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Is affirmative consent the answer? Yes, sort of, maybe

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Abstract

Recently there have been some powerful calls in the media for the law to adopt an affirmative consent model in relation to the law on rape. This article explores this proposal. It argues

that while there is much that is attractive about the concept of affirmative consent, it needs considerable unpacking and explanation before it can be accepted. Indeed, if adopted at a simplistic level it carries considerable dangers. The article presents six ambiguities around what is meant by affirmative consent, but concludes with a proposal as to what an appropriate nuanced model of could look like.

Introduction

The Sexual Offences Act 2003 defines consent in section 74:

> 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice.'[1]

The statutory definition makes it clear that consent is something positive: it is rape unless it is shown that the victim positively consented. But it does not make it clear whether the consent has to expressed or is a state of mind.

There has been growing pressure on policy makers to make significant changes to the Sexual Offences Act 2003. In particular, comedian & actress Emily Atack has fronted the provocative 'Asking for it' campaign with CPB London and Right to Equality, urging for a standard of affirmative consent in law.[2] The campaign[3] seeks to reform the law to require a

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[1] Section 75 and 76 set out circumstances in which non-consent can be presumed.

[2] Atack's 'Asking for it' BBC documentary highlighted her distressing experience of receiving unsolicited intimate images online. Her campaign was successful and ultimately led to the creation of a new offence of cyber flashing.

[3] See https://cpblondon.com/affirmative-consent-uk/ and https://righttoequality.org/campaign/affirmative-consent/.

clear ‘yes’ to sexual encounters. That is ‘voluntary, explicit agreement to engage in specific sexual activity, requiring ongoing communication and mutual understanding.’ They identify the problem of implied consent, citing that more than one fifth of Brits think no can mean yes. Moreover, they suggest that the victim is often burdened with the responsibility of proving they did not say yes, which is particularly troublesome when victims do not conform to stereotypical expected behaviour. In this article we argue that the proposal of affirmative consent requires much unpacking before it can be accepted. There is something very helpful at the heart of the proposal, but it is highly dangerous without sufficient development. In this article we highlight some of the ambiguities within the case for affirmative consent and then set out the version we suggest could be accepted.

The Attractions of the Affirmative Model of Consent

The affirmative consent model finds its origins as an objection to ‘resistance rape law’ which defined rape to only occur where the victim[4] expressed opposition to the sexual encounter. Under such a law a woman who was passive or silent could not be raped. There is clearly much to object about such a law. In particular, there is considerable evidence that victims of

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

sexual assault can “freeze” in the face of assault.[5] In any event, in the face of rape attempted resistance may be futile, indeed, extremely dangerous.

The ‘resistance rape law’ in effect creates a presumption that a woman is willing to consent to sex with any man at any point in time unless she makes clear she opposes it. The responsibility is placed on her to manifest her opposition, rather than putting the responsibility on the man to obtain consent before sexual touching. Those who find such an approach objectionable often promote an affirmative consent model.

Supporters of affirmative consent claim that there should be rape unless there is unambiguous consent from the victim. This sends a strong message to people engaging in sexual activities: only proceed if you have a clear manifestation of consent. If you are not sure, then there is a simple solution: ask if the other person is happy to proceed. They can then give a clear affirmative consent.

The affirmative consent model has found some support in various jurisdictions. New York law[6] defines it as : “[A] knowing, voluntary, and mutual decision among all participants to engage in sexual activity.” It clarifies that consent “can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.”[7]

[5] Rape Crisis, *The 5 Fs: Fight, Flight, Freeze, Flop and Friend* (London: Rape Crisis, 2024).

[6] N.Y. EDUC. LAW § 6441(1)

[7] [1991] 1 SCR 330, para 50

Universities often include in their campus codes of conduct an affirmative model. For example, University College, London (UCL) states:

> UCL understands consent to be 'affirmative and enthusiastic' consent. This is important because consent is often understood as the absence of a 'no'. This understanding of consent ensures that we move away from the absence of 'no', and from interpreting silence as agreement. Consent must be affirmatively and enthusiastically provided for it to be considered present. [8]

Such statements have become fairly standard in University policies for those which have them. It has, indeed, been suggested we are witnessing an "affirmative consent reform juggernaut."[9]

English Law has to a large extent accepted affirmative consent as a broad principle, although as we shall see there are ambiguities around what the concept means. In *Malone*[10] the Court of Appeal were clear:

> The actus reus of rape is an act of sexual intercourse with a woman who at the time of the act of sexual intercourse does not consent to that act of sexual intercourse. There is no requirement that the absence of consent has to be demonstrated or that it has to be communicated to the defendant for the actus reus of rape to exist.

[8] https://report-support.ucl.ac.uk/campaigns/i-heart-consent

[9] A. Gruber, 'Consent Confusion' (2016) 38 *Cardozo Law Review* 415.

