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Citation:

Mc Cormack, S and Herring, J (2024) The duties of the penetrator and the limits of consent. *Criminal Law Review* (2). pp. 94-103. ISSN 0011-135X

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The Duties of the Penetrator and the Limits of Consent

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Abstract

The core claim of this article will be that where A plans to sexually penetrate another, he has a duty to ensure the penetration is justified. We will argue that these duties are both negative (to avoid certain kinds of conduct) and positive (to ensure that the other party is in a position to be able to express her consent (richly understood)). Rape trials and legal scholarship too often focus on the victim and her state of mind. This article argues that the focus should be on the penetrator and whether he was justified in acting in the way he did. This requires a careful assessment of the limited circumstances in which consent might provide a justification.

1. Introduction

The core claim of this article is that where A plans to sexually penetrate another, he¹ has a legal duty to ensure the penetration is justified. The article will proceed by first making the claim that a sexual penetration is a *prima facie* wrong. We will then explain how consent can play a role in justifying that penetration. We will then explore the duties that the penetrator has as a result, arguing there are both negative duties (behaviour that must be avoided) and

¹ It is our contention that sexual penetration requires a justification, regardless of the sex of the parties.

However, consideration of male rape and female on male sexual assault raises slightly different issues and so is not addressed in this piece.

sometimes positive duties (behaviour that must be engaged in) if the penetration is to be justified.

2. Sexual Penetration as a Prima Facie Wrong

This section briefly recaps the claim that a sexual penetration is a *prima facie* wrong. It is an argument that Michelle Madden Dempsey and one of us developed fully some time ago:

“When a man penetrates a woman’s anus or vagina he commits a prima facie moral wrong. Sexual penetration requires a justification, and in the absence of a justification, it will be wrong all things considered.”²

The claim was based on three wrongs, the first two of which are nearly always present in a male-on-female penetration, and one which is always present.

The first wrong is that a sexual penetration involves the use of force against a body.³ Jesse Wall has supported the claim arguing “penetration of the vagina or anus, forceful or otherwise, is the use and control by the other, rather than the use and control by the self” and hence a prima facie wrong.⁴

² M. Madden Dempsey and J. Herring, “Why Sexual Penetration Requires Justification” (2007) 27 O.J.L.S 467.

That article provides a fully developed form of the claim. Note Madden Dempsey has argued that a sexual penetration should be regarded as a prima facie moral, but not legal, wrong: see Michelle Madden Dempsey, ‘The Normative Force of Consent in Moral, Political, and Legal Perspective’ in T. Hörnle (ed), *Sexual Assault* (OUP, 2023).

³ J. Wall, “Sexual Offences and General Reasons Not to Have Sex” (2015) 35 O.J.L.S. 777.

The second wrong is the non-trivial risks of harms that are often associated with penetrative sex (e.g., sexually transmitted diseases, unwanted pregnancy; abrasions and bruising; and particularly the risk of psychological harm).

The third wrong (that is always present in male penetration of women), is the negative social meaning that act communicates in our patriarchal society. That is the “the devaluation of women *qua* women and a disrespecting of women’s humanity”, with which heterosexual sexual penetration is unfortunately always associated in a society marked in rape culture and sexism. As Madden Dempsey and one of us put it:

“any credible interpretation of the practices of, language regarding, and depictions of sexual penetration in our culture betray a social meaning of sexual penetration which devalues women *qua* women and disrespects women’s humanity to an extent which renders such conduct *prima facie* wrong”.⁵

It should be emphasised that the claim is that sexual penetration is a *prima facie* wrong. If there are adequate reasons for it then it can, “all things considered” be justified, indeed wonderful. Just as a cut into a person is a *prima facie* wrong, but when done in the context of life saving surgery, it can be fully justified, indeed very good act; so too with sex. By claiming that it is a *prima facie* wrong the argument is that it is an act requiring a

4 J Wall, “Sexual Offences and General Reasons Not to Have Sex” (2015) 35 OJLS 777. For a contrary view see K Greasley, “Sex, Reasons, Pro Tanto Wronging, and the Structure of Rape Liability” (2012) 15 Criminal Law and Philosophy (2021) 159.

