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YES! TO COMMUNICATION ABOUT CONSENT; NO! TO AFFIRMATIVE CONSENT: A REPLY TO ANNA KERR

ANDREW DYER*

This is part of a four-piece conversation published in this issue, and a response to Anna Kerr's 'Cups of Tea, Joyriding and Shaking Hands – The Vexed Issue of Consent'.

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I INTRODUCTION

As Anna Kerr notes, the New South Wales Law Reform Commission (NSWLRC) is currently reviewing s 61HE of the *Crimes Act 1900* (NSW).¹ That section deals with both consent and an accused's knowledge of a complainant's non-consent for the purposes of: the sexual assault offences created by ss 61I, 61J and 61JA of that Act; the sexual touching offences provided by ss 61KC and 61KD; and the sexual act offences in 61KE and 61KF.² As Kerr also notes, the NSWLRC's review is a response to community outrage following Tupman DCJ's decision³ to acquit Luke Andrew Lazarus of one count of sexual assault, contrary to s 61I, at his second trial⁴ for that offence. The NSW government announced the review the day after the ABC telecast a *Four Corners*⁵ episode in which the complainant in the *Lazarus* case, Ms Saxon Mullins, waived her right not to be identified as a complainant in 'prescribed sexual assault proceedings'⁶ and claimed that the government should insert an affirmative consent standard in (what is now) s 61HE. 'If you don't have [enthusiastic consent]', Ms Mullins said at the end of the programme, 'you're not good to go'.⁷ Indeed, she continued, the person who fails to ask 'do you want to have sex with me?' is — without exception — properly regarded as a criminal if the resulting intercourse is non-consensual.⁸ The same is true of the person who *does* ask, but receives no 'enthusiastic yes' in response.⁹

Is this right? Kerr thinks that it is,¹⁰ and many people agree with her.¹¹ I firmly (though with great respect) believe that it is not. Fewer people seem to agree with me, at least in

¹ Anna Kerr, 'Cups of Tea, Joyriding and Shaking Hands – the Vexed Issue of Consent' (2019) 7(1) *Griffith Journal of Law & Human Dignity* (in this issue); see also Mark Speakman and Pru Goward, 'Media Release: Sexual Consent Laws to be Reviewed' (Media Release, NSW Government, 8 May 2018).

² This has been so since the coming into force of the *Criminal Law Amendment (Child Sexual Abuse) Act 2018* (NSW) on 1 December 2018. Before that date, s 61HA regulated consent and knowledge of non-consent – for the purposes only of the offences created by ss 61I, 61J and 61JA. Section 61HA now deals with the meaning of the term 'sexual intercourse'.

³ *R v Lazarus* (District Court of NSW, Tupman DCJ, 4 May 2017) ('*Lazarus*').

⁴ Judge Tupman heard that trial without a jury because of the attention that the media had given the proceedings: see *Criminal Procedure Act 1986* (NSW) s 132.

⁵ Four Corners, 'I am that Girl', *ABC Four Corners* (Transcript, 7 May 2018) <<http://www.abc.net.au/4corners/i-am-that-girl/9736126>> ('*I am that Girl*').

⁶ See *Crimes Act 1900* (NSW) s 578A(2), (4)(b).

⁷ '*I am that Girl*' (n 5).

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ See, eg, Rape & Domestic Violence Services Australia, Submission No CO28 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (21

academic circles. That said, many academics do resist affirmative consent proposals.¹² Contrary to what Kerr suggests, many of them are women.¹³

In this reply, I argue that affirmative consent proposals are objectionable, mainly because they are draconian, but also because they perpetuate notions of female passivity. They are draconian because, by rendering nugatory the honest and reasonable mistake of fact ‘defence’,¹⁴ they effectively convert sexual assault and like offences into crimes of absolute liability. Morally innocent persons are punished to achieve what is seen as a higher good.¹⁵ They perpetuate notions of female passivity because of their — and their supporters’ — insistence that it is always for male actors to ask female ‘gatekeepers’ for their permission to engage in sexual activity. ‘Men as active and women as passive in sex ... women with no role in shaping events in the world and men with all the responsibility for shaping them,’ Janet Halley says.¹⁶ ‘[H]ave we ever heard those ideas before?’¹⁷ We certainly have. As Halley points out, we have heard them from social conservatives.¹⁸ Affirmative consent is not progressive — it is punitive, authoritarian and, in some ways, unliberated. That is why right-wing parliamentarians, such as the former NSW Minister for the Prevention of Domestic Violence and Sexual Assault, Pru Goward, support it.¹⁹ Those who believe in fairness for accused persons, and a limited state, should not.

February 2019); Tom Dougherty, ‘Yes Means Yes: Consent as Communication’ (2015) 43(3) *Philosophy and Public Affairs* 224.

¹² See, eg, Aya Gruber, ‘Consent Confusion’ (2016) 38 *Cardozo Law Review* 415; Kimberly Kessler Ferzan, ‘Consent, Culpability, and the Law of Rape’ (2016) 13(2) *Ohio State Journal of Criminal Law* 397; Janet Halley, ‘The Move to Affirmative Consent’ (2016) 42(1) *Signs: Journal of Women in Culture and Society* 257.

¹³ See, eg, Ferzan (n 12); Aya Gruber, ‘Not Affirmative Consent’ (2016) 47(4) *The University of the Pacific Law Review* 683, 692; Halley (n 12); Arlie Loughnan et al, Submission No C009 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (1 February 2019).

¹⁴ In NSW, a person will not be guilty of sexual assault if the jury thinks it reasonably possible that, though s/he had non-consensual intercourse with another person, s/he believed on reasonable grounds that the complainant was consenting: *Crimes Act 1900* (NSW) s 61HE(3)(c). In the text, I place the word ‘defence’ inside inverted commas because as Brennan J pointed out in *He Kaw Teh v The Queen* (1985) 157 CLR 523, 573 (*‘He Kaw Teh’*), since *Woolmington v DPP* [1935] AC 462 (*‘Woolmington’*), the ultimate onus of negating honest and reasonable mistake of fact – both at common law and in the Code states – has rested on the Crown. See also *CTM v The Queen* (2008) 236 CLR 440, 446 [6] (*‘CTM’*); *Youssef v R* (1990) 50 A Crim R 1, 2-4 (*‘Youssef’*). The same is true of the s 61HE(3)(c) ground of exculpation.

¹⁵ As is pointed out by Ferzan (n 12) 421.

¹⁶ Halley (n 12) 276.

¹⁷ *Ibid.*

¹⁸ *Ibid* 276-8.

¹⁹ See Michaela Whitbourn, ‘Enthusiastic yes’: NSW announces Review of Sexual Consent Laws’, *Sydney Morning Herald* (online, 8 May 2018) <<https://www.smh.com.au/national/nsw/enthusiastic-yes-nsw-announces-review-of-sexual-consent-laws-20180508-p4zdyn.html>>.

I respectfully disagree with Kerr in two other ways.

First, whether one agrees with everything that the NSW Bar Association said in its preliminary submission to the NSWLRC's review²⁰ — and I do not²¹ — there is nothing problematic about its statement that '[c]onsent obtained after persuasion is still consent'.²² Provided that the persuaded person has nevertheless made a free and voluntary decision to engage in sexual activity,²³ s/he is consenting. That is the law in NSW.²⁴ It is reflected in the standard direction that judges give juries in sexual assault cases.²⁵ Moreover, there is nothing normatively undesirable about this position. Take, for example, the man who is persuaded by his sexual partner to participate in planned, formulaic sexual intercourse as part of fertility treatment that the couple is receiving. His participation in such activity might be reluctant. It might not be 'enthusiastic'. Despite this, however, he has made an autonomous decision to proceed. He is not being raped. It is wrong, with respect, for Kerr to suggest that persuasion of this sort is comparable to an accused's use of 'rougher than usual handling' to procure a person's 'consent'.²⁶ It is also inaccurate to suggest that the Bar Association was lending its support to the latter kind of behaviour. With that said, however, I do believe Kerr to be right insofar as she suggests that the person who 'consents' because of a non-violent threat has not really consented at all.²⁷ Certainly, I do not agree the Bar Association's further claim that '[c]rimes of sexual assault should be confined to cases where sexual choice is non-

²⁰ NSW Bar Association, Submission No PCO47 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018).

²¹ See Andrew Dyer, Submission No CO02 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (1 February 2019); Andrew Dyer, 'The Mens Rea for Sexual Assault, Sexual Touching and Sexual Act Offences in New South Wales: Leave it Alone (Although You Could Consider Imposing an Evidential Burden on the Accused)' (2019) 47(4) *Australian Bar Review* (forthcoming) ('*The Mens Rea for Sexual Assault*').

²² NSW Bar Association (n 20).

²³ *Crimes Act 1900* (NSW) s 61HE(2).

²⁴ *R v Mueller* (2005) 62 NSWLR 476, 479 [36]-[37].

²⁵ The Criminal Trials Court Benchbook, *Sexual intercourse without consent*, 'Suggested direction – sexual intercourse without consent (s 61I) where the offence was allegedly committed on or after 1 January 2008'

<https://www.judcom.nsw.gov.au/publications/benchbks/criminal/sexual_intercourse_without_consent.html>.

²⁶ Kerr (n 1).

²⁷ *Ibid.*

existent'.²⁸ I also believe that the list of mistaken beliefs that negate a complainant's apparent consent²⁹ should be expanded and modified (a topic not addressed by Kerr).