[10] [1998] EWCA Crim 1462.

This is reflected in the language of section 74, cited above. However, such an approach falls just short of an affirmative consent model. While clearly stating that opposition does not need to be manifested in order for there to be a rape conviction, it does not state that there is rape unless there is explicit consent.

A major appeal of the affirmative consent model is that the defendant cannot rely on assumptions or myths as evidence of what the victim's consent. There is plenty of evidence that men assume that friendliness from a woman or the fact she wears certain clothes amounts to consent.[11] Such assumptions cannot be relied upon under and affirmative consent model, but that requires clear articulated consent. It is the responsibility of each party to a sexual encounter to get affirmative unequivocable consent before they proceed with a sexual encounter.

The affirmative consent model may make the task for the jury slightly easier. As Hörnle[12] has noted attempting to ascertain the inward thoughts of a person is difficult because "the existence of a mental state does not necessarily imply the formulation of coherent sentences or, for that matter, the formulation of any sentences at all." More importantly, she notes "Mental states are not accessible to others and thus cannot play a crucial role in guiding

[11] T. Humphreys and M. Brousseau, 'The Sexual Consent Scale—Revised: Development, Reliability, and Preliminary Validity' (2010) 47 *Journal of Sexual Research* 420.

[12] T. Hörnle, 'The Challenges of Designing Sexual Assault Law' in T. Hörnle (ed) Sexual Assault (Oxford: Oxford University Press, 2023), 21.

conduct." So, focussing on whether a clear consent was expressed, is more straight-forward than determining what a person's state of mind was.

A final benefit of the affirmative approach is that may help to tackle the relentless use of stereotypes and victim blame tactics of defence barristers.[13] Under the affirmative consent model, once it is clear there was no clear affirmation of consent, there is no scope for asking the victim what he or she "really wanted".

There are, however, plenty of ambiguities within the concept of affirmative consent model and these need to be unpacked before it is appropriate to offer full support to it. In order to understand and analyse these ambiguities, we need to explore what it is that consent does in law.

What Consent Does

Consent can be relevant in the criminal law in two ways:

> Model 1: The lack of consent plays a transformative role in rendering the act unlawful.
>
> Model 2: Consent plays a transformative role in rendering an act lawful.

[13] Law Commission, *Evidence in Consent Offence Prosecutions* (London: Law Commission, 2023).

According to the model 1 the lack of consent plays a clear role in rendering the act unlawful. The lack of consent must be sufficiently serious to render the act unlawful. According to Model 2. consent needs to be sufficiently rich to demonstrate that the act should not be unlawful.[14] For some acts Model 1 is the correct approach and for others Model 2. We suggest that in relation to a sexual penetration Model 2 is correct. Let us explain why.

The role consent plays in the law (Model 1 or 2) depends on the nature of the act that is done. There are some acts which are prima facie wrongs: that is, they are acts which require a justification. These are acts which in their nature harm the victim: they involve an interference in bodily integrity; risk harms; express negative messages and the like. Here the defendant can be asked “why did you do that?” and needs to provide a sufficient justification to avoid the conclusion that they behaved unlawfully. If the defendant has no explanation or cannot evidence consent then a conviction can be upheld. There Model 2 is being used.

In other cases, the act is not itself wrong but may become wrong if done without consent. Take, for example, a tourist taking pictures of a landmark, when given its crowded nature, will capture images of passers-by. We might take it the tourist does no wrong in taking such a photograph, but if a passer-by said “please don’t take a photograph of me” it would be wrong to do so.[15] Then what one is doing wrong because the objection has rendered an otherwise permissible act impermissible. There Model 1 is being used..

[14] J. Herring, ‘Rethinking Sexual Crimes’ (2023) 17 *Anatomia Do Crime* 19.

[15] There could be a criminal offence under Public Order Act 1986, section 4A or the Protection from Harassment Act 1997 (if there is a course of conduct).

Affirmative consent makes more sense in cases under Model 2: acts which are prima facie legally wrong and require the consent to render them permissible. Only clear consent can do that work. If there is an ambiguity we do not want the person proceed. However, if we give clear rich consent, we can authorise the act. We want the general position to be that people should not cut us, but to have the power to authorise a surgeon to perform an operation. Consent in relation to interference with bodily integrity allows us to consent to some interactions, while meaning that the law protects our bodily integrity in the absence of rich consent.[16]

The law, through consent, is able to provide a clear and justifiable approach. You can interfere with another person's bodily integrity or sexual autonomy if you have clear consent. If you do not you should not proceed. The law in this way provides authority to the consent provider to determine whether or not another can touch them, but also guidance to the would-be toucher as to when they can proceed. As Renzo puts it: "Consent is a tool that enables both consenters and consentees to pursue the projects they have chosen for themselves while reducing the risks of being involved in acts of wrongdoing, either as victims or as perpetrators."[17]

So, we can be clear about what consent is doing in legal terms in rape. It is providing the defendant with a justification. The work it has to do is to transform a legal wrong into a justified act.[18] How might it do that? It does that by providing A (the person wishing to

[16] T. Dougherty, *The Scope of Consent* (Oxford: Oxford University Press. 2021).