5 Madden Dempsey and Herring, “Why Sexual Penetration Requires Justification” at 486-487.

justification. The actor has the responsibility of providing sufficient reasons why they did the act. If no justification is available, then it will be assessed as an all things considered wrong.

At the heart of a justification will be the consent of the other party. However, while this is widely accepted, there is surprisingly little explanation of how consent can provide that justification. We turn to that next.

3. How Consent can Justify a Penetration

If a sexual penetration is a *prima facie* wrong, how does consent operate as a justification? In other words, how does consent work to perform its “moral magic”:⁶ how can it turn a *prima facie* wrong into something that is all things considered right?⁷ Drawing on Madden Dempsey’s⁸ work we suggest that if B consents to A’s act the consent can be effective in this way. It gives A the option of setting aside some reasons against acting a particular way. It does this when A is justified in relying on B’s own assessment of what is best B. In other words, A is entitled to say:

This is [B]’s decision. She’s an adult and can decide for herself whether she thinks the risk is worth it. In considering what to do, I will assume that her decision is the

6 H. Hurd, “The Moral Magic of Consent” (1996) 2 *Legal Theory* 121, 121

7 We leave open the question of whether more than consent is required. It may be, for example, that the man needs to ensure the negative social message referred to in section 2 is not, in fact, reflected in their sexual encounter.

8 M. Madden Dempsey, “Victimless Conduct and the Volenti Maxim: How Consent Works” (2013) 7 *Criminal Law & Philosophy* 11.

right one for her. After all, she is in a better position than I to judge her own well-being.

Applying this to the context of a male penetration of a woman then consent of the woman can provide a justification⁹ where the man is able to say “She has made the decision to agree to sex and has decided that is what she wants to do. I will accept her assessment as she alone has the right to decide whether she wants to have sex.”¹⁰

At the heart of this approach is respect for sexual autonomy. No one has any reason to decide for someone else that sex is good for them. Indeed, the false mindset that a man can tell if a woman needs sex or that a woman will inevitably benefit from sex with a man is portrayed in pornography. Indeed, it is striking that under the Mental Capacity Act 2005, section 27, it is specifically stated that a person cannot consent to sexual relations on behalf of a person lacking capacity. That is because although for many decisions it is possible to make a determination of what is in another’s best interests, that is not possible for sexual relationships, given their inherently personal nature.

This point might also be developed by considering a doctor who determines that a patient needs an operation. Clearly the doctor needs the patient’s consent, if the latter has capacity, but consent here might be doing less work than it is in relation to sex. The doctor has one good reason to perform the operation (it will benefit the patient’s health in a medical sense).

⁹ A justification in the sense that A is entitled to set aside the reasons he has against penetrating so that he commits no wrong in doing so.

¹⁰ J. Herring, “Consent in the Criminal Law: The Importance of Relationality and Responsibility” in A. Reed and M. Bohlander (eds) *General Defences in Criminal Law* (London: Taylor and Francis, 2016).

That may not be sufficient reason, but it is a reason. By contrast where A is going to sexually penetrate B, A has no good reasons for thinking the sexual penetration will benefit B. So, the model of consent, just proposed, rightly involves A recognising that A is in no position to determine that the sex will be good for B. It is B alone who is in a position to make this determination. This, however, throws some important light on the role of consent in justifying sexual relations.

First, it should be obvious that silence or equivocation cannot perform the work required of consent. A is in no position to rely on silence as an assessment from B that the sex is in B's best interests. The same is true where the "consent" is ambiguous or impaired because A has no other evidence to clarify whether the sex will be beneficial for B.

Second, although B's consent can give A a reason for the penetration, A must act *for* that reason. John Gardner has helpfully explained that in order for a person to be justified, an act must be justifiable, and the person be justified.¹¹ This is important because it makes clear that whether or not B was consenting is not really the key question for the purposes of the criminal charge, it is whether A was acting in appropriate reliance on this consent. It is, in other words, the attitude A is expressing towards B's sexual autonomy which is key.

