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The Challenges of Designing Sexual Assault Law

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Abstract The paper compares and evaluates newer laws on sexual assault in Germany (2016), Sweden (2018) and Spain (2022). It focuses on the main challenge for law reform in this field: the complexity of consent-based rules. Before drafting new offence descriptions, the variety of models of consent should be analysed and their advantages and disadvantages considered. Lawmakers should also pay attention to situations that either make consent impossible or endanger the validity of factual consent.

Key words: sexual assault; law reform; sexual autonomy; models of consent; comparative criminal law.

I. *New Consent-Based Sexual Assault Laws*

Several European countries have recently changed their definitions of sexual assault and replaced the traditional coercion-based approach with a consent-based approach.[1] In Germany and in Spain new laws were introduced during a narrow window of opportunity, after shocking crimes and gaps in the law led to public outrage (the wolf-pack case in Spain and multiple attacks by crowds of men in Cologne on New Year's Eve 2015/2016 were crucial events).[2] Features of the new laws in

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[1] See for the traditional definitions of rape and the emergence of modern concepts Donald A. Dripps, 'Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent' (1992) 92 Colum L Rev 1780, 1781–83; Keith Burgess-Jackson, 'A History of Rape Law' in Keith Burgess-Jackson (ed), *A Most Detestable Crime. New Philosophical Essays on Rape* (OUP 1999) 15; Jill Elaine Hasday, 'Contest and Consent: A Legal History of Marital Rape' (2000) 88 Cal L Rev 1373; Lindsay Farmer, *Making the Modern Criminal Law* (OUP 2016) 264–96; Aya Gruber, 'Sex Exceptionalism in Criminal Law' (2023) 75 Stan L Rev 755, 774–810.

[2] After the events in Cologne (which also garnered a great deal of attention because the crowds consisted mainly of refugees and migrants) politicians from all parties soon reached a consensus that they should change the law and to introduce a new offence of sexual harassment, see Tatjana Hörnle, 'The New German Law on Sexual Assault' in Tatjana Hörnle (ed), *Sexual Assault. Law Reform in a Comparative Perspective* (OUP

Germany (2016), Sweden (2018) and Spain (2022) will be discussed in this paper (see Appendix for the statutory texts).

Intense debate concerning the need to renounce a coercion-based approach preceded the passing of new laws in each country. I will not recapitulate these discussions[3] but will start with the central premises behind the reforms: first, coercion should no longer be the defining element of sexual assault (violence and other forms of severe coercion are aggravating factors), and second, lack of valid consent constitutes the core of wrongdoing. The latter assumption has also been contested, but the main topic to be discussed here is not whether legal policy should favour consent-based sexual assault laws[4] but rather how this concept has been adopted and how different legislative approaches should be assessed.

On the surface, the results of law reform in Germany, Sweden and Spain might appear similar; however, it is worth paying attention to details. A more nuanced analysis that delves beneath the cursory description 'consent-based' reveals differences. Given the confusions surrounding the concept of consent (see Peter Westen: 'single concept with a multiplicity of competing conceptions'),[5] the task of reforming sexual

2023) 141. In Spain, women criticized the convictions of the group of offenders in the wolf-pack case, despite the fact that the offenders had received long prison sentences, because the label applied to the crimes was 'sexual abuse' rather than rape. It took a bit longer than in Germany to build a political majority willing to change the law of sexual assault, see for developments in Spain, Patricia Faraldo-Cabana, 'The Wolf-Pack Case and the Reform of Sex Crimes in Spain' (2021) 22 German Law Journal 847; Manuel Cancio Meliá, 'Sexual Assaults Under Spanish Law: Law Reform, Consent, and Political Identity' in Tatjana Hörnle (ed), *Sexual Assault. Law Reform in a Comparative Perspective* (OUP 2023) 215, 221–27. In Sweden, the reform was not triggered by any one spectacular case.

[3] See for Germany: Tatjana Hörnle, 'The New German Law on Sexual Offenses' (2017) 18 GLJ 1310, 1314–17; Ralf Kölbel, '"Progressive" Criminalization? A Sociological and Criminological Analysis Based on the German "No Means No" Provision' (2021) 22 German Law Journal 817; for the Swedish discussions, Moa Bladini and Wanna Svederg Andersson, 'Swedish Rape Legislation from Use of Force to Voluntariness—Critical Reflections from an Everyday Life Perspective' (2020) 8 Bergen Journal of Criminal Law & Criminal Justice 8, 95, 104–09; Linnea Wegerstad, 'Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden' (2021) 22 German Law Journal 734; Claes Lernestedt and Marie Kagrell, 'The Swedish Move Towards (In) Voluntariness' in Tatjana Hörnle (ed), *Sexual Assault. Law Reform in a Comparative Perspective* (OUP 2023) 163, 166–73; for the particularly heated debate in Spain see Faraldo-Cabana and Cancio Meliá (n 2).

[4] See for a critical position eg Tanya Palmer, 'Distinguishing Sex from Sexual Violation' in Alan Reed et al. (eds), *Consent. Domestic and Comparative Perspectives* (Routledge 2017) 9; see also the sources cited in n 12. Critics tend to avoid the crucial question: If not consent and the notion of autonomy, *what else* could be the criterion for drawing the boundaries of criminal liability? See David Archard, *Sexual Consent* (Westview 1998) 151.

[5] Peter Westen, *The Logic of Consent* (Ashgate 2004) 309.

assault law is not an easy one. For readers familiar with the England and Wales Sexual Offences Act 2003 (SOA 2003), the thesis that drafting consent-based laws is challenging might at first glance seem odd. English law has taken what could be called a straightforward approach: 'does not consent' is the central element in the SOA's definitions of sexual assault and rape.[6] S 74 SOA defines consent as follows: a person 'consents if he agrees by choice, and has the freedom and capacity to make that choice'. But this definition leaves central questions open: 'Does not consent' could refer to an inner mental state or to communication or to a combination of both. The word 'agrees' does not provide much clarity, either—agreement, too, could be either an inner mental state or an expression of approval. The newer sexual assault laws in the three countries under study here do not simply use words such as 'consent' or 'non-consensual' as part of the offence descriptions.

This paper compares and evaluates the approaches taken in the newer laws on sexual assault with regard to the two main challenges facing law reform: the variety of models of consent (Section III) and the various situations that either make consent impossible or endanger the validity of factual consent (Section IV) Before addressing these issues, I will briefly explain some of the premises on which my assessments are based (Section II).

II. *Premises for Evaluating Consent-Based Sexual Assault Laws*

A. *Sexual Autonomy*

Sexual offence laws protect sexual autonomy, which in most cases means they support defensive rights ie the right of individuals to be spared unwanted interactions (negative sexual autonomy). The other side is positive autonomy ie the right to choose for oneself how and with whom and why to have sex.[7] The defensive rights against intrusions by others[8] and the opportunities that are protected by positive sexual autonomy are of great importance to many (or most) adult human beings.[9] Unwanted sexual acts are often a particularly intense form of attack, not only with

[6] Ss 1–4 SOA.

[7] See for the two facets of sexual autonomy, Stephen Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of the Law* (Harvard University Press 1998) 99; Alan Wertheimer, *Consent to Sexual Relations* (CUP 2003), 3, 125; Tatjana Hörnle, 'Rape as Non-Consensual Sex' in Andreas Müller and Peter Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (Routledge 2018) 235, 236–37; Stuart P. Green, *Criminalizing Sex. A Unified Liberal Theory* (OUP 2020), 21–22.

[8] See for case law of the ECHR, Dana-Sophia Valentiner, 'The Human Right to Sexual Autonomy' (2021) 22 GLJ 703.

[9] Green (n 7) 22–23.

regard to actual harm but also because the right to remain untouched, in a literal sense, in the most intimate and personal spheres of human life is of high importance. The degrading and humiliating effects of imposed sexual contact mean that the notion of negative sexual autonomy is connected to the right to human dignity.[10] Negative autonomy is pivotal in cases involving two people with conflicting rights: if one person invokes defensive rights, the other's claim to positive sexual autonomy is outweighed.

