is it rape?, p. 69

<sup>167</sup> McGregor, Is it rape?, p. 47

<sup>168</sup> McGregor, Is it rape?, p. 48

McGregor argues the law should instead make it clear that sex is incompatible with violence.<sup>169</sup>

This conjunction has led to unreasonable outcomes such as acquittals where the element ‘with force’ was fulfilled but not ‘without consent’ simply because the victim did not physically resist. This disregards valid reasons for not resisting such as fear of (further) violence and peritraumatic paralysis. The reverse situation – the court has found the element ‘without consent’ fulfilled but no force was used – has also led to acquittals.<sup>170</sup> Yet if it was apparent that there was no consent and the court is satisfied the defendant had the requisite mens rea there is no justification for an acquittal. For the above reasons, McGregor’s suggestion of the crime ‘aggravated rape’ where consent is not an element seems sound. The only problem is the previously mentioned practice of sadomasochism. McGregor recognizes this problem and does not propose a ban on or targeting of those who engage in sadomasochistic practices as this would limit positive sexual autonomy without anyone feeling harmed and having complained.<sup>171</sup> If a putative victim files a complaint on the other hand, the defendant cannot use consent as a defence to sexual violence save for the slightest of injuries. This means that the individuals who engage in such activities – and are on the harming end of the practice – run a risk of legal reprisals by doing so.<sup>172</sup> As McGregor argues, the harm risked by allowing belief in consent for sexual violence as a defence is great – assuming the vast majority of women are not masochists – and the use of this defence very common while the loss by not allowing it is not that great.<sup>173</sup> Even masochists would be worse off if the state allowed any amount of violence as long as consented to.<sup>174</sup> Again, it should be remembered that criminal law does not allow consent to excuse violence in other contexts.<sup>175</sup>

I sympathize with McGregor’s wish to hinder violent rapist from using consent as an excuse. Furthermore, one can certainly ask how much violence should be acceptable in the name of sex even when it is consensual. Take ‘sex’ out of the equation and few would consider consent to excuse violence to any greater extent, outside some specific sports. I believe it is correct to hold those who cause moderate to grave injury criminally responsible even when injury occurs in the context of consensual sex.<sup>176</sup> Yet violent consensual sex should not be labelled rape because the injury rape law seeks to avoid – violation of negative sexual autonomy – is missing. In these cases no one’s choice is overridden, there is not even an intention to override another’s choice because the masochist is getting what he or she

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<sup>169</sup> McGregor, *Is it rape?*, p. 49

<sup>170</sup> McGregor, *Is it rape?*, p. 61

<sup>171</sup> McGregor, *Is it rape?*, p. 245

<sup>172</sup> McGregor, *Is it rape?*, p. 245

<sup>173</sup> McGregor, *Is it rape?*, pp. 244-245

<sup>174</sup> McGregor, *Is it rape?*, p. 244

<sup>175</sup> McGregor, *Is it rape?*, p. 243

<sup>176</sup> For a discussion on this topic see Duff who argues violent sexual acts are degrading even if carried out with consent in *Harms and wrongs*, *Buffalo criminal law review*, pp. 13-45



desires. These acts should probably be prosecuted as assault and battery instead. To label them rape in order to withdraw the possibility of a consent excuse from those who achieve nonconsensual sex by means of violence, in essence to solve evidentiary problems, is problematic and should be avoided.<sup>177</sup> The situation is different when events unfold as in *People v. Jovanovich*, a case discussed by McGregor. In this case the defendant completely disregarded the fact that the applicant invoked the agreed upon ‘safeword’ and subjected her to much graver violence than she had initially consented to. In this case, it would be correct to invoke rape liability as what started out as consensual sex turned nonconsensual.

As mentioned earlier consent is the focus of all other types of sexual violations amounting to rape according to the Yes Model. Individuals may give consent either verbally or behaviourally and they must *intend* to consent.<sup>178</sup> Consenting behaviour alone will not do, such a regulation would fail to protect the person’s autonomous choice; consent has to emanate from within a person.<sup>179</sup> The fact that expression is necessary but not sufficient makes the Yes Model an example of a hybrid (or a weak expressive) model. McGregor states that “[T]he person must have a certain mental state to consent, namely to intend their acts or words to be consenting.”<sup>180</sup> A ‘positive inner attitude’ is not necessary though,<sup>181</sup> meaning one need not desire sex to consent to it. McGregor makes it clear that desire is not consent<sup>182</sup> and there is a difference between unwanted and nonconsensual sex.<sup>183</sup>

McGregor is equally convinced consent cannot be solely a mental state because the way consent protects negative sexual autonomy is by working as permission.<sup>184</sup> In order to have this function consent needs to be communicated otherwise the defendant has no reason for changing his behaviour – he should stay clear of his potential victim.<sup>185</sup> Furthermore, she does not understand how the victim herself much less a defendant or court can tell desire and choice apart if they are both mental states.<sup>186</sup> The way we tell our desires apart from our choices is when we act on them.

I will examine the alleged shortcomings of the attitudinal model in the next subchapter, as for the critique against (strong) expressive models I understand McGregor’s scepticism. Her model requires an intention to consent because she wants to ensure consent behaviour does not happen by mistake or due to some pressure. Expressive models require more than expression however, they require expression under circumstances that are

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<sup>177</sup> Asp, *Sex och samtycke*, pp. 161-162

<sup>178</sup> McGregor, *Is it rape?*, p. 130

<sup>179</sup> McGregor, *Is it rape?*, p. 123

<sup>180</sup> McGregor, *Is it rape?*, p. 130

<sup>181</sup> McGregor, *Is it rape?*, p. 126

<sup>182</sup> McGregor, *Is it rape?*, p. 206

<sup>183</sup> McGregor, *Is it rape?*, p. 126

<sup>184</sup> McGregor, *Is it rape?*, p. 125

<sup>185</sup> McGregor, *Is it rape?*, pp. 124-125

<sup>186</sup> McGregor, *Is it rape?*, p. 122

legitimate. Furthermore, it seems a weak expressive model (or hybrid views in general) serves no purpose because when there is contradiction between intention and expression – when a person does not intend to convey what the expression is perceived to mean by observers<sup>187</sup> – a weak expressive model such as McGregor’s has to decide which element is decisive.<sup>188</sup> If expression is decisive then this is in fact an expressive model, if intention is decisive then it is an attitudinal model.<sup>189</sup> I believe expression is decisive under this model as McGregor herself calls it a performative (another word for expressive) model and emphasises consents function as permission to sex (which must be communicated) and that we tell desire from choice by the latter being expressed. I will therefore keep referring to this model as expressive.

The fact that affirmative consent can be given behaviourally has led Anderson to criticize the Yes Model for easily collapsing into the No Model.<sup>190</sup> One problem with behavioural consent is male misinterpretation, which women have to counteract by verbal resistance. Extensive research shows men to be exceedingly bad at interpreting women’s body language. Men often interpret women’s body language as conveying sexual interest where women have no such intention.<sup>191</sup> The misinterpretation only goes in one direction, in other words men do not believe women are uninterested in them sexually when they in fact are interested.<sup>192</sup> The research also shows that this is not attributable to the natural limits of human communication; women are quite good at interpreting men’s body language.<sup>193</sup> This could lead to behaviour seen as conveying affirmative consent – first by the defendant and later by a mostly male court or jury – just being the product of male misinterpretation.

However, the very fact that the Yes Model requires women’s active participation should mitigate male misinterpretation. McGregor requires more than ambiguous cues that a woman is interested in sex, in fact she requires those seeking to have sex to go ‘beyond symbolically appropriate behaviour to ensure consent was given.’<sup>194</sup> A man may not derive consent

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<sup>187</sup> In the interest of protecting negative sexual autonomy a reasonable observer-standard should be applied. If defendants’ perceptions governed what victim’s expressions meant it would encourage any matter of fantasies entertained by the defendant to determine the existence of actus reus. Furthermore, it would be unreasonable to let the defendant’s perception of events decides the existence of both mens rea and actus reus. The reasonable observer standard is suggested by Westen in *The logic of consent. The diversity and deceptiveness of consent as a defense to criminal conduct*, pp. 71-75

<sup>188</sup> Westen in *The logic of consent. The diversity and deceptiveness of consent as a defense to criminal conduct*, pp. 70-71

<sup>189</sup> For a discussion on why hybrid views do not work and why the type McGregor suggests – one that does not require a mental state of choosing sex but a mental state of intention – is even more problematic see Westen, *The logic of consent. The diversity and deceptiveness of consent as a defense to criminal conduct*, pp. 162-164

<sup>190</sup> Anderson, *Negotiating sex, Southern California law review* vol. 41, p. 105

<sup>191</sup> Anderson, *Negotiating sex, Southern California law review* vol. 41, p. 117

<sup>192</sup> Anderson, *Negotiating sex, Southern California law review* vol. 41, p. 118

<sup>193</sup> Anderson, *Negotiating sex, Southern California law review* vol. 41, p. 119

<sup>194</sup> McGregor, *Is it rape?*, p. 135

from the fact that *he* is kissing or fondling his partner while she shows neither disinterest nor interest. Instead, McGregor gives the example of a woman undressing her partner and sexually touching him as indicating affirmative behavioural consent.<sup>195</sup> Naturally, no other circumstances pointing to nonconsent – such as a previously made threat – is allowed to be present.

