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WHY RAPE LAW REVISIONS SHOULD BE CONSISTENT WITH ANDERSON'S NEGOTIATION MODEL

by Emma Jervis

(Preamble)

This paper examines the failings of the current structures of Rape Law across the world, and offers an insight into the strengths and weaknesses of the proposed revision models. I will argue in favour of Anderson's Negotiation Model as it considers what it means for the law to take the lead in initiatives that protect victims of such crimes.

In this essay I argue that the current law structure unequivocally fails to protect women against cases of rape and needs reform. I further maintain that Anderson's suggestion of 'negotiation consent' is the most appropriate line of reform, and I will defend her proposal in the face of potential objections. The current rape law in the UK was implemented in 2003¹, which revised previous laws firstly defined in the Sexual Offences Act of 1953. Despite the ostensibly 'objective' nature of this law, which will be further examined in this essay, many feminist philosophers have noted the biases within the law which favour male interests.

This essay explores the present issues within UK law, as well as our current understandings of what constitutes 'a reasonable belief of consent', that fail to protect women in instances of rape. This foundational attitude towards such matters influences performative revision models, such as the No Model and the Yes model, which I consider within this essay. Yet the inadequacies of such approaches, mirror some of the current issues with rape law in the UK today; the lack of recognition of men's frequent inability to interpret women's nonverbal behaviour and disregard for instances where one person changes their mind.

Furthermore, I advocate for Anderson's proposal of the negotiation model as an alternative reform of the law as well as society's attitude towards sex and how consent can be clearly obtained. This model, when legally applied, will not only legally protect women in cases of rape, but eventually protect them from the present societal norms that perpetuate the imminent risk of rape and sexual exploitation. Through making the act of negotiation a legal requirement, I

¹ Rape and Sexual Offences - Chapter 7: Key Legislation and Offences | The Crown Prosecution Service," (May 21, 2021) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-7-key-legislation-and-offences>.
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maintain that there would be a ‘ripple effect’ throughout society that would encourage a societal shift.

True negotiation is a concept founded on respect and equality. Such an initiative, I argue, must be rooted in rape law revision, which would eventually seep into society’s wider expectations of individuals when initiating sex, and instigate an educational programme to facilitate the act of negotiation and raise awareness. Societal change will require all these aspects, but can be led by the law.

As of 2003, rape in UK law has been defined in the Sexual Offences Act as a criminal offense when the following criteria has been met: 1a) if a person (A) intentionally penetrates the vagina, anus or mouth of another person (B) with his penis; 1b) B does not consent to the penetration and 1c) A does not reasonably believe that B consents. A second clause within this law states that whether A’s belief that B has consented is reasonable is to be determined having regard to all the surrounding circumstances². This supposedly objective legislation immediately presents a potential complication as the subjectivity of the mens rea that the defendant truly had ‘reasonable belief’ of the victim’s consent, is difficult to establish. The controversy surrounding the meaning of such ‘reasonable belief’ has raised concern for many scholars within the philosophical field of feminist jurisprudence. These feminist philosophers assert that the criteria for this ‘reasonable belief’, along with the law and many other facets of society, has been both influenced by and continues to perpetuate patriarchal structures that protect male interests over those of women. Catherine MacKinnon further develops this point and holds the radical belief that “so long as power enforced by law reflects and corresponds to power enforced by men over women in society, the objective law... becomes just the way things are”³.

Although I considered MacKinnon’s claims that the law as it is, is intrinsically and unalterably sexist against women to be intuitively too extreme, the statistics for rape in the UK support her statements. According to statistics, 1 in 4 women in the UK have been raped or sexually assaulted, and despite a low reporting rate, studies have shown that 55% of charges, when formally brought to trial, do not lead to conviction⁴. These harrowing findings clearly

²“Rape and Sexual Offences - Chapter 7: Key Legislation and Offences | The Crown Prosecution Service,” (May 21, 2021) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-7-key-legislation-and-offences>.