[17] M. Renzo, 'Defective Normative Powers: The Case of Consent' (2022) 10 *Journal of Practical Ethics* 1.

[18] J. Wall, 'Sexual Offences and Reasons not to have Sex' (2015) 35 *Oxford Journal of Legal Studies* 777

sexually touch B) with a justifying reason. The justifying reason being they are seeking to respect and comply with B's consent: B's sexual autonomy. In fact, this is the only potential justification reason.[19] A is permitted to rely and respect B's exercise of sexual autonomy.

In other words, it is not for A, nor anyone else, to determine whether sex between A and B would be good for B. This is B's decision alone. While in other contexts A may have other reasons to be believe that an act will promote B's best interests (for example, A is a doctor offering B a treatment which make them healthier) in relation to sex A has no reason to think the sex will benefit B, save B's own assessment.

Understanding this we can see three key points, which will be at the heart of our arguments to follow. First if A is to use B's consent in the way which will justify A's action, then it must be clear, unambiguous consent. A is not going to be able to say they are respecting B's autonomy to justify an otherwise wrongful act, without a clear "yes". The affirmative consent model is right to insist on this.

Second, this is key when we come to determine what counts as consent. Because it is now widely accepted that consent is not a binary concept: rather we might distinguish consent in a rich or a weak sense. We will explain the difference further below (see section 6) but it should be noted that the concept of affirmative consent does not itself indicate whether we are talking about rich or weak consent. If A is to use consent in the approved way just discussed they must have reasonable grounds to believe B is consenting and have a duty to

[19] Save, arguably, in bizarre hypotheticals, e.g. that the world will be destroyed unless A penetrates B without consent.

take reasonable steps to ensure that consent is given. Where B has consented only in a weak sense there is not enough evidence for A to conclude that B has exercised their autonomy to justify the penetration.[20]

Third, and it is surprising how often this obvious point is missed, A is only permitted to do the act B has consented to. Everyone would agree that consent to a kiss is not consent to sexual intercourse. What is often missed is that if emphasising consent is about respecting B's sexual autonomy then A can only do the act to B, *as B understands that act*. If, for example, B's religious beliefs mean that she will be committing a terrible sin to have sex with A is married, but the act will be approved of by God if A is not married, then *to her* these two acts are fundamentally different. At least as much, maybe more so, as a kiss is different from intercourse to many other people. There may be plenty of people for whom the marital status of their would-be partner is irrelevant, but that is back the point earlier: we should be asking what it is B is consenting to, *as she understands it*.

We might draw an analogy at this point. If C is cooking D a meal and D has stated they are vegan and has asked C not to use any animal products in her meal, then I think most people would agree it would be a moral and legal wrong for C to do use meat (if she has the necessary *mens rea*).[21] The fact that D may think veganism is foolish is beside the point. It is likewise beside the point that, let us say, the majority of the population are not vegan and so see no significant difference between a food containing animal products and one not. It is for D to decide what she wants to eat. C may say "D consented to eat the meal" but the point

[20] Herring, n. 13, above.

[21] It could be a poisoning offence under sections 23 or 24 of the Offences Against the Person Act 1861.

is D consented to eat a vegan meal and C knew that to D it really mattered whether the food was vegan and was clearly not consenting to eat animal products. In feeding D animal products C would be failing to respect D's autonomy. So, too in sex B's consent to the sexual act is only consent to the act as B understands it.

We are now in a position to unpack some of the ambiguities behind the affirmative consent model.

Ambiguity One: Is Consent a State of Mind or a Communication?

Affirmative consent requires a clear positive consent. But what does consent mean here? Is it a state of mind or a communication? In other words, do we focus on what B said or did or do we focus on what was in B's mind? It might be thought that the affirmative consent model is all about a positive display of communication of consent, but we suggest there needs also to be a positive state of mind which is communicated. Let us unpack that.

Renzo distinguishes between the "mental state view" which sees consent as a state of mind and the "behavioural view "which sees consent as a state of mind which is communicated to the other person."[22] Drawing on Hörnle[23] we might imagine three different versions of an affirmative consent model:

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[22] Renzo, above n. 16.

[23] Hörnle, above n. 11.

1. There needs to be positive approval as a mental state; communication is irrelevant.
2. The mental state is irrelevant, but there needs to be communication of positive approval.
3. There needs to be both positive approval as a mental state and a communication of positive approval.