The importance of considering male misinterpretation is questioned however. The prominent commentator Bryden argues that most mistakes about consent are legally irrelevant, such as believing that the woman will change her mind and consent during the intercourse or believing the victim will not report the rape to the police.<sup>196</sup>

Another possible problem with behavioural consent is that a person engaging in non-penetrative sexual acts might only want to consent to those acts<sup>197</sup> yet the Yes Model sees undressing your partner and sexually touching him as expressive consent to sex. Anderson criticizes that the woman who does not want to proceed beyond sexual foreplay must resist verbally or physically also under the Yes Model.<sup>198</sup>

Requiring verbal consent for the specific act of penetration as Anderson suggests would solve this problem.<sup>199</sup> Such a requirement would make clear that consent to foreplay is not consent to penetration. However, requiring verbal consent sharply deviates from sexual customs. Studies indicate that women as well as men typically consent to sex nonverbally whereas nonconsent tends to be expressed in a more direct manner.<sup>200</sup>

A model based on affirmative consent is preferable to one based on physical or verbal resistance from a sexual autonomy perspective as it requires men to await positive verbal or behavioural signals before proceeding with sexual acts instead of letting men proceed without any signal the advance is welcome and until they meet resistance. Under a model that requires affirmative consent, there is a rebuttable presumption of nonconsent.<sup>201</sup> This is rational for a legislation that aims to protect negative sexual autonomy. It is reasonable to refrain from sexually touching or penetrating other people until they signal such acts are welcome.

However, for many situations involving a violation of sexual autonomy requiring affirmative consent provides no more protection than a legislation

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<sup>195</sup> McGregor, *Is it rape?*, p. 129

<sup>196</sup> Bryden, *Redefining rape*, *Buffalo criminal law review* vol. 3, pp. 349-350

<sup>197</sup> Anderson argues that the rise of HIV and other sexually transmitted diseases have increased the practice of engaging in non-penetrative sexual acts which means there is now even more reason not to read in consent to intercourse from for instance petting. Anderson, *Negotiating sex*, *Southern California law review* vol. 41, p. 120

<sup>198</sup> Anderson, *Negotiating sex*, *Southern California law review* vol. 41, p. 121

<sup>199</sup> Anderson, *Negotiating sex*, *Southern California law review* vol. 41, pp. 107, 122

<sup>200</sup> Cowling, *Should communicative sexuality be written into English law on rape?*, pp. 57-58, *Contemporary issues in law Vol. 6 Issue 1*

<sup>201</sup> Bryden, *Redefining rape*, *Buffalo criminal law review* vol. 3, p. 345

requiring victims to say no. For instance, when subjected to coercion a victim will just as easily say yes to avoid the alternative as refrain from saying no. A deceived victim is no better off because the law requires her affirmative consent. Therefore, it is as important to clarify when a yes does not remove criminal liability. One of the biggest strengths of the Yes Model is the robust list and elaboration of invalidating factors.

Factors that invalidate consent under the Yes Model comprise of the well established such as use or threat of violence and underage.<sup>202</sup> It also includes the slightly less established factors mental illness and retardation depending on the severity of the condition. A person incapable of understanding the nature and consequences of engaging in sex cannot legally consent.<sup>203</sup> An adult having the mental capabilities of a small child will be unable to effect legal consent while a high functioning mentally disabled individual will be able to consent legally.<sup>204</sup>

The Yes Model also protects the intoxicated or high victim.<sup>205</sup> The requirement of affirmative consent means that the passive victim does not by that very fact signal consent, and passivity is common after large intake of alcohol. This does not mean that as soon as a person drinks alcohol or takes any kind of drugs their consent is without legal effect.<sup>206</sup> People of both sexes use alcohol to relax, get up their courage, get 'in the mood' for legitimate sexual interactions. Yet, McGregor makes it clear that once someone cannot carry on normal functions such as standing up or carrying on a conversation this person cannot legally consent.<sup>207</sup>

The Yes Model also extends its protection to many victims of fraud. Traditionally any type of fraud has been acceptable when securing sex; this has begun to change though. However, even states that acknowledge fraud as capable of invalidating consent to sex, apply fraud in a much narrower fashion in rape cases than in cases involving property. Whereas both 'fraud in factum' and 'fraud in inducement' are illegal when trying to acquire property, in those states that see fraud as an invalidator of sexual consent at all only fraud in factum is usually illegal.<sup>208</sup> The Yes Model includes deception as a factor that invalidates consent but has a different approach to fraud in sexual situations than dividing fraud into 'in factum' and 'in inducement'. McGregor argues that this division is in itself problematic as whether one perceives fraud as 'in factum' or 'in inducement' depends on how much one builds into the description of what is consented to.<sup>209</sup> Take the case of *People v. Hough* where a man had sex with his twin brother's girlfriend posing as her boyfriend. In this and similar cases several courts

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<sup>202</sup> McGregor, *Is it rape?*, pp. 69, 159

<sup>203</sup> McGregor, *Is it rape?*, pp. 156-157

<sup>204</sup> McGregor, *Is it rape?*, pp. 156-157

<sup>205</sup> McGregor, *Is it rape?*, pp. 146-147

<sup>206</sup> McGregor, *Is it rape?*, p. 147

<sup>207</sup> McGregor, *Is it rape?*, p. 150

<sup>208</sup> McGregor, *Is it rape?*, p. 182. For an explanation of the two forms of fraud see note 77 of this thesis.

<sup>209</sup> McGregor, *Is it rape?*, p. 185

have seen the situation as one of fraud in inducement – the women consents to the act but is induced to consent by the misrepresentation. Yet when we give a more robust description of what X consented to – she consented to sex with her boyfriend and got sex with someone else – the situation is one of fraud in factum.<sup>210</sup>

However, it is not as simple as saying that both fraud in factum and fraud in inducement should invalidate consent. McGregor realises that depending on how much we build into the description, more or less any minor deception can become a matter of fraud in factum.<sup>211</sup> For example, David falsely alleges to be a doctor whereby Lisa believes she is consenting to ‘David who is a doctor’ not to ‘David who is an accountant’.

Even if it is correct to understand fraud in factum only as deception relating to the sexual act itself,<sup>212</sup> for instance the victim believes she is consenting to a medical examination and is subjected to penile penetration instead. The division of ‘in factum’ and ‘in inducement’ does not reflect a difference in harm to the victim or blameworthiness on the part of the defendant. The victim penetrated by a stranger posing as her husband – argued to be fraud in inducement – may be no less harmed than the patient penetrated by her gynecologist under the guise of inserting a medical instrument during examination (fraud in factum). Both will arguably feel humiliated and violated, both will risk unwanted pregnancy and venereal disease.

McGregor argues that whether deception should be unlawful depends instead on two things. First, causal effect between the misrepresentation and the consent – what makes fraud wrong is that it causes people to consent where they otherwise would not.<sup>213</sup> Using my above examples, the woman in *People v. Hough* would not have consented to sex had she known it was not her boyfriend. In the example with Lisa and David there might not be a causal effect between the misrepresentation and the consent. Lisa might happily consent to sex with David regardless of his profession.

Yet even if Lisa had sex with David because his lie made him more attractive to her, this example would not be criminal fraud under McGregor’s model because causal effect is not enough to warrant criminal sanction. This is where McGregor’s second criteria comes in which has to do with ‘expectations in a potential sexual relationship’.<sup>214</sup> Most people exaggerate or embellish on their person when trying to get a partner. Trying to look better, more accomplished, better off or more emotionally invested is common. Yet few if any would like to send someone to prison for false professions of love for instance. This kind of minor deception, making oneself more attractive is different in kind to fraud that invalidates consent

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<sup>210</sup> McGregor, *Is it rape?*, p. 185

<sup>211</sup> McGregor, *Is it rape?*, p. 188

<sup>212</sup> Westen makes a good argument for this in *The logic of consent: the diversity and deceptiveness of consent as a defense to criminal conduct*, pp. 195-196

<sup>213</sup> McGregor, *Is it rape?*, p. 189

<sup>214</sup> McGregor, *Is it rape?*, p. 189

to sex under the Yes Model. A woman can expect that her date try to come off as more appealing than he really is, her boyfriend more emotionally invested. She should not have to take that her boyfriend is substituted for someone else, to name but one example of fraud.

Finally, the Yes Model extends its protection to victims of coercion beyond threats of violence in certain situations. McGregor suggests a somewhat different understanding of coercive threats than the standard approach of viewing proposals that make the recipient worse off as threats and proposals that places the recipient in a better position as offers.<sup>215</sup> McGregor sees that for instance, when someone exploits a position of trust even a seeming offer can be coercive. In foster parents' or teachers' proposals of benefit for their wards or pupils in exchange for sex, lies implicit threat of not giving the children what they have a right to; shelter, food or the grade they deserve.<sup>216</sup> Parents, teachers and the like may not condition anything on their wards' sexual compliance. Neither may people in certain professions condition performing their job on sexual favour. If for instance a firefighter, lifeguard or police officer in his official capacity conditions saving someone on sexual favours, the situation involves a coercive threat.<sup>217</sup> Even if the proposal makes the victim better off than she would be without it, she and society at large have a right to expect of these professionals their unconditional rescue of people in distress.<sup>218</sup> Other situations may involve coercion as well but McGregor's explanation of what makes threats coercive is too lengthy and intricate to go further into within the scope of this thesis.<sup>219</sup>

## 5.2.2 Rights of the accused

McGregor's suggested division into aggravated and unaggravated rape has both positive and negative effects for defendants. The negative aspect arises for sadomasochists, those who are on the harming end of this practice will not be able to invoke a consent defence for any but the most minor of injuries. I discussed why punishing consensual sadomasochistic acts in the same way as violent rapes, even if one believes people should not be able to consent to more severe sexual violence, should be avoided in the previous subchapter. Viewing violent rapes as aggravated offences, while retaining consent as an excuse, is reasonable though. The violent rapist violates an additional interest the state seeks to protect, the right to be free from violence and threat.

