



RAPE AND THE DEFINITION OF CONSENT

—Jonathan Herring*

Commission of rape in most jurisdictions hinges upon one crucial manifestation – consent. In analysing this ingredient, the simple question most often asked is whether or not the victim consented to the act of sexual penetration by the defendant, without the depths of the issue really being appreciated. The long-standing disagreements and debates between academicians and practitioners regarding the meaning and nature of this term have resulted in courts directing that consent should have its “normal meaning”. This article goes a step ahead to understand the moral and legal implications of consent. Addressing the lacunae in the law to administer deception and breach of trust in the sexual context, the author argues that consent ought to go beyond merely knowing whether the victim said “yes” or “no”. Instead the inquiry must analyse the defendant’s justifications, the context and most importantly the victim’s “whole story” in order to understand her values, relationships and best interests. Only such an approach can truly ensure effective consent.

I. INTRODUCTION

Most jurisdictions have the same core definition of rape. It is sexual penetration by the defendant of the victim without the victim’s consent. At that point the consensus breaks down. There are a wide range of views between lawyers, both practising and academic, over the meaning and nature of consent. In some jurisdictions lack of consent must be marked by a physical resistance; in others words, the courts focus on whether the victim had a genuine choice. Many academic books have been produced debating the meaning of consent, with little agreement emerging.¹ In the light of such disagreement it is unsurprising that a standard approach of courts is to direct that consent should have its “normal meaning”.²

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¹ See JOAN MCGREGOR, *IS IT RAPE?* (2005); ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* (2003); PETER WESTEN, *THE LOGIC OF CONSENT* (2004); Franklin Miller and ALAN WERTHEIMER, *THE ETHICS OF CONSENT* (2010).

² See *R. v. H*, 2007 EWCA Crim 2056.

This article will start by addressing a question which is often overlooked in the debates over consent: what does consent do in moral and legal terms? It is only once we have answered that question, that we can then go on to look at how consent should be understood.

II. WHY DO WE NEED CONSENT?

Someone's consent is only relevant if an act is a prima facie wrong to that person. You do not need a person's consent to walk past them in the street, because you are not doing anything wrong to them. Indeed to ask for consent for an act which does not require a justification would seem odd. For example, "Would you mind if I looked at you?" would produce a puzzled response.

In the context of rape, consent is required because a sexual penetration is a prima facie wrong.³ It involves the use of force against a body and involves risks to the other person. The defendant needs to have a good reason for the sexual penetration. This can only be provided by consent. That is because the defendant has no reason for thinking that sexual penetration is good for the victim, apart from consent of the victim. This puts the defendant in a different position to a doctor, who also requires the consent of the victim before performing an operation. The doctor is in a better position because she already has one good reason for doing the operation: it will benefit the patient (we presume), while the defendant has no reason for thinking that sex will be good for the woman. Both the doctor and the defendant need consent, but more moral work needs to be done by consent in the case of the defendant.

It must be admitted that some people balk at the idea of describing sexual penetration as a prima facie wrong, but this is not as odd as it sounds at first. The claim is not that sex is always wrong. Rather that a man who penetrates a woman requires a good reason for doing so. Imagine a man has sex with a woman and is asked "why did you do that?" and he simply replies "no reason". Few would dispute that, prima facie, he has done a wrong. He needs to have a justification for what he has done. If he has good reasons for his act, then the act becomes justified, all things considered.

III. WHAT DOES CONSENT DO?

So how does consent provide someone with a reason for performing an act which is a prima facie wrong? I would adopt the analysis of Michelle Madden

³ For a detailed justification for this claim, see Jonathan Herring and Michelle Madden Dempsey, *Why Sexual Penetration Requires Justification*, 27 OXFORD JOURNAL OF LEGAL STUDIES 467 (2007).