Secondly, there are flaws in Kerr's argument that there should be two sexual assault offences, one with and the other without, non-consent as an element. Kerr apparently supports³⁰ an offence along the lines of that suggested by Peter Rush and Alison Young in their preliminary submission to the NSWLRC's review.³¹ But if it were an offence for a person to engage in sexual intercourse with another person and intentionally or recklessly cause that person (serious) injury,³² those who engaged in consensual sadomasochistic sex would be guilty of sexual assault.³³ That is a sufficient reason for rejecting any new offence that focusses purely on the harm caused to the complainant and requires no proof of her/his non-consent. Moreover, Kerr is, with respect, wrong to argue that the lesser offence that she is proposing would lead to a higher conviction rate for those who have intercourse with another person without that person's consent.³⁴ Kerr proposes that the mens rea threshold for such an offence would be 'mere recklessness in relation to consent'³⁵ or an 'objective standard'.³⁶ But that would not make things any easier for the Crown than they are currently. Because sexual assault offences are already crimes of 'objective culpability',³⁷ and because, additionally, both advertent and inadvertent recklessness are sufficient mental states for those offences,³⁸ Kerr's offence would be just as difficult to prove as the sexual assault offences that are currently on the books.

²⁸ NSW Bar Association (n 20).

²⁹ See *Crimes Act 1900* (NSW) s 61HE(6).

³⁰ Kerr (n 1).

³¹ Peter Rush and Alison Young, Submission No PC059 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018) ('Preliminary Submission'); See also Peter Rush and Alison Young, 'A Crime of Consequence and a Failure of Legal Imagination: The Sexual Offences of the Model Criminal Code' (1997) 9(1) *Australian Feminist Law Journal* 100 ('A Crime of Consequence').

³² I place the word 'serious' in brackets for the reasons noted at (n 198).

³³ See the facts of *Brown v DPP* [1994] 1 AC 212 ('Brown').

³⁴ Kerr (n 1).

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Tabbah v R* [2017] NSWCCA 55 (29 March 2017) [139].

³⁸ *R v Mitton* (2002) 132 A Crim R 123, 139 [28] ('Mitton'); See also *Crimes Act 1900* (NSW) s 61HE(3)(b).

II THE PROBLEMS WITH AFFIRMATIVE CONSENT

A The Law Relating to Consent and Knowledge of Non-Consent in NSW

Before I discuss the difficulties with Kerr's contention,³⁹ echoing Pru Goward that '[t]here must be explicit permission to have sex',⁴⁰ it is important to set out what the law in NSW says about consent and an accused's knowledge of a complainant's non-consent for the purposes of the offences covered by s 61HE of the *Crimes Act*.

Under s 61HE(2), a person consents to sexual activity if s/he freely and voluntarily agrees to that sexual activity. Section 61HE(5) provides that a person does not consent to such activity if s/he: lacks the capacity to do so because of her/his age or cognitive incapacity;⁴¹ is unconscious or asleep;⁴² 'consents' because of threats of force or terror;⁴³ or because s/he is unlawfully detained.⁴⁴ Section 61HE(6) provides that there will, likewise, be no consent if the complainant consented 'under' any of the mistaken beliefs that it specifies. Section 61HE(8) provides that a person *might* not consent — the matter is one for the trier of fact to work out — if s/he 'consents' because of: her/his substantial intoxication;⁴⁵ non-violent threats;⁴⁶ or the abuse by the accused of a position of authority or trust.⁴⁷ And, finally, s 61HE(9) provides that the complainant who offers no physical resistance might, even so, not be consenting.

It is necessary to pause briefly here. With great respect, Kerr is wrong to imply that juries are currently given no direction that 'a lack of physical resistance does not constitute consent'.⁴⁸ They *are* given such a direction. They are told that the law — that is, s 61HE(9) — specifically provides that submission is not the same as consent.⁴⁹

A person will have the mens rea for the offences to which s 61HE applies if s/he 'knows' that the complainant was not consenting.⁵⁰ In turn, a person will have the requisite

³⁹ Kerr (n 1).

⁴⁰ Whitbourn (n 19).

⁴¹ *Crimes Act 1900* (NSW) s 61HE(5)(a).

⁴² *Ibid* s 61HE(5)(b).

⁴³ *Ibid* s 61HE(5)(c).

⁴⁴ *Ibid* s 61HE(5)(d).

⁴⁵ *Ibid* s 61HE(8)(a).

⁴⁶ *Ibid* s 61HE(8)(b).

⁴⁷ *Ibid* s 61HE(8)(c).

⁴⁸ Kerr (n 1).

⁴⁹ The Criminal Trials Court Benchbook, (n 25).

⁵⁰ *Crimes Act 1900* (NSW) ss 61KC, 61KD, 61KE, 61KF, 61I, 61J, 61JA.

knowledge, not merely if s/he actually knows that consent is absent,⁵¹ but also if s/he is reckless as to consent⁵² or lacks reasonable grounds for his/her belief that consent is present.⁵³ When determining whether the accused did have one of the required mental states, the trier of fact must have regard to all of the circumstances of the case⁵⁴ — including any ‘steps’ that the accused took to ascertain whether the complainant was consenting,⁵⁵ but excluding the accused’s self-induced intoxication (if any).⁵⁶

It is necessary again to pause briefly. In the second *Lazarus* appeal, the NSW Court of Criminal Appeal (NSWCCA) found that Tupman DCJ erred, at the second trial, by failing to consider any ‘steps’ taken by Mr Lazarus to work out whether Ms Mullins was consenting.⁵⁷ Her Honour thought it reasonably possible that, though Ms Mullins was in fact not consenting, Mr Lazarus believed on reasonable grounds that she was.⁵⁸ Crucial to that conclusion, as Kerr notes,⁵⁹ were her Honour’s anterior factual findings that (a) Ms Mullins had not said ‘stop’ or ‘no’ at any stage during the relevant encounter; and (b) Mr Lazarus had behaved in neither an ‘aggressive’ nor an ‘intimidatory’ way.⁶⁰ Concerning this last point, Tupman DCJ said:

[I]t has never been the complainant’s evidence at trial that the accused acted aggressively or roughly, or used any form of physical restraint or force against her, to persuade her to stay. She made that point quite clear in her evidence. So whilst she said she felt scared and that was why she did what she did, that fear was not as a result of any physical force being used by the accused, nor aggressive or forceful tones.⁶¹

However, s 61HE(4)(a) means what it says when it provides that the trier of fact *must* have regard to any ‘steps’ taken by the accused to ascertain whether the complainant was

⁵¹ *Ibid* s 61HE(3)(a).

⁵² *Ibid* s 61HE(3)(b).

⁵³ *Ibid* s 61HE(3)(c).

⁵⁴ *Ibid* s 61HE(4).

⁵⁵ *Ibid* s 61HE(4)(a).

⁵⁶ *Ibid* s 61HE(4)(b).

⁵⁷ *R v Lazarus* [2017] NSWCCA 279 (27 November 2017) [142]-[149] (*‘Lazarus’*).

⁵⁸ *Lazarus* (n 3).

⁵⁹ Kerr (n 1).

⁶⁰ *Lazarus* (n 3).

⁶¹ *Ibid*.

consenting, when it determines whether s/he had the requisite mens rea.⁶² Her Honour's failure to do that meant that error was established.

This is relevant to my reply in three ways.

First, with respect, it is not entirely clear that Kerr is right to contend that the provisions that currently appear in the *Crimes Act* are 'insufficient' to deal with a case such as *Lazarus*.⁶³ If Tupman DCJ had considered that Mr Lazarus took only the 'step' of forming a positive belief that Ms Mullins was consenting, her Honour might have answered the 'reasonable grounds' question differently from how she did. That is, Mr Lazarus's failure to make any 'enquiry of the complainant before or during intercourse as to whether she was willing to have anal intercourse (or intercourse at all)',⁶⁴ would have to have been viewed alongside various other matters that should have put him on notice that Ms Mullins might not have been consenting. It was undisputed that, at one stage in the laneway where the intercourse occurred, Ms Mullins announced her intention to go back to her friend.⁶⁵ Judge Tupman also found that, when Mr Lazarus pulled the complainant's undergarments down the first time, she promptly pulled them up again.⁶⁶ And Mr Lazarus's knowledge of Ms Mullins's virginity might also reasonably have raised some doubt as to whether she was a willing participant.⁶⁷ A trier of fact considering all of that might have concluded that Mr Lazarus was negligently incurious about whether Ms Mullins was consenting. And it might have concluded that his failure to ask the relevant question in those circumstances fortified the inference that, despite Ms Mullins's silence and his lack of aggression, he had no reasonable grounds for believing what he did.

Secondly, as I have argued elsewhere,⁶⁸ there is a difficulty with the NSWCCA's reasoning regarding the meaning of 'steps' in s 61HE(4)(a). For the NSWCCA, a person can take a

⁶² *R v XHR* [2012] NSWCCA 247 (23 November 2012) [51], [61]-[65]; *Lazarus* (n 57).

⁶³ Kerr (n 1).

⁶⁴ *Lazarus* (n 57).

⁶⁵ *Lazarus* (n 3).

⁶⁶ *Ibid.*

⁶⁷ Gail Mason and James Monaghan, 'Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus* cases' (2019) 31(1) *Current Issues in Criminal Justice* 24, 33.

⁶⁸ Andrew Dyer, 'Sexual Assault Law Reform in New South Wales: Why the *Lazarus* Litigation Demonstrates no Need for Section 61HE of the *Crimes Act* to be Changed' (2019) 43(2) *Criminal Law Journal* 78, 97-9. Other commentators have criticised this reasoning on the same basis. See, eg, Mason and Monaghan (n 67) 33; Rape & Domestic Violence Services Australia, Submission No PC088 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018); Luke McNamara et al, Submission No C013 to NSW Law Reform Commission, *Review of*

'step' within the meaning of that provision simply by considering the events in front of him/her and concluding that the complainant is consenting.⁶⁹ The problem with this is that it appears to run contrary to the legislative intention, namely, to require juries to consider whether the accused took *active* measures to ensure that the complainant was consenting, when those juries determine whether the accused had the mens rea for sexual assault. It is for this reason that I have proposed⁷⁰ this change to the text of s 61HE(4)(a):

For the purpose of making any such finding [i.e. that the accused 'knew' that the complainant was not consenting], the trier of fact must have regard to all the circumstances of the case:

- (a) including any **physical or verbal** steps taken by the person to ascertain whether the other person consents to the sexual intercourse ...