The Yes Model provides a bright line for those who seek sex to act in accordance with – they must await positive signals. It places higher demands on those seeking sex though to be observant and to be able to read their sex partner's signals or at least to ask when they are unsure if their

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<sup>215</sup> McGregor, *Is it rape?*, p. 169

<sup>216</sup> McGregor, *Is it rape?*, p. 175

<sup>217</sup> McGregor, *Is it rape?*, p. 176

<sup>218</sup> McGregor, *Is it rape?*, p. 176

<sup>219</sup> For a more detailed understanding see McGregor, *Is it rape?*, pp. 164-181

partner is consenting. The Yes Model avoids one of the No Models problems however. As I discussed under the No Model an expressed no gets progressively weaker the more time passes. 'No now may not mean no later' with the accompanying problem of determining how long an expressed no reigns over a situation. Under the Yes Model, a woman can change her mind later during an evening and consent to sex but must then signal this change of mind affirmatively.<sup>220</sup>

Expressive models seem preferable from a defendant's point of view because here consent is visible to him. However, a defendant will not be guilty of rape under an attitudinal model either when he has no reason for believing the sex was nonconsensual, as I will discuss in the next subchapter. Expressive models may be preferable from the court's point of view however, providing corroborative evidence of the applicant's consent. Courts need not base factual consent merely on the applicant's mental state, knowledge of which is hard to come by. As McGregor says we have no epistemological insight into other people's mental states.<sup>221</sup>

Under the Yes Model more sexual encounters will amount to rape because the model lists more actions on the part of the defendant and conditions of the victim that depending on degree lead to invalidating consent. The Yes Model also requires more of those seeking sex than other models when it comes to being observant of your sex partner's signals and possibly inquiring about consent. This will arguably lead to more men being tried and perhaps also convicted of rape. The higher and more rigid demands a state sets for rape liability the fewer men will be convicted and the slighter the risk is of convicting an innocent man. However, the fact that a jurisdiction adds more factors that invalidate consent does not necessarily lead to less legal security so long as men are made aware of the types of behavior (which types of threats and exploiting which types of conditions of the victim) that will invalidate consent. A problem for legal security arises instead because it is not set in stone (nor could it reasonably be) to which degree potentially invalidating factors need to be present in order to invalidate consent. For instance, what degree of intoxication, mental retardation invalidates an expressed (factual) consent. This brings about some level of insecurity for potential offenders. Every rape legislation model entails some level of insecurity. Even traditional force-resistance models do not set the exact levels of violence required to incur rape liability, is threatening a slap or a punch sufficient for rape liability for instance. This is determined through case law. However, the more invalidating factors a jurisdiction employs the more types of deliberations of degree it will have to make.

Finally, there is a risk that the Yes Model deviates too much from the general public's perception of what amounts to rape, especially when it comes to the extensive understanding of coercive threats and the requirement of affirmative signals. Some commentators argue it is unjust to

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<sup>220</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 345

<sup>221</sup> McGregor, Is it rape?, p. 122

send a man to jail simply for not awaiting affirmative signals.<sup>222</sup> If the gap between the law and the public's understanding of rape is too great there is a risk of the law not being conformed with, for instance by juries disregarding the law, in extension making it void.<sup>223</sup> I will discuss this issue further in my conclusions.

### 5.2.3 Liability for negligence

Under the Yes Model, negligence is enough to warrant rape conviction.<sup>224</sup> Since the harm caused to victims is great and irreversible even if made by mistake, the law should give men incentive to act with care and prudence in sexual situations. If unreasonable beliefs exonerate incentives may go in the opposite direction encouraging men to remain ignorant, to hold onto sexist ideas of women and consent.<sup>225</sup>

The argument against liability for negligence has traditionally been that it is unfair to convict the stupid man who might be doing the best he can and ineffective from a deterrence perspective.<sup>226</sup> Yet negligence is not the same as stupidity; highly intelligent people can be careless too. Negligence liability is thus not about convicting those who lack capacity to behave reasonably, in such cases other defences will be open for instance diminished capacity.<sup>227</sup>

Negligence liability is instead about punishing those who could do better but did not. When punishing negligence the aim is to install habits of care in people.<sup>228</sup> This effort is no less rational than trying to deter the intentional criminal, someone whose behaviour may originate from inability to feel empathy to intoxication.<sup>229</sup>

A valid reason to refrain from criminalizing negligence is thus not that it cannot be deterred but that criminal sanctions may be too harsh for negligent acts.<sup>230</sup> However, our justification for punishing intentional criminals does not rest upon scientific findings that intentional criminals have more freedom in their actions than negligent perpetrators do yet the law presumes free choice except for the narrowly defined legally insane.<sup>231</sup> These perpetrators may also be doing their best and a negligent defendant – intelligent or not – has usually made a blameworthy conscious decision earlier to refrain from proper precautions.<sup>232</sup>

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<sup>222</sup> Bryden, *Buffalo criminal law review* vol. 3, Redefining rape, p. 348

<sup>223</sup> Bryden, *Buffalo criminal law review* vol. 3, Redefining rape, p. 347

<sup>224</sup> McGregor, *Is it rape?*, p.202

<sup>225</sup> McGregor, *Is it rape?*, p.202

<sup>226</sup> Estrich, *Real rape*, p. 97

<sup>227</sup> Baron, *I thought she consented*, p. 14; cit. McGregor, *Is it rape?*, p. 201

<sup>228</sup> Bryden, *Redefining rape, Buffalo criminal law review* vol. 3, p. 323

<sup>229</sup> Bryden, *Redefining rape, Buffalo criminal law review* vol. 3, p. 323

<sup>230</sup> Bryden, *Redefining rape, Buffalo criminal law review* vol. 3, p. 323

<sup>231</sup> Bryden, *Redefining rape, Buffalo criminal law review* vol. 3, p. 323

<sup>232</sup> Bryden, *Redefining rape, Buffalo criminal law review* vol. 3, p. 323



As interesting as these distinctions may be in theory in practice the difference between purpose, knowledge, recklessness and negligence seems very thin, especially for crimes such as rape.<sup>233</sup> Rape is not an act committed absentmindedly like running a red light. In realistic scenarios, the unreasonable mistakes will have more in common with recklessness than absentmindedness.<sup>234</sup> Furthermore, the outcome of a case will likely depend more on the sensibilities and prejudices of the court or jury. A sexist court may see an unreasonable but honest mistake or even a reasonable mistake where a court without such bias sees recklessness or even the purpose to commit rape.<sup>235</sup>

Furthermore, this defence will likely have little relevance in practice. In most rape cases, the defendant will argue he had consent<sup>236</sup> and the prosecution will argue the rape was intentional because that is how the victim perceived the situation.<sup>237</sup> The defendant has no reason to concede there was no consent; this only puts him in a less favourable light. When claiming honest mistake his opportunity to invoke the victim's sexual history is also limited to what he knew at the time of the sexual act, arguing for instance her bad reputation was at least partly the reason for his mistake.<sup>238</sup> This defence will likely only be used when there is no question that the victim did not consent and in such cases, the court is unlikely to believe the defendant did not even consider there was no consent.

### 5.3 Attitudinal consent

When I examine the two different views of expressive consent, I use two accounts of expressive consent proposed by legal theorists. When I examine attitudinal consent, I will not be examining an attitudinal model per se. I will base my examination of attitudinal consent on Westen's analysis of consent instead. Westen has written a much needed and appreciated account of the different conceptions of consent and provides an elaborate description of attitudinal consent.<sup>239</sup>

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<sup>233</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 324

<sup>234</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 324

<sup>235</sup> Dripps, Beyond rape: An essay on the difference between the presence of force and the absence of consent, *Columbia law review* vol. 92, p. 1790

<sup>236</sup> Fairstein, Sexual violence: Our war against rape, p. 137; cit. Bryden, Redefining rape, *Buffalo criminal law review*, p. 351

<sup>237</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 350

<sup>238</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 351

<sup>239</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law* vol.2 and Westen, The logic of consent: The diversity and deceptiveness of consent as a defense to criminal conduct

Heidi Hurd provides the most well known account of attitudinal consent in legal literature, frequently referred to by other legal theorists when discussing attitudinal consent. The reason I do not base my examination on her article is that Westen provides the more pragmatic account of attitudinal consent as well as giving the better arguments for applying an attitudinal consent model. Hurd gives, in my opinion, an unnecessarily complicated account of attitudinal consent. She must also make a number of exceptions from her own description of attitudinal consent in order to make her model work satisfactorily.

### 5.3.1 Sexual autonomy

The attitudinal consent model has merit because it sees consent as something emanating from within a person, something necessarily deliberate, exercising the will.<sup>240</sup> The advantage from a sexual autonomy perspective is that an individual cannot consent by mistake.<sup>241</sup> Attitudinal consent seems intuitively correct because one has to make a choice in one's mind before one can express said choice. Even expression of consent only has meaning because it refers to the underlying state of mind.<sup>242</sup>

Therefore, I believe McGregor is wrong when she argues it is possible the attitudinal model fails because it is questionable whether we can tell desire apart from choice when both are mental states, the way we turn desire into choice is by acting on it.<sup>243</sup> For example, I can desire to go jogging because I know it will be good for me. Yet in order for me to turn this desire into a choice, I have to do the act of jogging. It is the act that says that I have made a choice according to McGregor. The act may be how the world knows I have made a choice but I believe McGregor is wrong in thinking that the act itself turns desire into choice. You do not all of a sudden find yourself out running. You have previously made a conscious decision to go out jogging before the act actually happens. We control our choices not our desires, that is how we tell the two apart.