Dempsey, developed in a recent important article.⁴ In outline, the argument is as follows. When the victim (V) gives effective consent, this provides the defendant (D) a justifying reason for having sex with V. It gives D a reason to assume that the act is in the V's well-being and so allows D to set aside reasons against penetration which rest in the wellbeing of V.⁵ Broadly understood, this is because D, in this context, is permitted to rely on V's assessment that the act is overall in the V's best interests.⁶ In effect, where consent is effective Madden Dempsey claims that D is entitled to say:

“This is [V]’s decision. He’s an adult and can decide for himself whether he thinks the risk is worth it. In considering what to do, I will assume that his decision is the right one for him. After all, he is in a better position than I to judge his own well-being. And so, I will not take it upon myself to reconsider those reasons. Instead, I will base my decision of whether to [harm] him on the other relevant reasons.”⁷

Applying that in the context of opposite sex sexual intercourse, where the woman gives effective consent the man is entitled to say: “She has made the decision to agree to sex and decided that is what she wants to do. I will assume she has determined that the sex is in her best interests. I do not therefore need to worry about arguments that it might not be in her best interests for her to have sex with me.”

This approach assists us in determining a range of questions which have troubled criminal lawyers in their understanding of consent in this context. To be effective consent it must provide D with sufficient grounds to be able to conclude that V has made an appropriate assessment of whether the penetration is in her best interests. Some of the issues that have troubles academics and courts in understanding consent will now be explored from that starting point.

IV. THE SIGNIFICANCE OF “NO CONSENT”

There is a clear distinction between consent and “no consent”. Where V does nothing in response to D’s proposal: V does not consent; V is doing nothing. A “nothing” cannot effect a change in moral position. It cannot provide D with a

⁴ Michelle Madden Dempsey, *Victimless Conduct and the Volenti Maxim: How Consent Works*, 7 CRIMINAL LAW AND PHILOSOPHY 11 (2013). This article should be consulted for a detailed philosophical explanation.

⁵ Consent does not, however, negate reasons against penetration which do not rest in the well-being of the victim. See further Jonathan Herring and Michelle Madden Dempsey, *Rethinking the Criminal Law’s Response to Sexual Penetration: On Theory and Context*, in RETHINKING RAPE LAW (Clare McGlynn and Vanessa Munro eds., 2010).

⁶ Jonathan Herring and Charles Foster, *Welfare Means Relationality, Virtue and Altruism*, 32 LEGAL STUDIES 480 (2012).

⁷ Madden Dempsey, *supra* note 4.

justification for committing a prima facie wrong. D cannot infer from nothing that the victim has made any assessment of any kind. He might make guesses, but they do not provide him with a reason for determining the act is in the victim's best interests.

Clearly a failure to object cannot be taken as an assessment by V that the act is in their well-being. That is why the English courts are right to require consent as a positive act;⁸ an "agreement" as the Sexual Offences Act puts it.⁹ It also explains why if the victim is asleep at the time of sex this will be rape because the defendant has nothing to give him a good reason for committing the wrong against her.¹⁰ Similarly if the victim is so intoxicated she does not resist the sexual advances, this cannot amount to consent.¹¹

Another, fairly obvious consequence of the proposed model of consent is that only the victim can provide the defendant with the exclusionary permission to do the act. Fairly obviously, a third party cannot provide an adequate assessment of V's best interests, and D should seek consent from V. In the general law of consent, there are some exceptions and those relate to where V lacks capacity to consent. In such a case, V's parent (if V is a child) or a holder of a power of attorney (if V is an adult lacking capacity) can provide the consent. However, none of these apply to sex. Sex is such a personal matter that it is not possible to make an objective assessment that sex will benefit another person; indeed the goods of sex only arise when both parties are wishing to be involved in the act.

V. CONSENT AND RESPONSIBILITY

One appealing feature of the Madden Dempsey model of consent is that it emphasises the notion of responsibility. When D has sex with V, because he is committing a prima facie wrong, he has responsibilities to ensure that the act is justified and he has good reasons for doing what he did.