Under such a reform, judges would be required to tell juries that they must take into account the accused's failure to ask the complainant whether s/he was consenting (or to take similar measures), when those juries assess whether the accused's belief in consent was held on reasonable grounds.

Thirdly, however, a provision of this kind differs from an affirmative consent provision of the sort that Kerr favours, in this crucial way. Under my proposed provision, the trier of fact would have to *take into account* the accused's failure to say or do anything to obtain unambiguous consent, when it decides the mens rea question. People would thereby be *encouraged* to communicate about consent. For Kerr, on the other hand, an accused's failure to seek 'permission' is not merely something to be taken into account. Rather, in her opinion, in all cases where the accused has omitted to gain express permission, s/he should be convicted of the relevant sexual offence if the complainant was in fact not consenting.⁷¹ People would thereby not only be *forced* to communicate about consent, but also to receive an unequivocal statement from the complainant that s/he was

Consent and Knowledge of Consent in relation to Sexual Assault Offences (1 February 2019). I thank Gail Mason for bringing this point to my attention originally.

⁶⁹ Lazarus (n 57) [147].

⁷⁰ Dyer (n 68) 99; Andrew Dyer, Submission No PC050 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018).

⁷¹ Kerr (n 1).

consenting. The problem with such a proposal is that, however well-intentioned it is, it is draconian. Certainly, Kerr is right to argue that the law of sexual assault must take account of the human rights of complainants.⁷² But the law must balance such rights against the rights of the accused. By effectively favouring absolute liability for sexual assault, and by seemingly supporting a reversal of the onus of proof in sexual assault cases (a separate issue dealt with below)⁷³ Kerr's proposal, with respect, does not achieve any such balance.

B Affirmative Consent and Absolute Liability

In *Wampfler v R*,⁷⁴ Street CJ noted the difference between subjective mens rea offences, strict liability offences and absolute liability offences. In the case of subjective mens rea offences, the Crown must prove that the accused actually knew of the existence, or the possible or probable existence, of the guilty circumstance.⁷⁵ In the case of the strict liability offences, the accused will be guilty of the crime unless it is reasonably possible that s/he had an honest and reasonable but mistaken belief in the existence of a state of affairs that, if it had existed, would have rendered his/her conduct non-criminal.⁷⁶ In the case of absolute liability offences, the accused will be guilty upon proof merely that s/he performed the actus reus of the crime.

It follows that, currently, the offences to which s 61HE applies closely resemble strict liability offences. As noted above, an accused will be acquitted of sexual assault, for example, if, leaving the onus of proof to one side, s/he believed on reasonable grounds that the complainant was consenting.⁷⁷ It is true that there are seemingly two other circumstances where an accused will lack the mens rea for sexual assault and like offences. If the accused did not consider the matter of consent at all, in circumstances where the risk of non-consent would not have been obvious to a person of his/her mental capacity if s/he had turned his/her mind to the relevant question, s/he will be acquitted.⁷⁸ The same is true, apparently, if s/he realised merely that there was a negligible, rather

⁷² Ibid.

⁷³ See text accompanying nn 130-141.

⁷⁴ (1987) 11 NSWLR 541, 546.

⁷⁵ Or, in the case of result-crimes, intended or foresaw as possible or probable the forbidden consequence: see *Macpherson v Brown* [1975] 12 SASR 184, 188.

⁷⁶ *CTM* (2007) 236 CLR 440, 447 [8] (Gleeson CJ, Gummow, Crennan and Kiefel JJ).

⁷⁷ *Crimes Act 1900* (NSW) s 61HE(3)(c).

⁷⁸ *Tolmie v R* (1995) 37 NSWLR 660, 672 (Kirby P, with whom Barr AJ agreed) ('*Tolmie*'); *Mitton* (n 38).

than a real risk that the complainant was not consenting.⁷⁹ But these mental states are rarely encountered. Generally, if a person who has engaged in non-consensual sexual activity with a complainant, is nevertheless to be exonerated, this will be because of honest and reasonable mistake.

In my view, if it were enacted, an affirmative consent provision of the sort that Kerr supports would turn the offences to which s 61HE applies into absolute liability offences. No one who performed the actus reus of sexual assault would be acquitted. This is because, while the statutory honest and reasonable mistake 'defence' for which s 61HE(3)(c) provides would continue to exist in form, no accused could satisfy its requirements. And nor could any accused have either of the other two innocent states of mind just noted.

Now, at a recent conference, I encountered some resistance to this idea.⁸⁰ However, with respect, nobody said anything that cast any doubt on the correctness of the following argument:

1. A person accused of an offence to which s 61HE applies can only successfully raise honest and reasonable mistake if s/he has made a reasonable mistake about whether the complainant was consenting.
2. A person can only make a reasonable mistake about whether the complainant is consenting if s/he has failed to obtain an unambiguous indication from him/her that she *is* consenting. This is because, as soon as s/he has received such an indication, s/he cannot reasonably be under any illusions as to whether the complainant is a willing participant.
3. The effect of 'affirmative consent' provisions is that any person who *has* failed to gain such an unambiguous — or 'unequivocal'⁸¹ — indication, has the mens rea for the relevant sexual offence (that is, lacks an honest and reasonable but mistaken belief in consent).

⁷⁹ *Banditt v R* (2004) 151 A Crim R 215, 232 [92] ('*Banditt*').

⁸⁰ Cf though others think that I am right: Loughnan et al (n 13).

⁸¹ See, eg, Rape & Domestic Violence Services Australia (n 11). According to that organisation, the point of affirmative consent provisions is to require the accused to 'resolve any ambiguity in communication' about consent.

4. It follows that, if an affirmative consent provision were enacted, it would be impossible for an accused successfully to raise honest and reasonable mistake of fact.

Until someone can show me what is wrong with this argument, I will adhere to the view that affirmative consent makes the honest and reasonable mistake ‘defence’ redundant.⁸² Indeed, Kerr seems happily to concede that this is so. The aim of a provision that requires people to obtain ‘explicit permission to have sex’, she says, is to ‘eliminat[e] ... any misinterpretation of behaviour’.⁸³ Because honest and reasonable mistake of fact can only successfully be pleaded if there is such misinterpretation — that is, because it requires the accused to have made a mistake — it could never succeed if Kerr were to have her way.

Nor, it seems, could an accused be acquitted if s/he had one of the other states of mind that will currently exculpate a person who has performed the actus reus of an offence covered by s 61HE. Because a non-consenting person cannot give a clear indication that s/he *is* consenting, and because only the accused who obtains such a clear indication would be acquitted under affirmative consent proposals, no acts of non-consensual intercourse would result in acquittal.

Now, to her credit, Kerr seems to be more forthright about the effects of her proposal than some others who advocate affirmative consent. As just noted, she seems to accept with equanimity the idea of convicting all those who perform the actus reus of sexual assault.⁸⁴ Nevertheless, with respect, some of those effects are nothing to be proud of. Three examples should suffice to make my point.

⁸² What if a person obtains an unambiguous communication of consent, but his/her partner then withdraws consent — without saying anything — during the resulting encounter? Might not honest and reasonable mistake of fact be capable of operating in such a scenario? Maybe, but I am not willing to concede the point. This is because, under an affirmative consent standard, according to Rape & Domestic Violence Australia, ‘where ambiguity arises, there is a ... burden on the person ... to resolve any ambiguity in communication’: Ibid 14 [52]. In the scenario just described, ambiguity would seem to have arisen as soon as the person revoked her/his consent. For, how can a person who is not consenting unambiguously communicate to another that s/he is? But even if affirmative consent does not entirely oust honest and reasonable mistake of fact, it very nearly does and the real point is that this allows non-culpable actors to be convicted of very serious crimes: see text accompanying nn 85-93.

⁸³ Kerr (n 1).

⁸⁴ An affirmative consent provision would be even more problematic when applied to the other offences covered by s 61HE. Should the person who ‘tests the waters’ by touching a woman’s breasts, or a person’s bottom, while kissing her/him, be guilty of sexual touching simply because the other person gave him/her no unambiguous indication that s/he was consenting to this? That said, even without an affirmative

First, take the accused with an intellectual disability,⁸⁵ or with Asperger's Syndrome,⁸⁶ who has non-consensual intercourse with another person, in circumstances where that person was silent because s/he was scared and the accused has not deliberately caused such fright — but also has failed to 'find out'⁸⁷ whether the other person is consenting. Should such an accused be convicted of sexual assault? If an affirmative consent provision were in force, s/he would be. S/he has not asked explicitly for permission to have sex. S/he has obtained no unambiguous indication from the complainant that s/he is consenting. Because of such an accused's disability, however, it might not occur to him/her that there is a risk that the complainant is not consenting — or that there is any need to ask whether s/he is. It might be quite reasonable *for him/her* to believe that consent has been granted.⁸⁸ Should we convict a person of a serious crime because s/he fell short of a standard that s/he was quite unable to reach? In my view, the answer is a clear 'no'.

Secondly, consider the accused who has no such disability but who nevertheless genuinely, but mistakenly, believes that s/he has received an unambiguous indication from the complainant that s/he is consenting to sexual activity. If we alter the facts of *Lazarus*, imagine that Mr Lazarus and Ms Mullins had gone together to the laneway after dancing with each other for a sustained period. Imagine further that, after kissing each other passionately at that location, Ms Mullins had never announced her intention to

consent provision, this conduct seems to be caught by the new sexual touching offence: *Crimes Act 1900* (NSW) s 61KC. In such a case, there has been sexual touching without consent, knowing that the complainant might not be consenting; and that is enough for liability to attach. The old indecent assault offence under *Crimes Act 1900* (NSW) s 61L, repealed by the *Criminal Law Amendment (Child Sexual Abuse) Act 2018* (NSW), additionally required the Crown to prove that the touching was contrary to the standards of morality of right-minded members of the community: *Harkin v R* (1989) 38 A Crim R 296, 299-301. But this is no longer the case. I have been critical of this change elsewhere: Dyer, 'The Mens Rea for Sexual Assault' (n 21).