So, under approach 1. the consent question would be entirely focussed on B's state of mind. What was said or done by B would be irrelevant save as evidence as to their state of mind. For approach 2 the focus would be entirely on the communication. What was in B's mind would be irrelevant. For approach 3 we can see that both the victim's state of mind and the communication from the victim are what matters.

We suggest approach 1 is implausible. We need an understanding of consent which gives B the legal protection that she won't be intimately touched without her consent but which also allows A to know whether they can touch B intimately without legal sanction if there is consent. Understanding consent as only based on B's state of mind does not allow consent to guide A's behaviour. As described above the way consent marks is by changing the practical reasoning of the other, to provide them with the option to act in what would otherwise be a prima facie wrong.[24] But we can only do that by communicating the consent. However, that leaves options 2 and 3. It is not normally made clear by supporters of affirmative consent

[24] S. McCormack and J. Herring ' The Duties of the Penetrator and the Limits of Consent'' [2024] Crim LR 91.

[25] [1994] Crim LR 226.

which of these two models they support. We think it must be option 3: that there needs to be positive approval as both a mental state and as communicated.

The case which demonstrates this well is *R v McFall*.[25] There the defendant kidnapped his former partner. The defendant had a gun and forced the victim into a hotel. There he made her take a bath and then have sex with her. The victim at the trial stated she had faked orgasms during the sex, indeed she said she had done that so well she might have made the defendant believe she was consenting. The Court of Appeal upheld the rape conviction. That must be the right outcome. Although outwardly (in terms of communication) the victim may have been displaying consent, even enthusiasm, it was clear that internally she was strongly objecting to the act.   In terms of the *mens rea* the Court of Appeal took the view that in the circumstances no reasonable jury would conclude the defendant reasonably believed the victim was consenting. It would be absurd to acquit in a case like this where the defendant knew the victim did not genuinely consent and in her mind the victim was not consenting, merely on the basis she had 'performed' consent, in a bid to save her life. Of course, where a victim is manifesting consent, but internally is not consenting, it may be the defendant lacks *mens rea*. But where the defendant has the *mens rea* there should be no barrier to finding there is no consent.

So, the affirmative consent model must include a requirement that the victim gave affirmative consent and that that matched their internal state of mind. In other words, there is no consent if either the victim did not in fact consent or the victim had not communicated their consent.

[25] [1994] Crim LR 226.

Ambiguity Two: Verbal Consent or Behaviour

The affirmative consent model is sometimes summarised as "yes means yes". This might be read as stating that only the uttering of the word "yes" or an equally clear phrase will suffice. No conduct could provide this kind of unambiguity. Other supporters of affirmative consent are open to accepting that actions as well as words could indicate consent. It seems that this must be correct, although it will be very rare. If nothing else sign language could be used by a deaf couple, presumably, to communicate consent. Certainly, between strangers it might be thought that any act will have a degree of ambiguity. Even if, for example, A suggests sex and B undresses and lies on the bed, it might not be clear quite what sexual acts B is consenting to. We might conclude that it would be very rare for anything other than explicit oral communication to communicate unequivocable consent it cannot be ruled out. Critics might suggest that such an approach is paternalistic, awkward and an onerous contract that 'kills the mood'. We would question whether checking for consent ever would kill the mood, but even if this fear is legitimate there is a clear balance. It is better to have a law which occasionally 'kills the mood' than to have a law which fails to protect sexual autonomy. Consent should be ongoing and communicative throughout a sexual encounter. It should be expressed and communicated, usually, but not necessarily, by words.

Ambiguity Three: Rich Or Weak Consent

As already mentioned, it is often unclear what quality of consent affirmative consent supporters are advocating for. Consent can be understood on a spectrum. We can distinguish between rich and weak consent.

- Consent in a rich sense would require us to be strict about what will count as consent. The person must know all of the relevant facts and be able to weigh them in the balance and reach a decision for themselves. They must be free from illegitimate pressure and feel they have a range of options open to them. Finally, their consent must be a positive enthusiasm to go ahead.
- Consent in the weak sense would mean we would not be strict about what would count as consent. The person need only know the essential facts. They need to be able to come to a decision, but we will not have requirements about the quality of their decision-making. Unless they are facing overwhelming pressures, we will accept their consent as valid.

We explained earlier that the starting point is that a sexual penetration is, prima facie, a legal wrong. This means that the consent must be sufficient to justify the otherwise wrongful act. That will be when A is having an attitude of respect for B's sexual autonomy. This means that A has a responsibility to ensure any consent given is full, rich and autonomous.[26] Any lesser quality of consent will be insufficient to justify an otherwise wrongful act. It would be quite wrong if a model of affirmative consent were to suggest that as long as B has said the word "yes" consent is established. Consent should not be seen as a game whereby the object is to get the other party to say "yes", but rather than attitude of respect towards the other party's sexual autonomy.

[26] Gruber, above n. 8.