There is often talk of when consent arises (especially in the context of sexual offences) or the victim being to blame for putting themselves in the position where they were liable to be attacked or where D could have thought they were consenting. This is erroneous for many reasons, but one is that it overlooks the fact that D is choosing to do an act which is prima facie wrongful to V. D, therefore, has the responsibility to ensure that he is in fact not wronging V. The fact, for example, that V is so intoxicated that she cannot indicate her views or is in a rough part of town, of course, provides D with no justification for wronging V. Indeed if V is incapacitated through intoxication, that is a particularly strong case

⁸ *R.(F) v. Director of Public Prosecutor*, 2013 EWHC 945 (Admin).

⁹ Sexual Offences Act, 2003, §74.

¹⁰ *R. v. Larter and Castleton*, 1995 Crim LR 75.

¹¹ *R. v. Malone*, (1998) 2 Cr App R 44.

of where D has no good reason for wronging V. Later more will be said about the issue of intoxication.

VI. AUTONOMY AND SEXUAL INTEGRITY

The language of autonomy is sometimes used to explain the role of consent.¹² At its heart, the principle of autonomy involves a claim that individuals should be allowed to make decisions for themselves and that those decisions should be respected by others, including the law, unless the decision involves harming another. Joseph Raz defines it in this way:

“The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.”¹³

Unfortunately focusing on autonomy as underpinning the law on rape can lead to mistakes being made. Professor Rubenfeld has recently written against the emphasis placed on sexual autonomy.¹⁴ He argues that:

“guaranteeing everyone a right to sexual “self-determination” is quite impossible. First, one person’s sexual self-determination will inevitably conflict with others’: John’s will require that he sleep with Jane, but Jane’s will require otherwise.”

This argument highlights the problem in talking too loosely about the nature of sexual autonomy. It would be much better to discuss the right to sexual bodily integrity, rather than autonomy. As Professor Rubenfeld suggests if we simply talk about sexual autonomy then it seems that John’s autonomous wish to sleep with Jane deserves as much protection as Jane’s autonomous decision to sleep with John. If Jane refuses to sleep with John, his autonomous wish will not be fulfilled. If John forces sex with Jane, her autonomous wish is not fulfilled. His argument is misconceived.

First, it misrepresents the significance of autonomy. Autonomy provides us with a reason for leaving a person alone to fulfil their desires. It does not require us to fulfil other people’s desires. That would be an impossible burden. True, there may be some cases where the state has obligations to meet particular

¹² See STEPHEN SCHULHOFER, *UNWANTED SEX* (2000).

¹³ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369 (1986).

¹⁴ Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 *YALE LAW JOURNAL* 1372 (2013).

wishes of an individual, but those do not fall on individual citizens, unless there is some particular undertaking or contract.

It is much better to analyse the case with reference to the right to sexual bodily integrity. This highlights the difference between Jane and John's positions. If John has sex with Jane without her consent not only has he interfered with a decision she has made, he has imposed his wishes on her body. If Jane refuses to sleep with John she has imposed nothing on his body and that certainly does not apply in the sexual context, particularly now that it is accepted that a wife has no legal obligation to have sex with her husband.¹⁵

Professor Rubinfeld¹⁶ has another point. He notes we do not normally allow exercises of autonomy that harm others. Yet, he says:

“Paradigmatic exercises of sexual autonomy routinely do serious harm to others. A's refusal to have sex with B can cause B acute suffering.”

Here again he is loose with the language. Properly understood, we should say that autonomy cannot be exercised in a way which unjustifiably harms another. Of course an exercise of autonomy is permitted if it justifiably harms another. Otherwise a person could not exercise autonomy to use harm to another in self-defence. Once that is appreciated it is clear there is nothing unjustifiable in refusing to have sex with another and such a refusal does not unjustifiably harm another. The point, in the terminology of this article, is that Jane in refusing to sleep with John is not committing a *prima facie* wrong: she has no need to provide a good reason for her decision. However, in John having sex with Jane, he is committing a *prima facie* wrong and requires justification for his act.