⁸⁵ See, eg, the facts of *R v Mrzljak* [2005] 1 Qd R 308 ('*Mrzljak*') and *Butler v The State of Western Australia* [2013] WASCA 242 (18 October 2013) ('*Butler*').

⁸⁶ In *R v B(MA)* [2013] 1 Cr App R 36 [41], the Court of Appeal of England and Wales accepted that an accused's 'demonstrated inability to recognise behavioural cues' might be able to be taken into account when determining whether his/her belief in consent was reasonable.

⁸⁷ New South Wales Law Reform Commission, *Consent in relation to Sexual Offences* (Consultation Paper 21, October 2018) 36 [3.37].

⁸⁸ Note that the question under s 61HE(3)(c) is not whether a reasonable person would have realised that consent was absent. Rather, it is whether it was reasonable for the *accused* — presumably taking into account any disabilities that s/he has — to believe that consent was present: *Lazarus* (n 57) [156]; *O'Sullivan v R* (2012) 233 A Crim R 449, 473-4 [124]-[126] (Davies and Garling JJ). Likewise, in Queensland and Western Australia, it is clear that, in a rape case where the defendant has an intellectual disability, the relevant question is whether it was reasonable *for a person of the accused's intelligence* to believe that the complainant was consenting: *Mrzljak* (n 85); *Aubertin v Western Australia* (2006) 33 WAR 87, 96 [43].

leave and that, when Mr Lazarus had tried to pull Ms Mullins's undergarments down the first time, she had not resisted this, but instead had kept on kissing him. Finally, imagine that Ms Mullins had never disclosed to Mr Lazarus that she was a virgin. If, in those circumstances, she and Mr Lazarus had then had sexual intercourse, should he inevitably have been convicted of sexual assault if Ms Mullins's 'subjective internal state of mind towards the [intercourse], at the time that it occurred'⁸⁹ was other than what he thought it was?⁹⁰ Again, in my view, the answer must be 'no'. The accused in this case seems to have believed on reasonable grounds that the complainant was consenting (at least as a reasonable possibility). Indeed, there is nothing in the circumstances known to him to call into question his belief that she actually communicated such consent to him. But because this belief was wrong and because he failed to ask, 'do you want to have sex with me?', Kerr would support his conviction. She suggests that the punishment of such morally innocent actors is justified by its tendency to promote 'ideal standards of behaviour'.⁹¹ The counterargument is that, however much authoritarian regimes might use the innocent to achieve some 'higher good', liberal democracies should not utilise such tactics.

Thirdly, consider the accused who, due to *non*-self-induced intoxication, is prevented from forming criminal intent. At present, such a person would seemingly not be guilty of sexual assault if s/he had non-consensual intercourse while in such a state: evidence of his/her intoxication could be taken into account when assessing whether s/he had the requisite mens rea.⁹² Under Kerr's affirmative consent proposal, however, such a person would apparently be convicted. That person is of course totally blameless. But because, for Kerr, *all* those who fail to ask permission are rapists, such an accused would no longer avoid criminal responsibility.

Because affirmative consent provisions lead to unfairness, and are untenable, I would be surprised if the NSWLRC were to recommend the introduction of such a provision into the *Crimes Act*. Even if it does, I would be very surprised if the NSW Government were to

⁸⁹ *The Queen v Ewanchuk* [1999] 1 SCR 330, 348 [26] (Major J, writing for himself, Lamer CJ and Iacobucci, Bastarache and Binnie JJ) ('*Ewanchuk*').

⁹⁰ Note the similar examples provided by Elaine Craig, 'Ten Years After Ewanchuk The Art of Seduction is Alive and Well: An Examination of The Mistaken Belief in Consent Defence' (2009) 13(3) *Canadian Criminal Law Review* 247, 252; Halley (n 12) 266.

⁹¹ Kerr (n 1).

⁹² *Crimes Act 1900* (NSW) s 428D(b). Such a person has no intent to have sexual intercourse, and the Crown must prove such intent before a guilty verdict is returned: see *R v Brown* [1975] 10 SASR 139, 141.

adopt such a recommendation. Kerr seems not to be unduly concerned about the prospect of ‘prisons bursting with a sizable proportion of the male population’.⁹³ But we *should* be concerned about the conviction of non-culpable actors simply because they have not received unambiguous consent — even though they might have thought that they did.

This brings me to another point. As Halley notes, affirmative consent has a reputation for being progressive.⁹⁴ As Halley also notes, that reputation is ill-deserved.⁹⁵ Indeed, the identity of some of the entities that support affirmative consent puts us on notice that this idea is likely to be a conservative, illiberal one. So, for example, the Police Association of NSW informs us, in its preliminary submission to the NSWLRC’s review, that:

A person should actively seek the consent of their [sic] prospective sexual partner, and only act in accordance with a consent which is wilfully and enthusiastically given. ... The Police Association does not think that this is an unwarranted standard of behaviour; if a person has not clearly and enthusiastically consented to sexual activity, don’t do it. No longer does the community accept that possible ambiguity or awkwardness about obtaining consent is a sufficient justification for ignoring the tens and thousands of people in NSW who suffer unwanted sexual contact every year.⁹⁶

And, as we have seen, members of the right-wing NSW Liberal Party, such as Pru Goward, have expressed exactly the same views.

It takes only a brief examination of a couple of the other proposals that have been supported by the Police Association and/or the Liberal Party’s more conservative elements, to realise that these people are not civil libertarians. Mandatory penalties for certain offenders convicted of one-punch killings.⁹⁷ A mandatory life without parole sentence for most of those who have been convicted of murdering a police officer.⁹⁸ Both of these are authoritarian, punitive proposals. And under each of them, crucially, an

⁹³ Kerr (n 1).

⁹⁴ Halley (n 12) 278.

⁹⁵ Ibid 278.

⁹⁶ Police Association of NSW, Submission No PC084 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018).

⁹⁷ *Crimes Act 1900* (NSW) s 25B(1).

⁹⁸ Ibid s 19B.

absolute rule is stated: 'if you do X, Y will happen to you, whatever were the circumstances'. It is the same with affirmative consent: 'if you do *not* gain an unequivocal permission, you are guilty of sexual assault, whether or not you have an intellectual disability, and whether or not there is some other valid reason why you did not seek permission to have sex'.

Affirmative consent is socially conservative for another reason. Not only is it indiscriminately punitive; it is also essentialist. As Halley points out, it:

[E]ncourages its intended constituency, women, to relinquish rather than exercise the social powers that they *do* have in sexual encounters with men. ... This is protective legislation and will have the classic and predictable social consequence of protective legislation: it will entrench the protected group in its weakness.⁹⁹

In other words, people like Pru Goward appear to view (heterosexual) sex as being something that men request from women and women give to men. They appear to like the idea of the woman who is too meek and passive to speak up and say 'no' and of the masterful gentleman who takes control of the situation. Now, depressingly enough, in heterosexual relations, women and men do seem *often* to take on such roles. That is to say, it is often men who initiate sexual activity and women who accept or decline such advances.¹⁰⁰ It is partly as a concession to this reality that I believe that the law should require juries to consider whether the accused — usually a man — took 'physical or verbal steps' to ascertain whether his sexual partner — usually a woman — was consenting.¹⁰¹ But is this the sort of behaviour that the law should positively encourage? It seems to me that, by perpetuating notions of male agency and female submissiveness, affirmative consent sends a very questionable message to the community. Women are not encouraged to speak up or to assert themselves. All of the onus to do that is on male agents. Of course, there are times when people — female and male — freeze in response to fear.¹⁰² The law must acknowledge this. But if it were to go one step further and compel men to seek permission to have intercourse, it would merely be lending its endorsement

⁹⁹ Halley (n 12) 277.

¹⁰⁰ Gruber (n 12) 443.

¹⁰¹ See text accompanying nn 68-70.

¹⁰² See New South Wales Law Reform Commission (n 87) [2.95].

to traditional gender roles. It would be doing nothing to liberate women from the oppression created by such roles, or the rigid thinking of those who promote them.

C Other Difficulties with Kerr's Argument for Affirmative Consent

There are several other problems with Kerr's argument in favour of affirmative consent.

Kerr argues that affirmative consent is required in Tasmania, Victoria and Canada.¹⁰³ But she is, with respect, wrong about Victoria; and she might well be wrong about Tasmania and Canada, too. And even if she were right, the presence in other jurisdictions of a particular rule is not really an argument in favour of its adoption in a new jurisdiction. The merits of that rule must first be considered.

Of Victoria, Kerr says:

[J]ury directions stipulate that the fact that the alleged victim did not say or do anything indicating free agreement to a sexual act is enough to show that that act took place without that person's free agreement.¹⁰⁴

Though she cites s 37 of the *Crimes Act 1958* (Vic), Kerr seems to be referring to s 36(2)(l), which provides that a person does not consent to an act 'if the person does not say or do anything to indicate consent to an act'. As I have argued elsewhere,¹⁰⁵ s 36(2)(l) does not create an affirmative consent standard. It does not require people to ask for permission to have sex. It does not require defendants to receive unambiguous consent if they are to escape sexual assault liability. Instead, it requires triers of facts to examine conduct of the complainant around the time of the relevant events, to determine whether s/he performed that conduct *to* indicate that s/he was consenting. So, if, for example, a case with the same facts as *Lazarus* were to arise in Victoria, the trier of fact would be required to consider whether the complainant pointed her buttocks towards the accused,¹⁰⁶ or got down on her hands and knees and arched her back,¹⁰⁷ or moved backwards and forwards during intercourse,¹⁰⁸ *for the purpose* of demonstrating that she was a willing participant.

¹⁰³ Kerr (n 1).

¹⁰⁴ *Ibid.*

¹⁰⁵ Dyer (n 68) 86-8.

¹⁰⁶ *Lazarus* (n 57) [43].

¹⁰⁷ *Lazarus* (n 3); *Lazarus* (n 57) [46].

¹⁰⁸ *Lazarus* (n 3).