Imagine, for example, a prostitute-user who is using a prostituted woman/sex worker for his sexual enjoyment, not caring, or not caring much, whether there is genuine consent. In such a case the consent of the prostitute/sex worker is not properly playing its full force in determining his reasons.¹² The user cannot claim to be acting on the reasons provided by the

11 J. Gardner, *Offences and Defences* (Oxford: Oxford University Press 2009), 131.

12 M. Madden Dempsey, "Rethinking Wolfenden: Prostitute-Use, Criminal Law, and Remote Harm" [2005] Crim LR 444.

consent. Whether or not the sex worker is consenting is beside the point. He was not using her consent in the way which could justify his penetration. Indeed, his act was portraying the kind of negative social meanings about a penetration, which was discussed earlier.

Third, and this is the primary point for the purpose of this article, this account explains that an “apparent consent” can only do the moral work required to justify the penetration where it is a rich consent. It must be sufficient for A to determine that B has made a clear assessment of whether she wishes to engage in sex. Clearly it is not enough just for B to have said “yes”: it may be that despite the expression of consent, the circumstances of it mean A cannot rely on it the way described. For example, if A knows that B is saying “yes” through pressure or based on a fundamental mistake as to the facts, then A cannot use the “yes” as an assessment by B that the sex is what they want. That requires A to interrogate the consent offered and take steps to ensure that it clearly is sufficient for A to be able to take it as a complete expression of what B wants.¹³

Catriona Makenzie and Wendy Rogers argue that to be able to exercise autonomy we need the following:¹⁴

- Self-determining: being “able to determine one’s own beliefs, values, goals and wants, and to make choices regarding matters of practical import to one’s

13 J. Wall, “Being yourself: Authentic Decision-Making and Depression” in C. Foster and J. Herring (eds) *Depression and the Law* (Oxford: Oxford University Press, 2017).

14 C. Makenzie and W. Rogers, “Autonomy, Vulnerability and Capacity: A Philosophical Appraisal of the Mental Capacity Act” (2013) 9 *International Journal of Law in Context* 37, 39.

life free from undue interference. The obverse of self-determination is determination by other persons, or by external forces or constraints”.¹⁵

- Self-governing: “being able to make choices and enact decisions that express, or are consistent with, one’s values, beliefs and commitments. Whereas the threats to self-determination are typically external, the threats to self-governance are typically internal, and often involve volitional or cognitive failings. Weakness of will and failures of self-control are common volitional failings that interfere with self-governance”.¹⁶
- Having authenticity: “a person’s decisions, values, beliefs and commitments must be her ‘own’ in some relevant sense; that is, she must identify herself with them and they must cohere with her ‘practical identity’, her sense of who she is and what matters to her. Actions or decisions that a person feels were foisted on her, which do not cohere with her sense of herself, or from which she feels alienated, are not autonomous”.¹⁷

Much could be said about the application of these principles, but they make clear that the mere fact B has said “yes” may not be an authentic expression of her wishes. She may merely be reflecting the value of others. For example, if B is saying “yes” because she is facing a threat, then her decision is not authentic (it is not “hers”). The expression of consent

15 C. Makenzie and W. Rogers, “Autonomy, Vulnerability and Capacity: A Philosophical Appraisal of the Mental Capacity Act”, 40.

16 C. Makenzie and W. Rogers, “Autonomy, Vulnerability and Capacity: A Philosophical Appraisal of the Mental Capacity Act”, 40.

17 C. Makenzie and W. Rogers, “Autonomy, Vulnerability and Capacity: A Philosophical Appraisal of the Mental Capacity Act”, 41.

is a reflection of what the person issuing the threat wanted to hear, not what the individual themselves wanted. Where A is aware of this then A is no position to rely on this “yes” as an assessment by B of the sex being good for her.

Bringing all these points together, if A intends to sexually penetrate B, he will be committing a *prima facie* wrong. Consent can play an important role in justifying the act, but only where A is legitimately able to rely on B’s consent as a rich exercise of her autonomy, expressing her decision that sex is good for her. A has responsibilities to ensure the act will be justified, in other words, that he is justified in concluding that B has clearly determined, in an autonomous way, that the act is what she wants. In other words, he acknowledges and respects B’s right to sexual autonomy.¹⁸ We will now explore in more detail what that means in practice.