Ambiguity Four: When Cannot be Relied Upon

Anyone proposing affirmative consent, will need to deal with cases where although a "yes" has been uttered, it was said in such circumstances that it should not constitute consent. That, we suggest, may not be the most helpful way to discuss the issue. The question should not be in these cases whether there was or was not consent, but whether in these circumstances A can rely on the "yes" as justifying their act. The following are the common scenarios where such issues arise:

(a) Lack of freedom

The term affirmative consent depends on whether the consent is given freely. A person may say "yes" but that might not reflect a genuine choice that has been made. So, what does the affirmative consent model require in terms of freedom?

The model clearly helps resolve a case such as *Olugboja*,[27] where the victim was so terrified of the defendant's behaviour that when he approached her, she voiced no resistance to the sex. However, she made no positive affirmation of consent.[28] So, the model would provide a clean answer in such a case.[29]

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[27] [1982] QB 320.

[28] In the case itself the Court of Appeal saw consent as a state of mind, but drew a distinction between 'real consent' and 'mere submission'.

[29] S. Leahy, ' "No Means No", but Where's The Force? Addressing the Challenges of Formally Recognising Non-Violent Sexual Coercion as a Serious Criminal Offence' (2014) 78 J Crim L 309.

Consider, however, for example *R v Kirk*[30] where a 14-year-old girl who had previously suffered sex abuse had run away from homes and sleeping on the streets. As the Court of Appeal put it 'She was tired, dirty and hungry and had nowhere to go.'[31] She went to see Kirk and asked for money. He offered her £3.25 if she agreed to have sex. She agreed. The prosecution case was she submitted, rather than consented to sex, due to the desperation she felt due to hunger. The Court of Appeal upheld the rape conviction, we believe correctly. There was a sense in which she had given affirmative consent, but it was in circumstances that her expression of her will could not be taken as reflecting her autonomous wishes. This, then is the key point. Where B is making a decision under considerable pressure, then A cannot rely on that assessment as an expression of sexual autonomy. In such a case it is incumbent on B to wait until A is in a position to make a non-pressurised choice. Going back to the *Kirk* case the defendant could have ensured that the victim had food and shelter. He could have ensured she felt safe and was secure; then there may be scope for an autonomous decision to be made, free from pressure. Notably that will include cases where there is coercion, but also cases like *Kirk*, where there was no direct coercion, but pressurising circumstances.

(b) Mistake

Where A has consented but is mistaken as to fact, and B knows this or ought to know it, can B rely on this mistaken consent to justify their act. It seems clear that it cannot. B is in no

[30] [2008] EWCA Crim 434.

[31] Para 85.

position to say they are respecting A’s sexual autonomy and using their consent in the permitted way, as described above.

Where B is acting under a ‘key fact’ mistake A cannot rely on that consent because they are not relying on B’s assessment of what is B’s interests. Indeed, quite the opposite. A knows that if B knew the ‘key fact’ B would not want to have sex. They may think B is foolish, petty or bigoted to place so much weight on the ‘key fact’, but that is to impose their own determination of what is best for B onto B. Whereas they should only rely on B’s own assessment and they know B does not want to do the particular act.

It is one thing to accept that “yes” expresses a consent; but the question then must follow what is being consented to. To take an obvious example consent to being kissed is not consent to sex. Consent to “sex” does not involve consent to any sex. The victim may be consenting to sex subject to certain conditions being fulfilled; or consent to certain kinds of sex; or consent to sex with a particular person or kind of person. So, we need to clarify precisely what is being consented to when it is declared that an affirmative consent is consent.[32] The error that many make is that consent to sex is consent to sex and it is as simple as that. Clearly that is a mistake. Martha Nussbaum recalls, ‘I certainly intended to consent to intercourse. What I did not consent to was the gruesome, violent, and painful assault that he substituted for intercourse.’[33]

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[32] I. Glendinning, ‘Should Mistaken Consent Still Be Consent? In Defence of an Incremental Understanding of Consent in the Sexual Offences Act 2003’ (2021) 85 *Journal of Criminal Law* 223.

33 M. Nussbaum, ’Accountability in an Era of Celebrity: Sexual Violence, Culture and the Law’' https://www.abc.net.au/religion/accountability-in-an-era-of-celebrity-sexual-violence-culture-an/10095542

For many commentators it is necessary to draw a line between different forms of mistake (or deception). We need to distinguish between important mistakes which might negate consent and unimportant mistakes which do not. That view must be firmly rejected. First, if A were to say 'B must give me good reasons why I should not have sex with her' that would demonstrate an utter lack of respect for B's sexual integrity. B does not need to justify not giving A access to her body. The bizarre thing is that we recognize this when it comes to fraud. If X lies about something and as a result acquires Y's property that will amount to the offence of fraud. It is no defence for X to say that Y should not have been taken in by such an obvious lie or that the lie related to simply a trivial issue. Why is it that we should take a clear line to those who use lies to get property, but not to those who lie to get sex?