If the trier of fact found that she did not do these things for that reason, the accused might still escape conviction. S/he would do so if the accused might reasonably have believed that the complainant was consenting.¹⁰⁹ In attempting to prove the contrary, the Crown would not be able to rely on any provision that stated that a person has a reasonable belief in consent only if s/he has obtained clear permission. That is because no such provision exists.

Moving now to Tasmania, s 2A(2)(a) of the *Criminal Code Act 1924* (Tas) is in very similar terms to s 36(2)(l); but Kerr does not refer to it. Rather, she refers to s 14A(1)(c), which provides that:

[A] mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused ... did not take reasonable steps, in the circumstances known to him/her at the time of the offence, to ascertain that the complainant was consenting to the act.

Kerr does not support her argument that s 14A(1)(c) is an affirmative consent provision with any references to Tasmanian case law. Rather, she refers to Helen Cockburn's statement, in her PhD thesis, that the effect of ss 2A(2)(a) and 14A(1)(c) is that '[p]ositive evidence of consent is now required to refute claims of non-consensual sex'.¹¹⁰ One point to note here is that 'positive evidence of consent' is not the same thing as an unambiguous assurance by one party to another that s/he is consenting. For example, a person's *apparently* willing participation in sexual activity is 'positive evidence' that s/he is consenting to that activity. But if her/his willingness *is* merely apparent, s/he has in fact given no clear indication of her/his willingness.

This brings me to the real point. While, like Kerr, I have been unable to find any case law concerning the meaning of s 14A(1)(c),¹¹¹ it would seem that, in a particular case, a person could take '*reasonable steps, in the circumstances known to him/her*' to ascertain whether consent had been granted, without explicitly asking for permission to have intercourse. For, as the Canadian Supreme Court has recently noted, when interpreting a

¹⁰⁹ *Crimes Act 1958* (Vic) s 40(1)(c).

¹¹⁰ Helen Cockburn, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials' (PhD Thesis, University of Tasmania, 2012) 6.

¹¹¹ But see *SG v Tasmania* [2017] TASCRA 12 (8 August 2017) [7]-[8], [11].

similarly worded provision in the Canadian *Criminal Code*,¹¹² ‘reasonable steps’ need not be active¹¹³ and may extend to ‘observing conduct or behaviour suggesting that’ the relevant circumstance existed.¹¹⁴ This is reminiscent of Bellew J’s reasoning in *Lazarus* that a ‘step’ is a ‘measure’, and that a person takes a ‘measure’ when s/he observes the complainant’s conduct and forms a positive belief that s/he is consenting.¹¹⁵ Of course, in the above text, I have criticised that reasoning.¹¹⁶ But I am not sure that I would be so critical of a Tasmanian court that employed it. When it comes to statutory interpretation, the idea is to work out the intent of Parliament.¹¹⁷ It is hard to believe that the Tasmanian Parliament’s intent, when it passed s 14A(1)(c), was to allow for the conviction of people — including those with intellectual disabilities, for example¹¹⁸ — simply because they were not in fact (even though they might have thought that they had been) given clear permission to have sex, and despite their having reasonably believed that the complainant was consenting.

It follows from what I have said about the Canadian Supreme Court’s approach to the meaning of the term ‘reasonable steps’ that, in that jurisdiction, too, it is unclear whether affirmative consent is required.¹¹⁹ That depends on whether a person can take ‘reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting’,¹²⁰ without obtaining an unambiguous assurance. The majority’s insistence in *Morrison v The Queen* that ‘the reasonable steps requirement is highly contextual’,¹²¹ taken together with its findings — just noted — that a person might take ‘reasonable steps’ while remaining passive and merely observing conduct, indicates

¹¹² The provision at issue was *Criminal Code*, R.S.C. 1985, c. C-46, s 172.1(4), which provides that, if the accused believed that the complainant was over a certain age, that is ‘not a defence’ to child luring offences created by s 172.1(1)(a),(b) and (c) ‘unless the accused took reasonable steps to ascertain the age of the person’. This provision does not contain the words ‘in the circumstances known to him/her’: cf *Criminal Code Act 1924* (Tas) s 14A(1)(c). Nevertheless, in the opinion of seven Canadian Supreme Court Justices, ‘the “reasonable steps” that the accused is required to take under subs. (4) are steps that a reasonable person in the circumstances known to the accused at the time, would have taken’: *The Queen v Morrison* [2019] SCC 15 (24 March 2019) [105] (*Morrison*) (emphasis added).

¹¹³ *Ibid* [109].

¹¹⁴ *Ibid* [112].

¹¹⁵ *Lazarus* (n 57) [146]-[147].

¹¹⁶ See text accompanying nn 68-70.

¹¹⁷ Of course, this is an objective question; there is no search for what Parliament — or individual parliamentarians — *subjectively* intended: see *CTM* (2008) 236 CLR 440, 498 [203] (Heydon J).

¹¹⁸ See text accompanying nn 85-8.

¹¹⁹ See *Morrison* (n 112) [105]-[112].

¹²⁰ *Criminal Code*, R.S.C. 1985, c. C-46, s 273.2(b).

¹²¹ *Morrison* (n 112) [105]; see also [110].

that s/he *can*.¹²² For her part, Kerr thinks¹²³ that the Canadian Supreme Court's decision in *Ewanchuk v The Queen*¹²⁴ creates an affirmative consent standard. With respect, it does not. As Elaine Craig makes clear, in an article that Kerr extensively cites: '*Ewanchuk* does not require that the complainant communicated consent in order to allow the defence of honest but mistaken belief in consent'.¹²⁵

It requires the accused merely to have believed, however wrongly, that the complainant had given such a communication.¹²⁶ In a 'truly ambiguous situation' — that is, in a situation where the accused mistakenly thought that a non-consenting complainant had communicated her/his consent in some way — *Ewanchuk* does not allow for a conviction.¹²⁷

A further difficulty with Kerr's affirmative consent argument relates to her apparent contention that the accused bears the onus of proof in a case where s/he is charged with 'taking a conveyance without the consent of the owner',¹²⁸ and larceny,¹²⁹ and that the same should be true in a sexual assault case.¹³⁰ This, with respect, is misconceived. The onus of proof is *not* on the defendant in cases of car theft. Rather, in cases of this kind, it is for *the Crown* to prove that the owner was not consenting. Nor is it correct to argue, as Kerr does,¹³¹ that the onus of proof is reversed in larceny cases where an accused person tries to set up a claim of right 'defence'.¹³² Certainly, the accused must discharge an

¹²² But see that since I wrote the above, the Canadian Supreme Court has delivered judgment in *R v Barton* [2019] SCC 33. In that case, the Court considered *Criminal Code*, R.S.C. 1985, c. C-46, s 273.2(b), which provides that an accused will have the mens rea for various sexual assault offences if s/he 'did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting'. As seven Justices did in *Morrison*, four Justices observed that 'the reasonable steps requirement is highly contextual': [108]; see also [106]. It is true that their Lordships also held that 'an accused cannot point to his reliance on the complainant's silence, passivity, or ambiguous conduct as a reasonable step': [107]; see also [109]. But because *the complainant's* silence, passivity or ambiguous conduct could never be a step that *the accused* took, the real meaning of this statement seems to be that the accused who views passivity, silence or other conduct that s/he *knows* to be ambiguous, fails to discharge his/her s 273.2(b) duty. On the other hand, the accused who mistakenly thinks that s/he has received an unambiguous communication seems liable to be acquitted.

¹²³ Kerr (n 1).

¹²⁴ *Ewanchuk* (n 89).

¹²⁵ Craig (n 90) 254.

¹²⁶ *Ewanchuk* (n 89) 354-5 [45].

¹²⁷ Craig (n 90) 254.

¹²⁸ But see *Crimes Act 1900* (NSW) s 154A.

¹²⁹ Kerr (n 1).

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² Again, I place the word 'defence' inside inverted commas because claim of right is not a true defence. Once the accused raises this issue, it is for the Crown to disprove it: *Fuge v R* (2001) 123 A Crim R 310, 315 ('*Fuge*'). Concerning 'defences' and defences, see generally *Youssef* (n 14).

evidential burden if s/he wants the jury to consider such a claim.¹³³ But this is only because it is reasonable to presume that this matter is not in issue. It is rare for an accused to argue that, while s/he did steal, s/he only did so because s/he believed that s/he was legally entitled to the relevant property. Accordingly, it is only fair to require her/him to produce, or point to, *some* evidence — it may be ‘slender’¹³⁴ or ‘very slight’¹³⁵ — before the matter is left with the trier of fact.¹³⁶ Once s/he has done so, *the prosecution* must disprove the accused’s claim.¹³⁷ In other words, contrary to what Kerr suggests, the law does not provide for different, more stringent rules of proof where sexual offences are concerned. The whole point of *Woolmington v DPP*¹³⁸ is that, *whatever the crime*, the Crown must prove the accused’s guilt beyond reasonable doubt unless the relevant statute provides otherwise.¹³⁹ In the case of car stealing and larceny, the statute does not provide otherwise.¹⁴⁰

There is another aspect of Kerr’s argument about car theft that strikes me, with respect, as wrongheaded. Like Kerr, I do not approve of ‘harrowing cross-examination placing blame on [the complainant]’ in sexual assault trials.¹⁴¹ But I cannot agree with her apparent suggestion that the defendant in such a case, through his/her counsel, should have no right to challenge a complainant’s evidence regarding consent. The offence of car stealing, Kerr observes, ‘does not evoke the same debate over the element of consent’.¹⁴² ‘Even if an owner leaves [his/her] ... car unlocked with the keys in the ignition’, she continues, s/he is unlikely to be asked any questions about whether s/he consented to the alleged theft.¹⁴³ In like vein, Germaine Greer has recently said:

If a man punches you in the eye, you are not expected to have pleaded with him not to for the crime to be accepted as an assault. If you are

¹³³ *Fuge* (n 132) 315.

¹³⁴ *The Queen v Khazaal* (2012) 246 CLR 601, 624 [74] (Gummow, Crennan and Bell JJ).