VII. CONSENT AND ASSESSMENT OF WELL-BEING

Criminal lawyers typically assume that by requiring “consent” we are respecting a victim's autonomy. But, the issue is complex as the literature on autonomy shows. Phrasing the question as whether D can take V's consent as an assessment of V's well-being is helpful. It shows that simply asking whether V said “yes” is inadequate. John Coggon has listed three versions of autonomy:

1. Ideal desire autonomy— this leads to an action decided upon because it reflects what a person should want, measured by reference to some purportedly universal or objective standard of values.

¹⁵ *R. v. R*, (1992) 1 AC 599 (HL).

¹⁶ RUBENFELD, *supra* note 14.

2. Best desire autonomy— this leads to an action decided upon because it reflects a person’s overall desire given their own values, even if this runs contrary to their immediate desire.
3. Current desire autonomy— this leads to an action decided upon because it reflects a person’s immediate inclinations, ie, what they think they want in a given moment without further reflection.¹⁷

As this makes clear we cannot assume that respecting someone’s decision involves respecting an apparent consent made at the time of the incident, even accepting that it is free informed consent. The person may be consenting with current desire autonomy, but that not be reflecting best desire autonomy. And where the issue is involving something as important as a serious wrong to V we might want the deeper understanding of autonomy reflected by best desire autonomy than current desire autonomy.

Catriona Makenzie and Wendy Rogers argue that to be able to exercise autonomy, we need the following characteristics:¹⁸

1. Self-determination: “being able to determine one’s own beliefs, values, goals and wants, and to make choices regarding matters of practical importance to one’s life free from undue interference. The obverse of self-determination is determination by other persons, or by external forces or constraints.”¹⁹
2. Self-governance: “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.”²⁰
3. 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

¹⁷ John Coggon, *Varied and Principled Understandings of Autonomy in English Law: Justifiable Inconsistency or Blinkered Moralism?*, 15 HEALTH CARE ANALYSIS 235 (2007).

¹⁸ Catriona Makenzie and Wendy Rogers, *Autonomy, vulnerability and capacity: a philosophical appraisal of the Mental Capacity Act*, 9 INTERNATIONAL JOURNAL OF THE LAW IN CONTEXT 37 (2013).

¹⁹ *Ibid.*

²⁰ *Ibid.*

with her sense of herself, or from which she feels alienated, are not autonomous.”²¹

These raise important and complex issues, which cannot be gone into in detail here. However, they highlight the kind of issues D, when seeking to ascertain whether V had made an effective assessment of what was in their best interest, might take into account. Consider this example.

Mary has been undergoing preparation to be a nun for many years and is determined to take up her vocation. She has a spiritual advisor, Steven, who helps her prepare for her calling and particularly helps her overcome lustful thoughts she that have been troubling her. One night she suggests to Steve they should have sex. Steve knows that this will mean that Mary will not be able to become a nun.

While Mary may have been expressing “current desire” consent to sex, Steve knows that having sex will go against her long held and deeply settled beliefs. This is momentary desire which does not reflect the true direction she wishes her life to take. Her decision is not authentic to the beliefs she holds. She will deeply regret it the next day. He cannot take this as consent, which would justify him acting in way which is a *prima facie* wrong.

There is a further important issue here. The relationship of Steve and Mary is key here.²² Had Mary, instead of approaching Steve, gone to a bar and picked up a stranger, the stranger, assuming they knew nothing of Mary’s vocation, would be entitled to take assurance by Mary that she wanted sex as an assessment by Mary that that was in her best interest, in a way Steve could not.