It can however be difficult for a court to tell when desire turns into choice under the attitudinal model. It is easier to tell under an expressive model since there when desire turns into choice it is communicated. Yet, under the attitudinal model when a situation involves no vitiating circumstances and the defendant has shown no contempt for the victim's autonomy there will be no liability due to lack of mens rea so the court will not have to determine the victim's mental state. Assessing when desire turns to choice is however relevant when the defendant shows disregard for the victim's autonomy (for instance disregards her communication of nonconsent) or another vitiating factor is present and the question arises whether to hold the defendant liable for rape or attempted rape. If the situation involves for instance violence, the defendant will be guilty of rape if the applicant consents because of the violence even if she does desire sex. If she consents not because of the violence but because she chooses to act on her desire the defendant will be guilty only of attempted rape. Whenever she chooses sex for a reason that does not invalidate consent in the jurisdiction at hand the defendant will only be liable for attempted rape in spite of the existence of force.<sup>244</sup>

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<sup>240</sup> Hurd, The moral magic of consent, *Legal theory* vol. 2, p. 125 and McGregor, Is it rape?, p. 123

<sup>241</sup> McGregor, Is it rape?, p. 123

<sup>242</sup> Westen, The logic of consent: The diversity and deceptiveness of consent as a defense to criminal conduct, p. 5

<sup>243</sup> McGregor, Is it rape?, p. 122

<sup>244</sup> See Westen's discussion on the Bink case in Westen, Some common confusions about consent, *Ohio state journal of criminal law* vol.2, pp. 343-345

It could prove a problem for negative sexual autonomy if prosecutors habitually charged defendants only for attempted rape because they considered the distinction between desire and consent too difficult to establish. It could also risk the defence making outrages claims of desire-induced consent in spite of the most grave of invalidating circumstances being present. In my understanding, the possible existence of desire or other valid reason to consent to sex will be irrelevant whenever the vitiating factor belongs in the competence category. Certainly, this is true when the victim cannot give valid consent due to grave retardation or mental illness. The very idea behind the incompetence category is to protect the victim from her own choices/desires. I also question the possibility of successfully arguing the applicant consented for another (valid) reason when the situation involved fraud. We cannot know what the victim's mental state would have been absent the fraud.<sup>245</sup> When a situation involves coercion though, there is a possibility that the victim consented for a legally permitted reason like desire. It is then up to the court to assess the victim's testimony and the circumstances of the case to determine if it is reasonable to conclude that the victim consented because she desired sex not due to the vitiating circumstance.

A positive aspect of the attitudinal model is that victims are not required to perform any specific physical or verbal expression to establish nonconsent; there is no obvious presumption of consent for the victim to overcome. This is not to say that the victim's expressions are without relevance. Expressions by the putative victim are relevant for instance to determine the defendant's liability as I have hinted at above and will discuss in detail later in this subchapter.

Yet since expression is not decisive to determining factual consent critiques argue this model fails because communication is precisely what protects sexual autonomy; we have a duty to refrain from sexual acts with someone else until we have their (audible or visible) permission.<sup>246</sup> Since there is no verbal or behavioural act that amounts to consent under this model there will be no justification for altering one's behaviour and engaging in sexual acts with another person.<sup>247</sup> Seen in another way, there is concern someone could subject another to intercourse in spite of expressions of nonconsent but still not be liable for rape because the putative victim had a mental state of consent.<sup>248</sup> Such a defendant would be equally blameworthy but it seems without liability under the attitudinal model. The opposite situation is also a concern, men who have sex with women who express consent but have a

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<sup>245</sup> This is also in line with Westen's explanation that every jurisdiction conditionally prohibits some pressures while unconditionally prohibiting others, force belonging to the former category while incompetence and fraud belongs to the latter. Westen, *The logic of consent: the diversity and deceptiveness of consent as a defense to criminal conduct*, p. 207. For an explanation why, see the same work page 240 note 83

<sup>246</sup> McGregor, *Is it rape?*, p. 114

<sup>247</sup> McGregor, *Is it rape?*, p. 124

<sup>248</sup> Westen, *The logic of consent. The diversity and deceptiveness of consent as a defense to criminal conduct*, p. 153

mental state of nonconsent (without vitiating factors being present) seem to risk conviction under this model.<sup>249</sup>

Taking these concerns into consideration the attitudinal model appears normatively deficient. Indeed, by itself it is because it will convict a man for having sex with a woman who feigned expressions of consent while acquitting a man who thought he was having nonconsensual sex but had the good fortune that his victim consented in her mind (for reasons acceptable to the state).<sup>250</sup> In practice however, courts apply attitudinal consent in combination with rules prohibiting attempted rape and requiring mens rea that cures the above deficiencies.<sup>251</sup> The outcome of the two cases is similar to the outcome under an expressive model, liability for the man who subjects his victim to sex he ought to infer she does not choose, no liability for the man who has sex with a woman who feigns consent. The outcome is similar but not identical. Under an expressive model, a defendant who subjects his victim to sex despite her expressions of nonconsent will invariably be guilty of rape. Under the attitudinal model, the same defendant could be liable for either rape or attempted rape depending on whether the victim factually consented to sex due to force (rape) or for some other legally permissible reason (attempted rape).<sup>252</sup>

To clarify the consequences of applying either an attitudinal or an expressive model I will use two real cases borrowed from Westen.<sup>253</sup> In the case *New York v. Bink*, a young prisoner who had previously been raped (sex by threat of violence) by fellow inmate Bink worked with prison authorities in order to catch the latter in the act. The young inmate feigned expressions of nonconsent secretly wanting to be assaulted so the authorities would catch Bink. Under an expressive model, Bink would be liable for rape since expression is decisive and the victim expressed nonconsent. Under the attitudinal model, Bink would be liable for rape if his victim chose sex because of the threat of violence. In the case at hand, Bink was not liable for rape because his victim did not acquiesce due to the force but instead because he wanted authorities to catch Bink. The jurisdiction allows the putative victim to consent for this reason. Bink should have been liable for attempted rape though, because he subjected his victim to sex he thought his victim did not choose (under conditions required by the jurisdiction i.e.

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<sup>249</sup> Westen, Some common confusions about consent, *Ohio state journal of criminal law* vol.2, p. 345

<sup>250</sup> Westen, Some common confusions about consent, *Ohio state journal of criminal law* vol.2, p. 345

<sup>251</sup> Westen, Some common confusions about consent, *Ohio state journal of criminal law* vol.2, p. 345

I do not know however whether states actually use the possibility of holding men liable for attempted rape when they only succeed in achieving dignitary harm under an attitudinal model.

<sup>252</sup> Westen, Some common confusions about consent, *Ohio state journal of criminal law* vol.2, pp. 345-346

<sup>253</sup> See Westen, Some common confusions about consent, *Ohio state journal of criminal law* vol.2, pp. 343-344

free of threats of violence). Bink showed contempt for his victim's sexual autonomy without actually managing to go against his victim's free choice.

The case *California v. Burnham* exemplifies the opposite situation, where the victim expresses consent but does not legally consent in her mind. Rebecca Burnham's husband beat her severely and threatened to injure her further unless she enticed motorists passing by their house to have sex with her. Under both expressive and attitudinal models, Rebecca's husband would be liable as an accomplice to rape because regardless of whether Rebecca factually consented in mind or deed or both, no jurisdiction would allow her to legally consent under these conditions. Since Rebecca expressed consent and the motorists had no reason to question this expression they would lack mens rea and in extension liability under either expressive or attitudinal model.

The attitudinal model enables more fine-tuned grading of liability because it takes into consideration something expressive models do not – the existence of primary harm. Both attitudinal and expressive models punish defendants who cause their victims dignitary harm. A defendant causes dignitary harm when he disregards his victim's sexual autonomy; when he subjects his victim to intercourse he (ought to) infer his victim does not choose under the conditions required by the jurisdiction.<sup>254</sup> This harm relates directly to a defendant's blameworthiness, he knows or he ought to know his actions cause this harm. Expressive models look only for this type of harm, when the defendant causes dignitary harm he is guilty of rape. In other words, under the expressive model the sole function of the punishment is to penalize blameworthy defendants.<sup>255</sup> The attitudinal model also looks at dignitary harm but in situations where this is the only harm caused, acts will instead be punished as attempted rape.<sup>256</sup> Consequently, this model also punishes failure to adhere to women's expressions albeit with a slighter punishment.

The precondition for rape conviction under the attitudinal model is instead the existence of primary harm. This harm arises when someone is subjected to sex without having subjectively chosen it under the conditions of freedom, competence and knowledge their jurisdiction entitles them to.<sup>257</sup> We can conclude that the commentators who argue a purely subjective attitude cannot change legal relationships are incorrect; a subjective attitude can change legal relationships because it determines the existence of primary harm.<sup>258</sup> Rebecca Burnham's husband and Bink both tried to inflict

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<sup>254</sup> Westen, Some common confusions about consent, *Ohio state journal of criminal law* vol.2, p. 345

<sup>255</sup> Westen, Some common confusions about consent, *Ohio state journal of criminal law* vol.2, p. 348

<sup>256</sup> Westen, Some common confusions about consent, *Ohio state journal of criminal law* vol.2, p. 345

<sup>257</sup> Westen, Some common confusions about consent, *Ohio state journal of criminal law* vol.2, p. 346

<sup>258</sup> Westen, The logic of consent. The diversity and deceptiveness of consent as a defense to criminal conduct, p. 152

this type of harm but only the former managed because Rebecca chose sex to avoid violence but the inmate chose sex to get Bink prosecuted for rape. Those who try but fail to inflict primary harm are equally blameworthy as those who succeed. Yet the punishment's function under the attitudinal model is not only to consider the blameworthiness of the defendant but also to consider how much punishment the state is justified in handing out due to the resulting harm.<sup>259</sup> Without primary harm, the state is arguably less motivated in handing out the harshest punishment.<sup>260</sup> Whether to base liability purely on the existence of dignitary harm or in combination with primary harm is not a question of a right and wrong way to construct rape liability, it is a policy question for states to make depending on what they consider ought to be the function of the punishment.<sup>261</sup>

A possible problem with applying 'attempted rape' in this way is that we usually associate attempted rape with situations of incomplete sexual intercourse. Using this label to describe completed sexual acts that lack primary harm as well may cause confusion and it may be problematic to place two such different situations under the same label. On the other hand, perhaps two defendants who both do all they can to achieve nonconsensual sex but fail – one fails to achieve penetration, the other achieves penetration but with (factual and legal) consent – are equally blameworthy. In terms of harm to the victim there may not be a great difference either between the woman subjected to sex she subjectively chose (for legally permissible reasons) while expressing nonconsent and the woman who evades penetration she subjectively does not choose.