Second, we need to recognize as a society that there is a wide diversity of views about the nature and values around sex. These reflect cultural, religious and personal values. It is not for the law to state that one set of reasons not to have sex are significant but another set of reasons are trivial. To do this imposes a particular moral perspective on the world. In particular, at least in so far as the decisions of the English courts, that has been a particular secular western perspective of sex. It shows an utter lack of respect for cultural and religious diversity that under the current law the issues that concern people around sex which do not relate to the physical act are dismissed as being trivial.[34]

[34] This section is developed from J. Herring, 'Consent Mistaken' in *Reforming the Relationship between Sexual Consent, Deception and Mistake (*Bristol: Criminal Law Reform Now Network, 2023). See further, O Madhloom, 'Deception, Mistake and Non-Disclosure: Challenging the Current Approach to Protecting Sexual Autonomy' (2019) 70 *Northern Ireland Legal Quarterly* 203.

(c) *Drunken consent*

If B is intoxicated it is unlikely that she is in a position to exercise her autonomy to consent to an act which is prima facie wrong. This is another area where the prima facie wrongfulness of penetration is important. If the act is one which is beneficial to B: A is going to walk B home to a place of safety and warmth. A is going to make sure that B is sleeping in a way which minimises the dangers of suffocation. Such acts are in B's benefit. In such a case consent is playing a less important role in justifying what A is doing. Of course, if B in this case lacks capacity then under the general principle that in such a case A can act in way which benefits B. Even if not, it seems that A can take it B would consent to B treating her in a way which promotes her welfare, unless there is clear evidence to the contrary. However, it is very different where the act is itself a prima facie wrong. Here the consent is justifying an otherwise wrongful act. This is not to say that all drunken consent is ineffective. The consent must be clear and rich. An intoxicated consent by definition is impaired and may not be sufficient to allow B to do a prima facie wrongful act.

(d) *Exploitation*

There are cases where the victim has said "yes" and even given the communication of consent, but this is as a result of exploitation. In a sensitive and insightful decision, the Court

of Appeal in *R v Ali*[35] recognised how grooming can impact on a person's capacity to express their wishes:

> Although… grooming does not necessarily vitiate consent, it starkly raises the possibility that a vulnerable or immature individual may have been placed in a position in which he or she is led merely to acquiesce rather than to give proper or real consent. One of the consequences of grooming is that it has a tendency to limit or subvert the alleged victim's capacity to make free decisions, and it creates the risk that he or she simply submitted because of the environment of dependency created by those responsible for treating the alleged victim in this way. Indeed, the individual may have been manipulated to the extent that he or she is unaware of, or confused about, the distinction between acquiescence and genuine agreement at the time the incident occurred.

It is important therefore to view any consent standard in a holistic way, not as merely act specific.[36] The yes alone is unlikely to overcome the years of grooming and abuse to make a D justified in the penetration. What is key therefore, is not necessarily whether or not the yes was affirmative, but the context in which it was given.

[35] [2015] EWCA Crim 1279, para 58

[36] E. Dowds, 'Towards a Contextual Definition of Rape: Consent, Coercion and Constructive Force' (2020) 83 *Modern Law Review* 85.

Ambiguity Five: Conditional Consent

A person may have consented, but subject to a condition. It is generally agreed that if B agrees to sex subject to conditions and A goes ahead without those conditions being met B will not have consented. For example, in *R (on the application of F) v DPP*[37] the victim agreed to sex on condition the defendant did not ejaculate insider her. The defendant had sex and deliberately ejaculated inside her. It was held she had not consented to the act the defendant did. Similarly in *Assange v Swedish Prosecution Authority*[38] it was held that if a woman agrees to sex, but only if the man wears a condom, she will not be held to have consented if the man does not wear a condom.

These cases, it should be noted are strikingly different from a mistaken consent case. Let us take *Assange*. There, in effect, what the victim was saying was "I consent to sex if you wear a condom. I do not consent to sex if you do not wear a condom." It seems blatantly clear in such a case the victim does not consent to sex if there no condom worn. The mistaken consent case are different. There the claim is not that there was consent to the act, but the mistake was sufficiently serious to mean the consent is vitiated. It is rather that B made it clear there was consent only in certain circumstances.[39]

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[37] [2013] EWHC *945* (Admin).

[38] [2011] EWHC 2849 (Admin).

[39] T. Dougherty, 'Deception and Consent' in P. Schaber and A. Muller, (eds) *Routledge Handbook of the Ethics of Consent* (Abingdon: Routledge, 2021).