However, the relationship between negative and positive sexual autonomy is not always that clear-cut. In cases described as exploitative, considerations of negative and positive sexual autonomy can apply to the same person—for instance, if the law deems individual's consent invalid due to eg severe mental disability, this can mean that the law restrains this person from having desired sexual contacts. Under such circumstances, prohibitory laws would assume a defensive right that might not be welcome to the exploited person, who could invoke positive autonomy rights. The liberal axiom demands that people should not be subjected to paternalistic interventions.[11] Consent-based rules in contemporary criminal (and medical) laws share the premise that choices regarding personal matters can usually be left up to the individual. Feminists and others who emphasize the weight of social pressures challenge this view, arguing that the liberal emphasis on choice falls short of grasping the true problems.[12] The discussion about foundational assumptions cannot be deepened here—it must suffice to point out that thinking about the quality of sex and intimate relations is an enterprise different from the one undertaken here. Norms of conduct stipulated in criminal laws do not amount to a recipe for a good and/or morally laudable life.[13]

The limits of positive sexual autonomy played a key role in offences with the old-fashioned label of sexual abuse. With the switch to consent-based sexual assault laws, they again require attention. I will

[10] See for the relation with human dignity, John Gardner and Stephen Shute, 'The Wrongness of Rape' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (OUP 2000) 193; Hörnle (n 7) 237.

[11] See for classical treatises on paternalism, Gerald Dworkin, 'Paternalism' (1972) 56 The Monist 64; John Kleinig, *Paternalism* (Rowman: 1984); Joel Feinberg, *Harm to Self* (OUP 1986) ch 17.

[12] Robin West, 'The Harms of Consensual Sex' in Alan Soble and Nicholas Power (eds), *The Philosophy of Sex: Contemporary Readings* (5th edn, Rowman and Littlefield 2008) 317; Shaun Miller, 'Sexual Autonomy and Sexual Consent' in David Boonin (ed), *The Palgrave Handbook of Sexual Ethics* (Palgrave Macmillan 2022) 247; Manon Garcia, *The Joy of Consent. A Philosophy of Good Sex* (Harvard University Press 2023).

[13] See for the crucial difference between moral blame and legal consequences, Wertheimer (n 7) 142–43; Archard (n 4) 136.

not discuss age limits for sexual relations with juveniles and amongst juveniles—this would deserve a paper of its own. With regard to adults, it must be emphasized that the normative notion of autonomy is a scalable concept, and for legal assessments, the decisive question must be whether a decision was sufficiently autonomous.[14] Sexual assault laws have to strike a difficult balance. On the one hand, highly vulnerable individuals need protection against exploitation; on the other hand, two considerations should be taken seriously. First, the harsh consequences of criminal accusations and convictions call for a non-perfectionist view. Second, and equally important, putative 'victims' might not always favour a perfectionist view of the validity of consent. For instance, criminal laws should not force adults with permanent severe cognitive disabilities to live celibate lives against their own strong desires and wishes.[15] I address this point in greater detail in Section IV.C.

B. *Criminal Laws as Special, Narrow Rules of Conduct*

Ex post evaluations of an individual's acts frequently take what I would call the classical moral perspective: they zoom in on agents (in the criminal law context, defendants) and ask whether their behaviour, attitudes, etc., were morally blameworthy. A central premise for this paper is that evaluations undertaken in a criminal law context should follow a somewhat different logic. First, these legal judgments, particularly those leading to criminal punishment, should be much more cautious with assigning blame than moral judgments. Second, if the acts in questions involve offences against people, human interactions must be evaluated, and in this context, an evaluation that focuses solely on the defendant may be insufficient.[16] This is particularly important for the evaluation of legislative decisions about criminal norms ie norms based on the *ex ante* assessment of future conduct.

[14] Green (n 7) 29–30.

[15] See for this point, Deborah Denno, 'Sexuality, Rape, and Mental Retardation' [1997] U Illinois L Rev 315; Franklin G. Miller and Alan Wertheimer, 'Preface to a Theory of Consent Transactions: Beyond Valid Consent' in Franklin G. Miller and Alan Wertheimer (eds), *The Ethics of Consent* (OUP 2010) 79, 88–89; Green (n 7) 146.

[16] See for a second-person approach to assessing crimes, Philipp-Alexander Hirsch, 'Individual Consent and Shared Normative Authority. Conceiving of Crimes as Violations of Individual Rights and Public Wrongs' and Tatjana Hörnle, 'Victims' Rights and Obligations—Why these Concepts Should be Central to the Assessment of Criminal Wrongdoing' both in Philipp-Alexander Hirsch und Elias Moser (eds), *Rights in Criminal Law* (Hart 2024, forthcoming).

Enacting criminal laws means authoritatively affirming (or establishing) a core of the most important rules of conduct that citizens must follow in their interactions with one other. In German criminal law theory, *Normentheorie* (theory of norms) plays a prominent role.[17] The point is to emphasize that offence descriptions contain two different messages: conduct rules for all citizens and rules of evaluation for criminal justice officials and courts.[18] Conduct rules in criminal laws should be based on a conscious and careful balancing of the conflicting rights and interests of citizens. This might seem self-evident; however, in my experience, in legislative committees and in criminal law theory, lawyers and legal scholars often stick to the familiar narrower focus on the moral wrongdoing of potential defendants.

C. *Details of Sexual Offence Law Should Not Be Left to the Courts*

Lawmakers should always draft statutory texts based on a clear idea of what consent means, and they should deliberate carefully in order to craft solutions that are up to the task of dealing with the variety of contexts that may compromise validity. Clarification should not be left up to the courts, at least not if the rules in question are both of great importance for human lives, and at the same time are not firmly settled. The regulation of sexual offences falls in this category. Sexual autonomy as an individual right has only recently—beginning in the second half of the 20th century—been widely recognized. Recognition came about after a long process of change in normative ideas and social practices concerning the relations between individuals, families and the state, including ground-breaking changes in gender relations.[19] Discussion about the reach of sexual autonomy continues.[20] If opinions in the general population differ about what the complex notion of consent calls for as a minimum standard, criminal laws should provide clear guidance

[17] See eg Renzikowski, 'Normentheorie als Brücke zwischen Strafrechtsdogmatik und Allgemeiner Rechtslehre' (2001) 87 Archiv für Rechts- und Sozialphilosophie 110; Anne Schneider and Markus Wagner (eds), *Normentheorie und Strafrecht* (Nomos Verlag 2018).

[18] Meir Dan-Cohen discussed these ideas in 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1984) 97 Harv L Rev 625.

[19] See for links between Christian thinking and the evolution of autonomy, Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (Penguin 2015); for different approaches to sexuality, David West, *Reason and Sexuality in Western Thought* (Polity Press 2005) and for the history of legal prohibitions that regulated sexuality, n 1.

[20] See for debate about models of consent Section III.A., and for ongoing debate about sexualized conduct without bodily contact eg Lucy McDonald, 'Cat-Calls, Compliments and Coercion' (2022) 103 Pacific Philosophical Quarterly 208.

about what is and what no longer is tolerable. If details are left to the judiciary, filling out the contours could take many years and some cases that raise important questions might never reach the (higher) courts. Also, it would not be fair to leave clarification to the courts because this would mean that some accused people will need to go through a criminal trial that could have been avoided had the legislators done a better job. Acquittal cannot wipe out the stigmatizing and distressing experience of being a criminal defendant. For all these reasons, legislatures should strive for as much clarity as possible.

III. *The Core Offence Description*

A. *Models of Consent*

Comparing and assessing criminal laws on sexual assault requires paying close attention to the underlying notion of consent. Consent is not a simple, ordinary term with a clear meaning and thus not much scope for interpretation. Journalists sometimes assume that every criminal law reform with a consent-based rationale can be called 'only yes means yes', as seen, for instance, in reports about Swedish law.[21] However, the matter is more complicated. In academic debate, the distinction between consent in an attitudinal sense and consent as an act of communication is common,[22] and mixed models are mentioned as a third category.[23] If one pays closer attention to the conceptual intricacies, a surprising variety of models can be distinguished. In table 1 have listed seven possible ways of operationalizing the notion of consent.

The first two options (models 1 and 2) are pure attitudinal models that focus either on inner disapproval or on inner approval. Offence descriptions with clauses such as 'against the will of the other person' rely on the second model. The word 'agrees' can be interpreted as a choice for the first model.[24] Criminal laws that call for a positive inner attitude of the people involved could also use words such as 'unless the act was in accordance with the other person's will' (an invented example). If

[21] See, for instance, Hannah Luisa Faiß, 'Only Yes Means Yes: Changing Sexual Offence Legislation in Europe' *The New Federalist* (10 November 2018) www.thenewfederalist.eu/only-yes-means-yes-changing-sexual-offence-legislation-in-europe?lang=fr

[22] See eg Green (n 7) 26–28.