¹³⁵ *Clarke v R* (1995) 78 A Crim R 226, 231.

¹³⁶ For more discussion of evidential burdens, how they operate, and why they do not breach *Woolmington* (n 14); see generally Andrew Dyer, ‘The Mens Rea for Sexual Assault’ (n 21).

¹³⁷ *Fuge* (n 132) 315.

¹³⁸ *Woolmington* (n 14).

¹³⁹ Viscount Sankey also required the Crown to prove the defence of insanity, now known in NSW as the mental illness defence: *Ibid* 481.

¹⁴⁰ See *Crimes Act 1900* (NSW) ss 117 and 154A.

¹⁴¹ Kerr (n 1).

¹⁴² *Ibid*.

¹⁴³ *Ibid*.

sitting at your cash register and someone demands the cash in it, you will not be accused of consent if you simply hand it over.¹⁴⁴

The reason why consent is almost never an issue in cases of assault or car stealing, however, is because it is unusual for a person to consent to be struck, or to allow a perfect stranger to break into his/her car and then go on a 'joyride' (usually with the assistance of a piece of wire). On the other hand, people consent to sex all the time. Accordingly, when an accused claims that a complainant was consenting, there is, in many cases — though by no means all — nothing inherently implausible about what s/he is saying. What s/he is saying might not be true. No doubt, there are many trials where the accused perjures him/herself by alleging that a non-consenting complainant was consenting. But fairness to the accused demands that s/he be entitled to dispute the complainant's account. A person should not serve a lengthy prison sentence after a trial at which s/he was not given the opportunity of presenting his/her version of events. Indeed, I do not understand Greer to be saying anything different. She observes that it is the 'savagery of the [maximum] sentence' for sexual assault 'that pushes juries towards extending the benefit of the doubt'.¹⁴⁵ She does *not* say that the approach of such juries is wrong, or that the onus of proof should be reversed in sexual assault cases, or that defendants should be unable to dispute the complainant's evidence, or that juries should be told that they must accept what the complainant has alleged.

Indeed, instead of comparing sexual assault with certain offences of dishonesty, Kerr might have compared it with the offence of murder. As Kimberly Kessler Ferzan has pointed out, no one in her/his right mind would argue that the person who kills another person without displaying either subjective or objective fault, should be convicted of murder.¹⁴⁶ So why should the person who believes on reasonable grounds that his/her sexual partner is consenting, when in fact s/he is not, be convicted of any of the very

¹⁴⁴ Germaine Greer, *On Rape* (Melbourne University Press, 2018) 41.

¹⁴⁵ *Ibid* 65.

¹⁴⁶ Ferzan (n 12) 422. Having said that, the constructive murder rule, provided for by *Crimes Act 1900* (NSW) s 18(1)(a), might be capable of facilitating a conviction for murder of a person who displays no fault — subjective or objective — in respect of the death that s/he has caused. Generally speaking, however, even the person convicted of murder in this way will have displayed objective culpability. The person who kills during an armed robbery, for example, will often have performed an act causing the relevant death that it was reasonable for him/her to have realised was dangerous to life. In any case, I have criticised the constructive murder rule elsewhere: Andrew Dyer, 'The Australian Position Concerning Criminal Complicity: Principle, Policy or Politics' (2018) 40(2) *Sydney Law Review* 291, 308-9.

serious sexual offences to which s 61HE now applies? As noted above, Kerr clearly thinks that such a person should be convicted. She thinks that: '[I]t should not be possible for a defendant to escape conviction based purely on a simple defence of mistaken belief on reasonable grounds in circumstances where no positive consent was given.'¹⁴⁷

At the risk of repetition, the problem with this is that it would not only be in cases where 'no positive consent was given' that the honest and reasonable mistake of fact 'defence' would fail to operate. That 'defence' would fail to operate at all. Because honest and reasonable mistake can only succeed when the accused has made a reasonable mistake, and because only a person who has not received a clear permission can make a reasonable mistake, honest and reasonable mistake would always fail.

Finally, Kerr's argument that the debate about affirmative consent is gendered¹⁴⁸ is *ad hominem* and in some respects misleading; and, with respect, it adds nothing. Kerr essentially says that most of those who supported affirmative consent in their preliminary submissions to the NSWLRC's review were women, while most of those who opposed it were men.¹⁴⁹ (She also makes the far from startling observation that those from 'services focused on victims' interests' were much more inclined to support affirmative consent than those who supported defendants' rights).¹⁵⁰ This argument is *ad hominem* because it suggests that the arguments of those men who resist affirmative consent are flawed simply because of the gender identity of those who make them. It is misleading because, as already noted, many women — including many feminists — oppose affirmative consent.¹⁵¹ Some women said so in their submissions to the NSWLRC's review.¹⁵² It adds nothing because it is *ad hominem* and inaccurate. Those who are critical of commentators who resist affirmative consent must engage with such commentators' *reasoning*. A person's arguments are not invalid just because that person is a man (or a woman).

¹⁴⁷ Kerr (n 1).

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid. But see that the NSW DPP does not favour affirmative consent: Office of the Director of Public Prosecutions Submission No CO14 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (1 February 2019).

¹⁵¹ Ferzan (n 12) 692; Gruber (n 12) 440-458; Halley (n 12).

¹⁵² See Loughnan et al (n 13).

III PERSUASION, RELUCTANCE, NON-VIOLENT THREATS AND MISTAKES; AND TWO-OFFENCE
PROPOSALS

A Acceptable Persuasion and Unacceptable Pressure — and Mistakes

As noted above, in her comments on the *Four Corners* show about the *Lazarus* litigation, Ms Saxon Mullins said that, 'if it's not enthusiastic yes, then it's not enough'.¹⁵³ Of course, it is understandable that she would say this. But is it right? Or can valid consent sometimes be given reluctantly? Kerr seems to be in no doubt about the answer to this question. Indeed, she seems to come close to saying that consent after *persuasion* can never amount to a real consent.¹⁵⁴ But, again, is this right?

In truth, consent given without enthusiasm and/or after persuasion *can* still be a valid consent. On the weekend, for example, I drove to my parents' house in heavy rain. The rain was so heavy, and the roads were so waterlogged, that at one stage I decided to abort the trip. My wife persuaded me to continue driving. I complied with her wishes reluctantly; but my consent was nevertheless a valid one. To use the words of Edelman J in *STZAL v Minister of Immigration*,¹⁵⁵ while I did not 'emotionally want' to keep driving, I 'volitionally ch[ose]' to do so. Consent to sex, too, can be reluctant without being invalid — as the above example of the couple undergoing fertility treatment shows.¹⁵⁶ Certainly, the same is true of many consents given after persuasion. People often change their minds after becoming aware of new facts. Indeed, a person who was initially opposed to the idea of having sexual intercourse might end up participating *enthusiastically* in such activity.

Having said all of this, I do agree with Kerr that this cannot be taken too far. Gentle persuasion is one thing. As she says, 'veiled threats' and 'relentless badgering' are quite another.¹⁵⁷ The difficulty, however, is in knowing where the boundary lies between the complainant who 'volitionally chooses' and the complainant who makes no such free choice. As noted above, the Bar Association of NSW thinks that it is only in those cases where 'sexual choice is non-existent'¹⁵⁸ that a person should be held not to have made a

¹⁵³ *I am that Girl* (n 5).

¹⁵⁴ Kerr (n 1).

¹⁵⁵ *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936, 956 [97].

¹⁵⁶ See further (n 26).

¹⁵⁷ Kerr (n 1).

¹⁵⁸ NSW Bar Association (n 20).

free and voluntary¹⁵⁹ (that is, autonomous) decision to have intercourse. For it, then, the person who has intercourse only because of a non-violent threat has consented. *To an extent*, this approach accords with s 61HE. As noted above, while s 61HE(5)(c) provides that the complainant who ‘consents’ because of a threat of force, has not in fact consented, the same is not necessarily true of the person who has sex because of a threat that ‘does not involve a threat of force’.¹⁶⁰ It is also to an extent consistent with an argument presented by Jennifer Temkin some years ago. For that commentator:

The defendant who threatens his victim with violence denies her the choice of whether to have intercourse with him or not. He means to have intercourse with her in any event. Her choice lies between intercourse with violence or intercourse without it. ... On the other hand, where the threat is to terminate a woman’s employment, she is left with a choice, albeit an unpalatable one, as to whether to have intercourse with the defendant or not. In cases such as this where sexual choice remains but is unacceptably limited or confined, liability for an offence which is less serious than rape is appropriate.¹⁶¹

Is this right? Is the woman who is threatened with the loss of her job really consenting? My intuition is that she is not, and I have said so in my final submission to the NSWLRC.¹⁶² Certainly, such a person’s choice is constrained rather than non-existent. But is it not so constrained as, in fact, to be no real choice at all?

On the other hand, what is the precise difference between this person and the person who reluctantly participates in fertility treatment sex? Why is one of these acts autonomous while the other is not? To be sure, the person who issues the threat is much more culpable than the person who persuades his/her spouse to engage in planned and uninspiring medical sex. But that does not seem to matter. It is the pressure that is brought to bear on an *individual*, and not the blameworthiness of the actor who brings it to bear on him/her, that makes his/her conduct less than autonomous.¹⁶³ *Does* the threatened person have

¹⁵⁹ See *Crimes Act 1900* (NSW) s 61HE(2).

¹⁶⁰ *Ibid* s 61HE(8)(b).

¹⁶¹ Jennifer Temkin, ‘Towards a Modern Law of Rape’ (1982) 45(4) *Modern Law Review* 399, 406-7.

¹⁶² Dyer, ‘The Mens Rea for Sexual Assault’ (n 21).