This distinction with mistaken cases is important. While in a mistaken consent case the question inevitably arises whether the mistake was sufficiently serious to vitiate the consent, that is not a question in a conditional consent case. There the question is simply whether or not the condition was met and therefore the act fell into the category of consented to act.[40]

After all sexual autonomy means little if all we can say is "yes" or "no" to sex and cannot put in place limits and conditions the kind and circumstances in which we are willing to have consent.   So any acceptable affirmative model must ensure respect is paid to any conditions that B places on her consent.

Ambiguity Six: Duties and Consent

We will be brief on this issue as we have addressed it at length elsewhere.[41] We agree with Thomas Doughtery[42] who has argued in favour of what he calls the "Due Diligence Principle" He argues

> At time t, an action A falls within the scope of the consent that X gives to Y if and only if

[40] T. Alencar, 'Conditional Consent and Sexual Crime: Time for Reform?' (2021) 85 *Journal of Criminal Law* 455.

[41] S. McCormack and J. Herring, 'The Duties of the Penetrator and the Limits of Consent' [2024] *Criminal Law Review* 94

[42] Dougherty, above n. 40.

(i) at t, X gives consent, or prior to t, X has given consent and has not subsequently revoked this consent;

(ii) at t, the available reliable evidence sufficiently supports the interpretation that X intends their consent-giving behaviour to apply to Y performing A; and

(iii) at t, the enhanced reliable evidence also sufficiently supports this interpretation.

He goes on to explain what he means by reliable evidence: "By stipulation, evidence is defined as 'reliable evidence' if and only if the consent-giver and the consent-receiver must reasonably accept that this evidence bears on how the consent ought to be interpreted." And by enhanced reliable evidence definition: "By stipulation, the 'enhanced reliable evidence' is defined as the available reliable evidence, supplemented by any reliable evidence that the consent-receiver has a duty to acquire."

If A is about to do an act which they know is a *prima facie* wrong and which if they have got the consent question wrong will cause serious harm to B then A has a responsibility to ensure that B's consent is indeed an effective determination by her of her best interests. A is about to do something dangerous, which could put B at risk of serious harm. This puts positive obligations on A to ensure that they are able to rely on B's assessment that the act will be in B's best interests. The focus should not be on 'did B consent?' but 'did A have sufficient reason to engage in a *prima facie* wrongful act?' This requires more than simply considering if there is a 'yes or no'. If A is to do an act which is a potentially serious harm to B then A can be expected to do a little more than that. Listening to what B is saying about the proposed act is likely to require appreciating how B understands the act within its wider relational and social meaning; ensuring that B is under undue pressure to make a decision; to ensure B has

time to consider the issue. Only thereby can they be sure the risk of serious harm from their act will not materialize. So, under a sound affirmative consent model, it should be insufficient simply for B to have consented, but also to show A has met their duties to take reasonable steps to ensure B can fully exercise autonomy and provide rich consent.[43]

Arguments Against Affirmative Consent

What do opponents of affirmative consent say? Are their arguments effective against the form of affirmative consent we have supported?

First, it has been argued "even those sympathetic to clear modes of sexual communication acknowledge that insisting on a specific word to legitimate sex is artificial and unrealistic, given the heterodoxy of intimate signalling"[44]. Various reasons may inhibit a woman making a clear statement of "yes" but expresses consent in other ways. We agree, which is why we have avoided a simplistic rule that there must be an utterance of the word "yes". However, we have made it clear that only exceptionally should behaviour other than the word yes be acceptable.

[43] McCormack and Herring, above n. 42.

[44] Gruber, above n. 8.

Second, one scholar pronounces that it is a "myth" to believe that "'no' does not always mean 'no.'"[45] We express no view on whether or not it is ever true that a woman may say "no" but subjectively consent, but we doubt it. What we are clear on is that where B has said "no" A has no basis on relying on this to do an act which will cause a serious harm to B and so has no justifying reasons to commit the prima facie wrong of a penetration.

Third, Tatjana Hörnle has warned against assuming that any behaviour short of ideally good behaviour should be criminal. She emphasises "the harsh consequences of criminal accusations and convictions call for a non-perfectionist view."[46] In cases where there was ambiguity over consent it may be argued the defendant may have behaved improperly, but the case is not of sufficient gravity to justify the involvement of the criminal law. However, in property dealings we expect people to behave up to the standards of the reasonable honest person. We do uphold moral standards there. Lies and exploitation used to obtain property are clearly fraud or theft. We see no reasons why property criminal law should be an area to uphold such standards, but not criminal law.

Fourth, Hörnle emphasises in her writing that in the context of sexual encounters. there must be a sharing of the burdens of the parties in ensuring there is a consent. She writes:

> Implementing an 'only yes means yes' model in criminal law means that a person may face criminal conviction and sanctions for omitting to ask for clarification. In

[45] B. Diehl, 'Affirmative Consent in Sexual Assault: Prosecutors' Duty' (2015) 28 *Georgetown Journal of Legal Ethics* 503.