[23] Eg Wertheimer (n 7) 144; Joan McGregor, 'Sexual Consent' in Hugh La Follette (ed), *The International Encyclopedia of Ethics* (Blackwell 2013).

[24] Jonathan Herring, 'The Sexual Offences Act 2003 England and Wales' in Tatjana Hörnle (ed), *Sexual Assault. Law Reform in a Comparative Perspective* (OUP 2023) 117, 126.

legislatures implement an attitudinal model or higher courts interpret legal terms such as 'agree' as references to a mental state, factfinders need to strive to reconstruct complainants' inner mental states at the time of the sexual act. What was communicated with words, gestures or other conduct is only of indirect interest, namely, as an indication of an inner mental state.

An alternative approach (models 5 and 6) describes offences in a way that focuses solely on what the other person communicates. If consent is understood as an act of communication, factfinders need to pinpoint words or gestures or conduct that objectively signified disapproval or approval—without exploring the complainant's inner mental state and without mentioning it in the ruling. In contrast, mixed models (models 3 and 4) assume that consent requires the presence of both factors (communication and the underlying mental state of inner approval or disapproval).

Finally, model 7 can be distinguished from the aforementioned attitudinal and communication-based models in its consequences for judges and juries. Although this way of thinking about consent has not, as far as I can tell, been discussed much, the difference becomes apparent if one takes the perspective of a judge who must explain in writing the reasons for conviction. A legislature that opts for this model would have to formulate offence descriptions in such a way that would neither require judges to detect and describe a complainant's actual mental state at the time of the offence nor require them to describe specific words, gestures or conduct of the complainant as facts, in accordance with the usual standards of proof. Rather, the focus would shift directly to the circumstances surrounding the sexual contact, not only as a procedural matter of evidence, but already as part of the substantive law definition

Table 1: Models of consent

1. Attitudinal model: inner approval, communication not necessary
2. Attitudinal model: inner disapproval, communication not necessary
3. Mixed model: inner approval plus expression ('only yes means yes', version 1)
4. Mixed model: inner disapproval plus expression ('no means no', version 1)
5. Communication model: expression of approval suffices ('only yes means yes', version 2)
6. Communication model: expression of disapproval suffices ('no means no', version 2)
7. Circumstances model: circumstances of the interaction indicate valid inner approval

itself. The Swedish phrase 'not participating voluntarily' could serve as an example (for more, see Section III.B.).

B. *Legislative Choices in Sweden, Spain and Germany*

A closer look at recent reforms of criminal codes in Europe shows that different models of consent have been adopted. Reports about the new Swedish law that describe it as an 'only yes means yes' approach[25] are misleading. Swedish law (unlike Spanish law) does not require the expression of approval. The central element is sexual activity 'with a person who is not participating voluntarily'.[26] As Swedish colleagues confirm, the legislative materials clarified that communication is not a necessary element.[27] The sentence that follows the description of the central element 'not participating voluntarily' says: 'particular consideration is given to whether voluntariness was expressed by word or deed or in some other way'. This is a weaker requirement than what would be expected for a genuine mixed model that includes communicative elements as a necessary feature. Swedish law leaves some space for acquittal even in the absence of communication. It is not entirely clear which model underlies the Swedish approach to consent. The depiction as a 'modified affirmative consent model'[28] does not clearly express the ways in which the Swedish model deviates from both communication models and mixed models. Two alternative interpretations seem most plausible: Either Swedish law has implemented an attitudinal model that requires a positive inner mental state (model 1 in table 1), supplemented by an evidentiary rule, expressed by the formula 'particular consideration is given to'. Or the Swedish model of consent could perhaps be what I call a 'circumstances model' (model 7). This would mean that, in contrast to model 1, courts would not need to identify the positive inner mental state of the complainant to acquit the defendant but could simply say that the entirety of objective circumstances did not include one of the factors (lack of capacity, pressure and manipulation) that indicate lack of voluntariness.

A mixed model in the 'no means no' version (model 4 in table 1) was implemented in German law. The central phrase is 'against a person's

[25] See n 21; Boris Burghardt and Leonie Steinl, 'Sexual Violence and Criminal Justice in the 21st Century' (2021) 22 German Law Journal 691.
[26] Both in ss 1 and 2, ch 6 Swedish Criminal Code.
[27] Wegerstad (n 3) 740–41; Lernestedt and Kagrell (n 3) 174.
[28] Wegerstad (n 3) 741.

discernible will'.[29] The other person's inner disapproval is essential for conviction, but only if it was recognizable to a hypothetical observer; 'discernible' distinguishes the German solution from a pure attitudinal model. The term discernible has been chosen to emphasize that not only words, but also gestures and other conduct can fulfil the expressive function.[30] In addition to the core definition, the German description of sexual assault includes the following situations in which the other person does not need to communicate disapproval: when communication is either impossible (eg the complainant is in a coma or the assault is a surprise attack) or unnecessary (eg the offender expresses threats).[31] If none of these situations obtains, silence and passivity will preclude conviction, even if subsequently, the court, hearing the complainant's *ex post* statement that the sexual contact was unwanted, believes them.

The newest of the law reforms discussed here, in Spain, provides an example of a communicative model with the 'only yes means yes' version (model 5). The core definition now stipulates: 'Whoever commits any act against the sexual autonomy of another person without his/her consent, shall be punished, as responsible of sexual assault … It will be understood that consent is present only when it has been manifested freely by acts that, the circumstances of the act considered, express clearly the person's will'.[32] The second sentence is crucial: 'present *only*' clarifies that an expression of approval is a necessary condition of legal sexual contact.

C. *Assessing Models of Consent*

(i) *Reasons to Be Sceptical of Attitudinal Models*

How should we evaluate these conceptions of consent? The first question is whether communicative elements should be included. Why not opt for a pure attitudinal model? Vera Bergelson argues that the only relevant question should be if the other person was willing to participate in the sexual interaction.[33] Consent presupposes a minimal mental basis: if someone babbles words due to a neurological disturbance or speaks while sleeping, this cannot count as consent. It is, however, a legitimate choice to disregard such highly unusual cases when deciding

[29] S 177 (1) German Criminal Code.
[30] Hörnle (n 2) 148.
[31] S 177 (2) German Criminal Code.
[32] Art 178 Spanish Criminal Code.
[33] Vera Bergelson, 'Sex and Sensibility: The Meaning of Sexual Consent' in Tatjana Hörnle (ed), *Sexual Assault. Law Reform in a Comparative Perspective* (OUP 2023) 33, 38–47.

about the standard model of consent. For the purposes of criminal law, in particular, subjective mental-state accounts of consent[34] have serious disadvantages. It is far from easy to describe the necessary mental state.[35] Legal scholars choose normative, evaluative expressions when defending attitudinal models (see for instance Larry Alexander: 'mentally accepting without objection another's crossing one's moral or legal boundary'),[36] but the actual thoughts of human beings will often use different terms. Another major difficulty is that 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. The qualia, the mental states that individuals experience, can be different, which raises the question of how clear the internal message must be—would some kind of vague gut feeling suffice? As a result, attitudinal models are not the best choice for an *ex post* assessment of potentially criminal sexual acts. The more diffuse mental states are, the harder it is to reconstruct them reliably after months or even, perhaps, years.

Regarding the second important function of offence descriptions as *ex ante* conduct rules, it is also preferable to focus on expressions. Interaction is of crucial importance, and giving consent is a performative act in the sense that it gives others reasons to adapt their plans and behaviour.[37] Mental states are not accessible to others and thus cannot play a crucial role in guiding conduct. Communicative models are preferable for both moral rules and for the conduct rules in criminal laws.[38]

In some legal systems, there are additional reasons to avoid attitudinal models, namely *mens rea* rules. In German and Spanish law, intent is the standard requirement for most offence descriptions, sexual offence laws do not refer to negligence or recklessness and rules governing errors do not include a reasonableness test (as in English law before the SOA

[34] See for the view called mentalism eg Heidi Hurd, 'The Moral Magic of Consent' (1996) 9 LEG 121, 124–25; Larry Alexander, 'The Ontology of Consent' (2014) 55 Analytic Philosophy 102; Doug Husak, 'The Complete Guide to Consent to Sex: Alan Wertheimer's *Consent to Sexual Relation*' (2006) 25 L & Phil 267, 275; Mark Dsouza, 'Undermining Prima Facie Consent in the Criminal Law' (2014) L & Phil 33, 489, 493.