4. Negative Duties

As argued above A can only rely on consent where B’s consent is sufficient to justify A in relying on it as a rich assessment by B that she wants to have sex. To be justified in the penetration of another, A must fulfil duties, both negative and positive ones. These will be explained shortly, but the significance is that instead of focussing only on B’s consent, we are asking specific questions about A’s behaviour and how *he* behaved to inhibit or enable effective consent, moving away from overly critiquing B.¹⁹

18 J. Herring, “Relational Autonomy and Consent” in A. Reed, M. Bohlander, N. Wake and E. Smith (eds) *Consent: Domestic and Comparative Perspectives* (London: Ashgate, 2016).

19 Whilst not within the scope of this article this would have significant implications in a criminal court context- shifting our focus away from what a complainant did/said/wore etc onto a defendant’s awareness and actions.

We suggest that if there is evidence of the existence of certain circumstances, consent cannot be relied upon to justify penetration. That is because such circumstances make it clear that A is not in a position to determine that B has autonomously decided she wants to have sex.

These circumstances include, but are not limited to:

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

Indeed, some of the above are contained within the conclusive and rebuttable presumptions of the Sexual Offences Act 2003.²⁰ However, it is our contention, that if any of the circumstances above listed existed at the time in which consent was given, it can be conclusively presumed that A was not justified in penetrating B. We will deal with each in turn, starting with exploitation.

We argue that everyone has a duty not to exploit another. The definitions of exploitation vary. As Jennifer Collins suggests, when using the term exploitation, it is important be clear what is meant and what is the wrong of exploitation.²¹ The wrong in this context it is denying B the opportunity to exercise her autonomy. The wrong of exploitation can also been

²⁰ Deception is a conclusive presumption contained within s76 of the Sexual Offences Act 2003. Violence and threat of violence to the complainant and others are contained within the rebuttable presumptions of s75(2)(a) and (b).

²¹ J. Collins, "Exploitation of Persons and the Limits of the Criminal Law" [2017] Crim LR 167-184, 181.

understood, as Ruth Semple suggests, as “degradation”.²² She explains that seeing exploitation “in terms of respect for persons”²³ helps us to understand our “obligation not to exploit”.²⁴ Moreover, she suggests the use of another person’s vulnerability to gain an advantage is at the core of exploitation.²⁵ She further argues that the basic ideals of exploitation involve “the interacting with another for the sake of advantage in a way that degrades or fails to respect the value in that being.”²⁶ In our context this involves failing to respect a person’s sexual autonomy and integrity. This understanding of exploitation also supports the positive duties on a penetrator that will be discussed later.

Indeed, it is this obligation not to exploit another that is our focus for penetration. For example, a penetrator cannot be said to be justified in penetration, or in relying on consent, where it was obtained in circumstances where they knowingly took advantage of someone, and or took advantage of the internal or external pressures a complainant was facing. For example, in the Canadian case of *R v Gagnon*²⁷ where although consent was obtained, the complainant had a low IQ and merely agreed to give oral sex to her bus driver as she feared she would be banned from the bus that she relied on to attend educational programmes. In this case the D was not found guilty, however through our analysis it would be argued that the focus should be on the D’s awareness and exploitation of the circumstances. Therefore, the D

22 R. Sample, *Exploitation: What it is and why it’s wrong* (Lanham: Rowman & Littlefield, 2003), 56

23 Sample, *Exploitation: What it is and why it’s wrong*, 58

24 Sample, *Exploitation: What it is and why it’s wrong*, 56

25 Sample, *Exploitation: What it is and why it’s wrong*, 83.

26 Sample, *Exploitation: What it is and why it’s wrong*, 84.

27 [2000] CanLII 14683 (QCCQ)

would not be justified in the penetration. Likewise, in the case of *Kirk*,²⁸ the defendant saw an opportunity to exploit a victim who was financially unstable by offering money. Here, whilst the source of the vulnerability was nothing to do with the defendant, it was rightly held that the victim's will was overborne by the circumstances such that she could not exercise her free choice. The better way to express this conclusion, we suggest, is that the defendant was aware that by making the offer of money he was exploiting the victim's vulnerability in a way that her apparent consent was not such that could be relied upon as a full assessment by her of what she wanted. If A is saying, "have sex with me and I will give you X", then A is not seeking to allow B to make an assessment of whether she wants to have sex. A is trying to change what B would say (presumably no without the inducement) to get the answer he wants.²⁹ That is not the kind of respectful attitude towards sexual autonomy required for consent to justify the penetration.