[46] Hörnle, above n. 11.

> comparison, the obligation imposed on the disapproving person with a 'no means no' model is a very small burden; thus, this rule of conduct in criminal law can be viewed as fair."

The argument here is that both parties to a sexual encounter need to share the burdens of things going wrong. In a standard sexual encounter it is reasonable to expect the party reluctant to proceed to make some attempt to express that opposition. This might be thought important especially as people find explicit discussions of sex awkward and embarrassing.[47] We are not convinced by this reasoning for two reasons. First, there is evidence of victims of sexual assault "freezing" in terror.[48] The gender issue is important here. A woman who voices her reluctance is risking a violent reaction. A man who seeks clarification is at worse risking disappointment or embarrassment. The two are not in an equal relationship, at least in terms of a male-female sexual encounter. Given the potential gravity of the harms and the imbalance of power within heterosexual sexual encounters it is not appropriate to seek a balancing between the obligations of the parties.[49] Second, if the penetration is a prima facie wrong and receiving a penetration is not then there is another marked difference between the two parties.

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[47] Gruber, above n. 8

[48] M. Schiewe, 'Tonic Immobility: The Fear-Freeze Response as a Forgotten Factor in Sexual Assault Laws' (2019) 8 *DePaul Journal of Women Gender and the Law* 1 .

[49] T. Palmer, 'Failing to See the Wood for the Trees: Chronic Sexual Violation and Criminal Law' (2020) 84 *Journal of Criminal Law* 573.

Finally, we ought to look elsewhere to understand the effectiveness of an affirmative consent standard in practice. In particular, section 273.1 of the Canadian Code defines consent as 'voluntary agreement of the complainant to engage in the sexual activity in question'. This was interpreted to be an affirmative standard of consent after the key *Ewanchuk*[50] decision which held implied consent is not enough and that voluntary agreement is to be expressed through words or conduct throughout a sexual encounter. In this case the victim initially resisted the advances but because she feared him she stopped objecting, which the defendant tried to rely on as evidence of implied consent. The Supreme Cout held that a belief that silence, passivity or ambiguous conduct is not consent and cannot provide a defendant with a defence.

The decision was initially welcomed, raising the standard to an 'only yes means yes' one. However, the cases that followed demonstrated a difficulty in interpreting and applying this standard as Vandervort discovered erroneous interpretations and applications of consent in a study of judicial interpretations.'[51]. In particular, some judges and juries continue to rely on stereotypes/myths to inform discussions and decision rather than the existence of consent.[52] For example, in *R. v. Adepoju*,[53] despite the complainant's repeated struggle to reject the defendant's advances, the complainant eventually submitted to the accused 'to get it over with.' Based on the fact the victim had 'stopped saying no' and her 'body language said yes' the defendant was acquitted. As Benedet rightly noted, the trial judge 'had erred in both

ignoring all of the sexually assaultive behaviour that took place prior to the sexual intercourse, and in inferring that submission to sexual intercourse was consent.'[54] Whilst a standard of affirmative consent appears, at least on paper, to reinvigorate sexual encounters by redistributing sexual power, it seems on its own it might do little to challenge engrained stereotypes and victim blame.

Conclusion

We have sought to show in this article that there is much to welcome in a proposal to explicitly adopt a model based on affirmative consent, but the headline "yes means yes" is potentially dangerous. We are now in a position to support a model of affirmative consent to sexual penetration (SP), with the following clarifications:

1. Affirmative consent requires B to have subjectively wanted the SP and to have unequivocally communicated that. That will normally require a clear oral statement of desire for the act, but exceptionally can be done through actions.
2. Affirmative Consent must manifest "rich consent". That is consent that is sufficient for A to be able to rely on it as a clear expression of B's wish. Where A knows, or ought to know, that B is acting based on a mistake, fraud, intoxication or pressure then A cannot rely on what B has said or done to communicate their autonomous choice.

Where A can take reasonable steps to ensure B's consent is richly autonomous then A must take those steps.

3. Where the affirmative consent is subject to a condition, then it can only be relied upon where the condition is satisfied, whatever the nature of that condition.

Even if so understood, much more work is required to improve the law on rape. Some of the key problems within sexual offence trials is more often than not it is the victim who is on trial. Her behaviour, clothing, and past sexual encounters are often used as a means of undermining her credibility and invoking stereotypical attitudes in juries. Even an explicit affirmative consent model will be open to interpretation and manipulation, ultimately reverting the spotlight on the victim. Any substantive legal change would need to be coupled with societal campaigns and education on rich affirmative consent. Moreover, substantive change would be needed to the trial process and jury education. Nonetheless, reforming the law to require an affirmative standard of consent would be a positive step forward, sending a clear message about the responsibility of penetration and the obligation to respect a partner's sexual autonomy.