[35] See for different versions of factual acquiescence, Westen (n 5) 28.

[36] Alexander (n 34) 108.

[37] Wertheimer (n 7), ch 7; Neil C. Manson, 'Permissive Consent: A Robust Reason-Changing Account' (2016) 173 Philosophical Studies 3317.

[38] Feinberg (n 11) 176, 181; Joan McGregor, 'Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes: A Critical Reconstruction of Consent, Sex, and the Law' (1996) 2 LEG 175, 193; Wertheimer (n 7) ch 7; John Kleinig, 'The Nature of Consent' in Franklin G. Miller and Alan Wertheimer (eds), *The Ethics of Consent* (OUP 2010) 3, 10–11; Stephen Schulhofer, 'What Does "Consent" Mean?' in Tatjana Hörnle (ed), *Sexual Assault. Law Reform in a Comparative Perspective* (OUP 2023) 53, 57–61.

2003, exemplified by the legal reasoning in *Morgan*[39]). Even errors that are obviously stupid and grossly egocentric preclude conviction in legal systems that have never introduced a reasonable person standard. Within this framework, an attitudinal model (in combination with the *in dubio pro reo* evidence rule) can lead to acquittal if the defendant argues: 'but I thought she wanted sexual contact'. For sexual offences, it is particularly important for unreasonable errors not to pre-empt criminal liability.[40] Opening this path to acquittal invites the *ex post* fabrication of errors. And even if offenders *did* act under the influence of an error, treating errors as relevant is tantamount to supporting traditional rape myths and problematic expectations in some subcultures, such as the notion that chaste females pretend not to want sexual contact.[41] An attitudinal model should not be considered seriously if the general rules for *mens rea* and errors do not capture cases of reckless disregard for others. Since the reform, the Swedish Criminal Code contains an innovative addition: a new offence of gross negligence was added to the Special Part (the chapter on sexual offences), with a lower punishment range, to cover cases of highly unreasonable errors regarding the voluntariness of the other person's participation.[42]

(ii) *What Kind of Communication Is Essential?*

The next question concerns what needs to be communicated: approval or refusal? The 'only yes means yes' rule makes sense as a *moral* rule. If rules of conduct are developed in the context of moral advice and educational guidelines, they should stipulate: 'if in doubt, ask the other person'. If that person remains silent and incommunicative, the person who nevertheless performs sexual acts deserves moral blame. However, transferring this conclusion directly into the field of criminal policy[43] does not pay sufficient attention to the differences between criminal law and morality. Conduct rules imposed by the state should

[39] *DPP v Morgan* [1976] AC 182.

[40] David Archard, 'The *Mens Rea* of Rape' in Keith Burgess-Jackson (ed), *A Most Detestable Crime. New Philosophical Essays on Rape* (OUP 1999) 213, 222–26.

[41] See for rape myths, Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2009) ch 2; Gerd Bohner et al., 'Rape Myth Acceptance: Cognitive, Affective and Behavioral Effects of Beliefs that Blame the Victim and Exonerate the Perpetrator' in Miranda Horvath and Jennifer Brown (eds), *Rape. Challenging Contemporary Thinking* (Routledge 2009) 17.

[42] S 1a, 3 Swedish Criminal Code.

[43] See for the position that calls for affirmative consent eg Stephen J. Schulhofer 'Taking Sexual Autonomy Seriously: Rape Law and Beyond' (1992) 11 L & Phil 35, 75–77; Schulhofer (n 7) 271–74; see for the even more demanding idea of negotiations Michelle J. Anderson, 'Negotiated Sex' (2005) 78 S Cal L Rev 1401.

not strive for moral excellence.[44] Criminal justice responses involve intense public blame and harsh consequences, and this precludes the use of criminal law to educate the public. This fundamental idea of a restrained criminal law is often expressed with the phrase 'ultima ratio'.[45] Beyond the normative principle, the difficulties associated with the allocation of limited resources should convince legislatures to refrain from extending the criminal law beyond a core of essential conduct rules. A basic, essential rule of conduct is: respect the other person's signs of disapproval ('no means no'). For the purposes of criminal law, enforcing this essential rule should be sufficient.[46] A relational construction of criminal law may take victims' obligations into account, too—again this statement presupposes that the realm of criminal law is different from the realm of morality. A moral evaluation that focuses solely on the agent could conclude that he alone was under a moral duty to clarify the situation. From the point of view of 'criminal law as ultima ratio', however, an expression of disapproval may legitimately be required if the situation preceding the sexual act remains ambiguous.[47]

The difference between 'only yes means yes' and 'no means no' becomes relevant in situations that are often called 'date rape'. Of course, the circumstance that two people spend a few hours together defined as 'a date' is meaningless if later on one person expresses disapproval of the proposed sexual interaction; the decisive point in time is always immediately before the sexual act. However, if a hypothetical observer at this point would be puzzled as to whether the ensuing sex was consensual or not, the person who does not want sexual contact should resolve the ambiguity. 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 comparison, the obligation imposed

[44] Aya Gruber, 'Affirmative Consent' in Elisa Hoven and Thomas Weigend (eds), *Consent and Sexual Offenses. Comparative Perspectives* (Nomos 2022) 57, 74. See for a contrary position Wegerstad (n 3) 750 who criticizes 'thin normativity' in criminal law.

[45] Cf. Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 Ohio State Journal of Criminal Law 521–34; Piet Hein van Kempen, 'Criminal Justice and the Ultima Ratio Principle: Need for Limitation, Exploration and Consideration' in Piet Hein van Kempen and Manon Jendly (eds), *Overuse of the Criminal Justice System* (Intersentia 2019) 3.

[46] See for an interesting compromise solution, Green (n 7) 93–94. He proposes to have two models of consent implemented. For the offence description in which affirmative consent is absent, the punishment would be lower than for other cases of non-consensual sexual acts.

[47] Cf. Wegerstad (n 2) 745 for a different view.

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.

As a supplement to the 'no means no' model, it is necessary to anticipate exceptional circumstances in which a victim's obligation to communicate cannot be assumed. Psychologists and psychiatrists have described tonic immobility as a response to a dangerous situation by an individual with a formative history of serious endangerment and abuse.[48] Under German law, physical inability to respond falls under the additional descriptions of sexual assault.[49] Concerns have been raised regarding the difficulty of proving at trial that the complainant failed to express refusal because of prior traumatic experiences.[50] The outcome of cases depends on the procedural framework for substantive criminal law ie the burden of proof. Under German law, the state would need to prove the physical inability of the complainant in order to convict the defendant. Swedish law stipulates that involuntariness must be assumed if the other person was in a particularly vulnerable situation,[51] but this also requires presenting evidence showing that an immobility response was caused by prior traumatic experiences.

(iii) *Comparative Conclusions*

My conclusion is that the best model of consent for the core offence description is a pure communicative model in the 'no means no' version (model 6 in table 1). However, none of the legal systems discussed here has taken this approach. German law is based on a mixed model in the 'no means no' version, using the term 'against the discernible will'. This is not the best solution because reference to victims' inner mental states should be avoided if rules about defendants' errors apply an entirely subjective standard. At the time of this writing, there was no well-publicized German case with an acquittal due to a blatantly unreasonable error, but the reason for this might be that prosecutors do not indict in such cases.

The solution in the new Swedish law is not optimal, either. If one assumes that an attitudinal model was implemented, criticism that pertains to all attitudinal models applies. If the Swedish law were to be interpreted according to what I call a 'circumstances model' (model 7 in table 1), the objection would also be that this is not an optimal way of

[48] See Kasia Kozlowska, Peter Walker, Loyola McLean, and Pascal Carrive, 'Fear and the Defense Cascade: Clinical Implications and Management' (2015) Harv Rev Psychiatry 23, 263–87.

[49] S 177 (2) (no 1) German Criminal Code ('not able to express a contrary will').

[50] Green (n 7) 82.