As will be clear by now, the approach advocated in this article means that more is expected of D than simply listening to whether V says “yes” or “no”. A proper respect for sexual integrity should allow the telling of a V’s story of what happened before the incident, and the context within which it took place. D should be listening to what V is saying about the proposed act as it is likely to require appreciating how V understands the act within its wider relational and social meaning; so that D can be assured that the act is one which V has properly assessed as promoting her well-being. Nicola Lacey, writing in the context of a sexual behaviour, highlights the problems in simply asking whether the victim consented to “the act”. She writes, discussing consent in the sexual context:

²¹ *Ibid.*

²² Jonathan Herring, *Relational Autonomy and Rape*, in *REGULATING AUTONOMY* (Shelley Day Sclater, et al, eds., 2009).

“The victim’s consent responds to power by conferring legitimacy, rather than shaping power in its own terms: consent is currently understood not in terms of mutuality but rather in relation to a set of arrangements initiated, by implication, by the defendant, in an asymmetric structure which reflects the stereotypes of active masculinity and passive femininity.”²³

The benefit of the approach promoted in this article is that it requires D, where appropriate, to consider V’s whole story and place it in the context of her values and relationships. D should not to treat V as an object, little more than the automatic barrier he is trying to get to raise by getting the “yes”. Instead, D must recognise V as a person with desires, values and feelings, and understand their consent (their assessment of their wellbeing) in that context.

So understood, the question becomes less “was there a yes” or “was there an intellectual understanding of the issues” and rather was an interaction marked by mutuality and respect? Was it tender or exploitative? Was D truly seeking to find out and respect what V wanted or seeking to produce the answer D wanted?

VIII. CASES WHERE V IS MISTAKEN

What about cases where although V has said “yes” to sex, this is based on a mistake? This may be due to a deception by D or for some other reason. Traditionally the common law has said that only deceptions as the “nature or quality” of the act will defeat consent.²⁴ That is, respectfully, an error.

Some mistaken consent cases are best described as conditional consent cases. In *R(F) v A*²⁵ the court had to deal with a case where the woman agreed to sex but only if the man wore a condom. He had proceeded to have sex with her without a condom. At one point in the judgement the court described that a case where her consent was negated. In fact they were closer to the truth when they later said she did not consent to the act.²⁶ She had consented to a specific act: sex with a condom. The act done was not the act she consented to. Indeed more than that it was the very act she had said she did not consent to. That should be an uncontroversial case of no consent.

Others cases are less straight-forward.²⁷ These will be where the consent is contingent on a particular fact. That would be where V is mistaken about a fact, when “consent” is given, for example she thinks D belongs to a particular religion or profession or is unmarried, and if V knew the truth she would not

²³ NICOLA LACEY, UNSPEAKABLE SUBJECTS, 127 (1998).

²⁴ Jonathan Herring, *Mistaken Sex*, CRIMINAL LAW REVIEW 511 (2005).

²⁵ *R(F) v A*, 2013 EWHC 945 (Admin).

²⁶ *Id.*, para 26.

²⁷ Herring, *supra* note 24.

have consented. If D knows (or would have known with reasonable enquiries and effort) that V is mistaken D and that D would not have reached the same conclusion, he cannot take that consent. Quite obviously the work of consent as we have described it cannot be achieved where V is mistaken. D cannot take V's consent as an assessment of V's well-being because D knows that V would not think the act would promote V's well-being if she knew the truth. So where D tells V that he is a rich lawyer and as a result V consents, D cannot rely on that consent as an assessment by V that the sex will be in her best interests. In fact, D knows that V believes the sex with D (as a poor non-lawyer) will not be in V's best interests.

That is not, of course, true for all cases where V is mistaken. If V is mistaken over a matter which would not affect their assessment then quite properly D can say "V has considered all the issues and determined that this is in her best interests. True V is mistaken over a particular fact, but I am sure that would not have affected their assessment."