¹⁶³ The High Court made a similar point to this in *Papadimitropoulos v The Queen* (1957) 98 CLR 249, 260 (*‘Papadimitropoulos’*).

more pressure on him/her than the fertility treatment spouse? Maybe it could be said that s/he does. The consequence with which s/he has been threatened is virtually certain to occur if s/he does not comply with the threatener's demand. By contrast, even if s/he does not go ahead with a particular act of intercourse, the spouse might still get a baby. And maybe, too, it is relevant that the spouse has more control over her/his situation than does the person who participates in sexual activity because of a threat emanating from an unscrupulous third party:¹⁶⁴ because the pressure on him/her is self-imposed, s/he can (theoretically, at least) liberate her/himself from it at any time. Whatever the true explanation is, however, it does seem unpalatable to treat the person who has intercourse only because of a threat to terminate her/his employment, or to 'tell her fiancé that she had been a prostitute',¹⁶⁵ or to 'report her to the Tax Office for tax evasion',¹⁶⁶ as having 'freely and voluntarily agreed to the sexual activity'.¹⁶⁷

It follows that I respectfully agree with Kerr when she argues that there is 'a need ... for ... an expanded list of factors [in s 61HE] that negate consent'.¹⁶⁸ Though I do have some doubts about the argument that I have just presented, my present thinking is that Parliament should amend the section to provide that a 'consent' given because of threats or intimidation of *any* kind is no consent at all. Certainly, the danger of an absolute rule like this is that, as Gleeson CJ put it in *Tame v New South Wales*, 'sooner or later a case is bound to arise that will expose the dangers of inflexibility'.¹⁶⁹ But *is* that bound to happen here? To put the matter differently, are there really any circumstances in which we are willing to say that a person has validly consented though s/he has only engaged in the relevant activity because of a threat?

I also think that the list of mistaken beliefs that vitiate a complainant's apparent consent, in s 61HE(6), should be expanded and modified. But because Kerr does not deal with this matter, I will deal with it only briefly here.¹⁷⁰ Currently, the only mistaken beliefs that certainly negate consent to sexual activity are mistaken beliefs: as to the other person's

¹⁶⁴ I thank Gail Mason for the suggestion.

¹⁶⁵ *R v Olugboja* [1982] 1 QB 320, 328.

¹⁶⁶ George Syrota, 'Rape: When Does Fraud Vitate Consent?' (1995) 25(2) *Western Australian Law Review* 334, 344.

¹⁶⁷ *Crimes Act 1900* (NSW) s 61HE(2).

¹⁶⁸ Kerr (n 1).

¹⁶⁹ (2002) 211 CLR 317, 337 [35].

¹⁷⁰ See generally, Andrew Dyer, 'Mistakes that Negate Apparent Consent' (2019) 43 *Criminal Law Journal* 159.

identity;¹⁷¹ that the complainant is married to the other person;¹⁷² that the sexual activity is for health or hygienic purposes;¹⁷³ and about the nature of the activity, where that belief has been induced by fraudulent means.¹⁷⁴ Accordingly, the NSWLRC has asked the question: should s 61HE(6) explicitly provide for other mistakes?¹⁷⁵ It is particularly interested in those cases where a complainant has had intercourse with the accused only because of a mistaken belief that he would wear a, non-sabotaged,¹⁷⁶ condom during intercourse. But it also refers to scenarios where an accused fails to disclose, or deceives the complainant about, the fact that s/he has a 'grievous bodily disease'¹⁷⁷ such as HIV/AIDS. It appears that it is common enough for these mistakes to be made;¹⁷⁸ so too, there are cases where the complainant has only consented to engage in sexual activity because s/he believes that s/he will be paid for it.¹⁷⁹

It is possible that all of these scenarios are currently covered by s 61HE, despite their not appearing on the s 61HE(6) list. Courts in other jurisdictions have held that intercourse is non-consensual when the complainant only engages in it because of her/his mistake about the accused's condom-use,¹⁸⁰ or the accused's HIV positive status,¹⁸¹ or the fact that the complainant will be paid.¹⁸² Perhaps a NSW court would likewise find that the complainant has not 'freely and voluntarily agree[d]'¹⁸³ to sexual activity in these situations. Further, it might hold that a complainant who has made a mistake about condom-use has made a 'mistake about the nature of the activity' within the meaning of s 61HE(6)(d). Whether or not this is so, in my view, this matter should be put beyond doubt. That is, s 61HE(6) should be amended to state:

¹⁷¹ *Crimes Act 1900* (NSW) s 61HE(6)(a). See also *Dee v R* (1884) 15 Cox CC 579; *Pryor v R* (2001) 124 A Crim R 22.

¹⁷² *Crimes Act 1900* (NSW) s 61HE(6)(b). See also *Papadimitropoulos* (n 163).

¹⁷³ *Ibid* s 61HE(6)(c). See also *R v Mobilio* [1991] 1 VR 339.

¹⁷⁴ *Ibid* s 61HE(6)(d).

¹⁷⁵ New South Wales Law Reform Commission (n 87) 60-1 [4.65]-[4.67], 61-2 [4.70]-[4.74].

¹⁷⁶ Note the facts of *Hutchinson v The Queen* [2014] 1 SCR 346 ('Hutchinson').

¹⁷⁷ See *Crimes Act 1900* (NSW) s 4.

¹⁷⁸ See, eg, *Aubrey v The Queen* (2017) 260 CLR 305; *Zaburoni v The Queen* (2016) 256 CLR 482; *Neal v R* (2011) 32 VR 454; *R v Reid* [2007] 1 Qd R 64; *R v Dica* [2004] QB 1257; *R v Konzani* [2005] 2 Cr App R 14; *Cuerrier v The Queen* [1998] 2 SCR 371 ('Cuerrier'); *Mabior v The Queen* [2012] 2 SCR 584 ('Mabior').

¹⁷⁹ See, eg, *R v Linekar* [1995] QB 252; *Livas v The Queen* [2015] ACTCA 54 (13 August 2015) ('Livas'); *R v Rajakaruna* (2004) 8 VR 340, 343 [5] (Chernov JA), 350-1 [37]-[40] (Eames JA); *R v Winchester* [2014] 1 Qd R 44.

¹⁸⁰ *Hutchinson* (n 176); *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) [86].

¹⁸¹ *Cuerrier* (n 178); *Mabior* (n 178).

¹⁸² *Livas* (n 179).

¹⁸³ *Crimes Act 1900* (NSW) s 61HE(2).

Without limiting the circumstances in which a person's mistake about, or ignorance as to, a matter, means that he or she does not consent to a sexual activity, a person does not consent to a sexual activity if she participates in it because of:

- (a) a mistaken belief as to the identity of the other person;
- (b) a mistaken belief that the other person is married to the person;
- (c) a mistaken belief that the sexual activity is for health or hygienic purposes;
- (d) a mistaken belief that the other person will wear a condom, or will wear a condom that has not been sabotaged, during the sexual activity (provided that that sexual activity is sexual intercourse);
- (e) a mistaken belief that the other person will pay the person for participating with him/her in the sexual activity; or
- (f) a mistaken belief that the other person does not have a grievous bodily disease, or his/her ignorance of the fact that the other person has such a disease, in circumstances where there is a real risk that the person will contract the disease as a result of the sexual activity.

But there is to be no conviction for an offence to which this sub-section applies where: a person participates in a sexual activity because of a mistaken belief about, or his/her ignorance of, some matter not expressly referred to in this sub-section; but his/her interest in sexual autonomy is outweighed by (a) a privacy or other interest of the defendant, and/or (b) a compelling concern, or compelling concerns of public policy.

Some commentators have resisted the idea that it is sexual assault not to pay a sex worker for the services that s/he has provided.¹⁸⁴ Other commentators think that, if we convict of sexual assault those who fail to disclose their HIV positive status, people who suspect

¹⁸⁴ See, eg, Syrota (n 166) 341; Neil Morgan, 'Oppression, Fraud and Consent in Sexual Offences' (1996) 26(1) *Western Australian Law Review* 223, 226, 233-4; AP Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, 6th ed, 2016) 475; Joel Feinberg, 'The Case of Fraudulently Procured Consent' (1986) 96(2) *Ethics* 330, 336-7.

they have the virus will be deterred from undergoing testing for it.¹⁸⁵ Still, others think that mistakes as to condom-use do not render a complainant's participation in sexual activity other than autonomous.¹⁸⁶

It is submitted that all of these arguments are misconceived. There is no difference in principle between such cases and those that are already covered by s 61HE(6). In each of them, the complainant's will stands opposed to that which in fact occurs. In each of them, the accused gets around this 'problem' by deceiving the complainant, or not informing her/him of a matter that is material to her/his decision to engage in intercourse. In other words, if there is no consent where a person has intercourse because s/he wrongly thinks that s/he is doing so with her/his regular sexual partner (for example), then there must logically be no consent wherever else a person makes a 'but for' mistake.¹⁸⁷ Of course, there are situations where, despite this, no sexual assault conviction should be returned (thus the final paragraph in my proposed provision). A classic case of this nature seems to be the case of the transgender person who fails to disclose her/his gender history to her/his sexual partner.¹⁸⁸ This person's privacy interest seems to trump the sexual autonomy interest of the complainant (strong though that interest is). But it is not at all convincing to argue that a similar concession should be made to the HIV positive person because of the pragmatic concern that, if his/her conduct is criminalised, s/he might be deterred from participating in STD-testing. It is unlikely that people consult the *Crimes Act* before they engage in such testing. Even if they were to do so, they would find that the law already criminalises the person who recklessly or intentionally transmits HIV to another.¹⁸⁹ It is hard to believe that, if those laws do not deter people from engaging in testing, an amendment of the type that I suggest here *would*. With that said, however, if

¹⁸⁵ See generally Rape & Domestic Violence Services Australia (n 11).

¹⁸⁶ Jonathan Rogers, 'The Effect of "Deception" in the Sexual Offences Act 2003' (2013) 4 *Archbold Review* 7, 8.

¹⁸⁷ As noted by many commentators. See, eg, Tom Dougherty, 'Sex, Lies, and Consent' (2013) 123(4) *Ethics* 717, 728; Tom Dougherty, 'No Way Around Consent: A Reply to Rubenfeld on "Rape-by-Deception"' (2013) 123 *Yale Law Journal Online* 321, 322; Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 *Yale Law Journal* 1372, 1376, 1400; Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford University Press, 8th ed, 2016) 357-8, 360.