[51] Ch 6, s 1, Sent. 3 (no 2) Swedish Criminal Code.

formulating a prohibition in criminal law. As I have pointed out, focussing on circumstances makes sense from the perspective of judges ie for *ex post* assessments, but it is not convincing with regard to the *ex ante* conduct rule. The label 'voluntary' does not provide enough guidance about what exactly one needs to do to obey the law. It is reminiscent of a sport coach's advice to 'play better'—it points in the right direction but invites the response that details need to be spelt out. In one aspect, Swedish law does better than German law, with its innovative step away from a traditional *mens rea* system in the form of a new offence of gross negligence.

Spanish law is based on a pure communicative model. A defendant's stupid, sexist errors about what the other person 'really wanted' will not be part of evidence procedures—such errors would be irrelevant. Of course, this will not solve all problems of proof: defence strategies will shift to denying that disapproval was expressed outwardly, but at least the simple defence 'never mind what she said, I believed …' is blocked. While the choice of a pure communicative model is laudable, opting for an 'only yes means yes' rule of conduct is suboptimal if one shares my assumption (see Section III.B.) that a fair conduct rule for the specific context of criminal law should include the obligation to give signs of disapproval in ambiguous situations. Again, moral conduct rules are a different matter.

IV. *The Unavoidable Complexity of Sexual Assault Laws*

A. *Necessary Considerations After Choosing the Model of Consent*

Whatever model of consent lawmakers prefer, modern sexual assault laws need to be complex. Not only do physical intensity, risks of serious harm and degrees of humiliation vary considerably (not discussed in this paper), but the basic notion of consent also calls for a variety of offence descriptions. The traditional coercion-based model had the advantage of simpler offence descriptions. When designing consent-based laws, a two-step process is necessary. After a decision has been made about the model of consent and the corresponding core offence description, situations that might require additional offence descriptions must be identified.

If an 'only yes means yes' model has been chosen, conditions that make factual approval meaningless must be addressed. A standard example of such a condition is saying 'yes' when threatened with a deadly weapon. While this 'yes' may be considered factual consent, it does not

satisfy the requirement of valid or prescriptive consent[52] is necessary. Special conditions also require attention if a 'no means no' model is the starting point. It might not be possible to communicate or even to develop an inner stance of disapproval (if, for instance, the complainant is in a coma or is asleep or if the attack comes suddenly and unexpectedly). Or it can be plainly unnecessary to express rejection. Again, the obvious example is silent submission after the offender has presented a weapon. Within the scope of this paper, it is not possible to cover all situations that consent-based sexual assault laws need to address, but three conditions deserve special attention: deception, mental disability and social pressure.

B. *Deception*

The question as to what kinds of deception are not compatible with the notion of valid consent has gained much attention in criminal law theory. A number of authors propose a *subjective* standard that focuses on what is important for the individual who consents. According to the most far-reaching approach, deceptions about *all* conditions that happen to be deal-breakers for the complainant vitiate consent.[53] Others argue that objective standards should be applied in order to distinguish important errors that render consent invalid from less important errors[54]; obviously this creates a line-drawing problem that the radically subjective approaches can avoid.

The newer sexual assault laws discussed here do not address the issue of deception explicitly. In the German reform debate, deception was not considered an issue worthy of analysis, and as far as I can tell, the situation was similar in Sweden and Spain. Interest in this topic has

[52] See for the distinction between factual and prescriptive consent, Westen (n 5) 4–7; Green (n 7) 28–29; for the general conditions of valid consent, Emma Bullock, 'Valid Consent' in Andreas Müller and Peter Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (Routledge 2028) 85.

[53] Tom Dougherty, 'Sex, Lies, and Consent' (2013) Ethics 123, 717; see also for a broad approach to deceptions that vitiate consent, Jonathan Herring, 'Mistaken Sex' [2005] Crim LR 511. See n 67 for attempts to refine and restrict the subjective approach.

[54] Wertheimer (n 7) ch 8; Green (n 7) 108; Victor Tadros, 'Beyond the Scope of Consent' (2022) 50 Philosophy and Public Affairs 430; Chloë Kennedy, 'Criminalizing Deceptive Sex: Sex, Identity and Recognition' [2020] LS 1. See for the German distinction between errors that affect awareness of the intrusion into the legal good and errors in the area of motives, Nora Scheidegger, 'Balancing Sexual Autonomy, Responsibility, and the Right to Privacy: Principles for Criminalizing Sex by Deception' (2021) 22 German Law Journal 22, 769, 776.

only recently evolved.[55] In contrast, s 76 SOA refers to deception in a narrow set of cases, as a rule of evidence (conclusive presumption): deceptions about 'the nature or purpose of the relevant act' and impersonation of a person 'known personally to the complainant'. It is probably not a coincidence that the newer German, Swedish and Spanish laws do not mention similar circumstances.[56] Today, with the ubiquity of casual sex, manipulations other than the somewhat out-dated idea of impersonating the husband require more attention, namely, deceptions about central features of the physical act, diseases and personal background.

What does the absence of explicit references to deception in sexual assault laws mean for criminal justice practice? Could prosecutors and courts view acts consented to on the basis of a defendant's deception as sexual assault? The answer is yes, they could, as a matter of statutory interpretation. Deceptive behaviour can fall under the core offence descriptions. If the central term is 'agrees' (s 74 SOA), this opens the possibility that a wide range of parameters and preconditions[57] might have shaped the content of the agreement.[58] The same holds for references to the other's discernible will[59] or expressions of consent.[60] If the relevant attitude is described as 'not participating voluntarily', see Swedish law, one could suggest that 'not voluntarily' refers to conditions imposed on the complainant (such as coercion, intake of drugs and social dependence) rather than errors. However, when the Swedish law was drafted, the idea was to include some deceptions (the traditional ones: about the nature of the sexual act and the identity of the perpetrator) as 'a situation of particular vulnerability'.[61]

Agreement among legal scholars and courts can be expected regarding one type of deception: if the sexual act performed was different

[55] See for one of the first articles that picked up the English discussions, Rita Vavra, 'Täuschungen als strafbare Eingriffe in die sexuelle Selbstbestimmung?' (2018) 12 Zeitschrift für Internationale Strafrechtsdogmatik 611.

[56] The German Criminal Code had criminalized obtaining consent to sex by lying about marital status since (at least) the 19th century, but the modernization movement abolished this offence, together with the crime of adultery (1. Gesetz zur Reform des Strafrechts, June 25, 1969).

[57] See for this useful distinction, Mark Dsouza, 'False Beliefs and Consent to Sex' [2022] MLR 1, 9–18.

[58] See Jonathan Herring (n 53) 519–20.

[59] S 177 (1) German Criminal Code.

[60] Art 178 (1) Spanish Criminal Code.

[61] Lernestedt and Kagrell (n 3) 180.

from the one agreed to. A change of parameters destroys the fit between approval and the actual events. For instance, anal penetration can be sexual assault even if vaginal intercourse had been consented to. German courts have ruled that intercourse without a condom and ejaculation into the other person's body are sexual assaults if the agreement had been 'only with condom or without ejaculation'.[62] The reason is not what might happen minutes or hours later (conception or transmission of disease) but that these modalities change the nature of the sexual act. Sex without a layer of rubber and/or contact with semen increases physical intimacy.[63] Following this logic means that some unexpected modifications are irrelevant, namely, if they decrease the degree of sexual intimacy (eg vaginal intercourse was consented to but penetration was only digital).

What about communicated preconditions? The wording of new sexual offence laws would not exclude interpretations that all or some subjective deal-breakers matter. However, at least for German courts, such interpretations are unlikely. Neither German legal scholars nor prosecutors and judges tend to emphasize moral wrongfulness, and the discussion about deception is less vivid in Germany.[64] This makes for an interesting difference between the English and the German systems. English courts have had to decide about a surprising variety of deceptions,[65] which might be an indication that English prosecutors show a greater propensity to follow moral intuitions. English scholars assume that sexual autonomy entitles people to stipulate whatever preconditions matter to them.[66] English criminal law theory with its orientation

[62] German Supreme Court (Bundesgerichtshof), 13 December 2022 (3 StR 372/22); Oberlandesgericht Schleswig, 19 March 2021 (2 OLG 4 Ss 13/21); Bayerisches Oberlandesgericht, 20 August 2021 (206 StRR 87/21).

[63] See also for this point, Alexandra Brodsky, '"Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal' (2017) 32 Colum J Gender & L 183, 195.