The key point is as D is doing a wrongful act against V, D needs the consent to provide him with sufficient reasons for believing that all things considered the act cannot wrong V. If he knows that V would not be consenting if V knew the truth then D clearly cannot rely on it as an assessment of best interests. In effect, in such a case, D is claiming to know better than V about what will be in V's interests. D is saying, "V would not have consented had she known the truth about X, but I regard X as a trivial matter and she should have consented nonetheless". And that is the response to the many commentators who suggest that if V is mistaken over a "trivial matter" or would not consent due to an "unreasonable belief".²⁸ We may think it absurd that V will only sleep with rich lawyers or unpleasant that V does not like to have sex with Jewish men, but ultimately it is for V to decide with whom to have sex with. She should not fall outside the law's protection simply because others do not agree with the reasons behind her sexual decisions. She is under no duty to supply sexual service to others on a non-discriminatory basis.

What is notable is that in other areas of the law we would not accept an argument that V is wrong to care about certain issues. Contrast these cases.

- V, a Chelsea Football club fan supporting pub owner, is offering half price beer to Chelsea fans. D, stating that he is a Chelsea fan, claims the half price beer. All would agree that V has not consented and that D has committed fraud.

²⁸ See Rebecca Williams, *Deception, mistake and vitiation of the victim's consent*, 124 *LAW QUARTERLY REVIEW* 132 (2008).

- V, a Chelsea loving woman, will only have sex with Chelsea fans. D, purports to be a Chelsea fan and V, who fancies D, agrees to have sex with him. In this scenario people find it hard to believe that V did not consent to sex. Yet it is no different from the earlier example.

Michael Bohlander²⁹ has responded to this point in the sexual context by stating:

“transactions in the property context take place in a highly ordered system of a mechanical exchange of goods and services based on public and more or less inflexible rules established to safeguard smooth commerce between participants in the system who may have had no prior contact. Being able to trust in the mere representations of the other side-with attendant severe sanctions for breach of that trust-is crucial for this commerce or the system will break down. None of this applies to sexual offences in our context.”

But that is precisely my point the current law fails to deal with breach of trust and deception in the sexual context, when it should. Enormous suffering has and is caused because men who believe the “seduction game” has no rules.³⁰ Indeed I would argue this is true generally where D is wishing to do a prima facie wrongful act against V, it is not unreasonable to require D to ensure he has good reasons to act in that way. If he has had to use deceptions or breach trust to obtain consent that is a clear sign he does not have good reasons. So, we can conclude then, that if V is mistaken about a fact, and had V known the truth she would not have consented, and D knows, or ought to know this, there is no consent in law.

IX. PRESSURE

What if V is consenting under pressure? As will be clear, the approach advocated in this article will ask whether D can take V’s consent to represent an assessment by V of whether the proposed act will promote their well-being.

At first sight it might be thought that the approach has a difficulty here. Suppose D says to V “have sex with me or I will kill you” and so V agrees to sex, cannot D say that he took V’s statement to be an assessment that the sex would be in V’s best interests (as preferable to death) and so amount to consent. That would appear to be a fatal flaw for the proposal in this article. However, the error with that argument is that we need to consider the context of all that has taken place between D and V. Looked at a whole V has not made the assessment

²⁹ Michael Bohlander, *Mistaken Consent to Sex, Political Correctness and Correct Policy*, 71 JOURNAL OF CRIMINAL LAW 412 (2007).

³⁰ For a detailed assessment of the evidence see Herring, *supra* note 24.

that *the penetration* will promote her well-being. It is the avoidance of the threat that she has decided will promote her well-being. To explain further, if V would not consent to the wrong, but D then attempts to persuade V to consent by the use of threats or offers *independent of the act* D cannot claim to be seeking to assist V in assessing whether the act promotes well-being.

The best response to cases of consent and pressure is to look at what is done in terms of whether it is consistent with D seeking to allow V to make a decision about whether the penetration promotes their well-being. A D who is making threats is clearly not seeking to enable V to make a decision about what is in her welfare. Rather, D is seeking to manipulate V into agreeing to the act in order to avoid the adverse consequence.