When examining the two expressive models I argued they extend the group of potential victims compared to traditional force-resistance legislation, providing women protection in more situations. Whether the attitudinal model provides as much or more protection than the two expressive models will depend largely on the understanding of factors that invalidate consent, clarifying when a mental state of consent is not sufficient to work as defence against rape liability. As this is not an attitudinal model per se, enumeration of such factors is missing but Westen makes it clear they are indispensable for any consent-based legislation and encompass three categories – competence, freedom and knowledge.<sup>262</sup>

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<sup>259</sup> Westen, Some common confusions about consent, *Ohio state journal of criminal law* vol.2, p. 348

<sup>260</sup> Comparison can be made with legislation on murder which is an offence states grade not only based on defendants' blameworthiness but also on the existence of primary harm, which in this case is loss of life. Where the victim survives (i.e. there is no primary harm only dignitary harm i.e. manifesting contempt for another's life) states punish offenders for attempted murder regardless of how blameworthy they are, how hard they tried to achieve primary harm. States are less motivated to impose full punishment as they have incurred a lesser loss. Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law* vol.2, pp. 347-348

<sup>261</sup> Westen, Some common confusions about consent, *Ohio state journal of criminal law* vol.2, p. 348

<sup>262</sup> Westen, The logic of consent. The diversity and deceptiveness of consent as a defense to criminal conduct, p. 180

Whether the attitudinal model will protect women in as many situations as the Yes Model will depend further on whether liability arises when the applicant expresses nonconsent or already when she is passive. Westen says a defendant inflicts dignitary harm when he has intercourse with someone “in the absence of expressions that reasonably lead him to believe that he is acting in accord with her desires.”<sup>263</sup> This indicates attempted rape liability for sex with someone who is passive.

### 5.3.2 Rights of the accused

The attitudinal model does not provide a bright line for men to act in accordance with in the same way as expressive models do. Under those models, certain expressions (or lack thereof) by the victim can make up the actus reus of the crime. No specific expression by the victim constitutes (non-)consent under the attitudinal model though. However, a list of vitiating factors provides lines not be crossed under this model just as it does under expressive models. Furthermore, Westen argues a person is liable for attempted rape when subjecting someone else to sexual intercourse *in the absence of expressions* that reasonably lead him to believe that he is acting in accord with her desires.”<sup>264</sup> [Emphasis added] This indicates a bright line at passivity, brought about indirectly by way of rules prohibiting attempted rape.

This model seems less advantageous from the perspective of the rights of the accused since the existence of rape depends on the putative victim’s mindset, into which the accused has no insight. This would create uncertainty – not even positive signals from a sex partner are conclusive – where it not for the rules on mens rea. As explained in the previous subchapter however, where the accused did not disregard his victim’s words or actions, and the situation involved no other vitiating circumstances he will be guilty of neither rape nor attempted rape.

However, not only defendants have no direct insight into putative victims’ mindsets, courts have no such insight either. Opponents of this model argue it fails due to the impossibility of gaining epistemological access to someone else’s subjective mental state.<sup>265</sup> Without such access, perhaps it is impossible to come to a materially correct verdict using this model.

It is true we cannot gain direct access to another’s mindset since we cannot read minds. Yet courts can make inferences regarding the victim’s mindset through her testimony in combination with assessing her credibility, and the surrounding circumstances (most importantly existence of vitiating circumstances). Moreover, it is not the case that the victim’s actions and expressions are wholly irrelevant under an attitudinal model. Her actions

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<sup>263</sup> Westen, Some common confusions about consent, *Ohio state journal of criminal law* vol.2, p. 345

<sup>264</sup> Westen, Some common confusions about consent, *Ohio state journal of criminal law* vol.2, p. 345

<sup>265</sup> McGregor, Is it rape? P. 122

can be used to infer either consent or nonconsent when seen in combination with the surrounding circumstances. Expression will just not constitute consent under this model, merely be a piece of the puzzle. In other words, determining a subjective mental state is not an entirely subjective test. Courts have to assess all these factors – testimony, credibility, surrounding circumstances, actions by the parties, under expressive models as well whenever defendant and complainant versions of events diverge, especially in the absence of witnesses and physical evidence of for instance violence. An expressed no or a terrified demeanour do not leave physical evidence, here too the court will have listen to the two sides and make a credibility evaluation along with assessing surrounding circumstances in order to determine what was said and done.

Courts admittedly already make these inferences about mental state on a regular basis, in fact whenever they assess mens rea. Defendant's mental states are equally inaccessible to courts yet this does not stop courts from regularly relying on inference of mental state when determining cases that require mens rea.

Courts may have difficulty determining when desire turns into choice under an attitudinal model since both are mental states. This provides no problem for the defence when the situation does not involve any vitiating circumstances and the defendant has shown no contempt for the victim's autonomy, he will lack mens rea. It is however relevant to assess when desire turns to choice when the defendant has shown disregard for the victim's autonomy or another vitiating factor is present and the question arises whether to hold the defendant liable for rape or attempted rape. Yet it is still not so much of a problem from the defendant's perspective. He is not disadvantaged relative to an expressive model, quite the contrary. Under expressive models, he will always be liable for rape whenever he disregards the applicant's autonomy or when a vitiating factor is present because these models are only interested in whether the defendant acted culpably and not in the victim's mental state. Under an attitudinal model there is the possibility he will only be held liable for attempted rape and when the court is in doubt it should chose the lesser form of liability (*in dubio mitius*).

Hence, even though the attitudinal model at first encounter may seem disadvantageous from the defendant's perspective, it is in fact the opposite. The attitudinal model is as explained earlier, a finer instrument for determining liability since it considers an extra factor when grading rape crimes. This model does not only punish perpetrators according to their blameworthiness but also looks at the harm incurred by their victims – was primary harm inflicted as well as dignitary harm – to determine how great a punishment the state is justified in handing out.



# 6 Conclusions

## 6.1 Previously drawn conclusions

### *Human rights obligations in the context of rape*

On both the global UN level and the regional European level, the international bodies have established that rape violates several human rights<sup>266</sup> and there exists an obligation on states to protect against rape even when committed by non-state actors.<sup>267</sup> Furthermore, the Committee on the elimination of all forms of discrimination against women urges states to define rape as sexual intercourse without consent<sup>268</sup> and the European court of human rights demands that states penalize any nonconsensual act as well as focus on the issue of consent in all investigations.<sup>269</sup>

### *The concept of consent and the various meanings given the term*

Consent creates a privilege in criminal law; it removes an obligation to refrain from conduct that would be prohibited were it not for said consent.<sup>270</sup> Yet this is only one way in which courts and legal commentators use consent. Consent is used both to describe the empirical fact that a person chooses sex regardless of the reasons for doing so and to describe the boundary between legal sex and criminal rape.<sup>271</sup> The first usage is morally impotent, the second normatively significant. Furthermore, consent can be understood as an act one performs but it can also be understood as a mental state one has.<sup>272</sup> Finally, consent is used to describe an actual choice (whether morally significant or not, whether an attitude or an act) but also to describe a legal fiction of actual choice.<sup>273</sup> To avoid confusion about consent in discussions and more importantly in judgments it is essential to be aware in which way consent is being used.

The very use of consent in rape legislation has been criticized. Feminists have criticized its historical and modern application where many violent,

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<sup>266</sup> CEDAW General recommendation no. 19, p. 1, 7; Articles 3 and 8 of the ECHR; M.C. v. Bulgaria, Application no. 39272/98, 2003, para. 187 of the judgment

<sup>267</sup> CEDAW articles 2b,c,e,f, 5a and general recommendation no. 19, p. 9; M.C. v. Bulgaria, Application no. 39272/98, 2003, para. 149 of the judgment

<sup>268</sup> See e.g. CEDAW, A/55/38 part II (2000) 61 at paras. 151; CEDAW, A/57/38 part I (2002) 13 at para. 98.

<sup>269</sup> M.C. v. Bulgaria, Application no. 39272/98, 2003, paras. 166, 181 of the judgment

<sup>270</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, pp. 333-334

<sup>271</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, pp. 335-336

<sup>272</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, pp. 336-337

<sup>273</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, pp. 337-338

threatening and deceptive situations have been seen as consensual.<sup>274</sup> Consent is applied more generously in sexual situations, that is more situations are considered consensual, than in other areas of law.<sup>275</sup> However, this is not a shortcoming of consent as a concept but rather of its normative aspect. As long as states have a narrow understanding of which kinds of pressure should be prohibited when seeking sex, the protection of negative sexual autonomy will be deficient under any legal construct.<sup>276</sup> When norms are changed in ways to better protect negative sexual autonomy, these can be codified within the concept of consent.<sup>277</sup>

## 6.2 Conclusions drawn when comparing models

### 6.2.1 Sexual autonomy

*General conclusions about consent drawn from comparing the models*

Even if we are talking about consent as delineator between sex and rape, consent that works as a defense against rape liability is not a question of whether a woman really wants sex when she chooses it under pressure of circumstances.<sup>278</sup> She both does and does not want sex. She wants sex in the sense that she prefers it to whatever she is threatened with, she does not want sex because she would not choose it were it not for the pressure she finds herself under.<sup>279</sup> Legal consent is instead a question of whether she chooses sex with the freedom (competence and knowledge) her jurisdiction entitles her to.<sup>280</sup>

Moreover, a victim's thoughts about whether she has given valid consent are irrelevant for determining the existence of legal consent. This is true for all consent-based models and whether the situation involves vitiating circumstances or not. Take a situation that involves no vitiating circumstance; a woman says yes to sex with her boyfriend because he threatens to end their relationship otherwise. She chooses sex in mind and deed to avoid a breakup, but she does not believe her consent is valid due to the threat. Yet, since no jurisdiction criminalizes this type of threat the situation does involve legal consent; it involves choice (factual consent)

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<sup>274</sup> Pateman, Women and consent, *Political theory* 8(2); cit. Cahill Rethinking rape, p.172; MacKinnon, Toward a feminist theory of the state; cit. McGregor, Is it rape?, pp. 79-80

<sup>275</sup> McGregor, Is it rape?, p. 100

<sup>276</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 359

<sup>277</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 359

<sup>278</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 355

<sup>279</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 355

<sup>280</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law vol.2*, p. 355

under conditions that are acceptable to the state. Take instead a situation that involves a vitiating circumstance, a woman says yes to sex at gunpoint. The victim has given factual consent under all of the models; she has chosen sex in mind (attitudinal) and deed (expressive) and she therefore truly believes she has given valid consent. Again the victim's belief is irrelevant for the existence of legal consent, because no jurisdiction upholds a choice made under these conditions. All jurisdictions make it a crime to obtain sex by use of threat of extreme harm.