[64] Thomas Weigend, 'Germany' in Elisa Hoven and Thomas Weigend (eds), *Consent and Sexual Offenses. Comparative Perspectives* (Nomos 2022) 183, 192.

[65] *R v Linekar* [1995] 3 All ER 6973 (deception about willingness to pay sex worker); *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (deception about use of condom); *R v MacNally* [2013] EWCA Crim 1051 (deception about gender); *R (on the application of F) v The Director of Public Prosecutions and 'A'* [2013] EWHC 945 (Admin) (deception about ejaculation); *R (Monica) v DPP* [2018] EWHC 3469 (deception about being a police officer); *R v Lawrance* [2020] EWCA Crim 971 (deception about having had a vasectomy).

[66] See n 53.

to moral philosophy faces the challenge of putting at least parts of the moral spirit back into the bottle.[67]

A determination that validity of consent depends on a broad range of preconditions greatly inflates the scope of sexual assault law. I have argued above that legal prohibitions should be much narrower than moral rules. A conduct rule that stipulates 'respect everything that matters to your sexual partner' goes too far. Another important point is that legal assessments, including those underlying conduct rules in criminal law, must pay close attention to legal rights. For cases of deception, Nora Scheidegger has pointed out that the right to privacy needs to be emphasized; this right entitles people not to disclose details about themselves, even if potential partners would like to know.[68]

Awareness of the contrast between moral demands and the need to limit criminal liability leads to advice for legislators: it would be better not to neglect the controversial issue of deception when drafting consent-based sexual assault laws and to describe in the text of statutory law the narrow boundaries of deceptions that are relevant.[69]

C. *Mental Disability*

Standard definitions of conditions for valid consent emphasize cognitive and evaluative capacities.[70] Communication of approval has traditionally been considered meaningless in cases involving people with severe mental disabilities. Until 2016 (when it was abolished) German law included a sexual abuse offence designed to protect people with severe mental disabilities and mental illnesses.[71] The problems with this provision were discussed in a Commission assembled by the Ministry of Justice in 2015

[67] See eg Manson (n 37) (arguing that in the case of sex, one does not consent to a type of person, such as 'any qualified surgeon' in medical law, but to acts by a specific individual); Campbell Brown, 'Sex crimes and Misdemeanours' (2020) Philosophical Studies 177, 1363 (arguing that not all of the individually chosen conditions are equally important); Dsouza (n 57) (pointing out that parameters are often not selected reflectively). Chloë Kennedy's proposal to focus on objective circumstances that express non-recognition of identity would also widen the scope of sexual assault law. Seeing oneself as a person who does not associate with partners from a lower class (defined via education, income, prior criminal records) is probably more frequent than Kennedy assumes, Kennedy (n 54) 15.

[68] Scheidegger (n 55) 780–82.

[69] See also for this point, Kennedy (n 54) 4.

[70] See eg Feinberg (n 11) ch 26.

[71] S 179 German Criminal Code, now abolished. Denno (n 15) 394–95 also argues that specialized offence descriptions for people with mental disabilities should be avoided.

to examine sexual offence law.[72] One point of criticism was that the label 'sexual abuse' and a lower range of punishments applied not only when victims with these kinds of disabilities had expressed approval, but also when they had communicated disapproval. In the latter case, the law should not distinguish between victims: any expression of disapproval must be respected, without asking if the decision to reject was fully autonomous.

Cases where people with significantly restricted mental abilities signal approval raise intricate problems. Moral blame for the person who did not herself suffer from comparable disabilities and who was aware of the other person's condition might be appropriate. However, even the moral judgment can become more ambivalent if context is taken into account ie if the 'victim' was an adult with a strong desire to engage in sexual contact.[73] One of the most impressive reports to the Reform Commission mentioned above came from an expert who worked with adults with cognitive disabilities. She explained that many young adults long desperately for dates and intimate relations and added that for someone living in an institution, it can be particularly desirable to interact more than superficially with people from outside. Being restricted to a very narrow social environment can be highly frustrating.[74] And she argued that even if expectations clash (the wish to have a romantic relationship versus using an opportunity for quick sex), disappointments are part of adult life.

This is a good example of why criminal laws should follow a different logic than moral assessments.[75] If the spotlight is on the agent, moral blame is appropriate if he uses the occasion for a brief sexual encounter while recognizing that the other persons longs to be appreciated, hopes for a personal relationship and is easily manipulable. However, when drafting criminal law, the focus should be broader and particular attention should be paid to the fact that the application of the label 'exploitation' may have negative consequences for those that the law seeks to protect.

[72] The main parts of the law reform in 2016 were not based on recommendation by this Commission, due to the overlap with the events after New Year's Eve 2015/2016, see n 5, which convinced politicians that sexual assault law needed to be changed fast, before we (I was a member of the Commission) had finished our agenda.

[73] Denno (n 15); Miller and Wertheimer (n 15) 88–89; Alan Wertheimer, 'Consent to Sexual Relations' in Franklin G. Miller and Alan Wertheimer (eds), *The Ethics of Consent* (OUP 2010) 195, 210, 218; Green (n 7) 142–44.

[74] See for this specific situation also Denno (n 15) 380–84.

[75] Wertheimer (n 7) 196.

One of the best features of the German law reform in 2016 was that this problem was recognized and the interests of people with mental disabilities were taken seriously. A special offence description was introduced into the law of sexual assault (not sexual abuse).[76] The first part describes the situation: 'the offender exploits the fact that the person is significantly impaired in respect of the ability to form or express a will due to said person's physical or mental condition'. The word 'exploits' allows the exclusion of cases where both people are similarly restricted in their cognitive abilities and it could not be determined that one dominated or manipulated the other. Up to this point, the German approach is similar to what we find in the text of Swedish criminal law ('exploits the fact that the person is in a particularly vulnerable situation due to … mental disturbance') and Spanish law ('abuse of a situation of vulnerability of the victim, including … whose mental disorder is taken advantage of'). With regard to all these elements, prosecutors and courts should apply a contextual approach ie they should not concentrate solely on the complainant's IQ and other general abilities, but rather, should evaluate these characteristics in light of the specific overall context.[77]

German law contains an additional, innovative element that applies *even if* there was a significant gap in capabilities between the parties and the interaction clearly was not conducted on an equal footing. The second half of the offence description reads: 'unless the offender has obtained the consent of that person'. I have taken for Appendix the translation published on the official homepage of the Federal Ministry of Justice; unfortunately, however, the translation of this passage is not good. The German phrase is 'sich der Zustimmung versichert hat', which means: to make sure that the other person had expressed approval. Approval (*Zustimmung*) is a purely factual communicative phenomenon. 'Versichert hat' means that one needs to ask for clarification if the factual approval is not crystal clear. German law thus contains an 'only yes means yes' model for this specific set of cases (it also applies in cases involving severe intoxication). On the one hand, it is a demanding 'only yes means yes' approach because a duty to ask is part of the offence description. On the other hand, it represents a conscious choice to deviate from the general principle of valid consent. Moral misgivings might persist with regard to some cases, but the legal solution

[76] S 177 (2) (no 2) German Criminal Code.

[77] Denno (n 15) 355–57, 394; Jonathan Herring and Jesse Wall, 'Capacity to Consent to Sex' (2014) 22 Med L Rev 620, 627, 629–30; Green (n 7) 149–51; see for Sweden Linnea Wegerstad, 'Sweden' in Elisa Hoven and Thomas Weigend (eds), *Consent and Sexual Offenses. Comparative Perspectives* (Nomos 2022) 251, 260.

now accords respect to the situation of people who could not have the sexual relations they desire if their decisions had to be fully autonomous in the usual sense.