Similarly incentives too are likely to work in this way. If D asks V to have sex and she refuses and he then starts to offer an incentive (e.g. payment), this is inconsistent with the idea that D is seeking to assist V to determine whether the act is in her best interests. This is transparent when it is realised that the incentive is offered at the level that D believes is a fair price for what is on offer. When D agrees a price with a prostitute he is little concerned with a calculation of whether the sum involved is such as to make the transaction in V's well-being, nor even concerned about whether V determines the sum is sufficient. He is likely to offer the price the service is worth to him. This indicates that he is not using V's consent in the acceptable way advocated in this article. He is not seeking to assist V in determining whether the act of penetration will be in V's interests.

So, we can conclude that where V would not otherwise consent to the act and D is making threats or offers seeking to change V's mind, that is inconsistent with someone seeking to obtain an effective consent and so the law should find there is no consent.

X. INTOXICATION

The UK courts have struggled with cases involving cases where the victim is intoxicated. There are three points to make. First, we should clearly dismiss an argument which is sometimes promoted, that because in the criminal law a defendant is treated as responsible for his actions committed while intoxicated, so too an intoxicated victim should be responsible for her decisions and so there should be no rape if the victim is intoxicated. As soon as we take this argument outside the context of sex, its errors become apparent. Imagine a burglar enters the victim's house and steals her property. She is drunk and so has not locked her door properly. In such a case no one would suggest that the defendant has not committed burglary because the victim failed to lock up their house. This is because the blameworthiness (if any) of victim provides no justification for the

defendant.³¹ D is committing a prima facie wrongful act and is in need of justification. V is doing nothing wrong (as least not a wrong to another person) in becoming intoxicated. Certainly V's intoxication provide no justification for a penetration.

So, when is a victim so intoxicated that there can be no consent? The key question is whether the consent is sufficient to reasonably allow D to conclude that V has made an assessment that sex will be in her best interests. There will be some easy cases: where V has had little alcohol and it has had only a minimal impact on her decision-making capacities, then D, absent other features, can rely on the consent. Similarly where V is so intoxicated that she has no awareness of what is going on, D can have no grounds for believing that D in a position to consent. It is the cases in between these which are trickier to deal with. Then it is important to appreciate the impact of alcohol on decision making, especially in the sexual context.

One leading study,³² summarising the current research, concluded (unsurprisingly!) that "alcohol consumption can increase men's and women's willingness to engage in sexually risky behavior, especially when faced with a potential new sex partner". It did this in a number of ways. Alcohol impaired individuals' ability to focus on inhibiting cues; led to individuals under-assessing the likelihood of negative outcomes; and caused women to over-estimate the benefits of sex that might arise. For example, one study found that women who were intoxicated were far more confident about being able to tell by gut instinct if the person they were talking to was HIV positive, than sober women.³³ Intoxication also causes individuals to act spontaneously, rather than give careful thought.³⁴

None of this is particularly surprising and is probably well known. It all makes it harder for a defendant to claim that the victim who is intoxicated to a degree which starts to impair their judgement in a meaningful way has capacity to consent. In short we may be able to do no better than direct the jury to consider whether D was entitled to take V's assessment as an effective assessment of her best interests, bearing in mind the alcohol intake. Here, it may be that the relationship between the parties is key. A couple in a happy long term relationship who regularly get drunk and have sex may more easily have an effective consent than a couple who have just met. Even then a partner may be so intoxicated that the intoxicated judgement cannot be taken as a valid assessment even in the case of well-established relationship.

³¹ Jonathan Herring, *Victims as Defendants: When Victims Participate in Crimes against Themselves*, in PARTICIPATION IN CRIME (Alan Reed and Michael Bohlander eds., 2013).

³² Jeanette Norris, Susan Stoner, Danielle Hessler, Tina Zawacki, William George, Diane Morrison and Kelly Davis, *Cognitive Mediation of Alcohol's Effects on Women's in-the-Moment Sexual Decision Making*, 28 HEALTH PSYCHOLOGY 20, 26 (2009).