The remaining circumstances include deception, use/threat of use of force, threats of emotional harm or self-harm and undue pressure. For example, if A knows B will say (or has said) no to sex, and he then seeks to use means to get the answer he wants, this behaviour indicates A is not seeking to use consent in a way which can justify the penetration. A's goal is to get a "yes" and *not* to get B to make a fully autonomous choice. For example, if A lies about his religion, knowing that B would not consent if she knew he was an atheist, A cannot rely on that consent, and ~~they~~ would not be justified in penetration. That is because A knows that B has not decided that sex with an atheist is something B wants. It does not matter that

28 [2008] EWCA Crim 434

29 Of course. There may be some circumstances where the offer/inducement is irrelevant to B's assessment- i.e. they would have consented anyway.

the deception to most people is not fundamental to the act itself,³⁰ rather what is fundamental is that A knew B would not have consented had she known the truth.³¹ Therefore, A has a duty not deceive, mislead, or place undue pressure by way of threats or harm on B in such a way as to obtain consent. Moreover, A has positive duties to ensure B is in a position to exercise her autonomy and to ensure any consent given truly reflects the wants and desires of B. These we will explain next.

5. Positive Duties

Where someone is aware that their actions risk causing avoidable serious harm to another they have a special responsibility to take steps to ensure they do not act in a way which harms the other.³² In the previous section we discussed the behaviour A is to avoid if A is to be able to use consent in the way we suggest can justify the penetration. However, more is often required, if A is to rely on B's consent with the kind of attitude which respects sexual autonomy, A must listen to what B is saying about the proposed act and that is likely to require appreciating how B understands the act within its wider relational and social meaning.³³ A should not treat B as an object, little more than automatic barrier he is trying to

30 Or an impersonation as s75 of the Sexual Offences Act 2003 stipulates.

31 As discussed in the following section below.

32 R. Goodin, *Protecting the Vulnerable* (Chicago: University of Chicago Press 1985); J. Collins, "The Contours of Vulnerability" in J. Wallbank and J. Herring (eds), *Vulnerabilities, Care and Family Law* (Abingdon: Routledge 2013).

33 J. Herring, "Relational Autonomy and Rape" in S. Day Sclater, F. Ebtehaj, E. Jackson and Martin Richards (eds) *Regulating Autonomy* (Oxford: Hart, 2009).

get to raise by getting B to say the word “yes”, but make a reasonable attempt to understand B’s autonomous wishes.

Clearly a key part of this will be examining the relational context within which the apparent consent was provided. Is A seeking to do what he can to enable B to make a free, informed decision about sex? Clearly that will involve avoiding lying, threatening, and pressuring B, as we saw in the previous section, but A should do what he can to ensure B is in a position to exercise her own autonomy relying on her desires, values and understandings in the particular context of the sexual interaction. That will require positive steps, be that the provision of information, the removal of sources of pressure, or giving time to make the decision.

A good example of the application of our arguments is in the area of cases where consent to sex has been based on a mistake/deception. We will not attempt to set out the law in detail as this has been done elsewhere.³⁴ The leading case on this issue is *R v Lawrance*.³⁵ After that case the position is that if the defendant has deceived the victim as to the nature or purpose of the sexual act, or has impersonated someone known personally to the victim, then section 76 of the Sexual Offences Act 2003 makes it clear that this will automatically be rape. In other cases where the victim is mistaken to a matter “closely connected to the nature or purpose of sexual intercourse rather than the broad circumstances surrounding it that it is capable of negating consent.”³⁶ The mistake must relate to the “physical performance of the sexual act”

³⁴ E.g. J. Herring, “Mistaken Sex” [2005] Crim LR 511; C. Kennedy, “Criminalising deceptive sex: sex, identity and recognition” (2021) 41 *Legal Studies* 91.

³⁵ *R v Lawrance* [2020] EWCA Crim 971.