D. *Social Dependency*

The sexual exploitation of socially dependent people is another phenomenon that calls for us to reflect about whether the criminal law's conduct rules are adequate. The #MeToo movement directed public attention to moral questions that arise if one of the participants in a sexual interaction was socially dependent on the other participant's decisions, for instance, as an employee or applicant for a job or other important contract in a competitive market. From a moral point of view that focuses on the agent (the potential defendant), evaluation is not difficult: awareness that the other person's sole or main reason for participating is to avoid dire social and economic consequences provides sufficient moral grounds not to engage in such sexual acts. However, there are again two reasons to avoid the straightforward transferral of moral assessments when designing criminal prohibitions. 'Morally wrongful' and 'criminal offence' should not cover the same situations (see above), and legal assessments need to take a broader focus than simply zooming in on agents' moral failures. Conduct rules in criminal laws should assess relations and focus on the interests of the people who are protected by prohibitions. Positive autonomy can be of high importance even in contexts of social vulnerability if people are motivated to improve their situation.[78] Positive autonomy not only entitles people to have sex for physical and/or emotional pleasure, love and intimate bonding with another person but also includes the right to use sex for purely instrumental reasons such as earning money or improving situations.[79] Positive autonomy is not a value that should only be allowed to flourish in a perfect or nearly perfect world of social equality. On the contrary: improving one's situation can be perceived as particularly important in imperfect situations.[80]

[78] See for sceptical comments about the prevailing moral discourses about exploitation and vulnerability, Vanessa Munro, 'Sexual Autonomy' in Markus Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2014) 747, 764–65.

[79] See for a different view Martha Chamallas, 'Consent, Equality and the Legal Control of Sexual Conduct' (1988) 61 S Cal L Rev 777.

[80] See Wertheimer (n 7), 191–92.

However, powered by the #MeToo movement and increased sensitivity to the moral wrongs of exploitation, some of the new sexual assault laws include rather general formulations. The new laws in Spain and Sweden contain terms that cover cases of economic dependency as well as abuse of position.[81] Spanish law has the potential to lead to the widest range of criminal liability among the three legal systems examined here. Expressions of approval (required by the Spanish 'only yes means yes' rule) are irrelevant if in the background there is an 'abuse of a situation of superiority'. The wording permits conviction in typical #MeToo scenarios, with the effect of a wide overlap between moral and legal assessments. Abuse requires knowledge of the situation of superiority, but this will usually be the case. Spanish courts could interpret the term 'abuse' in a narrower way, but whether they will actually do so remains to be seen.

Under Swedish law, a lack of voluntariness will be assumed if 'the perpetrator induces the person to participate by seriously abusing the person's position of dependence on the perpetrator'.[82] Employer/employee relations can fall under this provision.[83] The offence description probably excludes situations where a dependent person did not need inducement but took the first steps herself; in this regard, the scope is somewhat narrower than Spanish law. Also, the Swedish Code requires the perpetrator to have 'seriously' abused the other person's position of dependence (a clause missing in the text of the Spanish law).

In contrast to Spanish and Swedish law, German sexual assault law does not contain references to dependence and social hierarchy. To understand the system, one needs to know that the chapter on sexual offences in the German Criminal Code still includes older offence descriptions with the title 'sexual abuse' that protect vulnerable adults, but only against abuse of position. Prison guards and doctors, for instance, commit a criminal offence if they have sexual contact with inmates or patients.[84] These sexual abuse offences address some of the contexts that create a 'position of dependence' or a 'situation of superiority' as mentioned in Swedish and Spanish law. They evolved over decades and can be described as piecemeal; it is unfortunate that they have not been systematically revised and integrated into a uniform concept of sexual assault. There was no systematic overhaul of the entire chapter on

[81] See for the latter, Green (n 7) ch 10.
[82] S 2 in combination with s 1 Swedish Criminal Code.
[83] Wegerstad (n 77) 260.
[84] Ss 174a–174c German Criminal Code.

sexual offences in 2016, however, due to the political momentum that called for immediate revision of s 177 German Criminal Code.[85]

Absent in German law is a general reference to social dependence, particularly dependence within the context of work. An explanation might be the timing of German law reform: it was completed before 2017 when the #MeToo movement drew broad attention to employers and other socially powerful people using their positions to obtain sexual submission or sexual services.[86] Otherwise, terminology such as dependence or abuse of position of superiority might perhaps have been introduced in German law too. There are, however, narrower clauses in the German sexual assault provision that also apply to pressure within a context of economic, social or legal dependence.[87] They cover the threat of serious negative consequences if the sexual advances are refused (eg termination of a contract or revocation of residence rights). Also covered is the situation in which both parties know that the person demanding sex is likely to impose severe negative consequences if the advances are refused, even if no explicit threats are made. If sexual acts take place in either of these situations, liability for sexual assault may ensue. The legislative materials clarify that the following scenario would not constitute sexual assault: a person who is worried about future developments,[88] such as being laid off from her job, offers sexual favours to a superior.

The German solution, with its focus on explicit or implicit threats and the exclusion of cases where people use sex instrumentally in order to improve their baseline situation,[89] allows for a more nuanced analysis compared to broader offence descriptions that focus on power imbalances as such. Such a fine-grained analysis is, in my view, to be recommended if criminal laws are designed to be less expansive than moral assessments.

[85] See for a description of the events, Hörnle (n 3). The work in the Reform Commission began in 2015 and lost steam with the revision of the core prohibition in s 177 German Criminal Code in 2016, which had been initiated by members of parliament. The Commission made some moderate recommendations, which were presented to the Ministry of Justice in August 2017 (printed as: Bundesministerium der Justiz und für Verbraucherschutz (ed), *Abschlussbericht der Reformkommission zum Sexualstrafrecht*, Nomos Verlag 2017), but political energy in the Ministry of Justice and Parliament had been exhausted.

[86] See for an overview of #MeToo movement, Bianca Fileborn and Rachel Loney-Howes (eds), *#MeToo and the Politics of Social Change* (Palgrave Macmillan 2019); for the ambivalent features of this social movement, Tatjana Hörnle, 'Evaluating #MeToo: The Perspective of Criminal Law Theory' (2019) 20 German Law Journal 833.

[87] In s 177 (2) (nos 4, 5) German Criminal Code.

[88] See Hörnle (n 3) 1323.

[89] See for the difficult task of distinguishing offers from threats, Wertheimer (n 7) ch 12; Green (n 7) 129–33.

V. *Conclusion*

What should legislatures take into account when reforming their laws? My answer is that two factors are conducive to making good laws: awareness of complexity and structured deliberations. Lawmakers need to be aware that consent is not a simple concept that does not need much deliberation. And they should reflect on the relationship between morality and criminal law, which means not simply relying on one's own moral intuitions: intuitions everyone has when considering conduct rules for sexual behaviour. The move towards consent-based sexual assault law facilitates entanglement with moral assessments as the notion of consent plays an important role for moral norms, too. If one accepts the premise that criminal law should be *ultima ratio*, drawing boundaries is obviously important. Important, too, are the willingness and courage to publicly explain and defend the position that criminal law should not aspire to moral perfection.

The process of designing sexual assault laws should proceed in several steps. The first step should be to think carefully about the notion of consent ie the advantages and disadvantage of different models, and to consciously choose one particular model. There are good reasons to favour a communication model over attitudinal and hybrid models, and, if the 'criminal law as ultima ratio' approach is accepted, the 'no means no' version of a communication model is preferable. The next, separate step should be to consider the appropriate wording for a core offence description that fits the chosen model.

Additional issues that require attention, in view of the realities of human lives, are the limits of fully autonomous decision-making. This leads to the question of where criminal law should draw the threshold of 'sufficient autonomy' so that the negative and positive aspects of sexual autonomy are balanced.[90] Compromises will be necessary. 'Sufficient autonomy' is less than the ideal of full autonomy that would require the other person to have detailed knowledge of all relevant facts, unimpeded cognitive and evaluative competences, and social independence. Again, the point here is an awareness of the tension between moral evaluation, which focuses on agents' exploitative attitudes and behaviour, and the focus on rights eg the privacy right not to disclose any and all facts that the other person might want to know, and, most importantly, the right

[90] Stuart Green, 'Presuming Non-Consent: Incapacity and Abuse of Position' in Tatjana Hörnle (ed), *Sexual Assault. Law Reform in a Comparative Perspective* (OUP 2023) 73, 74.

to positive sexual autonomy. Balancing negative and positive autonomy can require the acceptance of factual approval despite deficiencies in cognitive skills or a social hierarchy between people. In German law, the offence descriptions show an effort to take this balancing seriously; the text of other sexual assault laws with unspecified references to 'vulnerability of the victim' or 'situation of superiority' (Spanish law) are less clear about this point.

The reality of drafting new laws and finding political majorities to pass them does not always (or perhaps ever) allow for calm and careful consideration. Two of the three sexual assault laws discussed here (German and Spanish) were the result of intense public debate in the aftermath of specific crimes. Unstable *ad hoc* political coalitions responding to public demands make a less-than-ideal framework for passing good laws. However, this should not stop criminal law theorists and legal scholars from analysing strengths and shortcomings, pitfalls and creative ideas in past reforms, with an eye to future law reform.