Indispensable for all consent-based models and more important than defining what consent is; attitudinal or performative, requiring no or yes, is defining which circumstances invalidate experienced or expressed factual consent. A threat can just as easily make a person say yes as refrain from saying no. A lie will not only make a victim perform the necessary expressions but will also make her consent in mind. It is therefore vital to have a robust and comprehensive understanding of the types of behavior on the part of potential perpetrators that invalidates consent (e.g. violence and threats thereof, certain types of nonviolent threats and deception) and which types of circumstances relating to the victim should be criminal to exploit (for example underage, retardation, intoxication). This is crucial in order to determine when the absence of no, the existence of yes or mental state of choosing sex should not be sufficient to work as defense against rape liability.

Important to note is also that it is not only the nature of vitiating factors that determine rape liability but also the degree to which they are present. This is true of all types of invalidating factors. Not all violence, deception, exploitation etc reach the level of invalidating consent under national jurisdictions, nor should it. Inflicting or threatening death or grave bodily harm in order to achieve intercourse is criminal under all jurisdictions, threatening a slap on the face or a pinch of the arm is not. Threatening grave economic setback (such as burning down the victim's house) is illegal in some jurisdictions,<sup>281</sup> threatening to destroy an item of low value is not illegal in any jurisdiction. Jurisdictions that see deception as a factor invalidating consent often see impersonation of a husband as fraud as well as sex under the pretence of medical examination.<sup>282</sup> No jurisdictions see insincere professions of love or bolstered statements of personal traits and abilities as illegal deception. Merely tasting alcohol does not invalidate consent under any jurisdiction; high level of intoxication invalidates consent under several jurisdictions.<sup>283</sup> It would in my opinion be a mistake to for instance criminalize sex with someone as soon as they have had a drink, to criminalize sex achieved by false professions of love or threat of a break-up. Alcohol works as a social lubricant helping people to relax and does not

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<sup>281</sup> In Sweden threatening to commit a criminal act results in rape liability, this includes crimes against property. Asp, *Sex och samtycke*, pp. 58-59

<sup>282</sup> Christopher et al., *Adult impersonation: rape by fraud as a defense to statutory rape*, *Northwestern university law review* vol. 101 no. 1, p. 87

<sup>283</sup> See for instance the Swedish criminal code *Brottsbalk 1962:700 1§ 2st*

remove the ability of rational choice when taken in moderation.<sup>284</sup> Making oneself appear more emotionally invested than one is may not be decent but it hardly warrants prosecution for a most serious crime. Finally, people should be free to leave relationships that do not meet their expectations. There is simply no public support for making these kinds of behavior (or rather exploitation, deception and threat to this lesser degree) criminal.

Contrary to popular belief all the different ways of understanding consent entail some form of resistance requirement in the absence of vitiating circumstances.<sup>285</sup> Applying consent as the absence of no entails the most obvious resistance requirement. Yet applying affirmative consent also entails a resistance requirement namely passivity. Also when applying consent as a mental state a woman cannot actively engage in sex and successfully claim to have been raped, in the absence of vitiating circumstances of course. When a vitiating factor is present though any resistance requirement is waived, for instance if a situation involves threat of grievous bodily harm the victim may actively cooperate and still have recourse to the courts.

Resistance is also the logical requirement when subjected to non-criminal threats under all the different understandings of consent.<sup>286</sup> If a man for instance threatens to stop inviting a woman out for dinner if she does not have sex with him, the woman is required to resist. If she chooses sex to keep the dinners she will not have recourse to the law under any conception of consent.

*Which examined model provides the best protection of negative sexual autonomy*

When it comes to protecting negative sexual autonomy the Yes Model clearly does the best job. Among other things, it requires those who seek sex to await positive signals of consent (rebuttable presumption of nonconsent) and contains a comprehensive list of vitiating factors. This model elaborates not only on the nature of vitiating factors that result in rape liability – underage, mental illness/retardation, intoxication, deception, coercion (not only violence) – but also on the degree to which they should be present.

The Yes Model also suggests a more extensive understanding of coercive threats based on what we may expect of other people, especially when they hold positions of trust. Additionally, McGregor sees the difficulty of dividing fraud into ‘in factum’ and ‘in inducement’ and provides an alternative view for when deception should be seen as criminal. She proposes using a combination of causal effect – the person consented because of the lie – and considering what we may expect in sexual

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<sup>284</sup> McGregor, *Is it rape?*, p. 147

<sup>285</sup> Westen, *Some common confusions about consent in rape cases*, *Ohio state journal of criminal law vol.2*, p. 350

<sup>286</sup> Westen, *Some common confusions about consent in rape cases*, *Ohio state journal of criminal law vol.2*, p. 353

relationships or encounters. We may expect people to exaggerate their virtues and emotional investment. No one should have to expect that their boyfriend be substituted for someone else, to name one example of fraud. This is not a perfect solution. The requirement of causal effect between the lie and the consent is sound and should meet no opposition, but ‘what one may expect’ in sexual situations is contestable. It may still be as useful as a fraud in factum/fraud in inducement construct though. Fraud in factum is very narrow and relates only to deception as to the nature of the act itself, all other instances of fraud are “in inducement” meaning they are normative and debatable. The division factum/inducement also does not reflect a difference in harm and violation to the victim, an ‘inducement-victim’ may well suffer the greatest injury but is in many jurisdictions without legal protection.

The Yes Model sees violence as incompatible with sex. While this seems sound it is problematic since it places sadomasochists in the same category as violent rapists without the former having violated the interest rape legislation seeks to protect; the right not to engage in sex. It is however positive from the negative sexual autonomy perspective that the Yes Model sees rape perpetrated by use or threat of violence as an aggravated offence. This is reasonable because these rapes entail additional harm to the victim but it may also increase chances of conviction for nonviolent rape since violent rape is generally seen as more serious.

A final aspect which could make the Yes Model preferable from the negative autonomy perspective is that it entails liability already at negligence. Since unreasonable beliefs do not acquit it may give men incentive to act with care in sexual situations instead of rewarding remaining oblivious to women’s choices. In practice however, negligence liability will likely have little effect since the difference between recklessness and negligence is thin and the outcome probably more dependant on the court or jury’s sensibilities and prejudices than on the distinction between conscious and unconscious risk-taking.<sup>287</sup> A sexist court will see more instances of objectionable behavior as reasonable leaving the applicant no better off with this distinction in place. Liability for recklessness also has the advantage over negligence in that the latter is necessarily a normative question, dependant on this courts opinion of what is reasonable, and the former is more akin to a question of fact – was this defendant aware he was taking a risk.<sup>288</sup> Moreover, this defense is bound to be rare in practice since most defendants will argue they had consent. When the existence of consent is ambiguous the defendant has nothing to gain from conceding there was no consent but he made a reasonable mistake about this. The defense will only have reason to use this excuse when there is no question the applicant did not consent and in these cases the court is unlikely to believe the defendant did not even consider the possibility of nonconsent.

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<sup>287</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 324

<sup>288</sup> Asp, Sex och samtycke, p. 193

The weakness of the Yes Model is the risk of consent being misread either in the form of male misinterpretation – although this is mitigated by the requirement of going ‘beyond symbolically appropriate behavior to ensure consent’<sup>289</sup> – or if consent to sexual foreplay and petting is seen as consent to intercourse. Both of these examples should be mitigated by the fact that it is not the defendant who determines the meaning of the victim’s expression, and if the ‘reasonable observer-standard’ is applied the female perspective of what is reasonable should hold equal weight to that of the male perspective.

Another possible problem is that the model may go too far. Perhaps too many situations result in rape liability relative to what people in general think constitutes rape. If this results in nullification of the law it is of course a problem for the protection of negative sexual autonomy. I will discuss this further in my conclusions about the ‘rights of the accused’.

*The consequences for negative sexual autonomy of seeing consent as either attitude or act*

The following pages will look at the consequences for negative sexual autonomy when consent is understood as the absence of no, yes or mental state; stripped of the specifics of the various models examined, for instance their views of the circumstances that vitiate consent.

I believe Westen is right when saying that defining consent as either expression or mental state is not a question of one way being right and the other wrong. Instead it is a question of the underlying rationale of the punishment, is it merely to punish the blameworthy or is it to punish the blameworthy in combination with considering the harm caused.<sup>290</sup> Having said this, one yields partially different effects on the protection of negative sexual autonomy when one applies these different views of consent.

Applying consent as an expression has the virtue of giving force to women’s words and actions as well as holding those who show disregard for someone else’s subjectivity liable. Applying consent as the absence of no silences arguments along the line of ‘she said no but meant yes’ which seems reasonable. As I discussed under the No Model subchapter, studies show that women rarely give token consent and even when they do most of the cases involve women who merely desired sex but did not choose it. Even without these findings men who have sex with women who say no are reckless in the absence of extremely convincing contrary evidence. They are taking a conscious risk of causing great harm since they must at the very least be aware this woman might mean what she is saying.