³ Catharine MacKinnon. “Rape Redefined” *Harvard Law and Policy Review*, (2016) https://harvardlpr.com/wp-content/uploads/sites/20/2016/06/10.2_6_MacKinnon.pdf 45

⁴*Sexual offences prevalence and victim characteristics, England and Wales - Office for National Statistics. (2021, March 18)*

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/sexualoffencesprevalenceandvictimcharacteristicsenglandandwales>

demonstrate the inconsistencies within the law which are failing to protect women from male perpetrators, who commit 90-98% of all rapes in the UK⁵.

In her paper, 'Rape Redefined', MacKinnon attributes such a miscarriage of justice to the misogynistic nature of the societal hierarchy, which has subsequently influenced how men 'reasonably believe' when consent is given, as well as the formal proceedings of court. MacKinnon writes, "in conceiving a cognizable injury from the viewpoint of the reasonable rapist, the rape law affirmatively rewards men with acquittals for not comprehending women's point of view on sexual encounters"⁶.

MacKinnon's view briefly touches on the widely held belief within feminist philosophy that historical male dominance within society is still being perpetuated in today's legal attitude towards female rape victims; as the criteria considered in court for 'reasonable belief' is still held to the 'male standard'. The male standard is what a man would consider 'reasonable' belief, which often overlooks subtle and misread signals that their female counterpart might be giving. The legal term 'stare decisis' also maintains this narrative, as it guides judges to rule in consistency with previous law in legislation and juridical decisions. This encourages the current legal system to refer to misogynistic ideals where the female voice was not considered and perpetuates male-centred ideals; which clearly supports my belief that the current rape law in the UK needs reform.

To demonstrate the context which Anderson challenges, this essay will consider the most widely accepted position of reform in response to the failings of the current law system; referred to as the 'Yes Model'. There are two main models of sexual consent in jurisprudence, both of which emerged towards the end of the twentieth century; the 'Yes Model' and the 'No Model'. Various countries have adopted the respective models differently into law, resulting in unjustifiable discrepancies in cases where the law considers it to have been an act of rape in one country, and not in another. A clear example is Germany, who enacted the 'No Model' in 2016, which states that the partner must communicate their disagreement verbally (in words) or physically, for example by resisting⁷. However, the 'Yes' model states that a sexual act is rape unless consent is affirmatively given, whether that be through verbal or physical means⁸. This ensures that the

⁵*Ibid.*

⁶ Catharine MacKinnon. "Rape Redefined" *Harvard Law and Policy Review*, (2016) https://harvardlpr.com/wp-content/uploads/sites/20/2016/06/10.2_6_MacKinnon.pdf 182

⁷ Fünfzigstes Gesetz zur Änderung des Strafgesetzbuches—Verbesserung des Schutzes der sexuellen Selbstbestimmung, Bundesgesetzblatt, Teil I [BGBl I] [Federal Law Gazette], (Nov. 4, 2016) at 246

⁸ Whisnant, Rebecca, "Feminist Perspectives on Rape", *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition), Edward N. Zalta (ed.) <https://plato.stanford.edu/archives/fall2021/entries/feminism-rape/>

woman must actively ‘give’ consent, however they choose to display that, in order for the sexual act to occur; instead of the rulings of other lines of reform such as the ‘No Model’ whereby sex is only considered rape if the woman physically or verbally conveys her non-consent⁹.

The ‘Yes Model’ is widely regarded as the most plausible of these reform models of performative consent, and has been advocated for by scholars such as Schulhofer to liberate women from the “the gray areas in which coercion and exploitation can be used to elicit a false but legally valid “consent”¹⁰. In his paper, Schulhofer considers the ‘Yes Model’ to have solved the problems presented in the current understandings of what ‘reasonable belief of consent’ means, as he argues the requirement of positive affirmation from the woman “protects each person’s right to refuse sexual encounters that are not genuinely desired.”¹¹. A contemporary, applied example of such a model is Slovenia’s current ruling. Under Article 100 of the Criminal Code of the Socialist Republic of Slovenia from 1977, the execution of rape could only be identified as ‘immission penis in vaginam’¹². Yet in later years, controversial cases meant that domestic legislators were put under social pressure to modernise criminal law, which resulted in the Republic of Slovenia assuming the amendments of the Rape and Sexual Assault in the Criminal Code (KZ-1H) in 2021¹³. These amendments are considered to be effective and consistent with the affirmative consent Yes Model. Through this, legislators sought to promote sexual autonomy and self-determination in sexual contexts.