Appendix: Offence Descriptions in Germany, Sweden and Spain

German Criminal Code[91]

Section 177 Sexual assault; sexual coercion; rape

(1) Whoever, against a person's discernible will, performs sexual acts on that person or has that person perform sexual acts on them, or causes that person to perform or acquiesce to sexual acts being performed on or by a third person incurs a penalty of imprisonment for a term of between 6 months and 5 years.

(2) Whoever performs sexual acts on another person or has that person perform sexual acts, or causes that person to perform or acquiesce to sexual acts being performed on or by a third person incurs the same penalty if

1. the offender exploits the fact that the person is not able to form or express a contrary will,

[91] English translation from the webpage of the Ministry of Justice, www.gesetze-im-internet.de/englisch_stgb/

2. the offender exploits the fact that the person is significantly impaired in respect of the ability to form or express a will due to said person's physical or mental condition, unless the offender has obtained the consent of that person,
3. the offender exploits an element of surprise,
4. the offender exploits a situation in which the victim is threatened with serious harm in case of offering resistance or
5. the offender has coerced the person to perform or acquiesce to the sexual acts by threatening serious harm.

(3) The attempt is punishable.
(4) The penalty is imprisonment for a term of at least 1 year if the inability to form or express a will is due to the victim's illness or disability.
(5) The penalty is imprisonment for a term of at least 1 year if the offender
   1. uses force against the victim,
   2. threatens the victim with a present danger to life or limb or
   3. exploits a situation in which the victim is unprotected and at the mercy of the offender's influence.

(6) In especially serious cases, the penalty is imprisonment for a term of at least 2 years. An especially serious case typically occurs where

   1. the offender has sexual intercourse with the victim or has the victim have sexual intercourse or commits such similar sexual acts on the victim or has the victim commit them on them which are particularly degrading for the victim, especially if they involve penetration of the body (rape), or
   2. the offence is committed jointly by more than one person.

(7) The penalty is imprisonment for a term of at least 3 years if the offender
   1. carries a weapon or other dangerous implement,
   2. otherwise carries an instrument or other means for the purpose of preventing or overcoming the resistance of another person by force or threat of force or
   3. places the victim at risk of serious damage to health.

(8) The penalty is imprisonment for a term of at least 5 years if
   1. the offender uses a weapon or other dangerous implement during the commission of the offence or
   2. the offender
      (a) seriously physically abuses the victim during the offence or
      (b) by committing the offence places the victim in danger of death.

(9) In less serious cases under subsections (1) and (2), the penalty is imprisonment for a term of between 3 months and 3 years, in less serious cases under subsections (4) and (5) imprisonment for a term of between 6 months and 10 years, and in less serious cases under subsections (7) and (8) imprisonment for a term of between 1 year and 10 years.

Swedish Criminal Code, Chapter 6—On sexual offences[92]

Section 1

A person who performs sexual intercourse, or some other sexual act that in view of the seriousness of the violation is comparable to sexual intercourse, with a person who is not participating voluntarily is guilty of rape and is sentenced to imprisonment for at least 2 and at most 6 years. When assessing whether participation is voluntary or not, particular consideration is given to whether voluntariness was expressed by word or deed or in some other way. A person can never be considered to be participating voluntarily if:

1. their participation is a result of assault, other violence or a threat of a criminal act, a threat to bring a prosecution against or report another person for an offence, or a threat to give detrimental information about another person;
2. the perpetrator improperly exploits the fact that the person is in a particularly vulnerable situation due to unconsciousness, sleep, grave fear, the influence of alcohol or drugs, illness, bodily injury, mental disturbance or otherwise in view of the circumstances; or

[92] Available in English on the Swedish Government's webpage: www.government.se/government-policy/judicial-system/the-swedish-criminal-code/.

3. the perpetrator induces the person to participate by seriously abusing the person's position of dependence on the perpetrator.

If, in view of the circumstances associated with the offence, the offence is considered less serious, the person is guilty of rape and is sentenced to imprisonment for at most 4 years.

If an offence referred to in the first paragraph is considered gross, the person is guilty of gross rape and is sentenced to imprisonment for at least 5 and at most 10 years. When assessing whether the offence is gross, particular consideration is given to whether the perpetrator used violence or a threat of a particularly serious nature, or whether more than one person assaulted the victim or took part in the assault in some other way, or whether, in view of the method used or the young age of the victim or otherwise, the perpetrator exhibited particular ruthlessness or brutality. (Act 2018:618.)

Section 1a

A person who commits an act referred to in Section 1 and is grossly negligent regarding the circumstance that the other person is not participating voluntarily is guilty of negligent rape and is sentenced to imprisonment for at most 4 years.

If, in view of the circumstances, the act is less serious, the person is not held responsible. (Act 2018:618.)

Section 2

A person who performs a sexual act other than those referred to in Section 1 with a person who is not participating voluntarily is guilty of sexual assault and is sentenced to imprisonment for at most 2 years. When assessing whether participation was voluntary or not, Section 1, first paragraph, second and third sentences apply.

If the offence is considered gross, the person is guilty of gross sexual assault and is sentenced to imprisonment for at least 6 months and at most 6 years. When assessing whether the offence is gross, particular consideration is given to whether the perpetrator used violence or a threat of a particularly serious nature, or whether more than one person assaulted the victim or took part in the assault in some other way, or whether, in view of the method used or the young age of the victim or otherwise, the perpetrator exhibited particular ruthlessness or brutality. (Act 2018:618.)

Section 3

A person who commits an act referred to in Section 2 and is grossly negligent regarding the circumstance that the other person is not participating voluntarily is guilty of negligent sexual assault and is sentenced to imprisonment for at most 4 years.

If, in view of the circumstances, the act is less serious, the person is not held responsible. (Act 2018:618.)

Spanish Criminal Code[93]

Article 178

1. Whoever commits any act against the sexual autonomy of another person without his/her consent, shall be punished, as responsible of sexual assault, with a sentence of imprisonment from 1 to 4 years. There will be understood that consent is present only when it has been manifested freely by acts that, the circumstances of the act considered, express clearly the person's will.
2. For the purposes of the preceding section, in any case there will be considered a sexual assault to concur if the acts with sexual content are carried out by violence, intimidation or abuse of a situation of superiority or of vulnerability of the victim, also including those performed on persons who are unconscious, or whose mental disorder is taken advantage of, and those when the victim has his/her will overturned for whatever the cause.
3. The sentencing court, explaining this in its ruling, and only if the circumstances lined out in art 180 are absent, may impose the prison penalties in the lesser half, considering a lesser gravity of the act and the personal circumstances of the guilty person.

Article 179

When the sexual assault consists of vaginal, anal or oral penetration, or inserting body parts or objects into either of the former two orifices, the responsible person shall be convicted of rape with a sentence of imprisonment from 4 to 12 years.

[93] Translations by Cancio Meliá (n 2).

Article 180

The preceding conduct shall be punished with prison sentences of 2–8 years for assaults pursuant to art 178, and from 7 to 15 years for those of art 179, when any of the following circumstances concur, unless they have been considered to assess that the elements of the offenses defined in arts 178 or 179 are present:

1. When the acts are committed by joint action of two or more persons;
2. When the sexual assault is preceded or accompanied by extremely severe violence or acts of a particularly degrading or humiliating nature;
3. When the victim is especially vulnerable due to age, illness, disability or other circumstances, except for what is set forth in art 183;
4. When the victim is or has been the wife of the agent, or a woman linked to him by an analogous link of affectivity, even without sharing a common household;
5. When, in order to execute the offense, the offender has availed himself of a superiority or relationship, due to being the ascendant, descendent or brother or sister, biological or adopted or in-law of the victim;
6. When the responsible person uses weapons or other equally dangerous means which may cause death or any of the injuries foreseen in arts 149 and 150 of this Code, without prejudice to the relevant punishment for the death or injuries caused, art 194 bis considered.
7. When the perpetrator commits the act by overcoming the will of the victim using narcotics, drugs or any other natural or chemical substance that is appropriate for such purpose.

Should two or more of the above circumstances concur, the penalties foreseen in this paper shall be imposed in the upper half.