Viewing consent as an expression of yes has the benefit of protecting more women as the passive victim is covered as well. It is unclear how important

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<sup>289</sup> McGregor, Is it rape?, p. 135

<sup>290</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law* vol.2, p. 342

extending protection to passive victims is when taking into account peritraumatic stress. The studies made show that victims are far more likely to experience this type of trauma when subjected to violence, attacked by a stranger, when sustaining injury or fearing for their lives.<sup>291</sup> In these situations victims are not required to resist verbally or physically. On the other hand victims may remain passive out of fear without their passivity being a peritraumatic response but instead a strategy to escape additional injury. Case law shows an unwillingness to see the connection between power and force, the fact that in some situations men do not need to use physical violence or express threats; superior strength, imbalance of power, and creating or exploiting a victim's vulnerable position will do.<sup>292</sup> Fear-induced passivity may also arise without the situation objectively entailing threat of violence; jurisdictions often do not take into account a particular victim's exaggerated fear when assessing threat of harm.<sup>293</sup> For these reasons equating passivity with consent does not provide sufficient protection of negative sexual autonomy. Holding passivity instead to equal nonconsent may also be relevant in protecting intoxicated victims, reducing the need for difficult inquiries into how drunk a victim need be for her consent to be invalid; if she was passive there was no consent. Since intoxication can also lead to the victim signaling affirmative consent it will not entirely remove the need for these inquiries though. Furthermore, it seems reasonable that a law aiming to protect negative sexual autonomy sees passivity as signaling nonconsent, that it is unacceptable to engage in sexual acts with someone who gives no indications such acts are welcome.

There may be problems with misreading signals when applying affirmative consent, especially when behavior can signal consent, studies show men often interpret women as consenting when they are not. However applying affirmative consent is still preferable to applying consent as the absence of no as the latter sees any behavior as indicating consent until the victim expresses verbal rejection.

Then again it may be harder to achieve convictions when applying affirmative consent. Or put differently, the extended protection offered by such statutes risks being nullified in practice. To have sex with someone despite verbal resistance is more in tune with how people perceive rape than not awaiting positive signals.<sup>294</sup> Verbal resistance also better establishes mens rea, a court or jury will likely find it easier to confirm the man was aware he was having nonconsensual sex if his victim told him so. Even if the statute does not demand it, juries want some evidence that corroborates nonconsent<sup>295</sup> and there is a risk that a verbal resistance requirement will

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<sup>291</sup> Finn, Paralysis common among sexual assault victims, *Family practice news*, March 1, 2003, p. 44

<sup>292</sup> *Gonzales v. State, Goldberg v. State, People v. Evans* – in all of these cases the victims found themselves alone with the defendant in a secluded area, in a vulnerable position created by the defendant but without explicit threat. Estrich, *Real rape*, pp. 66-69

<sup>293</sup> Two cases in which the court states that the fear must be reasonable are *State v. Rusk* and *Gonzales v. State*. Estrich, *Real rape*, pp. 63-67

<sup>294</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 348

<sup>295</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 352

persist in practice. Furthermore, some studies indicate that while consent is most often nonverbal, nonconsent is often expressed in a more direct, verbal manner.<sup>296</sup> Some commentators even argue the majority of acquaintance rape victims physically resist their attacker.<sup>297</sup> This would mean that for most victims the added protection of requiring positive signals would be superfluous. However, for a significant number it may still be relevant requiring positive signals.<sup>298</sup> To sum up very shortly, applying affirmative consent is preferable to applying consent as the absence of no, provided the law is conformed with.

When applying consent as a mental state the consentor seems privileged because she cannot consent by mistake and what determines the existence of consent is not how it was perceived by the defendant or even a reasonable observer, but what she experienced. Consent under an attitudinal view is not a purely subjective test though. When an applicant lacks competence – she is underage, mentally retarded, intoxicated – the court will have objective evidence of this. And when she does not lack competence it is not her testimony alone but in combination with credibility assessment, the surrounding circumstances of the case and possibly her actions that determines the existence of consent. An example of a situation in which surrounding circumstances can effect the determination of subjective legal consent is the Bink case. Here the prosecution had evidence the inmate consented to ensnare Bink – a legally acceptable reason to consent – and not because of Bink’s violence. The surrounding evidence thus helped determine that the inmate gave legal attitudinal consent and Bink was therefore only liable for attempted rape.

I argued above that applying consent as an expression has the virtue of holding those who show disregard for someone else’s subjectivity legally responsible. Yet states can achieve this when applying consent as a mental state as well through the prohibition of attempted rape. Though with a mental state view there is a risk of defendants routinely arguing that despite their use or threat of violence or that they went ahead in the face of their victim’s expressions of nonconsent, the women consented in their minds. They consented due to desire or because they wanted to get the defendants prosecuted for rape and for that reason the defendants should only be held liable for attempted rape. However applicants are probably not worse off since when applying consent as an expression the same defendant could

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<sup>296</sup> Rosenthal and Peart, The rules of the game: Teenagers communicating about sex, *Journal of adolescence*, p. 325 and; McCormick and Jones, Gender differences in nonverbal flirtation, *Journal of sex education and therapy*, pp. 271-282; cit. Cowling, Should communicative sexuality be written into English law on rape?, pp. 57-59, *Contemporary issues in law Vol. 6 Issue 1*

<sup>297</sup> Rozee et al., The Personal Perspective of Acquaintance Rape Prevention: A Three-Tier Approach, in *Acquaintance Rape: The Hidden Crime* 216, 337, 349 and Warshaw, I Never Called it Rape; cit Bryden, Redefining rape, notes, 195-196. Warshaw even cites the number 70 percent.

<sup>298</sup> If Warshaw is correct that still leaves 30 percent who do not resist, whether these victims are protected anyway because they were subjected to violence or another vitiating factor is unclear.



instead argue the applicant consented but afterwards changed her mind and is now making a false accusation of rape or, if the defendant used violence that it was just part of a consensual sadomasochistic practice they shared.

There may be a risk of prosecutors habitually only indicting defendants for attempted rape though because they think it too difficult to establish subjective factual nonconsent and to difficult to determine when desire turns into choice. Though I do not believe this poses a great risk. In the absence of indications or evidence that the victim consented for another legally acceptable reason<sup>299</sup> and with the victim's testimony along with the other circumstances of the case (the victim's expressions, vitiating factors) the prosecution should be confident to prove subjective nonconsent. Furthermore the distinction between desire and consent will not be relevant for cases involving fraud or incompetence. Of those who are underage, mentally retarded, intoxicated there is no reason to ask if they consented for another legally valid reason, they are excluded from giving valid consent for any reason.

I have just dismissed my apprehensions that defendants will find it too easy to argue consent in the face of expressions of nonconsent or vitiating circumstances and prosecutors will lack confidence to prove subjective nonconsent, when applying consent as an attitude. If I am right to do so a mental state-view of consent provides better protection of negative sexual autonomy than applying consent as the absence of a no and protection almost equal to that of applying affirmative expressive consent. The liability and sentencing will be lower in some cases (when the applicant validly consents in mind) under an attitudinal view, but like with affirmative consent more victims (passive victims) will have recourse to the courts.

## **6.2.2 Rights of the accused**

It seems as if conceiving of consent as an expression would be better from the defendant's perspective since here he can trust a woman's words or behavior, if she said yes or behaviorally signaled yes she cannot claim to have been raped later on (in the absence of vitiating circumstances of course). Under an attitudinal view the applicant's mental state is decisive for determining the actus reus which may not correspond with her actions and the defendant has no insight into her mental state. However, the rules on mens rea cure this problem making it safe to trust women's expressions under an attitudinal view as well. Men will not be held liable for having sex with women who signaled consent in the absence of vitiating factors.

Courts have no direct access to the applicant's mental state either. However, courts frequently make inferences about mental states they have no direct insight into whenever they determine whether a defendant has the requisite mens rea. When courts determine the applicant's mental state they are aided by the same tools as when determining mens rea: the person's actions,

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<sup>299</sup> Such as the inmate's cooperation with prison authorities to ensnare Bink.

testimony, credibility assessment and the surrounding circumstances of the case. Courts may have difficulty determining when desire turns to choice when both are mental states but that does not mean that men are disadvantaged under this view. When there is doubt about whether to hold the defendant liable for rape or attempted rape courts should choose the lesser form of liability (in dubio mitius). Even if a court were to depart from this principle the defendant would not be disadvantaged relative to an expressive view. Under expressive models the defendant is invariably guilty of rape when he shows contempt for the applicant's subjectivity or another vitiating factor is present.

Appearances aside, the attitudinal view entails the most favorable consequences for the legal rights of the accused since it constitutes a finer-tuned instrument for grading liability. When jurisdictions perceive consent as an expression they focus only on the blameworthiness of defendants; when defendants disregard their victim's subjectivity they are guilty of rape. Perceiving of consent as an attitude means considering this aspect as well but also having a more complex understanding of the harm victims may incur. Where expressive models look only for dignitary harm – that which defendants cause when they subject others to intercourse they (ought to) infer the other person does not choose – attitudinal models look for primary harm as well.<sup>300</sup> Primary harm is achieved when the victim does not get to subjectively choose intercourse under conditions the jurisdiction considers her entitled to.<sup>301</sup> Between two men who both do what they can to achieve nonconsensual sex but only one achieves his aim, both are equally blameworthy but it is questionable whether the state is justified in handing out as severe punishment where less harm was incurred. Understanding consent as an attitude acknowledges this and considers it unjust to hand out equal punishment for different types of harm.