However, I argue that the implications of this line of reform have not been fully recognised, as it does not allow for instances where the woman may engage in romantic or non-penetrative sexual activity, whilst not wanting to consent to penetration. The ‘Yes Model’ seems to act under the assumption that when a woman, for example, participates in heavy sexual petting, she is indicating her affirmative willingness to have intercourse. This, as Anderson also emphasises in her paper, is a dangerous assumption in the “age of AIDS”, where many people are concerned for their sexual health and don’t want to engage in penetrative sex, yet are happy to consent to other sexual acts.

⁹ *Ibid.*

¹⁰ Stephen J. Schulhofer, “Unwanted Sex: The Culture of Intimidation and the Failure of Law” (1998) Cambridge, MA: Harvard University Press.

¹¹ *Ibid.*

¹² Act Amending the Criminal Code (KZ-1H). Official Gazette of Republic of Slovenia (July 4, 2021) 5970.

¹³ *Ibid.*

Furthermore, I argue that there is an intrinsic problem with the notion that once one has given an indication of consent for one sexual act, the man cannot be penalized for assuming consent has been given for all forms of sexual acts. This does not protect women from the right to change their mind, and seeks only to protect the man from penalisation for not recognising this woman's right. Schulhofer does not account for such instances and therefore seems to implicitly force woman into sexual situations where they can't escape after implying consent.

A further problem of this performative reform model is the lack of recognition of men's frequent inability to interpret women's nonverbal behaviour. A prime example of this would be an instance where a man and woman go on a date, and subsequently go home together; this mere act often leads men to believe that the woman has displayed signs of consent, and this expectation can pressure the woman into doing more sexually, than they truly want. This perpetuates the fundamental problem with the notion of sexual consent in contemporary society, and within this reform model, which is seen as "a woman's passive acquiescence to male sexual initiative"¹⁴.

In response, Anderson presents her alternative approach of the Negotiation Model to avoid this interpretation of consent, whereby she provides an analytical framework that "requires consultation, reciprocal communication and the exchange of views before a person initiates sexual penetration"¹⁵. Anderson demands that such a communicative exchange between partners before intercourse should be revised into law, where the emphasis is no longer on the granting of permission for the actions of another; but instead on an active consultation between two people coming to mutual agreements.

In her paper, Anderson carefully details the content of the discussion whereby "partners should have to communicate with one another to discern each other's desires and limitations before sexual penetration occurs"¹⁶. Ideally, this involves a dialogue about the partner's individual tastes, and an agreement to engage in unitedly desired behaviours. The paper subsequently asserts that in trial cases of rape, the prosecution must prove beyond reasonable doubt that the defendant initiated and engaged in penetration and failed to negotiate and come to an agreement beforehand.

I argue that the greatest strength of this argument is the shift on emphasis from 'what did she let him do' and 'which signals did she give to demonstrate this', to whether they both had an open

¹⁴ Michelle Anderson "Negotiating Sex", *Southern California Law Review*, (2005b) 78: 1401

¹⁵ *Ibid.*, 1432

¹⁶ *Ibid.*, 1405

dialogue where both equals are simply discussing their sexual desires. This model directly addresses the issue of gender norms of male agency initiating sexual acts and female compliance to their advances which is prevalent in alternative lines of reform, such as the aforementioned 'Yes Model'. Anderson explicitly tackles this as the negotiation model is a gender-neutral reform model, whereby either partner, of either gender, is able to initiate the discussion to reach a mutual understanding, in order for sexual penetration to occur. Just as Anderson observes, this approach "expresses an interest in the other person's perspective ... [and] a willingness to consider the other person's inclinations and humanity."¹⁷ I argue that this embodies the liberating spirit of Anderson's reform proposal, as the open discussion regards each person involved to have an equal standing, without having to conform to the gender norms of one-sided permission seeking, which is implicitly encouraged in the current legal system and performative models of reform.