¹⁸⁸ Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' [2014] *Criminal Law Review* 207, 218-222.

¹⁸⁹ See *Crimes Act 1900* (NSW) ss 33(1), 35(1)-(2), s 4. In 2007, s 4 was amended to make it clear that a person who caused a person to contract a grievous bodily disease had inflicted grievous bodily harm on him/her for the purposes of ss 33 and 35: *Crimes Amendment Act 2007* (NSW) sch 1 [1]. But, according to a majority of the High Court in *Aubrey* (2017) 260 CLR 305, even before 2007, a person 'inflict[ed] grievous bodily harm' upon a person, within the meaning of ss 33 and 35, if s/he transmitted a serious sexual disease such as HIV to her/him.

the accused poses no 'real risk' of transmitting the disease, I accept that his/her privacy interest does seem to take precedence over the complainant's autonomy interest.¹⁹⁰

B Kerr's Two-Offence Proposal

This brings me to my final point. In her article, Kerr says this:

In cases involving violence or injury the need to establish that sexual activity was without consent should be dispensed with altogether. There should be an alternative offence created with lower penalties and an objective test of consent, enabling easier prosecution and eliminating a Lazarus defence of mistaken fact.¹⁹¹

With respect, both of these proposals are misconceived.

The first proposal is much along the lines of Peter Rush and Alison Young's recommendation that, in a sexual assault case, it should no longer be necessary for the Crown to prove that the complainant was not consenting to the sexual intercourse that took place.¹⁹² Rather, they think, 'what must be prohibited by the legal characterisation of the offence is the *causing of sexual harm* by an accused'.¹⁹³ 'A serious offence of sexual assault', in their opinion, should be defined as follows:

A person who:

- (a) engages in sexual intercourse with another person, and
- (b) causes serious injury to that other person,
- (c) with the intention of causing injury or with recklessness as to causing injury

is guilty of the offence of sexual assault.¹⁹⁴

The most glaring problem with this model provision is that it treats as sexual assault, conduct that, because it is consensual, should not be characterised in this way. The

¹⁹⁰ That is, I agree with the balance that the Canadian Supreme Court struck in *R v Mabior* [2012] 2 SCR 584.

¹⁹¹ Kerr (n 1).

¹⁹² Rush and Young, *Preliminary Submission* (n 31).

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

appellants in the well-known case of *Brown v DPP*,¹⁹⁵ for instance, engaged in sexual intercourse with their 'victims' (I imagine¹⁹⁶) and intentionally or recklessly caused them injury.¹⁹⁷ It is of course highly debatable whether they should have been convicted of any assault or wounding offences. It is even more questionable whether such persons ought to be convicted of sexual assault. The same point can be further exemplified if we again alter the facts of *Lazarus*. The complainant in that case was not consenting. But what if she had been? In such a scenario, there would have been sexual intercourse within the meaning of s 61HA of the *Crimes Act*, and Mr Lazarus would recklessly have caused the complainant injury. A person who has anal intercourse with a person whom they know to be a virgin, must foresee the possibility that s/he will cause her/him injuries of the type that Ms Mullins in fact sustained.¹⁹⁸ If the injured person willingly participated in the intercourse that occurred, however, why should it be possible to convict of sexual assault the person who inflicted such injuries?¹⁹⁹

¹⁹⁵ *Brown* (n 33).

¹⁹⁶ Having said that, no acts of sexual intercourse are described in the Court of Appeal's judgment in that case (see *R v Brown* [1992] 1 QB 491, 495-7 ('*Brown*'). It is true that Lord Lane CJ tells us, for example, that Jaggard considered it to be necessary to push 'a piece of wire and later his finger down the urethra in Laskey's penis' (at 597); but, in NSW, the penetration of male genitalia does not amount to sexual intercourse: *Crimes Act 1900* (NSW) s 61HA. But even if there was no sexual intercourse in *Brown*, there could easily have been; and in those circumstances, sexual assault convictions would seem a singularly inappropriate response.

¹⁹⁷ I use the term 'injury' here, rather than 'serious injury', because Rush and Young are not always clear about whether the latter should be necessary or, alternatively, whether the former should suffice. In their preliminary submission, for example, they say that '[t]he physical element [of the proposed offence] simply requires proof of *injury* and the accused's causative relation to the occurrence of the injury. ... Such injury can be defined in a number of ways: we would not limit it to physical injury, but also extend it to injury to mental well-being, whether permanent or temporary. There may also be [a] need ... to include adverse economic consequences': Rush and Young, *Preliminary Submission* (n 31) (Emphasis added). Moreover, in their 2002 submission to the Victorian Law Reform Commission, Rush and Young supported the enactment of an offence that required proof that the accused: (a) sexually penetrated the complainant; and (b) caused *injury* to her/him, with the intention of causing harm or with recklessness as to causing injury: Peter Rush and Alison Young, Submission No 5 to Victorian Law Reform Commission, *Reference on Sexual Offences: Law and Procedure*, (10 January 2002)' (Emphasis added). Cf Rush and Young, *A Crime of Consequence* (n 31) 107-8. In any case, it seems that at least some of the activities in which the appellants in *Brown* engaged, resulted in serious injury (even though there was no evidence that any of the 'victims' sought medical attention): see *Brown* (n 196). Indeed, the scarring of the complainant A, as a result of Laskey's act of branding his initials on him (see 495) would presumably amount to the 'permanent ... disfiguring of ... [his] person', and thus to grievous bodily harm: *Crimes Act 1900* (NSW) s 4.

¹⁹⁸ The doctor who examined Ms Mullins reported that 'she had a number of painful grazes around the entrance to the anus. She was in pain, and it was extremely difficult for me to examine her because it was very painful': '*I am that Girl*' (n 5).

¹⁹⁹ Rush and Young have expressly stated elsewhere that 'where the acts of sexual penetration provide the setting in which the other acts are alleged to be the cause of the serious injury ... whether or not the victim consented to sex would be totally irrelevant to the determination of guilt or innocence': Rush and Young, *A Crime of Consequence* (n 31) 111 (emphasis in original).

The problem with the second proposal is that it would not make prosecution easier. It would merely reduce the maximum penalty that applied in cases where the accused had a genuine but unreasonable belief that the complainant was consenting. By 'objective test for consent', Kerr seems to mean 'an objective mental element for consent'. This is because, as noted above, she refers to the requisite mens rea for the proposed offence as involving 'mere recklessness in relation to consent'²⁰⁰ and 'an objective standard'.²⁰¹ The problem is that this type of mens rea threshold is no lower than that which applies to the sexual assault offences for which the *Crimes Act* currently provides. As noted above, a person has the mens rea for those offences if s/he either is (advertently or inadvertently) reckless as to consent,²⁰² or lacks an honest and reasonable but mistaken belief that consent has been granted.²⁰³

To be clear, I am not necessarily opposed to the idea of having two sexual assault offences, one focussing on violence *and* lack of consent, and the other focussing merely on lack of consent.²⁰⁴ But any such solution would have to be carefully considered and, for the reasons just given, I am opposed to the different solution that Kerr proposes.

IV CONCLUSION

The United States commentator Aya Gruber makes some very good points about affirmative consent. 'Critics' of such provisions, she says, 'often [nevertheless] ... agree that best sexual practices involve clear communication'.²⁰⁵ I am one such critic. Though I cannot accept that conviction for a serious offence should follow every time a person engages in non-consensual sexual activity with another without first obtaining that person's clear permission, I accept that people should be encouraged to communicate about consent to sexual activity. Certainly, there are situations where such communication is probably unnecessary and impracticable. Does a person really have to ask for permission to touch the buttocks of a person whom s/he is kissing? Moreover, there are situations where a person who fails to gain clear permission is not morally culpable. The cases that spring to mind here are those involving an accused with an

²⁰⁰ Kerr (n 1).

²⁰¹ Ibid.

²⁰² *Crimes Act 1900* (NSW) s 61HE(3)(b); *Mitton* (n 38).

²⁰³ Ibid s 61HE(3)(c).

²⁰⁴ See, in this regard, the offences noted in *Feinberg* (n 184) 338.

²⁰⁵ Gruber (n 12) 445.

intellectual disability, or an accused who thinks, wrongly but reasonably, that consent has been clearly communicated. Nevertheless, it is usually the case that, if ambiguity arises about whether a person is consenting, his/her sexual partner should check with him/her that s/he is.

Gruber also notes, however, that '[o]ne should ... be wary of the "punitive impulse" to embrace criminalization as a preferred tool of social change'.²⁰⁶ Apart from anything else, she continues, 'shoves may produce backlash'.²⁰⁷ Again, I agree. As I have argued here, it is not morally permissible for the state to punish non-culpable actors as a means of achieving social change. The arguments that I have used to support this view are principled arguments; Gruber's backlash argument is, on the other hand, a pragmatic one. But it is a good argument even so. The more unfair and draconian a law is, the less likely it is to hold the respect of those whom it governs.

I am not opposed to sexual assault law reform in NSW. As noted above, I believe in allowing juries to be told that they must consider any physical or verbal steps that the accused took to ascertain whether consent has been granted when those juries determine whether s/he had the mens rea for the offences to which s 61HE applies. I believe that the list of vitiating mistakes in s 61HE(6) should be expanded. And I think that I believe that consent should be negated in any case where it is given only because of a threat — whether violent or non-violent. But I do not believe in provisions that make rapists of all those who fail to ask for permission to have intercourse. As explained above, under such a provision, there is apparently no scope for a person to perform the actus reus of sexual assault — non-consensual sexual intercourse — and be acquitted. Sexual assault would therefore effectively become an absolute liability offence. Even if this is wrong, and the 'defence' of honest and reasonable mistake of fact could very occasionally still succeed, that 'defence' would have a very limited scope of operation indeed. Undeserving people would be convicted of sexual assault. The state should not use such means in an attempt to improve sexual behaviour.

²⁰⁶ Ibid 446.

²⁰⁷ Ibid.

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