³³ Jennifer Monahan, Sheila Murphy, & Lynn Miller, *When Women Imbibe: Alcohol and the Illusory Control of HIV Risk*, 23 PSYCHOLOGY OF WOMEN QUARTERLY 643 (1999).

³⁴ Norris et al, *supra* note 32.

A final point, which can only be briefly discussed, is that cases involving an intoxicated victim can raise some tricky issues relating to evidence. If the victim is so drunk that she cannot remember what has happened, or her recollection is extremely fuzzy, then it this can prove fatal to the prosecution case. How can the jury be sure beyond reasonable doubt that there was a rape if the victim cannot give effective evidence about what happened? Much can be learned from the case of *R. v H.*³⁵ There the Court of Appeal was surely right that the jury were entitled to assume from the mere facts that there was no consent. A young woman with no sexual experience who was highly intoxicated and got into a cab with three strangers, had sex with them and then left. This was captured on CCTV and although the victim had no recollection, the Court of Appeal correctly thought the defendant's story that she had consented to sex with them was unbelievable. And surely the judge was incorrect to suggest there might have been consent in *Gardner*,³⁶ where the defendant digitally penetrated the victim when she was vomiting into a toilet. The fact the victim was unable to recall what happened should not have impeded the jury from concluding that there was no consent. Indeed I would suggest the very fact the victim has no recollection of what has happened (if the jury believe that) is strong evidence that the intoxication must have been so strong that any effective judgement was not possible.

XI. CONCLUSION

This article acknowledges that the concept of consent, which is key to the law on rape is troublesome. It has argued that the solution to the difficulties is to return to the central question of what it is that consent does in moral and legal terms. Only when that question has been answered can we start to assess in which cases an effective consent has been given.

In this article it has been argued that consent operates by giving D permission to take V's consent as an assessment by V that the act is in V's well-being. If D chooses to take up that permission that allows D to set aside those reasons against harming V that rest in V's well-being. The significance of that is as follows.

First, the starting point is that by sexual penetrating V, D is committing a prima facie wrong. He therefore needs a justification for his act. The question in a rape case is not whether was the victim acting under such a strong pressure or under such a bad mistake that the case should be treated as rape. Rather it is whether there was a sufficiently good reason for the defendant to act as he did.

Second, D must be confident that V is making a decision which reflects V's assessment of her best interests. That requires a proper assessment of the facts,

³⁵ 2007 EWCA 2056.

³⁶ *R. v. Gardner*, 2005 EWCA 1399.

and also an ability to act in accordance with the values they live by. A decision in the heat of the moment will not necessarily represent a true expression of autonomy. As explained in detail above V needs self-determination, self-governance or authenticity to be able to make an autonomous decision. If D is aware that the apparent consent of V in fact does not sit with their deeper values and decision then D is aware that the “at the moment” consent cannot amount to a genuinely autonomous decision.

Third, as D is doing an act which is *prima facie* wrong against D he has a duty to do what he can to allow V to make the assessment of their best interests, which can justify his act. It should always be remembered that D has no right to commit a *prima facie* wrong against another person and is always free to walk away or wait until any uncertainty is resolved. If D wishes to rely on V’s consent as justifying the act he must give V the information, freedom from pressure, environment and time to make that decision.³⁷ The use of pressure, deception, manipulation, exploitation are inconsistent with an attempt by D to allow V to determine whether sex will be in her best interests and to seek to rely on that as justifying his act.

In summary this article argues that parties to a sexual encounter need to take care of each other. They need to ensure that each has the freedom, capacity and space to decide whether the sex is what they want. Obtaining consent should not be a game to see what wheezes can be used to get a “yes” but a mutually respectful and supportive environment so that a sexual encounter is what both parties truly desire.

³⁷ I accept that just might be cases where V has deliberately sought to avoid that. For example, V has gone to an orgy in the expectation that they will have multiple sexual encounters with people who they do not know and do not have time to go through the normal procedures to ensure there is consent. In such a case D might take the decision by V to attend the event as considered decision to consent.