Anderson directly responds to some criticisms in her paper, the first being the 'He said/She said' criticism, which states that the negotiation model does not avoid the current issue whereby it is difficult to prove whether the man or the woman is telling the truth; as all the court often has to go on is word-of-mouth. Yet Anderson strongly responds that no rape law can escape this objection, as the alternative of considering physical evidence would fail to protect even more women who have been pressured non-physically into having penetrative sex.

However, one may object to Anderson's negotiation model to argue that it is an unrealistic standard for people, which does not account for the spontaneity of romance and would, ultimately, criminalise all sex. It appears intuitively wrong to illegalise people engaging in sexual acts when 'in the heat of the moment', and furthermore seems irrational to expect that of young people, who the law should be protecting as sexually vulnerable.

Firstly, I would respond to this objection by referring to the case study of the AIDS epidemic in the 1980s¹⁸. The life-altering STD pandemic rapidly spread throughout the late 20th century, and condoms proved to be the most effective form of contraception that would protect the individuals from the disease. Subsequently, there was a society-wide shift in attitude towards spontaneity during sex whereby both men and women accepted that there would have to be a break before they engaged in penetrative sex so that they could ensure their own and their partner's sexual safety. This demonstrates that it is not only a realistic possibility for there to be

¹⁷ *Ibid.*, 1428

¹⁸ Hallie Lieberman, "A Short History of the Condom" (2018)

a society-wide change to account for a necessary condition added to the act of sex, but it would be an extension of the current standards of sexual spontaneity.

Furthermore, Anderson addresses such criticisms in her paper and demonstrates her recognition that demanding formalised negotiation into sex is unrealistic. Instead, she provides examples whereby the two individuals can negotiate their specific desires in a casual manner, using colloquial language that could be a conversation that many young people are already having. I argue that making such a negotiation a legal requirement is simply guaranteeing the practice, and enforcing this healthy initiation of sex on everyone.

One could also contend that Anderson fails to consider how the current gender roles of women submitting to men's requests could still have a detrimental impact on her negotiation model. This could specifically manifest itself in implicit pressure for the woman to act and say 'provocative' things within Anderson's discussion model to appease the standards of women enforced by society, and indeed the man with her. This demonstrates how Anderson's model, arguably, does not avoid the current issues she criticized in her paper, but could still fall prey to the social pressures put upon men and women to act in a certain way, whether that be acting overly or reservedly sexual. Simply because the social pressures initially take a verbal form does not necessarily mean that men and women are truly able to communicate their wants and desires external from societal standards and pressures. However, I argue that this objection has not considered the societal change that the implementation of the negotiation model would itself create.

Through making the act of negotiation a legal requirement, I maintain that there would be a 'ripple effect' throughout society that would, eventually, lead to a change in public expectations of men and women. Reinforced by a government-led programme of education that would flow from a legislation. The government is more likely to act in this way, if it is implementing legislation.

Anderson's emphasis on either party being able to initiate the negotiation establishes a much more open-minded, balanced attitude towards gender roles and expectations of individuals based on their gender. This is the greatest strength of Anderson's argument, as this equality-driven initiative would eventually seep into society's wider expectations of individuals when initiating sex, and create a world where understanding what the other person is anticipating in a sexual situation is the norm. One may respond to this as too idealistic and not considering how deeply current social norms are ingrained into society.

However, in response to criticism, I refer back to how society has developed in recent years to become more accommodating towards condoms as a contraceptive measure after its initial unpopularity. Society's norms have been able to develop when it has become necessary, and making such an equality-driven model legislation would again lead to societal change. Yet, it is important to acknowledge. The current structure veers towards a philosophical exposition, which is insufficient. However, laws alone may not be enough to change deeply ingrained behaviours regarding consent, but they can be a driver a societal shift in education and awareness.

To conclude, I have clearly demonstrated that the current rape law in the UK fails to protect women, and have explored two reform models presented in response to such miscarriages of justice. I have proven the more widely accepted 'Yes Model' to be an inadequate approach to the issue, and have instead endorsed Anderson's negotiation model as the best alternative. The objections to her reform model which I considered in this essay have been rebutted to show that Anderson's model, when legally applied, will not only legally protect women in cases of rape, but eventually protect them from the present societal norms that perpetuate the imminent risk of rape and sexual exploitation.

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