³⁶ Para 35. This will be under Sexual Offences Act 2003, section 74.

rather than the “risks or consequences associated with it”.³⁷ In *Lawrance* itself this meant that even though the defendant declared that he had had a vasectomy and so was infertile, and the victim made it clear she was consenting to sex on that basis, there was no rape because the lie about fertility did not impact on the physical nature of the act. This approach is in line with *R (Monica) v DPP*³⁸ where an undercover police officer infiltrated a group of environmentalist activists. As part of his cover, he entered a relationship with one of the women in the group. They had sexual relations and had children together. Clearly, she would not have agreed to the sex had she known the truth. She believed he was a fellow environmentalist, who was in a committed relationship with her. However, her mistake did not relate to the physical nature of the act, which was exactly of the kind she was agreeing to, and so she was found to have consented to the sexual relations and the man was not guilty of rape.

In light of our proposed approach, we highlight the errors in the approach the courts have been taking. First, it is relatively uncontroversial that a distinction needs to be drawn between cases where the mistake relates to a fundamental matter or a trivial matter. The real question is who gets to decide what a fundamental mistake is. It is here, we believe, the courts have made a serious error. They have taken the view it is for the courts to determine what kinds of mistake are fundamental and have determined that only mistakes that impact on the physical nature of the act are sufficient. This is an error: it is for each person to decide for themselves what is important or not about their sexual decisions,³⁹ not for someone else to

37 Para 37.

38 [2018] EWHC 3508 (QB).

39 T. Dougherty, “Deception and Consent” in Peter Schaber and Andreas Muller, *Routledge Handbook of the Ethics of Consent* (Abingdon: Routledge, 2021).

say “their reasons for not having sex with me are not very good ones, so I will go ahead anyway, even though they are mistaken.” If A is seeking to respect B’s autonomy, allowing B to determine what is important about sex for her is essential.

Second, adopting the approach we advocate above, if A knows that B was mistaken about a fact and had B known the truth B would not have “consented”, then A cannot be taking B’s apparent “consent” as an effective assessment that she believes sex would be good for her. Indeed, quite the opposite: A knows that if B was aware of the truth then B would not want to have sex with this person in these circumstances. If A were to proceed with sex in these circumstances, he would not be acknowledging this as B’s decision and respecting her autonomy. If A is having sex with ~~the~~ B and is thinking “it is a good thing she does not know X about me or she would not be consenting” that is a shocking lack of respect for the victim’s autonomy. That is the opposite of the mindset needed to rely on consent to justify the act of penetration.

Third, there should be no difference whether the case involves a mistake caused by a deception from A or simply a mistake B has made, that A knows about.⁴⁰ In neither case can A rely on the “mistaken consent” to justify the penetration. A knows, or ought to know, that the consent cannot be taken as an assessment by B that sex is good for her. The source of the mistake is beside the point. It is enough that someone who was motivated by a desire to respect sexual autonomy, would never rely on a mistaken consent.

6. Conclusion

⁴⁰ *R v Lawrance* [2020] EWCA Crim 971 appears to take this approach.

This article has argued for a rethinking of rape. The starting point is that A engaging in a penetration of B will be committing a *prima facie* wrong. This means he must ensure he has sufficient justification for the act. Key to that will be that B has provided consent, but consent needs to be understood in a particular way. Consent will only be effective as a justification if it is such that A reasonably relies on it as an assessment that B has decided that sex is what she wants. A must, in other words, have the attitude that he respects that this is a decision for the woman to take and he will seek to honour her decision.

This requires much more than simply a “yes” from B, but that the consent to be sufficiently rich for A to rely on it as a full expression of her sexual autonomy. Cases where A has threatened B in any way; has misled her; or pressurised her are clearly ones where he is not asking to respect the victim’s sexual autonomy, but rather is trying to get the victim to give the answer he wants. Further A has a responsibility to ensure that the consent is sufficient to authorize him to do the act and that includes giving B the time, information, and freedom from pressure to provide that consent.

At the heart of this approach is a shift away from focusing on the victim and asking questions such as “did she make her opposition clear?”; “was she so badly deceived as to mean there was no consent?”; “was she so intoxicated she lacked capacity to consent”? Rather, the focus is on the penetrator and asking: did he have sufficiently good reasons to engage in the *prima facie* wrong of a sexual penetration? Was he seeking to respect and acknowledge the victim’s right to make sexual decisions for herself? Did he take the steps necessary to ensure she had as much autonomy as is reasonably possible? The law thereby can acknowledge a key point: in engaging in sexual relation with others we have responsibilities towards them and particularly the responsibility to respect their autonomy.