If we look at the three different models per se – vitiating factors included – the attitudinal model is still the most favorable from the perspective of the legal rights of the accused. The attitudinal model has the least far-reaching understanding of what vitiates consent; since it is not a model per se it does not list any vitiating factors (simply categories that could be relevant: freedom, competence and knowledge). As I see it the only way the attitudinal model would be less favorable than the other models from the 'legal rights'-perspective is if it had a more extensive and questionable understanding of factors that vitiate consent. For instance, if trivial threats (have sex with me or I will be annoyed) or trivial deception (falsely claiming to be a natural blonde) were seen to vitiate consent.

A factor that influences the legal rights of the accused is how well the various models (or the various conceptions of consent for that matter) provide a bright line between criminal and non-criminal behavior for

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<sup>300</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law* vol.2, p. 344

<sup>301</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law* vol.2, p. 346

putative offenders to relate to. The bright line is also relevant for courts as when it is crossed it provides a corroborative of actus reus and the defendant's mens rea. The No Model provides a brighter line than the Yes Model because under the No Model it is up to the putative victim to make clear that sex is unwelcome, men are made aware they are crossing the line. The No Model is not entirely straightforward though, even disregarding the issue of no not always meaning no<sup>302</sup>, as there is the issue of how long a 'no' reigns over the situation. It seems unreasonable for a previous 'no' to control the situation even when the victim subsequently behaves in a way that indicates she has changed her mind (absent a threat or similar circumstance). A 'no' becomes progressively weaker the more time passes and should be interpreted in the light of what was said and done since.<sup>303</sup> Under the No Model repeated requests or attempts to have intercourse are seen as inherently coercive but even Estrich must concede that a no eventually loses its command over the situation. How much time must pass before this happens remains unclear though and problematic for the No Model as well as for other models that focus on verbal rejection.

The Yes Model and affirmative consent in general avoids this problem; a woman may change her mind and consent but must then signal this affirmatively whereas under the No Model a woman's change of mind may be legally ineffective after an uttered 'no'.<sup>304</sup> The Yes Model has its own problems though as it involves reading affirmative signals correctly, something studies indicate men are bad at. The misinterpretation only goes in one direction – believing a woman signaled consent when she did not and thus possibly incurring rape liability. The fact that a reasonable observer determines the meaning of the expression<sup>305</sup> may go in both directions. A male observer may come to the conclusion consent was given meaning the defendant is not liable, a female observer may come to the opposite conclusion. Then again misreading signals may not be as problematic as it seems. When a woman realizes the man has misread her signals she will either engage in some form of resistance or remain passive, either behavior means there is no consent under the Yes Model (the man has the requisite mens rea if he has sex with someone who is passive). Here passivity provides a bright line (and corroboration for the court) and passivity should be sufficiently easy for men to spot and they are already required to know the meaning of verbal resistance under the No Model, meaning the Yes Model entails no extra requirement in this respect. One prominent

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<sup>302</sup> No does always mean no in the sense that it should be criminal to disregard, because such behavior shows contempt for the other person's subjectivity (labeled rape under the expressive models and attempted rape under the attitudinal model). However, no does not always mean that the victim did not subjectively choose intercourse under conditions acceptable to the jurisdiction (i.e. it is not necessarily rape under the attitudinal model).

<sup>303</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 341

<sup>304</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 345

<sup>305</sup> McGregor thinks that the consentor's intention should decide the meaning of the expression but as I have previously explained that would make this an attitudinal model. When what the applicant intended to express clashes with how the expression was perceived an attitudinal model holds the former to be decisive, an expressive model the latter.

commentator even questions the importance of considering male misinterpretation. He argues that most mistakes about consent are legally irrelevant, such as believing that the woman will change her mind and consent during the intercourse or that the victim will not report the rape to the police.<sup>306</sup>

The attitudinal model provides no bright line function by itself since here what determines the existence of factual consent is not an expression or a lack thereof but a mental state. However, in combination with rules prohibiting attempted rape the attitudinal model achieves this function indirectly. Westen indicates the line should be drawn at having sex with someone who does not give positive signals, the defendant causes dignitary harm when he subjects his victim to “sexual intercourse in the *absence of expressions* that reasonably lead him to believe that he is acting in accord with her desires.<sup>307</sup>” [Emphasis added] Yet it seems that it is up to states to decide where they draw the line for criminal attempts – at verbal resistance or already at the absence of affirmative signals – the conception of consent as attitudinal seems to enable either preference.

Finally, a bright line function is provided by the various models understanding of the factors that vitiate consent, what types of threats or deception for instance. These types of lines are a lot harder for men to keep track of than either respecting a no or refraining from having sex with someone who is passive meaning that a model with an extensive understanding of vitiating factors would entail more insecurity of what amounts to rape. Ignorance of the law is as invalid of an excuse here as in other areas of the law though.

However there are legal commentators who argue it is unjust to punish those who are ignorant of the law.<sup>308</sup> The justice system speak of statutes as providing sufficient warning to potential offenders but most people do not know the specifics of various laws not even of a highly debated one as the law on rape.<sup>309</sup> People usually learn what is right and wrong from the society they live in. I do not believe this fact justifies an ignorance of the law defense. If states could only enforce laws that people living in their territory had full comprehension of it would make a thin list and people would generally be a lot worse off, many laws exists to protect them against various abuses from others. It does however raise the question of how great a gap between the law and the public’s perception on a particular issue is acceptable when introducing new legislation, especially in the realm of social interaction and conventions. For this reason, some legal commentators argue it is unjust to send a man to jail for not awaiting positive signals of consent,<sup>310</sup> as the Yes Model and the attitudinal model

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<sup>306</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, pp.33-34

<sup>307</sup> Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law* vol.2, p. 345

<sup>308</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 347

<sup>309</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 347

<sup>310</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 347

proposes to do. They argue that although the proper thing to do is to await positive signals, to refrain from doing so is not uncommon or immoral to justify imprisonment.<sup>311</sup>

If the gap between the law and the general public's perception of what amounts to rape is too great it may not only be unfair to those who are ignorant of the law, it may also lead to the law not being enforced.<sup>312</sup> This does provide a problem for the Yes Model and possibly the attitudinal model; a problem the No Model largely avoids as there is greater consensus among people in general that proceeding beyond a 'no' is unacceptable enough to warrant sanction. On the other hand, it seems unfair to make women alone bear the consequences for men's ignorance; this problem could be alleviated by information campaigns instead of refraining from adopting otherwise just laws. Because it does seem reasonable to abstain from penetrating another person without indications that it is welcome. It also seems logical that legislation that aims to protect negative sexual autonomy presumes nonconsent. As for the fear that the law will not be enforced this can be solved by other means such as more education of and accountability for those employed in various areas of the judicial system. I also imagine this problem will decrease the more women (and men with more modern attitudes towards equality) work in the various stages of the judicial system.

If the gap between the law and the public's perception of what amounts to rape is a greater problem than I have supposed here, I maintain that the attitudinal model (or understanding consent as an attitude) is the best model from the 'legal rights'-perspective. Under the attitudinal model it is as I see it possible to place the line between criminal and non-criminal behavior at 'sexual intercourse with someone who expresses nonconsent' instead of at 'sexual intercourse with someone in the absence of positive signals'. For the Yes Model there is obviously no such possibility which is one of the reasons why this model is the less favorable from perspective of the legal rights of the accused but there are other reasons as well.

The Yes Model has the most expansive notion of the factors that vitiate consent. Especially when it comes to fraud and even more so coercion, the Yes Model goes further than current legislation in various states and further than many other legal commentators suggest. Under this model coercion is expanded beyond violent threats to exploiting a position of trust, exploiting someone in a harmful situation (for instant conditioning the rescue of a person in acute distress on sexual favors) and to certain nonviolent threats. The Yes Model also provides a different explanation of what turns deception and nonviolent threats into criminal behavior than the standard accounts. This understanding has to do with what people may expect instead of division into fraud in factum/fraud in inducement and threats being that which places people at a disadvantage relative to their baseline. These ideas may go too far relative to the general public's perception of what amounts to

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<sup>311</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 348

<sup>312</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 348

rape and basing what counts as deception and coercion in large part on what one may expect may be considered too imprecise and hard to identify a common understanding of. The Yes Model is further problematic because in removing consent as an excuse when violence was used it risks punishing sadomasochists for rape even though they do not even attempt to override someone else's negative sexual autonomy which is the essence of the crime of rape.

A final aspect which makes the Yes Model as well as the No Model less favorable from the defendant's perspective is liability for rape already at negligence. In fairness to the No Model it may be more negligent – reckless even – to proceed in the face of verbal rejection than in the absence of positive signals. In either case, the standard reasoning for not holding the negligent liable – that it is unjust punishing those who can do no better and ineffective as deterrence – is flawed as a blameworthy decision to forego precautions has usually preceded the harm.<sup>313</sup> There might still be those who deem it to harsh to demand liability for a crime as stigmatizing as rape when the defendant acted without intention. Be that as it may, negligence liability is likely to have little effect in practice. The line between recklessness and negligence is thin in practice and the outcome probably more dependant on the court or jury's sensibilities and prejudices than on the legal distinction. For most defendants it will be irrelevant as they will argue they had consent, not that they had a reasonable mistaken belief about consent. In those cases where it would be a relevant defense – where it would be obvious the applicant did not consent – the defendant would most likely be held to be reckless anyway. It seems unlikely the court would believe the defendant did not even consider there was no consent when it is so obvious to them the situation lacked consent.

I will end with a few words about violence as an aggravating factor. It seems reasonable to place the nonviolent rapist in a different category than that of the most violent rapists. The former has caused his victims great harm but he has not exacerbated this harm by additional violence; assault and threat thereof being offences in their own right. All the models enable this division.<sup>314</sup>

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<sup>313</sup> Bryden, Redefining rape, *Buffalo criminal law review* vol. 3, p. 323

<sup>314</sup> Westen explains there is no contradiction in defining the more severe felony as sexual intercourse by force and without legal consent and the less severe felony as sexual intercourse without legal consent. Westen, Some common confusions about consent in rape cases, *Ohio state journal of criminal law* vol. 2, note 25

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